Approved: 3-29-06
Date

MINUTES OF THE SENATE FEDERAL AND STATE AFFAIRS COMMITTEE

The meeting was called to order by Chairman Pete Brungardt at 10:30 a.m. on February 14, 2006 in Room 231-N of the Capitol.

All members were present except:
Senator Anthony Hensley- excused
Senator Dennis Wilson- excused
Senator Kay O'Connor - excused

Committee staff present:
Athena Andaya, Kansas Legislative Research Department
Dennis Hodgins, Kansas Legislative Research Department
Mary Ann Torrence, Revisor of Statutes Office
Connie Burns, Committee Secretary

Conferees appearing before the committee:
Senator Francisco
Senator Betts
Professor Steve McAllister
Shelby Smith

Others attending:
See attached list.

The Chairman noted that committee minutes for January 24, 25, 26, 31; February 1, 2, 7, and 8 were on the bench for the committee members to review.

Chairman requested a bill introduction concerning sales tax measure for improvement in Saline County.

Chairman Brungardt made the motion that the request should be introduced as a committee bill. Senator Reitz seconded the motion. The motion carried.

Senator Francisco appeared before the committee to request a bill introduction. The bill would amend language to add humiliate, harass or degrade the child or to in KSA 21-3503, 21-3504, 21-3517, 21-3518 and 60-3102, 2005 supp. 21-3516.

Senator Vratil made the motion that the request should be introduced as a committee bill. Senator Gilstrap seconded the motion. The motion carried.

Senator Betts appeared before the committee to request a bill introduction concerning labor and employment relating to employers' health care costs; establishing the fair share health care fund.

Senator Gilstrap made the motion that the request should be introduced as a committee bill. Senator Reitz seconded the motion. The motion carried.

SB 421 - Unlawful picketing or protest march at funeral or memorial service

Professor Stephen McAllister, appeared before the committee to provide constitutional advice regarding **SB 421**. (Attachment 1) Mr. McAllister stated that he was appearing in a personal capacity and not on behalf of University of Kansas nor its School of Law, or as an advocate for or against the bill. Several questions were addressed:

I. The First Amendment Preliminary Questions

Does the Kansas Funeral Picketing Act Regulate "Speech"? Not every action taken by a person is expressive nor counts as "speech" for constitutional purposes. Picketing is speech, though not all "protested activities" are necessarily speech. The courts have been less protective of targeted or focused picketing-at least where the aim is a private residence-than of other forms of speech. KSA 21-4015 almost certainly regulates "speech"; it is at least in part regulating a less favored form of speech, one that the Supreme Court has in at least one case permitted government to ban with respect to the targeted picketing of individual

residence.

Does the Kansas Funeral Picketing Act Regulate on the Basis of Content? It does not appear to regulate on the basis of content or viewpoint, as it applies to all "picketing" and "directed protest march[es]", irrespective of the subject matter the protesters are addressing.

II. Time, Place and Manner Regulation

Creates three categories of "forum" for purposes of establishing standards by which to measure the constitutionality of government regulation of speech in each type of forum. A critical step in the First Amendment analysis of the Kansas Funeral Picketing Act is to determine the nature of the "forum" being regulated:

- Traditional Public Forum - typical examples are town squares, and public parks, streets and sidewalks.
- Limited Public Forum - typical examples are schools or colleges, government has opened or designated for such purposes of public forum.
- Nonpublic Forum - is one that has not by tradition or by designation been open for public communication. Government has the most leeway in the regulation of a nonpublic forum, with restriction generally upheld if they are "reasonable" in light of the purpose of the forum is constitutional as long the government is not targeting a particular point of view. Case law has included churches and cemeteries as nonpublic forum.

III. Summary of the Bill

An argument certainly can be made that focused or targeted picketing of a nonpublic forum such as a cemetery, church, or mortuary is subject to greater restriction or regulation than picketing of a public forum, such as a park or town square, and such picketing can be banned on the premises of such nonpublic fora.

