

**Eduardo P. PANGELINAN, et al.**  
**vs.**  
**Francisco C. CASTRO, et al.**  
**vs.**  
**Edwin MEESE, III**

**Civil Action No. 79-0006**  
**United States District Court**

**Decided January 24, 1986**

**[Prior opinions: Smith v.**  
**Pangelinan, 651 F.2d 1320**  
**(9th Cir. 1981);**

**Pangelinan v. Castro,**  
**688 F.2d 610 (9th Cir. 1982);**

**Pangelinan v. Castro,**  
**District Court NMI**  
**(November 4, 1985).]**

**1. Civil Procedure - Summary Judgment**

Summary judgment is appropriate only if it is demonstrated that there exists no genuine dispute as to any material fact and movant is entitled to judgment as a matter of law. Fed.R.Civ.P. 56.

**2. Civil Procedure - Summary Judgment**

In addressing a motion for summary judgment, the court must construe the pleadings, other record evidence and its attendant inferences most favorably to the party opposing the motion. Fed.R.Civ. P. 56.

**3. Civil Procedure - Summary Judgment**

On motion for summary judgment, a genuine factual issue may exist only if a viable legal theory would entitle plaintiffs to judgment if they prove their

asserted version of the facts. Fed.R.Civ. P. 56.

**4. Civil Rights - Persons Liable**  
The Commonwealth is a suable "person" under federal civil rights statute and defenses of governmental immunity are available. 42 U.S.C. §1983.

**5. Sovereign Immunity - Civil Rights Actions**

In an action brought pursuant to federal civil rights statute, the Commonwealth may not raise as a shield its asserted sovereign or statutory immunities. 42 U.S.C. §1983.

**6. Constitutional Law - Due Process - Property Interests**

When addressing a due process challenge to government action a court must decide whether the plaintiff possessed a constitutionally protected property interest and if so, whether the plaintiff was deprived of that interest without due process of law. U.S. Const., Amend. 14.

**7. Constitutional Law - Due Process - Property Interests**

Property interests are protected by the United States Constitution but are created and defined by state law. U.S. Const., Amend. 14.

**8. Constitutional Law - Due Process - Property Interests**

Where plaintiff residents were determined by the Board of Elections to be domiciled in the Commonwealth and where the plaintiffs met the other requirements for issuance of certificates of identity, they had a constitutionally protected interest in the certificates which could not be taken without due process of law.

**9. Constitutional Law - Due**

## **Process**

The due process clause has essentially two components, one "procedural" and one "substantive".

### **10. Constitutional Law - Due Process - Substantive**

The substantive arm of due process doctrine mandates that government action not be arbitrary or capricious.

### **11. Constitutional Law - Due Process - Substantive**

For an agency's wrongful action to be cognizable under the substantive branch of due process, federal courts have often required that the action be egregious, invidious, represent a gross abuse of power, or be otherwise similarly objectionable. U.S. Const., Amend. 14.

### **12. Constitutional Law - Due Process - Particular Cases**

Action of Chief of Immigration's denial of certificates of identity to permanent residents based on Chief's erroneous conclusion that permanent residents are incapable of forming domiciliary intent constituted arbitrary and capricious action in violation of the due process clause where High Court had held one year earlier that such persons could be lawfully domiciled in Mariana Islands, and where Chief acted contrary to advice of two attorney generals. U.S. Const., Amend. 14.

### **13. Civil Rights - Government Liability - Official Policy**

Where the execution of a government's policy by those whose edicts or acts may fairly be said to represent official policy inflicts civil rights injury, the government is liable for the resulting damages. 42 U.S.C. §1983.

### **14. Constitutional Law - Equal**

## **Protection**

Equal protection demands at a minimum that a government must apply its laws in a rational and nonarbitrary way and the focus of equal protection analysis is on the differential treatment afforded similar persons in like circumstances.

### **15. Constitutional Law - Equal Protection**

The constitutional mandate of equal protection extends to discriminatory executive or administrative conduct as well as to discriminatory legislation. U.S. Const., Amend. 14.

### **16. Constitutional Law - Equal Protection**

Where the Chief of Immigration intentionally and purposefully refused to issue the plaintiff Certificates of Identity based on a legal conclusion rejected by the High Court as well by legal advisors, such flagrant disregard of prevailing legal theories by a lay person sufficiently demonstrates invidious discrimination against an identifiable class of persons and proves an unequal application of the laws.

