

OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 83-630

TITLE EFREM BERNAL, Petitioner v. JOHN W. FAINTER, JR.,
SECRETARY OF STATE OF TEXAS, ET AL.

PLACE Washington, D. C.

DATE March 28, 1984

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P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments
next in Bernal against Fainter et al.

We'll wait until the noise is dispensed with.

Mr. Hitchcock, I think you may proceed
whenever you're ready.

ORAL ARGUMENT OF CORNISH F. HITCHCOCK, ESQ.,
ON BEHALF OF PETITIONER

MR. HITCHCOCK: Thank you, Mr. Chief Justice,
and may it please the Court:

Eleven years ago in the case of In Re
Griffiths, this Court held that it was a violation of
the equal protection clause for a state to require
United States citizenship as a condition for being
admitted to a state bar. The question before the Court
today is whether, in light of the Griffiths decision, a
state may constitutionall require citizenship as a
condition for being licensed as a notary public.

The Petitioner in this case is a lawful
resident alien who in 1978 applied to the Texas state
authorities for a license as a notary public, and he
desired to use license in cconnection with his job as a
paralegal with a legal aid organization in Texas. The
state authorities denied his application solely on the
basis that he was not a United States citizen and

1 therefore ineligible under the statute at issue before
2 you.

3 This Court has indicated that in assessing
4 state classifications and restrictions involving aliens,
5 the general standard of review is strict scrutiny,
6 although there are exceptions in some areas. For
7 example, the Court has held that states are able to deny
8 aliens certain rights, such as voting or running for
9 elective office.

10 And especially pertinent for today's case is
11 the Court's holdings that citizenship may be a relevant
12 factor if the state imposes the restriction in
13 connection with certain appointive positions where the
14 individual is exercising powers of the state that go to
15 the heart of representative self-government. Our
16 position is that the statute in this case is to be
17 judged under the strict scrutiny standard of Griffiths,
18 but even under the more deferential standard applied for
19 certain of these appointive positions we are still
20 entitled to prevail.

21 Let me focus for a minute, if I may, on the
22 qualifications it takes to become a notary public in
23 Texas and also on the nature of the function. In order
24 to become a notary public in the State of Texas, one
25 must fill out a one-page application -- and Mr. Bernal's

1 application is part of the record -- that gives one's
2 name, address, and requires the answers to four
3 questions: Are you 18 years of age; are you a citizen
4 of the United States of America and Texas; are you a
5 resident of the county for which you are applying; have
6 you ever been convicted of a crime involving moral
7 turpitude? There's a requirement of notifying the
8 Secretary of State and the county clerk of any changes
9 of address.

10 What's interesting is what is not required.
11 There is no requirement that one say one is familiar
12 with what a notary does in Texas, nor, interestingly
13 enough, is there a requirement that the application be
14 notarized.

15 The functions of a notary are relatively
16 straightforward. A notary in Texas is allowed to
17 witness signatures on documents, to administer oaths,
18 take depositions, and authenticate documents. And the
19 nature of the functions of this office are important
20 because the Court has discussed these in a number of
21 situations when the lesser standard of review has been
22 applied.

23 QUESTION: Do those functions differ much from
24 the functions of notaries public generally?

25 MR. HITCHCOCK: No, they are rather similar to

1 the functions of notary publics. They are similar to
2 the functions that Mr. Bernal performed when he was a
3 notary public in Indiana four years, and they're also
4 identical to the functions that are performed by
5 commissioners of the superior court, an office to which
6 lawyers are appointed in Connecticut, which was in the
7 Griffiths case.

8 QUESTION: Mr. Hitchcock, what difference does
9 it make that the notaries public in Texas are
10 constitutional officers --

11 MR. HITCHCOCK: In our view --

12 QUESTION: -- as opposed to statutory
13 authorization, such as in Griffiths?

14 MR. HITCHCOCK: In our view, Justice O'Connor,
15 there is no difference between the fact that an office
16 is created in the constitution and the fact that the
17 office, such as commissioner of the superior court, is
18 created by statute.

19 QUESTION: Well, does it indicate that the
20 state considers the office more important?

21 MR. HITCHCOCK: I would say it indicates that
22 the state does consider the office slightly more
23 important. But I think it's important to focus on the
24 nature of what the statute and the constitutional
25 provision are involved here.

1 In the first place, the Texas constitution
2 merely states that the office is created, and there is
3 discretion that is left to the legislature to decide the
4 qualifications, the standards, what regulation should be
5 imposed.

6 Interestingly enough for this case, the
7 state's argument that this is an important position
8 because it is in the state constitution really cuts both
9 ways. It took a century before, until 1945 at least,
10 that a residency requirement was imposed by the Texas
11 legislature, that one be a citizen of the state, an
12 ambiguous phrase at the time. Citizenship of the United
13 States was not required until 1965. So in that sense
14 the argument does cut both ways.

15 One final point, if I may. The state's
16 argument that this is an important post because it's in
17 the constitution has the problem with it that what the
18 state is saying in effect is that, we have greater
19 discretion to discriminate provided we name the post in
20 our state constitution. And we're not aware of any
21 authority that gives the state that leeway, and there
22 would be the potential hazard that states would seek to
23 get more deferential review by simply naming posts in
24 their constitution.

