

# Saint Louis University Public Law Review

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Volume 30

Number 1 *Voting 45 Years After the Voting Rights Act*  
(Volume XXX, No. 1)

Article 8

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2010

## English Monolingual Speakers in Puerto Rico: A New Language Minority Group Under the Voting Rights Act

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### Recommended Citation

Olivera-Soto, Angel L. (2010) "English Monolingual Speakers in Puerto Rico: A New Language Minority Group Under the Voting Rights Act," *Saint Louis University Public Law Review*: Vol. 30 : No. 1 , Article 8.  
Available at: <https://scholarship.law.slu.edu/plr/vol30/iss1/8>

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**ENGLISH MONOLINGUAL SPEAKERS IN PUERTO RICO:  
A NEW LANGUAGE MINORITY GROUP UNDER THE VOTING  
RIGHTS ACT<sup>1</sup>**

ANGEL L. OLIVERA-SOTO\*

INTRODUCTION

It is widely accepted that the right to vote is “at the very foundation” of our democratic system.<sup>2</sup> It rests on the republican principle that the actions of the government must be based upon the consent of those governed.<sup>3</sup> This precious right should evolve to increase voters’ participation and include those who traditionally feel excluded from the process. Precisely, that has been the direction voting rights in America have taken during the past several decades. Racial, sexual, ethnic, and language barriers have been demolished over time. This has been done through constitutional amendments and through monumental legislation such as the Voting Rights Act of 1965.<sup>4</sup>

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1. This is an expanded and footnoted version of an address the author delivered at the *Voting 45 Years after the Voting Rights Act* Symposium held at the Saint Louis University School of Law in St. Louis, Missouri on March 26, 2010.

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2. Brenda Fathy Abdelall, *Not Enough of a Minority?: Arab Americans and the Language Assistance Provisions (Section 203) of the Voting Rights Act*, 38 U. MICH. J.L. REFORM 911, 914 (2005) (“As President Gerald R. Ford stated upon signing the minority language provisions into law, “[t]he right to vote is at the very foundation of our American system, and nothing must interfere with this very precious right.””).

3. James Thomas Tucker, *Tyranny of Judiciary: Judicial Dilution of Consent Under Section 2 of the Voting Rights Act*, 7 WM. & MARY BILL RTS. J. 443, 458 (1999) (“But most of all, the right to vote rests on the republican principle that the actions of government must be based upon the consent of the governed.”).

4. U.S. CONST. amend. XV, XIX; 42 U.S.C. § 1973 (2006).

As one of the most important and successful pieces of civil rights legislation of our time,<sup>5</sup> the Voting Rights Act has evolved to guarantee those who do not speak English access to the polls by providing language assistance in several forms.<sup>6</sup> Language accommodation could take the form of oral assistance at the voting center, the printing of ballots in languages other than English, multilingual orientation campaigns encouraging voting participation, and publicity about the availability of bilingual assistance.

Failure to provide such assistance, particularly in the form of bilingual ballots, which are considered the “cornerstone” for voting access to language minorities,<sup>7</sup> will have the direct effect of denying the right to vote to a member of a language group.<sup>8</sup>

Another consequence of not providing language assistance is that the margin for casting invalid votes increases while future voting participation decreases.<sup>9</sup> This precisely has been the problem of using Spanish-only ballots in Puerto Rico. The fact that law does not require language assistance for U.S. citizens who do not understand Spanish almost certainly has the effect of discouraging English monolinguals from participating in the local electoral processes.

Ironically, Puerto Ricans living in continental United States have benefited from the language minority provisions contained in the Voting Rights Act.<sup>10</sup>

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5. Pamela S. Karlan, *Voting Rights and the Third Reconstruction*, in *THE CONSTITUTION IN 2020* 159, 159 (Jack M. Balkin & Reva B. Siegel eds., 2009) (“At the signing ceremony for the Voting Rights Act of 1965, President Lyndon B. Johnson called the act ‘one of the most monumental laws in the entire history of American freedom.’”) (internal citation omitted); James Thomas Tucker, *The Politics of Persuasion: Passage of the Voting Rights Act Reauthorization Act of 2006*, 33 J. LEGIS. 205, 205 (2007) (“The Voting Rights Act is one of the most successful civil rights laws ever enacted . . . .”); Ellen Katz et al., *Documenting Discrimination in Voting: Judicial Findings Under Section 2 of the Voting Rights Act Since 1982*, 39 U. MICH. J.L. REFORM 643, 644 (2006) (The Voting Rights Act of 1965 . . . is one of the most remarkable and consequential pieces of congressional legislation ever enacted.”).

6. 42 U.S.C. § 1973b(9)(f)(4) (2006).

7. Glenn D. Magpantay, *Asian American Access to the Vote: The Language Assistance Provisions (Section 203) of the Voting Rights Act and Beyond*, 11 ASIAN L.J. 31, 38 (2004) (“Bilingual ballots are the cornerstones to making the vote accessible to language minorities.”).

8. Karlan, *supra* note 5, at 161 (“A citizen who is handed an official ballot written in a language she does not understand is effectively denied the right to vote.”).

9. Jocelyn Friedrichs Benson, *¡Su Voto es su Voz! Incorporating Voters of Limited English Proficiency into American Democracy*, 48 B.C. L. REV. 251, 272 (2007) (“[S]tudies illustrate that when accommodations (in the form of translated ballots and election materials) are *not* available to LEP voters, participation decreases and voter error increases.”).

10. See *Katzenbach v. Morgan*, 384 U.S. 641, 652 (1966) (“Section 4(e) may be viewed as a measure to secure for the Puerto Rican community residing in New York nondiscriminatory treatment by government—both in the imposition of voting qualifications and the provision or administration of governmental services, such as public schools, public housing and law enforcement. Section 4(e) may be readily seen as ‘plainly adapted’ to furthering these aims of the

Thus, Puerto Ricans cannot be discriminated against in New York, but absurdly can discriminate against monolingual English speakers on the island of Puerto Rico.

Allow me to present a hypothetical situation to illustrate the problem that is addressed in this work. Let us say that upon retirement you decide to move to a tropical place. Considering that no passport or visa is required, you choose the Caribbean island of Puerto Rico. Moreover, because Puerto Rico is a territory of the United States you presume your rights, as an American citizen, will not be affected. This seems like the ideal place for retreat.

Finally, you arrive in Puerto Rico and settle in the town of Rincón, the surfing capital of the Caribbean. Weeks later, you decide to register to vote in the next election. After an exhausting search for the nearest voting registration office, you arrive but surprisingly none of the officials speak English. You argue for several minutes that since Puerto Rico is part of the United States and because you are a United States Citizen, you are therefore entitled to some sort of language assistance during the voting registration process. The officer responds—in Spanish—that he is not required by law to render his services in any language other than Spanish. Fortunately a bilingual individual, waiting for his turn after minutes of watching the theatrical scene, decides to give you a hand. With his assistance you complete the necessary paperwork and get your photo taken. After your voter identification card containing all the information (in Spanish) is handed to you, you are finally registered to vote in the Commonwealth of Puerto Rico.

The ninth inning of the Puerto Rican national pastime arrives—Election Day, that is. The entire island shuts down. In recent elections, approximately eighty percent<sup>11</sup> of the registered voting population embarks on a pilgrimage to the polls to ritually exercise their holy duty of voting. You do the same but with less veneration than the local voters. At your assigned voting center, after patiently waiting for your turn you walk into the room where an officer makes

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Equal Protection Clause. The practical effect of § 4(e) is to prohibit New York from denying the right to vote to large segments of its Puerto Rican community.”). *See also* *Arroyo v. Tucker*, 372 F. Supp. 764 (E.D. Pa. 1974) (granting relief in a class action suit brought on behalf of Puerto Ricans, who had difficulty reading and understanding English, seeking judicial mandate for the provision of bilingual registration and electoral materials in all areas of Philadelphia where more than five percent of the population was of Puerto Rican birth or extraction); *Puerto Rican Org. for Political Action v. Kusper*, 350 F. Supp. 606 (N.D. Ill. 1972) (granting relief to plaintiff in a class action seeking bilingual election materials on behalf of Spanish-speaking voters pursuant to the Voting Rights Act); *Torres v. Sachs*, 381 F. Supp. 309 (S.D.N.Y. 1974) (holding that New York City’s English-only election system constituted a proscribed “condition on the plaintiffs’ right to vote” based on their ability to “read, write, understand, or interpret any matter in the English language”).

11. Manuel Alvarez-Rivera, *The sharp decline of Puerto Rico’s voter turnout rate*, ELECTORAL PANORAMA (Jan. 7, 2009), <http://electionresources.org/panorama>.

sure you are not wearing any political message or insignia, as required by local law.<sup>12</sup> At the table, another official asks for your voting identification card and checks that you are included on the official voting list. Bingo! Your name appears on the list and after you sign on the column next to it, you are handed three official ballots and directed to the flimsy compartments where voters cast their ballots in secrecy. Once inside a voting cabin and ready to eagerly cast your vote, you are astonished to find that the three ballots are entirely printed in Spanish, including the enclosed voting instructions. At this point you have the choice of asking the officials for assistance, hoping one of them is bilingual and can assist you—but remember, they are not required to do so. Or, you could simply attempt casting your vote, praying it is made correctly.

The inevitable question raised by this situation is whether it is legal to deny language assistance to English speaking voters. More specifically, is denying language assistance to English monolinguals possible considering that Puerto Rico is a territory of the United States of America? Are you protected by the Voting Rights Act or perhaps any other federal law? Is this democratic at all? Is your right to vote being infringed?

This article focuses on the discussion of minority language groups' voting rights from the unique perspective of the U.S. territory of Puerto Rico, where English-speakers constitute the largest language minority group.<sup>13</sup> Part I provides a brief historical background on the political relationship between the United States and Puerto Rico. Part II examines in a more detailed manner the language issues affecting the Island and concludes that Spanish is the main language used. Part II also discusses the data available about the English monolingual population residing in Puerto Rico and how their voting rights are affected, despite the fact that they are citizens of the United States. Part III examines the election legal framework of Puerto Rico including a brief historical background of its electoral process and the evolution of voting rights on the island. Part IV turns to the discussion of the decision of a federal court where a challenge on the constitutionality of Spanish-only ballots was filed. Part V focuses on the amendments made by the Legislature of Puerto Rico in an attempt to comply with the judicial decision that declared unconstitutional the use of Spanish-only ballots. To conclude, some final thoughts and recommendations for a potential amendment by Congress to the Voting Rights Act are provided.

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12. No political propaganda may be done within 100 meters from a voting center on Election Day. P.R. LAWS ANN. tit. 16, § 3353 (2008). *See also* Comisión Estatal de Elecciones, Reglamento para el Establecimiento de Locales de Propaganda [Regulation for the Establishment of Locals for Propaganda], May 21, 2007, <http://www.ceepur.org/sobreCee/leyElectoral/reglamentos/pdf/ReglamentoEstablecimientodeLocalesdePropaganda.pdf>.

13. U.S. CENSUS BUREAU, TABLE DP-2. PROFILE OF SELECTED SOCIAL CHARACTERISTICS: 2000, available at <http://censtats.census.gov/data/PR/04072.pdf>.