### **17. Public Officers & Employees - Immunity**

Government officials are entitled to immunity from suits for damages.

### **18. Public Officers & Employees - Immunity - Qualified**

Qualified immunity protects public officials from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.

### **19. Public Officers & Employees - Immunity**

Where public officials arbitrarily and capriciously refused to issue Certificates of Identity to the plaintiffs based on a legal theory already rejected by one court and advised against by defendants' counsel, the defendants are not shielded by official immunity and stand liable for the damages caused by their unconstitutional acts.

**20. Civil Rights - Attorneys' Fees**

An award of attorney's fees pursuant to federal civil rights statute is uniquely separable from the cause of action. 42 U.S.C. §1988.

**21. Civil Rights - Attorney Fees**

Where decision favorable to plaintiff on civil rights claim asserted does not entirely dispose of action against the defendants, court may reserve determination on the nature of any fee award until a final judgment has been entered. 42 U.S.C. §§1983, 1988.

U.S. District Court

JAN 24 1986

For The Northern Mariana Islands  
by James A. ...  
20 (U.S. District Court)

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN MARIANA ISLANDS

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EDUARDO P. PANGILINAN, et al., )  
Plaintiffs, )  
vs. )  
FRANCISCO C. CASTRO, et al., )  
Defendants, )  
vs. )  
EDWIN MEESE III, )  
Intervenor. )

CIVIL ACTION NO. 79-0006

DECISION

The factual background of this case has been extensively discussed in the previous decisions of this Court and in opinions issued by the Ninth Circuit in Smith v. Pangilinan, 651 F.2d 1320 (9th Cir. 1981) and in Pangilinan v. Castro, 688 F.2d 610 (9th Cir. 1982).

In the instant motion, the plaintiffs seek partial summary judgment as to the liability of the defendants under the claims brought pursuant to 42 U.S.C. § 1983. Distillation of the arguments presented reveals four substantive issues:

1. Whether the defendants can be held liable for monetary damages under 42 U.S.C. § 1983;
2. Whether the undisputed facts sufficiently demonstrate an unconstitutional deprivation actionable under 42 U.S.C. § 1983;

- 1 3. Whether any or all individual defendants  
2 are entitled to assert a defense of  
3 qualified immunity;  
4 4. Whether the plaintiffs are entitled to  
5 an award of attorney's fees pursuant to  
6 42 U.S.C. § 1988.

7 I. Standard of Review

8 [1-3] Summary judgment is appropriate only if it is demon-  
9 strated that there exists no genuine dispute as to any material  
10 fact and movant is entitled to judgment as a matter of law. U.S.  
11 v. First National Bank of Circle, 652 F.2d 882, 887 (9th Cir.  
12 1981). The Court must construe the pleadings, other record  
13 evidence and its attendant inferences most favorably to the party  
14 opposing the motion. Harlow v. Fitzgerald, 457 U.S. 800, 816,  
15 n.26, 102 S.Ct. 2727, 2737, n.26., 73 L.Ed.2d 396, 409 n.26  
16 (1982). A genuine factual issue may exist only if a viable legal  
17 theory would entitle plaintiffs to judgment if they prove their  
18 asserted version of the facts. Ron Tonkin Gran Turismo v. Fiat  
19 Distributors, 637 F.2d 1376, 1381 (9th Cir. 1981), cert. denied,  
20 454 U.S. 831, 102 S.Ct. 128, 70 L.Ed.2d 109 (1981).

21 II. § 1983 Liability

22 The fundamental cause underlying the claims asserted in  
23 this action is the failure of the defendants to issue to the  
24 plaintiff class Certificates of Identity which identify the  
25 holders as interim United States citizens under the Commonwealth  
26 Constitution; interim citizens become United States citizens upon

1 termination of the Trusteeship Agreement.<sup>1/</sup> On September 11,  
2 1980, this Court held that the defendants had a legal duty to  
3 issue the Certificates under the principle of administrative res  
4 judicata. In the alternative, it was held that the defendants  
5 were equitably estopped from denying the Certificates to the  
6 plaintiff class. The Ninth Circuit, not reaching the equitable  
7 estoppel issue, affirmed on the basis of administrative res  
8 judicata and remanded for a determination on the plaintiffs'  
9 request for monetary damages under § 1983. Pangilinan v. Castro,  
10 supra.

