Ten-year Struggle Brings English Case to Top Court

Primacy of language in government at stake

by Robert Park

Some Chinese, with thousands of years of history, believe that all countries follow the "dynastic cycle," with a birth, success, peak and decline. The United States, for all its power and glory, they believe, is not immune to the dynastic cycle, and scholars could spend many hours engaged in agitated debate over whether the United States has peaked.

The March 1996 issue of *Discover* magazine brought home this question once again, with its cover story on how China achieved unity despite the enormous diversity of more than a billion people. *Discover* suggests that the Chinese were able to forge, and *maintain* unity because they had a common language imposed throughout the ages ("The Great Chinese Puzzle: Empire of Uniformity," *Discover*, March 1996, p. 78).

> This is the story of how individual citizens of one state worked together to enact English as the official language, and how individuals of different beliefs used the courts to block the public will.

In this country, we have a common language as well. English is, and has been, our common language. As Professor J.R. Pole has written, at the time of the Constitutional Convention: "[T]he English language dominated all public life. It was the only official language and as such was used in the courts, the assemblies, and the press" (J. R. Pole, *Foundations of American Independence: 1763-1815*, Bobbs-Merrill, 1972, p. 18).

Through most of American history English remained our common language. Government stayed out of people's private choice of language, and, for the most part, functioned in English. In the 1920s, the U.S. Supreme Court struck down several states' attempts to forbid private and religious schools from teaching foreign languages, but said the state schools could provide all educational instruction in English (*Meyer v. Nebraska*, 262 U.S. 390, 402 [1923]).

Then in the 1970s, the federal government began to force states and local government to use languages other than English — first in schools, where it required bilingual education, then in elections, where it required multilingual voting materials. The federal government said that English in government was not enough.

And, inevitably, the federal government moved from regulating government language to regulating private language use. In 1981, the federal Equal Employment Opportunity Commission (EEOC) decided that private employers had to permit employees to speak languages other than English on the job. In 1984, Alva Gutierrez, a Los Angeles County court clerk, sued her employers because they stopped her from using Spanish to make racial insults against her African-American co-workers and supervisors. U.S. Appeals Court Judge Stephen Reinhardt agreed with Gutierrez that she had a federal civil right to insult her co-workers in Spanish. If the employer had a problem with that, Reinhardt said, they should fire their Black supervisors and hire bilingual ones (*Gutierrez v. Municipal Court of the Southeast Judicial District*, 838 F.2d 1031, 1043 [9th Cir. 1988], *vacated*, 490 U.S. 1016 [1989]). The U.S. Supreme Court, swiftly and without another word, vacated Reinhardt's decision. (Keep Judge Reinhardt in mind, though, for he will appear yet again in our saga.)

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In 1994, the federal EEOC regulations were struck down by a federal court in San Francisco (*Garcia v. Spun Steak Co.*, 998 F.2d 1480 [9th Cir. 1994], *cert. denied*, 114 S.Ct. 2726 [1995]). But the EEOC is still using its illegal regulations.

And the stories of the federal government's other forays into language coercion fare no better. As *U.S. News & World Report* reported last year, bilingual education "was born of good intentions but today it has mushroomed into a $10 billion-a-year bureaucracy that not only cannot promise that students will learn English but may actually do some children more harm than good" (Susan Headden, "Tongue-tied in the Schools," *U.S. News & World Report*, September 25, 1995, p. 44).

The *New York Times* was even more blunt, calling bilingual education "a system that dragoons children into bilingual programs that reinforce the students' dependency on their native language and then makes escape impossible" ("A Bilingual Prison," *The New York Times*, September 21, 1995, A22).

And recent congressional testimony shows that bilingual ballots, which have cost millions of dollars over the years, are both unused and ineffective. An elections supervisor from California told the House Subcommittee on the Constitution that her county had spent hundreds of thousands of dollars on bilingual ballots during her tenure, but only one ballot had ever been requested. And U.S. Census Bureau figures show that voting participation rates among language minority groups have declined, not improved, and the *gap* between Hispanic and "Anglo" voting participation *increased* after the use of bilingual voting materials began (U.S. Census Bureau, *Current Population Reports*, Series P-20, Nos. 174, 228, 293, 344, 383, 414 and 453).

Against this backdrop of federal governmental failures, the states have been acting. Twenty-two states have now declared English their official language. (See the list on page 248.) Some critics claim that these laws are discriminatory or unnecessary. But many Americans believe that they are both necessary — to prevent waste, protect freedom, and protect national unity — and non-discriminatory, because they treat all Americans, of whatever background, alike.

This is the story of how individual citizens of one state worked together to enact English as the official language, and how individuals of different beliefs used the courts to block the public will. Judge Reinhardt — who wrote the 1988 "fire the Black supervisors" opinion — wrote five different opinions maneuvering his court to strike down the official English law.

