

United States Supreme Court Decisions Uphold Constitutionality of Ethics Law and Factors a Child's Age into Miranda Analysis

The United States Supreme Court recently decided two cases of note to municipalities. The first, *Nevada Commission on Ethics v. Carrigan*, concerns the affects of ethics regulations on the Free Speech rights of legislators. The second, *J.D.B. v. North Carolina*, concerns the Miranda rights of juveniles.

Nevada Commission on Ethics v. Carrigan, No. 10-568

On June 13, 2011, the United States Supreme Court upheld a Nevada ethics law requiring public officials to recuse themselves from voting on or advocating for matters in which they have a disqualifying conflict of interest.

The Nevada Commission on Ethics censured Michael Carrigan, a City of Sparks council member, under Nevada law for failing to abstain from voting on an application for a hotel/casino project ("Lazy 8") that his long-time friend and campaign manager, Carlos Vasquez, worked for as a paid consultant. Nevada's Ethics in Government Law provides that "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 ... his commitment in a private capacity to the interests of others." Nev. Rev. State. §281A.420(2) (2007).

Carrigan filed suit in the First Judicial District Court of the State of Nevada asserting that the Ethics in Government Law violated the First Amendment to the U.S. Constitution. The District Court disagreed, but the Nevada Supreme Court reversed on appeal, holding that voting was protected speech and that the law was unconstitutionally overbroad.

The U.S. Supreme Court reversed. Writing for a unanimous Court, Justice Scalia took into account the more than 200-year tradition of federal and state conflict of interest recusal rules as justifying a strong presumption of their constitutionality. He pointed out that one of the very first acts of the U.S. House of Representative was to adopt a rule that "No member shall vote on any question, in the event of which he is immediately and particularly interested." No one, Scalia pointed out, was on record as having objected to the rules on the grounds that it was an unconstitutional restriction of free speech rights. This early congressional enactment, the Court stated, provides "contemporaneous and weighty evidence of the Constitution's meaning."

Absent this historical support, Scalia writes, such rules would still not be considered restrictions upon protected speech because the act of voting in and of itself by a legislator is not "speech" and therefore not protected by the Speech Clause of the First Amendment. To emphasize this point, the Court distinguishes here between voting by a legislator and voting by a citizen. Whereas a citizen's right to vote is a personal right, that of a legislator is a function of the legislative process, "the commitment of his apportioned share of the legislature's power to the passage or defeat of a particular proposal." A legislator casts his vote "as trustee for his constituents, not as a prerogative of personal power." The expressive value is found not in the act of voting but in the speech accompanying it. Consequently, while deeply held personal beliefs

may give rise to a vote for or against a particular proposal, the act of voting itself expresses nothing. Rather, it is a governmental act that discloses the legislator's wishes.

This decision is welcome news to Vermont's municipalities, particularly to those already with conflict of interest policies or ordinances in place, as these rules create a framework for identifying and evaluating ethical dilemmas, ensure decisions at the local level are fair and impartial, and safeguard the public trust against elevation of personal interests.

J.D.B. v. North Carolina, No. 09-11121

On June 16, 2011, the United States Supreme Court reversed a ruling by the North Carolina Supreme Court that a suspect's age is irrelevant when determining whether to provide a Miranda warning.

This case involves 13-year old "J.D.B.," a suspect in a pair of home break-ins. A uniformed police officer removed J.D.B. from his seventh grade classroom and escorted him to a school conference room where he was questioned by the officer, the assistant principal, and an administrative intern behind closed doors for 30 to 45 minutes. J.D.B. was never informed of his Miranda rights, nor was he told he was free to leave or given the opportunity to talk to his legal guardian, his grandmother. After he was threatened with being sent to juvenile detention, J.D.B. admitted that he and a friend were responsible for the break-ins. Only then did the officer tell J.D.B. that he could refuse to answer his questions and that he was free to leave. After writing a confession, J.D.B. was allowed to go home.

J.D.B.'s public defender moved to suppress J.D.B.'s confession and the evidence derived from it on the grounds that the youth was interrogated in a custodial setting without first being Mirandized. The trial court denied the motion and the North Carolina Supreme Court affirmed declining to take J.D.B.'s age into consideration when determining whether he was in custody when he confessed.

The question before the U.S. Supreme Court was whether a suspect's age should factor into the analysis of whether he/she is in custody for purposes of a Miranda warning. In a 5-4 decision delivered by Justice Sotomayor, the Court held that J.D.B. *was* entitled to a Miranda warning. In the landmark case of *Miranda v. Arizona*, 384 U.S. 436 (1966), the Court put in place measures ("Miranda warning") to ensure the constitutional right against self-incrimination. This warning protects against involuntary statements. Police custodial interrogations can compel a suspect to speak when he or she wouldn't otherwise do so. This pressure is so strong that it can compel individuals to confess to crimes they didn't commit. Prior to questioning, therefore, a suspect in custody "must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." The Court employs a two-part test to determine whether a suspect is "in custody" for Miranda purposes by asking "first, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was at liberty to terminate the interrogation and leave." This objective analysis looks not to the suspect's actual state of mind but rather to how a reasonable person in the same position would have perceived his or her freedom to leave.

This decision implicitly acknowledges that a “reasonable person” is different from a “reasonable child.” Refusing to simply view children as “miniature adults,” Sotomayor notes that since children are more susceptible to outside pressures than adults, “a reasonable child subjected to police questioning will sometimes feel pressured to submit, when a reasonable adult would feel free to go.” A child’s age is “a reality that courts cannot simply ignore” and therefore must be taken into consideration.

Justice Samuel Alito, in his dissent, decries the affect that factoring a child’s age into the custody analysis will have on the ease and clarity of Miranda application, predicting that it “will be hard for the police to follow, and it will be hard for judges to apply.” Favoring a one-size-fits-all reasonable-person test over one that accounts for an individualized characteristic (age), Justice Alito sees the difficulty of “a 60-year-old judge attempting to make a custody determination through the eyes of a hypothetical, average 15-year-old. Forty-five years of personal experience and societal change separate this judge from the days when he or she was 15 years old.”

Justice Sotomayor disagrees that age is such an obscure factor to assess that law enforcement officers and judges will need knowledge of developmental psychology or expertise in cultural anthropology to put themselves in the shoes of another. “They simply need the common sense to know that a 7-year-old is not a 13-year-old and neither is an adult.”

Garrett Baxter, Staff Attorney
VLCT Municipal Assistance Center