25 With respect to the Griffiths case, the office

1 of commissioner of the superior court was a public
2 office, it was created by the statute. Now, the
3 restriction in Griffiths on being admitted to the state
4 bar carried with it the restriction on being a
5 commissioner of the superior court, and let me focus
6 specifically on what a commissioner of the superior
7 court does.

8 Despite the very grandiose name, the
9 commissioner of the superior court is essentially a
10 notary public, and lawyers sign documents, notarize
11 documents in Connecticut as commissioners of the
12 superior court with their own signature. They don't
13 need a seal. When one is admitted to the Connecticut
14 bar as an attorney, one takes a second oath immediately
15 after that attorney oath as a commissioner of the
16 superior court, and that is the nature of the office.

17 What's important about Griffiths and important
18 about the restriction with respect to commissioners of
19 the superior court is that the State of Connecticut in
20 Griffiths raised precisely the same arguments that are
21 being advanced here, that lawyers as commissioners of
22 the superior court are being entrusted with the actual
23 performance of government power and that the state has
24 given meaning to the phrase that they are officers of
25 the court.

1 And this Court answered the question in
2 language which we think is highly pertinent here, where
3 the Court said that giving a lawyer the authority to
4 issue writs and subpoenas or to witness signatures or to
5 administer oaths is not a matter of state policy or a
6 matter of such unique responsibility that only citizens
7 can be entrusted with that responsibility.

8 In light of the similarities between what
9 Texas notaries public do and Connecticut commissioners
10 of the superior court do, we submit that Griffiths is
11 controlling and that the statute should be judged on
12 constitutional -- under strict scrutiny. The state here
13 has presented no evidence that aliens as a class are so
14 untrustworthy, disloyal to the United States, or
15 incompetent that they must all be excluded from
16 performing this role, from administering oaths, from
17 witnessing signatures, and so forth.

18 The Secretary of the State has the power to
19 issue qualifications. There's a bonding requirement, a
20 recordkeeping requirement, civil liability for
21 negligence or for intentional wrongdoing, and criminal
22 liability. These are the sorts of regulations that
23 should assure proper performance regardless of
24 citizenship.

25 If the state's argument is accepted in this

1 case, what will happen is a very curious anomaly. Under
2 the state's argument, an alien in the State of Texas can
3 go to law school, can be admitted to the Texas bar, can
4 practice law, and can draft a whole host of legal
5 documents that have a significant impact on the public.
6 But that alien, that lawyer, will not be able to
7 notarize the documents that he or she has drafted. We
8 believe that this anomaly is inconsistent with the equal
9 protection standards of this Court and that it should be
10 struck down under the strict scrutiny test.

11 Let me turn now, if I may, to the state's
12 argument that a more deferential standard of review is
13 appropriate here because we're dealing with an office
14 involving execution or formulation of policy factors
15 that go to the heart of representative self-government.

16 This Court indicated in Sugarman against
17 Dougall and most recently in Cabell versus Chavez-Salido
18 that there are two standards that must be met. First,
19 in order to take advantage of this more deferential
20 standard, the state must show that the restriction is
21 sufficiently tailored to meet its ends, that it's not
22 over-inclusive or under-inclusive; and secondly, that we
23 really are dealing with one of these significant
24 sovereign functions of the government.

25 The restriction in this case fails on both

1 counts. The restriction is over-inclusive because it
2 denies qualified resident aliens such as Mr. Bernal, who
3 performed the functions of a notary for four years in
4 Indiana, the opportunity to get a commission.

5 And it's also under-inclusive because there's
6 another state office which performs similar functions,
7 the office of court reporter. Court reporters are
8 officers of the state. They are licensed by the state.
9 There, I believe, is a committee to deal with
10 unauthorized practice of court reporting. And they
11 certainly perform functions that we find it hard to
12 believe are less important than those that are performed
13 by notaries public. But however, these court reporters
14 are not required to be citizens.

15 Finally, there is another anomaly here, that
16 the Secretary of the State of Texas, who actually is
17 responsible for licensing notaries, is not required to
18 be a citizen.

19 What the Texas statutory scheme has done is
20 what was aptly described in Cabell: The state has
21 indiscriminately swept in a variety of menial
22 occupations, while leaving out some of the state's most
23 important political functions.

24 Turning now to the second part of the
25 standard, the application of the Sugarman exception for

1 sovereign functions of government. There are several
2 common themes that run through the Court's cases in
3 which this restriction, in which this lower standard,
4 more deferential standard, has been applied.

5 In the first case, the cases where the
6 standard has been applied involving policemen, school
7 teachers, deputy probation officers, all involved public
8 employees, state municipal employees, who were on a
9 public payroll.

10 QUESTION: Do you think all those cases are
11 consistent?

12 MR. HITCHCOCK: Well, I think that if some of
13 the cases had come out differently we would have an
14 easier time in this case, Justice Blackmun. But your
15 question leads me to the other common threads here.
16 What the Court has done is identified several important
17 functions, two important functions, law enforcement and
18 education, and has allowed there to be restrictions in
19 deference because of the importance of law enforcement
20 and education to the exercise of the state's functions.

21 QUESTION: I suppose it's fair to say the
22 Court's been cutting back from what, a more extreme
23 position taken in Griffiths?