The Bumpy Road to Arizona's English Language Amendment

Arizona is a state of austere beauty, with a rugged Western tradition that draws much from its Hispanic and Native American origins. But Arizona is also a staunchly American state, with an iconoclastic streak that gave America Sen. Barry Goldwater and Black Republican basketball star Charles Barkley.

"Arizona, as part of its agreement to become a state, pledged that its schools would always be taught in English, and that its legislators would be able to speak and write in English."

Arizona, as part of its agreement to become a state, pledged that its schools would always be taught in English, and that its legislators would be able to speak and write in English (Arizona Constitution, Article XX, §§ 7 and 8 [1910]). Arizona's educational laws provide that students shall be taught English as quickly as possible (A.R.S.A. § 15-754). Almost 9,000 Arizonans had joined the largest Official English organization, U.S.English, then headed by former U.S. Senator S.I. Hayakawa and a Michigan ophthalmologist, John Tanton. But Arizona had never had a declaration that English was its official language.

In 1987, Arizona State Representative Dave Carson and State Senator Peter Kay set out to declare English the official language. Although hearings were held on their legislation, neither Carson nor Kay was able to get his bill passed in the legislature.

A few years before, I had joined U.S.English, which, at the time, was the only "official English" organization, and I asked them for help. In 1987, I was invited to the U.S.English meeting in Philadelphia. I made a presentation on Arizona's situation and asked for help in starting a citizens' initiative to pick up where the legislature had left off. U.S.English agreed to support me and my Arizona effort.

It was active support. Sen. Hayakawa persuaded Sen. Goldwater to head the effort. U.S.English's legal counsel, Barnaby Zall, worked with the legislature's lawyers to craft an initiative amending Arizona's constitution to declare English the official language. And U.S.English provided substantial financial support, mostly from its thousands of members in Arizona, but also directly.

The Arizona English Language Amendment incorporated all that the Official English movement had learned in the prior five years of initiative efforts. Arizona's ELA would not affect private language choice, but it would require Arizona's government to function in English except in certain specific situations, described as "exceptions."

This requirement was specified in three different ways, culminating in the requirement that Arizona "act in English and in no other language" (Arizona Constitution, Art. XXVIII, § 3[1][a]). The drafters had first used the more cumbersome phrase "shall take official actions in English," but after five drafts, the Arizona Legislature's lawyers thought that the simpler "shall act" phrase was just as clear. That simple clarification, however, would cost much in later court battles.

Exceptions to the requirement were made for compliance with federal laws and constitutional mandates, foreign language teaching, protecting public health and safety, and protecting the rights of criminal defendants and victims of crime. The Arizona legislative style has become the model for all later English Language Amendments in other states.

Thousands of volunteers and supporters worked to qualify the Arizona initiative for the ballot. On July 7, 1988, we turned in 203,000 signatures to the Arizona Secretary of State, the most signatures to qualify an initiative in Arizona history. The boxes filled an armored car. The Secretary of State designated our initiative "Proposition 106."

The campaign for the initiative began and the opposition was vicious. Anyone who supported Proposition 106 was a racist; opponents were protectors of American rights. Carolyn Warner, the former state superin-tendent of public instruction, said, "Those who believe in English-only are traitors to the United States of America because we live in a global society."

The state's elite citizens mobilized against us. Even the telephone company, U.S.West, provided funding against the initiative. The justices of the Arizona Supreme Court issued a statement condemning the initiative. J. Fife Symington III, then a developer and now governor (who has just been indicted because his development schemes were apparently not what he claimed), declared that passage of Proposition 106 would lead to the loss of millions of jobs and businesses. Bruce Babbitt, a former governor and now U.S. Secretary of the Interior, said that passage of the initiative would make Arizona "the laughing stock of the nation." Even impeached former Governor Evan Mecham urged the defeat of Proposition 106.

And then the campaign turned ugly. With polls showing two-thirds of Arizonans supporting Proposition 106, thousands of Hispanics and other opponents of the initiative marched through Phoenix behind the Mexican flag. And the television ads began.

One TV ad opened with the initiative language, then showed pictures of Senator Joseph McCarthy, a sign reading "Japs keep moving," police

attacking Blacks, Adolph Hitler, and victims of a concentration camp peering through the wire. Keep in mind that the initiative opponents knew about Senator Hayakawa when they ran the anti-Japanese sign, and about Gerda Bikales, executive director of U.S.English, an immigrant who had lived through the Holocaust period in France. The TV ad announcer solemnly intoned:

> *It always starts like this — with something like Proposition 106. Sometimes it looks respectable, even patriotic. And, we are fooled for a while. Or it comes with violence and it is easy to see, infecting entire nations, and it strikes most deeply to our deepest fears. And, now it is here, in Arizona.*

This was their entire campaign: to vote for English is to bring back Hitler. Nothing solid, just potent symbols.

