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English as the Official Language of the United States: Legal Background and Analysis of Legislation in the 110th Congress

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Jody Feder
Legislative Attorney
American Law Division



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Summary

Congressional proposals to install English as the official language of the United States reflect yet another aspect of the complicated ongoing national debate over immigration policy. The modern “Official English” movement may be traced to the mid-1980s, when various proposals to achieve linguistic uniformity by constitutional amendment were considered. While these earlier federal efforts failed, some legislation promoting official English laws at the state level was more successful. At least 28 states have laws declaring English to be the official state language. These state laws have usually been enacted by direct popular votes on referenda by substantial margins.

In response, renewed congressional efforts to codify English as the “official” or “national” language by statute largely replaced the constitutional amendment approach of earlier years. This trend culminated in 1996 when the House passed H.R. 123, to declare English the official language of the United States government and restricting other linguistic usage in the conduct of “official” governmental business. The measure died in the Senate. Contemporary versions of the earlier measure, however, have appeared in subsequent legislative sessions, and similar legislation has been introduced in the 110th Congress. Both H.J.Res. 17 and H.J.Res. 19 would amend the Constitution to establish English as the official language of the United States, while H.Con.Res. 11 would resolve that the federal government should pursue policies that not only encourage all residents to become fully proficient in English but also encourage all residents to learn or maintain skills in languages other than English.

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Introduction

The steady growth within U.S. borders of new immigrant populations, whose primary language is other than English, has created a public policy divide on issues of language diversity. On one side, opposition to expanded foreign language assistance has led at least twenty-eight states to enact statutes or amend state constitutions to declare English the official state language.² Federal statutes and the U.S. Constitution, however, have traditionally afforded some legal protection to minority language rights. For example, the Voting Rights Act of 1965, as amended, mandate use of bilingual voting materials in states and political subdivisions when certain conditions are met.³ Other federal statutory safeguards include Title VI of the 1964 Civil Rights Act and the Equal Educational Opportunities Act.⁴ In addition, state and federal policies mandate the use of languages other than English when necessary for effective delivery of public and private services to non-English speakers in judicial and law enforcement proceedings, health and managed care services, conduct of state and local administrative agencies, business and professions, elections, and other critical areas.⁵

Congressional proposals to install English as the official language of the United States reflect yet another aspect of the complicated ongoing national debate over federal immigration policy. The modern “Official English” movement in Congress is traceable to the mid-1980’s, when various proposals to achieve linguistic uniformity by constitutional amendment were considered.⁶ When that approach

¹ This report was originally written by Charles V. Dale, Legislative Attorney.

² See U.S. English, Inc., States with Official English Laws, at [<http://www.us-english.org/inc/official/states.asp>].

³ 42 U.S.C. § 1973aa-1a.

⁴ Id. at §§ 2000d et seq; 20 U.S.C. § 1703(f).

⁵ See the “Miscellaneous Federal Policies Providing for Non-English Translation and Services” and the “State Laws” sections below for additional information.

⁶ See The English Language Amendment: Hearings on S.J.Res. 167 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary, 98th Cong., 2nd sess. (1984); Hearings on H.J.Res. 13, H.J.Res. 33, and H.J.Res. 60 before the Subcomm. on Civil and (continued...)

failed, Congress renewed its efforts to codify English as the official language, proceeding on a statutory track. This effort culminated in 1996 with House passage of H.R. 123, declaring English the official language of the United States Government and restricting other linguistic usage in the conduct of “official” governmental business. The “Language in Government Act” passed the House in the 104th Congress but died in the Senate.⁷ Substantially amended versions of this earlier measure, however, have appeared in subsequent legislative sessions.

For example, during the 109th Congress, the Senate adopted the Inhofe Amendment as part of its comprehensive immigration reform package, declaring English to be our “national language” and calling for a governmental role in “preserving and enhancing” the role of English.⁸ An alternative offered by Senator Salazar also passed the Senate; it would have recognized English as the “common and unifying language of the United States,” while protecting existing rights of non-English speakers “to services and materials provided by the government” in languages other than English.⁹ Also proposed in the 109th Congress was H.J.Res. 43 which would have amended the U.S. Constitution to establish English as the official language of the United States.

Likewise, similar legislation has been introduced during the 110th Congress. Both H.J.Res. 17 and H.J.Res. 19 would amend the Constitution to establish English as the official language of the United States, while H.Con.Res. 11 would resolve that the federal government should pursue policies that not only encourage all residents to become fully proficient in English, but also encourage all residents to learn or maintain skills in languages other than English. In addition, should the 110th Congress decide to take up immigration reform legislation, other English-as-the-official-language measures may be introduced in conjunction with such legislation.

