

***Time to Revive Puerto Rican
Voting Rights/Ya Es Tiempo
para Revitalizar los Derechos
al Voto de los Puertorriqueños***

Katherine Culliton-González, Esq.

Berkeley La Raza Law Journal
& Center for Puerto Rican Studies

Introduction

- This article follows the chronological order of the establishment of Puerto Rican citizenship and voting rights on the Island and then Stateside.
- It tells stories & recounts past victories.
- It will show how rights established through the 1965 Voting Rights Act should be revitalized, as currently over one million Stateside Puerto Ricans may be experiencing violations of their rights to vote with equal access and in their primary language.

Main Thesis

- Over one million Stateside Puerto Ricans may be living without the protections of rights guaranteed to them by the Voting Rights Act of 1965 (“VRA”).
- Section 4(e) of the 1965 VRA was enacted specifically to prohibit denial of voting rights of persons born in Puerto Rico based on any inability to read, write, or understand English.
- The Supreme Court has emphasized that the “practical effect” of Section 4(e) was to prohibit denying the right to vote to large segments of the Puerto Rican community and thereby further the aims of the Equal Protection Clause with regard to the right that is “preservative of all rights.”
- For Puerto Ricans, there is no requirement to speak English in order to be U.S. Citizens.
- Thus, the voting rights of many Puerto Ricans with limited English proficiency (“LEP”) are compromised if elections are held only in English.

Pasado al Presente

- I. Great Migration & 1st Generation
Puerto Rican Voting Rights Cases
(1945-1975)***
- II. 1975 Voting Rights Act Amendments***
- III. New Migration & New Stateside
Puerto Rican Voting Rights Issues
(1976-2008)***
- IV. Time to Revive Puerto Rican Voting
Rights***

I. Brief History of Puerto Rican Migration & 1965-1975 “Stateside” Voting Rights

A. Puerto Ricans & US Citizenship

- Jones Act (1917)(retroactive)(goals included migration)(never any requirement to speak English)
- Spanish primary language in Puerto Rican & its school system (especially since 1947)

B. The Great Migration

- Started with 1917 Jones Act—1000s to NYC factories
- 1952 Commonwealth policies encouraged migration for population control & development
- 1940-1950—151,000 men & women
- 1950-1960—nearly ½ million (470,000/2m = 21%)(Cf. Irish)
- Exploitative conditions
- Circular migration—identity including Spanish (in 2000, 81.5% Stateside PRs speak it at home)

C. 1st Generation Puerto Rican VRA Cases

1. The Case of María López

- Section 4(e) of VRA enacted (permanent)
- Testimony (Badillo) included that NY English literacy RQ “discriminatory on its face”
- 21 year-old María López attempted to register to vote in Rochester; Election Commission said it was their policy to deny her, despite 4E, due to NY State Constitution & Election Law requiring English-literacy test
- AG John Doar brought her case to WDNY federal court, which ruled that “the VRA was born out of problems in the South; [but] devised to eliminate 2nd class citizenship wherever present.”

US v. Monroe County (WDNY 1965)

- 4E valid exercise of Congressional power under 14th Amendment—reviewed purposes (anti-discrimination)—reviewed PR school system—issued Permanent Injunction
- NY State 10th A defense defeated due to Supremacy Clause (federal trumps state law)
- This court held that, although DCDC ruled differently, “upgrading the people of the Island of Puerto Rico to full & complete citizenship” through the enactment of 4E was a judgment “Congress was superbly suited to make.”

2. *The 1966 Supreme Court*

- Cardona v. Power—6th grade literacy RQ in 4E meant it could not be enforced for all
- Katzenbach v. Morgan—appeal from Ms. López v. NY Constitution & Election Laws & “concerned citizens”
- Justice Brennan held that despite 10th A, states may not legislate in contravention of the 14th & 15th As
- 4E constitutional—1/2 million PRs in NY no longer subject to English-literacy test

Katzenbach v. Morgan's impact

- (1) Legal foundation for banning literacy tests for all voters in 1970 VRA amendments (despite 1959 Lassiter decision requiring discriminatory intent)
- (2) Used in 1980 & 1997 Supreme Court opinions on Section 5 & Congressional “authority to enact appropriate legislation to enforce the 14th & 15th As”
- (3) First case upholding language access rights for LEP voters

3. The 1970s Urban Population Decisions

PROPA v. Kusper (7th Cir. 1972)

- Established American legal rule that right to vote includes not just the right to pull a lever, but right to vote an informed and effective vote (based on Garza (Texas) & US v. Louisiana SCt decisions RE illiterate voters).
- This means thousands of Puerto Ricans educated in Spanish had right to bilingual poll workers, election materials & information (wherever needed).
- Included long analysis of Spanish-language education in Puerto Rico.