Restricting such activities when they take place on a traditional public forum – such as a public sidewalk– adjacent to or near the nonpublic forum is whether it is constitutional. Arguably, the proposed amendment to the Kansas funeral Picketing Act satisfies those requirement as follows:

1. By serving a significant government interest (preserving and protecting the sanctity and dignity of religious or non-religious memorial and funeral services, as well as protecting the privacy of family and friends of the deceased during a time of mourning and distress.
2. Being narrowly tailored by limiting targeted picketing only for a relatively brief time period and only to a certain distance from the entrance to a church, cemetery or mortuary;
3. Leaving open ample alternative channels of communication (targeted picketing can take place at any other times and even during a funeral at a distance of 300 feet).

Of the two aspects of the proposed restrictions - the time period and the distance requirement - the time period does not in and of itself appear to be as much potential constitutional concern as the distance requirement, and a 300 foot zone is far more likely to cover traditional public fora such as public sidewalks and streets. It is clear that some type of buffer zone around entrances to nonpublic fora will be permitted, and as previously covered the proposed amendment to the Kansas statute arguably satisfies the three constitutional requirements that courts will apply.

Several suggestions were discussed and the bill will be worked later in the week. Chairman Brungardt thanked Mr. McAllister for his review of the bill.

SB 533 - Separation of powers, study of

Chairman Brungardt opened the hearing on **SB 533**.

Shelby Smith, appeared before the committee in support of the bill. (Attachment 2) The bill's final report would benefit the current office holders while serving as a guiding orientation for newly elected public servants and a constitutional reference document for students of government and political science in Kansas.

Chairman Brungardt closed the hearing on **SB 533**.

The meeting was adjourned at 11:28 am. The next scheduled meeting is February 15, 2006.

SENATE FEDERAL AND STATE AFFAIRS COMMITTEE
GUEST LIST

DATE Feb 14 / 06

NAME	REPRESENTING
Richard Stavenhagen	Patriot Guard
Brandy Sacco	Dominic Sacco / Patriot Guard
Shelby Smith	—
Jana Wacker	Kansas Equality Coalition
Pam Scott	Ks Funeral Directors Assn
Stacey Woodington	
Mary Feighny	Atty General
marci francisco	2nd District
Phil Bradley	KLBA
Jim Clark	KBA
Derek Heim	Heim Law Firm

TO: The Senate Federal And State Affairs Committee

FROM: Stephen R. McAllister

RE: Constitutionality of Proposed Amendment To K.S.A. 21-4015

DATE: February 14, 2006

Senate Bill No. 421 would amend the Kansas Funeral Picketing Act, K.S.A. 21-4015(e), to read that "[i]t is unlawful for any person to engage in picketing or a directed protest march at any public location within 300 feet of any entrance to any cemetery, church or mortuary within one hour prior to, during and two hours following the commencement of a funeral or memorial service."

Recently, the Chair of this Committee, Senator Pete Brungardt, asked me to provide constitutional advice regarding Senate Bill No. 421. I am honored to accept Senator Brungardt's invitation but, as an initial matter, I wish to make clear that I appear in my personal capacity as someone who has spent many years studying and teaching constitutional law. I do not appear on behalf of the University of Kansas nor its School of Law. Nor am I here as an advocate for or against Senate Bill No. 421. Rather, I am here as a lawyer seeking to aid the Committee in its understanding of the constitutional issues the proposed bill may, or may not, raise.

I. First Amendment Preliminary Questions

Does the Kansas Funeral Picketing Act Regulate "Speech"?

Not every action taken by a person is expressive nor counts as "speech" for constitutional purposes. Even some conduct which has an expressive aspect is not given as much constitutional protection as "pure speech." See, e.g., Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991) (nude dancing); Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984) (sleeping in a park to protest plight of the homeless); United States v. O'Brien, 391 U.S. 367 (1968) (burning a draft card to protest the draft).

