

TO: President, Second
Constitutional Convention

DATE: 7-15-85

FR: Legal Counsel

RE: Does the U.S. Constitution permit interim U.S. citizens to be treated differently than U.S. citizens until termination of the trusteeship; and if so, may the Commonwealth Constitution treat U.S. citizens differently than interim U.S. citizens prior to the termination of trusteeship?
Legal Opinion No. 25

You have asked whether the U.S. Constitution permits interim U.S. citizens to be treated differently than U.S. citizens until termination of the trusteeship; and if so, whether the Commonwealth Constitution treat U.S. citizens differently than interim U.S. citizens prior to the trusteeship.

The equal protection principles of Amendments 5 and 14 of the U.S. Constitution, made applicable to the NMI by section 501 of the Covenant since approval of the Constitution, apply to all persons within the territorial limits of the Commonwealth. Thus, discriminatory treatment of U.S. citizens, vis-a-vis interim U.S. citizens under the Commonwealth Constitution, must satisfy the standards established by the Equal Protection Clause of the U.S. Constitution.

Implicit in the question posed is the assumption that the equal protection language of the Fourteenth Amendment applies only to people who are "citizens" of a government. Furthermore, this develops a belief that the Equal Protection Clause can be limited in its application to "citizens" of the NMI before termination of the Trust Territory -- in particular, interim U.S. citizens as defined in section 301 of the Covenant.

The U.S. Supreme Court has decisively rejected the idea that a state government can define the class of people under its jurisdiction for purposes of equal protection of the laws, while leaving other people beyond the protection of the Equal Protection

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Clause. In Plyler v. Doe, 457 U.S. 202, 72 L.Ed. 2d 786, 102 S.Ct. 2382, the state of Texas sought to avoid paying for the education of children of illegal aliens on the ground that the children were not "within the jurisdiction" of Texas within the meaning of the Fourteenth Amendment's mandate that "[n]o State shall . . . 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". The State of Texas argued that illegal aliens, because of their immigration status, were not "persons within the jurisdiction of the State of Texas", and that they, therefore, had no right to equal protection under Texas law. The court rejected this contention as follows:

The Fourteenth Amendment to the Constitution is not confined to the protection of citizens. It says: 'Nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.' These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the pledge of the protection of the laws is a pledge of the protection of equal laws. Yick Wo., *supra*, at 369, 30 L.Ed. 220, 6 S.Ct. 1064 at 72 L.Ed. 2d at 212.

Therefore, the court held the Equal Protection Clause to require equal application of the laws to all persons within the territorial jurisdiction of the government. Governments are, within the territorial jurisdiction of the government, not allowed to define who its laws will apply to.

To permit a State to employ the phrase 'within its jurisdiction' in order to identify subclasses of persons whom it would define as beyond its jurisdiction, thereby relieving itself of the obligation to assure that its laws are designed and applied equally to those persons, would undermine the principal purpose for which the Equal Protection Clause was incorporated in the Fourteenth Amendment. The equal protection clause was intended to work nothing less than the abolition of all caste based and invidious class-based legislation. That objective is fundamentally at odds with the power the State asserts here to classify persons subject to its laws as nonetheless excepted from its protection." 457 U.S. at 213.

Thus, the Commonwealth could not limit the application of the Equal Protection Clause to those people it considered its citizens -- whether interim citizens as defined by section 301 of the

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Covenant or any other group -- and put U.S. citizens beyond the reach of the Fourteenth Amendment. Likewise, by section 501 of the Covenant, the U.S. government is constrained in its treatment of interim U.S. citizens by the requirements of the Equal Protection Clause.

The Equal Protection Clause directs that "all persons similarly circumstanced shall be treated alike". F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415, 64 L.Ed. 989, 40 S.Ct. 560 (1920). But so too, "[t]he Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same". Tegner v. Texas, 310 U.S. 141, 147, 84 L.Ed. 1124, 60 S.Ct. 879 (1940).

Therefore, the Equal Protection Clause requires that differential treatment of U.S. citizens vis-a-vis interim U.S. citizens must be based on differences in the circumstances of U.S. citizens and interim U.S. citizens. It doesn't matter whether the U.S. government or the Commonwealth is making the discrimination; as pointed out above, the same principle applies.

In Pyler, the Court said the mere fact of one's immigration status is not sufficient basis, without more, to justify denying one benefits the State might choose to afford other residents. 457 U.S. at 224. Therefore, the mere fact that a class of people are not defined as citizens, whether U.S. or interim U.S., is not sufficient basis to discriminate against them. Nor may the state justify its classification with a concise expression of an intention to discriminate. Examining Board v. Flores de Otero, 426 U.S. 572, 605, 49 L.Ed. 2d 65, 96 S.Ct. 2264 (1976). Rather, the classification must be reasonably adopted to "the purposes for which the state desires to use it". Oyama v. California, 332 U.S. 633, 664-665, 92 L.Ed. 249, 68 S.Ct. 269 (1948) (Murphy, J. concurring).

Section 8 of the Constitution defines interim citizenship in terms of when certain people have been born, domiciled or voted in the NMI on certain dates.

As described above, the Equal Protection Clause of Amendment Fourteen would apply to discriminations based on the definitions of U.S. citizen -- interim U.S. citizen. Any such discriminations, under equal protection principles, would have to be logically related to the definitions of interim U.S. citizens being born, domiciled, or voted in the NMI as of certain dates, as opposed to U.S. citizens, who are not born, domiciled, or voting in the NMI on those dates.

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Therefore, a restriction on the right to vote or run for office
applied to U.S. citizens and nationals must be clearly justified.

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