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Requirements of the Voting Rights Language Assistance Act of 1992

Poli A. Marmolejos†

It is an honor and a privilege for me to participate in this workshop on civil rights. I am well aware of the challenges that face the Hispanic community in America today. This morning I would like to address my brief remarks to the most recent civil rights statute enacted by Congress which I believe will bring about more equality of political opportunity for Hispanic Americans. The statute is the Voting Rights Language Assistance Act of 1992.1

BACKGROUND

In amending the Voting Rights Act in 1975 by adding the minority language provisions to the Act,2 Congress did more than expand the most effective civil rights law in our nation’s history.3 It gave new mean-

† The following article is excerpted from presentations made by Poli A. Marmolejos during several Civil Rights workshops held October 9-10, 1992, before the U.S. Hispanic Leadership Conference in Chicago, Illinois. Mr. Marmolejos currently serves as a Special Assistant in the office of the Assistant Attorney General, Civil Rights Division, U. S. Department of Justice. Prior to that, he worked for 12 years as a trial attorney in the Voting Section of the Civil Rights Division.

2. In 1975, Congress passed the bilingual language requirements of the Voting Rights Act in order to afford language minority citizens who speak little or no English with an equal opportunity to participate in all aspects of the political process. 42 U.S.C. § 1973aa-1a. After extensive Congressional hearings, the Congress found that “through the use of various practices and procedures, citizens of language minorities have been effectively excluded from participation in the electoral process. Among other factors, the denial of the right to vote of such minority group citizens is ordinarily directly related to the unequal educational opportunities afforded them, resulting in high illiteracy and low voting participation.” 42 U.S.C. § 1973aa-1a(a). See also 42 U.S.C. § 1973b(f) (1). In 1992, Congress found that the conditions giving rise to the original passage of § 203 still exist and again authorized extension of § 203 of the Act. 42 U.S.C. § 1973aa-1a. For the legislative history of the Voting Rights Language Assistance Act of 1992, see H.R. REP. NO. 102-655, 102d Cong., 2d Sess. (1992) and S. REP. NO. 102-315, 102d Cong., 2d Sess. (1992). The 1975 language amendments are popularly known as §§ 4(f)4 and 203 of the Voting Rights Act. 42 U.S.C. § 1973b(f) (1) and 42 U.S.C. § 1973aa-1a. In this short presentation I will deal primarily with § 203 of the Act. However, in summary I note that while the statutory requirements for providing language minority citizens bilingual information is the same under § 203 and § 4(f)4, jurisdictions covered under § 4(f)4 are also additionally subject to the Act’s § 5 preclearance requirements, 42 U.S.C. § 1973c, and to the special provisions regarding the appointment of federal examiners. 42 U.S.C. § 1973d. Jurisdictions covered under § 203 are not subject to these latter special provisions. See 28 C.F.R. § 55.8 (1992).
3. The Voting Rights Act has been hailed as perhaps the most comprehensive and effective piece of civil rights legislation ever passed by Congress. The Supreme Court has declared that the Act was designed “to banish the blight of racial discrimination in voting which has infected the electoral process in parts of our country for nearly a century.” South Carolina v. Katzenbach, 383
ing to the guarantees of the fourteenth amendment. By protecting those with a limited knowledge of English, the Voting Rights Act today provides limitless opportunities for increased political participation by Native Americans, Asian Americans, Alaska natives and, of course, Spanish heritage Americans. The latter include Mexican Americans, Puerto Ricans, Dominicans and Cubans. Let me take a few minutes today to discuss with you the minority language provision of the Voting Rights Act.

**MINORITY LANGUAGE PROVISIONS OF THE VOTING RIGHTS ACT**

The minority language provisions of the Voting Rights Act require covered states and their political subdivisions to conduct their elections in the language of the appropriate minority language group as well as in English. The text of the minority language provisions is technical and complex, but its simple purpose could not be clearer. That purpose is to give language minorities the same rights enjoyed by other Americans. These include the right to be informed about the electoral process, the right to vote, and the right to otherwise participate in the political process.

Let me add that the guarantees of the minority language provisions afford protection at every level of government and elective office. We have recently informed jurisdictions that became subject to the minority

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4. Section 203 of the Voting Rights Act provides that whenever a covered jurisdiction "provides any registration or voting notices, forms instructions, assistance, or other materials or information relating to the electoral process, including ballots, it shall provide them in the language of the applicable minority group as well as in English." 42 U.S.C. § 1973aa-1a(c). The Department of Justice, in its Interpretative Guidelines concerning Implementation of the Voting Rights Act regarding Language Minority Groups, has interpreted this broad language to encompass the full range of voting related activities. This begins with the provision of any material regarding how to register to vote through activities related to conducting elections. Also included is polling place assistance and assistance at the actual moment of casting a ballot. See 28 C.F.R. § 55.15. Section 203 also specifically provides that where a minority language is unwritten, as is the case with many Native American and Alaska Native languages, the covered jurisdiction must provide oral assistance in the applicable minority language. 42 U.S.C. § 1973aa-1a(c); 28 C.F.R. § 55.20.