K.S.A. 21-4015(d)(2) defines "Picketing" as "protest activities engaged in by a person or persons" in specified locations, and 21-4015(e) prohibits "picketing or a directed protest march". Picketing is speech, though not all "protest activities" are necessarily speech. The courts have been less protective of targeted or focused picketing–at least where the aim is a private residence–than of other forms of speech. Frisby v. Schultz, 487 U.S. 474 (1988) (upholding an ordinance construed to prohibit "targeted" picketing in front of a specific residence); City of San Jose v. Superior Court, 38 Cal. Rptr. 2d 205, 209 (Cal. Ct. App. 1995) ("In short, the United States Supreme Court has described targeted picketing as highly offensive conduct which is not entitled to the same level of First Amendment protection as is more general expression of political or social views.").

Thus, although K.S.A. 21-4015, almost certainly regulates "speech", it is at least in part regulating a less favored form of speech, one that the Supreme Court has in at least one case permitted government to ban with respect to the targeted picketing of individual residences.

Does the Kansas Funeral Picketing Act Regulate On The Basis Of Content?

A critical question for First Amendment analysis is whether a law regulates speech on the basis of content (or the sub-category of viewpoint). If a law singles out one or more subject matter areas for speech regulation (or one side of a debate), it will be subjected to the most exacting scrutiny, and is far more likely to be found unconstitutional than otherwise.

The Kansas Funeral Picketing Act does not appear to regulate on the basis of content or viewpoint, because it simply applies to all "picketing" and "directed protest march[es]", irrespective of the subject matter the protesters are addressing.

II. Time, Place And Manner Regulation

For First Amendment speech cases, the Supreme Court has developed something known as the "time, place and manner" doctrine. This doctrine creates three categories of "forum" for purposes of establishing standards by which to measure the constitutionality of government regulation of speech in each type of forum. See Perry Education Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983); Hawkins v. City and County of Denver, 170 F.3d 1281 (10th Cir. 1999). Thus, a critical step in the First Amendment analysis of the Kansas Funeral Picketing Act is to determine the nature of the "forum" being regulated.

Traditional Public Forum

A "traditional, public" forum is one that has, since time immemorial, been open to and used for speech and expression. Typical examples are town squares, and public parks, streets and sidewalks. It is not sufficient that government owns the property–rather the test is whether the property is of a type that has traditionally been used as a forum for expression. In a traditional public forum, government cannot close the forum to all speech nor regulate on the basis of content without a compelling state interest. Content-neutral time, place and manner regulations, however, may be imposed if they (1) serve a significant government interest, (2) are narrowly tailored, and (3) leave open ample alternative channels of communication. Thus, even though public streets and sidewalks generally are traditional public fora, government retains the ability to impose content-neutral time, place, and manner regulations in such locations, subject to the standards stated in the preceding sentence.

Limited Public Forum

A "limited public" forum is one which has not necessarily been open for expression as a matter of tradition and history, but which government has opened or designated for such purposes. Again, it is not sufficient that the government owns the property; rather, the property must be designated for expressive purposes. See, e.g., Preminger v. Principi, 422 F.3d 815, 824 (9th Cir. 2005). Examples in the case law include a public school or public university building which has been opened to groups to use for non-school functions, a state fairgrounds, and a municipal theater. In limited public fora, the same rules apply as in a traditional, public forum, except that government may close the forum entirely, rather than simply regulate speech activity.

Nonpublic Forum

The third category is a "nonpublic" forum. A nonpublic forum is one that has not by tradition or by designation been open for public communication. Government is given considerably more leeway in the regulation a nonpublic forum, with restrictions generally upheld if they are "reasonable" in light of the purpose(s) which the forum serves and so long as any regulation is not an effort to suppress speech which government opposes. Examples of a nonpublic forum include a cemetery. Lower v. Bd. of Directors of Haskell County Cemetery Dist., 274 Kan. 735, 746 (2002) ("while a cemetery may be open and accessible to the public, cemeteries may properly be classified as nonpublic fora for purposes of constitutional review"); see also Warner v. City of Boca Raton, 420 F.3d 1308, 1310 n. 1 (11th Cir. 2005) ("We reject Plaintiffs' arguments that cemeteries are public fora. We are aware of no federal court that has concluded otherwise.").