11 A. Threshold Issues

12 [4.5] Initial issues raised by the defendants involve the  
13 applicability of § 1983 to the named defendants. Defendants are  
14 sued in their official and in their individual capacities.  
15 Accordingly, the Commonwealth is an unnamed defendant, since the  
16 named defendants, as officers, were acting within the scope of  
17 their official authority. Ante, pp. 13-14; see Civil Actions  
18 Against State Government § 2.33. (Shepard's/McGraw-Hill, 1982).  
19 The individual defendants also remain subject to personal  
20 liability for their unconstitutional acts. Id. at § 2.23. The  
21 defenses raised by the Commonwealth are addressed here while the  
22 individual qualified immunity defenses are addressed in part III.

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25 <sup>1/</sup>Covenant to Establish the Commonwealth of the Northern Mariana  
26 Islands in Political Union with the United States of America,  
Art. III, P.L. 94-241, 90 Stat. 263.

1           The Commonwealth, in its response to the plaintiffs'  
2 motion and in its cross motion for summary judgment raises  
3 initial issues regarding the suability and the liability of the  
4 government under § 1983. In a nutshell, the Commonwealth  
5 contends that § 1983 is not applicable in the Commonwealth and  
6 that, in any event, the Commonwealth is not a "person" within the  
7 meaning of the section. Additionally, the government asserts the  
8 defenses of sovereign and statutory immunity.

9           Subsequent to the filing by the Commonwealth of its  
10 response and cross-motion in this matter, this Court held that  
11 the Commonwealth is indeed a suable "person" under § 1983 and  
12 further ruled that the governmental immunity defenses asserted  
13 here are unavailable in an action brought pursuant to § 1983.  
14 See Fleming v. Department of Public Safety, Civ.No. 84-0006  
15 (D.N.M.I. decision filed Sept. 11, 1985). Following the  
16 precedent in Fleming, the Court denies the Commonwealth's motion  
17 for summary judgment.

#### 18                           B. Constitutional Deprivation

19           The plaintiffs allege in their complaint, and reassert  
20 in this motion, that the defendants' refusal to issue the  
21 Certificates denies the plaintiffs due process and the equal  
22 protection of the laws entitling them to damages under § 1983.

23                           42 U.S.C. § 1983 provides:

24                           Every person who, under color of any statute,  
25                           ordinance, regulation, custom, or usage, of  
26                           any State or Territory... subjects, or causes  
                         to be subjected any citizen of the United  
                         States or other person within the

1 jurisdiction thereof to the deprivation of  
2 any rights, privileges, or immunities secured  
3 by the Constitution and laws, shall be liable  
4 to the party injured in an action at law,  
5 suit in equity, or other proper proceeding  
6 for redress.

7 It is not disputed here that the defendants' actions  
8 were taken under color of law, nor is there any longer a question  
9 as to the Commonwealth's status as a suable person under the  
10 statute. Therefore, the analysis focuses on the alleged viola-  
11 tions themselves.

#### 12 1. Due Process

13 [6] The Fourteenth Amendment to the United States Constitu-  
14 tion, applicable to the Commonwealth through Section 501 of the  
15 Covenant, protects persons from the deprivation of property  
16 without due process of law. When addressing a due process  
17 challenge to government action, the federal courts have developed  
18 a two-step test under which to analyze these claims. A court  
19 must decide whether the plaintiff possessed a constitutionally  
20 protected property interest and if so, whether that interest was  
21 deprived without due process of law. Morrissey v. Brewer, 408  
22 U.S. 471, 481, 92 S.Ct. 2593, 2600, 33 L.Ed.2d 484 (1972); Belnap  
v. Chang, 707 F.2d 1100, 1102 (9th Cir. 1983).

23 [7,8] Property interests are protected by the United States  
24 Constitution but are created and defined by state law. See Roth  
25 v. Board of Regents, 408 U.S. 564, 577, 97 S.Ct. 2701, 2709, 33  
26 L.Ed.2d 548 (1972). There can be no serious question here (and

1 the defendants do not attempt to raise one) that the plaintiffs  
2 had a protected property interest in the issuance of the  
3 Certificates. Under Section 3 of the Certificate of Identity  
4 Act<sup>2/</sup> the Governor, through the Chief of Immigration, had the  
5 mandatory duty to issue certificates to those persons who  
6 qualified as Interim Citizens under Section 8 of the Schedule on  
7 Transitional Matters. The plaintiffs herein were already  
8 determined to so qualify by the Board of Elections. That the  
9 Chief of Immigration was bound by the Board's determination was  
10 decided by this Court with the approval of the Ninth Circuit.  
11 The plaintiffs had a constitutionally recognized property  
12 interest in the Certificates. The more troublesome question is  
13 whether the initial refusal<sup>3/</sup> to issue the Certificates  
14 constituted a deprivation without due process of law.