Federal Legislation to Make English the Official Language of Government

Standing alone, a legislative declaration of English as the “official” or “national” language of the United States would be a largely symbolic act of negligible legal effect. Although an affirmation by the Congress of the central place of English in our national life and culture, such a pronouncement would not, of its own force, require or prohibit any particular action or policy by the government or private persons. Nor would it, without more, imply the repeal or modification of

⁶ (...continued)

Constitutional Rights of the Comm. on the Judiciary, 100th Cong., 2nd sess. (1988).

⁷ 142 *Cong. Rec.* 21206-07 (1996). H.R. 123, among other things, proposed that the federal government has an “affirmative obligation to preserve and enhance the role of English as the official language of the United States,” and would have repealed the bilingual voting requirements.

⁸ 152 *Cong. Rec.* S4770 (daily ed. May 18, 2006).

⁹ *Id.*

existing federal or state laws and regulations sanctioning the use of non-English for various purposes. As in the past, however, any official English proposals introduced during the 110th Congress would give varying force to this declaration depending on the degree to which they would propose adherence to English in various governmental activities at the federal and state level. Several examples of legislation introduced during the 109th Congress illustrate this concept.

During the 109th Congress, the Inhofe and Salazar amendments to the proposed immigration reform effort both included elements from earlier legislative proposals. Declaring English to be our “national language,” the former measure called on “the Government of the United States . . . [to] preserve and enhance” the role of English, and except as otherwise legally recognized, would have denied any private “right, entitlement, or claim” to non-English governmental services or materials. The Salazar amendment would have recognized English as the “common and unifying language of the United States,” while protecting existing rights of non-English speakers “to services and materials provided by the government” in languages other than English.

Meanwhile, H.R. 4408 (the “National Language Act of 2005) and H.R. 997 (the “English Language Unity Act of 2005”), also proposed in the 109th Congress, differed considerably in scope as to governmental entities and types of activities that would have been covered by the “official English” mandate. The immigration reform approach to the subject, however, seemed to draw at least marginally from elements of each. H.R. 4408 would have applied to all “official business” of the “Government of the United States” — including any “publications, income tax forms, and informational materials” — and would have denied any legal right, claim, or “entitlement” to “communicate with” and “receive information from” the Government in languages other than English. H.R. 4408, however, stated that it “shall not preempt any law of any state,” suggesting that it would have largely been confined to federal language policies. In contrast, H.R. 997, by its terms, would have required that “official functions” — including “all laws, public proceedings, regulations, publications, orders, actions, programs, and policies” — of the Federal Government, the States, and the District of Columbia be conducted in English. It thus seemed intended to bind State officers and agents much like their Federal governmental counterparts.¹⁰ Absent further elaboration, it is uncertain what, if any, implications the proposal might have had on non-federal governmental activities at the state or local levels.

The Senate immigration reform proposals seemed to raise fewer questions of jurisdictional sweep along these lines. The Inhofe Amendment appeared largely limited in any direct manner to actions of the federal government rather than the states and localities. Nor did it appear that the Salazar Amendment would carry direct

¹⁰ Exceptions written into both House bills, however, would have permitted linguistic diversity in governmental communications concerned with teaching of foreign languages; international relations, trade, or commerce; compilation of census information; public health and safety matters; and the conduct of criminal proceedings. In addition, H.R. 997 would have allowed use of other languages under the Individuals with Disabilities Act, for national security purposes, and in the compilation of census information.

legal implications — beyond, perhaps, those that Congress might impose by means of the “carrot and stick” of federal funding conditions — on the linguistic policies of state or local governmental entities. Indeed, the major sticking point between Inhofe Amendment supporters and its opponents centered on the measure’s potential effect on existing laws mandating private claims for non-English services or materials provided by the federal government.¹¹ Questions arose in particular with respect to amendment language that would have allowed governmental non-English policies “authorized or provided by law,” wording criticized for “going further than what you have indicated; that you are trying to diminish existing rights of the law.”¹² Senator Inhofe expounded his understanding of the “unless otherwise authorized or provided by law” exceptions to his “national language” mandate as follows:

My amendment makes clear that nobody has a right or entitlement to sue the Federal workers or the Federal Government for services or materials in languages in other than English. . . . [T]he Federal Government has no duty to provide services or materials in languages other than English, but the Federal Government is free to do so. In other words, they are not compelled to do it, but they may do it, they have the authority to do that.