Another example in the cases would be churches–by definition since they generally are not publicly owned. See, e.g., St. David's Episcopal Church v. Westboro Baptist Church, Inc., 22 Kan. App. 2d 537, 549 (1996) ("We agree with the trial court and find that, in addition to the government interest in protecting residential and clinical privacy, the government has a legitimate interest in protecting the privacy of one's place of worship as well."); City of Prairie Village v. Hogan, 855 P.2d 949 (Kan. 1993) (construing city ordinance that banned picketing of residences or churches to prohibit only focused picketing in front of a residence or church, but declining to determine the ordinance's constitutionality because the defendant's conduct did not violate the ordinance as construed); but compare Olmer v. City of Lincoln, 192 F.3d 1176, 1181-1182 (8th Cir. 1999) (rejecting, by a 2 - 1 vote, the argument that churches should receive the same level of protection from picketing and protests as the private residences of individuals). Implicitly and necessarily, funerals and memorial services held in cemeteries or churches should not be considered public fora of any type, and should receive the same level of privacy protection as ordinary worship services.

III. Senate Bill No. 421

Senate Bill No. 421 does not regulate expressive activity on the basis of content, so the bill need not be justified by a compelling government interest. And the statute appears, for the most part, to regulate "targeted" picketing, a form of expressive activity that the Supreme Court of the United States has held can be banned altogether in at least some circumstances (when the target is an individual residence). And the Kansas Court of Appeals has at least suggested that churches may be given the same level of protection as private residences in this regard.

That said, there are a couple of difficult issues. First, not all courts agree that government may protect churches from protests and picketing to the same degree as private residences. Second, Senate Bill No. 421 clearly restricts expressive activity not just within or on the premises of a cemetery or church, but also on traditional public fora such as adjacent public sidewalks and streets.

There is little case law, and certainly none at the Supreme Court level or in Kansas that directly addresses the approach taken by Senate Bill No. 421–to restrict picketing even on public locations within 300 feet of the entrance to a church or cemetery during a specific time period. Although an injunction restricting such protests to 215 feet from the entrance of a church in Topeka was entered in previous litigation, Kansas appellate courts appear not to have determined the constitutionality of such a measure. See St. David's Episcopal Church v. Westboro Baptist Church, Inc., 22 Kan. App. 2d 537, 552-553 (1996) (concluding that the court lacked sufficient information to evaluate the 215-foot buffer zone and expressly declining to decide "whether a court can enjoin picketing outside of a church on public sidewalks"). Likewise, the United States Court of Appeals for the Tenth Circuit, the Circuit which includes Kansas, appears to have avoided ruling on the constitutionality of the Kansas Funeral Picketing Act in a previous form. See Phelps v. Hamilton, 122 F.3d 1309, 1323 (10th Cir. 1997).

The Supreme Court of the United States has addressed buffer zones in the context of protests at clinics which perform abortions, upholding an 8-foot "no approach" zone created by a state statute, Hill v. Colorado, 530 U.S. 703 (2000), and a 36-foot buffer zone around clinic entrances and driveways imposed by a court injunction. Madsen v. Women's Health Center, Inc., 512 U.S. 753 (1994). But the Court struck down a 300-foot buffer zone around the residences of clinic staff when the buffer zone prohibited not just targeted picketing in front of a residence, but any form of protesting or marching. Madsen, at 774-775. The Court in Madsen, however, reiterated that Frisby v. Schultz allows government to ban targeted or focused picketing in front of a particular home.

In summary, an argument certainly can be made that focused or targeted picketing of a nonpublic forum such as a cemetery, church, or mortuary is subject to greater restriction or regulation than picketing of a public forum, such as a park or town square. Indeed, such picketing can be banned on the premises of such nonpublic fora.