Polls show that immigrants — like all Americans — support Official English in overwhelming numbers."

We fired back. We had an elderly immigrant, sitting in a comfortable chair, with leather that creaked when he sat forward to speak. "Voting for English doesn't mean you love the old country any less. It means you love America a little more."

I really believe that, and so do most citizens, and most immigrants. Polls show that immigrants — like all Americans — support official English in overwhelming numbers. A March 1990 *San Francisco Chronicle* poll showed that 90% of Filipino-American immigrants, 76% of Chinese-American immigrants, and 69% of Hispanic-American immigrants support English as the official language (Viviano, "Poll Contradicts Stereotypes," *San Francisco Chronicle*, March 28, 1990, p. A1). As Linda Chavez, who headed U.S.English at the time, wrote this year:

> *Failed policies such as bilingual education and multicultural curricula are not being demanded by Mexican laborers or Chinese waiters. Instead they are being rammed down immigrants' throats by federal, state and local governments, at the behest of native-born political activists and bureaucrats.* (Linda Chavez and John Miller, "The Immigration Myth," *Reader's Digest*, May, 1996, p. 73).

And in the end, the voters agreed as well. As the *Phoenix Gazette* editorialized: "Arizonans sided with the elderly man in the leather chair." But it was close, with Proposition 106 winning by only 51% of the vote, after one of the most vicious, emotional political campaigns in history.

Blocking the Initiative

Then the opponents, defeated at the polls, moved to other weapons. The Arizona Attorney General issued an analysis which said that the Arizona ELA was constitutional, so long as it didn't have an adverse impact on any language minority group. Otherwise, it violated federal civil rights laws. The attorney general relied on Judge Reinhardt's opinion in the *Gutierrez* case, the one which said that Black supervisors should be fired and bilingual supervisors hired, and which the Supreme Court vacated.

More important, however, was a federal lawsuit filed the day after the initiative passed on behalf of a government worker, Maria-Kelly Yniguez. Yniguez (EE-neh-gez) was recruited as a plaintiff by a young Yale Law School graduate named Steve Montoya. For several years, Montoya had been thinking about how to block English Language Amendments in court. Now he got his chance. Montoya recruited Yniguez, who was married to one of the partners in his law firm, as a plaintiff in a constitutional challenge to Arizona's ELA.

"Kelly" Yniguez handled medical malpractice claims filed against state hospitals. She could settle claims on her own by paying up to $10,000. She talked to attorneys and claimants in a combination of Spanish and English. Sometimes she drafted her settlement documents in Spanish, although Fred Cuthbertson, her supervisor, couldn't read Spanish. "He could just ask me to translate for him," she later testified.

She used Spanish because "[i]t's kind of a solidarity thing. It's a comfortableness." She also said she could express some elements of medical malpractice claims in Spanish which are

impossible to express in English, such as her cultural heritage as a Hispanic, the sense of community, experiences shared by Hispanics, "and other feelings."

So, to protect her right to express herself by writing her government settlement releases in Spanish, Kelly Yniguez filed suit. She claimed that the Arizona ELA violated her First Amendment rights to free speech on the job.

On February 6, 1990, federal Judge Paul G. Rosenblatt agreed with Yniguez saying that:

> *When read at its full literal breadth, Article XXVIII [Arizona's ELA] would force Arizona governmental officers and employees, whose use of a non-English language in the performance of their official duties is protected by the First Amendment, such as state legislators speaking to constituents in a language other than English, state employees officially commenting on matters of public concern in a language other than English, and state judges performing marriage ceremonies in a language other than English, to either violate their sworn oaths to obey the state constitution, and thereby subject themselves to potential sanctions and private suits, or to curtail their free speech rights* (730 F.Supp. 309, 314 [D.C. Ariz. 1990]).

Judge Rosenblatt was thus assuming that "use of a non-English language in the performance of their official duties *is protected by the First Amendment*," which no other court had ever found. He struck down the ELA as unconstitutional, declaring it "void as being invalid on its face in violation of the First Amendment."

Rosenblatt's decision had an immediate impact far beyond Arizona's borders. Between 1986 and 1990, eleven states had declared English their official languages; Cameron Whitman, then the national field coordinator for U.S.English, testified that Rosenblatt's decision had stopped further state considerations of ELAs. No more states would declare English their official language for another five years.

And why should they? If ELAs violate the federal First Amendment — the supreme law of the land — there's nothing a state could do that would be constitutional. No mere federal statute could violate the Constitution either. It was a total victory for the opponents of English language amendments. The only possible answer would be a federal English Language Amendment — and that would take years to pass through two-thirds of both houses of Congress and three-fourths of the states.

Gleeful at the result, Arizona's governor, Rose Mofford, announced "Adios, Official English," and

refused to appeal Judge Rosenblatt's decision. That was it. We were taking on water and sinking fast. There would be no appeal of a decision that threatened to close down the entire English Language movement.