## I. U.S.-P.R. RELATIONS: A BRIEF BACKGROUND

The Caribbean island of Puerto Rico was first colonized by the Kingdom of Spain in 1493.<sup>14</sup> On July 25, 1898, during the Spanish-American War, the United States invaded Puerto Rico with little resistance from Spanish troops.<sup>15</sup> Spain officially ceded the island to the United States on December 10, 1898 after signing the Treaty of Paris, which put an end to the Spanish-American war.<sup>16</sup> Since then, Puerto Rico has been a territory<sup>17</sup> of the United States subject to Congress's plenary powers under the Territorial Clause of the Constitution.<sup>18</sup> A military government ruled Puerto Rico until 1900, when the Foraker Act was enacted to provide for a civil government.<sup>19</sup>

By 1901 the United States had acquired the islands of Hawaii, Puerto Rico, Guam, Cuba, and the Philippines.<sup>20</sup> Shortly after, a debate emerged on how these possessions should be governed because nothing was said about such a government in the Constitution.<sup>21</sup> As a result of this debate, a series of cases reached the U.S. Supreme Court which became known as the *Insular Cases*.<sup>22</sup>

14. For a brief history of Puerto Rico under Spanish rule, see Johnny Smith, *Commonwealth Status: A Good Deal for Puerto Rico?*, 10 HARV. LATINO L. REV. 263, 264–68 (2007).

15. *Id.* at 267–68.

16. See Treaty of Paris, U.S.-Spain, art. IX, Dec. 10, 1898, 30 Stat. 1754, 1759.

17. For an in depth discussion of the United States and Puerto Rican relations, see generally CESAR J. AYALA & RAFAEL BERNABE, *PUERTO RICO IN THE AMERICAN CENTURY: A HISTORY SINCE 1898* 74–94 (2007) (providing a well-rounded overview of Puerto Rico's political history under the U.S. flag); JOSÉ A. CABRANES, *CITIZENSHIP AND THE AMERICAN EMPIRE: NOTES ON LEGISLATIVE HISTORY OF THE UNITED STATES CITIZENSHIP OF PUERTO RICANS* (1979); JOSÉ TRIÁS MONGE, *PUERTO RICO: THE TRIALS OF THE OLDEST COLONY IN THE WORLD* (1997); JUAN R. TORRUELLA, *THE SUPREME COURT AND PUERTO RICO: THE DOCTRINE OF SEPARATE AND UNEQUAL* (1985); Jaime B. Fuster, *The Origins of the Doctrine of Territorial Incorporation*, 43 REV. JUR. U.P.R. 259 (1974).

18. U.S. CONST. art. IV, § 3, cl. 2 (“The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . .”).

19. See Foraker Act, ch. 191, 31 Stat. 77 (1900) (codified as amended in scattered sections of 48 U.S.C.) (providing for the enactment of a civil government, including a limited elected legislature and an appointed supreme court and governor).

20. BARTHOLOMEW H. SPARROW, *THE INSULAR CASES AND THE EMERGENCE OF AMERICAN EMPIRE* 3–4 (Peter Charles Hoffer & N.E.H. Hall eds., 2006).

21. See generally Christophers C. Langdell, *The Status of Our New Territories*, 12 HARV. L. REV. 365 (1899); Simeon E. Baldwin, *The Constitutional Questions Incident to the Acquisition and Government by the United States of Island Territory*, 12 HARV. L. REV. 393 (1899); Carman F. Randolph, *Constitutional Aspects of Annexation*, 12 HARV. L. REV. 291 (1899); James Bradley Thayer, *Our New Possessions*, 12 HARV. L. REV. 464 (1899). *But see* Abbott Lawrence Lowell, *The Status of Our New Possessions-A Third View*, 13 HARV. L. REV. 155 (1899) (criticizing the four previous articles).

22. *De Lima v. Bidwell*, 182 U.S. 1 (1901); *Goetze v. United States*, 182 U.S. 221 (1901); *Dooley v. United States*, 182 U.S. 222 (1901); *Armstrong v. United States*, 182 U.S. 243 (1901); *Downes v. Bidwell*, 182 U.S. 244 (1901); *Huus v. New York and Porto Rico Steamship Co.*, 182

In essence, the Supreme Court construed the Territorial Clause and developed the territorial incorporation doctrine which provides that incorporated territories—those territories that will eventually become states—are to be guaranteed the same constitutional rights as those of the states.<sup>23</sup> On the other hand, the inhabitants of unincorporated territories, those that are not en route to becoming a state, are guaranteed only fundamental rights and, therefore, the Constitution is not applicable *ex proprio vigore*.<sup>24</sup> In short, Puerto Rico was declared an unincorporated territory subject to Congressional authority under the Territorial Clause.<sup>25</sup>

In 1917, Congress passed the Jones Act which among other things made Puerto Ricans U.S. citizens at birth.<sup>26</sup> Decades later in 1952, under Congressional authority,<sup>27</sup> a Constitutional Convention was assembled with the purpose of drafting what would become the Constitution of the Commonwealth of Puerto Rico.<sup>28</sup> After months of intense debates regarding the content of the document, a draft was presented to the people at a referendum for its approval.<sup>29</sup> Subsequently, Congress ratified it and the

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U.S. 392 (1901); *Dooley v. United States*, 183 U.S. 151 (1901); *Fourteen Diamond Rings v. United States*, 183 U.S. 176 (1901); *Crossman v. United States*, 182 U.S. 221 (1901).

23. *See generally*, SPARROW, *supra* note 20.

24. For a discussion on the “unincorporated territory” doctrine, *see generally id.*; Efrén Rivera Ramos, *The Legal Construction of American Colonialism: The Insular Cases, 1901-1922*, 65 REV. JUR. U.P.R. 225 (1996); Ediberto Román, *The Alien-Citizen Paradox and Other Consequences of U.S. Colonialism*, 26 FLA. ST. U. L. REV. 1 (1998); Carlos R. Soltero, *The Supreme Court Should Overrule the Territorial Incorporation Doctrine and End One Hundred Years of Judicially Condoned Colonialism*, 22 CHICANO-LATINO L. REV. 1 (2001); Juan R. Torruella, *The Insular Cases: The Establishment of a Regime of Political Apartheid*, 29 U. PA. J. INT’L L. 283 (2007); Gabriel A. Terasa, *The United States, Puerto Rico and the Territorial Incorporation Doctrine: Reaching a Century of Constitutional Authoritarianism*, 31 J. MARSHALL L. REV. 55 (1997).

25. SPARROW, *supra* note 20, at 215.

26. *See* Jones Act of 1917, ch. 145, sec. 5, 39 Stat. 951, 953, *amended by* Puerto Rican Federal Relations Act, Pub. L. No. 81-600, ch. 446, 64 Stat. 319 (1950) (conferring U.S. citizenship on all citizens of Puerto Rico).

27. Puerto Rican Federal Relations Act, Pub. L. No. 81-600, ch. 446, 64 Stat. 319 (1950) (providing “for the organization of a constitutional government by the people of Puerto Rico”).

28. *See* Diario de Sesiones de la Convención Constituyente de Puerto Rico [Diary of Sessions of the Constitutional Convention of Puerto Rico] (Equity Publishing, 1961) (official record of the debates held in the Constitutional Convention to draft the Constitution of Puerto Rico from September 17, 1951 until February 6, 1952).

29. Joint Resolution of July 3, 1952, Pub. L. No. 82-447, 66 Stat. 327; *see also*, El Archivo de las Elecciones en Puerto Rico: Escrutinio del Referendum del 3 de Marzo de 1952 Aceptacion o Rechazo de la Consituicion Aprobada por la Convencion Constituyente [Archives of the Elections in Puerto Rico: Scrutiny of the Referendum of March 3 1952 Acceptance or Rejection of the Constitution Approved by the Constitutional Convention], <http://electionspuertorico.org/archivo/proceso.constituyente/1952.html> (last visited Feb. 23, 2011) (showing the votes tallied by precinct in the referendum).

*Commonwealth of Puerto Rico* was officially established.<sup>30</sup> This document contains a Bill of Rights and organizes the local government in a manner similar to the continental states.<sup>31</sup> Consequently, Puerto Rico is structured and functions similarly to the other fifty states of the Union. Perhaps the most notable differences are that residents of the island do not vote directly in the election of the President<sup>32</sup> and do not have full Congressional representation.<sup>33</sup> Indirectly, residents of Puerto Rico participate in the election of the President through primaries only if they are necessary.<sup>34</sup> With respect to Congressional representation, Puerto Rico's sole representative, the Resident Commissioner, has no vote and very limited participation on the floor of the House of Representatives.<sup>35</sup> Curiously, he is the only member of Congress who is elected for a four-year term.<sup>36</sup>

Aside from these two main differences—citizens' indirect role in presidential elections and lack of house representation—the governmental structure of Puerto Rico is very similar to that of the other states. It constitutes a federal judicial district and therefore, has a U.S. District Court which is part of the U.S. Court of Appeals for the First Circuit based in Boston, Massachusetts.<sup>37</sup> Furthermore, the territory of Puerto Rico is considered a state for various purposes including diversity jurisdiction in federal courts.<sup>38</sup> The federal building located in the city of San Juan houses most, if not all, federal agencies for the Commonwealth. Also, there is free movement of residents

30. Joint Resolution of July 3, 1952, *supra* note 29.

31. P.R. CONST. art. 2; *see generally* Jones Act of 1917, *supra* note 26.

32. *See generally* GREGORIO IGARTÚA DE LA ROSA, U.S. DEMOCRACY FOR PUERTO RICO: A DENIAL OF VOTING RIGHTS IN PRESIDENTIAL ELECTIONS TO OVER 3.5 MILLION AMERICAN CITIZENS (1996); Eduardo Guzmán, *Igartúa De la Rosa v. United States: The Right of the United States Citizens of Puerto Rico to Vote for the President and the Need to Re-Evaluate America's Territorial Policy*, 4 U. PA. J. CONST. L. 141 (2001); José Capó Iriarte, *Voto Presidencial ¿Puertorriqueños Excluidos de la Democracia?* [*Presidential Vote: Are Puerto Ricans Excluded from Democracy?*], 39 REV. DER. P.R. 389 (2000).

33. *See generally* Jamin Raskin, *A Right-to-Vote Amendment for the U.S. Constitution: Confronting America's Structural Democracy Deficit*, 3 ELECTION L.J. 559, 565–67 (2004); Luis Fuentes-Rohwer, *The Land that Democracy Theory Forgot*, 83 IND. L.J. 1525 (2008); José Coleman Tió, *Six Puerto Rican Congressmen Go to Washington*, 116 YALE L.J. 1389 (2007).

34. *See generally* P.R. LAWS ANN. tit.16, §§ 1321–1352 (2008).

35. Foraker Act, *supra* note 19; *see also* William R. Tansill, *The Resident Commissioner to the United States from Puerto Rico: An Historical Perspective*, 47 REV. JUR. U.P.R. 68, 68 (1978).

36. Jones Act of 1917, *supra* note 26, at sec. 36 (“[T]he qualified electors of Puerto Rico shall choose a Resident Commissioner to the United States, whose term of office shall be four years from the fourth of March following such general election . . .”).