24 MR. HITCHCOCK: Well, the restrictions have --
25 the last three cases have applied a more deferential

1 standard and have upheld the restrictions. Our position
2 again is that this case is governed by strict scrutiny
3 and this discussion of the more deferential standard
4 comes in only if the Court says that strict scrutiny is
5 not applicable in this situation.

6 QUESTION: Do you think this case can stand
7 without Griffiths in effect being overruled?

8 MR. HITCHCOCK: No, Griffiths would have to be
9 overruled in order for the state to prevail in this
10 particular action.

11 The other thread that I was referring to is
12 that we are dealing with functions that go to the
13 sovereign functions of government, the exercise by the
14 state entrusting individuals with the performance of
15 state functions. It's one thing to give individuals the
16 power to build bridges, such as civil engineers do in
17 Flores de Otero, but when engineers build bridges
18 they're not exercising the sovereign function of the
19 state even though they're licensed by the state. When
20 lawyers draft contracts, they may be licensed to do
21 that, but they're not exercising sovereign power.

22 QUESTION: Well, how about roads? I thought
23 roads and bridges were a sovereign function now in this
24 country.

25 MR. HITCHCOCK: Well, they've always been

1 performed -- they are public works, but it's not
2 exercising the sovereign function of the government that
3 goes to --

4 QUESTION: You mean the building of a road is
5 not exercising a sovereign power?

6 MR. HITCHCOCK: Not in the sense that it has
7 been used in the descriptions, in the standards set
8 forth in the decisions of the Court. Conceivably, if
9 building a road is regarded as a sovereign function, the
10 people who are building the road might be regarded as
11 sort of employees.

12 QUESTION: Governments always have to hire
13 people to do their work. They even hire -- the governor
14 of a state is hired by the people, but that doesn't make
15 him any less sovereign, does it?

16 MR. HITCHCOCK: Chief Justice Burger, the
17 difference tends to be, as the Court recognized in
18 Sugarman, that there are differences between the
19 functions that are performed by different state
20 employees.

21 The point that I am making is that there is a
22 world of difference between the situation in which
23 policemen are authorized to make arrests and deprive
24 people of their liberty in the name of the state and the
25 situation in which a notary public is authorized to tell

1 someone to raise their right hand and take an oath or to
2 witness a signature on a document. That is the
3 distinction which is important, which separates this
4 case from the cases where the more deferential standard
5 has been applied.

6 Finally, even if the Court should apply the
7 more deferential standard of review to this restriction
8 involving aliens, we submit that we are still entitled
9 to prevail because there is no rational basis for this
10 particular blanket exclusion. The state has presented
11 no evidence that excluding all aliens, discriminating
12 against all aliens, rationally advances the legitimate
13 state interest with respect to having documents
14 processed or the other interests that have been
15 identified in this case.

16 If the Court has no further questions at this
17 point, we would respectfully like to reserve the
18 remainder of the time for rebuttal.

19 CHIEF JUSTICE BURGER: Ms. Keller.

20 ORAL ARGUMENT OF MARY F. KELLER, ESQ.

21 ON BEHALF OF RESPONDENTS

22 MS. KELLER: Mr. Chief Justice and may it
23 please the Court:

24 To resolve this case, there are basically two
25 inquiries that need to be made. The first inquiry is,

1 does the Texas office of notary public come within the
2 governmental function principle recognized in Sugarman
3 and refined in Cabell? And if it does, the second
4 inquiry is, does the requirement of citizenship bear a
5 rational relationship to legitimate state interests?

6 It is certain that Texas recognizes the office
7 of notary public as performing a governmental function.
8 The State of Texas is one of six states to provide for
9 the office of notary public in its constitution,
10 beginning with the constitution of 1845.

11 QUESTION: Of what significance is that?

12 MS. KELLER: Your Honor, the significance is
13 that historically Texas has considered the office of
14 notary public to be a public office, one that the state
15 gives high regard to. There would be only six per
16 county. The constitution does not name very many public
17 officers in its constitution and this happens to be one
18 of them.

19 It is only one of many factors which lend
20 credence to the statement --

21 QUESTION: Does the holder get a special
22 title, so that you call him "Mr. Notary Public" instead
23 of "Mr. Jones"?

24 MS. KELLER: I'm certain that a notary could
25 insist on it. It does not appear in any cases that I

1 have read.

2 QUESTION: And yet, in your state most lawyers
3 are called "Judge," aren't they?

4 (Laughter.)

5 MS. KELLER: That is true, Your Honor.

6 The interpretive commentary to the Texas --

7 QUESTION: There are quite a few more notaries
8 today than six per county, I take it? The role has
9 changed somewhat over the years in Texas.

10 MS. KELLER: Yes, Your Honor, there are quite
11 a few more notaries. It's not that the role --

12 QUESTION: For instance, how many today in the
13 State of Texas?

14 MS. KELLER: I believe, reading Petitioner's
15 brief, that there are in excess of 100,000. Maybe there
16 are 300,000 notaries.

17 And it's not so much that the role has
18 changed, Your Honor; it's that Texas is becoming --

19 QUESTION: Well, let's say the significance of
20 the office has been diluted somewhat.

21 MS. KELLER: There are many more --

22 (Laughter.)

