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Kagan's free speech views murky

Prospective new justice could get first big test when Court hears WBC 'free speech' case

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The legal record of U.S. Supreme Court nominee Elena Kagan is sparse on all big constitutional issues except for free speech, an issue with particular pertinence for an upcoming Topeka-related case.

Kagan, the former dean of Harvard Law School and current U.S. solicitor general, has written scholarly law reviews about the First Amendment and argued on behalf of the federal government in cases with heavy implications for the issue.

Some media accounts have cast those writings as proof of Kagan's hostility toward what is a sacred right in America — to say what you feel with few restrictions. Constitutional scholars say there is something to glean from these writings. But not much.

Free speech is at the heart of the case of a Marine's father who is suing some members of Topeka's Westboro Baptist Church for their picketing of his son's funeral. That case will come before the country's high court this fall, by which time Kagan could be on the bench. How could she rule in that case?

Some of the arguments she made in Supreme Court cases alarmed defenders of free speech. Observers, however, warned against extrapolating her personal views from a legal argument she made while acting as a government advocate. Some of her journal articles are seen as a giant brainstorming session for scenarios in which free speech can be restricted, but other articles illustrate an appreciation for the precedent that the government can't restrict speech based on content.

All of her papers, anyhow, are so nuanced that scholars say pinpointing her personal beliefs is difficult if not impossible.

"I'm not sure we can really know how Elena Kagan is going to rule on free speech issues," said David Hudson, a First Amendment law professor at Vanderbilt University in Nashville, Tenn., and a scholar at the First Amendment Center.

Most cited by critics of Kagan's free-speech beliefs is a legal brief she prepared last year as solicitor general in which she defended the criminalization of depictions of animal cruelty.

In the case — *United States v. Stevens* — Kagan wrote a brief arguing for a new exception to protected speech. Other categories of unprotected speech include defamation, incitement and

obscenity. Kagan, acting on behalf of the government, asked for a "balancing of the value of the speech against its societal costs."

Writing for an 8-1 majority that rejected the government's side, Chief Justice John Roberts called Kagan's argument "startling and dangerous."

Kansas solicitor general Steve McAllister said don't read too much into Kagan's written words in the animal cruelty case. How to argue a case is arrived at only after consultation with multiple sources, he said, probably including the White House, the Department of Justice and other lawyers in the solicitor general's office.

"I can say from personal experience," McAllister said, "most of the time the thing lawyers argue for the government may not reflect their deeply held beliefs on the legal issue."

Others said while they can't fault her for her role as solicitor general, her specific legal argument did raise eyebrows. Hudson was "bothered" by Kagan's strategy. So was Ilya Shapiro, a senior fellow in constitutional studies at the Cato Institute, a libertarian think tank in Washington.

"It is some evidence, more than nothing, that it's a view she holds," he said. "There's nothing in her other writings to counter that."

In a paper Shapiro wrote about Kagan's views earlier this month, he reviewed the numerous scholarly articles she penned about free speech in the mid-1990s, including one in 1993 titled, "Regulation of Hate Speech and Pornography after R.A.V." In that article, Shapiro wrote, Kagan "attempts to find a constitutional way to restrict the sorts of speech that she personally finds offensive."

Hudson thinks that paper showcases something else — Kagan's appreciation for "viewpoint neutrality." The legal term essentially means you can't restrict speech based on its content.

He said another good representation of Kagan's beliefs is found in a 1996 article titled, "Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine." In that article, Hudson said, Kagan argues that one of the key questions when dealing with free speech is ferreting out the government's motive for restricting it. For instance, a government would have a better court case if it restricted strip clubs based on increased crime related to the businesses. The government's case would fail if it passed those restrictions based on a dislike of nude dancing.

With that in mind, Hudson said one could see any action against Westboro Baptist as an attempt to restrict the church members' right to free expression.

Everyone interviewed for this story stressed the speculative nature of this analysis. And the case against the church is unique in that the government isn't trying to restrict speech.

The case involves a civil suit in which the Marine's father is asking for damages due to intentional infliction of emotional distress and an invasion of privacy. The First Amendment issues shouldn't even come into play, said Josh Wheeler, an attorney and associate director of the Thomas Jefferson Center for the Protection of Free Expression in Charlottesville, Va.

He said the facts of the case — that the father didn't see church members at the funeral and that they were on a public sidewalk — should preclude any awarding of damages.

Definite answers will have to wait.

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