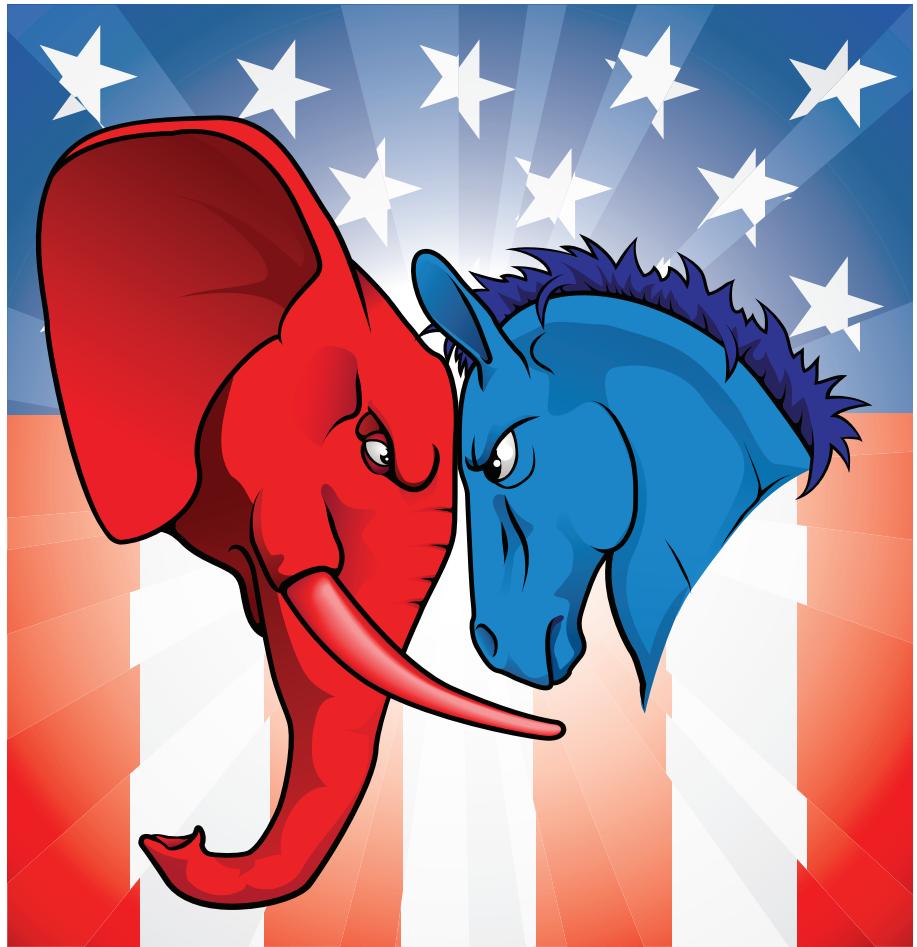


LESSONS LEARNED FROM THE “BALLOT ROYALE” CONTROVERSY IN NEVADA

(DEMOCRATIC PARTY V. NEVADA)

BY DAVID O’MARA, ESQ.

An interesting election quandary arose last year. In April of 2011, Senator John Ensign resigned as Nevada’s junior senator in light of questions surrounding his involvement in a sex scandal. In filling the vacancy created by Ensign’s resignation, Governor Brian Sandoval appointed then-Congressman Dean Heller to serve out the remainder of Ensign’s term. In taking that appointment, Heller resigned from the U.S. House of Representatives and created the perfect storm for the “Ballot Royale” controversy.



The events that set up the conditions for the 2011 special election actually began a decade before the election to fill the vacancy in Nevada’s Second Congressional District took place. As a result of the terrorist attacks on September 11, 2001, the policymakers in the legislative branches of the federal government and various state legislatures, including Nevada’s, began to ask the question: How would the federal government continue to operate if a terrorist attack or catastrophe hit the U.S. Congress and required the House of Representatives to quickly replenish its vacant seats through elections?

Unlike Senate vacancies, which are filled by gubernatorial appointments,¹ the U.S. Congress requires the House to elect its members.² Within a year of the terrorist attacks, the U.S. House of Representatives passed a resolution encouraging states to “examine [their] existing statutes, practices and procedures governing special elections,” so that a vacancy could be filled in a timely fashion in the event of a catastrophe.³

In Nevada, at the time of the terrorist attacks, Chapter 293 of the Nevada Revised Statutes (NRS), and previous case law governed the manner and methods for special elections.⁴ In 2003, the Nevada Legislature enacted NRS 304.200 through .250 in an effort to take a more “proactive approach to formulating policy relating to Nevada’s representation in the United States House of Representatives”⁵ and to provide procedures for filling vacancies.

Ironically, in 2003, then-Secretary of State Dean Heller should have promulgated regulations related to a special election for the U.S. House of Representatives, as required by Nevada law, but he failed to adopt any such regulations.

Unfortunately, as Nevadans found out in 2011, the Legislature's proactive approach was not easy to understand. The vacancy in the U.S. House seat led only to confusion, political rhetoric and litigation.

Almost immediately after Heller's Senate appointment was announced, the political pundits and operatives began to assert that Nevada's special election laws were unclear. In one news article, political columnist Jon Ralston asserted that Nevada's Secretary of State, Ross Miller, "would be influenced by his political party to interpret the statutory laws to provide a 'free-for-all'" because it would "increase the chances [the Democrats] could win or that Sharon Angle would [win], thus giving [the Democrats] a chance to take the seat"⁶ in the general election in 2012.⁷

In response to the "free-for-all" assertions, the Nevada Republican Party provided information and legal analysis to the Secretary of State's office, in an attempt to convince the office that the major political parties are entitled to nominate their candidate in a special election. Historically and legally, the major parties nominated their respective candidate.

