

**Statement Of Senator Patrick Leahy (D-Vt.),
Chairman, Senate Judiciary Committee,
On The Nomination Of Elena Kagan To Be An Associate Justice
Of The Supreme Court Of The United States
August 4, 2010**

During the three months that this nomination has been pending, Senators have made many statements about Solicitor General Elena Kagan. I begin today by commending the statements made yesterday by the Majority Leader, Senator Cardin, Senator Feinstein, Senator Kohl, Senator Franken, Senator Lieberman, Senator Durbin, Senator Dorgan, Senator Klobuchar, Senator Gillibrand, Senator Shaheen, Senator Hagan, Senator Mikulski, Senator Bingaman, Senator Whitehouse, Senator Levin, Senator Carper and Senator Graham. They were outstanding in describing the qualifications of a nominee who should be confirmed with a strong bipartisan majority. I also want to acknowledge the extraordinary contributions of Senator Klobuchar. She spoke eloquently, organized a group of Senators and persevered despite her personal loss.

Understanding How the Law Affects Hardworking Americans in the Real World

When President Obama set out to find a well-qualified nominee to replace retiring Justice John Paul Stevens, he said he would “seek someone who understands that justice isn’t about some abstract legal theory or footnote in a casebook. It’s also about how laws affect the daily realities of people’s lives – whether they can make a living and care for their families, whether they feel safe in their homes and welcome in our nation.” In introducing Solicitor General Elena Kagan as his Supreme Court nominee, President Obama, whose 49th birthday is today, praised her “understanding of the law, not as an intellectual exercise or words on a page, but as it affects the lives of ordinary people.”

President Obama is not alone in recognizing the value of judges and justices who are aware that their duties require them to understand how the law works and the effects it has in the real world. Within the last few months, two Republican appointees to the Supreme Court have made the same point. Justice Anthony Kennedy told a joint meeting of the Palm Beach and Palm Beach County Bar Associations that, as a Justice, “You certainly can’t formulate principles without being aware of where those principles will take you, what their consequences will be. Law is a human exercise and if it ceases to be that it does not deserve the name law.”

In addition, Justice David Souter, who retired last year and was succeeded by Justice Sotomayor, delivered a thoughtful commencement address at Harvard University. He spoke about judging, and explained why thoughtful judging requires grappling with the complexity of constitutional questions in a way that takes the entire Constitution into account. He spoke about the need to “keep the constitutional promises our nation has made.” Justice Souter concluded: “If we cannot share every intellectual assumption that formed the minds of those who framed that charter, we can still address the constitutional uncertainties the way they must have envisioned, by relying on reason, by respecting all the words the Framers wrote, by facing facts, and by seeking to understand their meaning for living people.”

Justice Souter understood the real-world impact of the Supreme Court's decisions, as I believe does his successor, Justice Sotomayor. Across a range of fields including bankruptcy, the Fourth Amendment, statutory construction, and campaign finance, Justice Sotomayor has written and joined opinions that have paid close attention to the significance of the facts in the record, to the considered and longstanding judgments of the Congress, to the arguments on each side, and to Supreme Court precedent. In doing this she has shown an adherence to the rule of law and an appreciation for the real-world ramifications of the Supreme Court's decisions.

Given America's social and technological development since we were a young Nation, interpreting the Constitution's broad language requires judges and justices to exercise judgment. In the real world, there are complex cases with no easy answers. In some instances, as Justice Souter pointed out in his recent commencement address, different aspects of the Constitution point in different directions, toward different results, and need to be reconciled. Acknowledging these inherent tensions, is not only mainstream, it is as old as the Constitution and has been evident throughout American history, from Chief Justice John Marshall in the landmark case of *McCulloch v. Maryland* to Justice Breyer this past June in *United States v. Comstock*.

Chief Justice John Marshall wrote for a unanimous Supreme Court in the landmark case of *McCulloch v. Maryland* in 1819, writing that for the Constitution to contain detailed delineation of its meaning "would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind." He understood, as someone who served with Washington, Jefferson, Adams and Madison, that its terms provide "only its great outlines" and that its application in various circumstances would need to be deduced. The "necessary and proper" clause of the Constitution entrusts to Congress the legislative power "to make all laws which shall be necessary and proper for carrying into execution" the enumerated legislative powers of Article I, Section 8, of our Constitution as well as "all other powers vested by this Constitution in the Government of the United States." In construing it, Chief Justice Marshall explained that the expansion clause "is in a constitution, intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs." He went on to declare how, in accordance with a proper understanding of the "necessary and proper" clause and the Constitution, Congress should not by judicial fiat be deprived "of the capacity to avail itself of experience, to exercise its reason, and to accommodate its legislation to human affairs" by judicial fiat. Chief Justice Marshall understood the Constitution, knew its text and knew the Framers. He rejected stagnant construction of the Constitution.

