



Center for Military Readiness

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The Honorable Patrick Leahy, Chairman
The Honorable Jeff Sessions, Ranking Member
Committee on the Judiciary
United States Senate
Washington, DC 20510

June 29, 2010

Dear Chairman Leahy and Ranking Member Sessions:

As you begin reviewing the qualifications of Solicitor General Elena Kagan for confirmation as Associate Justice of the United States Supreme Court, the Center for Military Readiness (CMR) would appreciate the opportunity to file for the record our concerns about her past official actions with regard to military law and policies with which she disagrees.

CMR opposes this nomination because Solicitor General Kagan has demonstrated a consistent pattern of anti-military actions that contradict her statements of support for the armed forces. When Ms. Kagan has had an opportunity to side with military policy as stipulated in law, General Kagan has chosen the opposite position. Her record calls into question not only her legal judgment, but her lack of regard for the tradition of judicial deference to Congress and the Executive branch on military issues. We hope that you will question Ms. Kagan about the principle of judicial deference to the other branches of government—a long-standing principle that is vital to national security.

Witt v. Department of the Air Force

In her current capacity as Solicitor General, the top lawyer for the United States, Elena Kagan failed to take action against an unjustified and problematic procedural ruling of the U.S. Ninth Circuit Court of Appeals in a case challenging the 1993 law stating that homosexuals are not eligible for military service. (*Witt v. Department of the Air Force*).

The case involved an Air Force nurse named Margaret Witt, who was living with a lesbian partner and was discharged in accordance with Section 654, Title 10, U.S.C. Witt challenged that action in a federal district court, and when she lost her case she appealed to the U.S. Court of Appeals for the Ninth Circuit.

Overcoming strong dissent among its own members, the Ninth Circuit sent the *Witt* case back to be reheard at the district level under unusual evidentiary requirements imposing a heavier burden than the “rational basis” standard that should have applied. Ms. Kagan’s irresponsible failure to ask for Supreme Court review of the rogue procedural ruling of the Ninth Circuit in the *Witt* case contradicted assurances she had given to Senator Jeff Sessions in a letter to Senator Arlen Specter dated March 18, 2009.

Solicitor General Kagan should have filed a petition for *certiorari*, asking the Supreme Court to review the Ninth Circuit's ruling. That petition likely would have succeeded. Instead, Kagan accepted the unprecedented and burdensome standard of review that the Ninth Circuit had imposed. This means that the Department of Justice will have to defend the law in personal terms related to Margaret Witt as an individual, even though the 1993 law does not require this. Even if the Department of Justice prevails in the *Witt* case, the unfortunate procedural ruling of the Ninth Circuit will remain until it is challenged, inviting more litigation under rules in conflict with those used in other circuits.

Solicitor General Kagan's irresponsible decision to allow the Ninth Circuit to substitute its judgment for the findings of Congress enacted in current law calls into question her support for the military as well as her respect for a duly-enacted law that she has the duty to defend.

Rumsfeld v. Fair

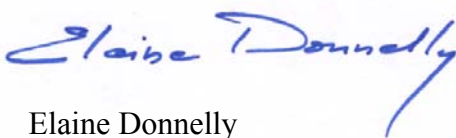
Senators considering this nomination also should question her flawed logic reflected in an *amicus* brief she joined challenging the Solomon Amendment in *Rumsfeld v. Fair*. It is significant that the U.S. Supreme Court upheld the constitutionality of that legislation, which protects equal access for military recruiters on college campuses, with a unanimous (8-0) vote. General Kagan, as Dean of Harvard Law School while *Rumsfeld v. Fair* made its way through the courts, removed military recruiters from the Office of Career Services at Harvard even though there was an immediate stay on the U.S. Third Circuit Court of Appeals ruling overturning Solomon, pending Supreme Court review.

Then-Dean Kagan's deliberate discrimination against military recruiters, therefore, was in violation of the Solomon Amendment, and even more inappropriate because the Harvard campus is not located within the territory of the Third Circuit. Ms. Kagan acknowledged this action in a September 20, 2005, email addressed "To all members of the HLS [Harvard Law School] community." Her gratuitous actions toward military recruiters during her tenure at Harvard show disturbing contempt for legal judgments with which she disagrees, as well as misplaced antagonism toward the military due to a law that Congress passed.

The Supreme Court's unanimous rejection of the challenge to Solomon not only repudiated Kagan and her colleagues' *amicus* brief, but exposed her to be a liberal activist promoting an ideological agenda contrary to federal law.

In the two situations described above, General Kagan deliberately acted in opposition to laws protecting the culture and best interests of the American military. In view of these official actions, the Center for Military Readiness opposes confirmation of Elena Kagan to be an Associate Justice of the Supreme Court.

Respectfully submitted,



Elaine Donnelly
President, Center for Military Readiness