

Minority-Language Election Rules and the Public Lawyer

By Bruce L. Adelson

With its nationwide scope and long history of success, the Voting Rights Act of 1965 (VRA) is perhaps the most effective and far-reaching civil rights legislation ever enacted in the United States. To alleviate voting discrimination, Congress outlawed the application of any “qualification or prerequisite to voting, or standard, practice or procedure . . . 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.”¹ Recognizing its impact, Congress voted overwhelmingly in 2006 to reauthorize portions of this landmark statute. For decades, litigants and the federal government have used its remedial provisions to combat voting discrimination based on race, color and language.

Enforcement of the VRA

The U.S. Department of Justice (DOJ) is charged with enforcing the VRA. With the 2008 presidential election rapidly approaching and DOJ’s enforcement activities likely to increase, it’s important that public lawyers familiarize themselves with the VRA and its myriad provisions.

In addition to the VRA, DOJ enforces the Help America Vote Act (HAVA), the National Voter Registration Act (NVRA), and the Uniformed Overseas and Civilian Absentee Voting Act (UOCAVA). However, DOJ’s enforcement efforts have predominantly focused on the VRA’s minority-language provisions, primarily Section 203.² Indeed, since 2004, DOJ has filed 16 suits alleging violations of the VRA’s bilingual election requirements, more suits than DOJ filed in a comparable period to enforce UOCAVA and NVRA combined. Fifteen of these 16 cases were noncontested filings, resulting in consent decrees. The 16th, *United States v. City of Philadelphia*,³ represented DOJ’s first contested minority-language litigation and its first defeat. This case will be discussed below.

The VRA’s Requirements

The VRA’s minority-language provisions apply only to voters who are American Indian, Asian-American, Alaska Native or of Spanish heritage⁴ and are limited-English profi-

cient (LEP), speaking English “less than very well,” according to the Census Bureau. These LEP citizens speak and understand primarily their native languages. Languages such as Hopi, Apache, Japanese, Mandarin, Choctaw and Spanish are among those covered by the VRA. Other languages, such as Russian, French and Arabic, are not included; and no additional languages can be added without congressional action.

Although only those languages listed in the statute are covered, other parts of the VRA may be used to capture languages beyond Section 203’s mandate and compel jurisdictions to provide assistance. For example, Section 208 of the Voting Rights Act of 1965 states that “[a]ny voter who requires assistance to vote by reason of blindness, disability, or inability to read or write may be given assistance by a person of the voter’s choice, other than the voter’s employer or agent of that employer or officer or agent of the voter’s union.”⁵ The phrase *inability to read or write* is generally interpreted to encompass English-language proficiency.⁶

DOJ has successfully used Section 2 of the VRA⁷ to encompass discrimination against voters who speak languages outside the scope of local Section 203 coverage.⁸ Typically, for Section 2 to be invoked successfully, there should be evidence that LEP people were denied the right to vote, or denied the right to vote effectively, because of their minority-language status. Section 203’s requirements are almost strict liability in nature: If you are a covered jurisdiction, you must provide language-based assistance. Section 2 does not have similar language-centered automatic mandates.

Section 203 requires that officials provide election information in covered non-English languages through written materials and bilingual poll workers and other personnel in certain parts of the country.

A jurisdiction is covered by Section 203 if, according to the census, the number of LEP U.S. citizens of voting age in a single language group (of a language included in the statute) within the jurisdiction is more than 10,000, is more than five percent of all citizens of voting age, or is more than five percent of the American Indian voting-age citizens on an Indian reservation; and the illiteracy rate of the citizens in the minority-language group is higher than the national illiteracy rate.⁹

According to the census, more than 4,100,000 voting-age LEP citizens lived in Section 203-covered jurisdictions in 2000. Of these people, approximately 3,300,000 are Hispanic LEP voting-age citizens. Undoubtedly, these numbers are

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Section 203 Programs Across the Country

Many jurisdictions across the United States successfully operate Section 203 programs. They have instituted procedures that comply with the law and serve their minority-language communities to ensure they can effectively participate in the electoral process.

Maricopa County, Arizona: This county developed election terminology glossaries in Spanish and O'odham, the language of the Tohono O'odham Nation. The county also instituted a system to survey election officials on election days to determine the number of voters per precinct who needed language assistance. The National Association of Counties recognized the county's bilingual election programs with achievement awards in 2005 and 2006.

Maverick County, Texas: The county hired, trained and assigned trilingual poll workers to the polls on the Kickapoo Indian Reservation. The poll workers speak English, Spanish and Kickapoo.

