

Exhibit R

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

v.

STATE OF WISCONSIN;
WISCONSIN ELECTIONS BOARD;
JOHN NIEBLER, Chairman;
HELEN VAN PROOYEN, Member;
GARY J. AAMODT, Member;
THOMAS PALAY, Member;
ERICK HALVERSEN, Member;
ESTHER KAPLAN, Member;
RON MONAT, Member; and
RANDAL KNOX, Member,

MEMORANDUM AND ORDER

84-C-863-S

Defendants.

This is an action for injunctive and declaratory relief commenced by the United States of America against the State of Wisconsin and its election officials under 42 U.S.C. § 1973dd-3. The United States requests that ballots cast pursuant to the Overseas Citizens Voting Rights Act of 1975, 42 U.S.C. 1973dd, et seq. and the Federal Voting Assistance Act of 1955, 42 U.S.C. 1973cc(b), which are signed and dated by voters on or before November 6, 1984 and returned on or before 7:00 P.M. on November 16, 1984 be counted as validly cast ballots for federal offices at the November 6, 1984 general election.

Copy of this document has been
mailed to the following: Attys.

Posner, Lee and Cronin

this 30 day of November, 1984

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BY Ellie Blanche
Secretary to Judge John C. Shabaz

This Court has jurisdiction under these sections and 28 U.S.C. § 1345.

The defendants have moved to dismiss the action, presumably under Rule 12(b)(6), Federal Rules of Civil Procedure, on the ground that the complaint fails to state a claim upon which relief can be granted.

At the commencement of an evidentiary hearing which was scheduled to begin on November 21, 1984, the parties reached a winner-take-all compromise, wherein either all or none of the ballots would be counted, depending upon this Court's determination of the pending motion to dismiss.

At the hearing, the plaintiff offered, without objection, four exhibits which although received will not be considered by the Court.

If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

Rule 12(b), Federal Rules of Civil Procedure.

In determining the propriety of a motion to dismiss under Federal Rules of Civil Procedure 12(b)(6), the Court must take all the allegations of the complaint to be true, Jenkins v. McKeithen, 395 U.S. 411 (1969).

Plaintiff does not contend that Wisconsin has failed to establish the required legal structure for absentee voting which properly implements the provisions of the Overseas Citizens Voting Rights Act of 1975 and the Federal Voting Assistance Act of 1955. Instead, the United States alleges, particularly at paragraph 13 of its complaint, that Wisconsin election officials have not mailed absentee ballots to overseas citizens who have made timely requests on a date sufficiently in advance of the November 6, 1984 election to allow voters to receive the ballot, cast a vote, and return the ballot to election officials by the close of polls on November 6, 1984.

The provisions of 42 U.S.C. § 1973dd-1 are as follows:

Each citizen residing outside the United States shall have the right to register absentee for, and to vote by, an absentee ballot in any Federal election in the State, or any election district of such State, in which he was last domiciled immediately prior to his departure from the United States and in which he could have met all qualifications (except any qualification relating to minimum voting age) to vote in Federal elections under any present law, even though while residing outside the United States he does not have a place of abode or other address in such State or district, and his intent to return to such State or district may be uncertain, if--

(1) he has complied with all applicable State or district qualifications and requirements, which are consistent with this subchapter, concerning absentee registration for, and voting by, absentee ballots;

(2) he does not maintain a domicile, is not registered to vote, and is not voting in any other State or election district of a State or territory or in any territory or possession of the United States; and

(3) he has a valid passport or card of identity and registration issued under the authority of the Secretary of State or, in lieu thereof, an alternative form of identification consistent with this subchapter and applicable State or district requirements, if a citizen does not possess a valid passport or card of identity and registration.

The provisions of 42 U.S.C. 1973cc are as follows:

(a) The Congress expresses itself as favoring, and recommends that the several States take, immediate legislative or administrative action to enable every person in any of the following categories who is absent from the place of his voting residence to vote by absentee ballot in any primary, special, or general election held in his election district or precinct, if he is otherwise eligible to vote in that election:

(1) Members of the Armed Forces while in the active service, and their spouses and dependents.