23 MS. KELLER: Yes, Your Honor, there are many
24 more significant officeholders now in Texas, and it
25 reflects to a large extent the industrialization of

1 Texas and the need for many more public officeholders to
2 do the functions that the State of Texas has authorized
3 the notary to do.

4 QUESTION: May I go back to the 1845
5 constitution for a minute. Are we to believe that that
6 provision really was enforced, that the notary was
7 appointed by and with the consent of the senate on a
8 two-thirds vote?

9 MS. KELLER: Yes, Your Honor, until 1940.

10 QUESTION: Until 1940.

11 MS. KELLER: Yes.

12 QUESTION: That must have been a busy
13 legislature.

14 MS. KELLER: Very busy legislature.

15 (Laughter.)

16 MS. KELLER: But it shows -- I think what all
17 this shows is that there is no set job of notary public
18 across the country; that in fact Texas has a special
19 place for its notary publics, notaries public; that it
20 gives them a great deal of authority; that it puts it in
21 its constitution; that it gives them a commission of the
22 state, a commission that requires that they are acting
23 by the authority of the State of Texas, with the seal of
24 the State of Texas.

25 QUESTION: In what ways do the actual

1 functions and authority of notaries in Texas differ from
2 those in Connecticut? Specifically how would their
3 functions and authority differ?

4 MS. KELLER: Your Honor, I am not completely
5 familiar with the functions of notaries in other
6 states. I would say --

7 QUESTION: Well, I picked in Connecticut
8 because of course that is where Griffiths was decided.

9 MS. KELLER: Right.

10 QUESTION: And it might be closely reviewed.

11 MS. KELLER: Yes. In Texas there are only
12 three offices which can take acknowledgment of written
13 instruments for the purpose of recording. They are the
14 district clerk, the judge or the county clerk -- the
15 county judge or county clerk, or the notary.

16 So to get a written instrument recorded in
17 Texas, there are only three officeholders that you can
18 go to. As part of taking --

19 QUESTION: Is that special to Texas?

20 MS. KELLER: Your Honor, I found it to be very
21 unusual, because, as we all know, there are deeds and
22 mortgages that need to be recorded every day, and to
23 limit it to three officeholders seemed unusual to me.

24 QUESTION: And that isn't true in most states
25 in your view?

1 MS. KELLER: As far as I know not, Your
2 Honor. In looking at the Connecticut statutory scheme,
3 it did not appear to be the case there.

4 QUESTION: And who else was authorized in
5 Connecticut that you found in your review?

6 MS. KELLER: I'm don't know, Your Honor.

7 As part of the process of --

8 QUESTION: Well, I would suspect that
9 everybody on this bench has been a notary public at one
10 time or another, and I would suspect that their
11 certificates read something like this: That I, so and
12 so, governor of the state of, imposing special trust and
13 confidence in, do hereby appoint you a notary public.

14 Do you think this is less serious than they
15 take it in Texas?

16 MS. KELLER: The only response I can make to
17 that, Your Honor, is that Texas takes it seriously. I
18 don't know that other states take it less seriously, but
19 Texas takes its notaries public very seriously.

20 I think part of it is it is a border state.
21 It has a great deal of influence coming from Mexico,
22 where the office of notario publico is a very important
23 office, much more analogous to attorney. Prior to the
24 Texas constitution of 1945, when it was a Republic, it
25 made a special statutory designation of notaries in

1 1837.

2 QUESTION: I don't recall from the record
3 here. Must the notary in Texas put up a bond?

4 MS. KELLER: Yes, Your Honor.

5 QUESTION: That's true in most of the states,
6 is it?

7 MS. KELLER: I believe it is true in most
8 states. Not only must the notary put up a bond, but
9 Texas statute requires -- or allows a party to sue a
10 notary for liability in the event that the notary does
11 not perform his or her function properly. So there is a
12 great incentive on the part of the notary to be well
13 versed in Texas law prior to taking on the commission of
14 the office of notary public.

15 QUESTION: Well, I suppose a lawyer can be
16 sued for malpractice, too.

17 I just wonder, are you really asking us to
18 overrule Griffiths?

19 MS. KELLER: No, Your Honor, absolutely not.
20 I don't think Griffiths is controlling in any way in
21 this case.

22 QUESTION: Do you think that the notary has a
23 more significant function to play in Texas than a lawyer
24 does?

25 MS. KELLER: It's not a question of

1 significance of the function. The notary is clearly a
2 public agent.

3 An attorney is just as clearly a private
4 occupation. It has traditionally been a private
5 occupation. The lawyer comes to the state to provide a
6 forum, but he or she is an advocate, an adversary. The
7 lawyer charges whatever fee the lawyer thinks he or she
8 can get. The lawyers records are not public records.

9 In Texas the notary's records are public. In
10 Texas the notary can only charge an authorized fee.

11 QUESTION: What is that fee, incidentally?

12 MS. KELLER: 50 cents per notarial act.

13 QUESTION: 50 cents?

14 MS. KELLER: That's right, Your Honor. It
15 would be very difficult to make a living as a notary in
16 Texas.

17 QUESTION: Well, other states are less than
18 that and some are higher.

19 MS. KELLER: Pardon me, Your Honor?

20 QUESTION: I say other states are less than
21 that and some are higher, so that Texas isn't very
22 special in that regard.

