

# ASIAN AMERICANS AND REAUTHORIZATION OF THE VOTING RIGHTS ACT

Glenn D. Magpantay & Nancy W. Yu<sup>1</sup>

## I. INTRODUCTION

In 2007, certain provisions of the federal Voting Rights Act will expire unless Congress reauthorizes them.<sup>2</sup> These include the provisions for language assistance (Section 203)<sup>3</sup> and enforcement (Section 5).<sup>4</sup> Asian Americans, like African Americans and Latinos, continue to face voting discrimination and grow in population. The Voting Rights Act's expiring provisions have helped to ensure that Asian Americans, and other racial and ethnic minorities, can fully exercise their right to vote. This article will review Section 203 and will discuss strengthening the provision as Congress considers reauthorization. The goal is to ensure that all Americans, particularly those who have suffered a legacy of discrimination, can fully participate in the political franchise.

## II. BACKGROUND

### A. Asian Americans in the United States

Asian Americans are one of the fastest-growing minority groups in the nation, estimated to number almost twelve million.<sup>5</sup> More and more are becoming U.S. citizens through naturalization and are registering to vote. Almost half (43%) of all Asian Americans 18 or over are limited English proficient<sup>6</sup> and eighty-one percent speak a language other than English in

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1. Glenn D. Magpantay, B.A., State University of New York at Stony Brook, 1992; J.D., *cum laude*, New England School of Law, 1998. Nancy W. Yu, B.A., University of Southern California, 1999. Magpantay is a Staff Attorney and Yu is a Policy Analyst at the Asian American Legal Defense and Education Fund, 99 Hudson Street, 12th floor, New York, NY 10013; info@aaldef.org; www.aaldef.org; 212-966-5932. AALDEF, founded in 1974, is a New York-based organization that protects and promotes the legal rights of Asian Americans through litigation, legal advocacy, and community education. AALDEF Executive Director Margaret Fung also assisted in writing parts of this article.

2. The Voting Rights Act is codified at 42 U.S.C. §§ 1973-1973aa-6 (2000).

3. § 1973aa-1a.

4. § 1973c.

5. Census 2000 identified 11,898,828 individuals who are of Asian heritage. U.S. CENSUS BUREAU, CENSUS 2000 PHC-T-1, TABLE 3: "POPULATION BY RACE ALONE, RACE IN COMBINATION ONLY, RACE ALONE OR IN COMBINATION, AND HISPANIC OR LATINO ORIGIN, FOR THE UNITED STATES: 2000" (2001), available at <http://www.census.gov/population/www/cen2000/phc-t1.html>. Asian American growth since 1990 is 72.2% (a "maximum" number as identified by the census report). U.S. CENSUS BUREAU, CENSUS 2000 PHC-T-1, TABLE 4: "DIFFERENCE IN POPULATION BY RACE AND HISPANIC OR LATINO ORIGIN, FOR THE UNITED STATES: 1990 TO 2000" (2001), available at <http://www.census.gov/population/www/cen2000/phc-t1.html>.

6. Defined as percentage of Asian Americans 18 or over who do not speak English only or English "very well." U.S. CENSUS BUREAU, CENSUS 2000 SUMMARY FILE 3, TABLE PCT62D: "AGE BY LANGUAGE SPOKEN AT HOME BY ABILITY TO SPEAK ENGLISH FOR THE POPULATION 5 YEARS AND OVER" (2001), available at <http://www.census.gov/Press-Release/www/2002/sumfile3.html>.

their homes.<sup>7</sup> Sixty-six percent of Asian Americans are citizens, most of whom (53%) acquired citizenship through naturalization.<sup>8</sup>

Because Asian Americans are often newly naturalized immigrants, they are typically “unfamiliar with the American electoral process, having come from Asian countries with political systems very different from [that of] the United States and which may even lack a tradition of voting.”<sup>9</sup> They often do not understand even basic political procedures, such as the need to register by a certain date in order to be eligible to vote in particular elections, the importance of enrolling in a political party in order to vote in primaries, and how to operate voting machines.<sup>10</sup>

For example, the Chinatown Voter Education Alliance found that in 1982, 35.2% of Chinatown voters, as compared to 18.9% of voters outside of Chinatown, went to the polls but did not vote – or mistakenly lost their votes through inadvertence – once they were in the voting booths. Many of these defects could [have been] remedied by providing bilingual materials.<sup>11</sup>

Special efforts are needed to prepare Asian American voters to fully participate in elections.

Moreover, economically disadvantaged Asian Americans face additional barriers to the free exercise of the right to vote.<sup>12</sup> In Chinatown, New York, for example, many Asian Americans are poor or working class, employed in restaurants and garment factory sweatshops. The struggle for day-to-day survival severely reduces their ability to involve themselves in the political process, which seems removed from their daily lives.<sup>13</sup> Ballots, voting materials, and poll workers conversant in Asian languages greatly facilitate Asian American access to the vote.

Since 1988, the Asian American Legal Defense and Education Fund (AALDEF) has conducted nonpartisan multilingual exit polls of Asian Americans and monitored elections to document instances of anti-Asian voter disenfranchisement.<sup>14</sup> In 2004, AALDEF expanded its multilingual exit poll to 23 cities in 8 states and surveyed almost 11,000 Asian American voters.<sup>15</sup> It was the largest survey of its kind. The poll found that 41% of

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7. *Id.*

8. U.S. CENSUS BUREAU, CENSUS 2000 SUMMARY FILE 3, TABLE PCT63D: “PLACE OF BIRTH BY CITIZENSHIP STATUS” (2001) available at <http://www.census.gov/Press-Release/www/2002/sumfile3.html>.

9. *Language Assistance Provisions of the Voting Rights Act, Hearing on S. 2236 Before the Subcomm. on Civil and Constitutional Rights of the H. Comm. on the Judiciary*, 102nd Cong. 286 (1992) [hereinafter 1992 *Hearings*] (statement of Margaret Fung, Executive Director of the Asian American Legal Defense and Education Fund, on file with author); *See also* S. REP. NO. 102-315, at 12 (1992).

10. 1992 *Hearings*, *supra* note 9, at 12 (statement of Margaret Fung).

11. *Id.*

12. THE COALITION FOR ASIAN AMERICAN CHILDREN AND FAMILIES, *HALF-FULL OR HALF-EMPTY? HEALTH CARE, CHILD CARE, AND YOUTH PROGRAMS FOR ASIAN AMERICAN CHILDREN IN NEW YORK CITY* (1999).

13. 1992 *Hearings*, *supra* note 9, at 8-9 (statement of Margaret Fung).

14. For a full review of AALDEF’s exit poll and election monitoring activities, *see* Glenn D. Magpantay, *Ensuring Asian American Access to Democracy in New York City*, 2 AAPI NEXUS 87 (2004).

15. AALDEF, *THE ASIAN AMERICAN VOTE 2004: A REPORT ON THE MULTILINGUAL EXIT POLL IN THE 2004 PRESIDENTIAL ELECTION* (2005) [hereinafter AALDEF ASIAN AMERICAN VOTE 2004 REPORT].

Asian American voters were limited English proficient.<sup>16</sup> In prior polls focused on New York City, AALDEF found that almost 70% of Chinese Americans and 80% of Korean Americans were limited English proficient.<sup>17</sup>

### B. *History of Voting Discrimination*

Over the past 18 years, AALDEF's election monitoring efforts have found that Asian Americans have had to overcome a series of discriminatory barriers to exercise their right to vote.<sup>18</sup> Many of these barriers were very similar to the forms of discrimination against language minority voters that Congress found in 1975.<sup>19</sup> The same types of voting discrimination present in 1975 continue to this day.

Through its poll monitoring efforts, AALDEF has found evidence of rude and hostile behavior by poll workers toward Asian American and limited English proficient voters, as well as racist remarks targeted against these voters.<sup>20</sup> In one such instance, a poll site supervisor in Richmond Hill, Queens, NY said: "I'll talk to [Asian voters] the way they talk to me when I call to order Chinese food," which was then followed with random English phrases with a mock Chinese accent.<sup>21</sup> Another site supervisor in Borough Park, Brooklyn, NY asked: "How does one tell the difference between Chinese and Japanese?" and brought her fingers to each side of her eyes and moved her skin up and down.<sup>22</sup> A poll worker in Edison, NJ carried on stating: "If you're an American, you better lose the rest of the [Asian] crap." A poll worker in Falls Church, VA commented to other poll workers, after he offered candy to a Pakistani American voter who politely declined in observance of Ramadan: "If you think certain cultures are weird, you should read about [Muslims]. They're really weird."<sup>23</sup>

AALDEF's poll monitoring efforts have also uncovered inappropriate or racially disparaging remarks made by elected officials and other voters.<sup>24</sup> In one such instance, several white voters at a poll site in Jackson Heights,

16. *Id.* at 5.

17. ASIAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND, ASIAN AMERICAN ACCESS TO DEMOCRACY IN THE 2002 ELECTIONS IN NYC: AN ASSESSMENT OF NEW YORK CITY COMPLIANCE WITH THE LANGUAGE ASSISTANCE PROVISIONS OF THE VOTING RIGHTS ACT (2003) [hereinafter AALDEF ELECTION 2002 REPORT] at 4.

18. *Diaz v. Silver*, 978 F. Supp. 96, 101 (E.D.N.Y. 1997), *aff'd mem.*, 522 U.S. 801 (1997) (citing Affidavit of Michael Shen at ¶ 25); ASIAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND, ASIAN AMERICAN ACCESS TO DEMOCRACY IN THE 2004 ELECTIONS: LOCAL COMPLIANCE WITH THE VOTING RIGHTS ACT AND HELP AMERICA VOTE ACT (HAVA) IN NY, NJ, MA, RI, MI, IL, PA, VA (2005) [hereinafter AALDEF ELECTION 2004 REPORT]; ASIAN AMERICAN ACCESS TO DEMOCRACY IN THE 2003 ELECTIONS IN NYC: AN ASSESSMENT OF THE NEW YORK CITY BOARD OF ELECTIONS COMPLIANCE WITH THE LANGUAGE ASSISTANCE PROVISIONS OF THE VOTING RIGHTS ACT (2004) [hereinafter AALDEF ELECTION 2003 REPORT].

19. S. REP. NO. 94-295, at 25-27 (1975), *as reprinted in* 1975 U.S.C.C.A.N. 774, 792-93. These incidents are the basis from which Congress enacted the Language Assistance Provisions of the Voting Rights Act, see discussion *infra*.

20. AALDEF ELECTION 2004 REPORT, *supra* note 18, at 16; AALDEF ELECTION 2003 REPORT, *supra* note 18, at 6; S. REP. NO. 94-295, *supra* note 19, at 26 (finding intimidation at the polls).