McCulloch v. Maryland was the Supreme Court's first interpretation of the "necessary and proper" clause. The most recent was this past June, in *United States v. Comstock*. That case upheld the power of Congress to enact the Adam Walsh Child Protection and Safety Act, which included provisions authorizing civil commitment of sexually-dangerous Federal prisoners who had engaged in sexually violent conduct or child molestation and were mentally ill. Quoting Chief Justice Marshall's language from *McCullough*, Justice Breyer wrote in an opinion joined by a majority of the Supreme Court, including Chief Justice Roberts, about the "foresight" of the Framers who drafted a Constitution capable of resilience and adaptable to new developments and conditions.

Justice Breyer's judicial philosophy is well known. A few years ago, he authored Active Liberty in which he discussed how the Constitution and constitutional decisionmaking protects our freedoms and, in particular, the role of the American people in our democratic government. When he writes about how our constitutional values apply to new subjects "with which the framers were not familiar," he looks to be faithful to the purposes of the Constitution and aware of the consequences of various decisions.

During the Civil War, in its 1863 *Prize Cases* decision, the Supreme Court upheld the constitutionality of President Lincoln's decision to blockade southern ports before a formal congressional declaration of war against the Confederacy. Justice Grier explained that it was no less a war because it was a rebellion against the lawful authority of the United States. Noting that Great Britain and other European nations had declared their neutrality in the conflict, he wrote that the Court should not be asked "to affect a technical ignorance of the existence of a war, which all the world acknowledges to be the greatest civil war known in the history of the human race." That, too, was judging in the real world.

In the same way, the Supreme Court decided more recently in *Rasul v. Bush*, that there was jurisdiction to decide claims under the Great Writ securing our freedom, the writ of habeas corpus, from those in U.S. custody being held in Guantanamo. Justice Stevens, a veteran of World War II recognized that the United States exercised full and exclusive authority at Guantanamo if not ultimate, territorial sovereignty. The ploy by which the Bush administration had attempted to circumvent all judicial review of its actions was rejected, recognizing that ours is a Government of checks and balances.

Examples of real-world judging abound in the Supreme Court's decisions upholding our individual freedoms.

Real-world judging is precisely what the Supreme Court did in its most famous and admired modern decision in *Brown v. Board of Education*. I recently saw the marvelous production of the George Stevens, Jr., one-man play, "Thurgood," starring Laurence Fishburne. It was an extraordinary evening, focused on one of the great legal giants of America. At one point, Justice Marshall reads a few lines from the unanimous decision of the Supreme Court in 1954 that declared racial discrimination in education unconstitutional. Chief Justice Warren had written:

In approaching this problem, we cannot turn the clock back to 1868, when the [Fourteenth] Amendment was adopted or even to 1896 when *Plessy v. Ferguson* was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws.

Understanding the facts in context, the entire court helped to end a discriminatory chapter in our history. The Supreme Court did not limit itself to the Constitution as it was written in 1787. At that point in our early history, "We the People" did not include Native Americans or African-American slaves, and our laws failed to accord half the population equality or the right to vote because they were female. Real-world judging takes into account that the world and our

Constitution have changed since 1788, starting with the Bill of Rights. It takes into account not only the Civil War but the Civil War Amendments to the Constitution adopted between 1865 and 1870, and every amendment adopted since then.

Would anyone today, even Justice Scalia, read the Eighth Amendment's limitation against cruel and unusual punishment to allow the cutting off of ears, a practice employed in colonial times? Of course not, because the standard of what is cruel and unusual punishment was not frozen for all time in 1788. Does anyone dispute that most of the Bill of Rights is correctly applied today to the States through the Due Process Clause of the Fourteenth Amendment? Our Bill of Rights freedoms were expressed only as limitations on the authority of Congress. Does anyone think that the Equal Protection Clause of the Fourteenth Amendment cannot be read to prohibit gender discrimination? It was most assuredly not women that its drafters had in mind when it was adopted.