Can Anybody Help Me?

Then began a six-year-long series of crap-shoots, incredible long-shots that paid off, and gambles that won every time. This was high-stakes constitutional litigation, involving every procedural wrinkle, lawyers' trick, and heart-stopping salvo in the book. First someone had to enter the case to appeal it when Governor Mofford would not; that would be really tough, since the court had already made its decision. Then someone would have to defend the initiative again and again through the courts, fighting Judge Rosenblatt's decision in courts dominated by Judge Reinhardt's *Gutierrez* opinion, despite its being vacated by the Supreme Court.

Apparently there wasn't anybody to do this except me and the other supporters of Proposition 106. We had no money; the entire elite of Arizona was against us; newspapers were editorializing "Good Riddance" to our initiative.

But Senator Hayakawa and Stanley Diamond, who had taken over as head of U.S.English, stood with us. They paid to send us their top lawyer from Washington, Barnaby Zall, who performed miracles time and time again, and also paid for our local lawyer, constitutional expert Jim Henderson from Phoenix, to defend against another lawsuit in state court that lawyer Steve Montoya filed to deplete our resources.

Zall and Henderson had a plan — a real longshot, but still the only thing we had. We would "intervene after judgment" in the case, meaning we would file to join the case as defendants when the governor wouldn't defend her own constitution.

The experts huffed that it couldn't be done. Paul Bender, then the dean of the Arizona State University Law School and now one of the top lawyers in the Clinton Administration's Justice Department, said it was impossible. Thousands of lawsuits are filed each year, but only five or six interventions after judgment were granted in the last twenty years. But Zall and Henderson filed our request for "intervention after judgment" anyway.

The idea was that the initiative proponents were not just "concerned bystanders," but were legally-recognized participants in the election process. The proponents, meaning us, had as much right to be recognized by the court as the governor. After all, the Arizona constitution gives us the right to propose and enact initiatives; we did that when the elected officials wouldn't pass our legislation. Why should we be shut out of court if the elected officials and constitutional challengers conspired together to do in our handiwork?

Judge Rosenblatt immediately rejected our request. He said we didn't have "standing" to intervene. The reasoning was surprising. Judge Rosenblatt said that his decision to void the Arizona ELA was not binding on any state court, so we could sue in state court, instead of federal court. This was a novel position — that a federal court ruling on the constitutionality of a law could just be ignored. But Judge Rosenblatt believed it, and denied our request. We appealed right away.

We got the worst possible three-judge panel to

States Which Have Declared English Their Official Language

Alabama	Ala. Const. Amend. 509 (1990)
Arizona	Ariz. Const. Art. XXVIII (1988)
Arkansas	Ark. Stat. Ann. 1-4-117 (1987)
California	Calif. Const. Art.III, § 6 (1986)
Colorado	Colo. Const. Art. II, § 30 (1988)
Florida	Fla. Const. Art. II, § 9 (1988)
Georgia	Ga. Code Ann. § 50-3-30 (1986)
Hawaii	Hawaii Const. Art. XV. § 4 (1978) [Hawaiian is second language]
Illinois	Ill. Rev. Stat. Ch. 1, § 3005 (1969)
Indiana	Ind. Code Ann. § 1-2-10-1 (1984)
Kentucky	Ky. Rev. Stat. § 2013 (1984)
Mississippi	Miss. Code Ann. § 3-3-31 (1987)
Montana	Mont. Code Ann. § 1-1-510 (1995)
Nebraska	Neb. Const. Art. I, § 27 (1920)
New Hampshire	1995 N.H. Laws 157 (1995)
North Carolina	N.C. Gen. Stat. Ch. 145, § 12 (1987)
North Dakota	N.D. Cent. Code, § 54-02-13 (1987)
South Carolina	S.C. Code Ann. § 1-1-(696-698) (1987)
South Dakota	S.D. Codified Laws Ann. §§ 1-27-20 to 1-27-26 (1995)
Tennessee	Tenn. Code Ann. § 4-1-404 (1984)
Virginia	Va. Code § 22.1-212.1 (1950)
Wyoming	Wyo. St. 8-6-101 (1996)

Note: Louisiana, a "civil code" jurisdiction, permits the use of both French and English.

hear our appeal. The U.S. Court of Appeals for the Ninth Circuit controls most of the Western and Pacific states; it is known as the least self-restrained circuit of judges in the country. By the luck of the draw we got three of the most liberal judges in the Ninth Circuit: Thomas Tang, Betty Fletcher, and our old friend Stephen Reinhardt.

Kelly Yniguez's principal lawyer, Bob Pohlman, leaned over to me and Barnaby Zall at the beginning of our hearing and said, "You won't get anywhere with these judges." But he was wrong.

Zall stood up and gave a masterful presentation, explaining why we should be allowed to appeal Judge Rosenblatt's decision. The judges peppered him with questions, but he hung in there and answered every one.