21. AALDEF ELECTION 2004 REPORT, *supra* note 18, at 16.

22. *Id.*

23. *Id.*

24. S. REP. NO. 94-295, at 26 (reporting on outright exclusion and intimidation at the polls).

Queens, NY yelled at Asian Americans, saying: “You all are turning this country into a third-world waste dump!”<sup>25</sup> A Democratic Party representative came to a poll site in Fort Lee, NJ and publicly claimed that there were no legitimate Korean American voters in the district and that the Korean American voters coming to vote were not “from here.”<sup>26</sup> In Edison, NJ, voters made a litany of racist comments about how Asian Americans were not, or should not be, American citizens.<sup>27</sup>

Some Asian American voters have also complained that they were treated differently, sometimes with more discourtesy, than white voters.<sup>28</sup> Election officials in Boston, MA reported that poll workers at one site segregated voters by race and made minority voters form one line apart from white voters in order to vote.<sup>29</sup> They claimed that ‘separate but equal’ lines for those who were limited English proficient would speed up the voting process for others.<sup>30</sup> A poll worker in Jackson Heights, Queens, NY approached AALDEF’s poll monitor to demand that he tell Asian American voters to vote faster because “one of his people” was waiting to vote.<sup>31</sup> Another poll worker blamed Asian American voters for holding up the lines saying: “You Oriental guys are taking too long to vote.” Asian American voters complained that they felt unduly rushed to vote.<sup>32</sup>

Poll workers discouraged Asian Americans from voting and even tried to turn them away.<sup>33</sup> At one poll site in Williamsburg, Brooklyn, NY, a Chinese voter’s name was inadvertently not listed in the book of registered voters and so the poll worker tried to turn him away.<sup>34</sup> Although the voter could have voted by provisional ballot,<sup>35</sup> the poll worker denied this request and argued that the voter should not be allowed to vote.<sup>36</sup> At other poll sites in Palisades Park and Fort Lee, NJ, Korean American voters complained that poll workers were impatient towards first-time voters, and were rude, hostile, and unhelpful in giving voting instructions.<sup>37</sup>

Earlier in 2005, shortly before the New Jersey primary elections, two talk radio hosts on 101.5 FM in New Jersey (“The Jersey Guys”) made several racist remarks about a Korean American candidate for mayor in Edison, NJ.<sup>38</sup> Speaking in an incoherent, mock-Asian accent, they com-

25. AALDEF ELECTION 2004 REPORT, *supra* note 18, at 16-17.

26. *Id.*

27. *Id.*

28. S. REP. NO. 94-295, at 26 (citing denial of ballot by failing to locate voters’ names on precinct lists).

29. Meeting with Geraldine Cuddyer, Chair, Boston Election Comm., and Michelle Tassinari, Legal Counsel, Mass. Sec’y of State, with Glenn Magpantay, AALDEF, in Boston, Mass. (April 26, 2005). The U.S. Department of Justice brought suit against the City of Boston for such discriminator treatment. *United States v. City of Boston*, Civ. 05-11598 WGY (D. Mass. 2005).

30. *Id.*

31. AALDEF ELECTION 2004 REPORT, *supra* note 18, at 17.

32. *Id.*

33. S. REP. NO. 94-295, at 26 (noting “memories of past discourtesies . . . may compound the problems for many language minority voters.”).

34. AALDEF ELECTION 2004 REPORT, *supra* note 18, at 17.

35. Provisional ballots are an alternative method of ballot-casting that are available in special circumstances. These ballots allow voters to cast votes when their names do not appear on lists of eligible voters located at poll sites. Help America Vote Act § 302, 42 U.S.C. § 15482 (2002).

36. AALDEF ELECTION 2004 REPORT, *supra* note 18, at 17.

37. *Id.*

38. S. REP. NO. 94-295, at 26.

mented that the candidate was “capitalizing on the rapid growth of the Asian community in Edison. . .” And, in response to a caller’s statement that “Indians have taken over Edison,” responded: “It’s like you’re a foreigner in your country, isn’t it?” Federal observers reported that a poll worker said that when a Gujarati or Hindi-speaking voter appeared, she would “send them to the nearest gas station.”<sup>39</sup>

Asian American voters encountered a number of other voting difficulties<sup>40</sup> in addition to these inappropriate and racist remarks which created intimidating and hostile voting environments.

Just like African American and Latino voters in Florida in 2000, many Asian Americans in 2004 were turned away from poll sites because their names were missing from lists of registered voters.<sup>41</sup> This was often due to the faulty processing or mishandling of voter registration forms by election administrators.<sup>42</sup> Under the Help America Vote Act, these voters had the right to vote by provisional ballot to preserve their votes.<sup>43</sup> But poll workers did not offer these ballots to voters or, in some cases, denied voters this right. Voters were simply turned away.<sup>44</sup> Even when provisional ballots were offered, many were not counted.<sup>45</sup>

Identification checks are not required to vote in most jurisdictions,<sup>46</sup> however, poll workers racially profiled Asian American voters and required them to prove their identities, verify their addresses, and sometimes even produce naturalization certificates.<sup>47</sup> There is no evidence that any white voters were ever required to provide naturalization certificates in order to vote.

Asian Americans were also given inadequate notice of their poll site assignments, or their site assignments were suddenly changed.<sup>48</sup> On Election Day, voters were often redirected, sometimes wrongly, to other poll sites only to be sent back to their original sites.<sup>49</sup> Many who had voted in prior elections complained that they were never informed that they were assigned to new poll sites.<sup>50</sup> In 2004, several voters were so frustrated that they decided not to vote at all.<sup>51</sup> Others simply could not exercise their

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39. *Oversight Hearing on the Voting Rights Act: Section 203-Bilingual Election Requirements, Part I: Before the Subcomm. on the Constitution Of the H. Comm. on the Judiciary* 109th Cong. 4 (2005) [hereinafter 2005 *Hearings*] (statement of Margaret Fung, Executive Director, AALDEF, on file with author); Jerry Barca, *Feds to Watch Edison Vote*, NEW BRUNSWICK HOME NEWS TRIBUNE, Nov. 2, 2005.

40. S. REP. NO. 94-295, at 26.

41. AALDEF ELECTION 2004 REPORT, *supra* note 18, at 17-18; AALDEF ELECTION 2003 REPORT, *supra* note 18, at 5, 14-15; S. REP. NO. 94-295, at 26.

42. AALDEF ELECTION 2004 REPORT, *supra* note 18, at 17-18.

43. Help America Vote Act § 302, 42 U.S.C. § 15482 (2002).

44. AALDEF ELECTION 2004 REPORT, *supra* note 18, at 17-18; AALDEF ELECTION 2003 REPORT, *supra* note 18, at 5, 14-15; S. REP. NO. 94-295, at 26 (finding denials of ballots).

45. AALDEF ELECTION 2004 REPORT, *supra* note 18, at 17-18.

46. *See* Help America Vote Act § 303.

47. AALDEF ELECTION 2004 REPORT, *supra* note 18, at 20.

48. AALDEF ELECTION 2004 REPORT, *supra* note 18, at 21, AALDEF ELECTION 2003 REPORT, *supra* note 18, at 10-11; S. REP. NO. 94-295, at 26 (discussing locations of poll sites).

49. AALDEF ELECTION 2004 REPORT, *supra* note 18, at 21.

50. *Id.*

51. *Id.*

right to vote because they could not find the other poll site or did not have enough time to get to the other site before polls had closed.<sup>52</sup>

On top of all this, several poll workers and election officials were unhelpful or unknowledgeable about proper election procedures and election laws.<sup>53</sup> Poorly trained and inefficient poll workers caused chaos in several poll sites.<sup>54</sup> This contributed to long lines that deterred voters from voting.<sup>55</sup>

AALDEF has documented racial animus and denials of the right to vote in numerous elections and in elections across the country.<sup>56</sup> Discrimination against Asian Americans occurs not only in the voting context, but also in housing, employment, the administration of justice, as well as through hate crimes, and police misconduct.<sup>57</sup> Combined, all of this thwarts Asian American political involvement. Because of continued voting discrimination, Congressional action imposing remedies is necessary so that Asian Americans have fair and equal access to the ballot.<sup>58</sup> In 1975, Congress found that language minority voters encountered these same exact forms of discrimination and responded by amending the Voting Rights Act with a provision requiring language assistance in voting.<sup>59</sup>

## II. THE LANGUAGE ASSISTANCE PROVISIONS OF THE VOTING RIGHTS ACT

### A. Overview of Section 203

The Language Assistance Provisions of the Voting Rights Act, codified at Section 203, mandate translations of ballots and other voting materials as well as oral language assistance.<sup>60</sup>

In 1975, Congress found that limited English proficiency was a serious barrier to political participation.<sup>61</sup> Congress found that “the four language minority groups covered by Section 203—Hispanics, Asian Americans, American Indians, and Alaska Natives—continue to experience educa-

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52. *Id.*

53. AALDEF ELECTION 2004 REPORT, *supra* note 18, at 21, AALDEF ELECTION 2003 REPORT, *supra* note 18, at 11-12, S. REP. NO. 94-295, at 26.

54. AALDEF ELECTION 2004 REPORT, *supra* note 18, at 23-24

55. *Id.*

56. AALDEF ELECTION 2003 REPORT, *supra* note 18; AALDEF ELECTION 2002 REPORT, *supra* note 17; AALDEF, ASIAN AMERICAN ACCESS TO DEMOCRACY IN THE NYC 2001 ELECTIONS (2002) [hereinafter AALDEF ELECTION 2001 REPORT]; AALDEF, ACCESS TO DEMOCRACY DENIED: AN ASSESSMENT OF THE NYC BOARD OF ELECTIONS COMPLIANCE WITH THE LANGUAGE ASSISTANCE PROVISIONS OF THE VOTING RIGHTS ACT, SECTION 203, IN THE 2000 ELECTIONS (2000) (unpublished work, on file with author); NAT'L ASIAN PAC. AM. LEGAL CONSORTIUM, ACCESS TO DEMOCRACY: LANGUAGE ASSISTANCE AND SECTION 203 OF THE VOTING RIGHTS ACT (2000).

57. S. REP. NO. 94-295, at 27 n.21 (citing *Korematsu v. United States*, 323 U.S. 214 (1944); *Hirabayashi v. United States*, 320 U.S. 81 (1943), *Yu Chong Eng v. Trinidad*, 271 U.S. 500 (1926); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886)).

58. See 42 U.S.C. §§ 1971-73 (2000); H.R. REP. NO. 102-655, at 7 (1992), *as reprinted in* 1992 U.S.C.A.N. 766, 771 (discussing lawsuits to protect Asian American voting rights); S. REP. NO. 102-315, at 5-6 (1992) (discussing the history of discrimination against Asian Americans). *But see* H.R. REP. NO. 102-655, at 15 (dissenting report); S. REP. NO. 94-295, at 26-27.

59. S. REP. NO. 94-295, at 26-27.

60. Minority Language Materials and Assistance, 28 C.F.R. §§ 55.14-55.21 (2001).

61. S. REP. NO. 94-295, at 24; S. REP. NO. 102-315, at 4.

tional inequities, high [English] illiteracy rates and low voting participation.” These groups were registered to vote at much lower rates than non-Hispanic whites.<sup>62</sup> So, in 1975, Congress enacted, in 1982 reauthorized, and in 1992 strengthened, Section 203 to increase the voter registration and political participation of these groups.