The Constitution mentions our "armed forces" but there was no Air Force when the Constitution was written. Does anyone doubt that our Air Force and Marines are encompassed by the Constitution even though no Framers had them in mind when the Constitution was being ratified? Of course not. Likewise, in its interpretation of the "commerce clause" and the intellectual property provisions providing copyright and patent protection for "writings and discoveries," the Supreme Court has sensibly applied our constitutional principles to the inventions, creations and conditions of the 21st century. Jefferson and Madison may have mastered the quill pen, but they never envisioned modern computers or phones, let alone smartphones and satellites.

The First Amendment expressly protects freedom of speech and the press, but the Supreme Court has applied it, without controversy, to television, radio, and the Internet. Our Constitution was written before Americans had ventured into cyberspace or outer space. It was written before automobiles, airplanes, or even steamboats. Yet the language and principles of the Constitution remain the same as it is applied to new developments. Our privacy protection from the Fourth Amendment has been tested but survived because the Supreme Court did not limit our freedom to tangible things and physical intrusions but sought to ensure privacy consistent with the principles embodied in the Constitution.

There are unfortunately occasions in which the current conservative activist majority on the Supreme Court departs from the clear meaning or purpose of the law and even its own precedents. One such case, the *Ledbetter* case, would have perpetuated unequal pay for women, by using a rigid, cramped reading of a statute which defied congressional intent. We corrected that decision by statute. Now there is the *Gross* case that would make age discrimination virtually impossible to prove. That erroneous decision, which disregarded the court's own precedent, should also be corrected.

And, of course, the *Citizens United* case wrongly reversed 100 years of legal developments to unleash corporate influence in elections. A number of us are trying to correct some of the excesses of that decision with the DISCLOSE Act, but Republicans have filibustered that effort, and will not allow the Senate to consider corrective legislation to add transparency to corporate electioneering.

Frankly, I am left to wonder whether some of the current members of the conservative activist majority on the Supreme Court would have supported the decision in *Brown v. Board of Education*, had they been members of the Supreme Court in 1954. They turned that decision upside down with their decision just a few years ago in the Seattle school desegregation case. Theirs was an ideological decision not based on that magnificent precedent, but undermining it.

It took a Supreme Court that, in 1954, understood the real world to see that the seemingly fair-sounding doctrine of “separate but equal” was in reality a straightjacket of inequality and offensive to the Constitution. All Americans have come to respect the Supreme Court’s unanimous rejection of racial discrimination and inequality in *Brown v. Board of Education*. That was a case about the real world impact of a legal doctrine.

But just three years ago, in the Seattle school desegregation case, we saw a narrowly divided Supreme Court undercut the heart of the landmark *Brown v. Board* decision. The Seattle school district valued racial diversity, and was voluntarily trying to maintain diversity in its schools. By a 5-4 vote of conservative activists on the Supreme Court, this voluntary program was prohibited. That decision broke with more than a half century of equal protection jurisprudence and set back the long struggle for equality.

Justice Stevens wrote in dissent that the Chief Justice’s opinion twisted *Brown v. Board* in a “cruelly ironic” way. Most Americans recognize that there is a crucial difference between a community that does its best to ensure that its schools include children of all races, and one that prevents children of some races from attending certain schools. Experience in the real world tells us that. Justice Breyer’s dissent criticized the Chief Justice’s opinion as applying an “overly theoretical approach to case law, an approach that emphasizes rigid distinctions . . . in a way that serves to mask the radical nature of today’s decision. Law is not an exercise in mathematical logic.”

Chief Justice Warren, a Justice who came to the Supreme Court with real world experience as a state Attorney General and Governor, recognized the power of a *unanimous* decision in *Brown v. Board*. The Roberts Court, in its narrow desegregation decision two years ago, ignored the real world experience of millions of Americans, and showed that it would depart from even the most hallowed precedents of the Supreme Court.

Considering how the law matters to people is a lesson that Elena Kagan learned early in her legal career when she clerked for Justice Thurgood Marshall. In her 1993 remarks upon the death of Justice Marshall, she observed: “Above all, he had the great lawyer’s talent . . . for pinpointing a case’s critical fact or core issue. That trait, I think, resulted from his understanding of the pragmatic – of the way in which the law acted on people’s lives.”