(2) Members of the merchant marine of the United States, and their spouses and dependents.

(3) Citizens of the United States temporarily residing outside the territorial limits of the United States and the District of Columbia and their spouses and dependents when residing with or accompanying them.

(b) Each State shall enable every citizen in the following categories who is absent from the place of his voting residence to register absentee and to vote by absentee ballot in any Federal election, as defined in section 1973dd(1) of this title, held in his election district or precinct if he is otherwise eligible to vote in that election:

(1) Members of the Armed Forces while in the active service, and their spouses and dependents.

(2) Members of the Merchant Marine of the United States, and their spouses and dependents.

The rights granted in this section shall be supple-

mental to the voting rights presently enjoyed by these citizens under other Federal and State laws.

Finally, the provisions of 1973dd-3 are as follows:

Jurisdiction of courts

(a) Whenever the Attorney General has reason to believe that a State or election district undertakes to deny the right to register or vote in any election in violation of section 1973dd-1 of this title or fails to take any action required by section 1973dd-2 of this title, he may institute for the United States, or in the name of the United States, an action in a district court of the United States, in accordance with sections 1391 through 1393 of Title 28, for a restraining order, a preliminary or permanent injunction, or such other order as he deems appropriate.

Depriving or attempting to deprive persons of secured rights; penalties

(b) Whoever knowingly or willfully shall deprive or attempt to deprive any person of any right secured by this subchapter shall be fined not more than \$5,000, or imprisoned not more than five years, or both.

Giving or conspiring to give false information; payment or acceptance of money; penalties

(c) Whoever knowingly or willfully gives false information as to his name, address, or period of residence for the purpose of establishing his eligibility to register, qualify, or vote under this subchapter, or conspires with another individual for the purpose of encouraging the giving of false information in order to establish the eligibility of any individual to register, qualify, or vote under the subchapter, or pays or offers to pay, or accepts payment either for registration to vote or for voting shall be fined not more than \$5,000, or imprisoned not more than five years, or both.

Congress has mandated that State election officials provide these citizens with the opportunity to vote. Inherent in

this obligation is the mailing of the ballot by election officials in sufficient time prior to the election if the vote is to be meaningful.

For instance, if a voter in Norway has made an application for a ballot before October 1, 1984, but it is not sent until October 23, 1984, common sense and knowledge of our postal system would appear to dictate that the round trip cannot be completed in sufficient time for the vote to be returned by November 6, 1984; and so with a ballot sent to Greece on October 22, 1984, or to Madrid, Spain on October 19, 1984.

There may very well be appropriate affirmative defenses to be considered at an evidentiary hearing or trial which could have been scheduled in this matter, with the further suggestion that where a request is not made until October 23, 1984 from the USS Midway, that voter's own delay should disenfranchise him.

Regardless of those defenses, however, the complaint states a claim for relief and cannot be dismissed. In spite of those reservations which this Court may have previously inferred, nonetheless it will approve the stipulation of the parties.

Accordingly,

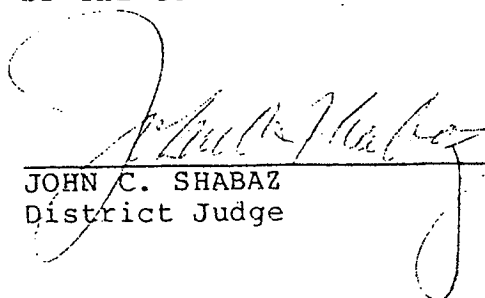
ORDER

IT IS ORDERED that the defendants' motion to dismiss is DENIED.

IT IS FURTHER ORDERED that all of those ballots received not later than November 16, 1984 will be counted for federal offices, and this matter is DISMISSED upon its merits, without costs.

Entered this 30th day of November, 1984.

BY THE COURT:



JOHN C. SHABAZ
District Judge