23 MS. KELLER: It's not special, but the point
24 is I think that the fee reflects the Texas perception
25 that it be basically a function that a private

1 individual performs on the behest of the state, but it
2 is not an occupation. It was not intended to be an
3 occupation.

4 QUESTION: Do judges have to be citizens in
5 Texas?

6 MS. KELLER: The judges in Texas are elected,
7 Your Honor, and as part of the election --

8 QUESTION: Well, the question was --

9 MS. KELLER: Yes, Your Honor, yes.

10 QUESTION: The statute says they have to be
11 citizens?

12 MS. KELLER: Yes, Your Honor.

13 QUESTION: Do the lawyers?

14 QUESTION: Do you think federal judges in
15 Texas have to be citizens?

16 MS. KELLER: I don't know that, Your Honor.
17 All the state judges do.

18 QUESTION: Lawyers don't have to?

19 MS. KELLER: Lawyers do not have to be, Your
20 Honor, absolutely.

21 QUESTION: Do you consider your profession
22 below a notary's?

23 (Laughter.)

24 MS. KELLER: As I said, Your Honor, it's not a
25 question of what's more important. It's a question that

1 the function of the notary is a state function, and as
2 such the state has the right to make certain
3 qualifications for what are sovereign functions.

4 The lawyer is not a state actor, and as a
5 matter of fact specifically this Court in In re
6 Griffiths found that under state law, Connecticut state
7 law, the lawyer was not an officeholder, was not an
8 official of the state. And that is a distinction with
9 this case, because --

10 QUESTION: Is the lawyer an officer of the
11 court in Texas?

12 MS. KELLER: I believe that -- I don't know
13 that. I don't know that, Your Honor. I believe that
14 there -- certainly the lawyer is regulated very
15 extensively in Texas, must -- there are canons of ethics
16 that require disclosure to the court in certain
17 circumstances. But the State of Texas does not consider
18 lawyers as officers of the State of Texas.

19 QUESTION: What about a prosecutor? Does he
20 have to be a citizen?

21 MS. KELLER: Well, to the extent that Ambach
22 makes distinctions between public school teachers and
23 private school teachers, it may be that a state could
24 designate certain attorneys as public officeholders and
25 require that they be citizens.

1 QUESTION: No, that wasn't my question.

2 MS. KELLER: Oh, excuse me.

3 QUESTION: As a matter of Texas law, must a
4 prosecutor be a citizen?

5 MS. KELLER: No, Your Honor. But the elected
6 prosecutor, the DA, the elected prosecutor would have to
7 be a citizen, because the elected officials in Texas --

8 QUESTION: But he could hire assistant
9 prosecutors who are not?

10 MS. KELLER: Yes, Your Honor, he could.

11 I might also add a distinction between
12 Griffiths and this case, and one that the Court was
13 justly concerned with, was that two deprive Griffiths of
14 the right to practice law would be to deprive her of a
15 livelihood. This is not the case here.

16 QUESTION: Well, I suppose there would be some
17 jobs in which you would not be eligible for the position
18 if you weren't a notary. Some law offices like to hire
19 a secretary who's a notary or something like that. So
20 it does affect job qualification, doesn't it?

21 MS. KELLER: Your Honor, hypothetically it
22 might, but the record before this Court includes two
23 plaintiffs, one who became a citizen before we got here
24 and the other who is still before the Court. The record
25 established in both of those cases that the Petitioners

1 had no impact on their ability to make a livelihood;
2 that they had continuously been hired; that being a
3 notary was not a requirement of their job.

4 And as a matter of fact, Mr. Bernal testified
5 that the reason he wanted to be a notary is it would be
6 more convenient for him.

7 Texas considers the notary to be a
8 governmental function, and in the constitution,
9 historically, statutorily, it has consistently treated
10 it that way. Once the state has defined the office of
11 notary public as one of a governmental function, of
12 course this Court may still inquire as to whether or not
13 citizenship is rationally related to a legitimate state
14 interest. The inquiry does not -- this is the harder
15 part of this case.

16 And basically, there are three parts in
17 looking at whether or not there is a rational basis
18 here: Does the notary perform functions that are so
19 essential to representative government that it is
20 rational to require the legal bond of citizenship? That
21 certainly would be one way for the state to establish
22 that there is a rational basis to require citizenship.

23 In looking at the line of Court cases in this
24 area, that is primarily where the attention has
25 focused: Is there something about the job itself that

1 rationally requires citizenship. My reading of the
2 cases indicates that the Court would entertain other
3 legitimate interests that might be advanced by the
4 requirement of citizenship.

5 And finally, the Court has been concerned with
6 whether or not the classification is substantially over
7 or under-inclusive, such that the state's scheme is
8 haphazard in some way. In Cabell --

9 QUESTION: I'm sorry, but before you leave the
10 first point about what the rational basis is, tell me
11 again, what is the reason for it? Why do you want them
12 to be citizens?

13 MS. KELLER: Texas has given great amounts of
14 authority to its notaries.

15 QUESTION: I thought that's how you got to the
16 rational basis standard. That's your first threshold.

17 MS. KELLER: Well, Your Honor, my first
18 threshold --

19 QUESTION: Once you get there, why do you have
20 to have citizenship?

21 MS. KELLER: My first threshold is is it a
22 governmental function.

23 QUESTION: Yes, and if we answer --

24 MS. KELLER: And it's a governmental function
25 apart from its duties. It's a governmental function

1 because Texas has recognized it as a public office.

