

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA

Richmond Division

UNITED STATES OF AMERICA,

Plaintiff,

v.

Civil Action Number 3:08cv709

JEAN CUNNINGHAM, *et al.*,

Defendants.

**ORDER**

This matter is before the Court on the Plaintiff's motion for an order granting permanent relief ensuring the Defendants' future compliance with the Uniformed and Overseas Citizens Absentee Voting Act ("UOCAVA"), 42 U.S.C. § 1973ff, *et seq.*, (Docket No. 67). On October 15, 2009, the Court entered a Final Order (the "October Order") declaring that the Commonwealth of Virginia and the Virginia State Board of Elections violated UOCAVA by failing to mail timely-requested absentee ballots to UOCAVA voters thirty days or more before the November 4, 2008 general federal election. In the October Order, the Court required the Defendants to count as validly-cast all timely-requested, but belatedly-mailed and otherwise-valid absentee ballots that were received by local electoral boards and registrars within thirty days of the close of polls on November 4, 2008. Recognizing that the intricacies of counting and certifying the absentee ballots at issue would take time and come at some expense, the Court left to the parties "the decision as to how the Commonwealth of Virginia w[ould] go about counting and certifying the ballots . . . ." October Order at 2. Additionally, pursuant to the Plaintiff's request, and "trusting that the Commonwealth

of Virginia w[ould] not have continuing problems complying with UOCAVA,” the Court also “[deferred] to the parties the determination as to the appropriate way in which to ensure Virginia’s compliance with UOCAVA in future federal elections.”<sup>1</sup> *Id.*

The parties timely reached agreement with respect to the proper way in which to count and certify the ballots at issue. Regrettably, however, the parties have been unable to reach agreement as to what relief is appropriate to ensure full compliance with UOCAVA in future elections.<sup>2</sup> In the absence of such an agreement by the parties, the Plaintiff asks the Court in the instant motion to order the Defendants to implement in the Commonwealth of Virginia “a remedial plan for training, monitoring, and reporting procedures” in order to assure future UOCAVA compliance. Pl.’s Mot. for Perm. Rel. at 1. The Plaintiff attached to the motion a proposed order detailing a suggested future relief plan that, itself, defers key decisions to the parties, requiring “consultation,” calling for

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<sup>1</sup>The Defendants argue that the October Order was “a *final* order, ending the case.” Defs.’ Opp’n to Pl.’s Mot. for Perm. Rel. at 5 (emphasis in original). However, the Plaintiff’s Amended Intervening Complaint sought, *inter alia*, “injunctive relief ordering the Defendants . . . to take such steps as are necessary to afford voters eligible to vote in Virginia under UOCAVA a fair and reasonable opportunity to participate *in future elections* for federal office.” (Docket No. 34, Ex. 1 at 4) (emphasis added). Thus, the Plaintiff has always sought prospective relief in addition to declaratory relief on liability. While an award of declaratory relief on *all* claims is a final order in a case in which only declaratory relief is sought, “a declaration has no such effect when other remedial issues remain unresolved.” *Henrietta D. v. Giuliani*, 246 F.3d 176, 180 (2d. Cir. 2001) (citing *Liberty Mut. Ins. Co. v. Wetzel*, 424 U.S. 737, 742 (1976)). Therefore, as in *Giuliani*, “[t]he declaratory judgment in this case did nothing more than determine liability, leaving the measure of prospective relief for another day. Such an order ‘has been a classic example of non-finality’ since ‘the time of Chief Justice Marshall.’” *Id.* (quoting *Taylor v. Bd. of Educ.*, 288 F.2d 600, 602 (2d Cir.1961); citing also 15B CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3915.2 (2d ed. 1992)). In other words, the October Order was “final” only in its finding that Virginia had violated UOCAVA.

<sup>2</sup>Again, the October Order temporarily deferred the issue of prospective relief to the parties, hoping that the parties would be able to craft an appropriate remedy on their own terms. Given the parties’ inability to do so, however, the Court must now revisit what it had first left for another day, and the matter has been properly raised in the Plaintiff’s instant motion.

matters to be “agreed upon by the Parties,” and, in the event of an impending UOCAVA violation, mandating that the parties “work to establish an alternative plan.” (Docket No. 67, Ex. 1). This only evidences further what the Court has explained since the very inception of this suit – “this situation cries out for a solution created by the parties rather than crafted by The Court.” Mot. to Dismiss Hr’g Tr. at 13.

Complicating matters is the fact that the parties long ago agreed to stay discovery as to facts related to future relief until the Court had made a liability finding. The Court understands from the parties that, to date, no discovery has ever been conducted with respect to this issue. In other words, the parties have never elicited the information needed to enable them to pinpoint what type of future relief is required in this case. Absent discovery on these issues, the parties and the Court are left with extremely relevant questions, not the least of which include why Virginia failed to comply with UOCAVA and how to craft an efficient and effective future compliance model to remedy that failure. As such, the Court – and, presumably, even the Plaintiff itself – presently has no way to evaluate the utility of the Plaintiff’s proposed order or any other suggested prospective plan.

Accordingly, the Court TAKES UNDER ADVISEMENT ruling on the Defendant’s instant motion for permanent relief and ORDERS the parties to develop and file with the Court within twenty (20) days from the entry of this Order a plan for the re-opening of discovery limited in scope exclusively to facts related to the cause of Virginia’s non-compliance with UOCAVA and the development of a functional future compliance plan. Also within twenty (20) days from the entry of this Order, the parties are ORDERED to jointly contact the Chambers of the Honorable United States Magistrate Judge Dennis W. Dohnal at 804-916-2270 to schedule a conference for discussion

of the creation of an appropriate, functional future compliance plan.<sup>3</sup> Counsel are also ORDERED to determine what, if any, additional requirements, such as a position brief, Judge Dohnal requires prior to the conference.

It is so ORDERED.

Let the Clerk send a copy of this Order to all counsel of record and the Honorable United States Magistrate Judge Dennis W. Dohnal.

September 10, 2010  
DATE

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/s/  
RICHARD L. WILLIAMS  
SENIOR UNITED STATES DISTRICT JUDGE

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<sup>3</sup>Obviously, the facts uncovered in discovery will be extremely relevant to the parties' discussions with Judge Dohnal. As such, the Court strongly recommends that the parties first develop their discovery plan and then schedule a conference with Judge Dohnal for a date that falls beyond the agreed-upon end of discovery to allow for a meaningful conference.