37. Jones Act of 1917, *supra* note 26, at sec. 40–49.

38. Luis Fuentes-Rohwer, *Bringing Democracy to Puerto Rico: A Rejoinder*, 11 HARV. LAT. L. REV. 157, 160–61 (2008) (stating that Puerto Rico is considered a state for purpose of diversity jurisdiction).

from Puerto Rico to the other states and territories without the need of a passport or issuance of visas.<sup>39</sup>

## II. LANGUAGE AND DEMOGRAPHICS IN PUERTO RICO

The Commonwealth of Puerto Rico has been an official bilingual jurisdiction since 1902.<sup>40</sup> In that year, the use of English and Spanish languages in conducting official business with the government became permissible.<sup>41</sup> This bilingual provision was in effect until 1991 when Governor Rafael Hernández Colón controversially<sup>42</sup> repealed it declaring Spanish as the only official language of Puerto Rico.<sup>43</sup> Nevertheless, when a pro-statehood administration returned to power in 1993, its first legislative action was to return the island to an official bilingual jurisdiction.<sup>44</sup> Thus, from a theory perspective, Puerto Rico is currently a bilingual jurisdiction

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39. *Needing a passport to enter the United States from U.S. territories*, U.S. CUSTOMS AND BORDER PATROL INFO CENTER (Feb. 1, 2007, updated May 10, 2010), [https://help.cbp.gov/app/answers/detail/a\\_id/980](https://help.cbp.gov/app/answers/detail/a_id/980).

40. José Julián Álvarez-González, *Law, Language and Statehood: The Role of English in the Great State of Puerto Rico*, 17 *LAW & INEQ.* 359, 361–62 (1999) (“In a speech at the ‘Foreign in a Domestic Sense Conference,’ held at Yale Law School on March 27–28, 1998, the governor of Puerto Rico, Dr. Pedro J. Rosselló, reminded the audience that since 1902 both Spanish and English have been official languages of government in Puerto Rico, predating the declaration of English as an official language in any of the states. That fact, however, does not respond to a sociological reality. Rather, it underscores the peculiar nature of Puerto Rican colonial politics.”) (citations omitted).

41. *Id.* at 365 & n.29 (“In all the departments of the Commonwealth government and in all the courts of this island, and in all public offices the English language and the Spanish language shall be used indiscriminately; and, when necessary, translations and oral interpretations shall be made from one language to the other so that all parties interested may understand any proceedings or communications made therein.”) (citations omitted).

42. FERNANDO BAYRÓN TORO, *HISTORIA DE LAS ELECCIONES Y LOS PARTIDOS POLÍTICOS DE PUERTO RICO [HISTORY OF ELECTIONS AND POLITICAL PARTIES OF PUERTO RICO]* 379 (2008) (stating that two out of every three Puerto Ricans were against the Spanish only law, and thousands of Puerto Ricans marched to the executive mansion to express their opposition of said law which was perceived as an act of separation from the United States. Nevertheless, the Governor received the Prince of Asturias Award in Spain for defending the Spanish language).

43. P.R. LAWS ANN. tit. 1 § 56 (Supp. 1993) (repealed) (“It is hereby declared and established that Spanish shall be the official language of Puerto Rico to be used in all its departments, municipalities or other political subdivisions, agencies, offices and government dependencies of the Executive, Legislative and Judiciary Branches of the Commonwealth of Puerto Rico.”). *See also* Álvarez-González, *supra* note 40, at 362–66.

44. P.R. LAWS ANN. tit. 1 § 59 (1999) (“Spanish and English are established as official languages of the Government of Puerto Rico. Both languages may be used, indistinctively, in all departments, municipalities or other political subdivisions, agencies, public corporations, offices and government dependencies of the Executive, Legislative and Judiciary Branches of the Commonwealth of Puerto Rico, pursuant to the provisions of this Act or by that which is provided by a special law.”). *See also* Álvarez-González, *supra* note 40, at 367 n.40.

where Spanish and English are the official languages. This, however, does not mean that ordinary citizens are fully bilingual in the Spanish and English languages. In fact, after more than a century of U.S. authority over the island, the vast majority of its inhabitants are Spanish monolingual.<sup>45</sup>

The establishment of Spanish and English as official languages has created unnecessary burdens that affect the daily lives of ordinary citizens. Rather than providing for all official business to be consistently available in both languages, it has actually made certain services available only in English and others solely in Spanish. For example, instead of providing parties with the opportunity to choose the language to be used in judicial proceedings, Spanish is the only language permitted in state courts<sup>46</sup> while English is the sole language used at the U.S. District Court for the District of Puerto Rico.<sup>47</sup> Although all the documents filed with the federal court must be in English and the proceedings are held in English, when judges and attorneys informally confer in the judge's chambers, Spanish is normally used unless someone present does not speak Spanish.<sup>48</sup>

Legislative procedures as well as state agencies' services are conducted solely in Spanish.<sup>49</sup> Generally, business at federal agencies in Puerto Rico is conducted in Spanish with the exception of formal proceedings.<sup>50</sup> With respect

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45. U.S. CENSUS BUREAU, PROFILE OF SELECTED SOCIAL CHARACTERISTICS: 2000 Table DP-2, *supra* note 13.

46. P.R. R. CIV. P. 8.5; *People v. Superior Court of Puerto Rico*, 92 P.R. 580, 590 (1965). The United States Court of Appeals for the First Circuit later held that a criminal trial in Spanish, with a right to translation services where the accused does not speak that language, satisfies due process. *See Jackson v. Cintrón García*, 665 F.2d 395, 396 (1st Cir. 1981).

47. 48 U.S.C. § 864 (2006) ("All pleadings and proceedings in the United States District Court for the District of Puerto Rico shall be conducted in the English language."); P.R. DIST. CT. R. 5(g) ("All documents not in the English language which are presented or filed, whether as evidence or otherwise, must be accompanied by a certified translation into English prepared by an interpreter certified by the Administrative Office of the United States Courts. Certification by a federally-certified interpreter may be waived upon stipulation by all parties."); P.R. DIST. CT. R. 43 ("All proceedings in this Court shall be conducted in the English language.").

48. Álvarez-González, *supra* note 40, at 374 (citing Luis Muñoz Argüelles, *The Status of Languages in Puerto Rico*, in CARMELO DELGADO CINTRON, EL DEBATE LEGISLATIVO SOBRE LAS LEYES DEL IDIOMA EN PUERTO RICO [THE LEGISLATIVE DEBATE ABOUT LANGUAGE LAWS IN PUERTO RICO] 69–82 (1994)) ("Even in this theoretically English-only setting, judges and attorneys will often go into chambers to confer in Spanish.").

49. *Id.* at 369–70.

50. *Id.* at 373 ("All formal proceedings in federal agencies in Puerto Rico are conducted in English, but Spanish translations are invariably a fact of life. All forms have an English version, but in most agencies there are Spanish versions as well. Informal dealings with federal employees in Puerto Rico, however, are usually conducted in Spanish, as the bulk of federal employees on the Island are native Puerto Ricans whose vernacular is Spanish. Spanish is most prevalent among the federal agencies that serve the general public, such as the Postal Service, the Department of Labor, the Social Security Administration, the Internal Revenue Service, the

to education, English was the official language of instruction across the island until the late 1940s.<sup>51</sup> Since then, public education has been primarily conducted in Spanish with the exception of English-as-a-second-language courses.<sup>52</sup> At private schools, however, English is often the primary language of instruction.<sup>53</sup> There are also a very few bilingual public schools where an equal amount of class time is provided in each language.<sup>54</sup>

Although some contend that “[l]anguage is no longer the sole determinant of a Puerto Rican national identity”<sup>55</sup> and want to portray the island as a multilingual society,<sup>56</sup> the truth is Puerto Rico is “functionally monolingual”<sup>57</sup> and, consequently, Spanish—not English—is the main spoken language.<sup>58</sup>

Due to Puerto Rico’s political nexus with the United States, the migration of fellow citizens from other States is likely to increase. Despite such likelihood of increase, the local government’s unwillingness to provide language assistance has resulted in limiting English monolinguals access to state courts, state government services, and naturally to the polls, resulting in a clear disfranchisement of U.S. citizens in their own country. But what is the magnitude of this damage? How big is the English monolingual population of Puerto Rico?

Immigration and Naturalization Service, the Small Business Administration, the Farmers Home Administration, the Department of Housing and Urban Development, the National Labor Relations Board, the Customs Service and the Veterans Administration.”).

51. Rodolfo O. de la Garza & Louis DeSipio, *Save the Baby, Change the Bathwater, and Scrub the Tub: Latino Electoral Participation After Seventeen Years of Voting Rights Act Coverage*, 71 TEX. L. REV. 1479, 1493 (1993) (“English was the official language of instruction in Puerto Rican schools until 1946.”). See also Katherine Culliton-González, *Time to Revive Puerto Rican Voting Rights*, 19 BERKELEY LA RAZA L.J. 27, 30 (“In 1947, the first elected Governor of Puerto Rico appointed a new Commissioner of Education. He established Spanish as the language of instruction in Puerto Rican schools, with English to be taught as a language course.”).

52. Álvarez-González, *supra* note 40, at 370–71; Culliton-González, *supra* note 51, at 30 (stating that English was to be taught as a language course).

53. Luis Muñoz Argüelles, *The Status of Languages in Puerto Rico*, in CARMELO DELGADO CINTRON, *supra* note 48, at 76.

54. Álvarez-González, *supra* note 40, at 372.

55. *Diffenderfer v. Gomez-Colon*, 587 F. Supp. 2d 338, 348 (D.P.R. 2008), *vacated as moot*, 587 F.3d 445 (1st Cir. 2009).

56. See generally JORGE DUANY, *THE PUERTO RICAN NATION ON THE MOVE: IDENTITIES ON THE ISLAND AND IN THE UNITED STATES* (2001); JUAN FLORES, *DIVIDED BORDERS: ESSAYS ON PUERTO RICAN IDENTITY* 62, 84, 99 (1993).

57. The term “functionally monolingual” was coined by Professor José Julián Álvarez-González. See Álvarez-González, *supra* note 40, at 379 (“[A]s I have shown, Puerto Rico is a ‘functionally monolingual’ jurisdiction, and that the only language is Spanish, not English.”).

58. See generally Álvarez-González, *supra* note 40. See also Lisa Napoli, *The Puerto Rican Independentistas: Combatants in the Fight for Self-Determination and the Right to Prisoner of War Status*, 4 CARDOZO J. INT’L & COMP. L. 131, 144 (1996) (“Puerto Rico has a racial, religious, linguistic, and territorial identity distinguishable from that of the metropole.”).

A. *English Monolingual Speakers in Puerto Rico*

According to the 2000 U.S. census report, the total population of Puerto Rico consisted of 3,808,610 individuals, of which 3,515,228 are over the age of 5.<sup>59</sup> Out of the total population of persons five years of age and older, 14.4% speak only English at home.<sup>60</sup> That equals 506,661 persons who speak only English in the home.<sup>61</sup> This amount includes those who are under 18 years old and therefore, are not eligible to vote. Considering that 71.3% of the total population is at least 18,<sup>62</sup> if this percentage is applied to the amount of non-Spanish speakers, which as mentioned earlier is 506,661, we could infer there are approximately 361,250 English monolingual eligible voters. In other words, if language assistance or bilingual materials are unavailable to English monolinguals, the voting rights of 10.27% percent of the voting-age population of Puerto Rico are abridged (see Chart 1).

