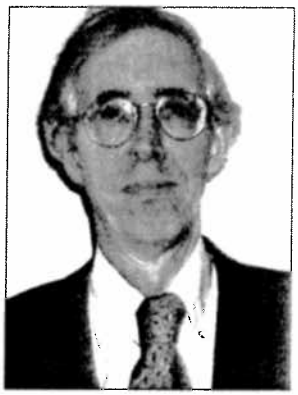
SCOTUS Delivers Victory for Municipal Ethics

By Mark Davies



On June 13, 2011, the U.S. Supreme Court upheld, against a First Amendment challenge, a Nevada state ethics provision prohibiting a conflicted public officer from voting on or advocating for or against the passage of a matter.[1] Specifically, the Nevada statute, section 281A.420(2) of the Nevada Revised Statutes, provided, in relevant part:

> [A] public officer shall not vote upon or advocate the passage or failure of, but may otherwise participate in the consideration of, a matter with respect to which the independence of judgment of a reasonable person in his situation would be materially affected by:
> . . .
> (c) His commitment in a private capacity to the interests of others.[2]

Michael Carrigan, a Sparks City Council member, upon advice of the City Attorney, voted, after public disclosure, on the hotel/casino development of a client of Carrigan's long-time campaign manager and friend, Carlos Vasquez. Carrigan was subsequently censured by the Nevada Commission on Ethics for violating section 281A.420(2)(c) by failing to abstain from voting. In particular, the Commission found that Carrigan's relationship to Vasquez "equates to a 'substantially similar' relationship to those enumerated under [section 281A.420(8)(a)-(d)]" within the meaning of section 281.420(8)(e). Section 281A.420(8) provided:

> As used in this section, "commitment in a private capacity to the interests of others" means a commitment to a person:
>
> (a) Who is a member of his household;
> (b) Who is related to him by blood, adoption or marriage within the third degree of consanguinity or affinity;
> (c) Who employs him or a member of his household;
> (d) With whom he has a substantial and continuing business relationship; or
> (e) Any other commitment or relationship that is substantially similar to a commitment or relationship described in this subsection.

The Nevada District Court denied Carrigan's petition for judicial review, but the Supreme Court of Nevada reversed, holding that voting by public officers on public issues is protected speech under the First Amendment, that section 281A.420(8)(e) must therefore be strictly scrutinized, and that pursuant to that standard the provision was "unconstitutionally overbroad in violation of the First Amendment, as it lacks necessary limitations to its regulations of protected speech."[3] In view of its resolution of the overbreadth issue, the court did not consider Carrigan's vagueness and prior restraint arguments.[4]

This article will, first, examine the reasoning of the Supreme Court of Nevada, then review the U.S. Supreme Court's reversal, and, finally, discuss the impact of the decisions on municipal ethics laws.

Supreme Court of Nevada Decision

The Supreme Court of Nevada first concluded that the act of voting by public officers on public issues is protected speech under the First Amendment because voting on legislation is a core legislative function. Second, rejecting the *Pickering v. Board of Education* balancing test, the court concluded that the strict scrutiny standard applies to a statute regulating an elected public officer's protected political speech of voting on public issues. *Pickering* held that "the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general" and accordingly set out a balancing test, whereby a court must balance "the interests of the [public employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."[5] But the Supreme Court of Nevada distinguished *Pickering* on the ground that for Carrigan, as an elected official, the employer is the public itself. Consequently, citing *Citizens United v. Federal Election Commission*, the court concluded that the appropriate standard of review is strict scrutiny.[6]

Under the strict scrutiny standard, the government must "prove that the restriction 'furthers a compelling interest and is narrowly tailored to achieve that interest.'"[7] Applying that standard to section

281A.420(8)(e), the court held that the statute was facially overbroad. Although the statute furthers a compelling state interest—namely, the interest in promoting the integrity and impartiality of public officers—the statute fails to meet the "narrowly tailored" requirement. The definition of a "commitment in a private capacity" in section 281A.420(8)(e) fails to sufficiently describe what relationships are included within section 281A.420(2)(c), and there is no definition or limitation to section 281A.420(8)(e)'s definition of any relationship "substantially similar" to the other relationships in section 281A.420(8)(a)-(d). "This catchall language fails to adequately limit the statute's potential reach and does not inform or guide public officers as to what relationships require recusal."[8] The Supreme Court of Nevada therefore declared section 281A.420(8)(e) unconstitutionally overbroad in violation of the First Amendment.