The more difficult question is the constitutionality of restricting such activities when they take place on a traditional public forum–such as a public sidewalk–adjacent to or near the nonpublic forum. Such regulation probably has to satisfy the three standards of Part II.A. above. Arguably, the proposed amendment to the Kansas Funeral Picketing Act satisfies those requirements as follows: (1) by serving a significant government interest (preserving and protecting the sanctity and dignity of religious or non-religious memorial and funeral services, as well as protecting the privacy of family and friends of the deceased during a time of mourning and distress); (2) being narrowly tailored by limiting targeted picketing only for a relatively brief time period and only to a certain distance from the entrance to a church, cemetery or mortuary; and (3) leaving open ample alternative channels of communication (targeted picketing can take place at any other times and even during a funeral at a distance of 300 feet).

Of the two aspects of the proposed restrictions–the time period and the distance requirement–the time period does not in and of itself appear to be of as much potential constitutional concern as the distance requirement. Relatively few court decisions have addressed such buffer zones in a context at all like this, and even in the abortion protest cases the Supreme Court has not upheld a buffer zone greater than 36 feet around clinic entrances and driveways. A 300 foot zone is far more likely to cover traditional public fora such as public sidewalks and streets.

On the other hand, it is clear that some type of buffer zone around entrances to nonpublic fora will be permitted, and as discussed above, the proposed amendment to the Kansas statute arguably satisfies the three constitutional requirements that courts will apply.

TESTIMONY
SENATE BILL 533
SHELBY SMITH

Senate Federal & State Affairs Committee
February 14th, 2006

My support for this study stems from a strong belief of what can be gained. I envision a work product, a Final Report beneficial to current office holders while serving as a guiding orientation for newly elected public servants. And, as a constitutional reference document for students of government and political science in Kansas.

The dangers inevitable to unchecked powers were obvious to this nation's founders, particularly Thomas Jefferson and James Madison. More than 200 years later, the dangers persist: In 2001, your Special Committee on the Judiciary wisely concluded, "The Legislature should be vigilant of the potential for abuse in the whole separation of powers arena."

Democracy depends on separation of powers.

As an indirect result of the 2005 special session, a debate was revived in the Capitol on the separation of powers, a debate that has lain largely dormant for a quarter of a century. So the debate must begin again, a debate arising from the highest grounds of public policy. Noteworthy are the alarms sounded from responses to the Montoy school finance case and the Marsh death penalty case for constitutional amendments with unintended consequences, deviations from separation of powers doctrine, politicizing the Kansas Supreme Court nominating process, unbalancing the competing values of representative government for taxing and spending with the judiciary's responsibility for enforcing constitutional rights, and the potential for converting state law claims into federal civil rights claims. So, a comprehensive study is clearly in order.

Changing the constitution always, always calls for caution.

Thank You.

See the attached references to other studies on the separation of powers.

Sen Fed & State Affairs
2-14-06
Attachment 2

the SHELBY SMITH group
PUBLIC AFFAIRS CONSULTANTS

OTHER STUDIES
SEPARATION OF POWERS

February 14, 2006

1) Iowa

Legislative Guide to Separation of Powers. An overview of executive, legislative and judicial encroachments -December 1996.

A comprehensive update of legislative powers, creation of a constitutional revision commission. An on again, off again four year study - March 4, 2003

2) Rhode Island

Governor vowed to make separation of powers the centerpiece of legislative agenda - January 9, 2003.

Removed lawmakers and legislative appointees from some 80 State Boards and Commissions - June 10, 2004.

3) Nevada

A case study on education funding, 1996.

4) Hawaii

The role and powers of the Legislature – has the executive branch encroached on the Legislature's fiscal powers- July 22, 2002

5) NCSL- "SEPARATION OF POWERS IN THE 21ST CENTURY"- July 22, 2004

What happens if legislature does not appropriate money for: executive branch; judiciary branch; schools? Who has standing to bring lawsuit, taxpayer, legislator, Attorney General? Is there any constitutional authority for continued operations by the executive branch? Legislative and Judicial rule making comparative study.

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