It is very likely that the English monolingual population has increased since 2003, when the U.S. Navy ceased using the naval gunfire range on the island-town of Vieques.<sup>63</sup> Beginning in 1941 the U.S. Navy used two thirds of Vieques' territory as a firing range for naval vessels.<sup>64</sup> During those years, the population of Vieques diminished, as did its potential economic development.<sup>65</sup> As a direct consequence of the military maneuvers, the islanders' health and wildlife environment were significantly affected.<sup>66</sup> In 1999, the accidental death of a security guard triggered the actions of various

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59. U.S. CENSUS BUREAU, TABLE DP-1. PROFILE OF GENERAL DEMOGRAPHIC CHARACTERISTICS: 2000, *available at* <http://censtats.census.gov/data/PR/04072.pdf>.

60. U.S. CENSUS BUREAU, TABLE DP-2. PROFILE OF SELECTED SOCIAL CHARACTERISTICS: 2000, *supra* note 13. Language spoken at home is defined as

The population who speaks a language other than English includes only those who sometimes or always speak a language other than English at home. It does not include those who speak a language other than English only at school or work, or those who were limited to only a few expressions or slang of the other language. Most people who speak another language at home also speak English.

*See* U.S. CENSUS BUREAU, DEMOGRAPHIC PROFILE: 2000: 2000 CENSUS OF POPULATION AND HOUSING, DEMOGRAPHIC PROFILE: TECHNICAL DOCUMENTATION 5-13 (2002), *available at* <http://www.census.gov/prod/cen2000/doc/ProfileTD.pdf>.

61. U.S. CENSUS BUREAU, TABLE DP-2. PROFILE OF SELECTED SOCIAL CHARACTERISTICS: 2000, *supra* note 13.

62. U.S. CENSUS BUREAU, TABLE DP-1, PROFILE OF GENERAL DEMOGRAPHIC CHARACTERISTICS: 2000, *supra* note 59.

63. Erika Fontanez Torres, *Law, Extralegality, and Space: Legal Pluralism and Landscape from Columbia to Puerto Rico*, 40 U. MIAMI INTER-AM. L. REV. 285, 292 (2009).

64. *Id.*

65. Natalie Barefoot-Watambwa, *Who is Encroaching Whom? The Balance Between Our Naval Security Needs and the Environment: The 2004 RRPI Provisions as a Response to Encroachment Concerns*, 59 U. MIAMI L. REV. 577, 594 (2005).

66. *See* BAYRÓN TORO, *supra* note 42, at 421.

civic and political organizations to demand the federal government immediately cease and desist of the military exercises on Vieques.<sup>67</sup> The actions resulted in President Bush ordering the Department of Defense to cease all military operations effective May 2003.<sup>68</sup> The departure of the naval forces resulted in the development of luxurious residential projects that have been mainly acquired by fellow citizens from the mainland.<sup>69</sup>

Moreover, the English monolingual population will likely continue to increase due to the closing of the nearby Roosevelt Roads Naval Station located in the town of Ceiba, on the eastern tip of Puerto Rico.<sup>70</sup> As in Vieques, on the area formerly occupied by the U.S. Navy several residential projects aimed at residents from other states are being planned.<sup>71</sup> These residential projects in Vieques and Ceiba have almost certainly had the direct effect of increasing the English monolingual community of Puerto Rico beyond what the 2000 census data reflects.

As discussed, it is evident that the English monolingual community in Puerto Rico constitutes a significant part of the island's total population. Their participation in prior elections could have played a decisive role—for example in 2004 the candidate for the position of Governor won with less than 0.5% of the vote.<sup>72</sup> However, most English monolinguals were likely not even registered voters because they did not understand Spanish and were not well informed of the process. Even if they registered to vote, casting their ballots would have also required some language assistance due to the fact that historically, ballots in Puerto Rico are printed only in Spanish and no voting instructions are available in English.<sup>73</sup>

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67. Barefoot-Watambwa, *supra* note 65, at 595–96.

68. David E. Sanger & Christopher Marquis, *U.S. Said to Plan Halt to Exercises on Vieques Island*, N.Y. TIMES, June 14, 2001, at A1.

69. See Carmelo Ruiz Marrero, *The Second Invasion of Vieques*, FELLOWSHIP OF RECONCILIATION (August 2003), [http://forusa.org/programs/puertorico/pr\\_update\\_0803-4.html](http://forusa.org/programs/puertorico/pr_update_0803-4.html).

70. Department of Defense Appropriations Act, 2004, Pub. L. No. 108-87, 117 Stat. 852 (2003).

71. *What's for Sale*, ROOSEVELT ROADS, <http://www.roosey-roads.com/whats-for-sale/> (last visited Feb. 23, 2011).

72. Comisión Estatal de Elecciones, Elecciones Recuento 2004, [State Election Commission, 2004 Election Results], <http://cee.ceepur.org/recuento/principal.aspx?Nivel=P1> (last visited Feb. 23, 2011) (Anibal Acevedo Vilá of Popular Democratic Party with 48.40%; Pedro Rosselló González of New Progressive Party with 48.22%; Rubén Berrios Martínez of Puerto Rican Independence Party with 2.74%; others with 0.64%).

73. *Diffenderfer v. Gomez-Colon*, 587 F. Supp. 2d 338, 341 (D.P.R. 2008), *vacated as moot*, 587 F.3d 445 (1st Cir. 2009).

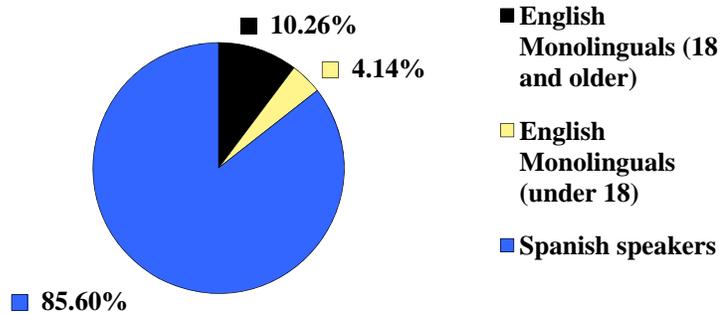


Chart 1: Approximate English Monolingual Population<sup>74</sup>

### III. PUERTO RICO ELECTION LEGAL FRAMEWORK

#### A. *Historical Background on the Election Process*

Elections in Puerto Rico were first held under Spanish rule in 1809, after more than three centuries of complete Spanish colonial domination based on “absolutismo real [royal absolutism].”<sup>75</sup> Since the United States invasion of Puerto Rico in July 1898, during the Spanish-American War, all subsequent elections, referenda, plebiscites, and similar processes have been conducted in Spanish,<sup>76</sup> except on three relatively recent instances.

The New Progressive Party, which supports full integration of Puerto Rico as the 51st state of the Union, partially conducted its 2003<sup>77</sup> and 2008<sup>78</sup>

74. See *supra* text accompanying notes 57–60.

75. BAYRÓN TORO, *supra* note 42, at 5.

76. *Diffenderfer*, 587 F. Supp. 2d at 348. The first elections under U.S. rule were to elect mayors and were held from October 26, 1899 to February 5, 1900. BAYRÓN TORO, *supra* note 42, at 143. The first general elections under U.S. rule were held on November 6, 1900, and were to elect a Puerto Rico sole representative for Congress, the Resident Commissioner, and members of the state legislature, then named the House of Delegates. *Id.* at 145–46. The governor of Puerto Rico was a presidential appointee until 1948 when the islanders were permitted to vote for candidate for said position and therefore elected Luis Muñoz Marín who remained in power until 1964. *Id.* at 240.

77. See Comisión Estatal de Elecciones, Primarias 2003 ¿Como Votar? [State Election Commission, Primaries 2003: How Will You Vote?], [http://www.ceepur.org/AvisosPrensa/Debes\\_SaberPNP.pdf](http://www.ceepur.org/AvisosPrensa/Debes_SaberPNP.pdf). (instructing the voter on how to cast a vote, and noting that the instructions are completely in Spanish but that the ballot models included are bilingual).

primaries in both Spanish and English. These primaries were “partially bilingual” because although ballots were printed in both languages,<sup>79</sup> instructional materials as well as the regulation enacted were printed only in Spanish.<sup>80</sup>

The third time bilingual material was used in Puerto Rico was during the 2008 Democratic presidential primary held on July 1 of that year. This was also a partially bilingual election. Although the ballots and information about the procedure for requesting an absentee ballot were bilingual,<sup>81</sup> the regulation enacted to govern this presidential primary was enacted only in Spanish.<sup>82</sup> In the author’s experience, media advertisements were generally broadcast in Spanish except on the few English-speaking radio stations.

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78. See Comisión Estatal de Elecciones, Papeletas Modelo [State Election Commission, Ballot Models], [http://www.ceepur.org/Primarias2008/papeletas/pnp/index\\_pnp.html](http://www.ceepur.org/Primarias2008/papeletas/pnp/index_pnp.html) (select “Ver Papeleta” hyperlink to download file).

79. *Diffenderfer*, 587 F. Supp. 2d at 341 n.3.

80. See, e.g., Comisión Estatal de Elecciones, Lo Que Debes Saber Sobre las Primarias de los Partidos Políticos [State Election Commission, What You Should Know about the Political Party Primaries], <http://www.ceepur.org/Primarias2008/pdf/LoQDbSaber.pdf>; Comisión Estatal de Elecciones, Proclama de Primarias de Partido 2008 [State Election Commission, 2008 Party Primary Proclamation] (Jan. 9, 2008), <http://www.ceepur.org/Primarias2008/pdf/PROCLAMA%20PRIMARIAS%202008.pdf>; Comisión Estatal de Elecciones, Sobre Aprobación de los e Reglamentos [State Election Commission, About the Approval of the Rules], <http://www.ceepur.org/Primarias2008/images/Reglamentos1.jpg>; Comisión Estatal de Elecciones, Si Te Reactivas, Quien Gana Eres Tú, <http://www.ceepur.org/Primarias2008/images/REACTIVAS.jpg>; Comisión Estatal de Elecciones, Si Te Inscribes, Quien Gana Eres Tú, <http://www.ceepur.org/Primarias2008/images/INCRIP.jpg>; Comisión Estatal de Elecciones, ¿Quiénes Necesitan Acudir a la Junta de Inscripción Permanente? [State Election Commission, Who Needs to Attend the Permanent Registration Meeting?], <http://www.ceepur.org/Primarias2008/pdf/QuienesNecJIP.pdf>; Comisión Estatal de Elecciones, Horario de Inscripción [State Election Commission, Registration Schedule], <http://www.ceepur.org/Primarias2008/pdf/HorarioJIP.pdf>.