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17 <sup>2/</sup>P.L. 1-6, § 3, codified at 3 C.M.C. § 4122, which provides:

18 The Governor, through the Chief of Immigration,  
19 shall issue Certificates of Identity to  
20 all persons who, on the date of approval of  
21 the Constitution (March 6, 1977) by the  
22 people of the Commonwealth, did not owe  
allegiance to any foreign state and who  
qualify under one of the criteria set forth  
in Section 4111. [Emphasis added.]

23 Section 4111 sets forth the three criteria by which Interim  
24 Citizenship is defined in § 8 of the Schedule on Transitional  
Matters.

25 <sup>3/</sup>Pursuant to order of this Court, the Certificates have now been  
26 issued.

1 [9] The due process clause has essentially two components,  
2 one "procedural" and one "substantive." See Fleming v. Depart-  
3 ment of Public Safety, supra, slip.op. at 26-27; Sirilan v.  
4 Castro, DCA No. 83-9009 (D.N.M.I. (App.Div.) 1984) slip.op. at  
5 8-14. Procedural due process requires that the government afford  
6 a party notice and a hearing before it deprives that person of a  
7 protected right or interest. Although the plaintiffs allege in  
8 their complaint that they were not afforded notice and an oppor-  
9 tunity to be heard, they do not argue this point in their motion  
10 now before the Court.<sup>4/</sup> Instead, the plaintiffs set forth an  
11 argument based on denial of substantive due process.

12 [10] The substantive arm of due process doctrine mandates  
13 that government action not be arbitrary or capricious. See Las  
14 Vegas v. Clark County, 755 F.2d 697, 704 (9th Cir. 1985);  
15 Wilkerson v. Johnson, 699 F.2d 325, 328 (6th Cir. 1983); Hewitt

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18 <sup>4/</sup>The Certificate of Identity Act provides for a hearing before  
19 "qualified members of the staff from the Immigration Service."  
20 3 C.M.C. § 4126. The applicant has the right to present  
21 testimony or other evidence, to meet any evidence adverse  
22 thereto and to cross-examine witnesses. 3 C.M.C. § 4125. The  
23 applicant has the right to be represented by an attorney. 3  
24 C.M.C. § 4127. There is evidence that the named plaintiffs  
25 were afforded such a hearing to discuss their qualifications  
26 with an immigration officer. See Transcripts of Hearings,  
Defendants' Motion for Summary Judgment (Jan. 16, 1980),  
Appendices D, S. However, the fact that a hearing was held is  
not alone dispositive, for a hearing which is merely a sham or  
pretense will not satisfy the demands of due process. See Olim  
v. Wakinekona, 461 U.S. 238, 103 S.Ct. 1741, 75 L.Ed.2d 813  
(1983). No decision is intended on this question as it is not  
now before the Court.

1 v. City of Truth or Consequences, 758 F.2d 1375, 1378 (10th Cir.  
2 1985); see also, e.g., Altaire Builders v. Village of Horseheads,  
3 551 F.Supp. 1066, 1069 (W.D.N.Y. 1982) ("the Constitution does not  
4 tolerate arbitrary and unreasoned action"). However, the Consti-  
5 tution is not implicated by all wrongful governmental action;  
6 there must be maintained a "meaningful separation between federal  
7 and state jurisdiction." Creative Environments, Inc. v.  
8 Estabrook, 680 F.2d 822, 831 (1st Cir. 1982). Accordingly, mere  
9 violation of state law or other established procedure will not  
10 necessarily establish a constitutional violation. See Creative  
11 Environments, supra; Roy v. City of Augusta, 712 F.2d 1517 (1st  
12 Cir. 1983) (wrongful refusal to issue a license alone not  
13 actionable under § 1983).