The PRLDEF Cases

Arroyo v. Tucker (ED. Pa. 1974)

- Phila. Voters born in PR could not cast “informed or effective” ballot if English-only elections.
- 3-prong remedy = (1) bilingual election materials (including ballot); (2) bilingual poll workers; (3) Spanish-language election info. publicized in proportionate media; all in every census tract with 5% PR population.

Torres v. Sachs (DCNY 1974)-same remedy

- Decision used to show NY, Bronx & King Counties could not escape Section 5 scrutiny

Classic Forms of Impact Litigation

NYC 860,552 PRs in 1980

Chicago 112,074 PRs in 1980

Philly 46,587 PRs in 1980

TOTAL 1,109,213 Puerto Rican citizens

NOTE: These were the 3 largest cities in terms of Stateside Puerto Rican migration during this era.

Other 1970s Cases

- **See Juan Cartagena—2 lawrevs**

Bridgeport, Conn. 4E case used to show history of discrimination in later Sec. 2 vote dilution case

- **Ortiz v. NY State Bd. Of Elections (WD NY 1974)**

- State-side class-action on behalf of LEP PRs in NY (except NYC due to Torres)

- Any county, city, town, village with 10% or more PR pop. (per latest census) was required by federal court ordered consent decree to provide 3 prongs of bilingual access

- Impacted about 30,000 PRs in NYS (Rochester, Albany, Haverstraw, etc.)

**** **No expiration date**

II. 1975 VOTING RIGHTS ACT AMENDMENTS **& 1976 THRESHOLD CASE**

- A. Amendments Expanded Section 5 Scrutiny for Latinos— based on 4E cases + MALDEF testimony on history of discr. vs. Latino voters
- States of Texas, New Mexico, Arizona & Cali brought under Section 5 pre-clearance RQ (any voting change; discriminatory impact)
 - Although statute says “language minority citizens” & “language minority group,” this means all Latino citizens
 - Section 2 was also amended to clarify discriminatory intent not required; applied to defined “language minority groups” (Latinos, Asians, Native Americans)
 - Section 2 protects vs. vote dilution as well as discriminatory treatment in the polls.

B. The New Language Minority Provisions

- **Sections 203 & 4(f)(4)**—4(f)(4) requires that Section 5 jurisdictions with ### of LEP Latino voters must provide bilingual access (3 prongs, effectiveness standard)
- Section 203 is a powerful, automatic, threshold-based remedy: If # of LEP citizens of a language minority group exceeds 10,000 or 5% of all voting-age citizens, bilingual access must be provided (3 prongs, effectiveness standard)
- Oral RQ for oral languages (certain Native American languages)

Impact of 203 for Spanish-speakers

California, New Mexico, Texas &
6 counties in Arizona “covered”
under 203, plus:

- 8 counties in Colorado
- 7 in Conn.
- 8 Florida counties
- 2 Illinois
- 6 Kansas
- 1 Maryland
- 6 Mass. cities
- 1 Nebraska county
- 1 Nevada
- 7 New Jersey counties
- 2 Oklahoma
- 1 Penn.
- 2 Rhode Island
- 3 Washington State

*****Per 2000 Census, 2,136,060
Stateside Puerto Ricans
lived in Section 203-covered
jurisdictions**

c. Questions Regarding Section 4(e) in the Post-203 Era

- Was 4(e) still applicable?
- 1976 Márquez v. Falcey consent decree—lead Plaintiff was in Trenton (Mercer County)—bilingual access was required for PRs in the entire state, not just those 7 counties “covered” under 203 b/c they met its population thresholds
- Bilingual access required state-wide if more than 10% Spanish-surnamed voters
- Required state to mail registration forms to say: “Check here if you were born in PR and require Spanish-language election materials.”
- This was despite State’s argument that 203 limited bilingual election requirements to 203 “covered” areas.

Impact of 1976 Márquez consent decree

- Assisted 121,397 Puerto Ricans living in New Jersey outside 203-covered counties
- Although only a consent decree, issued by federal court & illustrated continued applicability & enforceability of 4E
- Unfortunately, only a one-time order, and many counties in NJ with significant PR populations have not provided the ballot in Spanish (Penns Grove).