The question has been asked: How does the amendment affect the X program? Will the Federal Government be free to offer X service or material in Y language? The answer is, yes, the Federal Government is at liberty to offer, can offer, X services or whatever the program is, in whatever language seems appropriate, but the Federal Government only has the duty to offer X services and Y language if a statute creates that right.¹³

Likewise, another proponent denied that the Inhofe Amendment would have had any “unintended consequence” of curtailing federal governmental interactions with persons in languages other than English, whether based on current law or future law. “There is nothing in this amendment, in my opinion, that does away with any laws that already exist or might exist in the future for a language other than English.”¹⁴ But Senator Inhofe’s remarks indicated his intention to ratify the Supreme Court’s *Sandoval* ruling, and its predecessors,¹⁵ which have refused to recognize a national origin- based private claim for entitlement to foreign language assistance under

¹¹ 152 Cong. Rec. S4752 (daily ed. 5-18-2006).

¹² *Id.*

¹³ *Id.* at S4753 (Remarks of Senator Inhofe).

¹⁴ Remarks of Senator Graham, *Id.* at S4764. (“That is why the term ‘unless otherwise authorized or provided by law’ is there. That means, simply put, if there is a law on the books – a case decision, a regulation, an Executive order, you name the source of law – or a constitutional provision that would allow the Federal Government to interact with its people in an language other than English, it is not affected by this amendment, nor does it prevent in the future the Government expanding those services in a language other than English. It says, also, there is no entitlement to a service in a language other than English, unless authorized by law. That is just a simple, commonsense concept.”).

¹⁵ See discussion pp. 8-12 *infra*.

federal civil rights laws, and the proponents' rejection of E.O. 13166, which directs foreign language services and materials in federally-conducted or assisted programs.¹⁶

In general, proposals before the Senate in the 109th Congress appeared to track the related House measures by obliging covered governmental entities “to preserve and enhance the role of English” and to “encourag[e] greater opportunities to learn the English language.” To this end, H.R. 997 sought to secure the “presumptive” legal validity of English language workplace policies, public and private, and would have established a basic English reading and comprehension rule for naturalization. Similarly, the Inhofe Amendment’s main sponsor explicitly embraced judicial rejection of any equation between governmental language policies and national origin discrimination. The Amendment itself would have added to existing literacy requirements for naturalization a “Goals for Citizen Test Redesign,” to be administered by the Department of Homeland Security, which would have required that all prospective new citizens to demonstrate an “understanding of American common values and traditions” and “of the history of the United States, including the key events, key persons, key ideas, and key documents that shaped the institutions and democratic heritage of the United States.” The Salazar Amendment would not have altered existing policies in this regard.

However, other formal legal aspects of the proposed House measures found no direct parallel to the proposed Senate amendments. A “rule of construction” in H.R. 997 would have permitted “unofficial” non-English communications by Members of Congress and other federal and state officers and agents — even “while performing official functions” — provided that “the official functions” themselves “[we]re performed in English.” The bill was silent, however, as to where the line between official and unofficial would have been drawn, a question that would probably have had to be answered administratively or by judicial rule. H.R. 4408 would have repealed requirements in the Voting Rights Act that mandate use of bilingual voting materials in states or political subdivisions when certain conditions are met.¹⁷ However, neither bill would have expressly overridden any other federal statute explicitly authorizing the use of language translations, interpreters, or other supplemental services. Any conflicting state policies mandating non-English usage in similar state or local proceedings could have been challenged under H.R. 997 unless saved by one of the specific exceptions in that bill, and both H.R. 997 and H.R. 4408 specifically called for renewed enforcement of English proficiency standards for citizenship and the “conduct [of] all naturalization ceremonies” in English.

Furthermore, a provision found in H.R. 997, but not H.R. 4408, would have allowed persons “injured by a violation of this chapter” to file a civil action in federal court for “appropriate relief.” The ramifications of this private right of action are difficult to predict. Traditional rules governing standing to sue in federal court generally call for proof of “injury in fact” or actual harm suffered by the claimant as the result of a legal violation. Under the bills, most “official” governmental activities would be required to be conducted in English, and any legal “entitlement” to

¹⁶ Id at S4754, 4756 (Remarks of Senator Inhofe).

¹⁷ 42 U.S.C. § 1973aa-1a.

language translation or interpreters would be denied. However, it is arguable, neither proposal specifically would have banned the government from also providing services or materials, as needed, in other languages for non-English speaking constituents. That is, they did not provide that the government conduct its official business “exclusively” or “only” in English. For this reason, it might have been difficult for plaintiffs to argue that they were actually injured by the provision of supplemental services to foreign language speakers if the core official English requirements of the bill were otherwise met. On the other hand, it could be argued that any foreign language usage would have conflicted with Congress’ purpose and the “affirmative obligation” imposed upon the Federal Government “to preserve and enhance the role of English as the official language... “ In effect, private civil actions that would have been permitted by the bill to enforce this “affirmative” governmental obligation could have made the linguistic policy implications of virtually any “official” action or inaction by the federal government susceptible to judicial inquiry.