14 [ ] For an agency's wrongful action to be cognizable under  
15 the substantive branch of due process, federal courts have often  
16 required that the action be egregious, invidious, represent a  
17 gross abuse of power, or be otherwise similarly objectionable.  
18 See, e.g., Creative Environments, supra, 680 F.2d at 833 (to  
19 implicate the Constitution, action must be "tainted with  
20 fundamental procedural irregularity, racial animus, or the like");  
21 Cordeco Development Corp. v. Santiago Vasquez, 539 F.2d 256, 260  
22 (1st Cir. 1976) (action properly brought under § 1983 where  
23 government decision made "wantonly and with actual malice" and  
24 based on "illegitimate political considerations"); Scott v.  
25 Greenville County, 716 F.2d 1409, 1419-1421 (4th Cir. 1983)  
26 ("extraordinary and unlawful" intervention in permit process by

1 county council demonstrated "manifest arbitrariness and  
2 unfairness" and was violative of substantive due process).  
3 However, substantive due process violations are not limited to  
4 the patently blatant and obvious.

5 The regular and impartial administration of  
6 public rules governing these interests, as  
7 required by due process, prohibits the subtle  
8 distortions of prejudice and bias as well as  
9 governmental violations exemplified by  
10 bribery and corruption and the punishment of  
11 political and economic enemies through the  
12 administrative process.

13 Wilkerson v. Johnson, *supra*, 699 F.2d at 328.

14 [12] Turning now to the record evidence in this matter, the  
15 Court must determine whether the denial of the Certificates to  
16 the plaintiffs, already determined to be wrongful, was accom-  
17 panied by such arbitrariness, capriciousness or irrationality, or  
18 was otherwise so offensive as to violate the substantive norms of  
19 due process.

20 The controlling rationale behind the decisions to deny  
21 the named plaintiffs their Certificates, according to Mr. Castro,  
22 was the failure to show domicile.<sup>5/</sup> The entry into the Common-  
23 wealth as non-immigrant workers, Castro reasoned, rendered the  
24 plaintiffs legally incapable of forming the necessary domiciliary  
25 intent. Of course, this legal conclusion was rejected by this  
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<sup>5/</sup> See Letter to DeMesa (Feb. 24, 1978), Complaint, Exh. F and  
Memo to File Re: Pangelinan [sic](Oct. 6, 1978), Complaint, Exh.  
H.

1 Court in its decision of Sept. 11, 1980. As noted above,  
2 standing alone, a misinterpretation of state law does not  
3 necessarily substantiate a due process claim. However, the facts  
4 before the Court show more than an innocent mistake.

5 Castro's interpretation of domiciliary intent was  
6 explicitly rejected as unconstitutional in 1977, one year  
7 earlier, by the Trust Territory High Court in White v. Government  
8 of the Northern Mariana Islands, Civ.No. 225-77 (TT High Court  
9 (Tr.Div.) 1977). Michael A. White<sup>6/</sup>, a practicing attorney and  
10 United States citizen who had resided on Saipan for more than  
11 seven years who considered Saipan his home, sought to be  
12 certified to vote in the election of officers of the first  
13 Commonwealth government. Section 7(a) of the Election Act<sup>7/</sup>  
14 provided that a United States citizen could vote if he or she was  
15 domiciled in the Northern Mariana Islands and had resided there  
16 for at least forty-five days prior to the election. Section  
17 (6)(c)(6) of the Act, however, provided:

18 Any person, whose presence or residency in  
19 the Northern Mariana Islands on, and prior to  
20 the effective date of the Constitution, is  
21 based on a work permit or any other temporary  
22 permit is not domiciled in the Northern  
23 Mariana Islands.

24 White was the holder of a nonimmigrant entry permit. The High

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25 <sup>6/</sup>Also the plaintiffs' attorney of record in the instant matter.

26 <sup>7/</sup>P.L. 5-11 (Sept. 6, 1977)

1 Court, addressing White's equal protection challenge, found  
2 Section (6)(c)(6) unconstitutional.<sup>8/</sup> Castro, responding to  
3 discovery requests, has admitted that he was aware of the White  
4 decision.<sup>9/</sup>

5 More importantly, in denying the Certificates based on  
6 the alleged inability of a "nonimmigrant" to form domiciliary  
7 intent, Castro acted in complete and total disregard of the  
8 advice of two Commonwealth government attorneys. On May 5, 1978,  
9 the Assistant Attorney General issued an opinion on the very  
10 issue.<sup>10/</sup> Referring to the White case, the opinion notes that  
11 research on the subject of domicile revealed that "domicile is  
12 determined by the intent of the individual, and a person may  
13 be domiciled in a country even though he is an illegal immigrant

