S T A T E O F T E N N E S S E E
OFFICE OF THE
ATTORNEY GENERAL
PO BOX 20207
NASHVILLE, TENNESSEE 37202

February 7, 2006

Opinion No. 06-026

Inability of the State to Require Notaries Public to be U.S. Citizens

QUESTION

Does the Office of the Attorney General adhere to its previous opinion, Op. Tenn. Att'y Gen. No. 94-059 (Apr. 15, 1994), that the Equal Protection Clause of the United States Constitution prohibits the State from requiring that notaries public be citizens of the United States.

OPINION

Yes, Op. Tenn. Att'y Gen. No. 94-059 remains a correct statement of the law on this issue.

ANALYSIS

In Op. Tenn. Att'y Gen. No. 94-059, this Office opined that the State is prohibited by the Equal Protection Cause of the U.S. Constitution from requiring U.S. citizenship for notaries public. That opinion cited to both a previous opinion of the Office (Op. Tenn. Att'y Gen. No. 83-276 (Aug. 15, 1983)) and to an opinion of the U.S. Supreme Court, *Bernal v. Fainter*, 467 U.S. 216 (1984), in which the Court "struck down a Texas statute that required notaries public to be citizens of the United States." Op. Tenn. Att'y Gen. No. 94-059. *Bernal* has been undisturbed since that case was decided. This Office has been asked to revisit Op. Tenn. Att'y Gen. No. 94-059 and it now reaffirms that opinion.

The *Bernal* Court stated that, generally, "a 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." *Bernal*, 467 U.S. at 219. The Court did, however, make note of the "political function" exception to this rule which "applies to laws that exclude aliens from positions intimately related to the process of democratic self-government." *Id.* at 220. The Court held that the exception did not apply to the position of notary public, because "a notary's duties, important as they are, hardly implicate responsibilities that go to the heart of representative government. Rather, these duties are essentially clerical and ministerial." *Id.* at 225. Because the Court determined that the position did not meet the political function exception, the general rule applied, and the Court held that the Texas statute at issue failed strict scrutiny.

Specifically, the instant request suggests that the events of September 11, 2001, and the resultant new problems of national security may have changed the legal landscape in this area. The request suggests, although this Office cannot verify the assertion, that illegal aliens may be appearing before notaries and giving power of attorney to U.S. citizens so that the empowered citizen may procure automobile license tags for the illegal alien, an act that requires proof of identification that the illegal aliens do not possess.

Because the law as set out in *Bernal* and Op. Tenn. Att'y Gen. No. 94-059 remains unchanged, this Office's previous conclusion would be altered only if something has occurred which would bring notaries public within the political function exception or if a new compelling state interest has emerged which is least restrictively addressed by requiring U.S. citizenship for notaries. It is the opinion of this Office that neither of these conditions has been met.

Although the statutes governing notaries public in Tennessee were extensively re-organized in 2004[1], the powers of notaries after these amendments are little if any different than beforehand. Previously, notaries were described in Tenn. Code Ann. § 8-16-302 (2002) as having "the power to administer oaths, to take depositions, to qualify parties to bills in chancery, and to take affidavits, in all cases." Currently, Tenn. Code Ann. § 8-16-112 states that a notary "has the power to acknowledge signatures upon personal knowledge or satisfactory proof, to administer oaths, to take depositions, to qualify parties to bills in chancery, and to take affidavits in all cases."[2] Thus, it does not appear to this Office that the powers of a notary public are in any appreciable way different than they were when Op. Tenn. Att'y Gen. No. 94-059 was issued. The duties having not changed, they as a matter of course remain "essentially clerical and ministerial" as termed by the *Bernal* Court and outside the scope of the political function exception. *Bernal*, 467 U.S. at 225.

A citizenship requirement must therefore serve some compelling governmental interest which has (presumably) arisen since the issuance of Op. Tenn. Att'y Gen. No. 94-059. The instant request suggests that the State's interest in preventing the issuance of automobile license tags to illegal aliens is more acute in an era of heightened concern for national security, justifying this citizenship requirement to guard against that practice. Even if this were so, however, requiring citizenship for notaries would be a rather minor obstacle to the perpetrators of terror; thus, it is difficult to suggest that the need to prevent the practice is truly compelling.

Moreover, even if one were to assume *arguendo* that the interest *is* compelling, a citizenship requirement for notaries is not the least restrictive means of achieving the stated goal of preventing the issuance of car license tags to illegal aliens. In the first place, there is no reason to assume that only non-citizen notaries public would engage in this practice, or more pointedly, no reason to

---

[1] See 2004 Tenn. Pub. Acts ch. 854, §§ 1-18.

[2] Note that in deciding a case under the old Tenn. Code Ann. § 8-16-302 language, the Tennessee Court of Appeals noted approvingly that it is "common for notaries public, in their official capacity, to attest to the signing of documents by others." *Goodman Factors, Inc. v. Meagan's Reflections, Inc.*, 1995 WL 672743 (Tenn. Ct. App. 1995). The 2004 amendment therefore does not seem to have appreciably altered the actual powers of a notary.

assume that a non-citizen notary public would be any more likely to flout the constraints of the office than a citizen notary public. The citizenship requirement would therefore deprive many upstanding notaries public (and potential notaries) of their powers while doing nothing to prevent the remaining citizen notaries from engaging in the practice purportedly justifying the restriction. The posited solution to the problem contemplated in the instant request would create a roadblock that could be navigated with little difficulty; it therefore is not the least restrictive means of addressing the government's interest, even if the interest could be considered "compelling." Accordingly, for all of these reasons, this Office reaffirms Op. Tenn. Att'y Gen. Nos. 94-059 and 83-276.

PAUL G. SUMMERS
Attorney General

MICHAEL E. MOORE
Solicitor General

BRAD H. BUCHANAN
Assistant Attorney General

Requested by:

The Honorable W. Kent Coleman
State Representative — Forty-Ninth District
32 Legislative Plaza
Nashville, Tennessee 37243-0149