2 QUESTION: Yes, but once we get there we would
3 say, now, having agreed with you on that, we say now
4 we've got to find out what the rational basis is.

5 MS. KELLER: Right.

6 QUESTION: You can't say the rational basis is
7 that it's a governmental function.

8 MS. KELLER: The rational basis in Ambach and
9 Cabell was, yes, it's a governmental function; is that
10 function so essential to government that the legal bond
11 of citizenship is required? That is what the Court
12 determined in Ambach, that's what the Court determined
13 in Cabell, that because of the function of the job, that
14 it was so closely tied to the execution of policy or the
15 formation of policy, that citizenship was rationally
16 required because of the nature of the job.

17 QUESTION: Well, you're not suggesting
18 notaries form policy, are you?

19 MS. KELLER: Notaries do not form policy.

20 QUESTION: Well now, what is the reason why
21 they have to be citizens? I still don't follow you.

22 MS. KELLER: Texas has given notaries a great
23 deal of authority. For instance --

24 QUESTION: That's why it's a governmental
25 function.

1 MS. KELLER: Yes, and I'm going to clarify it
2 right now. In authorizing notaries to take
3 acknowledgment of written instruments for recording, the
4 State of Texas has provided notaries with the authority
5 to administer oaths, employ and swear interpreters,
6 issue subpoenas, and to punish for contempt if the
7 subpoena is ignored.

8 QUESTION: And it's so important that it's
9 worth 50 cents.

10 (Laughter.)

11 MS. KELLER: Your Honor, I think the notary is
12 very similar, similarly situated to a juror. Jurors are
13 paid --

14 QUESTION: Well, even at that, a juror gets
15 more than 50 cents.

16 (Laughter.)

17 MS. KELLER: Well this is just for one little
18 act. I mean, it may be that in the whole day there
19 would be more to be made. But jurors are not
20 compensated nearly in relationship to their importance
21 to the governmental function.

22 QUESTION: They get more than 50 cents.

23 MS. KELLER: Well, they get ten dollars a
24 whole day, I think, or something like that.

25 QUESTION: But they get more than 50 cents.

1 (Laughter.)

2 MS. KELLER: Yes, Your Honor, they get more
3 than 50 cents. But they are basically -- it's an honor
4 to be a juror, in the same way that it's an honor to be
5 a notary in Texas. It is not -- notaries and jurors are
6 not in it for the money. They are requested by the
7 state to perform an important governmental job, and they
8 do so. They are private citizens for the most part and
9 they do so because it is an honor to do so.

10 QUESTION: Well, Ms. Keller, if we go along
11 with you to the point that Justice Stevens took you and
12 then said, so why does it have to be, why is citizenship
13 required, in Cabell at that very point the Court
14 inquired whether the position in question involves
15 discretionary decisionmaking or execution of policy.

16 Now, tell me how a Texas notary performs, is
17 involved in discretionary decisionmaking?

18 MS. KELLER: All right, Your Honor.

19 QUESTION: Because that's part of the argument
20 on the other side, is that this is wholly ministerial.

21 MS. KELLER: In Texas, as I was saying, under
22 state law, in performing one of its important functions,
23 which is preparing documents for recordation, the notary
24 has the right to issue subpoenas to witnesses, and if
25 they fail to come or fail to answer properly the notary

1 has the right to punish them for contempt.

2 The punishment for contempt is a coercive
3 authority of the state. It is --

4 QUESTION: And what does that -- when does the
5 notary get involved in this function?

6 MS. KELLER: As part of the statutory scheme
7 for authenticating documents to be recorded, there
8 are --

9 QUESTION: If the notary disbelieves somebody,
10 he can get some witnesses, is that it?

11 MS. KELLER: There are two ways to record
12 instruments. One is the person signing it comes forward
13 and has it notarized.

14 QUESTION: Yes.

15 MS. KELLER: In the event that it's already
16 been signed and the person is deceased, there is a proof
17 of written instrument.

18 QUESTION: So he holds -- in effect, takes
19 some evidence?

20 MS. KELLER: That's right, Your Honor,
21 absolutely.

22 QUESTION: Holds a -- and makes a judgment.

23 MS. KELLER: That's right, makes a judgment
24 about whether or not this is the person who signed it,
25 it's an authentic document. And as part of that

1 authority, the notary has the right to issue a subpoena
2 to recalcitrant witnesses and, if the witnesses fail to
3 cooperate, has the right to hold them in contempt.

4 QUESTION: Is there anything else about the
5 notary's job that involves some sort of discretionary
6 decisionmaking?

7 MS. KELLER: In taking affidavits, the notary
8 is allowed to -- is authorized by law to take oaths. In
9 this case the notary is required to be certain that
10 whatever is being authorized or sworn to, that the
11 person understands, that it is in fact the person.
12 There is a large -- there is nobody that the notary is
13 supervised by. They are in many counties and there are
14 many of them, and they are basically operating on their
15 own.

16 QUESTION: Suppose two or three people come
17 into a notary and they present a deed of a conveyance,
18 and one of the persons being requested to sign, perhaps
19 the wife of one of them, exhibits great reluctance.
20 Does the notary have an obligation in Texas to determine
21 whether that is the free act of the person signing and
22 swearing?