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15 <sup>8/</sup> Although a major part of the High Court's order relies on the  
16 intent of the members of the Commonwealth's Constitutional  
17 Convention to allow citizens of the United States to vote in  
18 the Commonwealth, the language of the concluding paragraph was  
19 not so circumscribed. The Court held that

20 the provision of the election law which would  
21 prohibit anyone who, at anytime had previous-  
22 ly entered the Northern Marianas pursuant to  
23 a special permit, could not be domiciled for  
24 purposes of the next election, is contrary to  
25 the Constitution, and, consequently, cannot  
26 stand.

27 The breadth of this Order reasonably put Castro on notice of  
28 the tenable foundation of his legal conclusion.

29 <sup>9/</sup> See Answers to Plaintiffs First Set of Interrogatories, at 19  
30 (Filed Apr. 21, 1981).

31 <sup>10/</sup> Appendix C to Plaintiffs' Motion for Summary Judgment (filed  
32 Feb. 20, 1980).

1 or only the possessor of a temporary visa." The opinion continued  
2 on to discuss foreign workers:

3 In the case of Filipino workers who renounced  
4 their Philippine citizenship upon the sug-  
5 gession of the Resident Commissioner an even  
6 stronger case can be made because they did so  
7 on the representation of the Government that  
8 they would become eligible for U.S. citizen-  
9 ship. Furthermore, if the above-cited  
10 sections [Covenant, Section 301 and Schedule  
11 of Transitional Matters, Section 8] are to be  
12 given meaning, these aliens would certainly  
13 come within the ambit of them.

14 The opinions, addressed to the Chief of Economic Development  
15 Division, was also "carbon-copied" to Castro.

16 Even more important is the "formal opinion and  
17 directive" of the Acting Attorney General to Castro dated June  
18 29, 1978<sup>11/</sup> regarding the status of third country nationals as  
19 interim United States citizens under the Commonwealth  
20 Constitution. The opinion emphasizes that the issue of domicile  
21 turns on a question of intent and not status. The opinion  
22 continues:

23 The fact that these people have been required  
24 to comply with Title 49 and 53 of the Trust  
25 Territory Code [Labor and Immigration] will  
26 not defeat their claim to local domicile in  
and of itself.

Opinion at p.2.

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<sup>11/</sup>Appendix D to Plaintiff's Motion for Summary Judgment (filed  
Feb. 20, 1980).

1           Castro, then, in rejecting the plaintiffs' application  
2 for Certificates of Identity based upon their status as alien  
3 workers, acted contrary to a decision of the High Court and in  
4 defiance of the advice of two government attorneys.<sup>12/</sup> Such  
5 action is clearly indicative of bad faith and ill will and rises  
6 beyond mere unlawful activity to the level of unconstitutional  
7 conduct. There is ample evidence to show that Castro acted  
8 arbitrarily and capriciously and violated the substantive norms  
9 of due process.

10       [13] The unconstitutional actions of Castro are also the  
11 unconstitutional actions of the Commonwealth. Where the "execu-  
12 tion of a government's policy... by those whose edicts or acts  
13 may fairly be said to represent official policy... inflicts the  
14 injury," the government is liable under § 1983 for the resulting  
15 damages. Monell v. Department of Social Services, 436 U.S. 658,  
16 694, 98 S.Ct.2018, 2037-2038, 56 L.Ed.2d 611 (1978). Here, an  
17 assertion that Castro was following no officially stated policy  
18 or course of conduct would not relieve the government of  
19 liability.

20           Policy making does not require the  
21 adoption of a rule of general application. Monell refers to official acts as well as  
22 official policies. As one commentator has noted, "the issue is not the scope of the  
23 decision but the scope of the decision  
24 maker's mandate. If a mayor decides, in a

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25 <sup>12/</sup> Furthermore, Castro admits that he did not consult any other  
26 attorney before he acted. See Answers to Plaintiffs' First  
Set of Interrogatories, ¶10 (Filed Apr. 21, 1981).

1 particular case, to direct that a house be  
2 broken into unlawfully, that is official  
3 policy." Schnapper, "Civil Rights Litigation  
After Monell," 79 Col.L.Rev. 213, 222 (1979).