A strong dissent by Justice Pickering stated that "no published decision has held that an elected local official engages in core political speech when he or she votes on an individual land use matter,"[9] that separation of powers issues do not arise when the state legislature enacts ethics restrictions on local government officials, that the First Amendment protects the communicative element in a public official's vote, such as against retaliation for *how* a legislator votes, that the Nevada statute therefore does not trigger strict scrutiny, that the statute passes muster under a rational basis or intermediate level of review standard, and that the overbreadth doctrine "applies only to 'statutes which, by their terms, seek to regulate only spoken words,' burden 'innocent associations,' or delegate 'standardless discretionary power to local functionaries, resulting in virtually unreviewable prior restraints,'"[10] and thus that doctrine does not apply here.[11] Justice Pickering would also reject any void-for-vagueness argument because Carrigan had six months in which to ask for an opinion from the Commission on Ethics as to whether his relationship to Vasquez was a disqualifying conflict of interest and, in any event, his sanction was not a criminal penalty.[12]

U.S. Supreme Court Decision

On petition for writ of certiorari, the U.S. Supreme Court reversed.[13] The Court noted the failure of either the Supreme Court of Nevada or Carrigan to cite "a single decision invalidating a generally applicable conflict-of-interest recusal rule—and such rules have been commonplace for over 200 years."[14] The U.S. House of Representatives and the U.S. Senate adopted recusal rules in 1789 and 1801, respectively, the latter by Thomas Jefferson as President of the Senate. So, too, the Court noted, "[a] number of States, by common-law rule, have long required recusal of public officials with a conflict.... Today, virtually every State has enacted some type of recusal law, many of which, not unlike Nevada's, require public officials to abstain from voting on all matters presenting a conflict of interest."[15]

Such restrictions upon a legislators' voting do not constitute restrictions upon legislators' protected speech. "The legislative power thus committed [to a legislator] is not personal to the legislator but belongs to the people; the legislator has no personal right to it." While action may convey a symbolic meaning, "the act of voting symbolizes nothing;" it is not an act of communication. Neither the fact that a nonsymbolic act is the product of a deeply held personal belief nor the fact that action may have social consequences transforms the action into First Amendment speech. The act of voting remains "nonsymbolic conduct engaged in for an independent governmental purpose." Furthermore, the First Amendment confers no right to use governmental mechanics to convey a message.[16]

The Supreme Court declined to consider Carrigan's arguments that section 281A.420(8)(e) unconstitutionally burdens the right of association of officials and supporters and is unconstitutionally vague, as neither argument was considered below.

Justice Alito, concurring in part and concurring in the judgment, disagreed with the Court's suggestion that restrictions upon legislators' voting are not restrictions upon legislators' speech; but he agreed "that legislative recusal rules were not regarded during the founding era as *impermissible* restrictions on freedom of speech."[17]

Impact of Decisions on Municipal Ethics Laws

The *Carrigan* decisions provide a number of lessons for the municipal attorney in the context of municipal ethics laws. First, no First Amendment impediment exists to a well-drafted ethics law mandating recusal by legislators.

Second, as a practical matter, one should note that Carrigan acted upon the advice of the Sparks City Attorney rather than upon the advice of the Nevada Commission on Ethics. In *Carrigan*, as in the most ethics cases, advice of counsel did not—nor should it—insulate the public official from prosecution for violation of the ethics law. Except in crystal clear cases, public officials are well advised to seek ethics advice from the ethics body empowered to render such advice.

Third, as the dissent in the Supreme Court of Nevada decision points out, a significant difference exists between state and local legislators in regard to separation of powers and enforcement of ethics laws. In Nevada, as in New York, the state constitution vests in the legislature the authority to discipline its members and mandates separation of powers at the state

level.[18] By contrast, in Nevada, as in New York, "[a] local government exercises such powers as the Legislature and Constitution confer. A corollary proposition is that, '[u]nless restricted by the constitution, the legislature may prescribe the qualifications, tenure, and duties of municipal officers.'"[19] Thus, no such separation of powers and enforcement limitation exist for local government. In New York, therefore, no impediment exists to the enactment of state *or local* legislation requiring recusal by municipal legislators or empowering a local ethics board to interpret and enforce state and local ethics provisions as to municipal legislators.

Fourth, that said, is mandating such recusal wise? Unlike in the case of other officials, whether elected or appointed, when legislators recuse themselves, no one else may act in their stead; their recusal thereby disenfranchises their constituents. Even if the recusing legislator has been elected at large, such as a village trustee, those who voted for that legislator no longer have his or her voice in the legislative body. Moreover, recusal by a member of a body functions, in effect, as a negative vote since under the New York General Construction Law actions by a municipal body must be taken by a majority of the total membership of the body, not by a majority of those present and voting.[20] Thus, recusal by a legislator may prove illusory. In addition, while separation of powers may not exist as a legal matter at the municipal level, the concept nonetheless plays some role even at the municipal level, at least in those municipalities with a clear delineation between the executive and the legislative roles, such as in a city with a strong mayor form of government. New York City's ethics law therefore permits a City Council member to vote on a matter even where such a vote may advantage the member or a person or firm with whom or with which the member is associated, provided that the member discloses the interest to the City's ethics board and on the records of the Council and further provided that the member takes no other action, apart from voting, on the matter, such as sponsoring the measure or advocating for it.[21]