Section 203 was not designed nor intended to capture all language minority groups across the nation.<sup>63</sup> It was tailored to cover sufficiently large citizen voting-age language minority groups that were limited English proficient and faced voting discrimination.<sup>64</sup> This was accomplished by Section 203’s test for coverage, or “trigger.”<sup>65</sup>

Section 203 mandates language assistance whenever the census, reported every ten years, finds that a political subdivision has either 5% or more than 10,000 voting-age citizens who speak the same Asian, Hispanic, or Native American language, are limited English proficient, and, as a group, have a higher illiteracy rate than the national illiteracy rate.<sup>66</sup>

In 1992, Congress strengthened Section 203 to include the 10,000 numerical trigger. As a direct result, ten counties in New York, California, and Hawaii were mandated to provide ballots, voting materials, and language assistance in Asian languages.<sup>67</sup>

After the next census in 2000, sixteen counties in seven states were required to provide assistance in an Asian language or multiple Asian languages. These included counties in Alaska, California, Hawaii, Illinois, New York, Texas, and Washington for Chinese, Korean, Filipino, Vietnamese, or Japanese language assistance.<sup>68</sup> The exact jurisdictions and languages currently covered under Section 203 are listed in Table 2: Existing Coverage for Asian Language Minority Groups, *infra*.<sup>69</sup>

Jurisdictions covered under Section 203 must ensure that covered language minority groups can effectively vote in elections.<sup>70</sup> Section 203 primarily requires covered jurisdictions to provide the following types of assistance: (1) translated written materials, including ballots, voter registration forms, voting instructions, notifications, and announcements;<sup>71</sup> (2) oral assistance such as interpreters, bilingual poll workers, and bilingual/multilingual voter hotlines;<sup>72</sup> and (3) publicity regarding the elections and availa-

62. S. REP. NO. 102-315, at 4.

63. S. REP. NO. 102-315, at 10.

64. *Id.*; H.R. REP. NO. 102-655, at 7 (1992).

65. 42 U.S.C. Sec. 1973aa-1a(b)(2)(A)(2000).

66. *Id.*

67. Implementation of the Provisions of the Voting Rights Act Regarding Language Minority Groups, 28 C.F.R. pt. 55, app. (2005). The counties and languages include Alameda County, CA (Chinese), Los Angeles County, CA (Chinese, Filipino, Japanese, Vietnamese), Orange County, CA (Vietnamese), San Francisco County, CA (Chinese); Honolulu County, HI (Filipino, Japanese), Kauai County, HI (Filipino), Maui County, HI (Filipino); Kings County, NY (Chinese), New York County, NY (Chinese), Queens County, NY (Chinese).

68. Voting Rights Act Amendments of 1992, Determinations Under Section 203, 67 Fed. Reg. 48,871 (July 26, 2002) (Notices).

69. *Id.*

70. 28 C.F.R. § 55.2 (b) (1), (2).

71. §§ 55.15, 55.19.

72. §§ 55.18, 55.20. Sometimes assistance must be provided in more than one dialect of the language. For instance, although there is one written form of Chinese, there are several spoken dialects, like Cantonese, Mandarin, Toisan, and others. *Id.*

bility of bilingual assistance,<sup>73</sup> such as signs at polling sites, announcements in language minority radio, television and newspapers,<sup>74</sup> and direct contact with language minority community organizations.<sup>75</sup> The underlying theory is that democracy works best when all voters understand and are educated about the electoral process.

### B. *Effectiveness of Section 203*

Section 203 has opened up the political process to tens of thousands of Asian Americans.<sup>76</sup> At the most fundamental level, translated ballots have enabled Asian American voters to exercise their right to vote independently and privately inside the voting booth.<sup>77</sup> The mandate for interpreters in poll sites has been instrumental for Asian American voters who are not fully proficient in English.<sup>78</sup>

In 1992, when three counties in New York City were first covered under Section 203, more than 54,000 Chinese Americans in Manhattan and Queens benefited from the availability of Chinese language materials.<sup>79</sup> Community exit polls, then and more recently, documented that the main beneficiaries were first-time voters, newly naturalized citizens, and voters with no formal U.S. education or less than a high school education.<sup>80</sup>

According to AALDEF's 2004 exit poll of almost 11,000 Asian American voters in 8 states, almost a third needed some form of language assistance in order to vote. Almost half (46%) were first-time voters.<sup>81</sup> In jurisdictions covered under Section 203, more than half of the respondents from covered language minority groups were limited English proficient.

73. § 55.20.

74. Of those polled, over 51% of Asian American voters got their news about politics and community issues from the ethnic press. AALDEF ASIAN AMERICAN VOTE 2004 REPORT, *supra* note 18, at 12.

75. 28 C.F.R. § 55.20.

76. H.R. REP. NO. 102-655, at 15-17 (1992) (dissenting report querying about the effectiveness of language assistance in increasing the political participation of minority groups); S. REP. NO. 102-315 (1992) (dissenting report querying same).

77. Critics of Section 203 have asserted that bilingual ballots perpetuate voter fraud. 2005 *Hearings*, *supra* note 39 (statement of Linda Chavez, President, One Nation Indivisible, citing a litany of sensationalistic newspaper clippings, on file with author) at 4-5. But there have been no direct findings that bilingual ballots have caused voter fraud. If anything, the lack of bilingual ballots has caused poll worker fraud and election abuse. In *United States v. Boston*, limited English proficient Chinese voters and the Chinese Progressive Association complained that because the ballots were not translated into their language, poll workers took voters' ballots and completed the ballots for them. Had ballots been translated, voters could have made their own independent choices. Declaration of Lydia Lowe, and Declaration of Siu Tsang, *United States v. City of Boston*, Civ. 05-11598 WGY (D. Mass. 2005). Interestingly, anti-203 witness Linda Chavez cited Boston University President John Silber's 1996 congressional testimony against bilingual ballots. Silber is from the very city, and also ran for governor from the very state, in which voter fraud occurred because of the absence of bilingual ballots in Asian languages. Chavez Testimony at 4.

78. 2005 *Hearings*, *supra* note 39 (statement of Margaret Fung).

79. *Diaz v. Silver*, 978 F. Supp. 96, 101 (E.D.N.Y. 1997), *aff'd mem.*, 522 U.S. 801 (1997) (citing Affidavit of Michael Shen at ¶ 25).

80. AALDEF ELECTION 2001 REPORT, *supra* note 56; ASIAN PACIFIC AMERICAN LEGAL CENTER, NOVEMBER 1998 SOUTHERN CALIFORNIA VOTER SURVEY REPORT (1999); NAT'L ASIAN PAC. AM. LEGAL CONSORTIUM, *supra* note 56; AALDEF ELECTION 2002 REPORT, *supra* note 17, at 6; AALDEF ELECTION 2004 REPORT, *supra* note 18, at 14-15.

81. AALDEF ELECTION 2004 REPORT, *supra* note 18, at 14-15.



Section 203 has also aided grassroots efforts to increase voter registration among eligible Asian Americans, most profoundly in New York.<sup>82</sup> As compared to a decade ago, when only a small number of nonpartisan groups actively registered voters, there are now scores of new Asian American groups doing voter education and registration in the Korean, Filipino, Indian, Pakistani, Bangladeshi, Cambodian, and Vietnamese communities.<sup>83</sup> This has largely been possible because of multilingual voter registration forms required under Section 203. Illustrating these efforts, from 2001 to 2004, Asian American voter registration increased by 40%.<sup>84</sup>

Most importantly, Section 203 has contributed to Asian American electoral success.<sup>85</sup> Prior to 2001, no Asian American had ever been elected to the New York City Council, New York State Legislature, or U.S. Congress from New York, notwithstanding an Asian American population of over 800,000. In fact, as late as 1996, many elected representatives from Asian American neighborhoods held the Asian American community in disdain.<sup>86</sup> In recent years, more Asian Americans have run for political office. In 2001, 13 Asian American candidates ran for New York City Council and one was finally elected to the City Council.<sup>87</sup> In 2004, an Asian American was elected to the New York State Assembly for the first time.<sup>88</sup> That same year, a Vietnamese American was elected to the state legislature from Harris County, TX for the very first time as well, after it became covered for Vietnamese language assistance under Section 203. Section 203 has been highly effective in opening up the political franchise to Asian Americans.

### C. *Enforcement of Section 203*

#### 1. *Section 203 Implementation and Compliance*

Although Section 203 has made the vote more accessible to countless Asian Americans, and in spite of the substantial efforts covered jurisdictions have made to fully comply with Section 203, AALDEF's poll monitoring efforts have shown that implementation problems remain.<sup>89</sup>

For example, in New York City during the 2000 Presidential Election, party headings were incorrectly translated on ballots, listing Republican

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82. S. REP. NO. 102-315 (1992) (dissenting report querying whether language assistance increases Asian American voter registration).

83. 2005 *Hearings*, *supra* note 39 (statement of Margaret Fung). See, e.g., [www.apava.org](http://www.apava.org) (website for the Asian Pacific American voting Alliance, a coalition of several Asian American organizations in New York City working on voter registration).

84. *Asian-American Voters Could Swing Mayoral Election* (New York 1 News television broadcast Feb. 9, 2005).

85. It is important to note that, notwithstanding these successes, today as well as in 1975, "language minority citizens for the most part have not successfully challenged white political domination." S. REP. NO. 94-295, at 26.

86. Celia W. Dugger, *Queens Old-Timers Uneasy As Asian Influence Grows*, N.Y. TIMES, Mar. 31, 1996, at A1 (quoting City Councilwoman Julia Harrison, who represents Flushing, as describing Asian immigrants as "colonizers," and more like "marauding invaders" instead of immigrants, and mistakenly describing Bok Choy as dandelion).

87. 2005 *Hearings*, *supra* note 39 (statement of Margaret Fung).

88. *Id.*

89. AALDEF ELECTION 2001 REPORT, *supra* note 56.

candidates as Democrats and vice versa.<sup>90</sup> Repeatedly, in New York City, Los Angeles and Orange Counties, and San Francisco and Alameda Counties, poll workers kept translated materials hidden and unavailable to voters.<sup>91</sup> On a number of occasions, poll workers did not even bother to open supply kits containing translated materials.<sup>92</sup> As late as 2002, Hawaii had not translated voter registration forms even though they were mandated to provide these since 1992.<sup>93</sup> At poll sites, translated signs were posted in obscure locations or not posted at all.<sup>94</sup> Voters have also complained about the lack of interpreters and interpreters speaking the wrong language or dialect.<sup>95</sup>

In 2004, at one poll site in Jackson Heights, Queens, NY, a Chinese American voter who asked for language assistance was directed to a Korean interpreter who could not help.<sup>96</sup> At another site in Queens, NY, a poll inspector, when asked about the availability of translated materials, sarcastically replied, "What, are we in China? It's ridiculous."<sup>97</sup> These problems resulted in numerous Asian Americans losing their ability to vote.

The Department of Justice has dispatched federal attorneys to monitor for Section 203 compliance.<sup>98</sup> Recently, the Department has been filing lawsuits to remedy these deficiencies.<sup>99</sup> These efforts have helped to ensure that jurisdictions fully comply with Section 203.

## 2. Section 203 and Section 5

Another mechanism for enforcement has been Section 5 of the Voting Rights Act.<sup>100</sup> Under Section 5, certain jurisdictions with a history of voter discrimination must obtain "preclearance" before any change to any voting procedure or practice can be implemented. When jurisdictions are covered under both Sections 5 and 203 – such as New York (NY), Kings (NY) and Alameda (CA) Counties and the State of Texas – the two provisions combined have been powerful tools to ensure that language minorities have full access to the vote.

Section 5 requires that plans for compliance with Section 203, or changes to current practices to comply with Section 203, must be

90. William Murphy, Mae Cheng & Herbert Lowe, *Spirit Willing, System Weak*, *NEWSDAY*, Nov. 8, 2000, at A10; Editorial, *Bungled Ballots in Chinatown*, *N.Y. TIMES*, Jan. 1, 2001, at A12.

