IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ASSOCIATION OF COMMUNITY ORGANIZATIONS FOR REFORM NOW (ACORN), et al.,	)	
Plaintiffs,	)	
v.	)	No. 95 C 174
JAMES R. EDGAR, etc., et al.,	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

This action began when Illinois--one of the few states to do so--refused to comply with Congress' mandate contained in the National Voter Registration Act of 1993 (the "Act," 42 U.S.C. §§1973gg to 1973gg-10) and when a number of lawsuits (now consolidated into this one) were filed early in 1995 to require such compliance. In response Illinois[1] challenged the constitutionality of the Act, and both this Court (at 880 F.Supp. 1215 (N.D. Ill. 1995)) and then our Court of Appeals (at 56 F.3d 791 (7th Cir. 1995)) rejected that challenge. That rejection resulted in the confirmation of an injunction compelling Illinois to conform to the terms of the Act.

Now the several plaintiffs (both the United States and the

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[1] Although the named defendants are Governor Jim Edgar and a number of other State of Illinois personnel, this opinion will follow the convenient though imprecise usage of speaking of the State itself as though it were the litigant. Because the decisions cited in this sentence of the text confirm that no Eleventh Amendment considerations are implicated by the Act's requirements, this opinion's references to "Illinois" also pose no legal problem.

private plaintiffs) have found it necessary to bring the current proceedings in order to require Illinois to do what the injunction has always required: to comply with the Act. Because Illinois has a sharply different perception of what such compliance means, this opinion addresses that issue as a preliminary to this Court's consideration of what further remedy is called for to implement (and to enforce) Illinois' duty under the Act and the existing injunction.

As Illinois would have it, the fact that it is now in compliance (that in itself remains a questionable proposition in certain respects[2]), nearly 17 months after the Act's effective date of January 1, 1995, calls for the denial of any further relief. In that respect Illinois treats its often snail-like (and frequently mistake-ridden) efforts at implementation, which did not even begin until some period of time had elapsed after the Court of Appeals' June 5, 1995 decision and which have exhibited no sense of expedition since then, as satisfying what seems to be Illinois' notion of "all deliberate speed" and what Illinois hence regards as sufficient unto the day. But that

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[2] Most notably, Illinois' continued noncompliance (effectively acknowledged by it even in its most recent monthly report) has created special roadblocks for citizens whose first language is Spanish rather than English--both in terms of Illinois' inordinate delays in making available to such citizens the Spanish translations mandated by the Act and in terms of Illinois' failure to correct some misleading inaccuracies contained in those translations even after those inaccuracies were identified for it. In consequence those citizens have suffered even greater and more prolonged injury than other Illinois citizens.

posture reflects a wholly mistaken notion of the workings of our Constitution--of the doctrine of separation of powers that is at its very core.

Both this Court's opinion and that of our Court of Appeals focused on what was then at issue: the respective roles of the state and national governments in a system of federalism. But in defining the triggering event for Illinois' obedience to the Act's mandate, what is now involved are the respective roles of the three branches of the federal government, under which it is the legislative and executive branches (acting successively) that make the law by promulgating legislation, while the judicial branch (despite the sometime characterization of the "imperial judiciary" that is popular in some quarters) simply declares the law (as it has been so enacted) whenever the law comes into issue in the course of litigation.

In this instance the Act was constitutional when it was enacted, not just at the months-later dates when this Court and our Court of Appeals (among other courts) found that it passed constitutional muster. As the Act's title itself reflects, that date of enactment was May 20, 1993 (almost three years ago to the day). But Congress had then provided (and the President had then approved) a January 1, 1995 effective date for the very purpose of giving states such as Illinois fully 19 months to gear up so that they could put the Act into operation on that effective date.

As our Court of Appeals' opinion pointed out, Illinois was

then entirely free to "seek[ ] a declaratory judgment that the 'motor voter' law is invalid" (56 F.3d at 798). If Illinois had done that, the clearly predictable result of that effort--the same result that was reached by this Court and the Court of Appeals (and every other court that has considered the matter) when the issue of constitutionality was presented to the judicial branch--would have enabled Illinois to do what the vast majority of its fellow States (which did not challenge the Act's validity) did: to begin at the beginning to afford Illinois citizens the opportunity to register, so that none of them would suffer the consequences of disenfranchisement that have flowed from Illinois' noncompliance for such an extended period.

This is not at all said, nor is it intended to be, in derogation of Illinois' right to have leveled a challenge to the Act's constitutionality. Illinois chose to exercise that right, and this Court neither makes nor suggests any determination as to its bona fides in having done so. But Illinois not only chose to level such a challenge, but it also chose the manner in which it went about pursuing the challenge. And because Illinois voluntarily selected a route that necessarily created delays in compliance,[3] very large numbers of prospective registrants (those who would have been afforded the opportunity to register at the

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[3] Again contrast what the situation would have been if, knowing full well that it was confronted with the preannounced effective date, and entertaining (it will be assumed) legitimate doubts as to the Act's constitutionality, Illinois had simply sought declaratory relief in advance.

various enumerated Illinois offices between January 1, 1995 and the considerably later dates when such opportunities were first made available) have been deprived of their right to register expressly conferred by the Act.

