1984 WL 249977 (S.C.A.G.)

Office of the Attorney General

State of South Carolina
September 6, 1984

***1** The Honorable Arthur Ravenel, Jr.
Member
South Carolina Senate
635 East Bay
Charleston, South Carolina 29403

Dear Senator Ravenel:
You have asked our advice concerning the constitutionality of the requirement in South Carolina that notaries public be United States citizens in light of the recent United States Supreme Court decision, Bernal v. Fainter, 52 U.S.L.W. 4669 (May 30, 1984). Based upon the Bernal case, we believe that a court would conclude that South Carolina can no longer constitutionally require notaries to be United States citizens.

In Bernal, Texas law mandated that only citizens of the United States could become notaries public. The plaintiff attacked this requirement on the ground that it violated the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution 'by denying aliens the opportunity to become notaries public.' 52 U.S.L.W. at 4670. The Supreme Court agreed.

The Court in Bernal noted that, generally speaking, any state law that discriminates on the basis of alienage 'can be sustained only if it can withstand strict judicial scrutiny. In order to withstand strict scrutiny, the law must advance a compelling state interest by the least restrictive means available.' Id. The Court observed, however, that it had
. . . developed a narrow exception to the rule that discrimination based on alienage triggers strict scrutiny. This exception has been labelled the 'political function' exception and applies to laws that exclude aliens from positions intimately related to the process of democratic self-government.

Id. The Court stated that the political function exception had been previously applied in Foley v. Connelie, 435 U.S. 291 (1978), with respect to the requirement that policemen be U.S. citizens, in Ambach v. Norwick, 441 U.S. 68 (1979) [teachers] and in Cabell v. Chavez-Salido, 454 U.S. 432 (1982) [probation officers]. Explaining the rationale of the political function exception, the Court further emphasized:
Some public positions are so closely bound up with the formulation and implementation of self-government that the State is permitted to exclude from those positions persons outside the political community, hence persons who have not become part of the process of democratic self-determination.

52 U.S.L.W. at 4671. The Court noted that if the political function exception was deemed applicable in a particular situation, the strict scrutiny standard of review would not be employed, but instead the much less rigorous rational relationship test would be utilized. A two part test was necessary to determine whether the political function exception applied:
'First, the specificity of the classification will be examined: a classification that is substantially overinclusive or underinclusive tends to undercut the governmental claim that the classification serves legitimate political ends . . . Second, even if the classification is sufficiently tailored, it may be applied in the particular case only to 'persons holding state elective or important nonelective executive, legislative and judicial positions,' those officers who 'participate directly in the formulation, execution, or review of broad public policy' and hence 'perform functions that go right to the heart of representative government."

***2** 52 U.S.L.W. at 4671, quoting Cabell v. Chavez-Salido, 454 U.S., supra at 440 (which quoted Sugarman v. Dougall, 413 U.S. 634, 647 (1973).

Applying the foregoing test in Bernal, the Court concluded that the Texas notary public provision did not fall within the political function exception. While the Texas requirement related to notaries public only and thus was not overinclusive, still, the Court was of the view that a notary's duties
important as they are, hardly implicate responsibilities that go to the heart of government. Rather, these duties are essentially clerical and ministerial.

52 U.S.L.W. at 4672. The Court thus subjected the Texas requirement to strict judicial scrutiny. Noting that '[o]nly rarely are statutes sustained in the face of strict scrutiny,' 52 U.S.L.W. at 4670, n. 6, the Court could find no compelling reason for the Texas requirement that only United States citizens could serve as notaries public. Accordingly, the Court declared the Texas requirement to be violative of the Equal Protection Clause.

Section 26-1-10 of the Code of Laws of South Carolina requires that notaries public must be qualified electors. This statutory provision is consistent with the mandate of Article XVII, § 1 of the South Carolina Constitution which states that with certain exceptions, '[n]o person shall be elected or appointed to any office in this State unless he possess the qualifications of an elector.' The term 'qualified elector' means a 'registered elector or one who has met the qualifications by law for registration and has been duly registered by the county board of registration . . ..' 1926 Op. Atty. Gen. 148. Under state law, an alien cannot become a qualified elector in South Carolina. Op. Atty. Gen., April 26, 1974. Pursuant to Section 26-1-90 a notary public in South Carolina is empowered to administer oaths, take depositions, affidavits, protests for nonpayment of bonds, notes, drafts and bills of exchange, acknowledgments and proof of deeds and other instruments required by law to be acknowledged and 'perform all other acts provided by law to be performed by notaries public.'