Whether the official English mandate in the House proposals would have pertained only to the form of speech or linguistic medium used by the government, or its employees, to communicate with the public or was also intended to reach the content or subject matter of governmental speech may be another issue. If narrowly interpreted by the courts, as reaching only the formal aspect of federal governmental documents, rather than their substance, H.R. 997 and H.R. 4408 could have had marginal impact on federally mandated standards in regard to the education of language minorities, bilingual election requirements, or private employer English-only workplace rules. H.R. 997, in particular, specifically provided that it not be read “to disparage any language or to discourage any person from learning or using a language” nor in a manner “inconsistent with the Constitution of the United States.” These disclaimers might have had the effect of preserving the *status quo* in regard to federally enforced bilingualism pursuant to the Constitution or federal civil rights statutes. An argument could be made, however, that the governmental duty to “preserve and enhance” the role of official English demands, at a minimum, that a substantive commitment to English be reflected in the content of federal agency rulemaking. Accordingly, the bills could have conceivably be read to apply both to the form and substance of federal laws, regulations, or orders, so as to preclude imposition upon state or local authorities, or private parties, of foreign language assistance or bilingual requirements of various sorts. Of course, H.R 4408 would have eliminated some uncertainty by its express repeal of language minority voting requirements.

Thus far, the 110th Congress has not yet witnessed the introduction of legislation comparable to the measures that emerged during the 109th Congress. However, several more limited proposals have been introduced, including H.J.Res. 17 and H.J.Res. 19, both of which would amend the Constitution to establish English as the official language of the United States, and H.Con.Res. 11, which would resolve that the federal government should pursue policies that not only encourage all residents to become fully proficient in English, but also encourage all residents to learn or maintain skills in languages other than English.

Federal Policy on Foreign Language Assistance

The interplay of previously proposed legislation with current federal foreign language policy is perhaps best illustrated by E.O. 13166 and departmental regulations by the federal government issued thereunder. That order, issued by President Clinton in 2000, directed each federal department and agency to “implement a system” for insuring that persons with limited English proficiency (LEP) are provided “meaningful access” to programs and activities conducted by the federal government and by recipients of federal financial assistance covered by Title VI of the 1964 Civil Rights Act.¹⁸ A policy guidance document, released by the Department of Justice (DOJ) on the same day, and referenced in the order, set forth “compliance standards that recipients must follow to ensure that the programs and activities that they normally provide in English are accessible to LEP persons and thus do not discriminate on the basis of national origin in violation of Title VI ... and its implementing regulations.” Each federal grant-making agency was to tailor the general standards of the DOJ guidance into an approach “ensuring meaningful access by LEP persons that is practical and effective, fiscally responsible, responsive to the particular circumstances of each agency, and can be readily implemented.”¹⁹

The DOJ guidance notes that Title VI and its regulations require recipients of federal funds to take reasonable steps to insure “meaningful” access to information and services they provide. What constitutes reasonable steps, the document advises, will be contingent on a number of factors, such as the number and proportion of LEP persons in the eligible service population, the frequency with which LEP individuals come into contact with the program, the importance of the service provided by the program, and the resources available to the recipient. In balancing factors for determining what steps are reasonable, agencies are to particularly address the appropriate mix of oral and written language assistance. Acknowledging that written translations are a “highly effective way” of communicating with LEP persons, the document states that oral communication may also be a necessary part of the exchange of information. LEP persons include those born in other countries, some children of immigrants born in the United States, and other non-English or limited English proficient persons born in the United States, including some Native Americans.

In its guidance, DOJ cited *Lau v. Nichols*,²⁰ in which the U.S. Supreme Court interpreted Title VI as requiring that a federal financial aid recipient take steps to insure that language barriers do not exclude LEP children from effective participation in public educational benefits and services. *Lau* involved a group of Chinese students in the San Francisco public school system who received classroom instruction solely

¹⁸ Title VI provides that “[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance.” Id. § 2000d.

¹⁹ 65 FR 50121. Additional information on the order and implementing guidance is available at [<http://www.usdoj.gov/crt/cor/13166.htm>].

²⁰ 414 U.S. 563 (1974).

in English. The Court ruled that the failure to provide such students with supplemental instruction in their primary language violated the Title VI ban on national origin discrimination. The DOJ document extrapolates an extension of the *Lau* doctrine beyond education to other contexts. Note, however, that while the *Lau* precedent remains intact, its value as precedent may be diminished somewhat by subsequent judicial developments.