D. Over 2 Million Protected by Section 203 & Over 1 Million Left Out

Per 2000 Census:

- 2,136,060 PRs live in jurisdictions “covered” under 203—notice of Census Bureau determinations—clear RQ to provide Spanish-language access
- Over one million—1,270,118—live in jurisdictions outside 203 coverage
- 40% of Stateside PRs are LEP (admitted on Census)(4E application is broader than LEP)
- 38% born on the Island—educated in Spanish in PR (circular migration means more are protected under 4E)
- **Therefore**, about 40% of one million Stateside Puerto Ricans are likely to be experiencing 4E violations.

(what it looks like)

III. 1980-2008 STATESIDE PUERTO RICAN VOTING RIGHTS ISSUES

A. The 1981 Gerena-Valentín Litigation

- NYC redistricting scheme violated Section 5 of the VRA.
- 4E did not include candidate petitions (note once on ballot rule).
- Plaintiffs did not prove Spanish-language candidate petitions were needed—judge noted that if community had provided translation, this would have proven the need under 4E.

B. Puerto Rican Migration 1980-2000

Another upsurge bringing new waves to new areas.

- Dispersal from cities to suburbs (better life).
- NYC had the highest Stateside PR pop, but it went from 860,000 in 1980 to 782,172 in 2000 (Chicago & Philly were similar)
- Satellite cities became important (some covered under 203, others not (examples are Wilmington DE, Haverstraw NY)

States:

- NJ PR pop. increased to 366,788 total in 2000 (121,397 not covered under 203)
- Mass. PR pop. grew to 199,207 total (98,084 not covered)
- NY—1,050,293 total, 835,440 covered (214,853 not covered)
- Florida—became #2 destination, with 16.31% Stateside PRs 331,410 covered, but 150,617 not covered under 203

Other Significant PR Pops Outside 203

Examples include:

- 20,251 in Maryland
- 25,385 in Cleveland
- 16,613 in Milwaukee
- 30,005 in Hawaii
- In all these jurisdictions, about 40% were born in PR & therefore educated in Spanish & about 40% are LEP
- In 2000, LEP rate in PR was 71% & circular migration continues
- Note also the dramatic drop in voter participation from 80% on the Island to 30% Stateside

B. **2003 DOJ 4(e) Litigation in Reading, Berks County, PA**

- Right to vote includes right to vote “informed & effective” ballot
- For 1000s of PRs in Reading, English-only elections “like going to a concert wo/being able to hear the music”
- Federal court holding that Section 203 did not replace 4E
- Although 4E has been “relatively unenforced,” DOJ could bring test cases to enforce federal voting rights law—moreover, this was not a “frivolous or de minimus” case
- Section 4E “clear & unambiguous”
- A few bpws & some Spanish-language instructions inside voting booths was still in violation
- 3-prong remedy---Reading has changed.

C. **2006 VRA Reauthorization Act**

- Act of Congress (not just leg history)
- Reconfirmed Validity of Section 4(e)

E. Need for Future Enforcement of Section 4(e)

From now until next decennial census & beyond:

- Mid-decennial census shows PR migration increasing
- Next 203 “determinations” are not until 2012 or 2013—and even after that, about one million Stateside Puerto Ricans may be left out
- This generation of Stateside Puerto Ricans living in challenging times for Latino voting rights, with issues such as racial profiling of Latino voters
- Highly unlikely that jurisdictions will volunteer to provide Spanish-language access to elections (even though relatively easy & inexpensive)

IV. Conclusion

- Over one million Stateside Puerto Ricans may be living without the protections of rights guaranteed to them by the Voting Rights Act of 1965 (“VRA”).
- Section 4(e) of the 1965 VRA was enacted specifically to prohibit denial of voting rights of persons born in Puerto Rico based on any inability to read, write, or understand English.
- The Supreme Court has emphasized that the “practical effect” of Section 4(e) was to prohibit denying the right to vote to large segments of the Puerto Rican community and thereby further the aims of the Equal Protection Clause with regard to the right that is “preservative of all rights.”
- For Puerto Ricans, there is no requirement to speak English in order to be U.S. Citizens.
- Thus, the voting rights of many Puerto Ricans with limited English proficiency (“LEP”) are compromised if elections are held only in English.

Recommendations

- See note 312.
- What does the audience think?
- Can enforcing Puerto Rican rights help all Latinos?