81. See Comisión Estatal de Elecciones, Primarias Demócratas 2008 [State Elections Commission, 2008 Democratic Primary], <http://www.ceepur.org/Presidenciales08/index.html>, for bilingual ballot models. See Comisión Estatal de Elecciones, Primarias Demócratas 2008: Voto Ausente [State Elections Commission, 2008 Democratic Primary: Absent Vote], <http://www.ceepur.org/Presidenciales08/pdf/JAVA.pdf>, for the Spanish version. See Comisión Estatal de Elecciones, Primarias Demócratas 2008: Absentee Ballot [State Elections Commission, 2008 Democratic Primary: Absentee Ballot], <http://www.ceepur.org/Presidenciales08/pdf/JAVAEng.pdf>, for the English version.

82. See COMISIÓN ESTATAL DE ELECCIONES, REGLAMENTO PARA LOS PROCESOS DE PRIMARIAS PRESIDENCIALES [STATE ELECTIONS COMMISSION, REGULATION FOR THE PRESIDENTIAL PRIMARIES PROCESS] (2008), available at <http://www.ceepur.org/Presidenciales08/pdf/ReglamentoPartidoDemocrata.pdf>.

Although Puerto Rico has a relatively short voting rights history,<sup>83</sup> and these three partially-bilingual elections constitute a significant advancement, they are not enough to significantly increase electoral participation of English monolingual citizens.

*B. The Universal Suffrage Clause*

Voting was not an individual fundamental right until 1952 when the Constitution of the newly established Commonwealth of Puerto Rico was adopted.<sup>84</sup> Section 2 of the Puerto Rico Bill of Rights provides for the laws to guarantee the expression of the people's will through an equal, direct, secret and universal suffrage.<sup>85</sup> It adds that the laws shall protect the citizens against coercion on exercising their vote.<sup>86</sup> Since then, the right to vote in Puerto Rico has been considered a fundamental right protected by the Constitution of the Commonwealth. It has been the basic element of the Puerto Rican democratic system.<sup>87</sup>

Particularly, the *Universal Suffrage Clause* has been interpreted by the Supreme Court of Puerto Rico on various occasions, establishing that no one should have their right to vote abridged based on gender, religion, or race.<sup>88</sup> Nevertheless, suffrage in Puerto Rico has not been entirely "universal" because, as we have seen, English monolinguals have been indirectly excluded from effectively casting their ballots.

Currently, the Puerto Rico Electoral Act of 1977 governs electoral processes on the island.<sup>89</sup> This law created the State Elections Commission and made it responsible for planning, organizing, structuring, managing and for supervising all electoral processes held in Puerto Rico.<sup>90</sup> The Chief Elections Administrator, who is the Chairman, directs the Commission.<sup>91</sup> An alternate-

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83. For a brief discussion on the evolution of voting rights in Puerto Rico, see PEDRO MALAVET VEGA, *DERECHOS Y LIBERTADES CONSTITUCIONALES EN PUERTO RICO* [CONSTITUTIONAL RIGHTS AND LIBERTIES IN PUERTO RICO] 304–12 (2003).

84. See ESCUELA DE ADMINISTRACIÓN PÚBLICA, *LA NUEVA CONSTITUCIÓN DE PUERTO RICO* [SCHOOL OF PUBLIC ADMINISTRATION, THE NEW CONSTITUTION OF PUERTO RICO] 218–20 (1954) (stating that neither the Foraker Act of 1900 nor the Jones Act of 1917, which established a civil government in Puerto Rico, explicitly granted the inhabitants of the island the right to vote).

85. P.R. CONST. art. 2, § 2.

86. *Id.*

87. See *Sánchez Vilella v. ELA II*, 134 P.R. Dec. 503, 508 (1993).

88. See *id.* at 516; *Ortíz Angleró v. Barreto Pérez*, 110 P.R. Dec. 84, 92 (1980); *Partido Popular Democrático v. Barreto Pérez*, 111 P.R. Dec. 199 (1981).

89. Puerto Rico Electoral Act, P.R. LAWS ANN. tit. 16, §§ 3001–383 (as amended) (2008).

90. *Id.* at § 3004; *id.* at § 3007.

91. *Id.* at § 3004. Unlike other states, the chief administrator of elections in Puerto Rico is the Chairman of the SEC and not the Secretary of State; rather, the Secretary of State is actually the Lieutenant Governor. See Jocelyn Friedrichs Benson, *Democracy and the Secretary: The*

Chairman and three Vice Chairmen assist the Chief Elections Administrator.<sup>92</sup> The regulating authority, however, rests collectively on the representatives of each registered political party, known as Electoral Commissioners,<sup>93</sup> and all election rules and regulations must unanimously be agreed on by these commissioners.<sup>94</sup> Absent unanimous consent, the approving authority rests on the Chairman of the State Elections Commission.<sup>95</sup> This delegation of power to the Electoral Commissioners practically removes the regulating authority of election processes from an independent state entity, as is the State Elections Commission, to the political parties.

Puerto Rico's antiquated balloting system currently consists of simply making an "X" mark under the candidate's picture.<sup>96</sup> Although there have been supporters of implementing voting machines, the paper ballots system has not been replaced.<sup>97</sup>

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*Crucial Role of State Elections Administrators in Promoting Accuracy and Access Democracy*, 27 ST. LOUIS U. PUB. L. REV. 343, 344 & n.6 (2008) (discussing the role of the Secretary of State as the chief elections administrators); J. Kenneth Blackwell & Kenneth A. Klukowski, *The Other Voting Right: Protecting Every Citizen's Vote by Safeguarding the Integrity of the Ballot Box*, 28 YALE L. & POL'Y REV. 107, 108–09 (2009) ("Every state in the Union has a secretary of state who serves in the executive branch of government as the chief elections officer. Chief elections officers are charged with administering the law, both through promulgating rules, regulations, and directives, and also through making countless decisions on how to proceed when reality confounds theory.").

92. Puerto Rico Electoral Act, P.R. LAWS ANN. tit. 16 § 3005 (2008).

93. *Id.* at § 3012. For the 2008 general elections there were four Commissioners, each one representing one of the four registered political parties. ELECTIONS IN PUERTO RICO: NOV. 4, 2008 GEN. ELECTION CANDIDATES TO ELECTIVE OFFICES, <http://electionspuertorico.org/referencia/candidatos/2008/> (last visited Feb. 23, 2011). After the election, two parties (Puerto Rican Independence Party, and Puerto Ricans for Puerto Rico) did not get enough votes to maintain their status as an active political party and therefore lost representation at the SEC, leaving just two Commissioners (New Progressive Party, and Popular Democratic Party). Puerto Rico Electoral Act, P.R. LAWS ANN. tit. 16, § 3101 (2008); ELECTIONS IN PUERTO RICO: RESULTS LOOKUP – ISLANDWIDE TOTALS, <http://electionspuertorico.org/cgi-bin/municipalities.cgi?municipio=pr&2008=on> (last visited Feb. 23, 2011).

94. See *Puerto Rico Electoral Law (2008 Edition) – General Aspects*, COMISIÓN ESTATAL DE ELECCIONES [STATE ELECTIONS COMMISSION], <http://www.ceepur.org/electoral.law.html> (last visited Feb. 23, 2011).

95. *Id.*

96. *Diffenderfer v. Gomez-Colon*, 587 F. Supp. 2d 338, 351–53 (D.P.R. 2008), *vacated as moot*, 587 F.3d 445 (1st Cir. 2009).

97. BAYRÓN TORO, *supra* note 42, at 301 n.281; Peter S. A. Kryzanowski, *Informe Adicional Sobre el Proceso Electoral en Puerto Rico [Additional Report about the Electoral Process in Puerto Rico]*, in INFORME DE LA COMISIÓN ESPECIAL PARA LA REVISIÓN DEL PROCESO ELECTORAL DE PUERTO RICO [REPORT BY THE SPECIAL COMMISSION FOR REVIEWING THE ELECTORAL PROCESS OF PUERTO RICO] 58–59 (1982).

There are three official ballots in Puerto Rico: the State, Municipal, and Legislative ballots.<sup>98</sup> The first one is to elect the governor and the resident commissioner (the island's sole representative in Congress).<sup>99</sup> The Municipal ballot is to elect the mayor of the city or town, and the members of the Municipal Legislature, the body charged with enacting local ordinances and other regulations.<sup>100</sup> The Legislative ballot is used to elect the members of the bicameral state legislature: the Senate and the House of Representatives.<sup>101</sup>

The Electoral Act provides for various ways to cast a vote on each of the three official ballots. These types of votes are known as single-party, mixed, individual or write-in vote.<sup>102</sup> A single-party vote, which is the most common one due to its simplicity, consists of simply writing a mark under the party symbol of your choice.<sup>103</sup> By doing this, every candidate under the selected party will receive the vote. A vote is considered mixed when a mark is made under a party symbol but also next to one or more candidates who belong to a different party than the one marked.<sup>104</sup> An individual vote occurs when no mark is written under a party symbol but rather to an individual candidate.<sup>105</sup> Another way of casting ballots is by writing the name of someone who is not listed as a candidate under the write-in column located on the right hand side of the ballot.<sup>106</sup> Voters also have the option of simply leaving the ballot blank or intentionally 'damaging' the ballot by voting for more candidates than the limit allowed as a way to express their dislike towards the political parties or the election system.<sup>107</sup>

Although the votes are cast by simply marking an "X" under your candidate or party symbol and there is no electronic voting system, the method is very complex and difficult.<sup>108</sup> Such complexity usually results in nullifying your vote, particularly on the Legislative ballot which is the most intricate one.<sup>109</sup> On this ballot, each voter is entitled to elect two district Senators and

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98. Puerto Rico Electoral Act, P.R. LAWS ANN. tit. 16, § 3211 (2008).

99. *Id.*

100. *Id.*

101. *Id.*

102. *Diffenderfer v. Gomez-Colon*, 587 F. Supp. 2d 338, 351–53 (D.P.R. 2008), *vacated as moot*, 587 F.3d 445 (1st Cir. 2009).

103. *Id.* at 351–52.

104. *Id.*

105. *Id.*

106. Puerto Rico Electoral Act, P.R. LAWS ANN. tit. 16, § 3211 (2008).

107. *Id.* at § 3003.

108. There have been several cases that reached the Supreme Court of Puerto Rico where the controversy regarded the correct adjudication of ballots due to the manner in which the "X" mark was made. See *Partido Socialista Puertorriqueños v. Comisión Estatal de Elecciones*, 110 P.R. Dec. 400 (1980); *Santos v. Comisión Estatal de Elecciones*, 111 P.R. Dec. 351 (1981); *Suárez v. Comisión Estatal de Elecciones*, 163 P.R. Dec. 541 (2004).

109. *Diffenderfer*, 587 F. Supp. 2d at 352.

one district Representative.<sup>110</sup> Moreover, both houses of the Legislature of Puerto Rico have what is called at-large Legislators. These lawmakers do not represent a specific district but rather the entire population as a whole.<sup>111</sup> Each of the chambers has eleven at-large Senators and Representatives respectively.<sup>112</sup> Accordingly, a voter may vote for one at-large Senator and one at-large Representative out of a pool of more than two dozen candidates from all political parties.<sup>113</sup> Consequently, if a voter unintentionally writes more than one mark under the at-large Senators column, his vote is not valid for that position and therefore none of the candidates is awarded a vote. Similarly, if a voter inadvertently votes for more than two district Senators the vote is also invalid. These errors are very common even to native Spanish speakers, so imagine how difficult, if not impossible, it would be for someone who does not read or understand Spanish.