The Court's ruling in *Alexander v. Sandoval* was decided after publication of the DOJ guidance,²¹ although DOJ has taken the position that the *Sandoval* decision did not strike down the Title VI regulations that form the basis for Executive Order 13166.²² At issue in *Sandoval* was the State of Alabama's "English-only policy" requiring all aspects of its driver's license examination process, including the written portion, to be exclusively in English. In rejecting a Mexican immigrant's claim that the state policy violated Title VI because of its "disparate impact" on ethnic minorities, a five Justice majority ruled that Congress did not intend a private right of action to enforce Title VI except as a remedy for intentional discrimination. Federal regulations prohibiting state practices that have a discriminatory impact, regardless of intent, could not provide a basis for private lawsuits. *Sandoval*, however, did not directly confront federal agency authority, previously acknowledged by the Court, to enforce Title VI compliance administratively with rules condemning practices discriminatory in their effect on protected minority groups. Thus, at least for now, "disparate impact" rules — mandating language assistance for non-English proficient clients of federally financed programs — may still be enforced by the government, just not by private litigants. However, some previous congressional proposals would arguably have negated any private Title VI remedy for linguistically-based ethnic discrimination. And any requirement regarding the government's "affirmative obligation" to promote English could portend similar perils for agency rules condemning the disparate impact of English-only policies under Title VI.

Constitutional Law Implications of Official English

Judicial decisions involving the constitutional implications of government language policies have arisen in a variety of legal contexts. One series of cases has involved non-English speaking plaintiffs who have unsuccessfully sought to require the government to provide them with services in their own language. In *Soberal-Perez v. Heckler*,²³ for example, the Second Circuit rejected an action on behalf of Hispanic individuals of limited English proficiency who claimed that the equal protection and due process clauses of the Constitution required the Secretary of Health and Human Services to provide them with Social Security forms and instructions in Spanish. The appeals court could find no basis for the constitutional

²¹ 532 U.S. 275 (2001).

²² Memorandum from Ralph F. Boyd, Jr., Assistant Attorney General, Civil Rights Division, Department of Justice, for Heads of Departments and Agencies, General Counsels and Civil Rights Directors (Oct. 26, 2001), available at [<http://www.usdoj.gov/crt/cor/lep/Oct26memorandum.pdf>].

²³ 717 F.2d 36 (2d Cir. 1983), *cert. denied*, 466 U.S. 929 (1984).

and related statutory claims since the Secretary’s action bore a rational relationship to a legitimate governmental purpose:

We need only glance at the role of English in our national affairs to conclude that the Secretary’s actions are not irrational. Congress conducts its affairs in English, the executive and judicial branches of government do likewise. In addition, those who wish to become naturalized citizens must learn to read English.... Given these factors, it is not irrational for the Secretary to choose English as the one language in which to conduct her official affairs.²⁴

The federal courts have similarly found no constitutional duty on the part of government to provide certain other forms of official notice or services to individuals in their native tongue.²⁵ These cases, however, hold only that in the circumstances involved, non-English speakers have no affirmative right to compel government to provide information in a language that they can comprehend. They do not address the converse issue of legislative power to restrict official speech in languages other than English as a matter of state or national policy.

Another body of judicial authority has found that certain state law restrictions on linguistic diversity may act as a “proxy” for national origin discrimination or infringe upon First Amendment free speech rights. In *Meyer v. Nebraska*,²⁶ for example, the Supreme Court found that a state law prohibiting modern foreign language instruction in any school, public or private, before the ninth grade violated Fourteenth Amendment due process because it infringed upon the liberty of parents to make educational choices for their children. According to the *Meyer* Court:

[t]he protection of the Constitution extends to all, to those who speak other languages as well as to those born with English on the tongue. Perhaps it would be advantageous if all had ready understanding of our ordinary speech, but this cannot be coerced by methods which conflict with the Constitution — a desirable end cannot be promoted by prohibited means.²⁷

Meyer was applied by the Court in *Farrington v. Tokushiga* to invalidate a Hawaii statute that singled out “foreign language schools,” such as those in which

²⁴ *Id.* at 43-44.