91. 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, 40-42 (2004).

92. See *id.* at 41.

93. Interview with Dwayne D. Yoshina, Chief Elections Officer, State Office of Elections, Pearl City, HI (Nov. 20, 2003) (notes on file with author).

94. Magpantay, *supra* note 91, at 41-43; AALDEF ELECTION 2003 REPORT, *supra* note 18, at 6, 8-9.

95. Magpantay, *supra* note 91, at 43-44.

96. AALDEF ELECTION 2004 REPORT, *supra* note 18, at 16.

97. 2005 *Hearings*, *supra* note 39, at 4 (statement of Margaret Fung).

98. 28 C.F.R. § 55.14(a), (b) (2001).

99. Implementation of the Provisions of the Voting Rights Act Regarding Language Minority Groups, 28 C.F.R. § 55.2(b)(1), (2) (2001). See, e.g., *United States v. City of Rosemead* (C.D. Cal. 2005), *United States v. San Diego County* (S.D. Cal. 2004), *United States v. City of Boston* (D. Mass. 2005), and other cases filed by the Department of Justice, Voting Section, available at <http://www.usdoj.gov/crt/voting/litigation/caselist.htm> (visited Dec. 8, 2005).

100. 42 U.S.C. § 1973c.

precleared. During the preclearance period, interested individuals and community groups may review the submission and comment.<sup>101</sup> As a result, interested groups have real opportunities to shape local language assistance programs.

Section 5 played a pivotal role in shaping the Chinese Language Assistance Program in New York, which was first adopted after the city became covered under Section 203 in 1992. Although the Board of Elections had agreed to provide sample ballots and voting instructions in Chinese for the 1994 primary elections, it claimed that New York's mechanical-lever voting machines did not have space for the candidates' names in Chinese. AALDEF met on numerous occasions with local election officials to convince them that candidates' names must be transliterated into Chinese, reasoning that the transliterated name was the single most important piece of information on the ballot to voters.<sup>102</sup>

One reason why this is of paramount importance is because Asian-language media outlets also transliterate the names of candidates. Section 203 regulations contemplate Asian-language media outlets as a source of news for language minority groups.<sup>103</sup> AALDEF found in its 2004 exit poll that more than half of the 11,000 respondents (over 51%) received their news about politics and community issues from the ethnic press, rather than mainstream media outlets.<sup>104</sup> Even Section 203's critics readily admit the "long tradition in the United States of ethnic newspapers—often printed in languages other than English—providing political guidance to readers in the form of sample ballots and visual aids that explain how to vote."<sup>105</sup> Because of the manner in which Asian Americans receive political and candidate information, the transliteration of candidates' names on ballots was critical.

Community groups pressed for fully translated ballots that included the transliteration of candidates' names. Unfortunately, political and media advocacy only went so far.<sup>106</sup> Ultimately, the denial of preclearance of the Board of Elections's language assistance program under Section 5 is what forced the recalcitrant Board to provide fully translated machine ballots with candidates' names in Chinese. Section 5's comment and preclearance process gave community groups and individuals the ability to design meaningful local language assistance programs.<sup>107</sup>

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101. Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, as Amended, 28 C.F.R. § 51.29 (2001) (allowing individuals and groups to make comments under Section 5).

102. 2005 *Hearings*, *supra* note 39, at 5 (statement of Margaret Fung).

103. S. REP. NO. 94-295, at 33 (1975). 28 C.F.R. § 55.18 (e) (discussing minority media).

104. AALDEF ELECTION VOTE 2004 REPORT, *supra* note 18, at 12.

105. 2005 *Hearings*, *supra* note 39, at 7 (statement of Linda Chavez, on file with author, quoting JOHN J. MILLER, *THE UNMAKING OF AMERICANS: HOW MULTICULTURALISM HAS UNDERMINED AMERICA'S ASSIMILATION ETHIC*, 242-43 (1998)).

106. During one lively meeting of the election commissioners, over one hundred Asian Americans packed the hearing room, carrying banners and Chinese-language signs demanding their right to fully-translated bilingual ballots. An August 19, 1994 *New York Times* editorial delivered a scathing rebuke of the Board of Elections' inaction under the Voting Rights Act: "That sounds like the foot-dragging bureaucratic arguments that have been raised all over America at one time or another against giving minorities their rights. It is no excuse for not obeying the law." 2005 *Hearings*, *supra* note 39, at 5 (statement of Margaret Fung).

107. *Id.*

In addition, under Section 5, federal observers have been sent to monitor elections in jurisdictions covered by Section 203.<sup>108</sup> This has been exceedingly helpful in moving local elections administrators to better comply with Section 203 and remedy deficiencies.<sup>109</sup> For example, in the 2000 elections, many voters were turned away because there were too few interpreters at poll sites.<sup>110</sup> The Department of Justice's monitoring and reporting of this problem persuaded the Board of Elections to maintain a backup pool of interpreters who could be assigned on the day of the election. This has helped alleviate the problem of the lack of interpreters in subsequent elections.

The guarantees of the Voting Rights Act and the Constitution have been realized for many Asian Americans because of Sections 5 and 203. Both provisions are necessary to protect the right to vote for language minority groups.

### III. REAUTHORIZATION OF THE VOTING RIGHTS ACT

The Asian American population remains one of the fastest growing communities of color in the United States. Asian American citizens of voting age numbered 3.9 million in 1996, and rose from 4.7 million in 2000 to 6.7 million in 2004. Asian American voter turnout is also steadily increasing, from 1.7 million in 1996 to nearly 3 million in 2004.<sup>111</sup>

As Congress considers reauthorization of the Voting Rights Act in 2007, Sections 5 and 203 must both be preserved. But while Section 203 has significantly increased the accessibility of the voting booth for hundreds of thousands of Asian Americans, full access to the right to vote is still far off for many others. The 2007 reauthorization should expand coverage of the Voting Rights Act to ensure that currently disenfranchised Asian Americans will not be overlooked.

#### A. *Background of the 1992 Amendment*

Thirteen years ago, AALDEF testified before Congress in support of the Voting Rights Act Language Assistance Act of 1992.<sup>112</sup> AALDEF supported the creation of the new, alternate benchmark of 10,000 language minority citizens to trigger Section 203 coverage, because large concentrations of Asian Americans in New York and other urban areas were not covered under the existing five-percent trigger.<sup>113</sup> Prior to 1992, under the

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108. 42 U.S.C. § 1973c (2004).

109. *Id.*

110. Murphy, Cheng & Lowe, *supra* note 90.

111. 2005 *Hearings*, *supra* note 39 (statement of Margaret Fung).

112. 2005 *Hearings*, *supra* note 39, at 4 (statement of Margaret Fung); S. REP. NO. 102-315, at 12 (1992).

113. At that time, no Asian American had ever been elected to Congress, the New York State Legislature or the New York City Council. AALDEF found in its multilingual exit polls of Asian American voters that 4 out of 5 voters in Manhattan's Chinatown and Flushing, Queens did not speak or read much English, and that they would vote more often if bilingual assistance were provided. 2005 *Hearings*, *supra* note 39 (statement of Margaret Fung); S. REP. NO. 102-315, at 12.

five-percent approach, only San Francisco and certain counties in Hawaii were required to provide materials in Asian languages.<sup>114</sup>

In fact, under the five-percent trigger, dense urban jurisdictions with large limited English proficient voting populations were not covered while, curiously, jurisdictions with smaller populations were covered (see Table 1, *infra*).<sup>115</sup> Ninety-seven percent of Asian Americans lived in densely populated urban areas,<sup>116</sup> yet an unduly large number of limited English proficient language minority voting-age citizens were needed for urban jurisdictions to meet the five-percent threshold.<sup>117</sup>

TABLE 1: NUMBER OF LIMITED ENGLISH PROFICIENT VOTING-AGE CITIZENS FROM A SINGLE LANGUAGE MINORITY COMMUNITY NEEDED TO MEET THE FIVE-PERCENT THRESHOLD (IN 1990)<sup>118</sup>

URBAN		NON-URBAN	
Los Angeles County, CA	443,158	Napa County, CA	5,538
San Francisco County, CA	36,198		
Cook County, IL	255,253	Peoria County, IL	9,141
Kings County, NY	115,033	Orange County, NY	15,382
New York County, NY	74,377	Albany County, NY	14,629
Queens County, NY	97,579		
Honolulu County, HI	41,812	Kauai County, HI	2,559

Congress determined in 1992 that a 10,000 person benchmark was an appropriate trigger to solve this conundrum.<sup>119</sup>

The adoption of the 10,000 trigger in 1992 had widespread bipartisan support in Congress.<sup>120</sup> As a result, 200,000 Asian Americans nationwide, in 10 counties in California, Hawaii and New York, were covered under Section 203.<sup>121</sup> The number of covered jurisdictions increased again after the 2000 census, with 16 counties in 7 states required to provide assistance in one or more Asian languages. Over 672,750 Asian Americans are now covered for language assistance, with some jurisdictions providing assistance in one or more Asian languages (see Table 2 *infra*).<sup>122</sup>

Since 2000, Asian Americans have grown tremendously in a number of localities<sup>123</sup> but many still do not qualify for language assistance, such as:

114. See 2005 *Hearings*, *supra* note 39 (statement of Margaret Fung); S. REP. NO. 102-315, at 12.

115. H.R. REP. NO. 102-655, at 8 (1992) (finding that the 5% trigger excluded jurisdictions that needed Asian language assistance).

116. Memorandum from Leadership Conference on Civil Rights on Section 203 Modifications and Clarifications, to voting rights listserv (July 20, 2005) [hereinafter LCCR Memo] (on file with author).

117. *Id.*

118. *Id.*

119. H.R. REP. NO. 102-655, at 8 (concluding on 10,000 trigger); S. REP. NO. 102-315, at 17 (discussing the effects of 20,000 and concluding on 10,000 trigger).

120. 2005 *Hearings*, *supra* note 39 (statement of Margaret Fung).

121. *Id.*

122. 2005 *Hearings*, *supra* note 39 (Fact Sheet on Lowering the Numerical Trigger to Improve the Effectiveness of Section 203, submitted by AALDEF, on file with author).

123. TERRANCE J. REEVES & CLAUDETTE E. BENNETT, WE THE PEOPLE: ASIANS IN THE UNITED STATES (2002), available at <http://www.census.gov/prod/2004pubs/censr-17.pdf>.

Southeast Asians (Cambodians and Thai) in Los Angeles, CA and parts of Eastern Massachusetts; Koreans in the Greater Chicago Area, IL, Honolulu, HI, Fairfax, VA and Bergen County, NJ; South Asians (Bangladeshis and Pakistanis) in New York City, NY; Vietnamese in Fairfax, VA and Dorchester, MA; and Chinese in Montgomery County, MD, Middlesex County, NJ and Boston, MA.

Among these states, New Jersey, Virginia, and Massachusetts have no Section 203 coverage for any Asian language. Among the others, Section 203 covers some Asian languages, but not the Asian languages listed above. The availability of bilingual ballots and voting materials must be expanded to enfranchise these emerging communities.

### B. *Expanding Language Assistance*

Modifying the Section 203 trigger to a lower population threshold will expand language assistance to cover more language minority groups in more jurisdictions.<sup>124</sup>

#### 1. *Lowering the Trigger to 5,000*

An analysis of census data reveals that adjusting the five-percent trigger has little or no impact on determinations for Asian language minority groups.<sup>125</sup> By contrast, a reduction in the 10,000 numerical trigger will expand Section 203 coverage to include more Asian American communities. In 1992, Congress considered various options for the numeric approach, eventually settling on 10,000.<sup>126</sup> In 2007, Congress should consider lowering the trigger to either 7,500 or 5,000.