5. The Attorney General's Interpretive Guidelines on the Implementation of the Minority Language provisions state in part: "The basic purpose of . . . [the bilingual language provisions of the Act] is to allow members of applicable language minority groups to be effectively informed of and participate effectively in voting connected activities. Accordingly, the quoted language should be broadly construed to apply to all stages of the electoral process, from voter registration through activities related to conducting elections, including, for example the issuance, at any time during the year, of notifications, announcements, or other informational materials concerning opportunities to register, the deadline for voter registration, the time, places and subject matters of elections, and the absentee voting process." 28 C.F.R. § 55.15. See also 28 C.F.R. § 55.2(b).

6. Political sub-units within a covered jurisdiction (e.g., cities, school boards, water districts, etc.) are also subject to the bilingual language requirements of the Act. See C.F.R. § 55.9. See also 28 C.F.R. § 55.10.

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language provisions of the Voting Rights Act that all information that is provided in English about voter registration, elections, and voting, including information provided in the polling places and the voting booths, must be provided in Spanish (or other applicable language). This information should be provided to the extent that it is needed to allow persons to participate effectively in the electoral process and all voting-connected activities. These are strong but necessary words if limited-English proficient citizens are to fully and equally participate in our country’s political process.

LANGUAGE MINORITIES IN THIS COUNTRY

Under the Voting Rights Act, persons who are Native Americans, Asian Americans (who include Chinese, Filipino, Vietnamese, and Japanese Americans, among others), or persons who are “of Spanish heritage” are considered language minorities.

In 1982, Congress redefined the language minority classification to include only those persons in the designated groups who have limited English proficiency as indicated by census data. Using census data, the director of the Census Bureau determined that those who reported that they spoke a language other than English in the home and who reported that they spoke English less than very well were found, for purposes of § 203 coverage, to be unable to speak or understand English adequately enough to participate in the electoral process. On the basis of these determinations jurisdictions which became subject to coverage must conduct elections in English and in the applicable minority language. That remains the way language minorities are classified today. Further, the determination made by Census in this regard is not reviewable by any

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7. See 28 C.F.R. § 55.15.
9. Section 203 of the Act was originally enacted for a ten year period scheduled to expire in 1985. During consideration of the extension of other provisions of the Voting Rights Act in 1982, § 203 was extended for an additional 7 year period, until 1992. The 1982 extension contained one substantive change in § 203. Prior to 1982 and pursuant to the coverage formula originally adopted by Congress, the Director of the Census had counted all individuals who fell within the broad definition of language minority when determining whether 5% of the voting age citizens of a jurisdiction were members of a language minority. See coverage formula—42 U.S. C. § 1973aa-1a(b); See also statutory notes to § 4 of the Voting Rights Act amendments of 1982. In 1982, Congress adopted an amendment that directed the inclusion of only those minority language citizens “who do not speak or understand English adequately enough to participate in the electoral process.” 42 U.S.C. § 1973aa-1a. This amendment, known as the Nickles Amendment, was enacted in recognition of the 1980 census. In that year the census, for the first time, included questions regarding an individual’s language ability. Consequently, it became possible to target the provision of language assistance to those areas where it is truly needed.
10. Id.
While the bilingual language provisions of the Voting Rights Act apply only in certain places, voting discrimination against persons because of membership in a language minority group is prohibited throughout the United States. Section 2 of the Voting Rights Act expressly incorporates the protection afforded by § 4(F)(2) of the Act which provides that no voting qualification of prerequisite to voting or standard, practice or procedure shall be imposed or applied by any state or political subdivision to deny or abridge the right of any citizen of the United States to vote because he is a member of a language minority group. Therefore, let no state or local election official tell you that they are exempt from complying with the Voting Rights Act’s protections which bar discrimination against language minority groups.

The special minority language provisions of the Voting Rights Act apply to those states or political jurisdictions where:

1) More than 5% of the citizens of voting age are members of a single-language minority and are limited English proficient; or

11. Section 203 of the Act specifically provides that the determinations of the Director of the Census “shall be effective upon publication in the federal register” and that such determinations “shall not be subject to review in any court.” 42 U.S.C. § 1973aa-1a(b). See also C.F.R. § 55.6. On September 18, 1992, the determinations of the Director of the Census were published in the federal register. See 57 Fed. Reg. 43,213 (1992). These determinations are codified in the Appendix of 28 C.F.R. § 55 et seq.

12. For a complete listing of those jurisdictions covered under § 203 of the Act, see the Appendix to 28 C.F.R. § 55 et seq.