While it could be argued that the mandate of Article XVII, § 1 that all public officers be qualified electors, and thus United States citizens, is overinclusive, see Sugarman v. Dougall, supra, we need not address that aspect of the Court's test, as articulated in Bernal. [1] For, even assuming that Article XVII, § 1 and and § 26-1-10 are not overinclusive, a court would likely conclude that notaries public in South Carolina, as in Texas do not "participate directly in the formulation, execution, or review of broad public policy' and hence [do not] 'perform functions that go right to the heart of representative government." Bernal v. Fainter, 52 U.S.L.W. at 4671. Examination of the powers and duties of notaries public in South Carolina, as set forth in Section 26-1-90, reveals such to be virtually identical to those in Texas, which were reviewed by the Supreme Court in Bernal. Thus, a court would likely subject the South Carolina requirement that notaries be United States citizens to strict scrutiny and conclude that such requirement can no longer be constitutionally applied.

***3** Our conclusion herein is consistent with a recent opinion issued by this Office concerning the constitutionality of a requirement that polygraph examiners in South Carolina must be United States citizens. See, Op. Atty. Gen., July 12, 1984. While this Office possesses no authority to declare a provision of law unconstitutional, we concluded that a court would likely find such a requirement constitutionally invalid and we repeat the advice given in that opinion:
Generally, a public officer . . . may not decline to enforce laws found on the statute books until the courts have declared such enactments unconstitutional. 67 C.J.S., Officers, § 201; 16 Am.Jur.2d, Constitutional Law, § 199; 63 Am.Jur.2d, Public Officers and Employees, § 279 . . .. However, a governmental officer who takes an oath to uphold the United States Constitution may act on the ruling of the Attorney General as to the doubtful constitutionality of a particular statute if the courts have not acted. 67 C.J.S., Officers, § 201; see also, 63 Am.Jur.2d, Public Officers and Employees, § 277; O'Shields v. Caldwell, 207 S.C. 194, 219, 35 S.E.2d 184, 194 (1945). This is consistent with the federal case law that would permit a governmental official to be held personally liable in a suit for money damages if he violates a person's clearly established constitutional rights. See, Harlow v. Fitzgerald, 73 L.Ed.2d 396 (1982); Schever v. Rhodes, 416 U.S. 232, 40 L.Ed.2d 90 (1974); Wood v. Strickland, 420 U.S. 308, 43 L.Ed.2d 214 (1975). A court may deem such rights to be clearly established based upon the above analysis. This

provides further authority for [a] . . . South Carolina public official to decline to enforce the state statute [or state constitutional provision]. O'Shields v. Caldwell, supra.

In other words, based upon the Bernal decision, a South Carolina public official may now be at risk in continuing to require that notaries public in South Carolina be United States citizens. We would caution that our advice herein is limited to notaries public in strict accordance with the Court's holding in Bernal. Again, we do not address other public offices, where the State constitutional requirement that the officeholder be an elector and thus a citizen may be constitutionally sustained. See, Sugarman v. Dougall, supra; Cabell v. Chavez-Salido, supra.

If we can be of further assistance, please let us know.
Sincerely,

Robert D. Cook
Executive Assistant for Opinions

Footnotes

1 By virtue of Article XVII, § 1, the right to hold any public office is dependent upon being an elector and thus a United States citizen. Since the position of notary is characterized by Section 26-1-10 as an office, compare Article XVII, § 1A (notary specifically exempted for dual office holding purposes), Article XVII, § 1 would probably come into play even though Section 26-1-10 itself relates only to notaries. See, Bernal, 52 U.S.L.W. at 4671. If so, Article XVII, § 1 might well be viewed as being similar to the provision in Sugarman where the right to hold any public office was dependent upon citizenship. There, the Court noted that '[t]he citizenship restriction sweeps indiscriminately.' 413 U.S. at 643. Again however, because a notary does not meet the second prong of the political function test, we need not address the possible overinclusiveness of Article XVII, § 1.
We also wish to make it clear that the question of whether aliens can be denied the right to vote is not in issue here. However we note that in Sugarman, the Court stated quite clearly that 'citizenship is a permissible criterion' where the right to vote is concerned. 413 U.S. at 648. And in Foley v. Connelie, the Court emphasized that 'the right to vote . . . lie[s] at the heart of our political institutions.' 435 U.S. at 296. Here, the question is not the right to vote generally, but the right to hold a public office, which the Court has characterized as 'clerical' in nature. It is evident that the Court views the two quite differently and our opinion here should not be construed as commenting upon the State's right to limit voting to U.S. citizens.

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