Judge Reinhart wrote the opinion. He said that the initiative proponents were like legislators with the right to protect the laws they propose and help pass. He said we had "standing" to sue because no state court would ignore Judge Rosenblatt's ruling that our initiative was unconstitutional. But he also ruled that the same three judges who heard this first appeal would hear all of our other appeals as well.

Out of the Frying Pan…

Suddenly, the Arizona attorney general announced that Kelly Yniguez had left government employment more than a year before — in fact, before our appeals hearing. The attorney general and Yniguez's lawyers just hadn't bothered to let us, or the appeals court, know about it. That could have rendered the whole case "moot," or void, without giving us a chance to defend our initiative's constitutionality.

But once again, Judge Reinhardt entered an order saving the case. (Of course, he was setting us up for a later fall.) He ordered Judge Rosenblatt to either keep Yniguez in the case or find someone else to take her place.

It was now December, 1992, four years after we won the election, and we filed yet another notice of appeal. The appeal went before the same three judges: Tang, Fletcher and Reinhardt. This time the hearing was a lot tougher. By now, Steve Montoya had multiplied his forces. He wasn't sure that Yniguez was the right plaintiff any more, so he brought in his own new group: Arizonans Against Constitutional Tampering. He had filed a state court case (which he would lose, thanks to Jim Henderson's careful lawyering) on behalf of this group and he asked Judge Fletcher to let him appear on behalf of the new group.

We first received Montoya's request to represent a new group in the case when we entered the courtroom for our hearing in May 1994. Judge Fletcher said to us: "I'm going to grant his request. Do you have anything to say?" That's the kind of day it was.

We had some great reasons why the court should have upheld our initiative:

- The First Amendment protects "content" and choice of language is not content, it's content-neutral.
- The State has some very strong reasons ("interests") for declaring English its official language. You can't let government employees decide which laws they'll obey and which they'll ignore on the basis of their own personal views about "solidarity" and "comfortableness."
- No court has ever struck down an official language statute, or even required a government to provide multilingual services (except for translators for criminal defendants).

Reinhardt wasn't buying.

The Arizona attorney general didn't even bother to show up for the hearing. Still, Barnaby Zall hung in there, all alone, fielding very difficult questions on his feet. But it was obvious that Judge Reinhardt was going to go against us. He could not believe that we were not racists. It was just like the initiative cam-paign all over again. If you were for English, you were anti-immigrant. The many Supreme Court and other court decisions that Zall marshaled in our favor meant nothing when measured against Reinhardt's view that we were evil people.

That's the way Reinhardt wrote it, on Pearl Harbor Day, 1994 (Yniguez v. Arizonans for Official English, 42 F.3d 1217 [9th Cir. 1994]). He declared our initiative unconstitutional as violating the First Amendment. He said:

- "Language is by definition speech, and the regulation of any language is the regulation of speech."

A Matter of Opinion

In 1989, following the passage of Arizona's ballot initiative declaring English the official language, several Arizona state agencies asked the attorney general how the English Language Amendment would affect their activities. The Arizona Lottery, for example, asked whether they could speak to customers in Spanish. Other agencies asked whether they could name highways and streets in Spanish, print motor vehicle pamphlets in other languages, and speak to foreign government officials in their own language.

The Arizona attorney general issued a formal opinion, No. 189-009, which said that federal law required the use of other languages whenever using English would cause "an adverse impact on non-English speakers." All state laws which had an "adverse impact on non-English speakers" were illegal. Relying on *Gutierrez v. Municipal Court*, the 1988 "fire the Black supervisors" decision by federal Judge Stephen Reinhardt, the Arizona attorney general said the ELA permitted "day-to-day delivery of [government] services" in languages other than English.

During the first seven years of the *Yniguez* lawsuit, Official English supporters were united against the attorney general's opinion. The initiative proponents, for example, told the U.S. Supreme Court that "the attorney general's opinion, though correct in recognizing that Article XXVIII (Arizona's ELA) applies only to official acts, is premised on an erroneous understanding of federal law: 'linguistic groups are ethnic groups.' No federal court has ever so held. *See, e.g., Soberal-Perez,* 717 F.2d at 41 ('Language, by itself, does not identify members of a suspect class.')."

One of the main focuses of Official English groups was to pass state laws requiring the use of English in government. Adopting the attorney general's opinion would be a Pyrrhic victory, neutering state laws on Equal Protection grounds while upholding them under the First Amendment.

Unfortunately, in 1995, one Official English group broke away from the unified opposition, and adopted the Arizona attorney general's opinion. U.S.English, the largest Official English organization, asked the Supreme Court to "adopt" the attorney general's opinion. "The Attorney General's Opinion was controlling and correct." U.S.English's attorney told a grassroots leader that U.S.English felt a "half-loaf" approach was the only way to uphold the constitutionality of the Arizona ELA.