13. Section 2 of the Voting Rights Act provides as follows:

“(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any state or political subdivision in a manner which results in a denial or abridgment of the right of any citizens of the United States to vote on account of race or color, or in contravention of the guarantees set forth in § 4(f)(2), as provided by subsection (b).

(b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the state or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunities than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the state or political subdivision is one circumstance which may be considered: Provided, That nothing in the section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.” 42 U.S.C. § 1973.

2) More than 10,000 citizens of voting age are members of a single language minority and are limited English proficient; or

3) In the case of a political subdivision that contains all or part of an Indian reservation, more than 5% of the American Indian or Alaska Native citizens of voting age within the reservation are members of a single-language minority group and are English proficient; and

4) The illiteracy rate for the citizens in the language minority group is higher than the national illiteracy rate.15

This is the coverage formula established by Congress earlier this year when it extended for another fifteen years the § 203 minority language provisions of the Voting Rights Act.16 As a result, numerous jurisdictions throughout the country, some for the very first time, are now subject to the minority language provisions of the Act.17 Some of the larger jurisdictions now covered under § 203 as a result of the revised coverage formula include Chicago, Boston, Philadelphia, Hartford, Los Angeles, San Diego, San Francisco, Hawaii, Queens (NY), Houston and Dallas.

PROTECTION OF LANGUAGE MINORITIES

The Voting Rights Act is intended to ensure that no American is deprived of the right to vote or participate in the political process because of their inability to read, write, speak or understand.18 State and local governments are responsible for regulating voter registration and for conducting elections. They also have a duty to implement the minority lan-

15. 42 U.S.C. § 1973aa-1a(b). The new coverage formula expanded the triggering mechanism under § 203. As noted above, the new amendments now provide coverage of jurisdictions that 1) have 10,000 or more limited-English proficient voting age citizens of a single language minority or a Native American reservation having 5 percent or more American Indian or Alaska Native limited English proficient voting age citizens and 2) where the single language minorities otherwise meet the remaining § 203 statutory requirements. Id.

16. The fifteen year extension makes § 203 coextensive with other parts of the Act which are scheduled to expire in 2007. 42 U.S.C. § 1973 et seq.

17. See Appendix, 28 C.F.R. § 55 et seq.

18. The case law in 1975, which in part inspired passage of the bilingual language provisions of the Voting Rights Act, recognized that the right to vote is more than the mere physical access to the voting booth, but also includes all action necessary to make the vote effective. Arroyo v. Tucker, 372 F. Supp. 764 (E.D. Pa. 1974). See Torres v. Sach, 381 F. Supp. 309 (S.D.N.Y.) ("Simple logic...[makes evident that language minority voters who do not speak English] cannot cast an effective vote without being able to comprehend fully the registration and election forms and the ballot itself." Id. at 312). See also Puerto Rican Organization for Political Action v. Kusper, 490 F. 2d 575 (N.D. Ill. 1973); Lopez v. Dinkins, No. 73 Civ. 695 (S.D.N.Y., March 21, 1973); Marquez v. Falcey, Civ. No. 1447-73 (D.N.J., Oct. 9, 1973). These cases were brought under § 4(e) of the Voting Rights Act. 42 U.S.C. § 1973b(e). Section 4(e) of the Act prohibits the denial to register to vote on the basis of failure to pass a literacy test if the registrant has completed the sixth grade in an American flag school. This provision of the Act was specifically enacted in order to enable Puerto Ricans living on the mainland to register to vote without having to satisfy English literacy requirements. See Katzenback v. Morgan, 384 U.S. 641 (1966).
We, at the Department of Justice, have the primary responsibility for enforcing the bilingual language provisions of the Act, and we have issued guidelines for states and localities so that they may comply with those provisions.

Minority language persons have the right to expect that their state and local election officials will provide all election related materials in the appropriate minority language, from voter registration applications to absentee ballots. Election notices in the newspaper, signs posted at the county courthouse and city hall, and instructions given to voters at the polls are other examples of information that must be made available to minority language citizens in their appropriate language. I urge you and other community leaders in your respective covered localities to meet with the election officials responsible for conducting elections and voter registration. It is important that you inform these election officials of the bilingual needs of your community, as well as identify the best methods to disseminate bilingual information in the community. You can also assist the responsible election officials by identifying qualified and interested bilingual persons who may be able to serve as poll officials and deputy registrars.

We, at the Department of Justice, have strongly urged election officials in covered jurisdictions to consult with the affected minority language groups in their jurisdiction. These officials seek to devise and implement a bilingual election program that complies with § 203. We have done this because we fully recognize that a jurisdiction is more apt to comply with the bilingual provisions of the Act if it works closely and in cooperation with persons and organizations that represent minority language citizens.