Judicial Independence, Not Litmus Tests

If confirmed, Elena Kagan would be the third member of the current Supreme Court to have had experience working in all three branches of the Government prior to being nominated. Some are criticizing her work during the Clinton administration as political. I suggest that a fair reading of her papers indicates that she has the ability to take many factors into account in analyzing legal

problems and that her skills include practicality, principle and pragmatism. These were all used in their service to the American people by Justices O'Connor, Souter and Stevens. There is more to serving the country as a Supreme Court Justice.

I reject the ideological litmus test that Senate Republicans would apply to Supreme Court nominees. Unlike those on the right who drove President Bush to withdraw his nomination of Harriet Miers and those who opposed Justice Sotomayor, I do not require every Supreme Court nominee to swear fealty to the judicial approach and outcomes ordained by adhering to the narrow views of Justice Scalia and Justice Thomas. I expect judges and Justices to faithfully interpret the Constitution and apply the law, and also to look to the legislative intent of our laws and to consider the consequences of their decisions. I hope that judges and Justices will respect the will of the people, as reflected in the actions of their democratically-elected representatives in Congress, and serve as a check on an overreaching Executive.

What others seem to want is assurance that a nominee to the Supreme Court will rule the way they want, so that they will get the end results they want in cases before the Supreme Court. Lack of such assurances was why they vetoed President Bush's nomination of Harriet Miers, only the third woman to be nominated to the Supreme Court, and the only one not to be confirmed. They forced Ms. Miers to withdraw even while Democrats were preparing to proceed with her hearing. They do not want an independent judiciary. They demand justices who will guarantee the results they want. That is their ideological litmus test. As critics level complaints against Elena Kagan, I suspect that the real basis of that discontent will be that the nominee will not guarantee a desired litigation outcome.

Of course that is not judging. That is not even umpiring. That is fixing the game. It is conservative activism plain and simple. It is only recently that some Republican Senators conceded that judicial philosophy matters. I hope this means that they will abandon the false premise that all a Justice does is mechanically apply obvious legal dictates to reach preordained outcomes. Solicitor General Kagan was right to reject that as "robotic."

It is the kind of conservative activism we saw when the Supreme Court in the *Ledbetter* case disregarded the plain language and purpose of Title VII. It is the kind of activism we saw when, this past January, a conservative activist majority turned its back on the Supreme Court's own precedents, the considered judgment of Congress, the interests of the American people and our long history of limiting corporate influence in elections in their *Citizens United* decision.

We can do better than that. In fact, we always have done better than that. In reality, we can expect Justices who are committed to doing the hard work of judging required of the Supreme Court. In practice, this means that we want Justices who will pay close attention to the facts in every case that comes before them, to the arguments on both sides, to the particular language and purposes of the statutes they are charged with interpreting, to their own precedents, and to the traditions and longstanding historical practices of this Nation. Applying these factors would reflect an appreciation for the real-world ramifications of their decisions. Judging is not just textual and is not automatic. If it were, a computer could do it. If it were, important decisions would not be made 5 to 4. A Supreme Court Justice is required to exercise judgment but should appreciate for the proper role of the courts in our democracy.

The resilience of the Constitution is that its great concepts and phrases are not self-executing. Constitutional values need to be applied. Cases often involve competing constitutional values. In the hard cases that come before the Court in the real world, we want – and need – Justices who have the good sense to appreciate the significance of the facts in the cases in front of them as well the ramifications of their decisions in human and institutional terms. I expect in close cases that hardworking Justices will sometimes disagree about results. I do not expect to agree with every decision of every Justice. I understand that. I support judicial independence. I voted for Justice Stevens, Justice O’Connor and Justice Souter, who were all nominees of Republican Presidents. I knew I would not agree with all of their decisions but I respected their approach to the law and their independence.

Confirmation Hearing and Thurgood Marshall

A few days before Independence Day, the Senate Judiciary Committee was able to complete its hearing on the nomination of Elena Kagan to be an Associate Justice of the Supreme Court of the United States. After opening statements on Monday afternoon, June 28, we were able to complete the questioning of the nominee on Tuesday, June 29, and Wednesday, June 30. We proceeded for 10 hours on Tuesday, and were able to complete most of the first round. We returned on Wednesday to complete the remainder of the first round, a second round, and a third round for those who requested additional time to question Solicitor General Kagan. We also held the traditional closed session and held the hearing record open for members of the Committee to submit additional questions to Solicitor General Kagan.