Fortunately, U.S.English is not legally a party in the case, and its new position was submitted only in a "friend of the court" brief. U.S. English's new position has, however, stirred controversy among Official English supporters. One grassroots organization circulated the U.S.English brief with a scathing commentary.

The net effect of the U.S.English position on the Supreme Court litigation (and on future state Official English laws) has yet to be seen. The initiative proponents are expected to blast the attorney general's opinion yet again in their final Supreme Court brief in August.

— Robert Park

- Governmental services must be provided in a language other than English if it is "normal" to do so and claimants wish it.
- The First Amendment protects both the rights of government employees to do their jobs in foreign languages and government benefits claimants to "receive" information in a language other than English.
- All other court decisions in our favor were "distinguishable" and didn't apply.

Once again, Judge Reinhardt justified the result based on his earlier decision in *Gutierrez*, although he didn't mention the part about firing the Black supervisors.

This was another awful decision. All new law, striking down Arizona's and other ELAs, without a shred of regard for other viewpoints. Judicial legislating at its worst.

At this critical point, U.S.English decided to stop paying for any legal fees necessary to bring the case before the United States Supreme Court. (See the box on this page containing the text of Mauro Mujica's letter.) A new organization, English Language Advocates, stepped into the breach and began paying the court costs.

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April 13, 1994

Arizonans for Official English
c/o James F. Henderson, Esq.
Scult, French, Zwilliger & Smock
P.O. Box 870
Phoenix, Arizona 85001-0870

Re: Yniguez v. Arizona and Arizonans for Official English
and Armando Ruiz, et al, v. Symington and Woods

Gentlemen:

We have been informed by Barnaby Zall, Esq. that the case of Ruiz v. Symington and Woods is over, at the State Trial Court level. As of this date, U.S.ENGLISH,INC. will no longer provide funds for this case.

Regarding Yniguez v. Arizona and Arizonans for Official English, Mr. Zall has informed us that Oral Arguments are scheduled at the Ninth Circuit Court of Appeals on May 3, 1994. He further indicated to us that the cost of legal services up to and including his appearance at the Oral Arguments should cost less than $25,000.00. U.S.ENGLISH has agreed to fund up to $25,000.00 and will no longer provide funds for this case after the Oral Arguments.

Sincerely yours,

s/ Mauro E. Mujica
Chairman of the Board and CEO
U.S.English, INC.

cc: Barnaby Zall

[Editor's note: This representation was re-typed from the original.]

Another Long-shot Gamble Pays Off

We were stuck again. But Barnaby Zall suggested that we ask other judges from the Ninth Circuit to look at Judge Reinhardt's opinion. Surely they couldn't *all* agree with Judge Reinhardt.

This kind of review, known as "*en banc* review," is exceedingly unusual. Even in the far-flung and diverse Ninth Circuit Court of Appeals, split on party lines like few other U.S. appeals courts, it's very tough to get an *en banc* review. A majority of the 32 sitting judges have to agree to rehear the case, on top of their already-crowded dockets. But we asked.

We pointed out that Judge Reinhardt's opinion would create some sweeping new rights, and ignored the testimony and facts in the record. Judge Reinhardt was saying that the government could never require a government employee to use certain words if they didn't want to, even though the Supreme Court had already said government employees could be required to salute the flag, wear a uniform, be nice to the public, conserve natural resources, prevent forest fires, and otherwise say what the government wanted conveyed to the people. Instead Judge Reinhardt was saying that government employees can say, *on behalf of the government*, whatever they wanted.

And, lo and behold, our request for an *en banc* review was granted. We would get yet another

hearing, in July, 1995, before eleven judges of the Ninth Circuit Court of Appeals. You might think that such a rare rehearing wouldn't be granted unless the judges wanted to reverse Judge Reinhardt's opinion, but that wasn't to be.

Once More Into the Breach

So seven years after our initiative passed, I filed into the largest courtroom in the Ninth Circuit's San Francisco headquarters. The judges sat in two rows, closely split between Democrats and Republicans (an important factor in the Ninth Circuit). The courtroom was packed, and they had opened an overflow room where the proceedings could be viewed on closed-circuit television. My friend and colleague Leo Sorenson, who sat in the overflow room, said it was also filled with reporters, law students and others interested in the case.

"Even in the far-flung and diverse Ninth Circuit Court of Appeals…it's very tough to get an <u>en banc</u> review. A majority of the 32 sitting judges have to agree to rehear the case, on top of their already crowded dockets.

In one more of the bizarre twists that make this lawsuit an ordeal, Judge Tang had died two nights before. He was replaced by Judge Alex Kozinski. Kozinski is often touted as the next conservative appointee to the U.S. Supreme Court. A brilliant immigrant from Romania (at age six), Judge Kozinski not only writes some of the most interesting opinions to come out of the Ninth Circuit, he is also a star columnist for the *Wall Street Journal*. He rides the lecture circuit with Judge Reinhardt in what some lawyers call the "Steve and Alex Show" — debating issues from the left and the right.