²⁵ See, e.g., *Toure v. United States*, 24 F.3d 444 (2d Cir. 1994)(no right to notice of administrative seizure in French); *Garcia v. Spun Steak Co.*, 998 F.2d 1480 (9th Cir. 1993), cert. denied 512 U.S. 1228 (1994)(employer’s English-only workplace rules do not violate Title VII of the 1964 Civil Rights Act); *Vialez v. New York City Hous. Auth.*, 783 F.2d 109 (S.D. N.Y. 1991) (Housing Authority’s failure to provide documents in Spanish does not violate Title VI or the Fair Housing Act since “it reflects, at most, a preference for English over all other languages” rather than racial or ethnic discrimination); *Guadalupe Org., Inc. v. Tempe Elementary Sch. Dist. No. 3*, 587 F.2d 1022, 1027 (9th Cir. 1978)(no right to bilingual education); *Frontera v. Sindell*, 522 F.2d 1215, 1219-20 (6th Cir. 1975)(English-only civil service exams do not violate Hispanic individuals’ equal protection rights since “[l]anguage, by itself, does not identify members of a suspect class”); and *Carmona v. Sheffield*, 475 F.2d 738 (9th Cir. 1973)(no right to employment notices in Spanish).

²⁶ 262 U.S. 390 (1923).

²⁷ *Id.* at 401.

Japanese was taught, for stringent government control.²⁸ The state's purpose for regulating language instruction in *Tokushiga* was "in order that the Americanism of the students may be promoted."²⁹ Similarly, the governmental interests asserted in defense of the *Meyer* statute were "to create an enlightened American citizenship in sympathy with the principles and ideals of this country,"³⁰ "to promote civic development,"³¹ and to prevent inculcation in children of "ideas and sentiments foreign to the best interests of the country."³² Despite a judicial acknowledgment of the validity of such goals, the Court found them insufficient to warrant state interference with foreign language usage in the schools.

Yu Cong Eng v. Trinidad considered the constitutionality of a Philippine law forbidding Chinese merchants from keeping their business account books in Chinese, the only language they knew.³³ Finding that enforcement of the law "would seriously embarrass all of [the Chinese merchants] and would drive out of business a great number,"³⁴ the Court held that the law denied the merchants due process and equal protection under the Constitution. Although based on the substantive due process doctrine of an earlier period, reverberations of *Yu Cong Eng* and *Meyer* may be found in rulings of more recent vintage. In *Hernandez v. New York*,³⁵ for example, the Court determined that peremptory challenges directed at Latino jurors because of their bilingualism and demeanor were not unconstitutional because the factors motivating the prosecutor's action in that case did not function as a proxy for race. Writing for the plurality, however, Justice Kennedy stated that:

[w]e would face a quite different case if the prosecutor had justified his peremptory challenges with the explanation that he did not want Spanish-speaking jurors. It may well be, for certain ethnic groups and in some communities, that proficiency in a particular language, like skin color, should be treated as a surrogate for race under an equal protection analysis.³⁶

The U.S. Supreme Court in *Arizonans for Official English v. Arizona* side-stepped constitutional controversy when it vacated for procedural irregularities a ruling by the Ninth Circuit voiding Arizona's official English law.³⁷ In 1988, Arizona voters had approved by referendum a state constitutional amendment providing that

²⁸ 273 U.S. 284 (1927).

²⁹ 273 U.S. at 293.

³⁰ *Id.* at 393.

³¹ *Id.* at 390.

³² *Id.* at 398.

³³ 271 U.S. 500 (1926).

³⁴ *Id.* at 514.

³⁵ 500 U.S. 352 (1991).

³⁶ *Id.* at 371. Similarly, Justice Stevens, in dissent, asserted that "an explanation [for striking prospective jurors] that is 'race-neutral' on its face is nonetheless unacceptable if it is merely a proxy for a discriminatory practice." *Id.* at 379.

³⁷ 520 U.S. 43 (1997).

English is the official language of the State of Arizona and that the state and its political subdivisions — including “all governmental officials and employees during the performance of government business” — must “act” only in English. A former insurance claims manager for the state who spoke both English and Spanish in her daily service to the public argued that the law had a silencing and chilling effect on constitutionally protected speech of bilingual, monolingual, and Spanish-speaking public employees and their clients. Despite assertions by Arizona’s Attorney General that communications “to facilitate delivery of governmental services” were not “official acts” covered by the law, the Ninth Circuit held that the “plain wording” of the law defied such limitation and was an overly broad restriction on free speech rights of state employees and the public they served.³⁸

The First Amendment analysis applied by the 6-5 *en banc* majority of the Ninth Circuit required balancing the right of public employees to speak on matters of “public import” against the government’s legitimate interest as an employer “in achieving its goals as effectively and efficiently as possible.” Although the government may generally regulate public employee speech concerned simply with “matters of personal or internal interest,” the Arizona law “significantly interfere[d]” with “communications by or with government employees” related to “the provision of government services and information,” a form of public discourse entitled to greater constitutional protection.³⁹ Moreover, the efficiency and effectiveness considerations constituting fundamental governmental interests in the usual “public concern” case — and that provide the justification against which the employee’s First Amendment interests must be weighed — were found totally lacking by the Ninth Circuit. Indeed, the appeals court determined that government efficiency would actually be promoted rather than hindered by permitting public employee speech in languages other than English. Nor was the state’s asserted interest in forging “unity and political stability” by “encouraging a common language” sufficient to warrant restrictions on foreign language usage.