Out of respect for the Senate observances honoring Senator Byrd, we reconvened at 4 p.m. on Thursday, July 1. We heard testimony from representatives of the American Bar Association, and 14 members of the public invited by the Republican minority and 10 invited by the majority. I especially want to thank Senators Cardin, Kaufman, and Schumer for sharing the duty of chairing our proceedings on Thursday, which extended past 8 p.m., long after the last Senate vote of the week.

In my opening statement at the hearing, I urged the nominee to engage with the Senators and she was, in fact, engaging. I also urged Solicitor General Kagan to answer our questions about her judicial philosophy. I think that she was more responsive than other recent nominees, and that she provided more information than was shared at other Supreme Court hearings in which I have participated. Of course, some of the questions attempted to solicit indications as to how she would rule in cases likely to come before the Supreme Court. Solicitor General Kagan appropriately avoided such attempts but displayed a keen understanding of the complex set of legal issues that come before our highest court.

I was disappointed that one line of attack against Elena Kagan was to disparage Thurgood Marshall. I appreciated the statements of Senators Cardin and Durbin in defense of this towering figure of American law. I commend the columns written by Stephanie Jones, the daughter of Judge Nathan Jones; Frank Rich; Dana Millbank; Margaret Carlson; Carol Steiker; and, of course, Thurgood Marshall, Jr. In addition, editorial pages, blogs and reports rejected this ill-

advised efforts. It is a strength and a blessing that Elena Kagan clerked for Justice Thurgood Marshall.

I remember Justice Marshall. The caricature of him by some at the Kagan confirmation hearing was wrong. Knowing him, I suspect that when he told his clerks that his philosophy was to do the right thing and let the law catch up, he was most likely referring to his precedent-setting career as the leading advocate of the time and not strictly defining a judicial philosophy or approach. To the contrary, in Elena Kagan's tribute to Justice Marshall in 1993 in the *Texas Law Review*, she recalled his commitment to the rule of law. She described, as did Carol Steiker in her column in *The National Law Journal*, how Justice Marshall's law clerks had tried to get him to rely on notions of fairness rather than the strict reading of the law to allow an appeal to proceed on a discrimination claim. She wrote that the 80-year-old Justice referred to his years trying civil rights cases and said: "All you could hope for was that a court would not rule against you for illegitimate reasons. You could not expect that a court would bend the rules in your favor. That is the rule of law."

Just as Sir Thomas More reminded his son-in-law in that famous passage from "A Man for All Seasons" that the law is our protection, Justice Marshall reminded his clerks that the existence of rules and the rule of law is the best protection for all, including the least powerful. Justice Thurgood Marshall was a man of the law in the highest sense. He understood the Constitution's promise of equality to his core. He relied on the law and the American justice system to overcome racial discrimination.

So I was deeply disappointed to see the manner in which his legacy was treated by some during the recent confirmation hearing and to read that there are Republican Senators currently serving who recently said that they would vote against Thurgood Marshall's confirmation to the Supreme Court. He was disparaged at his confirmation hearing to the Supreme Court. His confirmation to the United States Court of Appeals to the Second Circuit, to be Solicitor General, and to the United States Supreme Court were delayed and made difficult at the time, but I had hoped and thought those dark days were behind us.

The attacks on Justice Marshall during Elena Kagan's confirmation hearing were particularly striking. On the first day of the hearings Republican members of the Judiciary Committee mentioned Justice Marshall 35 times. They did not do so to praise him or his contributions to America's historic effort to overcome racial discrimination. Rather, they pilloried him as if someone who functioned outside the mainstream of American constitutional law. In fact, he did as much as any American in the last century to make sure America lived up to its promise. He moved America forward, toward a more perfect union. On that day, however, they were trying to penalize Elena Kagan because as a young lawyer she clerked for him on the United States Supreme Court.

Two current Justices also clerked for Supreme Court Justices – Chief Justice John Roberts and Justice Stephen Breyer. That Chief Justice Roberts clerked for then-Justice Rehnquist was viewed by Republicans as a credential and a positive just a few years ago. Judge Douglas Ginsburg of the D.C. Circuit and Judge Ralph Winter of the Second Circuit each clerked for

Justice Marshall as young lawyers. They were not criticized during their confirmation hearings for having done so; far from it.