Also note that the interpretative guidelines to the Voting Rights Act outline only the general minimum requirements for compliance. State and local jurisdictions are not forbidden, and indeed are encouraged to go beyond those requirements so that they comply not only with the letter of the law, but with the spirit of the law as well.

**FAILURE TO COMPLY WITH MINORITY LANGUAGE REQUIREMENTS**

We, in Washington, are fond of saying that we are with the federal government and we are here to help you. This is one of those areas where it is true.

If any person believes that their covered state or local government is not taking the necessary steps to make the electoral process equally ac-

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19. See 28 C.F.R. § 55 et seq.
20. See 28 C.F.R. § 55.16.
21. See 28 C.F.R. § 55.2(h).
cessible to language minorities, they can file a lawsuit in federal court on their own behalf or write to the Assistant Attorney General for the Civil Rights Division of the Department of Justice. In writing to us, it is important to set forth in as much detail as possible all information you have with regard to those concerns so that we may be able to investigate them. You have the right to expect your federal government to take its obligations in this area quite seriously, and, in fact, we do. You also have the right to demand action. Those are tough words. However, as a Department of Justice Attorney bound to uphold the United States Constitution and the laws of our country, I can say that we will investigate and take appropriate action when we find out that violations of the Voting Rights Act have occurred.22

EFFECT OF THE MINORITY LANGUAGE PROVISIONS IN ELIMINATING VOTING DISCRIMINATION

The minority language provisions of the Voting Rights Act have been instrumental in eliminating voting discrimination. Let me give you one example.

In the state of New Mexico, Navajo and Pueblo voters were being purged from voting rolls for non-voting. They were unable to obtain voter registration information from local election officials since these officials did not speak any of the languages spoken by these Native Americans. Navajos and Pueblos who did go to the polls often encountered English only ballots and local election officials unable to translate the ballot for them. Since the languages spoken by these Native Americans have been historically unwritten, the minority language provisions required that state and local officials provide all election information orally in the appropriate minority languages. State and local officials had failed to do so and we at the Department of Justice had no alternative but to sue the state and the offending county to enforce the minority language provisions. The state and county eventually settled out of court with an historic agreement, one that included many innovations for the oral dis-

22. The Interpretative Guidelines indicate that "[c]onsideration by the Attorney General of a jurisdiction's compliance with the requirements of § 203(c) occurs in the consideration of the need for litigation to enforce the requirements of § 203(c)." 28 C.F.R. § 55.2(f). In order to ensure compliance with those provisions, the Department has filed various lawsuits under § 203 of the Act. All have been resolved by consent decree. See, e.g., United States v. City and County of San Francisco, C.A. No. C-78 2521 CFP (N.D. Cal., filed Oct. 27, 1978; consent decree May 19, 1980); United States v. San Juan County, New Mexico, C.A. No. 79-508-JB (D.N.M., filed June 21, 1979; consent decree Apr. 8, 1980); United States v. San Juan County, Utah, C.A. No. C-83-1287 (D. Utah, filed Nov. 22, 1983; modified consent decree Oct. 11, 1990); United States v. McKinley County, New Mexico, C.A. No. 86-0029-M (D.N.M., filed Jan. 9, 1986; modified consent decree entered Oct. 9, 1990); United States v. State of New Mexico and Sandoval County, C.A. No. 88-1457-SC (D.N.M. Filed Dec. 5, 1988; consent decree filed May 17, 1990).
semination of bilingual information and that was fully comprehensive. The department is continuing to monitor compliance with this consent decree. This is just one example of how we at the Department of Justice can help make the minority language provisions work for language minority citizens.

CONCLUSION

It is necessary to remember that the Voting Rights Act is a potent weapon in the arsenal provided by Congress in the fight against discrimination. However, the greatest protection against discrimination is to inform minority citizens of their rights and how to exercise them. I hope that what I have shared with you today helps with that objective. In closing, I say to you: Let all of us here today renew our pledge to keep the faith, uphold the rule of law, and maintain the fight to rid our nation of the evil of voting discrimination.

23. Among other things, the adopted bilingual election information program requires the employment of Native American voting rights coordinators, and that the county appoint chapter and Pueblo tribal election Liaisons. Also, the county must provide audio tape translations of election materials to the public and it must use a variety of techniques to disseminate election-related information, including radio broadcasts when announcing election related matters. The decree also requires the appointment of Native American deputy registrars, the provision of opportunities for eligible Native American voters to vote by absentee ballot, and fully trained bilingual poll officials and translators. Further, the decree requires that election officials follow voter purge procedures that will not have an adverse or unfair impact on Native American voters, and maintain records that will enable the Department of Justice or members of the public to evaluate the county's compliance with the plans and the plan's effectiveness. See United States v. State of New Mexico and Sandoval County, C.A. No. 88-1457-SC (D.N.M. Filed Dec. 5, 1988; consent decree filed May 17, 1990).