Under the 10,000 trigger, five Asian language groups (Chinese, Korean, Filipino, Vietnamese, and Japanese) are covered in 16 jurisdictions. As shown in Table 3, *infra*,<sup>127</sup> under a 7,500 trigger, seven Asian language groups (adding Cambodian and Asian Indian) would be covered in 17 jurisdictions. Although a 7,500 trigger would technically add nine jurisdictions for six languages, many of these new jurisdictions are already covered

124. Another way to expand Section 203 is to change the geographic unit of county to smaller political subdivisions such as towns or even congressional districts. See 42 U.S.C. § 1973aa-1a(b) (2004). Including towns in the definition of a political subdivision may bring in other language minority groups, particularly in the East Coast and Midwest, under Section 203 coverage. There are many small cities and towns in which Asian Americans are large and compact alone, but too few to meet the trigger for the larger county. Section 203 covered jurisdictions smaller than counties for language assistance, most notably various cities in Massachusetts and Rhode Island and incorporated towns in Connecticut for Spanish assistance. Voting Rights Act Amendments of 1992, Determinations Under 203, 67 Fed. Reg. at 48,872 (July 26, 2002). However, Section 203 considers political subdivision to be the geographic unit in which elections are administered. The definition of "political subdivision" in the Voting Rights Act is "any county or parish, except that where registration for voting is not conducted under the supervision of a county or parish, the term shall include any other subdivision of a State which conducts registration for voting." 42 U.S.C. § 1973l(c)(2); 28 C.F.R. § 55.1 (2001). These are usually counties. Therefore to apply Section 203 coverage to smaller units than the unit in which elections are administered might be unworkable at the local level.

125. 2005 *Hearings, supra* note 39 (Fact Sheet on Lowering the Numerical Trigger to Improve the Effectiveness of Section 203, submitted by AALDEF, on file with author).

126. Congress also consider a 20,000 numerical trigger but settled on 10,000. H.R. REP. NO. 102-655 (1992) at 8 ; S. REP. NO. 102-315, at 17 (1992).

127. *Id.*

under the 10,000 trigger for some Asian language assistance. The real new effect would be adding Chinese coverage in Sacramento County, CA; Cambodian in Los Angeles County, CA; Korean in Cook County, IL; and Asian Indian in Queens County, NY. It is well known that these groups are growing in these counties, and that they have encountered voting difficulties. Yet there has been no protection under Section 203.

As shown in Table 4, *infra*,<sup>128</sup> if the trigger was reduced to 5,000, eight Asian language groups (the original five plus Cambodian, Asian Indian, and Thai) would be covered in 21 jurisdictions. Again, this would add ten new jurisdictions, but half of them are already covered under the 10,000 trigger for some Asian language assistance. The real new effect would be the same as for the 7,500 trigger, and adding Thai in Los Angeles County, CA; Chinese in Montgomery County, MD; and Vietnamese and Korean in Fairfax County, VA. Again, these groups are growing in these counties, have encountered voting difficulties, yet have no protection under Section 203.

Reducing the 10,000 trigger by half has a more modest effect than one might initially suspect. The number of jurisdictions covered for any particular Asian language increases from 16 to 21, a net of only five entirely new jurisdictions. The Asian language groups increases from five to eight, specifically adding Cambodian, Thai, and Asian Indian. Counties in two new states, Virginia and Maryland, would be covered.

Moreover, lowering the trigger to 5,000 would not cause a watershed for Spanish language assistance either. Some advocates have expressed concern that Congress might be averse to an enormous expansion of Section 203 coverage, and would consequently not authorize any expansion at all.<sup>129</sup> The change to the 5,000 trigger will not have such an effect on either Spanish language or Asian language assistance. Under the present regime, 217 jurisdictions are covered for Spanish. Lowering the numerical trigger to 7,500 only adds 6 new Spanish jurisdictions, for a total of 223 jurisdictions. Lowering to 5,000 adds 29 new Spanish jurisdictions, for a total of 246 jurisdictions. Such increases are hardly a watershed.

On the other hand, lowering the percentage trigger would have a comparatively small impact for Asian language assistance but a more dramatic effect on Spanish language assistance. Reducing the trigger to 4% or even 3% would add only 3 new jurisdictions for Asian language assistance. But a reduction to 4% would add 36 new jurisdictions for Spanish assistance, and a reduction to 3% would add 81 jurisdictions. Lowering to 2% would add 8 new jurisdictions for Asian language assistance but 187 new jurisdictions for Spanish language assistance. In essence, modifying the percentage trigger has a more dramatic effect on Latinos, while modifying the numerical trigger has a more dramatic effect on Asian Americans. Nevertheless, reducing the numerical trigger is beneficial for *both* Asian Americans and Latinos.

128. This analysis does not take into consideration the rates of growth of these populations or adjust for the undercount of various Asian American communities in the 2000 census.

129. The authors believe that an expansion of Spanish language assistance is also necessary and warranted, but no within the scope of this article. Nevertheless, statistical exploration of this impact using census data is provided to guide those who may be interested.

TABLE 2: EXISTING COVERAGE FOR ASIAN LANGUAGE  
MINORITY GROUPS<sup>130</sup>

	GROUP	CITIZEN VOTING AGE POPULATION (CVAP)	CVAP & LIMITED ENGLISH PROFICIENT	ILLITERACY RATE
<b>ALASKA</b>				
Kodiak Island Borough	FILIPINO	870	470	12.77
<b>CALIFORNIA</b>				
Alameda County	CHINESE	62,155	28,280	10.98
Los Angeles County	CHINESE	189,820	95,700	10.71
Los Angeles County	KOREAN	79,740	42,390	2.67
Los Angeles County	FILIPINO	156,320	34,985	4.46
Los Angeles County	VIETNAMESE	48,070	30,340	10.42
Los Angeles County	JAPANESE	85,765	12,510	2.88
Orange County	VIETNAMESE	71,075	45,730	6.90
Orange County	CHINESE	39,565	14,805	4.36
Orange County	KOREAN	25,235	12,240	2.37
San Diego County	FILIPINO	78,195	17,155	4.58
San Francisco County	CHINESE	102,815	58,735	16.89
San Mateo County	CHINESE	32,570	11,780	6.24
Santa Clara County	VIETNAMESE	48,375	31,265	5.76
Santa Clara County	CHINESE	61,620	24,895	5.12
Santa Clara County	FILIPINO	44,950	11,245	3.65
<b>HAWAII</b>				
Honolulu County	FILIPINO	111,270	24,815	10.44
Honolulu County	JAPANESE	169,865	13,865	5.27
Honolulu County	CHINESE	88,600	12,640	13.49
Mauui County	FILIPINO	18,620	5,350	13.08
<b>ILLINOIS</b>				
Cook County	CHINESE	26,200	11,645	9.36
<b>NEW YORK</b>				
Kings County	CHINESE	51,290	33,635	13.32
New York County	CHINESE	41,770	21,070	21.33
Queens County	CHINESE	66,715	37,865	8.05
Queens County	KOREAN	18,525	11,835	6.46
<b>TEXAS</b>				
Harris County	VIETNAMESE	28,405	16,970	7.81
<b>WASHINGTON</b>				
King County	CHINESE	28,430	10,535	9.35

130. Voting Rights Act Amendments of 1992, Determinations Under Section 203, 67 Fed. Reg. 48871-77 (July 26, 2002); U.S. CENSUS BUREAU, REDISTRICTING DATA PROGRAM, REDISTRICTING DATA 2000 (2004), [http://www.census.gov/rdo/www/data\\_and\\_products.html](http://www.census.gov/rdo/www/data_and_products.html).



TABLE 3: COVERAGE LOWERING THE NUMERICAL TRIGGER TO 7,500

	GROUP	CITIZEN VOTING AGE POPULATION (CVAP)	CVAP & LIMITED ENGLISH PROFICIENT	ILLITERACY RATE
<b>CALIFORNIA</b>				
Alameda County	FILIPINO	43,895	9,335	5.57
Los Angeles County	CAMBODIAN	12,135	7,830	29.44
Sacramento County	CHINESE	19,715	8,085	16.14
San Diego County	VIETNAMESE	17,285	9,915	8.93
San Francisco County	FILIPINO	29,360	8,295	7.11
San Mateo County	FILIPINO	37,185	8,695	4.60
<b>ILLINOIS</b>				
Cook County	KOREAN	18,770	8,930	4.54
<b>NEW YORK</b>				
Queens County	ASIAN INDIAN	43,900	8,640	3.18
<b>WASHINGTON</b>				
King County	VIETNAMESE	13,605	8,230	10.27

TABLE 4: ADDITIONAL COVERAGE LOWERING THE NUMERICAL TRIGGER TO 5,000

	GROUP	CITIZEN VOTING AGE POPULATION (CVAP)	CVAP & LIMITED ENGLISH PROFICIENT	ILLITERACY RATE
<b>CALIFORNIA</b>				
Alameda County	VIETNAMESE	12,095	7,075	11.10
Contra Costa County	CHINESE	19,945	6,070	4.70
Los Angeles County	ASIAN INDIAN	29,740	5,405	5.27
Los Angeles County	THAI	10,405	5,130	5.56
Sacramento County	VIETNAMESE	8,060	5,010	11.08
San Diego County	CHINESE	20,195	6,295	10.09
<b>HAWAII</b>				
Honolulu County	KOREAN	20,010	5,830	5.75
<b>ILLINOIS</b>				
Cook County	ASIAN INDIAN	27,310	6,630	4.00
Cook County	FILIPINO	33,550	5,955	3.36
<b>MARYLAND</b>				
Montgomery County	CHINESE	14,755	5,815	4.47
<b>TEXAS</b>				
Harris County	CHINESE	16,385	7,025	9.32
<b>VIRGINIA</b>				
Fairfax County	VIETNAMESE	11,920	6,960	4.89
Fairfax County	KOREAN	12,090	5,970	1.68

The tables also show that lowering the numerical trigger to 7,500 would remove language barriers for at least 77,955 limited English proficient Asian American citizens eligible to vote (see Table 3). An additional 79,170 citizens would receive language assistance if the numerical trigger were lowered to 5,000 (see Table 4). To expand access to the vote and ameliorate political barriers that Asian American voters have endured, Congress should reauthorize Section 203 of the Voting Rights Act with a new numerical trigger of 5,000 persons.