Gila and Graham Counties, Arizona: Section 203 requires these counties to provide Apache-language assistance to LEP residents of the San Carlos Apache Reservation. In 2004, the counties held a joint voter reservation event, featuring bilingual Apache and English election staff from both jurisdictions, during an animal spaying clinic sponsored by the San Carlos Apache Tribe. The event resulted in dozens of registrations by LEP citizens who had never voted.

higher today. There are more than 200 Section 203 jurisdictions across the country that are required to provide Spanish-language election information to its LEP citizens, and more that must offer assistance in other languages. Once Section 203 applies to a county, all of its constituent jurisdictions, municipalities, school districts and special districts are also subject to the law's bilingual election requirements.

Section 203 jurisdictions include many of the largest cities and counties in the United States: New York City, Boston, Philadelphia, Miami and Miami-Dade County, Chicago, Houston and Harris County, Dallas and Dallas County, Phoenix and Maricopa County, Los Angeles and Los Angeles County, San Francisco and San Francisco County, San Diego and San Diego County, and Seattle and King County.

The director of the census issued the current Section 203 determinations in July 2002. Courts have no jurisdiction to review or overturn these census decisions. The next determinations will follow the 2010 Census, perhaps by 2012. Given current population and demographic trends, many jurisdictions not presently covered by Section 203 should expect to be subject to this law in approximately five years.

Compliance with the VRA

There are several absolutes for compliance with Section 203. Covered counties and municipalities must ascertain the languages and dialects spoken by their LEP voters.¹⁰ Written materials, such as "any registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots" must be translated into the applicable minority languages.¹¹ American Indian and Alaska Native languages are unwritten, so jurisdictions covered for these languages must provide oral language assistance.¹²

Oral assistance at the polls (i.e., with bilingual poll workers) must be provided to LEP voters who require such help to "participate effectively in the electoral process."¹³ Jurisdictions should take "all reasonable steps" to achieve this goal.¹⁴

In evaluating how jurisdictions assist LEP voters and whether such assistance complies with the law, DOJ will consider

... the number of a precinct's registered voters who are members of the applicable language minority group, the number of such persons who are not proficient in English, and the ability of a voter to be assisted by a person of his or her own choice. The basic standard is one of effectiveness.¹⁵

Indeed, jurisdictions are not required to provide non-English-language information to all voters. Instead, federal regulations permit them to use a "targeting system."

To establish a workable, compliant targeting system, jurisdictions need an effective outreach program, which could include voter education events for the LEP community and the use of bilingual employees to interact with LEP populations. This outreach will allow jurisdictions to stay informed about their communities' needs and changing demographics while also contributing to their VRA compliance.

A combination of tools, such as census data, information from community organizations, outreach to LEP populations, and Election Day survey data indicating the number of LEP voters who voted by precinct in previous elections and their primary languages, will help jurisdictions determine which precincts need minority-language materials and bilingual poll workers.¹⁶

This may all seem axiomatic. However, DOJ's Section 203 litigation record reveals several pitfalls, but jurisdictions can avoid these with preparation.

Consent Decrees May Not Provide the Solution

In 2005, the *Boston Globe* reported that when DOJ is about to bring suit alleging Section 203 violations, the agency contacts the prospective defendant counties and municipalities to present a *fait accompli* consent decree. "They basically were asking us to agree to all their allegations, and they never shared the facts," said Merita Hopkins, then chief of staff to Boston Mayor Thomas Menino and city corporation counsel.¹⁷ Boston eventually signed a consent decree to resolve DOJ's case.¹⁸

The recent Section 203 consent decrees follow a pattern. In the vast majority, the defendants agree to hire a bilingual coordinator to assist with Section 203 compliance and to create an advisory group to advise the bilingual coordinator. Although hiring someone who is bilingual in English and the relevant minority language(s) to coordinate bilingual election compliance is advisable, federal law neither requires nor suggests this or the creation of an advisory group.

In addition, the vast majority of post-2004 Section 203 consent decrees require that the defendants assign a certain number of bilingual poll workers per voting precinct according to the number of minority-surnamed voters registered there. However, the VRA's implementing regulations do not provide for such a formula. Interestingly, DOJ did not use this formula in its pre-2004 Section 203 consent decrees.

In the 2006 case of *United States v. Hale County, Texas*,¹⁹ the defendants agreed that "[a]ny polling place in which there are 100-249 registered voters with Spanish surnames shall be staffed by at least one bilingual election official." Virtually identical formulas are included in other consent decrees involving disparate jurisdictions: *United States v. San Benito County, California*,²⁰ *United States v. San Diego County, California*,²¹ *United States v. City of Rosemead, California*,²² and *United States v. Cochise County, Arizona*.²³ Additional consent decrees are posted on DOJ's website, www.usdoj.gov/crt/voting/litigation/caselist.htm.