Fifth, the common law in New York State may prohibit a municipal legislator, or other municipal official, from taking an action that may advantage the official or someone with whom the official is associated.[22]

Finally, although the U.S. Supreme Court upheld the Nevada recusal statute against a First Amendment overbreadth challenge, the Court expressly did not consider the merits of Carrigan's arguments that the statute unconstitutionally burdens the right of association of officials and supporters and that the provision is unconstitutionally vague, as neither argument was raised by Carrigan in his brief in opposition to the petition for writ of certiorari. The Supreme Court of Nevada did not mention the former argument and did not address the latter because of that court's resolution of the overbreadth argument.[23] As noted, in her dissent Justice Pickering concluded that:

> Carrigan does not have a legitimate vagueness challenge. The Ethics Commission is available to rule in advance on whether a disqualifying conflict of interest exists; Carrigan admits he had six months lead time before the Lazy 8 application came to a vote; his sanction was a civil rebuke, not a criminal penalty. He thus cannot prevail on a void-for-vagueness challenge.[24]

Whether on remand of the case from the U.S. Supreme Court the Supreme Court of Nevada will consider any of those arguments remains to be seen.

But one may question whether, Justice Pickering's conclusion to the contrary notwithstanding, the Nevada statute was sufficiently specific to give notice of the exact conduct proscribed. Rather than risk the expense of a challenge, the careful municipal attorney should draft a recusal provision more narrowly tailored to the conduct intended to be prohibited. The ethics law may well contain a general or catch-all provision prohibiting, for example, interests or actions in conflict with one's official duties, provided that no penalty attaches to violation of such a provision, absent a rule adopted by the ethics board specifying the interest or conduct prohibited.[25]

Conclusion

The Supreme Court's decision in *Carrigan* justifiably gives cause for celebration by municipal ethicists. It should not, however, lull municipal attorneys into a false sense of security that broad recusal provisions, particularly those aimed at municipal legislators, will always withstand constitutional scrutiny. A specific, clear and comprehensible, carefully drafted code of ethics will not only prevent a successful constitutional challenge but will also avoid a costly court battle over an ill-conceived provision.

Endnotes

1. Nevada Comm'n on Ethics v. Carrigan, ___ U.S. ___, 131 S. Ct. 2343 (2011).
2. Nev. Rev. Stat. § 281A.420(2) (2007) (This provision at the time of the relevant events was actually codified at section 281.501 (2003), but the parties and the courts cited to the identical 2007 version. The Nevada Legislature further amended the statute in 2009. 2009 Nev. Stat. ch. 257, § 9.5, p. 1057.). Under the Nevada Revised Statutes,

   > "Public officer" means a person elected or appointed to a position which is established by the Constitution of the State of Nevada, a statute of this State or an ordinance of any of its counties or incorporated cities and which involves the exercise of a public power, trust or duty.

NEV. REV. STAT. § 281A.160(1) (2007) (subsequent amendments, in 2009 Nev. Stat. ch. 257, § 8.2, p. 1047, are immaterial to the discussion in this article).