This Court is of course aware that there is no way to ascertain with any precision exactly how many persons would have chosen to register if they had been afforded, as they should have been, their right to register from the very beginning. Some reasonably accurate projection may perhaps be made from the numbers of other persons who, upon now being given that opportunity, actually take advantage of it. In the United States' most recent submission (its Brief on Comprehensive Relief, filed May 22) it estimates (id. at 4-5) that based on a calculation that looks only at the numbers of persons served in the Secretary of State's license facilities between January 1, 1995 and August 15, 1995,[4] at least 120,000 citizens would have taken advantage of the registration opportunity in those facilities alone during that period. And the total numbers in all of the registration locations required by the Act could plainly dwarf that estimate, depending on the variables involved in trying to quantify the problem.

But such precision in ascertaining the extent to which Illinois citizens have been the victims of the State's

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[4] That latter date gives Illinois the benefit of every doubt, for the State itself has admitted its total noncompliance with the Act until then.

substantial delays in compliance is not at all a precondition to the granting of relief where, as here, it is Illinois' own conduct that has created the difficulty of proof-- and where it is certain that very substantial numbers are involved in any event. In that respect the situation is somewhat reminiscent of this Court's comment in confirming the appropriateness of preliminary injunctive relief in a service mark infringement case (Instrumentalist Co. v. Marine Corps League, 509 F.Supp. 323, 333 (N.D. Ill. 1980), later quoted and applied by our Court of Appeals in Hyatt Corp. v. Hyatt Legal Servs., 736 F.2d 1153, 1158 (7th Cir. 1984)):

> [T]here is no effective way to measure the loss of sales or potential growth--to ascertain the people who don't knock on the door or to identify the specific persons who do not [return] because of the existence of the infringer.

Just so, it will not do for Illinois--which has made it impossible, as the result of its own noncompliance with the Act, to obtain precise proof of the consequences of that noncompliance--to seek to block remedial relief by pointing to the absence of precise proof.

At the time of the most recent hearing on this matter, this Court requested that each of the parties address the issue dealt with in this opinion. Illinois' response (also filed May 22) is totally silent on the subject, continuing to reflect its and its counsel's myopic view of the Act-dictated mandate with which it must comply. Both the United States and the private plaintiffs did adduce some case law speaking to the related issues, and what

appear to be the closest analogies that they were able to identify stem from two cases cited by the private plaintiffs: Harper v. Virginia Dep't of Taxation, 509 U.S. 86 (1993) and Jordan v. Weaver, 472 F.2d 985 (7th Cir. 1973), rev'd on other grounds sub nom. Edelman v. Jordan, 415 U.S. 651 (1974).

Harper applied Griffith v. Kentucky, 479 U.S. 314 (1987) to an illegal state tax, obligating the state to provide a means for the refund of payments that had been made under the invalid statute. In so doing, it repeated the Griffith principle "that 'the nature of judicial review' strips us of the quintessentially 'legislat[ive]' prerogative to make rules of law retroactive or prospective as we see fit" (509 U.S. at 95). If this case had involved the arguably retrospective effect of a newly-announced rule of law, Harper would indeed cut in favor of compelling Illinois to redress its citizens' harms sustained from the very outset. But what has been said here calls for the same conclusion a fortiori, for no considerations of retroactivity are involved here at all--what we have instead is a valid (not an invalid) statute, and it was valid from the very first.

Jordan comes much closer to the mark, and it squarely supports the analysis that has been set out in this opinion. There as here the State of Illinois had not complied with a federally-imposed obligation (in that instance established by regulations rather than a statute) setting time requirements for the taking of certain actions. As part of the District Court's grant of relief, it required Illinois to pay the benefits that

would have been paid if it had conformed to the federal requirements. Our Court of Appeals affirmed, observing (472 F.2d at 992):

> [I]f the only relief that could be granted under the Eleventh Amendment here were an injunction against the continuation of illegal conduct after the date of the decree, the force of federal law could be seriously blunted. The state welfare officials could withhold benefits in violation of federal law until suit is brought and a court acts, and retain the illegal savings acquired theretofore. The price would be paid by the beneficiaries of a federal program in which the state, not incidentally, agreed to participate and whose regulations it therefore agreed to abide by.

True enough, Jordan was overturned by the Supreme Court, but only because what had been required of the State there was in conflict with the Eleventh Amendment (again it will be remembered that no such constraint is present here, see 56 F.3d at 793-96). In terms of its analytical force apart from that factor, however, it confirms directly the reason to look to the January 1, 1995 date in defining Illinois' duty to cure the effects of its noncompliance. Jordan's statement of equitable principle as announced by our Court of Appeals remains entirely accurate and persuasive.

Under the circumstances involved here, Illinois cannot cavil at any requirement that places the cost of its own delay on it rather than on its innocent citizens. To be sure, this Court will attempt to select the least onerous remedy that is consistent with reason (an effort on which counsel for the State, which has the most at stake, have been of absolutely no help to this date despite the repeated requests made of them by this

Court). But the bottom line is that the price of delayed compliance must be borne by Illinois and not by its citizens disenfranchised by Illinois' delays.

Milton I. Shadur
Senior United States District Judge

Date: May 24, 1996