

CIVIL REMEDIES AND PROCEDURE: CERTAIN INCIDENTS OF TRIAL. CONSTITUTION OF VIRGINIA: BILL OF RIGHTS — LEGISLATURE.

Discretionary provision of interpreters in civil cases for non-English-speaking persons in courts of 17th through 20th judicial districts and circuits does not violate Equal Protection Clause.

The Honorable J.R. Zepkin
Judge, Ninth Judicial District
April 13, 2000

You ask whether providing state-funded interpreters to non-English-speaking persons for civil cases in courts of the seventeenth through the twentieth judicial districts and circuits violates the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.¹

Section 8.01-384.1:1 of the *Code of Virginia* provides, in part:

A. In any trial, hearing or other proceeding before a judge in a civil case in which a non-English-speaking person is a party or witness, an interpreter for the non-English-speaking person *may* be appointed by the court. A qualified English-speaking person fluent in the language of the non-English-speaking person *may* be appointed by the judge of the court in which the case is to be heard unless the non-English-speaking person shall obtain a qualified interpreter of his own choosing who is approved by the court as being competent.

B. To the extent of available appropriations, the compensation of such interpreter shall be fixed by the court and shall be paid from the general fund of the state treasury as part of the expense of trial. The amount allowed by the court to the interpreter *may*, in the discretion of the court, be assessed against either party as a part of the cost of the case and, if collected, the same shall be paid to the Commonwealth.^[2] [Emphasis added.]

You note that the 1998 Appropriation Act provides for payments limited to civil proceedings only in the courts of the seventeenth through the twentieth judicial districts and circuits.³ You also note that there is no acknowledged constitutional right to an interpreter in civil matters. Once a state decides to provide an interpreter at state expense, however, you question whether it may provide a benefit from public funds for litigants and witnesses in only certain judicial circuits/districts without violating the Equal Protection Clause of the United States Constitution.

The Equal Protection Clause was intended as a restriction on state legislative action inconsistent with elemental constitutional premises. The Equal Protection Clause directs that "all persons similarly circumstanced shall be treated alike."⁴ 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."⁵ The initial discretion to determine what is "different" and what is "the same" resides in the states' legislatures. "A legislature must have substantial latitude to establish classifications that roughly approximate the nature of the problem perceived, that accommodate competing concerns both public and private, and that account for limitations on the practical ability of the State to remedy every ill."⁶

In designating the seventeenth through the twentieth judicial districts and circuits for the purpose of providing such interpreters, it is readily apparent that the General Assembly has neither denied any class of persons a fundamental right nor involved a suspect classification, either one of which would require the application of a judicial "strict scrutiny" test to § 8.01-384.1:1 under traditional equal protection scrutiny.⁷ "Suspect" classifications include race and, in modified forms requiring "intermediate" scrutiny, discrimination on the bases of sex, alienage and wealth.⁸ "Fundamental" classifications concern basic civil rights, including the right to vote and the right of procreation.⁹

The standard of review, therefore, for an equal protection challenge to § 8.01-384.1:1 is, in my opinion, the rational basis test.

The Equal Protection Clause allows the States considerable leeway to enact legislation that may appear to affect similarly situated people differently. Legislatures are ordinarily assumed to have acted constitutionally. Under traditional equal protection principles, distinctions need only be drawn in such a manner as to bear some rational relationship to a legitimate state end. Classifications are set aside only if they are based solely on reasons totally unrelated to the pursuit of the State's goals and only if no grounds can be conceived to justify them.^[10]

"In applying the rational basis test, courts will not overturn a statutory classification on equal protection grounds unless it is so unrelated to the achievement of a legitimate purpose that it appears irrational."¹¹ Although I cannot discern any classification created by such allocation of funds by the General Assembly, the mere fact that a classification has been made will not void legislation.¹² "Statutes create many classifications which do not deny equal protection; it is only 'invidious discrimination' which offends the Constitution."¹³

Consequently, in order to conclude that the discretionary provision of interpreters in civil matters contained in § 8.01-384.1:1 violates equal protection guarantees, the legislature must be found to have acted in a manner bearing no rational relationship to a legitimate state end; i.e., the discretionary provision must be found to be so unrelated to the achievement of a legitimate purpose that it appears irrational. More often than not, a decision made by the General Assembly affects some group at the expense of another, and creates one or more classifications.

The Supreme Court of Virginia has found that constitutional prohibitions against special legislation do not prohibit classifications, as long as the classification is not purely arbitrary. "It must be natural and reasonable, and appropriate to the occasion. There must be some such difference in the situation of the subjects of the different classes as to reasonably justify some variety of rule in respect thereto."¹⁴ In the facts you present, the decision by the General Assembly to provide such funds for use in the four designated judicial districts and circuits clearly does not create a "classification" between groups in other judicial districts and circuits requiring interpreters.

