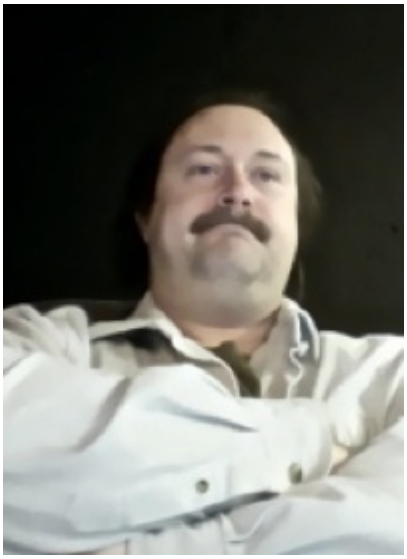
Written by **Dennis Behreandt** on May 26, 2010

Elena Kagan and the First Amendment



The Obama administration and the Democrats are openly hostile to the First Amendment. On that issue, here is the scoreboard so far:

1. In remarks to graduates of Hampton University on May 9, the President said that the free flow of information enabled by new technologies like the iPad "is putting pressure on our country and our democracy."

2. At the White House Correspondents Association Dinner in May 2009, White House Chief of Staff Rahm Emanuel joked: "When you think of the First Amendment … you think it's highly overrated."

3. The administration has repeatedly attacked those in the press it considers to be their ideological opponents, targeting Fox News and Rush Limbaugh, for instance.

4. Mark Lloyd, the associate general counsel and chief diversity officer (aka, the Diversity Czar) for the Federal Communications Commission wrote in his book *Prologue to a Farce* regarding freedom of speech and of the press that "this freedom is all too often an exaggeration. At the very least, blind references to freedom of speech or of the press serve as a distraction from the critical examination of other communications policies."

With this background, here comes Elena Kagan. According to Fox News, and quoted by *Capitalism Magazine*, "In a 1996 paper [in the University of Chicago Law Review] 'Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine," Kagan argued it may be proper to suppress speech because it is offensive to society or to the government."

That summary doesn't really capture the potential subtleties and consequences of Kagan's view as expressed in her 1996 paper. In it, she argues that the modern court has developed a complex means of ferreting out government motive in laws passed by legislatures and basing First Amendment decisions on those perceived motives. She writes: "The doctrine of impermissible motive, viewed in this light, holds that the government may not signify disrespect for certain ideas and respect for others through burdens on expression.

That sounds good so far, but she continues: "This does not mean that the government may never subject particular ideas to disadvantage. The government indeed may do so, if acting upon neutral, harm-based reasons. But the government may not treat differently two ideas causing identical harms on the ground that — thereby conveying the view that — one is less worthy, less valuable, less entitled to a hearing than the other."

Again, this sounds reasonable. After all, wouldn't we want judges deciding First Amendment cases on such a level playing field? To ask this question, however, is to sidestep the real issue. Under the doctrine of impermissible motive, the court is expected to determine if the government's action in

restricting speech is based on a permissible, or acceptable, motive. Ultimately, this still results in a branch of government that is empowered to determine when speech is restricted and when it is not.

What would the Founding Fathers think of this? A good way to find out is simply to read the First Amendment, which is written in strikingly good, plain English. The Amendment states, simply: "Congress shall make no law … abridging the freedom of speech, or of the press…."

Pretty straightforward. The Amendment does not worry about motive, does not reference the Supreme Court, and leaves no room for misunderstanding. Congress, the legislative branch of the government, responsible for all lawmaking, can not interfere with freedom of speech. This is often referred to as the "absolutist" approach to understanding the meaning of the First Amendment. Whatever one chooses to call it, it is also the one that is both in accord with common sense, natural law, and the Jeffersonian and Madisonian approach to Constitutional interpretation.

Under Kagan's doctrine of impermissible motive, this goes out the window. If the court finds that the government in restricting speech has a permissible motive, then goodbye First Amendment in that case. Given that to Rahm Emanuel the First Amendment is a joke, and that to the Diversity Czar the importance of freedom of speech is exaggerated, and that Obama thinks freedom of speech puts too much pressure on our "democracy," Kagan's nomination for the Supreme Court is more than a little disturbing, and perhaps suggests that future abridgments of the First Amendment may be in the offing.

Does that sound too pessimistic? Not according to columnist Wesley Pruden of the *Washington Times*. Commenting on Kagan's 1996 paper, Pruden observes that she "does not identify, exactly, what speech the government could regard as inflicting such 'harm' as to justify suspending the Constitution, but she offers as examples incitement to violence, 'hate speech,' and 'fighting words.' Since certain friends of the White House have suggested that 'tea party' activists may have already been guilty of sedition, we can imagine what some of the violations might one day be."

Kagan has been cautiously circumspect in her scholarly work on the subject of the First Amendment. Her defenders will be able to say, accurately, that she simply described the natural development of First Amendment legal theory in the "modern" court. And they will be able to say, also accurately, that she did a fine job of it too. But, she certainly didn't criticize these developments either, and it is reasonable to conclude that she is at least mildly, if not enthusiastically, supportive of the doctrine she describes.

The very ambiguity of her position, and the danger it poses to freedom of speech and of the press, makes it reasonable to question whether Ms. Kagan should be allowed to sit on the nation's highest court.

Dennis Behreandt is a contributor to *The New American* magazine. Visit his blog and archives here.