In my experience, I emitted my first vote in Puerto Rico in the 2000 general elections. Days later I realized I had cast my vote erroneously on the Legislative ballot. If I recall correctly, I voted for two at-large Senators because I was under the impression that, similar to the district Senators, I was entitled to vote for two candidates. Therefore, my vote with respect to the at-large Senator position was invalid. This was a direct consequence of the poor educational campaign on how to vote, in addition to the already complex voting methods.

For the 2004 election, I made sure the same error was not repeated and to that effect took some countermeasures. First, as a law student in the 2004 spring semester, I enrolled in an Election Law course where, among many other things, we were taught the correct procedure for casting a vote on each of the three ballots. Second, I volunteered to work as a poll officer for the 2004 elections and therefore attended mandatory training on voting procedures. Naturally, the ordinary citizen does not undergo this type of preparation so he has to rely on the normally poor orientation the State Elections Commission provides—which has been historically provided only in Spanish,<sup>114</sup> completely disregarding the non-speaking Spanish community on the island.

Over the years some initiatives have been taken to address the problem of voting access to English monolinguals, most recently by the electoral representative of the New Progressive Party.<sup>115</sup> On April 16, 2008 at a State Elections Commission meeting, Acting Commissioner José E. Meléndez Ortíz proposed that ballots for the upcoming 2008 general elections be printed in

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110. *Id.*

111. PR CONST. art 3, § 3.

112. *Id.*

113. *Id.*

114. *Diffenderfer*, 587 F. Supp. 2d at 349.

115. *Id.* at 341 n.3.

both Spanish and English.<sup>116</sup> An agreement among the four Electoral Commissioners was not reached at that meeting.<sup>117</sup> Pursuant to the Electoral Act, the decision whether or not to order the printing of bilingual ballots was one to be made by the Chairman.<sup>118</sup> Accordingly, on July 31, 2008 Mr. Ramón Gómez-Colón, the Chairman of the State Elections Commission (SEC), issued a resolution denying the request for bilingual ballots and ordered them to be printed only in Spanish.<sup>119</sup>

This resolution opened the door to a judicial battle that would change all future elections in Puerto Rico and set in motion a reform of the entire electoral system.

#### IV. JUDICIAL CHALLENGE

##### A. *Diffenderfer v. Gómez-Colón*

On August 19, 2008, a few weeks after the SEC's resolution mandating the use of Spanish-only ballots in the 2008 general election, two English monolingual U.S. citizens filed a complaint with the U.S. District Court for the District of Puerto Rico challenging the resolution's validity.<sup>120</sup> Plaintiffs had been living on the Island for more than a decade but never voted due to the complexity of the registration and voting process.<sup>121</sup> One of them, Ms. Sylvia Diffenderfer, was born and raised in New Jersey and had been living in Puerto Rico since 1994.<sup>122</sup> The other Plaintiff, Mr. Robert McCarroll, was from the State of New York and had made Puerto Rico his home during the past fifteen years.<sup>123</sup> Both of them were registered voters at the time the complaint was filed.<sup>124</sup> Moreover, Mr. McCarroll unsuccessfully attempted to cast his vote in the 2004 general elections but found the ballots to be confusing and only in the Spanish language.<sup>125</sup>

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116. *Id.* at 342.

117. *Id.* at 341–42.

118. *Id.*

119. *Id.* at 342; Compendio de Resoluciones de la Comisión Estatal de Elecciones 1983-2008 (Feb. 28, 2008) [Compendium of Resolutions of the State Commission of Elections], <http://www.ceepur.org/sobreCee/leyElectoral/pdf/COMPENDIO-RESOLUCIONESDELACEE-VERSIONTABLA.pdf>; Manuel Alvarez-Rivera, *Puerto Rico's English-language election ballots controversy*, ELECTORAL PANORAMA (Aug. 24, 2008), <http://electionresources.org/panorama>.

120. *Diffenderfer*, 587 F. Supp. 2d at 342.

121. *Id.* at 345.

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

Despite the fact that just two individuals filed the action, the Court certified the case as a class action.<sup>126</sup> To this effect, the Court held that the English monolingual speakers in Puerto Rico who are eligible voters constitute a class so numerous that joinder of all members is impracticable.<sup>127</sup> The legal question presented (the validity of Spanish-only ballots) and facts (inability to vote without language assistance) were common to all members.<sup>128</sup> Finally, based on testimony of the two representatives of the class, Diffenderfer and McCarroll, stating they would pursue the legal action to end, the Court found they would adequately protect the interests of the class.<sup>129</sup> Therefore, the Court indicated that the four requisites for a case to be certified as a class action under Rule 23 of the Federal Rules of Civil Procedure were satisfied.<sup>130</sup>

Plaintiffs argued that their voting rights as U.S. citizens were violated because the ballots and other electoral material were not translated into English.<sup>131</sup> After learning that in the continental United States certain jurisdictions were required by law to provide bilingual ballots to non-English speakers, they challenged the State Elections Commission's decision on the grounds of being discriminatory to residents from other states of the nation.<sup>132</sup>

The claim basically sought an injunction requiring the Commonwealth of Puerto Rico to print ballots, including voting instructions for the 2008 general elections, in both English and Spanish.<sup>133</sup> The plaintiffs suggested an English translation of the voting instructions contained on the ballots as a model.<sup>134</sup> Defendant's only justifications for the Spanish-only system were related to the cost of printing bilingual ballots and the difficulty of printing them before the November 4, 2008 elections.<sup>135</sup> The increase in cost, or what could be called the cost of fulfilling democracy, would be \$26,472.00.<sup>136</sup> Naturally, this argument was unequivocally rejected by the Court.<sup>137</sup> Accordingly, the Court granted relief declaring the Spanish-only balloting system used in Puerto Rico

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126. *Diffenderfer*, 587 F. Supp. 2d at 343.

127. *Id.* at 343.

128. *Id.*

129. *Id.*

130. *Id.* at 343.

131. *Id.* at 341.

132. *Diffenderfer*, 587 F. Supp. 2d at 346.

133. *Id.* at 342.

134. *Id.* at 349.

135. *Id.* at 342. The "cost" argument was also used during the discussion of the Voting Rights Act. See James Thomas Tucker, *The Battle Over "Bilingual Ballots" Shifts to the Courts: A Post-Bourne Assessment of Section 203 of the Voting Rights Act*, 45 HARV. J. ON LEGIS. 507, 510-11 & n.19 (2008) ("Detractors also maintain that 'bilingual ballots' are costly and ineffective.").

136. *Diffenderfer*, 587 F. Supp. 2d at 342.

137. *Id.* at 347-48.

as invalid for violating the Constitution and the Voting Rights Act.<sup>138</sup> Also, the Court ordered defendants to print ballots to be used in all future election processes in both languages, and that the English translation of the voting instructions provided by plaintiffs be included on the ballots.<sup>139</sup>

#### 1. The Court's Reasoning: Unconstitutionality

From a constitutional point of view, the Court concluded that the Spanish-only ballot system was a clear violation of both the First Amendment and the Equal Protection Clause of the Fourteenth Amendment.<sup>140</sup>

##### a. Equal Protection Clause

In its Equal Protection analysis it seems the Court did not want to leave room for any doubt regarding the appropriate standard applicable to the case at issue. Consequently, it opted for applying both strict scrutiny and the rational-basis test.<sup>141</sup>

After reciting the applicable U.S. Supreme Court jurisprudence,<sup>142</sup> and stating that this “clause protects all citizens of the United States without distinction as to culture or geography,”<sup>143</sup> the Court justified the applicability of strict scrutiny by stating that monolingual English speakers in Puerto Rico constitute a suspect classification.<sup>144</sup> Because the U.S. Supreme Court has not extended full “suspect class” status to groups other than racial minorities or religious groups,<sup>145</sup> the Court reached the conclusion that

In Puerto Rico, use of English is frequently identified with natives of the continental United States, as a distinct national category apart from native-born Puerto Ricans, for whom Spanish remains their mother tongue. Thus, in the context of the Commonwealth of Puerto Rico, membership in a linguistic group is essentially identical to a national, ethnic, or even racial classification.<sup>146</sup>

Consequently, because the State Elections Commission policy severely affected the rights of English monolingual speakers to vote based on their

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138. *Id.* at 345, 348, 350.

139. *Id.* at 350–51.

140. *Id.* at 348, 350.

141. *Id.* at 348.

142. *Diffenderfer*, 587 F. Supp. 2d at 346 (citing *Johnson v. California*, 543 U.S. 499, 505 (2005); *Yick Wo v. Hopkins*, 118 U.S. 356, 369–71 (1886); *Pennell v. City of San Jose*, 485 U.S. 1, 14 (1988)).

143. *Id.* at 347.

144. *Id.*

145. *Id.* (citing *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 450 (1985)).

146. *Id.* (internal citation omitted).

nationality and/or race, strict scrutiny was the appropriate level of review applied in this case.<sup>147</sup>

During the judicial process Defendants did not propose any “compelling interest which Spanish-only elections serve to protect.”<sup>148</sup> In fact, their actions “have frustrated the basic democratic precept that each voter should have equal voice in the electoral process.”<sup>149</sup> Accordingly, the Court concluded that “[t]he Spanish-only ballot system clearly does not withstand strict scrutiny.”<sup>150</sup>

Even applying the more deferential rational basis review, the Court stated, the Spanish-only ballot system could not survive.<sup>151</sup> Defendant’s suggestion that it was not possible to print bilingual ballots on certain paper stock in time for the November 2008 elections was not persuasive.<sup>152</sup> In fact, this argument was contradicted by the printer hired for this purpose, who stated at a hearing the printing of the ballots on the specified type of paper stock would be possible before the elections.<sup>153</sup> Moreover, the Court found no credible reason why other paper stock could not be obtained in time to print.<sup>154</sup>

b. First Amendment

It is well known that the right to vote is at the heart of the First Amendment’s right of association.<sup>155</sup> The Court began its analysis by emphasizing the complexity of the ballots, as previously explained, and the fact that they are solely printed in Spanish.<sup>156</sup> Accordingly, the Court held that “[r]equiring non-Spanish speakers to navigate these ballots entirely in Spanish effectively limits the political participation of a significant percentage of Puerto Rico’s eligible voters.”<sup>157</sup>

The Court then examined the interests put forward by the government, which were the (i) impossibility of printing the ballots in time and the (ii) increase in cost.<sup>158</sup> As previously noted, the first alleged interest was shown to

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147. *Id.* (“Because the policy burdens the rights of monolingual English speakers to vote on the basis of their nationality and/or race, strict scrutiny is appropriate.”).

148. *Diffenderfer*, 587 F. Supp. 2d at 347.

149. *Id.*

150. *Id.*

151. *Id.* (“Even if we apply only rational basis review, the Spanish-only ballot system cannot survive. Although the rational basis test is deferential to the government, it does not blindly condone all governmental classifications.”).