23 MS. KELLER: Yes, Your Honor, and that is
24 another area where the notary exercises a great deal of
25 discretion.

1 QUESTION: In Texas do they, as in some states
2 in the past, are they required to take the oath of a
3 husband and a wife separately, out of the presence of
4 each other, so that they can determine whether the wife
5 is making the husband sign or the husband is making the
6 wife sign against their free will?

7 MS. KELLER: Your Honor, that had been in the
8 Texas statutory scheme, but it has been repealed. It no
9 longer makes that kind of requirement.

10 QUESTION: But the notary must make a judgment
11 as to whether or not the person is acting of his or her
12 own free will?

13 MS. KELLER: That's absolutely correct. And
14 once the notary notarizes the document, it is conclusive
15 that it is what it said, what it purports to be, unless
16 there is fraud proven in a court of law.

17 QUESTION: Is that aspect of the notary's duty
18 different, do you suppose, than that of other states,
19 such as Connecticut?

20 MS. KELLER: The ability to hold a person in
21 contempt of court is one that I think is unusual and,
22 looking at some of the publications of the American
23 Association of Notaries, it does not appear to me that
24 that is a standard authority given to notaries. And in
25 my reading of In re Griffiths, which is the only

1 familiarity I have with the notary in Connecticut, it is
2 not designated as one of the authorities that the
3 notaries there have.

4 QUESTION: Do you cite in your brief any cases
5 in Texas in which a notary has held anybody in contempt
6 of court?

7 MS. KELLER: We do not, Your Honor. The most
8 recent case on this is Harbison versus McMurray, 163
9 Southwest Second 680. It was decided in 1942 on a writ
10 of habeas corpus to release somebody from a commitment
11 by a notary. And the court in that case found that it
12 was a verbal order and therefore was not an effective
13 commitment, but in so doing recognized the notary's
14 authority to hold somebody in contempt of court.

15 QUESTION: And there has been no case in the
16 last 40 years on it?

17 MS. KELLER: There have been no reported cases
18 in the last 40 years that I have been able to find on
19 this issue.

20 QUESTION: What does a notary do when he
21 commits, when he finds somebody in contempt? Does he
22 call the sheriff to take him to the jail, is that it?

23 MS. KELLER: That's right. That's right.

24 QUESTION: And what is it? It isn't criminal
25 contempt, is it? It's civil, or what?

1 MS. KELLER: Well, I suppose it depends on --
2 it's a civil contempt until they're purged. It would
3 not be a criminal contempt.

4 QUESTION: May I ask, just to refresh my
5 recollection, what are the qualifications to be a notary
6 in Texas, beside being a citizen?

7 MS. KELLER: You must be over the age of 18.

8 QUESTION: Yes.

9 MS. KELLER: A resident of the State of
10 Texas.

11 QUESTION: Yes.

12 MS. KELLER: The Secretary of State, in making
13 appointments, has to be convinced that there is no good
14 cause -- that there is good cause to appoint you.

15 QUESTION: What does that consist of?

16 MS. KELLER: Basically, you cannot be
17 appointed if you have committed a crime of moral
18 turpitude?

19 QUESTION: Ma'am?

20 MS. KELLER: You cannot be appointed if you
21 have committed a crime of moral turpitude.

22 QUESTION: Do you have to present a court
23 record or affidavit? How do you show you haven't
24 committed?

25 MS. KELLER: You certify on your application

1 that there is no reason under law that you would be
2 excluded.

3 QUESTION: Do you have to have any
4 documentation from other people or is your certification
5 accepted?

6 MS. KELLER: I believe the certification is
7 accepted, Your Honor.

8 QUESTION: Who appoints you?

9 MS. KELLER: You're appointed by -- now, since
10 1940, you're appointed by the Secretary of State.

11 QUESTION: And the Secretary of State need not
12 be a citizen, as I understand it?

13 MS. KELLER: The Secretary of State need not
14 be a citizen. But Your Honor, the Secretary --

15 QUESTION: And the notary need not know how to
16 read or write.

17 (Laughter.)

18 MS. KELLER: The notary -- the requirement to
19 be a notary does not include that. However, Your Honor,
20 it is a bonded position, and by statute the notary is
21 liable for any harm done as a result of a mistake that
22 he or she makes. So to the extent that there is
23 incentive to be able to read and write and do your job
24 correctly, there certainly is a financial incentive.

25 QUESTION: I don't see any requirement that

1 somebody be able to read and write in connection with an
2 awful lot of official positions.

3 MS. KELLER: That's probably -- that is
4 certainly true. All the elected -- all the elected
5 positions in Texas, of course, that clearly is not
6 required.

7 QUESTION: Or maybe for the Senators and
8 Congressman of the United States.

9 (Laughter.)

10 MS. KELLER: To the extent the Secretary of
11 State is not required to be a citizen, I'd like to
12 respond briefly to that. The Secretary of State is
13 appointed by the Governor with the advice and consent of
14 the Senate, the same way the notary was previously
15 appointed, previous to 1940.

16 To the extent that what the State of Texas is
17 interested in is commitment to the state,
18 accountability, loyalty, availability should a question
19 about a notarial act arise, it is the legislature's
20 determination that there is sufficient reason to believe
21 that a person of that character will be appointed by the
22 Governor with the advice and consent of the Senate.
23 It's a substitute mechanism for guaranteeing the
24 qualities that Texas wants in its notaries or in its
25 Secretary of State.