The Supreme Court vacated and remanded the case, in effect leaving the Arizona law intact for the time being. Speaking for a unanimous Court, Justice Ginsburg declared the case moot since the plaintiff had resigned from state employment prior to appeal and had never sought to have the case certified a class action. In addition, the Justices had “grave doubts” whether Arizonans for Official English, original sponsors of the ballot initiative, had standing to appeal the case as a party after the Arizona Governor declined to do so. Finally, the federal district and

³⁸ *Yniquez v. Arizonans for Official English*, 69 F.3d 920 (1995).

³⁹ In this regard, the court’s opinion observed: “The practical effects of Article XXVIII’s de facto bar on communications by or with government employees are numerous and varied. For example, monolingual Spanish-speaking residents of Arizona cannot, consistent with the article, communicate effectively with employees of a state or local housing office about a landlord’s wrongful retention of a rental deposit, nor can they learn from clerks of the state court about how and where to file small claims court complaints. They cannot obtain information regarding a variety of state and local social services, or adequately inform the service-givers that the governmental employees involved are not performing their duties properly or that the government itself is not operating effectively or honestly. Those with a limited command of English will face commensurate difficulties in obtaining or providing such information.” *Id.*, at 941.

appeals courts had erred by failing to certify unsettled state-law questions regarding the scope of the English-only amendment to the Arizona Supreme Court for “authoritative construction” before proceeding with the case. The Supreme Court thus left a constitutional ruling on the Arizona Official English law for another day.

In 1998, the Arizona Supreme Court decided *Ruiz v. Hull*,⁴⁰ holding that the state’s English-only amendment violated the First Amendment and the Equal Protection Clause. Like the Ninth Circuit, the Arizona Court found a core First Amendment right in a citizen’s ability to receive essential information from government officials and to petition the government for redress of grievances. According to the opinion, the state law “effectively cuts off governmental communication with thousands of limited-English-proficient and non-English-speaking persons in Arizona, even when the officials and employees have the ability and desire to communicate in a language understandable to them.” Applying strict scrutiny analysis, *Ruiz* held the English-only amendment violated the First Amendment because it was overbroad and could not satisfy the compelling state interest test. The Arizona Court also found an Equal Protection violation based on earlier precedents establishing a “fundamental individual right of choice of language.” Pending a definitive federal court ruling, however, the constitutionality of restrictive official English policies remains a somewhat unsettled matter.

Miscellaneous Federal Policies Providing for Non-English Translation and Services

Besides voting rights, federal statutory requirements regarding foreign language interpretation and use are included in various other federal programs and activities. For example:

- American Indians: Congress enacted Chapter 31, Title 25 of the U.S. Code to “preserve, protect, and promote the rights and freedom of Native Americans to use, practice, and develop Native American languages.” (25 U.S.C. § 2903(1)) The chapter is supported by congressional findings relative to the “unique” and “special” status of Native-American language and culture, and to the need for the “United States, individual States, and territories to encourage the full academic and human potential achievements of all students and citizens and to realize these ends...” (Id. at § 2901) Specifically, in regard to education, the declaration of policy “encourage[s] and support[s]” the use of Native American languages “as a medium of instruction” in Indian schools, and also “encourages” all other “elementary, secondary, and higher education” institutions to “afford full academic credit” and “include Native American languages in the curriculum in the same manner as foreign languages.” (Id. at § 2903) In aid of this policy, the statute further provides that “[t]he right of Native Americans to express themselves through the use of Native

⁴⁰ 191 Ariz. 441, 957 P.2d 984, cert. denied, 525 U.S. 1093 (U.S. 1999).

American languages shall not be restricted in any public proceeding, including publicly supported education programs.” (Id. at § 2904) Federal departments and agencies are to evaluate their policies and procedures, and laws within their administrative jurisdiction, for compliance with the stated policy, but no procedure for governmental enforcement of the linguistic “right” created by the law is provided.

