



Written by [Jack Kenny](#) on July 8, 2010

McCain Will Vote Against Kagan

Sen. John McCain (Ariz.) is the latest Republican Senator to announce he will vote against confirmation of Solicitor General Elena Kagan as the next associate justice on the U.S. Supreme Court. In a strongly worded op-ed piece published in USA Today for July 8, McCain said his criteria for Supreme Court nominees are "integrity, character, legal competence and ability, experience, and philosophy and judicial temperament. On that test, Elena Kagan fails," he wrote.



McCain based his case on Kagan's decision while dean of Harvard Law School to restrict access to students by military recruiters because of government policy that denies military service to avowed homosexuals. Kagan has said her decision was based on the school's anti-discrimination policy, a point McCain sharply disputed. The claim is "belied by the fact that her predecessor allowed military recruiters full official access — a policy Kagan changed. And while Kagan barred military recruiters' access to the school, Harvard continued to receive millions of dollars in federal aid," McCain wrote.

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Kagan denied military recruiters "the same access to Harvard students that was granted to white-shoe law firms," McCain said, by denying the military access to the Career Service Office and asking the law school's Veterans Association to host the recruiters. The veterans group protested that with its small membership, limited budget and lack of office space, it could not provide the time and resources that the Career Service Office could. McCain quoted an Air Force recruiter who wrote to the Pentagon, saying that at the law school, "we are relegated to wandering the halls in hopes that someone will stop and talk to us." An Army report describing the period Kagan was law school dean said, "The Army was stonewalled at Harvard." McCain said he was not opposing Kagan for her belief that the "Don't ask, don't tell" policy is wrong, but for adopting procedures at the law school that violated a federal law known as the Solomon Amendment.

"While Kagan is entitled to her opinion, she was not entitled to ignore the law that requires universities to allow military recruiters on campus under terms of equal access with all other recruiters," McCain wrote. He bluntly dismissed Kagan's claims during her confirmation hearing that the law school was



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"never out of compliance with the law" covering recruiter access. "The military at all times during my deanship had full and good access," Kagan said. "The facts are otherwise," wrote McCain, who pointed out that Kagan's policy was found illegal by the same court she now hopes to join.

"In the end Kagan's interpretation of the Solomon Amendment was soundly rejected by the Supreme Court. By changing the policy she inherited and restricting military recruiter access when the prevailing law was to the contrary, Kagan stepped beyond public advocacy in opposition to a policy and into the realm of usurping the prerogative of the Congress and the president to make law and the courts to interpret it," McCain wrote.

McCain is the eighth Republican senator so far to announce his intention to vote against Kagan's nomination, joining Minority Leader Mitch McConnell of Kentucky, Orrin Hatch and Bob Bennett of Utah, Jim DeMint of South Carolina, James Inhofe of Oklahoma, Johnny Isaacson of Georgia, and Lisa Murkowski of Alaska. No Republican has announced support for the nomination, though Lindsey Graham of South Carolina seemed favorably disposed to it in his questioning of Kagan during the Judiciary Committee hearing. Though Kagan is expected to get most, if not all, of the Democratic votes, Al Franken of Minnesota is the only Senator so far to announce his intention to vote for the nominee. Should opponents attempt to block the nomination with a filibuster, it would take 41 votes, equal to the total number of Republican senators, to sustain it. Kagan was confirmed as Solicitor General last year on a 67-31 vote. McCain was among those opposing her confirmation for that position as well.

Ironically some of the opposition to Kagan has come from conservative and libertarian organizations aroused by some of the arguments the Solicitor General made in defending the government's position in *Citizens United v. Federal Election Commission*, the Supreme Court case in which the court ruled unconstitutional provisions of the McCain-Feingold Campaign Reform Act that limited spending by corporations, including non-profit advocacy groups, on election campaign ads. The legislation was something McCain had pushed for years and its passage in 2002 was a major achievement of his 28-year political career.

But the Arizona Senator is a former Navy pilot and the son and grandson of career military officers. The apparent willingness of Kagan to bend the law to thwart military recruitment efforts obviously did not sit well with a man whose military service included five-and-a-half years as a prisoner of war during the Vietnam War. The senator might also have had his own family history in mind when he noted in his op-ed piece: "On the main campus of Harvard University stands Memorial Church, dedicated to the memory of Harvard's veterans who laid down their lives for their country, including some from the greatest families in American history, such as the Roosevelts and the Kennedys."

Highlighting his opposition to Kagan might also be a good reelection strategy for McCain, 73, who is seeking a 5th Senate term this year. He is facing a determined primary challenge from former Congressman and conservative talk-show host J.D. Hayworth. But McCain might make a more credible bid for conservative support if he raised the questions of why Harvard, one of the nation's most richly endowed universities, should be getting "millions of dollars in federal aid" in the first place and why Congress should be dictating to a private institution what its policy must be regarding military recruiters. Perhaps McCain has been in Congress too long for such questions to occur to him.

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