

Testimony of Robert C. Clark, Professor and former Dean, Harvard Law School
Before the Senate Committee of the Judiciary
Concerning Supreme Court Nominee Elena Kagan
July 1, 2010

I am pleased to be invited to this hearing. I support the appointment of Elena Kagan as associate justice of the Supreme Court, and would like to offer some perspectives based on my experience as her colleague and as her predecessor in the role of dean at Harvard Law School. I believe her superb performance as dean should be a positive factor in your decision making.

The case for Solicitor General Kagan has many parts, of course. First, as she demonstrated as both a student and a teacher, she is extremely bright. I know this from having observed and graded her as a law student in the mid-‘80s, and from having judged her legal scholarship in the late ‘90s when I supported her appointment to our faculty. Moreover, she really thinks like a lawyer – and I mean this in a good way. She makes sure she understands the law and the facts precisely and accurately before she draws conclusions on legal issues, and explains her reasoning in ways that take careful account of likely objections. A lawyer who actually does think this way is unlikely to get too creative or loose when she makes decisions as a judge. She will feel obligated to follow the law, not make it up. Furthermore, she has relevant experience with the law, not just in her recent job as Solicitor General of the United States, but also in her years of spectacularly successful teaching of constitutional law and administrative law to hundreds of bright and tough students. This teaching experience tends to get neglected when people discuss her qualifications for the Court, but it is important. She knows legal doctrines relevant to service on the Supreme Court inside and out, in a way that few practitioners do.

But I want to stress her performance as an institutional leader, and explain why I think the skills and attributes she brought to the complex task of being Dean of Harvard Law School would benefit her and the Court if she is confirmed as a Justice.

I was Dean of Harvard Law School for 14 years (1989-2003), and strongly supported Elena Kagan as the choice to be my successor. From my viewpoint, once she became dean she did a great job of taking positive changes and initiatives that had begun in the ‘90s and building on them. She brought the school to a new level of greatness.

For example, we hired a large number of new faculty members, including top scholars from other leading schools, during her tenure. (The number of full-time professors went from about 81 to 105 from 2003 to 2009.) In my view this is a positive indicator because, in the case of our complex law school, it says something about the ability of the dean to build consensus. The appointment process is democratic – you need two-thirds of the faculty to approve each new appointee – and in a strong willed faculty with widely varying views about what really counts as good scholarship, you need a dean who can understand many different points of view and then encourage people to work together. Dean Kagan did this successfully. I watched her learn and grow in the process. She wasn’t just “political”; she actually learned to understand and appreciate many different points of view.

Similarly, she took over and led a very successful fundraising campaign. In the late '90s, under my guidance, the law faculty developed an ambitious long term strategic plan. We then proceeded to get university-level approval for a campaign that would fund it, and I spent a couple of years getting initial gifts and commitments. In June of 2003, my last month in office, we had a so-called kickoff of the campaign's public phase. I announced \$170-plus million in commitments and gave the about-to-become dean Elena Kagan and her team the hard task of getting the amount up to at least \$400 million. Five-plus years later, in the fall of 2008, the campaign closed, having greatly exceeded its goal, by reaching over \$476 million – a record in law school fundraising.

This fundraising success – of fundamental importance to an institution like Harvard Law School – would not have happened without Elena Kagan's skill in seeing other people's perspectives. In order to gain support from about 23,000 alumni and friends, as the law school did, its dean had to learn to understand and appreciate the viewpoints of many very different people, with strongly varying attitudes toward what the school was doing and proposing to do. I watched her get better and better at this task over time, and I believe it will help her to be a better justice on the Court.

As with faculty and alumni, so with students: Dean Kagan did a superb job of boosting the mood and morale of the student body. She did this with gestures great and small – everything from free coffee and an ice skating rink to initiating major substantive changes in the first year curriculum, in order to make it fit better with the modern legal world. (For example, first year students must now take introductory courses in international or comparative law, and in legislation and regulation, in addition to the old classics like property, contracts, and torts.)

I could go on listing her other achievements as dean, and will gladly elaborate during the questioning period if you are interested. But my general theme should be clear. She did a great job as leader of a complex organization, and that indicates she has personal characteristics that are relevant for service on a court that is also full of diverse and sometimes conflicting perspectives.

I do note that the topic of military recruiting at Harvard, and Elena Kagan's actions as dean with respect to it, have already received a great deal of attention. I wrote an Op Ed for the Wall Street Journal that set out some relevant facts and expressed my views. I would like to put into the record a copy of my Op Ed.

In conclusion, I think the Committee's decision about Solicitor General Kagan ought to be positive. Yes, it may happen that as a justice she will sometimes fill in the blanks of received constitutional law in a way that some of us, including me, do not like. As history shows, it is hard to predict accurately what the future decisions of a new justice will be. But I think worrying obsessively about the downside possibilities is to miss the forest for the trees. Elena Kagan is an excellent choice for the Supreme Court and should be confirmed.