

Nevada's Legislative Recusal Law: The Supreme Court Denies One First Amendment Challenge But Sees Other Fundamental Concerns

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In *Nevada Commission on Ethics v. Carrigan*, the U.S. Supreme Court considered a constitutional challenge to a provision of the Nevada Ethics in Government Law, which requires a public official to recuse him or herself from voting on a matter where a conflict of interest exists based on the official's "commitment in a private capacity to the interests of others." On June 13, 2011, the Court decided that Nevada's recusal provision was not unconstitutionally overbroad, but the Court did so on the narrow and unsurprising ground that legislative voting, in itself, is not protected by the First Amendment because a legislator has no personal right to the legislative power to vote. The Court left open, however, the more difficult and fundamental question raised by Nevada's legislative recusal requirement: Did the recusal requirement—as applied to respondent legislator Carrigan in connection with his voting on a matter in which his campaign manager had an arguable financial interest—unconstitutionally burden his right of association with his political supporters?

The Nevada Ethics in Government Law provides that "a public officer shall not vote upon or advocate the passage or failure of, a matter with respect to which the independence of judgment of a reasonable person in his situation would be materially affected by . . . [h]is commitment in a private capacity to the interests of others." The "others" who specifically fall within the ambit of this recusal provision include: members of a public officer's household; relatives of the officer; employers of the officer or of a member of the officer's household; and persons with whom the officer has a substantial and

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continuing relationship. But the recusal law also includes a catchall clause intended to capture any “other commitment or relationship that is substantially similar” to one of the specifically listed relationships.

Michael Carrigan, a member of the City Council of Sparks, Nevada, was censured by the Nevada Commission on Ethics for failing to recuse himself from voting on approval of the “Lazy 8” hotel/casino project. The Commission concluded that Carrigan should have recused himself because his friend and campaign manager, Carlos Vasquez, stood to benefit financially from approval of the “Lazy 8” project. The Commission determined that the relationship between Carrigan and Vasquez fell within the catchall provision of the recusal law because it was “substantially similar” to the prohibited relationships specifically described in the law.

Carrigan's case reached the Court on the narrow question of whether Nevada's recusal law, by restricting Carrigan's legislative vote, infringed upon his protected speech. An undivided Court held that the recusal law did not burden protected speech, with eight justices agreeing that the legislator's vote is not his or her personal speech at all. (Justice Alito concurred in the judgment of the Court but did so on the ground that although a legislator's vote is personal, protected speech, the Nevada recusal law was not an impermissible restriction on that speech.) As Justice Scalia stated in the opinion of the Court reversing the Nevada Supreme Court's determination that the recusal provision was unconstitutional because it burdened the protected speech of legislative voting:

[H]ow can it be that restrictions upon legislators' voting are not restrictions upon legislators' protected speech? The answer is that a legislator's vote is the commitment of his apportioned share of the legislature's power to the passage or defeat of a particular proposal. The legislative power thus committed is not personal to the legislator but belongs to the people; the legislator has no personal right to it.

In addition to arguing that the Nevada recusal law restricted protected speech by restricting his legislative vote, in his brief, Carrigan raised two other arguments: that the recusal law unconstitutionally burdens the right of association of officials and supporters and that the law is unconstitutionally vague. But the Court considered these arguments to be waived in the record before it and, thus—“[w]hatever the merits of these arguments,” as Justice Scalia stated in the Court's opinion—did not consider them. But the potential force of these arguments was not lost on the Court. As Justice Kennedy stated in his concurring opinion, given that Carrigan was censured for a legislative vote affecting his supporter and campaign manager, “the possibility that Carrigan was censured because he was thought to be beholden to a person who helped him win an election raises constitutional concerns of the first magnitude.” As Justice Kennedy also stated, “one fair interpretation, if not the necessary one, is that the statute could apply to a legislator whose personal life is tied to the longstanding, close friendships he or she has forged in the common cause” of an election campaign. “The interests here at issue are at the heart of the First Amendment,” Justice Kennedy concluded.

With such fundamental First Amendment issues at stake, it appears unlikely that the *Carrigan* case will stand as the Court's last word on legislative recusal laws, particularly given, as Justice Scalia noted in the opinion of the Court, that "[t]oday, 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."