## 2. *Justification for Lowering the Trigger*<sup>131</sup>

### a. Asian American Need for Language Assistance

Just as Congress enacted an expansion of Section 203 in 1992, another expansion is also needed in 2007. AALDEF's multilingual exit poll documented high rates of limited English proficiency and low levels of U.S. educational attainment among Asian American voters (see Table 5 *infra*).<sup>132</sup>

In AALDEF's survey, more than a third (38%) of all respondents stated that the November 2004 elections were the first U.S. elections in which they had voted. 82% of all respondents were foreign-born naturalized citizens. 29% had no formal education in the United States.<sup>133</sup> Only 14% identified English as their native language. 41% were limited English proficient,<sup>134</sup> of which over a third (37%) were first-time voters.<sup>135</sup>

Lowering the trigger would create coverage in various counties for Asian-language assistance in particular Asian languages, including Chinese, Korean, Filipino, Vietnamese, Japanese, Cambodian, Asian Indian, and Thai. As seen in Table 5, AALDEF found that among Chinese American voters in 2004, more than half (52%) were limited English proficient and more than a third (37%) had no formal U.S. education.<sup>136</sup> Among Korean voters, well over half (59%) were limited English proficient and almost a third (31%) had no formal U.S. education. Among Filipino voters, while only 5% were limited English proficient, 17% had no formal U.S. education.<sup>137</sup> Among South Asian voters, one in five (19%) were limited English proficient and 17% had no formal U.S. education.<sup>138</sup> Among Southeast Asian voters, almost half (47%) were limited English proficient and one in

131. Much of this section was written with the assistance of the Leadership Conference on Civil Rights. See LCCR Memo, *supra* note 116.

132. AALDEF ELECTION 2004 REPORT, *supra* note 18. This data is extremely valuable because while the census can report data on limited English proficiency and educational attainment for citizens of voting age, almost no one has this data specifically for voters. Characteristics of voters are important to consider in efforts to remedy voting barriers.

133. The census phrases questions on educational attainment without distinguishing between education completed abroad and education acquired in the United States. The percentages presented in this report reflect educational attainment only in the U.S. S. REP. NO. 94-295, at 26 (1975).

134. Limited English proficiency is defined as the ability to read English less than "very well." H.R. REP. NO. 102-655, at 7 (1992). See note 6, *supra*. Compare *supra* note 6, showing that according to census data, 43% of all Asian Americans 18 or over are limited English proficient.

135. AALDEF ELECTION 2004 REPORT, *supra* note 18, at 10.

136. *Id.*, at 9.

137. It is important to note that no Filipinos were surveyed in California and Hawaii where they are known to have higher rates of limited English proficiency.

138. "South Asian" describes voters of Indian, Bangladeshi, Pakistani, Sri Lankan and other South Asian descent.

five (19%) had no formal U.S. education.<sup>139</sup> Every Asian American group had higher rates of limited English proficiency and lower than average educational attainments.<sup>140</sup> Asian American voters need language assistance to effectively cast their votes.

Lowering the trigger to 5,000 would specifically capture counties in Illinois for Korean language assistance, and Virginia for Korean and Vietnamese language assistance.

In Illinois, AALDEF found that among Asian American voters in 2004, 37% were limited English proficient and 25% had no formal U.S. education. Almost half of those respondents were Korean American, and all were in Cook County.<sup>141</sup>

Cook County has the nation's third-largest Korean American population. In 2004, the Korean American Resource & Cultural Center (KRCC) persuaded the county to voluntarily provide some assistance like translations of instructions and voter guides. Yet such efforts have not adequately addressed the great need for assistance.<sup>142</sup> KRCC has documented many voting barriers faced by Korean Americans in Cook County.<sup>143</sup> AALDEF has found that, among Korean voters, more than half are limited English proficient. About a third needed interpreters or translated materials. Limited English proficiency rates for Korean American voters were higher than the overall average for all Asian American voters surveyed in Cook County.<sup>144</sup>

The Asian American population in Virginia has grown by 62% since 1990, numbering more than a quarter million. In Fairfax County, the Vietnamese population has doubled over that span, numbering about 20,000 by the year 2000. The Asian Pacific American Legal Resource Center in Virginia has initiated a language rights project that seeks to expand language assistance for Asian Americans to government services.<sup>145</sup>

The Center, along with AALDEF, found that among Asian American voters in 2004, 22% were limited English proficient, and 16% had no formal U.S. education. Almost a third were Southeast Asian, and 12% were Korean American, most of whom resided in Fairfax County.<sup>146</sup>

Among Vietnamese voters in Fairfax County, more than half were limited English proficient. About a quarter needed interpreters or translated materials. Limited English proficiency rates for Vietnamese American voters were higher than the overall average for all Asian American voters

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139. "Southeast Asian" describes voters of Vietnamese, Cambodian, Thai and other Southeast Asian descent.

140. AALDEF ELECTION 2004 REPORT, *supra* note 18, at 9.

141. *Id.* at 14-15.

142. *Id.*

143. Testimony of Kat Choi, KRCC, before the National Voting Rights Commission of the Lawyers Committee for Civil Rights at the Midwest Regional Hearing, Minneapolis, MN (July 22, 2005) (on file with author).

144. AALDEF ELECTION 2004 REPORT, *supra* note 18, at 14-15.

145. *Id.* at 15.

146. *Id.* at 14-15.

surveyed in Northern Virginia.<sup>147</sup> Asian American voters in Virginia also faced many voting barriers.<sup>148</sup>

Because of limited English proficiency, low rates of educational attainment, and past voting barriers, Section 203 should be expanded to ensure that Asian Americans are fully able to participate in the political process.

As discussed *supra* in Part II.B, the prime beneficiaries of language assistance have been first-time voters.<sup>149</sup> Language assistance correlates with increased political participation of Asian Americans. It expands access to the vote and, consequently, more Asian Americans can exercise their right to vote.

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147. *Id.* at 15.

148. Letter from Glenn D. Magpantay, Staff Attorney, AALDEF, and Nicholas Rathod, Language Access Project Director, Asian Pacific American Legal Resource Center, to Michael Brown, Chairman, Barbara Hildenbrand, Vice Chairwoman, and Jean Jensen, Sec'y, Va. State Bd. of Elections; Allen H. Harrison, Jr., Chairman, Charlene N. Bickford, Vice Chairwoman, and Fred G. Berghoefer, Sec'y, Arlington County Electoral Bd.; and Nancy Krakover, Chairwoman, Larry E. Byrne, Vice Chairman, and Margaret K. Luca, Sec'y, Fairfax County Electoral Bd. (May 9, 2005) (RE: Observations of the General Election in Northern Virginia on November 2, 2004).

149. *Compare* H.R. REP. NO. 102-655, at 15 (1992) (dissenting report arguing that language does not increase political participation of language minority groups).

TABLE 5: CHARACTERISTICS OF RESPONDENTS OF AALDEF'S MULTILINGUAL EXIT POLL, NOV. 2004<sup>150</sup>

ALL RESPONDENTS	FIRST-TIME VOTER	FOREIGN-BORN	NO FORMAL U.S. EDUCATION	ENGLISH AS NATIVE LANGUAGE	LIMITED ENGLISH PROFICIENT	LARGEST ASIAN POPULATIONS
10,789	38%	82%	29%	14%	41%	46% Chinese <sup>151</sup> 25% South Asian 14% Korean 6% Southeast Asian <sup>152</sup> 5% Filipino

STATE

New York	36%	84%	34%	14%	46%	56% Chinese 24% South Asian 13% Korean 4% Filipino
New Jersey	35%	85%	18%	11%	23%	39% Asian Indian 24% Korean 20% Chinese 13% Filipino
Massachusetts	42%	84%	22%	6%	55%	47% Chinese 28% Vietnamese 15% Cambodian
Rhode Island	45%	61%	4%	21%	25%	84% Southeast Asian 11% Filipino
Illinois	37%	77%	25%	12%	37%	48% Korean 21% South Asian 13% Chinese 9% Filipino
Michigan	64%	50%	16%	29%	18%	27% Arab 19% Bangladeshi 19% Chinese
Virginia	35%	77%	16%	21%	22%	29% Southeast Asian 25% South Asian 15% Chinese 12% Korean
Pennsylvania	43%	68%	36%	13%	43%	81% Chinese 13% Southeast Asian

ETHNIC GROUP

Chinese	37%	79%	37%	10%	52%	N/A
Korean	35%	87%	31%	10%	59%	N/A
Filipino	27%	75%	17%	22%	5%	N/A
South Asian	42%	88%	17%	20%	19%	52% Indian 18% Bangladeshi 15% Pakistani 14% Indo-Caribbean
Southeast Asian	46%	85%	21%	6%	47%	53% Vietnamese 22% Cambodian 7% Thai 7% Laotian 4% Hmong

150. AALDEF ELECTION 2004 REPORT, *supra* note 18, at 9.

151. Includes Asian Indian, Bangladeshi, Pakistani, Indo-Caribbean, Sri Lankan, and Nepalese.

152. Includes Vietnamese, Cambodian, Laotian, Hmong, Thai, Indonesian, Burmese, and Malaysian.

TABLE 6: CHARACTERISTICS OF LANGUAGE MINORITY GROUPS,  
AALDEF'S MULTILINGUAL EXIT POLL, NOV. 2004<sup>153</sup>

STATE - LOCALITY	LANGUAGE MINORITY GROUP	FIRST-TIME VOTER	LIMITED ENGLISH PROFICIENT	NEEDED INTERPRETER	NEEDED TRANSLATED MATERIALS
NEW YORK - Manhattan - Queens	Chinese	34%	56%	41%	39%
	Chinese	34%	51%	29%	31%
	Korean	35%	67%	34%	49%
	Bangladeshi	50%	31%	26%	24%
	Pakistani	44%	21%	26%	19%
- Brooklyn	Chinese	44%	67%	48%	47%
	Bangladeshi	55%	43%	33%	33%
	Pakistani	49%	41%	29%	35%
NEW JERSEY - Bergen Co. - Middlesex Co.	Korean	35%	55%	21%	33%
	Indian	40%	13%	20%	19%
	Chinese	31%	26%	12%	14%
MASSACHUSETTS - Boston - Dorchester - Lowell - Quincy	Chinese	36%	65%	43%	52%
	Vietnamese	45%	74%	60%	55%
	Cambodian	62%	41%	37%	34%
	Chinese	32%	46%	16%	22%
RHODE ISLAND - Providence	Cambodian	39%	36%	23%	15%
ILLINOIS - Cook Co.	Korean	31%	59%	22%	37%
MICHIGAN - Dearborn - Hamtramck	Arab	38%	6%	28%	27%
	Bangladeshi	42%	59%	26%	33%
	Arab	46%	38%	30%	24%
VIRGINIA - Falls Church - Annandale	Vietnamese	59%	55%	29%	24%
	Vietnamese	36%	43%	29%	29%
PENNSYLVANIA - Philadelphia	Chinese	42%	44%	25%	31%

b. New Populations Covered: Southeast Asians<sup>154</sup>

Under the current Section 203 trigger, one particular Asian American community has been largely left out – Southeast Asians.<sup>155</sup> Southeast Asian Americans are largely from Cambodia, Laos, Vietnam, and Thailand. Most arrived in the U.S. as refugees after the Vietnam War or are the children of refugees. There are more than 1.8 million Southeast Asians in the United States and their naturalization rates outpace the national average. At the same time, they are much less likely than most Americans to hold college degrees, more likely to have had no formal education, and more likely to live in poverty.<sup>156</sup>

153. AALDEF ELECTION 2004 REPORT, *supra* note 18, at 12.

154. Much of this subsection was written with the assistance of the Leadership Conference on Civil Rights, *see* LCCR Memo, *supra* note 116.

155. Vietnamese is a covered language in a number of jurisdictions, but other Southeast Asian languages have not been captured thus far. Voting Rights Act Amendments of 1992, Determinations Under Section 203, 67 Fed. Reg. 48871-77 (July 26, 2002).