Judge Kozinski has weighed in on English language issues. In the infamous *Gutierrez* case, Judge Kozinski called Judge Reinhardt's "fire the Blacks" approach a "let them eat cake" strategy that would exacerbate racial tensions in the workplace (861 F.2d 1187, 1194 [9th Cir. 1988]). Judge Kozinski instead offered a reasoned analysis based on examples from other countries' language problems, which would have recognized that government employees' private language choices have no place in a public workplace.

Once again Barnaby Zall faced Judge Reinhardt in the courtroom. Judge Reinhardt, who had shaved his beard for this hearing, complained that we wanted government employees to shout Nazi slogans and racist statements. Other judges weighed in this time, however, and the questioning was marginally more substantive. Clifford Wallace, Chief Judge of the Ninth Circuit, for example, wanted to know why choice of language wasn't just a "mode" of speech which could be regulated.

In the end, however, Reinhardt convinced five other judges to vote with him, prevailing on a 6-5 vote. He republished his earlier opinion, with a few more footnotes (*Yniguez v. Arizonans for Official English*, 69 F.3d 920 [9th Cir. 1995]).

The chief dissent was written by Judge Ferdinand F. Fernandez, who said that although he wouldn't have voted for the Arizona ELA, it was constitutional. Judge Fernandez said that telling a government employee what language to use in particular circumstances is the same as telling the employee how to dig a ditch or write a contract. Choice of language is a political choice, and not one for the courts. "For good or ill, it was a question for the people to decide."

Judges Kozinski and Reinhardt, on the other hand, went at each other hammer and tongs. Judge Kozinski pointed out that under Judge Reinhardt's opinion, any government employee would have a First Amendment right to ignore any government policy with which he disagrees, whether on affirmative action, teaching of evolution, or any other subject. Judge Reinhardt wrote a "special concurrence" with his own majority opinion, just to lambaste Kozinski:

> *The end result of Judge Kozinski's legal approach would be to punish people who are not as fortunate or as well educated as he — people who are neither able to write for nor read the* Wall Street Journal*, and indeed*

would have little cause to do either.

Legal commentators had a field day with the Reinhardt/Kozinski feud. Legal ethics scholars wrote that Reinhardt should be sanctioned for unethical acts in making personal charges of racism against Kozinski. *National Review* published a long article on the feud, citing lawyers as being horrified at Reinhardt's vehemence.

Nevertheless, the bottom line was that we had lost to Reinhardt one more time. The stage was set for the final act: a request that the U.S. Supreme Court review the case.

Rave Reviews

Getting the U.S. Supreme Court to review a case is incredibly difficult. More than 9,000 requests are filed each year — this term the Supreme Court will hear only 75 cases. (Actually, the odds of our getting the *en banc* review were about the same.)

Barnaby Zall filed our request for review in December, 1995. In our request, we argued that Judge Reinhardt's opinion conflicted with many other courts' decisions, that the First Amendment did not cover choice of language, and that we had very strong reasons to enact our initiative.

"Curiously, the organization that supported us at the outset, U.S.English, has chosen to file an amicus brief that supports the Arizona attorney general's opinion."

We had a surprising number of "friend of the court" briefs filed in support of our request for review. Twenty-one members of the Congress, 39 members of the Arizona legislature, Linda Chavez's new organization: the Center for Equal Op-portunity, the Pacific Legal Foundation, the Washington Legal Foundation, the Florida-187 Committee, and a number of other groups all filed briefs in support of our request.

On March 25, 1996, the Supreme Court agreed to review our case, probably in the fall of 1996. Barnaby Zall has by now filed the first of our briefs in the Supreme Court, arguing that we have a right to establish and maintain an official language for the state, and that the First Amendment does not grant a right to government employees to ignore their governments' official language.

The Supreme Court asked two procedural questions which suggested to some observers that it might decide the case on narrow grounds. The Court asked whether Yniguez should still be in the case since she left government employment in 1990, and whether we, as private citizens, could represent the interests of the state in the Supreme Court.

Already numerous organizations are lining up on all sides of this case. In addition to those who filed friends of the court briefs on our side in the earlier proceedings, the attorney general of Nebraska, Don Stenburg, weighed in with us. On the other side are the National Council of La Raza, the Mexican American Legal Defense and Educational Fund, the American Civil Liberties Union and many others (see box on page 254). The Congressional Hispanic Caucus also has asked the Clinton Administration to join the case against us.

Curiously, the organization that supported us at the outset, U.S.English, has chosen to file an amicus brief that supports the Arizona attorney general's opinion, which relied on Judge Reinhardt's (vacated) opinion in the *Gutierrez* case. U.S.English's position is that the attorney general's opinion was a binding interpretation which must be adopted; we oppose that position because it affirms that federal law supersedes state "official English" laws whenever they have an adverse effect on a linguistic minority.