However, *Hale County* and similar decrees do not allow for the flexibility contained in federal regulations. Indeed, federal law does not require that jurisdictions staff polls with set numbers of bilingual poll workers based on voters' surnames alone. This formula contradicts federal regulations that state DOJ will consider the number of LEP people per precinct in evaluating a jurisdiction's Section 203 compliance. It also suggests that having a certain surname imparts LEP status and lack of English-language ability on particular voters. Assigning poll workers based on a precinct's number of voters with certain surnames, without more (i.e., information from community organizations and targeting conclusions based on outreach to LEP groups), does not seem to be a reliable way to assess the need for bilingual assistance; indeed, it belies federal regulations' "effectiveness" standard.

A three-judge federal court reached a similar conclusion in *United States v. City of Philadelphia*. In a decision on the eve of the 2006 general election, the court denied DOJ's request for injunctive relief in a case alleging Section 203 violations

What Does It All Mean?

Jurisdictions should be knowledgeable about census data and other information concerning the local population, know neighborhoods where non-English-speaking people reside, establish effective outreach and targeting programs to help pinpoint voting precincts with LEP voters, have systems in place to reach voters who require assistance, and use targeting correctly by having translated written materials and bilingual poll workers in selected precincts and districts with LEP voters.

by the city of Philadelphia. In addition to the court's remarkable castigation of DOJ for "dilatoriness" and "undue delay"²⁴ in prosecuting the case, the court decided that DOJ's evidence was insufficient to prove that the defendants underserved their Spanish-speaking voters. The court further questioned the validity of DOJ's surname-based formula for assigning poll workers:

[DOJ's] analysis makes several assumptions regarding Spanish-speaking voters that are too attenuated to actual English language ability to support a finding regarding the distribution of limited English proficient voters throughout the City. In particular, the Government asks us ... to find a correlation between a Spanish surname and Spanish language ability.²⁵

In denying DOJ's motion for injunctive relief, the court cited with approval the Fifth Circuit's decision in *Rodriguez v. Bexar County*,²⁶ where the court found that the use of Spanish surnames to identify Hispanic voters was "highly problematic."

The *City of Philadelphia* opinion gives public lawyers a valuable tool if DOJ alleges that their clients are noncompliant with Section 203. The decision succinctly questions DOJ's use of surname-based formulas for poll worker assignments.

The Bottom Line

Section 203 is but one of myriad federal voting laws that bind states, counties, municipalities, and school and special districts across the country. Its minority-language mandates reflect our national population trends and are at the core of DOJ's enforcement priorities. Public lawyers who come to the federal negotiating table armed with knowledge of applicable law, current court decisions, and effective bilingual election programs will serve their clients well and help them better prepare for the 2008 presidential election and other elections in the future. ■

Endnotes

1. 42 U.S.C. § 1973 b(f)(2) (2005).
2. 42 U.S.C. § 1973 aa-1a.
3. *United States v. City of Phila. & Phila. City Comm'n*, No. 2:06cv-4592 (E.D. Pa. 2006).
4. 42 U.S.C. § 1973 l(b)(3).
5. 42 U.S.C. § 1973 aa-6.
6. *E.g.*, *United States v. Miami-Dade County, Fla.*, No. 02-21698 (S.D. Fla. 2002).
7. 42 U.S.C. § 1973.
8. *United States v. City of Boston*, No. 05-11598-EGY (D. Mass. 2005).
9. 42 U.S.C. § 1973aa-1a (b)(2)(A).
10. 28 C.F.R. § 55.13 (1999).
11. 28 C.F.R. § 55.15.
12. 28 C.F.R. § 55.12.
13. 28 C.F.R. § 55.2 (b).
14. *Id.*
15. 28 C.F.R. § 55.20 (c).
16. 28 C.F.R. § 55.17.
17. *City Said No to Remedies in Voting Bias Case, Cites Lack of Data from US*, BOSTON GLOBE, Aug. 1, 2005.
18. *United States v. City of Boston*, No. 05-11598-EGY (D. Mass. 2005).
19. No. 5-05CV0043 (N.D. Tex. 2006).
20. No. 02056 (N.D. Cal. 2004).
21. No. CV1273JEG (S.D. Cal. 2004) (memorandum agreement).
22. No. CV05-5131 GAF (C.D. Cal. 2005).
23. No. CV 06-304 TUC-FRZ (D. Ariz. 2006).
24. *United States v. City of Phila. & Phila. City Comm'n*, No. 2:06cv-4592, at 2 (E.D. Pa. 2006).
25. *Id.* at 3.
26. 385 F.3d 867 n. 18 (5th Cir. 2004).