This U.S. Official Is Leading the Charge Against Anti-Semitism on College Campuses. Here's What You Should Know About Him.



Susan Walsh, AP Images Kenneth L. Marcus, assistant secretary for civil rights at the U.S. Department of Education

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Through two books, numerous op-eds, academic studies and talks, Marcus, a lawyer, has argued that the past 20 years have seen a rise in anti-Israel, pro-Palestinian protests on American campuses and in the harassment of Jewish students. He has also asserted that many Middle East-studies programs are biased and dismissive of counter views that support the Jewish right to a homeland in the state of Israel, or Zionism.

Since his 2018 appointment to the same post he held during the George W. Bush administration, the Education Department office that enforces civil-rights laws has placed a new focus on the matter.

The office has reopened an investigation into a 2011 civil-rights case at Rutgers University using the definition of anti-Semitism that appears in the executive order. In August, the department also ordered revisions in the joint Middle East-studies program at the University of North Carolina at Chapel Hill and Duke University after the program was deemed biased, in part because it did not offer enough positive imagery of Judaism and Christianity.

Marcus, through the Department of Education press office, declined to answer questions about enforcement of the executive order, instead issuing a written statement:

“The executive order makes clear that Jewish students are covered by Title VI of the Civil Rights Act. Title VI provides protection to individuals, including Jewish students, who face discrimination on the basis of race, color, or national origin. Under Secretary DeVos, it is the policy of OCR to pursue vigorously all forms of discrimination prohibited by Title VI,” he said.

But Marcus’s influence over the executive order and recent enforcement actions are clear, according to Samuel Bagenstos, a professor at the University of Michigan at Ann Arbor’s law school.

“I think it’s fair to say that Ken Marcus is certainly supportive of and behind a lot of this, and very likely very supportive and behind all of it,” said Bagenstos, who was second in command at the U.S. Department of Justice’s civil-rights division in the Obama administration.

Among the biggest hints of Marcus’s influence is that the executive order mirrors his writings. They offer a glimpse of what colleges can expect in the coming months.

What, exactly, is in the executive order?

The executive order, signed by President Trump in December, essentially requires investigators at the Department of Education’s Office for Civil Rights to regard anti-Semitic bias at colleges to be in violation of Title VI of the Civil Rights Act, which bans discrimination on the basis of a person’s race, color, or national origin.

When investigating whether a violation occurred, the order also mandates U.S. Office for Civil Rights investigators to collect evidence of discriminatory intent by using a definition that characterizes anti-Semitism as “a certain perception of Jews, which may be expressed as hatred toward Jews. Rhetorical and physical manifestations of anti-Semitism are directed toward Jewish or non-Jewish individuals and/or their property, toward Jewish community institutions and religious facilities.”

The order specifically directs federal investigators not to infringe anyone’s First Amendment rights. But the definition, previously adopted by the State Department for data-collection purposes, also provides examples of anti-Semitism that include the anti-Israel speech common among progressive activists, who often protest on college campuses.

Any speech that challenges Israel’s existence, according to the definition cited in the executive order, is also considered anti-Semitic. As is creating a double

standard for Israel — holding it to a standard that is not demanded of other democratic nations.

Marcus and many Jewish groups — among them, the American Jewish Committee and the Anti-Defamation League — believe that modern day anti-Semitism, or anti-Jewish sentiment, is often veiled as anti-Zionist protest challenging Israel's right to exist. They say the executive order is needed to stem the rise of such activism, which they say demonizes Jews.

In 2011, Marcus founded an organization called the Louis D. Brandeis Center for Human Rights Under Law, which filed Title VI anti-Semitism complaints and has also supported the executive order.

In 2016 he supported a bill called the Anti-Semitism Awareness Act that would have allowed Office for Civil Rights investigators to use the definition when assessing whether an alleged Title VI violation was motivated by anti-Semitic intent. The bill failed to pass through Congress.

In his 2015 book *The Definition of Anti-Semitism,* Marcus stressed that not all criticism of Israel is anti-Semitic. Speech would become anti-Semitism, he writes, if someone were to characterize Israel using symbols or images associated with "classic anti-Semitism," compare contemporary Israeli policy to that of the Nazis, or blame Israel for all religious or political tensions.

But he wrote extensively about how the Boycott, Divest and Sanctions movement could be considered anti-Semitic.

Commonly known as BDS, the boycott was created in 2005 in opposition to Israel's treatment of Palestinians. The BDS movement that has taken place on American college campuses has called for an end to Israel's occupation of Palestinian land and discrimination against Palestinian people, along with the right for Palestian refugees to return to their homes. Many Jewish people

believe these demands attack their deeply held belief that Jews have the right to their own state and that Israel has the right to protect itself.

Marcus wrote in his 2015 book that boycotts against Jewish people have roots to Nazi Germany and a 1945 movement by the 22-nation Council of the Arab League. The movement, he said, is anti-Semitic because its primary strategy is to "reject Israel's 'normalization'"— echoing anti-Jewish boycotts of the past.