152. *Id.* at 348.

153. *Id.* at 347–48.

154. *Diffenderfer*, 587 F. Supp. 2d at 347–48 (“[E]ven if the current paper stock in supply cannot meet the requirements to run bilingual ballots, we see no credible reason why other paper stock may not be obtained in time to print.”).

155. *Storer v. Brown*, 415 U.S. 724, 756 (1974) (Brennan, J., dissenting).

156. *Diffenderfer*, 587 F. Supp. 2d at 349–50.

157. *Id.* at 350.

158. *Id.*

be false by the testimony of the printer.<sup>159</sup> With respect to the second interest, the Court held it was not a reason important enough to justify limitations on Plaintiff's First Amendment rights.<sup>160</sup>

Accordingly, the Court determined that the Spanish-only policy is unconstitutional for transgressing the First Amendment and the Equal Protection Clause of the Fourteenth Amendment.<sup>161</sup> This declaration of unconstitutionality seemed the obvious and perhaps the only course of action the Court would have taken to invalidate the Spanish-only provision, partially because the minority language provisions contained in the Voting Rights Act are technically inapplicable to Puerto Rico.<sup>162</sup> Perhaps the Court could have simply limited its legal analysis to constitutional questions. However, it took advantage of the opportunity to interpret the language provisions of the Voting Rights Act from the unique Puerto Rican perspective.

## 2. The Courts Reasoning: Transgression of the Voting Rights Act

The Court was fully aware that if the Voting Rights Act were strictly interpreted it would be inapplicable to the case. Acknowledging this fact, the Court began its Voting Rights Act analysis by stating that the application of the Act "is a matter of first impression in a mainly Spanish-speaking jurisdiction like Puerto Rico."<sup>163</sup> By expressing this, the Court paved the way for a possible construction of the Voting Rights Act that would make it applicable to Puerto Rico. I believe the Voting Rights Act minority language provisions are not technically applicable to Puerto Rico for one reason: Congress enacted them in the context of the continental United States, where English is the predominant language, without even taking into consideration the particular situation of Puerto Rico. Accordingly, Congress did not foresee the potential language controversy that would eventually arise in Puerto Rico when non-Spanish speaking U.S. citizens move to the island.

The language minority provisions contained in the Voting Rights Act could be generally classified as having two purposes. One purpose is to prohibit State and local government from creating obstacles that would discourage minorities from exercising their right to vote.<sup>164</sup> The other provision mandates that State and local government provide language assistance by facilitating bilingual ballots and other election material in certain

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159. *Id.* at 342.

160. *Id.* ("The increase in cost alone does not justify a substantial burden on Plaintiffs' First Amendment right to express themselves by voting.")

161. *Id.* at 350.

162. *Diffenderfer*, 587 F. Supp. 2d at 344.

163. *Id.* at 343.

164. 42 U.S.C. § 1973(a) (2006).

jurisdictions that have a significant language-minority population.<sup>165</sup> These provisions are commonly referred to as sections 2 and 4, respectively.<sup>166</sup> Although other sections of the Act could have been applied in *Diffenderfer*, the Court decided to rely primarily on these two sections in its analysis.<sup>167</sup>

Initially, section 2 was enacted to prohibit States from abridging voting rights of their citizens based on color or race.<sup>168</sup> Ten years after its enactment, the Voting Rights Act was amended to extend this provision to members of various language minority groups.<sup>169</sup> The intention was to facilitate poll access to U.S. citizens who are non-English speakers.<sup>170</sup> These amendments to the Voting Rights Act were originally directed at Hispanic minorities in the state of Texas.<sup>171</sup> But when they were finally enacted, only four groups were included as language minorities: persons who are American Indian, Asian American, Alaskan Natives or of Spanish heritage.<sup>172</sup> No other language groups were included because Congress found no evidence of voting discrimination against other minorities.<sup>173</sup> Since then, some commentators

165. 42 U.S.C. § 1973b(9)(f)(4) (2006).

166. Voting Rights Act of 1965, Pub. L. No. 89-110, §§ 2, 4, 79 Stat. 437 (1965) (codified at 42 U.S.C. §§ 1973–1973aa).

167. *Diffenderfer*, 587 F. Supp. 2d at 344 n.7 (“There are still more sections of the VRA that would apply here but for Congress’ focus on ‘English-only,’ rather than language majority-only, elections.”).

168. 42 U.S.C. § 1973(a). See also Michael Jones-Correa & Israel Waismel-Manor, *Verifying Implementation of Language Provisions in the Voting Rights Act*, in VOTING RIGHTS ACT REAUTHORIZATION OF 2006: PERSPECTIVES ON DEMOCRACY, PARTICIPATION AND POWER 161, 162 (Ana Henderson ed., 2007) (“When the Voting Rights Act was first passed, its primary focus was African Americans in the South.”).

169. 42 U.S.C. § 1973b(f)(2) (2006) (“No voting qualification or 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.”). See also de la Garza & DeSipio, *supra* note 51, at 1481 & n.15 (“[T]he 1975 Amendments extended the basic protections of the Act to specific language minorities.”); JoNel Newman, *Ensuring that Florida’s Language Minorities Have Access to the Ballot*, 36 STETSON L. REV. 329, 343–47 (2007).

170. de la Garza & DeSipio, *supra* note 51, at 1485 (“Congress consciously excluded ‘language minorities’ other than Latinos, Asian Americans, Alaskan natives, and Native Americans from protections of the Act.”).

171. James Thomas Tucker, *Enfranchising Language Minority Citizens: The Bilingual Election Provisions of the Voting Rights Act*, 10 N.Y.U. J. LEGIS. & PUB. POL’Y 195, 200–01 (2007) (citing David H. Hunter, *The 1975 Voting Rights Act and Language Minorities*, 25 CATH. U. L. REV. 250, 254–57 (1976)) (“Congress originally targeted these provisions to protect Spanish language minorities in Texas, whose experience with discrimination in voting and education was well-documented.”).

172. 42 U.S.C. § 1973l(c)(3) (2006).

173. Abdelall, *supra* note 2, at 918–19 (“[I]t was not the intention of Congress to preclude other language minorities from protection under the Voting Rights Act. In 1975, when the minority language provisions were first enacted, Congress expressly stated that no other language

have argued for the recognition of other language groups as protected minorities for Voting Rights Act purposes.<sup>174</sup> English was not included in the 1975 amendments as a minority language. Consequently, because English speakers are not defined as a minority language group, the Court in *Diffenderfer* held that section 2 of the Voting Rights Act was “technically” inapplicable.<sup>175</sup>

The other Voting Rights Act section the Court examined was section 4.<sup>176</sup> This section requires a jurisdiction to provide election-related materials, including ballots, in both English and the language of a language minority group if three criteria are met: (1) more than five percent of voting age citizens are members of that language minority, (2) the Attorney General found that the jurisdiction employed any test or device in the 1972 election, and (3) less than fifty percent of voting-age citizens were registered or actually voted in the 1972 election.<sup>177</sup> The Court found that this section is not applicable to Puerto Rico because the Attorney General has made no findings regarding whether Puerto Rico employed any test or device as a prerequisite to voting in the 1972 election, and therefore, Puerto Rico is not a covered jurisdiction.<sup>178</sup>

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minorities were included because no information was disclosed regarding evidence of voting discrimination. The inclusion of particular minority groups was based upon evidence presented at the time the bill was drafted. This leaves open the possibility that with sufficient demonstration of discrimination, educational disparities, and illiteracy statistics, other language minority groups, like Arab Americans, could be included as a language minority group.”)

174. Newman, *supra* note 169, at 355 n.169; see, e.g., JoNel Newman, *Unfinished Business: The Case for Continuing Special Voting Rights Act Coverage in Florida*, 61 MIAMI L. REV. 1, 35 (2006) (arguing for expansion of the term “language minority” to include Haitian Creole). See generally Jocelyn Friedrichs Benson, *Language Protections for All? Extending and Expanding the Language Protections of the Voting Rights Act 5* (Jan. 22, 2007) (unpublished manuscript) (on file with author), available at <http://ssrn.com/abstract=958626> (arguing Congress should consider Arabic for inclusion within the definition of the term “language minority”); Abdelall, *supra* note 2, at 913–14 (arguing for the possibility of adding Arab Americans as a federally recognized language minority group under the Voting Rights Act).

175. *Diffenderfer v. Gomez-Colon*, 587 F. Supp. 2d 338, 344 & n.7 (D.P.R. 2008), *vacated as moot*, 587 F.3d 445 (1st Cir. 2009) (“There are still more sections of the VRA that would apply here but for Congress’ focus on ‘English-only,’ rather than language majority-only, elections.”); *id.* at 344 (“Section 2 may be similarly technically inapplicable because the VRA defines ‘language minority’ as encompassing only groups of Asian American, American Indian, Alaskan Native, or of Spanish heritage.”).

176. *Id.*

177. 42 U.S.C. § 1973b(b), (f)(3)–(4) (2006).

178. *Diffenderfer*, 587 F. Supp. 2d at 344 (“We cannot apply the requirements of § 4 because the Attorney General has made no findings with regards to whether Puerto Rico employed any test or device as a prerequisite to voting in its 1972 elections; thus, Puerto Rico is not a covered jurisdiction. Moreover, that section specifically refers to elections conducted in English, while it is a Spanish-only ballot at issue here.”).

By using a strict interpretation of the statute, the Court would not have been able to apply the Voting Rights Act minority language provisions to English monolingual speakers living on the island. Relying on *Chisom v. Roemer* the Court stated that the U.S. Supreme Court “has emphasized that the VRA ‘should be interpreted in a manner that provides ‘the broadest possible scope’ in combating discrimination.”<sup>179</sup> Based on this “broadest possible scope” the Court found it “appropriate to look at the spirit and intent of the law: eliminating discrimination on the basis of race or language minority status in voting.”<sup>180</sup> More importantly, the Court added that although the Voting Rights Act limits the definition of “language minority” to four groups, due to the particular situation of the English monolingual community in Puerto Rico, it is appropriate to include them as a language minority group in order to best implement the intent of the Act.<sup>181</sup> Thus, the Chief Judge of the U.S. District Court for the District of Puerto Rico designated the English monolingual speakers of Puerto Rico as a new language minority group under the Voting Rights Act.<sup>182</sup> This determination would now make section 2 applicable to the case at issue. Consequently, after applying section 2, the Court concluded that by providing Spanish-only ballots the State Elections Commission’s actions constituted a violation of the aforementioned provision.<sup>183</sup>

To summarize, the Court initially held that section 2 was not technically applicable because the definition of language minority groups contained in the Voting Rights Act did not include English monolinguals.<sup>184</sup> However, after interpreting the Act with the “broadest possible scope” and looking at the “spirit and intent of the law” the Court declared the English monolingual community of Puerto Rico as a language minority group in the context of voting rights.<sup>185</sup> Now that English speakers are a language minority group, section 2 is applicable, and, consequently, defendant’s action of providing Spanish-only ballots is a violation of this section.<sup>186</sup> The Court granted the

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179. *Id.* at 345 (quoting *Chisom v. Roemer*, 501 U.S. 380, 503 (1991)).