Thurgood Marshall was perhaps the most influential lawyer of the 20th century. He dedicated his life to the rule of law. He, and the dedicated and talented team of lawyers with whom he worked at the NAACP, did not engage in violent protests but sought to ensure the full equality of all Americans by appeal to American justice and our Constitution. They brilliantly and courageously argued their claims on behalf of their clients. They bettered America's soul. Beginning in the late 1930s, their cases eventually led to the overturning of the misguided 1896 decision in *Plessy v. Ferguson* and the dismantling of state-mandated segregation of the races in public facilities. When the Supreme Court unanimously agreed with Thurgood Marshall's argument in the landmark case of *Brown v. Board of Education* that state-mandated segregation of the races in public school violated the Constitution, it was vindication of the rule of law. *Brown* was one of the 29 cases that Thurgood Marshall won out of the 32 cases that he argued as a Supreme Court advocate. Justice Marshall's record of advocacy before the Supreme is unsurpassed and not likely to ever be matched.

Thurgood Marshall's life was lived in the law, not outside it. As a Justice, he was the embodiment of what the rule of law can achieve. He was a giant in the law. For good and enduring reason, Thurgood Marshall is a hero not just to Solicitor General Kagan, but to countless American lawyers, judges, Presidents, and hardworking Americans. He should be a hero to us all.

I am concerned that the younger Americans who waited in line to attend our confirmation hearings or who tuned in to watch them may not understand what the mischaracterization of Justice Marshall by some at our hearing how important it was four decades ago for President Lyndon Johnson to nominate then-Solicitor General Marshall, to the Supreme Court. As President Johnson said at the time, "He is the best qualified by training and by valuable service to the country. I believe it is the right thing to do, the right time to do it, the right place."

Justices Sandra Day O'Connor, Antonin Scalia, and Clarence Thomas, all Republican appointees, have acknowledged Justice Marshall's greatness as a lawyer and judge. Shortly after Justice Marshall's passing, Justice O'Connor, who had served on the Court with him, wrote: "His was the eye of a lawyer who had seen the deepest wounds in the social fabric and used law to help heal them. His was the ear of the counselor who understood the vulnerabilities of the accused and established safeguards for their protection. His was the mouth of a man who knew the anguish of the silenced and gave them voice." Justice Scalia remarked that Justice Marshall "could be . . . a persuasive force just sitting there. . . . He was always in the conference a visible representation of a past that we wanted to get away from and you knew that, as a private lawyer, he had done so much to undo racism or at least its manifestation in and through government." During his own confirmation proceedings, Justice Thomas praised Justice Marshall, as "one of the greatest architects of the legal battles to open doors that seemed so hopelessly and permanently sealed and to knock down barriers that seemed so insurmountable to those of us in Pin Point, Georgia." These Justices recognize and respect Justice Thurgood Marshall and his enduring impact on American law. He made this a stronger and more inclusive Nation.

At least two Republican members of the Senate Judiciary Committee recently said that they are not sure whether, if given the chance, they would vote to confirm Thurgood Marshall as a Justice on the Supreme Court. Though he had to face humiliating questioning during his own confirmation hearings for the Court, he was confirmed by a vote of 69 to 11 in 1967. I would have hoped that as a Nation we would have progressed to acknowledge Thurgood Marshall's fitness to serve on the Supreme Court but I am sad to acknowledge that is not so. If there are Republicans who would now vote against the nomination of Thurgood Marshall to the Supreme Court, it is a sign of just how far the former party of Lincoln has changed and just how much some would like to undo the progress made over the last century.

Conclusion

We 100 who are charged with giving our advice and consent on Supreme Court nominations should consider whether those nominated have the skills, temperament and good sense to independently assess in every case the significance of the facts and how the law applies to those facts. I believe that Elena Kagan does meet that test. The more judges appreciate the real world impact that their decisions have on hard working Americans, I believe the more confidence the American people will have in their courts. I have urged Republican and Democratic Presidents to nominate people from outside the judicial monastery because I think real world experience is helpful to this process. The American people live in a real world of great challenges. We have a guiding charter that provides great promise. The Supreme Court functions in the real world that affects all Americans. Judicial nominees need to appreciate that simple, undeniable fact and promise to uphold the law that Americans rely on every day for their continued safety and prosperity.

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