3. Carrigan v. Comm'n on Ethics, 236 P.3d 616, 618 (Nev. 2010), *rev'd sub. nom.*, Nevada Comm'n on Ethics v. Carrigan, __ U.S. __, 131 S. Ct. 2343 (2011).
4. *Carrigan*, 236 P.3d at 620 n.4.
5. Pickering v. Bd. of Educ., 391 U.S. 563, 568, 88 S. Ct. 1731, 1734–35 (1968).
6. *Carrigan*, 236 P.3d at 622 (citing Citizens United v. Federal Election Comm'n, ___ U.S. ___, 130 S. Ct. 876, 898 (2010) (holding that "[l]aws that burden political speech are 'subject to strict scrutiny,' which requires the Government to prove that the restriction 'furthers a compelling interest and is narrowly tailored to achieve that interest'" (citation omitted))).
7. *Citizens United*, 130 S. Ct. at 898 (citation omitted). *See also Carrigan*, 236 P.3d at 622.
8. *Carrigan*, 236 P.3d at 623. The Court rejected the Ethics Commission's arguments that the statute should not be declared invalid—that is, that a facial challenge should not lie—because the statute could be constitutionally applied to Carrigan. The court noted that, "[w]hile generally a facial challenge cannot be maintained by someone whose conduct the statute could validly regulate, there is an exception to this rule under First Amendment overbreadth challenges based on the danger that an overbroad statute's 'very existence may cause others not before the court to refrain from constitutionally protected speech or expression.'" *Carrigan*, 236 P.3d at 622 n.8 (citations omitted).
9. *Carrigan*, 236 P.3d at 624 (Pickering, J., dissenting).
10. *Carrigan*, 236 P.3d at 630 (Pickering, J., dissenting) (quoting Broadrick v. Oklahoma, 413 U.S. 601, 612–13, 93 S. Ct. 2908, 2916 (1973)).
11. Overbreadth analysis is an exception to the basic rule that "a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court." *Broadrick*, 413 U.S. at 610, 93 S. Ct. at 2915.
12. *Carrigan*, 236 P.3d at 631 n.7 (Pickering, J., dissenting).
13. Nevada Comm'n on Ethics v. Carrigan, __ U.S. __, 131 S. Ct. 2343 (2011), *rev'g* 236 P.3d 616 (2010).
14. *Carrigan*, 131 S. Ct. at 2348.
15. *Carrigan*, 131 S. Ct. at 2349 (citations omitted).
16. *Carrigan*, 131 S. Ct. at 2350-2351.
17. *Carrigan*, 131 S. Ct. at 2355 (Alito, J., concurring).
18. NEV. CONST. art. 3, § 1(1) (2011); NEV. CONST. art. 4, § 6; N.Y. CONST. art. 3, § 1 (legislature's authority); N.Y. CONST. art. 3, § 9 (providing that "[e]ach house shall determine the... qualifications of its own members"); N.Y. CONST. art. 4, § 1 (executive's authority). *See also Carrigan*, 236 P.3d at 624; Maron v. Silver, 899 N.Y.S.2d 97, 111, 14 N.Y.3d 230, 258 (2010).
19. *Carrigan*, 236 P.3d at 624 (Pickering, J., dissenting) (citations omitted).
20. N.Y. GEN. CONSTR. LAW § 41 (2011).
21. N.Y.C. Charter § 2604(b)(1)(a) (2011); N.Y.C. Conflicts of Interest Board Ad. Op. No. 2009-2 (2009). *See generally* Elizabeth Fine & James Caras, *The New York City Council's Approach to Ensure Compliance with Conflicts of Interest Laws in the Discretionary Funding Process*, NYSBA/MLRC MUNICIPAL LAWYER, Vol. 24, No. 1, 13, at 14–15 (Winter 2010).
22. *See, e.g.*, Tuxedo Conservation & Taxpayers Ass'n v. Town Board of Tuxedo, 418 N.Y.S.2d 638, 640, 69 A.D.2d 320, 324 (2d Dep't 1979) (invalidating, as contrary to the "spirit" though not the letter of section 809 of the New York General Municipal Law, a special permit where the town board member who cast the tie-breaking vote was vice-president of an advertising agency that had the parent of the applicant as a client and that would be a strong contender to obtain all advertising contracts on the $200 million project if it was approved). *See also* Zagoreos v. Conklin, 491 N.Y.S.2d 358, 363, 109 A.D.2d 281, 287 (2d Dept. 1985) (holding that "[i]t is not necessary, however, that a specific provision of [Article 18 of] the General Municipal Law be violated before there can be an improper conflict of interest"); Conrad v. Hinman, 471 N.Y.S.2d 521, 524, 122 Misc. 2d 531, 534–35 (Sup. Ct., Onondaga Co., 1984) (despite the lack of a violation of Article 18, annulling a village board of trustees' decision granting a zoning variance where the tie-breaking vote was cast by a trustee who co-owned the property and was an employee of the company to which the property was to be sold); Schweichler v. Village of Caledonia, 845 N.Y.S.2d 901, 904, 45 A.D.3d 1281, 1283–84 (4th Dept. 2007) (despite the lack of a violation of Article 18, annulling a planning board site plan approval because of the appearance of bias and actual bias of planning board members).
23. *Carrigan*, 236 P.3d at 620 n.4. *See also Carrigan*, 131 S. Ct. at 2351. The Supreme Court of Nevada likewise did not consider Carrigan's prior restraint argument. *Carrigan*, 236 P.3d at 620 n.4.
24. *Carrigan*, 236 P.3d at 631 n.7 (Pickering, J., dissenting) (citations omitted).
25. *See, e.g.*, N.Y.C. Charter § 2604(b)(2) (2011) (providing that "[n]o public servant shall engage in any business, transaction or private employment, or have any financial or other private interest, direct or indirect, which is in conflict with the proper discharge of his or her official duties"); § 2606(d) (providing that "no penalties shall be imposed for a violation of paragraph two of subdivision b of section twenty-six hundred four unless such violation involved conduct identified by rule of the board as prohibited by such paragraph"); 53 Rules of the City of New York § 1-13 (identifying conduct prohibited by N.Y.C. Charter § 2604(b)(2)).

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