4 Altaire Builders, Inc. v. Village of Horseheads, supra, 551  
5 F.Supp. at 1070; see also Fleming v. Department of Public Safety,  
6 supra, at 34-35 (actions of the Director of Public Safety clearly  
7 represent the official policy of the Commonwealth). Here, too  
8 there can be no question that in exercising his authority to  
9 issue Certificates of Identity pursuant to 3 C.M.C. § 4122,  
10 Castro was acting in his official capacity on behalf of the  
11 Commonwealth.

12 The liability of Governor Camacho is not as readily  
13 determined. The only evidence which the plaintiffs have  
14 presented is the denial of the Certificates by Castro. There is  
15 no evidence that Governor Camacho personally authorized the  
16 rejections or otherwise failed to properly exercise his authority  
17 to prevent the unconstitutional action. Without more, there  
18 remain material facts in dispute making summary judgment against  
19 Governor Camacho inappropriate.

## 20 2. Equal Protection

21 [4,15] The mandates of the equal protection clause as applied  
22 to government action are set forth in this Court's decision in  
23 Fleming:

24 There exists some overlap between the protec-  
25 tion offered by the due process clause and  
26 that provided under the equal protection  
clause. "Equal protection demands at a  
minimum that a [government] must apply its

1 laws in a rational and non-arbitrary way."  
2 Ceichon v. City of Chicago, 686 F.2d 511, 522  
3 (7th Cir. 1982). The focus of equal protec-  
4 tion analysis, however, is on the differen-  
5 tial treatment afforded similar persons in  
6 like circumstances. "The guarantee of equal  
7 protection... is... a right to be free from  
8 invidious discrimination in governmental  
9 activity." Harris v. McRae, 448 U.S. 297,  
10 372, 100 S.Ct. 2671, 2691, 65 L.Ed.2d 784  
11 (1980). "It is axiomatic that the Equal  
12 Protection Clause... guarantees like treat-  
13 ment to persons similarly situated." Desris  
14 v. City of Kenosha, Wisconsin, 687 F.2d 1117,  
15 1119 (7th Cir. 1982). Put another way,  
16 "[w]hen a choice is made by the government,  
17 the obligation to afford all persons the  
18 equal protection of the laws arises."  
19 Kirchberg v. Feenstra, 609 F.2d 727 (5th Cir.  
20 1979). Lastly, it is undisputed that "the  
21 constitutional mandate of equal protection  
22 extends to discriminatory executive or  
23 administrative conduct as well as to discrim-  
24 inatory legislation." Jackson v. Marine  
25 Exploration Co., Inc., 583 F.2d 1336, 1347  
26 (5th Cir. 1978).

15 Fleming, supra, slip.op. at 29-30.

16 [6] In light of the facts recited in support of the finding  
17 of a due process violation, the denial of equal protection is  
18 evident. The Chief of Immigration intentionally and purposefully  
19 refused to issue the plaintiffs the Certificates based on a legal  
20 conclusion rejected by the High Court as well by Castro's legal  
21 advisors. Such flagrant disregard of prevailing legal theories  
22 by a lay person sufficiently demonstrates invidious dis-  
23 crimination against an identifiable class of persons and proves  
24 an unequal application of the laws.<sup>13/</sup>

25 \_\_\_\_\_  
26 <sup>13/</sup>In their Complaint, the plaintiffs allege that the actions  
"are done for the purpose of, and has [sic]the result of,  
practicing racial and ethnic discrimination against Plaintiffs

1 III. Qualified Immunity

2 [17] The defendants seek summary judgment on the basis of  
3 qualified immunity. As a general matter, government officials  
4 are entitled to immunity from suits for damages; this defense was  
5 recognized at common law. See Harlow v. Fitzgerald, 457 U.S.  
6 800, 806, 102 S.Ct. 2727, 2732, 73 L.Ed.2d 396 (1982). Two forms  
7 of immunity have been recognized. For legislators, judges, those  
8 engaged in adjudicative functions and select others such as the  
9 President of the United States, absolute immunity has been  
10 extended. See Nixon v. Fitzgerald, 457 U.S. 731, 102 S.Ct. 2690,  
11 73 L.Ed.2d 349. All others enjoy only a qualified immunity. The  
12 Supreme Court has held that state governors and state officials  
13 are protected by qualified immunity. Scheuer v. Rhodes, 416 U.S.  
14 232, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974). The defendants here  
15 acknowledged that the immunity to which they claim entitlement is  
16 qualified.

