

STATE OF TENNESSEE
OFFICE OF THE
ATTORNEY GENERAL
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February 29, 2008

Opinion No. 08-41

Requirement that applicants seeking commission as a Notary Public be lawful permanent residents.

QUESTION

Does the Office of the Attorney General adhere to its previous opinion, Op. Tenn. Atty. Gen. No. 07-76 (May 22, 2007), that the legislature may amend Tenn. Code Ann. § 8-16-101 to require that applicants seeking a commission as a notary public be lawful permanent residents?

OPINION

Yes. Op. Tenn. Atty. Gen. No. 07-76 remains a correct statement of the law on this issue. Further, it is not in conflict with Op. Tenn. Atty. Gen. No. 06-026.

ANALYSIS

In Op. Tenn. Atty. Gen. No. 07-76, this Office opined that the state may amend Tenn. Code Ann. § 8-16-101 to require that applicants seeking a commission as a notary public be lawful permanent residents as long as there is a rational basis for such legislation. That opinion cited to an opinion of the United States Supreme Court, *Plyler v. Doe*, 457 U.S. 202 (1982), for the proposition that illegal aliens are not members of a suspect class. Op. Tenn. Atty. Gen. No. 07-76. That Opinion remains a correct statement of the law. This Office has been asked to revisit Op. Tenn. Atty. Gen. No. 07-76, and it now reaffirms that opinion.

Specifically, the requestor questions whether there may be an inconsistency between Op. Tenn. Atty. Gen. 07-76 and a similar opinion released by this Office, Op. Tenn. Atty. Gen. No. 06-026 (Feb. 7, 2006), in which we concluded, relying on another United States Supreme Court opinion, *Bernal v. Fainter*, 467 U.S. 216 (1984), that “the State is prohibited by the Equal Protection Clause of the United States Constitution from requiring U.S. citizenship for notaries public.” Op. Tenn. Atty. Gen. No. 06-026. However, there is no inconsistency between the two opinions.

The Fourteenth Amendment provides, “[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” See *Graham v. Richardson*, 403 U.S. 365 (1971). The *Graham* Court went on to note that “it has long been settled . . . that the term ‘person’ in this context encompasses

lawfully admitted resident aliens as well as citizens of the United States and entitles both citizens and aliens to the equal protection of the laws of the State in which they reside.” *Id.* (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886); *Truax v. Raich*, 239 U.S. 33, 39 (1915); *Takahashi v. Fish & Game Comm’n*, 334 U.S. 410, 420 (1948)). But the United States Supreme Court has never suggested that *illegal* aliens are encompassed within the term “person” such that they are entitled to the same protections under the Equal Protection Clause as citizens and lawfully admitted resident aliens.

Op. Tenn. Atty. Gen. No. 07-76 addresses the constitutionality of requiring that applicants be lawful permanent residents, while Op. Tenn. Atty. Gen. No. 06-026 addresses the constitutionality of requiring that applicants be United States citizens. The classification involved in the amendment proposed to Tenn. Code Ann. § 8-16-101 and addressed by Op. Tenn. Atty. Gen. 07-76 discriminates between United States citizens and aliens who are lawful permanent residents on the one hand, and individuals who are illegal aliens and aliens who are not lawful permanent residents on the other. Illegal aliens and aliens who are not lawful permanent residents are not members of a suspect class, and, accordingly, statutes that treat them differently than citizens and lawful residents need not satisfy the heightened strict scrutiny standard in order to withstand equal protection challenge. As long as there is a rational basis to support such a classification, it does not violate the Equal Protection Clause. *See Plyler v. Doe*, 457 U.S. 202, 219 (1982); *see also League of United Latin American Citizens (LULAC), et al. v. Bredesen, et al.*, No. 3:04-0613, 2004 WL 3048724, *3, *4 (M.D. Tenn. Sept. 28, 2004).

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