National Right To Work Committee

A COALITION OF EMPLOYEES AND EMPLOYERS

HEADQUARTERS AT THE NATION'S CAPITAL

July 1, 2010

United States Senate
Washington, DC 20510

Dear Senator:

On behalf of the over 2.6 million members of the National Right to Work Committee, I strongly urge you to vote against confirmation of Elena Kagan for a lifetime seat on the United States Supreme Court. Her record as an high-level White House advisor to President William Jefferson Clinton demonstrates that her views about the First-Amendment and statutory rights of American workers are far outside the judicial mainstream.

In 1977, in *Abood v. Detroit Board of Education*, a case in which National Right to Work Legal Defense Foundation attorneys represented the plaintiff, public school teachers, the U.S. Supreme Court considered whether non-union public employees can constitutionally be compelled as a condition of employment to subsidize their union monopoly bargaining agent's political activities. The Court, unanimously, held "that a State cannot constitutionally compel public employees to contribute to union political activities which they oppose."

The First-Amendment right of workers not to be forced to subsidize union politics, first recognized in *Abood*, has been reaffirmed by the Supreme Court in several subsequent cases brought to the Court for workers by National Right to Work Legal Defense Foundation attorneys, cases such as *Ellis v. Railway Clerks* (1984), *Teachers Local 1 v. Hudson* (1986), *Lehnert v. Ferris Faculty Ass'n* (1991), and *Davenport v. Washington Education Ass'n* (2007).

The Court's *Abood* ruling relied on the principle underlying the Supreme Court's 1976 decision about the Federal Election Campaign Act in *Buckley v. Valeo*, that

"contributing to an organization for the purpose of spreading a political message is protected by the First Amendment." The Court has reiterated that principle repeatedly, and relied upon it again as recently as this year in *Citizens United v. Federal Election Commission*.

However, in 1996, when she was Associate Counsel to President Clinton, Ms. Kagan rejected this long, unbroken line of Supreme Court precedent that protects the First-Amendment right of public employees – and of Americans generally – not to be compelled by government to subsidize political activities of private, voluntary associations.

In an e-mail message on October 31, 1996, to Paul J. Weinstein, Jr., Chief of Staff of the White House Domestic Policy Council, Ms. Kagan said (emphasis added):

> It is *unfortunately* true that almost any meaningful campaign finance reform proposal raises constitutional issues. This is a result of the Supreme Court's view – *which I believe to be mistaken in many cases* – that money is speech and that attempts to limit the influence of money on our political system therefore raise First Amendment problems. . . . *I also think the Court should reexamine* its premise that the freedom of speech guaranteed by the First Amendment entails a right to throw money at the political system.

In her Senate Judiciary Committee testimony on June 29, 2010, Ms. Kagan claimed in answer to a question from Senator Orrin Hatch that these were merely the Clinton Administration's, not her personal, views.

However, later, on October 31, 1996, Ms. Kagan was one of several White House staff members whose memorandum *recommending* how the White House should respond to questions about President Clinton's "Campaign Finance Reform Announcement" was transmitted to White House Chief of Staff Leon Panetta. That memo from Ms. Kagan and others *incorporated* Ms. Kagan's argument that the First Amendment does not protect the right to spend money for political activities. In short, in 1996 Ms. Kagan both suggested and endorsed that crabbed view of the First Amendment.

Thus, Ms. Kagan's testimony this week before the Senate Judiciary Committee clearly is disingenuous. It is reasonable to conclude from her record that, if confirmed,

Ms. Kagan would be willing to overrule *Abood*'s well-established protection of the constitutional right of workers not to be forced to subsidize union politics.

This conclusion is supported by other documents the Clinton Presidential Library recently produced for the Senate Judiciary Committee in preparation for its hearings on Ms. Kagan's Supreme Court nomination.

On November 14, 1996, Ms. Kagan sent a memorandum on White House stationery to then White House Counsel Jack Quinn and then Deputy White House Counsel Kathleen Wallman about a draft "memo to the President on campaign finance." In her memo, Ms. Kagan said:

> The memo does not address what seems to me the key issue in developing a strategy on campaign finance legislation: how to deal with Republican efforts to restrict labor union spending. I think the Republicans will insist on including in any campaign finance legislation a provision making it difficult for unions to use money from compulsory union dues in political campaigns. . . . We should start thinking now how we're going to deal with this Republican poison pill.

In 1988, of course, in *Communications Workers v. Beck*, yet another case in which National Right to Work Legal Defense Foundation attorneys represented the plaintiff workers, the Supreme Court had already held that the National Labor Relations Act – like the First Amendment – prohibits unions from using compulsory union dues of objecting workers in political campaigns. Thus, any provision that would make "it more difficult for unions to use money from compulsory union dues in political campaigns" would simply protect a constitutional and statutory right of workers recognized by the Court in the *Abood* line of cases and in *Beck*.

Ms. Kagan nonetheless subsequently recommended that President Clinton oppose any legislation protecting the right of workers not to be forced to subsidize union politics, despite the First Amendment's guarantee of that basic worker freedom of speech and association.

On February 12, 1997, Kathleen Wallman, then Deputy Assistant to the President for Economic Policy, circulated an 11:30 a.m. draft memorandum for the President on

possible policy announcements of labor issues that the Vice President could make at a meeting of the AFL-CIO's Executive Committee later that month. The draft indicates that Ms. Kagan, by then Deputy Assistant to the President for Domestic Policy, was writing two sections of the memo that were not included in the draft. One of those sections that Ms. Kagan "agreed to draft" concerned the Administration's "[p]osition on Beck legislation aimed at limiting the use of union dues in political activity."

Later that same day, Ms. Kagan e-mailed Ms. Wallman her recommendation about "legislation aimed at limiting the use of union dues in political activity" (italics added): John Hilley [Director of Legislative Affairs], Bruce Reed [Director of the Domestic Policy Council], *and I* all recommend that you state *strong opposition* to Beck legislation, no matter what it is attached to."

In sum, as a high-level White House official Ms. Kagan *both* disagreed with the well-established legal principle that underlies the long line of Supreme Court decisions recognizing the constitutional right of workers not to be compelled to subsidize union political activities as a condition of employment *and* opposed any legislation designed to protect that fundamental right of free speech and free association. This puts her far outside the judicial mainstream and demonstrates a disdain for the rights of independent-minded American workers.

Consequently, on behalf of the National Right to Work Committee's over 2.6 million members, I strongly urge you to vote NO on confirmation of Ms. Kagan's nomination to the Supreme Court.

Respectfully,

Mark A. Mix