1 QUESTION: And the only evidence of character
2 is the filling out of a form by the applicant himself or
3 herself?

4 MS. KELLER: That is correct, Your Honor.

5 QUESTION: How much is the bond?

6 MS. KELLER: \$2,500.

7 QUESTION: Does an insurance company put that
8 up?

9 MS. KELLER: I believe they're -- it's a
10 bonding company.

11 QUESTION: And what is the premium?

12 MS. KELLER: I don't know that, Your Honor.

13 QUESTION: And what is the term of a notary?

14 MS. KELLER: Four years.

15 QUESTION: Four years. And most of them have
16 other jobs, I assume?

17 MS. KELLER: Oh, yes. This is very much
18 analogous to being a juror. It is a periodic honor at
19 the behest of the state to do a governmental function.

20 QUESTION: Is it a political plum in Texas?

21 MS. KELLER: Pardon me, Your Honor?

22 QUESTION: Is it a political plum in Texas?

23 MS. KELLER: Yes, Your Honor, it is.

24 (Laughter.)

25 MS. KELLER: To the extent -- but Your Honor,

1 to the extent that it is part of the state's political
2 community -- and it clearly is, there is no question
3 about that -- this case involves political rights, not
4 economic rights. It is not an attempt to deprive
5 somebody of their basic existence in the community. And
6 when the state confers political rights, the level of
7 scrutiny is whether it is rational or not.

8 Perhaps Texas has given notaries more
9 authority than they should have, given the level of
10 scrutiny of application and the level of
11 qualifications. But that decision is not before this
12 Court, whether the legislature has wisely allowed
13 300,000 notaries to find somebody in contempt of court.

14 The point is, Texas has given a great deal of
15 authority to its notaries traditionally.

16 QUESTION: Let me ask one other question about
17 that contempt power. Is that by statute?

18 MS. KELLER: That is by statute, Your Honor.

19 QUESTION: And you cite that statute in your
20 brief?

21 MS. KELLER: It is not specifically. It's
22 part of the --

23 QUESTION: I didn't see it in your brief.

24 MS. KELLER: The statutory authority is 6618.
25 The notary also has the authority to hold someone in

1 contempt in relationship to a deposition, and that is

2 --

3 QUESTION: Is this a statute you did not cite
4 in your brief?

5 MS. KELLER: Not specifically cited. It's
6 part of the whole scheme for what the notary does, but
7 that specific statute is not cited.

8 QUESTION: I see. But there is a statute that
9 says notaries can hold people in contempt?

10 MS. KELLER: Yes. Yes, Your Honor, there is.

11 QUESTION: And it was executed, exercised some
12 40 years ago? Or was that before the statute was
13 passed?

14 MS. KELLER: It's not before the statute was
15 passed. It was challenged some 40 years ago, the last
16 challenge to it.

17 QUESTION: In the notary law?

18 MS. KELLER: Presumably it's exercised on a
19 daily basis. I do not know that, Your Honor.

20 QUESTION: When was the provision about
21 contempt in connection with a deposition put into the
22 statute? That must have been an amendment.

23 MS. KELLER: It's an old statute, Your Honor.
24 It is --

25 QUESTION: Is that true, the only contempt

1 case you can give us is one that was lost?

2 MS. KELLER: That's the only challenge to it
3 by habeas corpus, Your Honor, that I have been able to
4 find.

5 QUESTION: Is that the only contempt case that
6 you can give us --

7 MS. KELLER: It's the only reported case
8 involving the contempt power that I have been able to
9 find, yes, Your Honor.

10 QUESTION: It's so well established it's never
11 been challenged.

12 MS. KELLER: That's right.

13 Thank you.

14 REBUTTAL ARGUMENT OF CORNISH F. HITCHCOCK, ESQ.

15 ON BEHALF OF PETITIONER

16 MR. HITCHCOCK: Mr. Chief Justice:

17 I just want to make one response to a factual
18 question from Justice Powell. The bonding requirement
19 in Texas is \$25 in order to become bonded as a notary
20 public.

21 If the Court has no further questions, we
22 respectfully request that the judgment of the Fifth
23 Circuit be reversed and the case be remanded with
24 instructions to reinstate the judgment of the district
25 court.

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Thank you very much.

CHIEF JUSTICE BURGER: Thank you, counsel.

The case is submitted.

(Whereupon, at 2:33 p.m., argument in the
above-entitled case was submitted.)

* * *

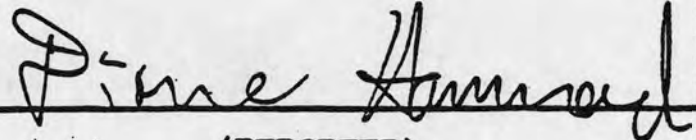
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#83-630-EFREM BERNAL, Petitioner v. JOHN W. FAINTER, JR.,
SECRETARY OF STATE OF TEXAS, ET AL.

and that these attached pages constitute the original transcript of the proceedings for the records of the court.

BY

A handwritten signature in cursive script, appearing to read "Pina Amador", written over a horizontal line.

(REPORTER)

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