In assessing the constitutionality of § 8.01-384.1:1, I am also guided by the doctrine that "[a] statute is not to be declared unconstitutional unless the court is driven to that conclusion."¹⁵ "Every reasonable doubt should be resolved in favor of the constitutionality of an act of the legislature."¹⁶ Following this doctrine, it has been a long-standing practice of Attorneys General to refrain from declaring a statute unconstitutional unless its unconstitutionality is clear beyond a reasonable doubt.¹⁷ This practice has its origins in well-founded considerations. Unlike a court, the Attorney General has no power to invalidate a statute. Thus, when an Attorney General opines that a statute violates the Constitution, that statute nevertheless remains in force. Further, by opining that a statute is unconstitutional, an Attorney General, in effect, is advising the enforcing state agency to ignore the statute. This an Attorney General should not do unless he is certain beyond a reasonable doubt that a reviewing court would strike down the statute.

Therefore, based on the above, it is my opinion that the discretionary provision of interpreters in civil cases for non-English-speaking persons in courts of the seventeenth through the twentieth judicial districts and circuits does not violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

¹Although the Constitution of Virginia does not contain an equal protection clause similar to that found in the United States Constitution, the antidiscrimination clause of Article I, § 11 of the Constitution of Virginia (1971) and the prohibition against special legislation in Article IV, § 14 provide analogous limitations on legislative authority. Neither of these constitutional provisions, however, provides broader rights than those guaranteed by the Fourteenth Amendment. See *Boyd v. Bulala*, 647 F. Supp. 781, 785-86 (W.D. Va. 1986), *amended*, 678 F. Supp 612 (W.D. Va. 1988), *aff'd in part and rev'd in part, questions certified*, 877 F.2d 1191 (4th Cir. 1989); *Archer and Johnson v. Mayes*, 213 Va. 633, 638, 194 S.E.2d 707, 711 (1973).

²See 1997 Op. Va. Att'y Gen. 10, 12 (noting that use of word "may" in statute indicates statute is permissive and discretionary, rather than mandatory).

³1998 Va. Acts ch. 464, Item 30(D), at 666, 687. (providing that "[o]ut of the amounts provided in [Item 30(D)] and Items 29 and 31 of this act, shall be paid an amount not to exceed \$45,000 each year to implement the provisions of § 8.01-384.1:1 ... in the 17th, 18th, 19th, and 20th Judicial Districts and Circuits.").

⁴*Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920).

⁵*Tigner v. Texas*, 310 U.S. 141, 147 (1940).

⁶*Plyler v. Doe*, 457 U.S. 202, 216 (1982).

⁷See *generally* *Hernandez v. Texas*, 347 U.S. 475 (1954) (jury exclusion of persons with Mexican ancestry).

⁸See, e.g., *Brown v. Board of Education*, 347 U.S. 483 (1954) (racial segregation in public schools); *Korematsu v. United States*, 323 U.S. 214 (1944) (exclusion of persons of Japanese ancestry from military area during war with Japan).

⁹See, e.g., *Dunn v. Blumstein*, 405 U.S. 330 (1972) (durational residence requirements for purposes of voting); *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (exceptions to sterilization of habitual criminals).

¹⁰*Clements v. Fashing*, 457 U.S. 957, 962-63 (1982); see also *McDonald v. Board of Election*, 394 U.S. 802, 808-09 (1969); *McGowan v. Maryland*, 366 U.S. 420, 425-26 (1961).

¹¹*Ballard v. Commonwealth*, 228 Va. 213, 217, 321 S.E.2d 284, 286 (1984).

¹²See *Schilb v. Kuebel*, 404 U.S. 357 (1971); *Atchison, Topeka &c. Railroad v. Matthews*, 174 U.S. 96, 106 (1899).

¹³*Ferguson v. Skrupa*, 372 U.S. 726, 732 (1963); see also *Williamson v. Lee Optical Co.*, 348 U.S. 483, 489 (1955).

¹⁴*Martin's Ex'rs v. Commonwealth*, 126 Va. 603, 612, 102 S.E. 77, 80 (1920).

¹⁵Roanoke v. Michael's Bakery Corp., 180 Va. 132, 142, 21 S.E.2d 788, 792 (1942); *see also* 1996 Op. Va. Att'y Gen. 33, 36.

¹⁶Roanoke v. Michael's Bakery Corp., 180 Va. at 143, 21 S.E.2d at 793 (quoting Hunton v. Commonwealth, 166 Va. 229, 236, 183 S.E. 873, 876 (1936)); *see also* Op. Va. Att'y Gen.: 1992 at 14, 18; 1985-1986 at 76, 77.

¹⁷Op. Va. Att'y Gen.: 1996, *supra* note 15, at 36; 1995 at 164, 165.