156. LCCR Memo, *supra* note 116.

Congress recognized that educational disparities significantly affect the ability of language minorities to participate in the electoral process.<sup>157</sup> Notwithstanding the model minority myth, educational attainment among Southeast Asians remains low.<sup>158</sup> Many Southeast Asian American students receive inferior education. Students who are limited English proficient are often unable to participate in English as a Second Language (ESL) programs or receive adequate bilingual assistance in the classroom due to school systems' inability to effectively provide such programs.<sup>159</sup> Students leave school with below-average English proficiency.<sup>160</sup> The inability or limited ability to read English thwarts the attempts of many individual Southeast Asian Americans to participate in the electoral process.<sup>161</sup>

Southeast Asians fall within the group of citizens that Congress intended to protect and empower under Section 203.<sup>162</sup> They are limited English proficient and have low levels of educational attainment. Additionally, because of their heroic service to American pilots during the Vietnam War, special naturalization rules apply to certain Southeast Asian veterans and their families, which allow them to take the citizenship test in their own language.<sup>163</sup> Lowering the trigger to 5,000 would capture Khmer (Cambodian), Vietnamese, and Thai languages in many jurisdictions.

### c. Constitutional Considerations<sup>164</sup>

Undoubtedly, there is a great need for language assistance in voting because of such high rates of limited English proficiency, as well as low rates of U.S. educational attainment.<sup>165</sup> However, need alone is insufficient to justify Section 203 protection. A finding of voting discrimination is also essential to warrant congressional action mandating language assistance.<sup>166</sup> The U.S. Supreme Court has held that such discrimination must

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157. H.R. REP. NO. 102-655, at 6 (1992) (discussing Asian American immigrant children and the lack of ESL teachers in schools); S. REP. NO. 102-315, at 6 (1992) (discussing *Lau v. Nichols*, lack of ESL courses, and lack of educational equity); S. REP. NO. 94-295, at 28-29 (1975).

158. LCCR Memo, *supra* note 116. 26.2% of Cambodians, 45% of Hmong and 22.7% of Laotians have had no formal schooling, compared to 1.4% of the overall population. Similarly, census data shows that only 9.1% of Cambodians, 7.4% of Hmong and 7.6% of Laotians obtain a bachelor's degree or higher, compared to 24.4% of the overall U.S. population.

159. *Id.* For example, in 1997, California only had 72 certified bilingual Vietnamese teachers for 47,663 Vietnamese-speaking students (ratio = 1:662), 28 certified bilingual Hmong teachers for 31,165 Hmong-speaking students (ratio = 1:1,113), and 5 certified bilingual Khmer teachers for 20,645 Khmer-speaking students (ratio = 1:4,129).

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

164. While we would have liked to have made this section much more expansive, constitutional issues are only cursorily reviewed here because the focus of the present article is the reauthorization of expiring provisions of the Voting Rights Act. A fuller discussion on the constitutionality of VRA is certainly needed, however. We raise the issue here simply to assert our belief that Section 203 is a legitimate, justified, and necessary act of Congress that bears no constitutional infirmity.

165. *Compare* H.R. REP. NO. 102-655, at 6 (1992) (dissenting report stating that no showing of need for language was made in 1992 hearings). Critics of Section 203 have also wrongly asserted that there is low use of translated voting materials. 2005 *Hearings, supra* note 39, at 7 (statement of Linda Chavez).

166. S. REP. NO. 102-315, at (1992) (dissenting report).

be purposeful<sup>167</sup> and the remedy congruent and proportional<sup>168</sup> to ameliorate the discrimination.

Purposeful discrimination against Asian American voters is well-documented. The 2004 election revealed racist poll workers; voters, elected officials, and others who created intimidating and hostile environments for Asian American voters; disparate treatment of Asian American voters compared to white voters; poll workers who discouraged Asian Americans from voting; racial profiling at poll sites through inappropriate identification checks or demands for naturalization certificates; and poll site changes without any or with poor notice given to Asian American voters.<sup>169</sup> These practices have categorically disenfranchised Asian American voters.<sup>170</sup>

Asian Americans, in jurisdictions which an expanded Section 203 would cover, also faced numerous voting barriers. For example, in Virginia, one voter complained that he was required to furnish additional forms of identification after he had already provided a valid form of identification under state law.<sup>171</sup> Moreover, this voter's white companion, who was also voting at the site, was not asked to show any identification whatsoever.<sup>172</sup> At another poll site a poll worker mocked an Asian American voter exclaiming: "Your name is the longest I've ever seen!" which made the voter feel extremely uncomfortable.<sup>173</sup> Asian American voters also complained that their names had been mysteriously removed from voter lists.<sup>174</sup> Reducing the trigger to 5,000 will cover counties in Virginia for Asian language assistance and may help ameliorate these problems by helping Asian Americans to better understand the voting process, proper voting procedures, and to know about and know how to assert their rights.<sup>175</sup> Reducing the trigger to 7,500, on the other hand, would not provide coverage for any county in Virginia.

Section 203 is not designed nor intended to capture all language minority groups across the nation.<sup>176</sup> It is tailored to cover groups in areas where there are sufficiently large citizen voting-age populations that are limited English proficient and have low rates of educational attainment.<sup>177</sup>

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167. *Washington v. Davis*, 426 U.S. 229 (1976); *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1976); *City of Mobile v. Bolden*, 466 U.S. 55 (1980).

168. *City of Boerne v. Flores*, 521 U.S. 507 (1997); *see also* *U.S. v. Lopez*, 514 U.S. 549 (1995).

169. The limitation on congressional action is even stricter when the federal statute in question involves areas usually considered a matter of state authority. *Bd. of Tr. of the Univ. of Alabama v. Garrett*, 531 U.S. 356 (2001). Election administration is typically a matter of state law. U.S. CONST. art. I, § 4 ("The Times, Places, and Manner of holding Elections . . . shall be prescribed in each State by the Legislature thereof; but Congress may at any time by Law make or alter such Regulations. . ."). However in the area of voting rights, as illustrated in the situations here of anti-Asian voter discrimination, it is the States and their actors and agents, who are the discriminators. Therefore, the need for Congressional oversight in elections is necessary and justified.

170. *See supra* discussion in Part II. B. History of Voting Discrimination

171. *See* Letter, *supra* note 148.

172. *Id.*

173. *Id.*

174. *Id.*

175. This would partially satisfy congruency under *City of Boerne v. Flores*, 521 U.S. 507 (1997).

176. S. REP. NO. 102-315, at 10 (1992).

177. *Id.*



Section 203 in itself<sup>178</sup>—and a lower numerical trigger of 5,000—will not only provide more Asian American communities with greatly needed language assistance, it would also provide a remedy that is congruent and proportional to the harm to ameliorate the discrimination encountered by Asian American voters.<sup>179</sup>

3. *Other Options for Expansion*<sup>180</sup> – *Eliminate the Illiteracy Requirement*<sup>181</sup>

Another way to expand language assistance is through the elimination of the illiteracy requirement, or the use of a different measure for this requirement.<sup>182</sup> Section 203 requires that a language minority group must have a higher illiteracy rate than the national illiteracy rate, as a group.<sup>183</sup> The current determination of illiteracy is having less than a fifth grade education.<sup>184</sup> This test has little to do with English proficiency. Indeed, limited English proficiency is already an element of Section 203's test for coverage.

Furthermore, the measure of illiteracy through educational attainment is problematic for other reasons. Educational attainment is assessed through a question on the census form that is ambiguous and could lead to unintended results.<sup>185</sup> The question on the census form asking about educational attainment could be interpreted as asking about education received *either in the United States or abroad*.<sup>186</sup> The illiteracy requirement

178. S. REP. NO. 94-295, at 25 (finding “inadequate numbers of minority registration personnel, uncooperative registrars, and the disproportionate effect of purging laws on non-[E]nglish speaking citizens because of language barriers”).

179. *City of Boerne v. Flores*, 521 U.S. 507 (1997); *see also* *U.S. v. Lopez*, 514 U.S. 549 (1995).

180. Some have discussed that the language minority groups covered under Section 203 should be expanded to go beyond Asian, Native American and Latino languages. The reason why these languages were covered is because these groups have endured a history of *de jure* discrimination and that discrimination was widespread among the states. Section 203 is remedial and looks to correct the lingering effects of past discrimination. Examples in the Asian American context include: the Chinese Exclusion Act, the internment of Japanese, anti-miscegenation laws, the prohibition of Orientals from testifying against white men or owning property. *See generally*, *Korematsu v. U.S.* 323 U.S. 214 (1944); *Hirabayashi v. U.S.*, 320 U.S. 87 (1943), *Yu Chong Eng v. Trinidad*, 271 U.S. 500 (1926); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886). Any language minority group seeking coverage must be able to demonstrate the same, and to satisfy federalism concerns, such discrimination must be widespread. Because of this, European languages are not included under Section 203. One argument might be made for Arab Americans and other Middle Easterners or “West Asians,” and that they may have a history and have endured widespread discrimination, especially in since September 11. ASIAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND, SPECIAL REGISTRATION: DISCRIMINATION AND XENOPHOBIA AS GOVERNMENT POLICY (2004). Arabs and other Middle Easterners are classified as “white” in the census and so they are not included under Section 203. This is a discussion which must be further explored but is outside the scope of this article.

181. Magpantay, *supra* note 91, at 55.

182. 42 U.S.C. § 1973aa-1a(b)(2)(a)(ii) (2004); Magpantay, *supra* note 91, at 55.

183. § 1973aa-1a(b)(2)(a)(ii) (“the illiteracy rate of the citizens in the language minority as a group is higher than the national illiteracy rate”).

184. H.R. REP. NO. 94-196 (1975); § 1973aa-1a(b)(3)(E) (“the term ‘illiteracy’ means the failure to complete the 5th primary grade”).

185. Letter from Asian Pacific American Legal Center of Southern California, to James F. Holmes, Director, Bureau of the Census, U.S. Department of Commerce (Feb. 9, 1998) (Re: Section 203: Census calculations of language minority groups requiring bilingual voting assistance).

186. *Compare* AALDEF ELECTION 2004 REPORT, *supra* note 18 (measuring educational attainment specifically in the United States).

and/or measure has disqualified languages and jurisdictions from Section 203 coverage.

The Los Angeles Korean American community provides an excellent example. After the 1990 census, the Korean American population in Los Angeles, which was already large and growing, exceeded Section 203's numerical threshold.<sup>187</sup> The populations should have qualified for mandated Korean language assistance, but many Korean Americans misinterpreted the illiteracy question on the census form, believing that the census questions pertaining to educational attainment referred to education they had received in the United States *or in Korea*. As a result, although Korean Americans were limited English proficient within the meaning of Section 203, they were deemed to *not* need language assistance.

This dilemma also resurfaces when the trigger is lowered to 5,000. Based exclusively on 5,000 limited English proficient voting-age citizens, Section 203 would cover Bergen County, NJ for Korean language assistance. However, the population's illiteracy rate is not high enough. In spite of the population's low level of English proficiency and history of voting disenfranchisement, particularly in Palisades Park and Fort Lee as described earlier,<sup>188</sup> Bergen County would not be included for Korean assistance.<sup>189</sup>

Section 203's test for coverage should be amended by eliminating the requirement of higher illiteracy. Alternatively, the test should be revised to be specific to education received in the United States.

### C. *Frequency for Testing for Coverage and Census Concerns*

Section 203 jurisdictional and language coverage is determined once every ten years, pursuant to the decennial census. As Congress considers reauthorization, more frequent testing of coverage should be allowed. Current developments at the U.S. Census Bureau make this option possible and particularly opportune.

