Testimony of

Mr. Peter N. Kirsanow

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Before the Senate Judiciary Committee
on

The Continuing Need for Section 203's Provisions
for Limited English Proficiency Voters

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Mr. Chairman, Senator Leahy, members of the Committee I am Peter Kirsanow, a member of the U.S. Commission on Civil Rights ("Commission") and a member of the National Labor Relations Board. I am appearing in my personal capacity.

The Commission was established by the Civil Rights Act of 1957 to, among other things, act as a national clearinghouse for denials of voting rights and equal protection. The Commission played a central role in providing the predicate information and rationale for passage of the Voting Rights Act of 1965 ("Act"). The Commission also provided analyses for the extension and expansion of the Act's temporary provisions in 1970, 1975 and 1982.

In furtherance of the Commission's clearinghouse function the Commission recently held a hearing on the reauthorization of the temporary provisions of the Act. My assistant and I also reviewed additional data on the matter. The hearing made clear that few pieces of legislation have been as successful as the Act in satisfying its objective. This assessment, however, does not necessarily apply to Section 203.

The purpose of the Commission hearing, and the report that issued therefrom, was to provide Congress and the President with a factual record upon which to consider reauthorization of the Act's temporary provisions. The Commission report makes no recommendations on whether any or all of the temporary provisions should be reauthorized.

Nonetheless, I respectfully submit that in its deliberations regarding the Act's temporary provisions Congress consider at least four issues: (1) cost and waste; (2) fraud and error; (3) racial/ethnic profiling in coverage and enforcement; and (4) constitutional compliance.

First, cost as a function of efficacy. The evidence shows that the cost to covered jurisdictions of section 203 compliance is disproportionate to its utility.

As K.C McAlpin has noted, two GAO reports found that in most covered jurisdictions bilingual ballots are barely used and evidence suggests that the low usage rate does not justify the cost. In fact, the 1986 GAO report found that in most responding jurisdictions not one voter used any form of language assistance. Moreover, when asked, nearly 90% of jurisdictions reported no need for minority language assistance whatsoever.

In contrast to its sparse usage, the cost of minority language assistance can be substantial. The average covered jurisdiction spends an estimated 13% of all election costs on minority language assistance. Some jurisdictions spend

more than 50% on such assistance and the costs are increasing rapidly--by as much as 40% over an election cycle in some jurisdictions.

The cited costs are monetary only. They do not include the effects of fraud and error. Bilingual or multilingual election materials necessarily increase the risk of both. Non- English materials can confound the gatekeepers of voting integrity.

Reports abound of ballots that convey false or misleading information. For example, in one case a bilingual ballot transposed party labels, converting a Democrat candidate into a Republican and vice versa. In another case, the "yes" and "no" on a ballot proposition were reversed. Proofreaders simply miss such errors.

Further, bilingual language requirements facilitate voting by those ineligible to vote. Just in the last few years there have been scores of instances, particularly in Florida and California, in which substantial numbers of non-citizens voted. It is uncertain how many outcomes may have been affected.

A third issue that merits consideration is the use of racial profiling and stereotyping to monitor and enforce Section 203. It would be unlawful for elections officials in a given jurisdiction to disenfranchise voters with ethnic surnames on the basis of suspect citizenship status. Yet the practice of reviewing surnames to monitor compliance with Section 203 is used by the federal government itself.

Voter registration lists are reviewed for surnames common to language minority groups to determine whether polling places in areas presumed to have sizeable concentrations of limited English proficiency voters are providing adequate bilingual assistance. The purpose may be benign, but it is racial/ethnic stereotyping nonetheless. Ethnic surnames are not proxies for limited language proficiency

This racial profiling and stereotyping also implicates the constitutional issues of Section 203's congruence and proportionality. The factual and logical bases for eliminating discriminatory access to the polls by providing bilingual election materials are, at best, underdeveloped.

One of the justifications often cited for Section 203 - unequal educational opportunities afforded language minorities--could easily be applied to blacks and other groups not usually viewed as being of limited English proficiency. Moreover, the coverage triggers related to literacy could easily be applied to many black communities as well as certain white ones, but are not--raising equal protection and congruence and proportionality issues.

It is respectfully submitted that prior to reauthorizing Section 203, Congress adopt the recommendation of my former colleague, Christopher Edley, now Dean at Boalt Hall. Dean Edley advises that with respect to Section 5 Congress appoint a commission to study and report on some of the issues just discussed, particularly matters related to coverage formulae and definitions. The same should be done for section 203.

Thank you Mr. Chairman.