17 [18] While absolute immunity protects absolutely, qualified  
18 immunity protects the officials "from liability for civil damages  
19 insofar as their conduct does not violate clearly established

20 \_\_\_\_\_  
21 (Con't. of Footnote 13):

22 and members of Plaintiffs' class." In their moving papers,  
23 however, the plaintiffs concentrate solely on the arbitrariness  
24 and capriciousness of the action taken and do not rely on the  
25 grounds of racial or ethnic discrimination. Accordingly, in  
26 granting the motion for summary judgment, the Court does not  
decide whether or not the action of the individuals or of the  
government is invidiously discriminatory on the basis of race  
or ancestry.

1 statutory or constitutional rights of which a reasonable person  
2 would have known." Harlow v. Fitzgerald, supra, 102 S.Ct. at  
3 2738. In other words, if the official's conduct was objectively  
4 reasonable under the circumstances at the time, he or she will  
5 enjoy immunity from civil liability. The defense, quite obvious-  
6 ly, is designed to encourage the diligent and energetic perfor-  
7 mance of official duties which are carried out in good faith.  
8 However, those actions taken in absence of good faith as  
9 determined primarily on objective factors, will not be shielded  
10 by official immunity.

11 Harlow denies the defense to any official who violated  
12 the clearly established constitutional or statutory rights of a  
13 plaintiff. The defendants here caution the Court that the United  
14 States Supreme Court has limited the statutory violation trigger  
15 somewhat in Davis v. Scherer, \_\_\_ U.S. \_\_\_, 104 S.Ct. 3012, \_\_\_  
16 L.Ed.2d \_\_\_ (1984). In Davis, the plaintiffs, who were deprived  
17 of their due process rights, sought to strip the defendants of  
18 their official immunity because even though the constitutional  
19 rights were not clearly established at the time, the defendants'  
20 conduct also violated state procedures which were clearly estab-  
21 lished. The Supreme Court declined to adopt the plaintiffs'  
22 suggested interpretation. The Court stated that notwithstanding  
23 the language of Harlow, the defense becomes unavailable only when  
24 the conduct violates clearly established constitutional rights.  
25 104 S.Ct. at 3020.

26 [19] The defendants' concern here is understandable since it

1 has been found that their action violated the plaintiffs statuto-  
2 ry rights. However, the concern is misplaced; the very facts and  
3 reasoning which supports today's decision regarding the  
4 defendants' violation of the plaintiffs' due process rights  
5 necessarily negates the immunity defense. The underlying basis  
6 of this Court's decision is that the defendants arbitrarily and  
7 capriciously refused to issue the Certificates to the plaintiffs  
8 based on a legal theory already rejected by one court and advised  
9 against by defendants' counsel. There can be no serious  
10 contention by the defendants that it was not clearly established  
11 that such egregious action as is evidenced here violates the  
12 substantive norms of the due process clause. The very bad faith  
13 nature of the action, which brings about the substantive due  
14 process violation, necessarily negates any assertion of good  
15 faith on the part of the defendants. Accordingly, the defendants  
16 are not shielded by official immunity and stand liable for the  
17 damages caused by their unconstitutional acts.

18

19

#### IV. Attorney's Fees

20

[20, 21] The plaintiffs also request attorney's fees pursuant to  
21 42 U.S.C. § 1988. An award of attorney's fees is not properly an  
22 element of relief indistinguishable from other elements. The fees  
23 allowed "are not compensation for the injury giving rise to an  
24 action" and are "uniquely separable from the cause of action."  
25 White v. New Hampshire Department of Employment Security, 455  
26 U.S. 445, 451-452, 102 S.Ct. 1162, 71 L.Ed.2d 325 (1982).

1 Accordingly, the Court reserves determination on the propriety  
2 and nature of any fee award until a judgment in this matter with  
3 respect to defendants has been entered.  
4

5 V. Conclusion

6 For the reasons stated herein, the Court:

- 7 1. GRANTS the plaintiffs' motion for summary  
8 judgment as against the Commonwealth and as  
9 against Francisco C. Castro; and  
10 2. DENIES the plaintiffs' motion for summary  
11 judgment as against Carlos S. Camacho; and  
12 3. DENIES the defendants' motion for summary  
13 judgment.

14  
15 Jan. 24, 1986  
16  
17 Date

14  
15 Alfred Laureta  
16  
17 JUDGE ALFRED LAURETA