#### 1. *Use of Census Data*<sup>190</sup>

The U.S. Census Bureau collects data through a short questionnaire sent to every household in the nation and a longer questionnaire sent to a sampling of households. The "short-form" asks basic questions such as age, race, gender, and family relationships. The "long-form" asks many more questions. In addition to the short-form's basic questions, it also asks about citizenship, the ability to speak English, housing type, income, educational attainment, occupation, etc. Section 203 coverage is determined by using data from the "long-form."<sup>191</sup> The long-form is only received by

187. Letter from Stewart Kwoh, President and Executive Director, and Bonnie Tang, Staff Attorney, Asian Pac. Am. Legal Ctr. to Gloria Molina, Supervisor, First District, County of Los Angeles (Sept. 1, 1998).

188. AALDEF ELECTION 2004 REPORT, *supra* note 18, at 14-17.

189. Phone Interview with Dan Ichinose, Project Dir., Demographic Research Unit, Asian Pac. Am. Legal Ctr. of S. Cal., by Glenn Magpantay, Staff Attorney, AALDEF (April 27, 2005) (notes on file with author).

190. LCCR Memo, *supra* note 116.

191. 42 U.S.C. § 1973aa-1a(b)(2)(A) (2004).

approximately 17% of the total population and is used to determine characteristics about the entire population.<sup>192</sup>

The Census Bureau is looking to discontinue the decennial long form and replace it with the American Community Survey (ACS). The Bureau claims ACS will provide critical economic, social, demographic, and housing information on an annual basis instead of once every 10 years. One out of 480 households in every U.S. county, American Indian and Alaska Native area, and Hawaiian Homeland area will receive the ACS questionnaire each month. Surveys are sent out to randomly selected addresses (not to individuals). An individual address has a chance of being selected once every five-year period.<sup>193</sup> The survey will be sent to approximately 2.5 percent of all U.S. households each year, as compared with the long form which is sent to 17% of households every ten years.<sup>194</sup>

## 2. *Frequency of Section 203 Determinations*<sup>195</sup>

Because ACS is replacing the long-form entirely, Section 203 coverage determinations must be made based upon the new ACS data. 2010 is the first year the Census Bureau will capture data for populations in all areas because it needs time to accumulate a large enough sample to produce reliable and accurate data.<sup>196</sup> Thus, 2010 is the first year that ACS data will be used to determine Section 203 coverage.<sup>197</sup> Once sufficient data is collected, the Census Bureau will release tabulations based on rolling three-year averages annually for areas with populations between 20,000 and 65,000, and rolling five-year averages annually for areas as small as census tracts.<sup>198</sup>

ACS is being implemented so that communities, businesses and other decision-makers will have more timely and relevant census data.<sup>199</sup> The change to ACS provides the opportunity for Section 203 determinations to occur more frequently and with greater sensitivity. This would be particularly appropriate today, when growth, migration and immigration rates show that today's society is increasingly mobile.<sup>200</sup>

To this point, Section 203 determinations have been made on a decennial basis because census data was available only on a decennial basis. ACS will allow census data to be compiled as a five-year rolling average beginning in 2010. With data thus available on an annual basis, Section 203 determinations should be made every 5 years beginning in the year 2010 to more accurately reflect society's mobility while still providing the Census Bureau ample time to run the needed analyses.

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192. LCCR Memo, *supra* note 116.

193. *Id.*

194. *Id.*

195. Magpantay, *supra* note 91.

196. LCCR Memo, *supra* note 116.

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.*

### 3. *Impact of the Change*

Currently, because Section 203 coverage is determined only once every ten years, language minority groups are left with little access to the vote.<sup>201</sup> Various Asian American communities have experienced tremendous population growth in every decade. Even though a language minority group within a jurisdiction would meet the test for coverage mid-decade, the community must wait until after the decennial census to be officially covered.<sup>202</sup> Congress should change Section 203 to make more frequent how often coverage is determined.<sup>203</sup>

This was the exact problem in New York. The Korean American population grew tremendously in the 1980s but after the 1990 census, it was about 250 persons short of meeting Section 203's 10,000 trigger.<sup>204</sup> Although the community continued to grow throughout the 1990s, perhaps meeting the new threshold as early as 1992, the community had to wait until after the 2000 census for coverage.<sup>205</sup> The same occurred with the Vietnamese community in San Diego, CA after the 2000 census. The 2000 census reported a Vietnamese-speaking voting age population with limited English proficiency of 9,915, short 85 persons below the 10,000 person trigger to bring San Diego County under Section 203 coverage.<sup>206</sup> Again, though the community has continued to grow and would even have met the trigger the following year, required language coverage had to wait until after the 2010 census. Testing for coverage more frequently will resolve dilemmas such as these.

### 4. *Other Concerns*

There are, however, concerns about the ability of ACS to gather accurate data on language minorities. There is already an undercount of racial and ethnic minorities in the census.<sup>207</sup> The Census Bureau estimated that it missed 6.4 million people in the 2000 Census, who were disproportionately racial and ethnic minorities, poor, and children, and double-counted 3.1 million people, most of whom were white or affluent. This yielded a net undercount of 3.3 million people.<sup>208</sup> In this differential undercount, Asian Americans were twice as likely to be missed as whites, African Americans

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201. Magpantay, *supra* note 91.

202. *Id.*

203. *Id.*

204. *Id.*

205. *Id.*

206. Notice of Lodgement and Memo. of Agreement *in* U.S. v. San Diego County (S.D. Cal 2004) (June 23, 2004).

207. Dep't of Commerce v. U.S. House of Representatives, 525 U.S. 316 (1999); U.S. CENSUS MONITORING BOARD PRESIDENTIAL MEMBERS, FINAL REPORT TO CONGRESS (2001); Press Release, U.S. Census Monitoring Board Presidential Members, U.S. Census Monitoring Board Presidential Members Submit Final Report to Congress (Sept. 26, 2001) *available at* <http://govinfo.library.unt.edu/cmb/cmbp/news/FinalReport.asp.htm>; Deepa Iyer, *Will Asian Pacific Americans Count in the Next Decade?: The Importance of Census 2000 to Asian Pacific Americans*, 6 UCLA ASIAN PAC. AM. L. J. 44 (2000).

208. U.S. CENSUS MONITORING BOARD PRESIDENTIAL MEMBERS, *supra* note 208; *see also* Press Release, *supra* note 208.

three times more likely, and Latinos four times.<sup>209</sup> Asian Americans were missed in the census.

Current ACS design methodology provides little assurance that certain language minorities will be accurately counted.<sup>210</sup> Questions such as whether enough language minorities will be counted or whether the form will be translated or surveyors will be bilingual in the appropriate languages, give advocates pause regarding the ability of ACS to accurately determine the number of language minority groups.<sup>211</sup> Even if Asian Americans want to be counted in the census, they may face difficulties in being able to do this.

Lastly, the ACS form will only be sent to about 2.5% of the population on an annual basis. The few that do receive the ACS and speak a language other than English at home are asked to evaluate their own English proficiency. The form requests that they respond to a question inquiring how well they speak English by checking one of the four answers provided: "very well," "well," "not well," or "not at all."<sup>212</sup> The Census Bureau has determined that most respondents over-estimate their English proficiency and therefore, those who answer other than "very well" are deemed limited English proficient.<sup>213</sup> The flaws in this self-evaluation significantly reduce the number of people who would otherwise benefit from Section 203.<sup>214</sup>

Smaller Asian ethnic populations that are limited English proficient have been among the hardest to count, resulting in significant undercounts in these populations.<sup>215</sup> Because many Asian American communities, as well as Native American/Alaskan populations are smaller populations and are substantially limited English proficient, lowering the numerical trigger from 10,000 to 5,000 will help mitigate and offset the effect of the undercount on these communities.<sup>216</sup> In the end, the limitations of ACS are another reason for lowering the numerical trigger.<sup>217</sup>

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209. *Id.*

210. LCCR Memo, *supra* note 116; compare Maki Becker, *Asians Watching Census, Legal Defense Fund Wary of Undercount*, DAILY NEWS, July 6, 2000, at QL11; Valerie Alvord, *Asians Are Eager to Be Counted in California, Census Finds Community Harder to Reach in N.Y.*, USA TODAY, April 19, 2000, at 16A; Mae M. Cheng, *Down for the Count, Low Response to Census in Queens' Minority Communities*, NEWSDAY, April 7, 2000, at A7; Steven Lee Myers, *Census Letters Go to 120 Million Wrong Addresses*, N.Y. TIMES, Feb. 28, 2000, at A15; David Stout, *Census Takers Uneasy as Mail Response Lags*, N.Y. TIMES, April 5, 2000, at A16.

211. LCCR Memo, *supra* note 116; Iyer, *supra* note 208 (discussing the importance of an accurate census count).

212. Letter, *supra* note 133.

213. *Id.*; H.R. REP. NO. 102-655, at 8 (1992); S. REP. NO. 102-315, at 10 (1992).

214. LCCR Memo, *supra* note 116.

215. GLENN D. MAGPANTAY AND PHILIP M. LIU, COUNTING ASIAN AMERICANS: AN EVALUATION OF CENSUS 2000 PROGRAMS AND POLICIES (2000).

216. Another way to correct for the undercount is to use modern scientific techniques, like statistical sampling, to ensure the most accurate census data. U.S. CENSUS MONITORING BOARD PRESIDENTIAL MEMBERS, *supra* note 208; Press Release, *supra* note 208. Sampling, as a supplement to an actual enumeration or headcount, will ensure that Asian American and other language minorities are accurately counted. Congress should more explicitly support the use of statistical sampling. See *Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316 (1999).

217. LCCR Memo, *supra* note 116.

#### IV. CONCLUSION

Section 203 does not capture all Asian Americans across the nation and so many who should be eligible to receive language assistance do not.<sup>218</sup> Section 203 is, however, tailored to cover large citizen voting-age language minority groups that are limited English proficient and have faced a history and widespread voting discrimination.<sup>219</sup> Those populations are different now than they were thirteen years ago when Section 203 was enacted, and so the formula for Section 203 should be modified accordingly.

In reauthorization, there is no doubt that Section 203, along with Section 5, must continue to exist to protect the right to vote for Asian Americans. Continued aggressive enforcement of Section 203, through Section 5 and by other means, is needed. Reauthorization is also an occasion to expand language assistance to currently non-covered Asian American groups and jurisdictions.

An expansion of Section 203 is necessary and justified. Statistical exploration of census data detailed herein demonstrates that, for Asian Americans, it is best to reduce the trigger to 5,000. This would capture the areas and language minority groups with the most growth, highest rates of limited English proficiency, and those who have faced voting discrimination. Such an expansion would be commensurate, proportional and congruent to ameliorating past discrimination.

Congress should also eliminate the illiteracy requirement, or apply a different measure of this requirement than educational attainment, because this requirement has served to erroneously disqualify several jurisdictions from coverage. Congress should also codify more frequent testing of coverage, given that data from the census used to test for coverage will soon be available more frequently.

Asian American populations have surged throughout the United States. They are becoming citizens and attempting to participate in the nation's political franchise, but have encountered many voting barriers. Section 203 has helped to ensure that these Americans, and indeed all Americans, may fully and fairly exercise their right to vote.

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218. S. REP. NO. 102-315, at 10.

219. *Id.*; H.R. REP. NO. 102-655, at 7.