Miller accepted the information and legal analysis provided by the Nevada Republican Party, but he rejected the party's interpretation of Nevada election statutes. The reasonableness of Miller's interpretation was critical to the election process, especially in light of the Nevada Supreme Court's history of deferring to the Secretary of State's interpretation of an election statute.

On May 2, 2011, Miller issued his "Ballot Royale" interpretation, to preclude members of the major political parties from nominating their own candidate. Secretary Miller stated that this interpretation allowed for "open ballot access, freedom for all to run and ultimately let the people decide" the election. Miller claimed that the electoral structure was as "American as apple pie."⁸

determine nominations came into question during oral argument, when justices indicated concern over the implementation of this requirement because it was excluded pursuant to NRS 293.175(5).

In contrast, Miller refused to consider NRS 293.165, which provides that the party central committees nominate their candidates when a vacancy occurs, even though there is no language showing that the Nevada Legislature intended to abrogate this statutory provision in special elections. The Nevada Supreme Court rejected Miller's procedure of picking and choosing some statutes and not others. Instead the Supreme Court found that the Nevada Legislature's passage of AB 344 did not repudiate NRS 293.165(1) within the language of NRS 304.240(1), but "incorporated it by express reference."

On July 5, 2012, after an expedited briefing schedule and oral argument, the Nevada Supreme Court rendered its decision and concluded that major political parties are entitled to nominate their respective candidates for a special election. In reaching a 6-1 decision, the Supreme Court held that its "interpretation of NRS 304.240(1) most faithfully provides meaning to all parts of the statute and properly accounts for the lack of legislative intent to abrogate this court's historical construction of similar statutes used for filling vacancies in office."

The Supreme Court's decision provided the relief sought by the Nevada Republican Party and confirmed Nevada's traditional method of allowing political parties to play a major role in the nomination process. ■



DAVID O'MARA, ESQ. is a partner with The O'Mara Law Firm, P.C. O'Mara practices primarily in shareholder actions, civil litigation, family law and election law. He has represented the Nevada Republican Party and its affiliates and candidates in the Nevada Supreme Court.

REPUBLICAN PARTY)

On May 5, 2011, the Nevada Republican Party sued, claiming that under the First Amendment to the United States Constitution⁹ and Nevada law, major political parties are entitled to nominate their candidate in a special election.¹⁰ The position of the Nevada Republican Party was fairly simple, in that Nevada has a substantial public interest in maintaining and conducting an orderly election process in compliance with Nevada law and the Constitution of the United States. The Republican Party sought to make the nominations for the special election conform to the traditional manner of filling a vacancy in Nevada, as set forth by the Nevada Supreme Court in *Brown v. Georgetta*; in that case, the Nevada Supreme Court determined that a vacancy should be filled by the party committee.¹¹

In what appeared to many to be an effort to minimize the perception of the election as a "free for all," Miller dubbed the process a "Ballot Royale." Neither characterization instilled any confidence that the election would be conducted in an orderly fashion.

Additionally, Miller attempted to fill in the gaps in the election procedures by looking at NRS 293. In its lawsuit, the Nevada Republican Party claimed the secretary was picking and choosing what statutes would be used to justify his position.

Miller imposed an additional requirement on minor party and independent nominees. He excluded three of the potential candidates from the running because they failed to obtain 100 signatures on a nominating petition. This process of picking and choosing only certain statutes and sections of the law to

1 U.S. Const. amend. XVII.

2 U.S. Const. art. I, § 2 cl. 4.

3 H.R. Res. 559, 107th Cong. (2002).

4 The Attorney General's office during oral argument "conceded that to fill a House vacancy by special election before 2003, there would only be a single candidate for each major political party, who would have been chosen by the party central committee under NRS 293.165(1)." See *Nevada State Democratic Party v. Nevada Republican Party*, 256 P.3d 1, 9 (2011).

5 Minutes of the Assembly Comm. on Elections, Procedures, and Ethics, (March 27, 2003).

6 Jon Ralston, Ralston Flash, <http://www.lasvegassun.com/blogs/ralstons-flash/2011/apr/22/nevadas-special-election-laws-not-so-clear-probabl/>

7 It appears that the Nevada Supreme Court rejected this claim of political partisanship by many when the Supreme Court "ultimately conclude[d] that ... Secretary Miller's interpretation, while not completely persuasive, proved at least one fair explanation of NRS 304.240(1). Democratic Party, 256 P.3d at 10, fn. 10.

8 <http://www.nevadanewsureau.com/2011/05/02/secretary-of-state-ross-miller-declares-special-election-open-for-all/>

9 The Nevada Supreme Court did not address whether the interpretation violated the First Amendment in light of its decision resolving the issue on statutory construction grounds. See Democratic Party, 256 P.3d at 6, fn. 3.

10 The district court, the Honorable James Russell held an expedited evidentiary hearing on the Republican Party's request for injunctive relief and as agreed to by the parties, at the conclusion of the hearing, advanced the matter to trial. The Nevada Supreme Court agreed with Judge Russell's result, however, they did so for different reasons. 256 P.3d at 10.

11 *Brown v. Georgetta*, 70 Nev. 500, 275 P.2d 376 (1954).