- Immigration: Interpreters must be provided during physical and mental examinations of alien immigrants seeking entry into the United States (8 U.S.C. § 1222 (b)).
- Judicial proceedings: The Director of the Administrative Office of the U.S. Courts is to establish a program for the use of foreign language interpreters in federal civil and criminal proceedings instituted by the United States (28 U.S.C. § 1827); courts may appoint interpreter to be paid by the government in federal criminal proceedings (Rule 28, Fed. R. Crim. Proc.); service of judicial process by the United States and state courts on a foreign state, its political subdivisions, agencies, or instrumentalities must be accompanied by a translation “into the official language of the foreign state” (28 U.S.C. § 1608); employment of interpreters in court-martial, military commission, or court of inquiry proceedings is required, if needed. (10 U.S.C. § 828).
- Social and health care services: Notices must be provided “in language that is easily understandable to reader” under various Social Security Act programs (42 U.S.C. §§ 405, 1383). Foreign language interpreters or translations are required in connection with federally funded migrant and community health centers (42 U.S.C. §§ 254b(b)(1)(a)(iv) and 254b(j)) in a grant program for certain health care services for the homeless (42 U.S.C. § 256); in alcohol abuse and treatment programs, which serve a substantial number of non-English speaking persons (42 U.S.C. § 4577(b)); and in the grant program for supportive services under the Older Americans Act (42 U.S.C. § 3030d(a)(3)).
- Agriculture: Department of Agriculture funds may be used for translation of publications into foreign languages (7 U.S.C. § 2242b).

State Laws

As noted, 28 states have adopted Official English laws in various forms. Some enactments make a simple declaration of English as the official state language,

without more.⁴¹ Others arm state legislatures with power to enforce linguistic uniformity, or otherwise to preserve and enhance the official role of the English language. More specific measures expressly prohibit or restrict, in one fashion or another, foreign language usage by state agencies or employees in the conduct of official business. Specific exceptions to English-only requirements are frequently included, however, particularly where necessary to comply with federal law.

Meanwhile, a plethora of other laws have also been enacted by various state legislatures to facilitate communication with persons of limited English proficiency in the provision of needed public and private services. For example, most states require the use of interpreters in courtroom and other law enforcement settings,⁴² while many states require similar services for LEP individuals appearing before administrative agencies or seeking health care.⁴³ Similar requirements regarding interpretation and translation also appear in state laws pertaining to professional licensing,⁴⁴ business and employment,⁴⁵ state and local elections,⁴⁶ and military justice.⁴⁷

⁴¹ See, e.g., Colo. Const. Art. II, § 30, which states, in its entirety, “[t]he English language is the official language of the State of Colorado.”

⁴² See, e.g., Code of Ala. §§ 12-21-130, 15-1-3 (Foreign language interpreters are provided to non-English speaking defendants or witnesses in criminal or civil proceedings); ALM GL ch. 221C, § 2 (Non-English speakers have the right to the assistance of a qualified interpreter in legal proceedings).

⁴³ See, e.g., Md. State Government Code Ann. § 10-212.1 (In contested cases, parties may apply to an agency for an interpreter if they cannot understand English); Minn. Stat. § 15.441 (“Every state agency that is directly involved in furnishing information or rendering services to the public and that serves a substantial number of non-English-speaking people shall employ enough qualified bilingual persons in public contact positions, or enough interpreters to assist those in these positions, to ensure provision of information and services in the language spoken by a substantial number of non-English-speaking people.”); Conn. Gen. Stat. § 19a-490i. (Each “acute care hospital” shall ensure that interpreters are available for patients that speak a language other than English that is spoken by more than 5% of the population and must review and translate standardized forms for non-English speaking patients); Fla. Stat. § 381.026 (Patients who do not speak English have the right to be provided with an interpreter when receiving medical services if the facility has a person readily available who can interpret on behalf of the patient).

⁴⁴ See, e.g., Md. Business Regulation Code Ann. § 2-110 (Applicants for professional or business licenses are permitted to use interpreters, provided the Department of Licensing determines that such use would not “compromise the integrity” of the testing process).

⁴⁵ See, e.g., Iowa Code § 91E.2 (If 10% or more of an employer’s workforce does not speak English and they speak the same language, then the employer must provide an interpreter); NY CLS Exec Appx § 466.11 (The provision of an interpreter is specifically included in the definition of “reasonable accommodation” in the workplace).

⁴⁶ See, e.g., Fla.Stat. § 101.2515 (A translated ballot in the language of any minority group should be provided if the supervisor of an election requests such a translation 60 days prior to an election); N. M. Stat. Ann. § 1-2-19 (An election translator shall be appointed to assist language minority voters).

⁴⁷ See, e.g., A.R.S. § 26-1028 (Interpreters may be provided for proceedings before “a court-
(continued...)”)

⁴⁷ (...continued)

martial, military commission or court of inquiry”); S.C. Code Ann. § 25-1-2640 (The convening authority of a military court may detail or employ interpreters who shall interpret for the court).