While not all proponents of BDS are anti-Semitic and may be ignorant of the movement's anti-Semitic roots, Marcus wrote: "This only makes them unwitting agents in a process by which hatred articulates itself across time. Moreover, they are allying themselves with others who consciously seek to undermine Israel for reasons of sheer hatred."

Jewish students have said that pro-Palestinian protesters have harassed them for showing their support for Israel, or that they've been shut down by professors when they try to debate their views during what they described as biased Middle East-studies classes or speaking events on campus. They say this harrassment has caused Jewish students to feel uncomfortable on campus and affected their ability to learn.

Marcus underscored specific examples from complaints in 2004 at the University of California at Irvine, in which Jewish students were allegedly threatened with beatings for wearing T-shirts expressing their love for Israel, called derogatory names, and told they would "burn in hell," and that they should "go back to Russia." He added that lecturers described Zionism as a "disease" and said that Jews control the government, among other examples.

However, the Office for Civil Rights, he said, had found that the events at UC Irvine were not actually in violation of Title VI because "OCR was swayed by its finding that 'their criticism of Jews was focused on their perceived support of Israel.' This amounts to holding 'Jews collectively responsible for the actions of

the state of Israel,' which the working definition provides as an example of anti-Semitism," he explained in his book.

The case underscored the need for the Office for Civil Rights to define anti-Semitism differently, he wrote.

While there is no list of words or phrases that are anti-Semitic, investigators must weigh each word, phrase, or deed with its speaker's intent, tacit meaning, and its cultural significance, according to Marcus.

In September 2018, the Office for Civil Rights reopened the 2011 case at Rutgers that the Obama administration had closed in 2014. In that case, Jewish students said they were charged last-minute fees to an advertised free and open campus event called Never Again for Anyone, which linked atrocities committed by the Nazis against Jews to Israel's policies toward Palestinians. The students said the last-minute fee was part of an effort to block pro-Israel protesters from attending. The university, however, determined that event organizers were simply trying to manage the larger-than-expected attendance.

If civil-rights investigators find Rutgers guilty of anti-Semitism and the college fails to take remedial action, it could lose federal funding.

Then, in August 2019, the department threatened to withhold federal funds from the University of North Carolina at Chapel Hill over its joint Middle East studies program with Duke University unless it revised its schedule of activities.

Among its criticisms, the department said the program lacked balance by placing a "considerable emphasis" on "understanding the positive aspects of Islam," while not placing a similiar focus on the positive aspects of Christianity, Judaism, or other belief systems in the Middle East, according to a letter to UNC published in the Federal Register.

There is some debate over how the executive order will affect college campuses. After all, the order includes a line that solidifies that the free speech rights of students are protected.

Among those that doubt the order will have much impact is David Bernstein, a professor and executive director of George Mason's Liberty & Law Center, who says he has spoken to Marcus about the subject. Bernstein says he believes the order was a political move, since the Office for Civil Rights had already been enforcing anti-Semitism under Title VI.

Under the law, Bernstein said, a professor would not get in trouble for comparing Israel to Nazi Germany. However, a professor could get in trouble for discrimination if they singled out a Jewish student in class and berated and harrassed the student about why they would visit Israel, a country that the faculty member compared to Nazi Germany, he said.

But Bernstein said the executive order could quiet supporters of the BDS movement. "I actually understand why, if you are a BDS supporter, you think that it has a chilling effect on you for the government to officially suggest that your movement is anti-Semitic," he said.

Others say the impact of the executive order will be substantial.

Some organizations, like the American Civil Liberties Union and the Foundation for Individual Rights in Education, criticized the executive order, saying it was too broad and could stifle protected free speech on campus.

Kenneth S. Stern, the scholar who originally wrote the executive order's definition of anti-Semitism, is in that camp. He said it will discourage criticism of Israel on campuses and create an environment that violates the First Amendment rights of students.

Stern, who now runs Bard College's Center for the Study of Hate, said that because the definition of anti-Semitism "looks at things that are inherently contentious and political and applies to campuses, it's disingenuous to say that it will have no impact on speech."

Meera Shah, who represents Palestinian-rights protesters as a senior staff lawyer at the advocacy group Palestine Legal, says the executive order "makes crystal clear that it will be used to justify censorship and attempt to silence advocacy of Palestinian rights in violation of the Constitutional protections guarenteeing free speeh," Shah said.

The order, Shah stressed, is already having an impact on student activists who now fear speaking out in this climate. Her organization has responded to many incidents of suppression, she said, in which students had to defend themselves in disciplinary proceedings because Israel activists charged them with anti-Semitism for their pro-Palestinian speech.

"Students and faculty activists supporting Palestinian rights don't just feel that their speech is being chilled. It's actually happening," she said.