180. *Id.*

181. *Id.* at 345 (“Although the VRA limits the definition of ‘language minority’ to four groups, we find it appropriate in this context, clearly not contemplated by Congress, to include the English monolingual community in Puerto Rico as a language minority group in order to best implement the intent of the VRA.”); *id.* at 344 n.7 (“There are still more sections of the VRA that would apply here but for Congress’ focus on ‘English-only,’ rather than language majority-only, elections.”).

182. *Id.* at 345.

183. *Id.*

184. *Diffenderfer*, 587 F. Supp. 2d at 344–45.

185. *Id.* at 345.

186. *Id.*

remedy sought and ordered the State Elections Commission to print the ballots in both English and Spanish for the 2008 general elections.<sup>187</sup>

The practical effect of the Court's decision was mirrored immediately. Although defendants argued that due to the proximity of the elections, which were less than two months away, it was physically impossible to print all the necessary election material before the November 4 elections, the State Elections Commission actually complied with the order.<sup>188</sup> Consequently, all three of the official ballots were printed in both Spanish and English.<sup>189</sup> Notwithstanding, on September 5, 2008 the State Elections Commission filed a notice of appeal before the U.S. Court of Appeals for the First Circuit in Boston.<sup>190</sup>

Despite its significance, this decision left some questions unanswered and paved the way for new ones. Does the new bilingual policy extend to other election materials? Will language assistance to non-Spanish speakers be provided at voting registration centers and at the polls? Is the State Elections Commission supposed to set up a bilingual web page? What about its rules and regulations? Will there be new voter's identification cards containing the voter's information in both languages? Are the Spanish-only identification cards still valid, or do I have to get a new identification card issued? What about educational campaigns regarding when and where to vote? And the list goes on and on.

In an effort to fill these gaps the Puerto Rico House of Representatives presented legislation amending the Electoral Law.

#### V. AMENDMENTS TO THE ELECTORAL LAW: PUBLIC LAW NO. 90

On September 7, 2009 the Governor of Puerto Rico signed into law House Bill No. 1853 to provide for bilingual elections.<sup>191</sup> This legislation amended seven articles of the Electoral Act in order to provide for the publication in both English and Spanish of all election material including but not limited to everything related to: (i) voter registration, (ii) issuance of voter's identification cards, (iii) campaign orientation, (iv) rules and regulations, and (v) ballots, among others.<sup>192</sup>

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187. *Id.* at 350–51.

188. *See* Comisión Estatal de Elecciones, Papeletas Modelo [State Election Commission, Ballot Models], [http://www.ceepur.org/Primarias2008/papeletas/pnp/index\\_pnp.html](http://www.ceepur.org/Primarias2008/papeletas/pnp/index_pnp.html).

189. For models of the ballots for each jurisdiction, *see* Comisión Estatal de Elecciones, Elecciones Generales 2008, Papeletas Modelo [State Election Commission, General Elections 2008, Ballot Models], <http://www.ceepur.org/elecciones2008/index.html>.

190. *Diffender v. Gómez-Colon*, 587 F.3d 445, 449–50 (1st Cir. 2009).

191. P.R. Act No. 90 (H.B. 1853) (Sept. 7, 2009) (amending sections 1.002, 2.001, 4.018, 5.010, 5.011, 7.001, and 7.009 of the Puerto Rico Electoral Act).

192. *Id.*

The bill explicitly mentioned the State Elections Commission's long history of inaction towards implementing a bilingual electoral system.<sup>193</sup> It also made direct reference to the *Diffenderfer* decision, praising it for providing thousands of non-Spanish speaking residents of Puerto Rico with the opportunity to finally exercise their constitutional right to vote.<sup>194</sup> Surprisingly, the bill did not mention the Voting Rights Act nor its language minority provisions.

The Puerto Rico Electoral Act of 1977 contains a list of all the prerogatives every citizen is entitled to when exercising his or her right to vote. This list, commonly referred to as the Voter's Bill of Rights, guarantees the right to cast an equal, free, direct and secret vote.<sup>195</sup> As part of these amendments to the Electoral Act a paragraph was added in the Voter's Bill of Rights to include the right of a voter to obtain all election materials in both languages.<sup>196</sup> This new legislation also orders the State Elections Commission to educate the electorate about these fundamental rights through bilingual instructional campaigns.<sup>197</sup>

The content of the three official ballots, including the instructions on how to cast your vote, is regulated by article 5.011 of the Electoral Act.<sup>198</sup> This article authorizes the State Elections Commission to formulate the necessary regulations that will determine the design and text to be printed on each of the ballots.<sup>199</sup> However, rather than delegating the translation of the voting instructions, and as a measure to avoid translation errors as it has occurred in other jurisdictions,<sup>200</sup> the Legislature opted to include on the bill an English version of the voting instructions as they will be printed on the ballots.<sup>201</sup> It should be noted that the translation included on the bill is an identical copy of a set submitted by plaintiffs in *Diffenderfer* as an exhibit, which subsequently were attached as supplement to the Opinion and Order issued by the Court.<sup>202</sup>

Because the Court in *Diffenderfer* limited the use of English and Spanish only to ballots, these amendments were enacted with the intent of extending the bilingual provision to other election material relating to voter registration,

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193. *Id.*

194. *Id.*

195. Puerto Rico Electoral Act, P.R. LAWS ANN. tit. 16 § 3051 (2008).

196. P.R. Act No. 90, § 2 (H.B. 1853) (Sept. 7, 2009).

197. *Id.*

198. Puerto Rico Electoral Act, P.R. LAWS ANN. tit. 16, § 3210 (2008).

199. *Id.*

200. See Glenn D. Magpantay, *Asian American Access to the Vote: The Language Assistance Provisions (Section 203) of the Voting Rights Act and Beyond*, 11 ASIAN L.J. 31, 39–42 (2004) (describing various incidents where faulty translations on ballots were made).

201. P.R. Act No. 90, § 5 (H.B. 1853) (Sept. 7, 2009).

202. See *Diffenderfer v. Gomez-Colon*, 587 F. Supp. 2d 338, 351 (D.P.R. 2008), *vacated as moot*, 587 F.3d 445 (1st Cir. 2009).

issuance of voter's identification cards, campaign orientation, regulations, ballots and any other document or message published by the State Election Commission directed at encouraging voter participation.<sup>203</sup>

Furthermore, because the Court did not make clear whether the bilingual provision is applicable to other electoral processes the Legislature included all electoral process such as referenda, plebiscites, special elections, and, naturally, general elections.<sup>204</sup> Additionally, all political parties are ordered to provide bilingual election material during their respective primary elections.<sup>205</sup>

Finally, Public Law No. 90 ordered the State Elections Commission to amend all its regulations and internal procedures in order to comply with the newly established bilingual voting policy.<sup>206</sup>

#### A. *Recent Developments*

Recently, the U.S. Court of Appeals for the First Circuit decided the appeal on the *Diffenderfer* case filed by the State Elections Commission.<sup>207</sup> Unfortunately, due to the enactment of Public Law No. 90 providing for mandatory bilingual election-related material, the First Circuit issued an order vacating the District Court's judgment on the grounds of being rendered moot.<sup>208</sup> Unquestionably Law No. 90, an independent intervening legislative act, turned moot the Spanish-only ballots controversy. This implies that the determination by the District Chief Judge of declaring English monolinguals as a new language minority group under the Voting Rights Act is set aside as well.

But more importantly, the vacatur of the judgment by the First Circuit puts at risk the voting rights of English speakers on the island. This is so because their right to obtain ballots in English is no longer federally protected. Considering the dynamics of local politics, which are characterized by overruling most acts of previous administration from the opposing party,<sup>209</sup> Public Law No. 90 may be repealed by a future administration. This possibility is real and not strange to the Puerto Rican political arena—as mentioned earlier, after decades the language law was amended to make

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203. P.R. Act No. 90 (H.B. 1853) (Sept. 7, 2009).

204. *Id.* at § 6.

205. *Id.* at § 3.

206. *Id.* at § 9.

207. *Diffenderfer v. Gomez-Colon*, 587 F.3d 445, 456 (1st Cir. 2009).

208. *Id.* at 451 (“Both parties contend, and we agree, that Law No. 90 mooted that appeal. Under that statute, the Commission must use bilingual ballots now that Puerto Rico has made bilingual ballots mandatory. Because we can no longer issue any judicial remedy capable of affecting the parties’ rights, the case no longer presents a live ‘case or controversy’ under Article III, and we lack jurisdiction to decide its merits.”).

209. *See supra* text accompanying notes 40–41.

Spanish the only official language of the island.<sup>210</sup> Consequently, there is no guarantee the next administration will not submit legislation amending the Electoral Act to order all election-related material, including ballots, to be printed only in Spanish.

The ideal measure to avoid such devastating situation is for Congress to amend the Voting Rights Act to add the English monolingual community of Puerto Rico as a language minority group. Unlike section 4 of the Voting Rights Act, which requires, among other things, that a minimum of five percent of voting-age citizens must be members of a language minority group in order to trigger the bilingual provision,<sup>211</sup> this proposed amendment should not include any pre-requisites. Pre-conditioning bilingual election-related material to English monolinguals in Puerto Rico would simply be unnecessary. Considering that the predominant language in Puerto Rico is Spanish, and that Puerto Rico is a territory of the United States where the common language is English, then it seems natural that Spanish and English should be the sole languages to be used, not just on election-related material but in all official activities. Accordingly, an amendment by Congress to the Voting Rights Act should simply consist of ordering that all election-related material in Puerto Rico shall be available in both English and Spanish languages.

#### VI. CONCLUSION

Although the language minority provisions of the Voting Rights Act were not initially applicable to Puerto Rico, the Court's liberal construction of the Act turned out to be the key factor for *Diffenderfer* invalidating the Spanish-only provision from a non-constitutional standpoint. The Court could have simply found the Spanish-only law unconstitutional due to its clear transgression of the Equal Protection Clause and First Amendment. Nevertheless, the Court decided to use the Voting Rights Act as the instrument to reach its conclusion. This action by the Court reflects the importance and relevance of the Voting Rights Act, even in a jurisdiction where its language minority provisions technically do not apply. Despite the fact that the judicial determination of the District Court was vacated by the U.S. Court of Appeals, the judgment provoked the House of Representatives to enact legislation directed at protecting the voting rights of the biggest language minority group in Puerto Rico—the English speaking community. However, local legislation is not enough to guarantee these rights. It is imperative that Congress intervenes in order to permanently protect the voting rights of English monolinguals in Puerto Rico and classify them as a minority language group entitled to election material in the language they understand.

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210. *Id.*

211. 42 U.S.C. § 1973b(f)(3) (2006).

The State Elections Commission is still working on translating its regulations and documents in order to comply with Public Law No. 90. Consequently, all election material, including the content on the voting identification cards, is still available in Spanish only. One goal would be to have everything translated before the next general election in 2012, but at this point there is no guarantee of when Public Law No. 90 will be fully implemented.

Voting rights in Puerto Rico still have a long road to walk; nevertheless, I am confident that the Voting Rights Act will be instrumental to achieving equality for our fellow citizens.