The Supreme Court won't schedule a hearing on our case until all written briefs have been submitted. With various delays, the scheduling won't occur until August or September. The hearing will likely take place in November or December, with a final decision some time in 1997. (Of course, there is a chance that the Supreme Court will make a procedural decision before then.)

The Moral

This initiative and case have taken ten years, with a few more to come. Yet the stakes are high for national unity, for sound fiscal and legitimate government, and for the future of our country as we know it.

We overcame enormous odds to get this far, when a mis-step on the high-wire could have sent us plunging to disaster. I have to be optimistic about the future. □

As of August 9, 1996 the following are among those that have filed amicus briefs in opposition to Arizonans for Official English

Attorney General, State of Arizona
Attorney General, State of New Mexico
Solicitor General, U.S. Dep't of Justice
Congressional Hispanic Caucus
Congressional Asian Pacific American Caucus
Nat'l . Ass'n. of Latino Elected & Appointed Officials
Three U.S. Senators, 29 members of Congress
A state legislator from New Mexico
Alivio Medical Center (Chicago, IL)
American Civil Liberties Union
American Civil Liberties Union Foundation of Northern California
American G.I. Forum of the U.S. (Austin, TX)
American Jewish Congress
Amigos de Valle, Inc. (Mission, TX)
Anti-Defamation League of B'nai B'rith
Arizona Civil Liberties Union
Arizona Hispanic Chamber of Commerce Foundation (Phoenix, AZ)
Arizonans Against Constitutional Tampering and Thomas Espinoza
Asian American Lawyers Association of Massachusetts, Inc. (Boston, MA)
Asian Law Alliance (San Jose, CA)
Asian Law Caucus, Inc.
Asociacion Pro Servicios Sociales, Inc. (Laredo, TX)
Ayuda, Inc. (Washington, DC)
CASA of Maryland, Inc. (Takoma Park, MD)
Center for Training and Careers, Inc. (San Jose, CA)
Centro de Amistad, Inc. (Guadalupe, AZ)
Centro de la Familia de Utah (Salt Lake City)
Centro Latino de San Francisco
CHARO Community Development Corp. (Los Angeles, CA)
Chicano Federation of San Diego County
Chinese Progressive Association (Boston)
Coalition of Hispanic Organizations
Colonias de Valle, Inc. (Pharr, TX)
Community Service Society of New York
Corporate Fund for Children (Austin, TX)
Escuela de la Raza Unida (Blythe, CA)
Friendly House, Inc. (Phoenix, AZ)
Guadalupe Center, Inc. (Kansas City, MO)
Greater Dallas Foundation, Inc. (Dallas, TX)
Hawaiian Civil Rights Commission
Hispanic American Council (Kalamazoo, MI)
Hispanic Bar Association
Housing for Mesa, Inc. (Mesa, AZ)
Houston Community Services - Centro Aztlán
Hispanic Coalition Corp. (Miami, FL)
Human Rights Watch
Humanidad, Inc. (Rocky Hill, CT)
La Causa, Inc. (Milwaukee, WI)
Language Rights Coalition
La Raza Services, Inc. (Denver, CO)
Latin American Professional Women's Ass'n (Los Angeles, CA)
Latin Americans for Social & Economic Development, Inc. (Detroit, MI)
Latino Family Services, Inc. (Detroit, MI)
LEARN, Inc. (Lubbock, TX)
Linguistic Society of America
Mexican American Commission (Lincoln, NE)
Mexican American Legal Defense and Education Fund
Mexican Community Committee (Chicago)
NAF Multicultural Human Development, Inc. (North Platte, NE)
National Association for Bilingual Education
National Association of Korean Americans
National Asian Pacific Center on Aging (Seattle, WA)
National Council of La Raza
National Education Association
Native Hawaiian Legal Corporation
The Navajo Nation
Northwest Communities' Educ.Center (Granger, WA)
Organization of Chinese Americans
El Proyecto del Barrio (Arleta, CA)
People for the American Way
Puerto Rican Legal Defense and Education Fund
Rural Opportunities, Inc. (Rochester, NY)
Southwest Key Program (Austin, TX)
Spanish Theatre Repertory Company [Repertorio Español] (New York, NY)
Sparks Housing Development Corporation (El Paso)
Student Alternative Program, Inc. (San Antonio, TX)
Tejano Center for Community Concerns (Houston, TX)
Texas Enterprise for Housing Development, Inc. (McAllen, TX)
U.S.English, Inc.
Valle del Sol, Inc. (Phoenix, AZ)
Washington Alliance for Immigrant and Refugee Justice (Seattle, WA)
Westside Housing Organization (Kansas City, MO)