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Log Cabin Republicans

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

LOG CABIN REPUBLICANS, a non-profit corporation,

Plaintiff,

vs.

UNITED STATES OF AMERICA and ROBERT M. GATES, SECRETARY OF DEFENSE, in his official capacity,

Defendants.

Case No. CV04-8425 VAP (Ex)

(1) *EX PARTE* APPLICATION FOR AN ORDER THAT CERTAIN REQUESTS FOR ADMISSIONS BE DEEMED ADMITTED OR FOR FURTHER RESPONSES;

(2) MEMORANDUM OF POINTS AND AUTHORITIES; AND

(3) DECLARATION OF PATRICK HUNNIUS

Date: N/A
Time: N/A
Courtroom: N/A

Discovery Cutoff: Mar. 15, 2010
Pretrial Conference: June 7, 2010
Trial: June 14, 2010

DISCOVERY MATTER

TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:

Pursuant to Local Rule 7-19, plaintiff Log Cabin Republicans ("Plaintiff") hereby applies *ex parte* for an order deeming 3, 4, 5, 10, 13, 14, 15, 81-117, and 119 from Plaintiff's First Set of Requests for Admissions as admitted, or, in the alternative, for further responses thereto. Plaintiff submits that cause exists to grant the relief requested herein because Defendants failed to participate in the meet and confer process regarding the Requests for Admissions, the objections to these Requests for Admissions are unfounded, proper responses would greatly expedite the trial of this matter, and insufficient time remains to hear a motion regarding these responses as a regularly noticed motion. As such, Plaintiff seeks immediate relief from this Court and, accordingly, seeks this relief *ex parte*.

Pursuant to Local Rule 7-19, Log Cabin Republicans has provided notice of this *ex parte* application to opposing counsel, as set forth in the accompanying Declaration of Patrick Hunnius, and asked opposing counsel whether they would oppose the application. The government does oppose the application.

This application is based on this *ex parte* application, the accompanying memorandum of points and authorities, the accompanying Declaration of Patrick Hunnius, all pleadings, records, and files in this action, and such evidence and argument that may be presented at any hearing on this application.

DATED: March 8, 2010

PATRICK HUNNIUS
WHITE & CASE LLP

By: */s/ Patrick Hunnius*
Patrick Hunnius
Attorneys for Plaintiff
LOG CABIN REPUBLICANS

I.

INTRODUCTION

Two simple examples suffice to show both that the government failed to appropriately respond to Plaintiff Log Cabin Republicans' First Set of Request for Admissions ("the RFAs") and that the appropriate sanction is an order deeming several of the requests for admissions as admitted.

On January 27, 2010, the Commander-in-Chief of the United States military, President Barack Obama, presented the State of the Union address to Congress and said:

> This year, I will work with Congress and our military to finally repeal the law that denies gay Americans the right to serve the country they love because of who they are. It's the right thing to do.[1]

The President's comments regarding the "Don't Ask, Don't Tell" policy ("DADT" or the "Policy") during the State of the Union were the culmination of a months-long public campaign against the Policy by the President, who has stated repeatedly not only that the Policy should be reversed but also that reversal is "essential for our national security." Yet one day after the State of the Union address, the government objected to Plaintiff's RFAs regarding the President's prior pronouncements – which had quoted the President's words *verbatim* – on the ground that his statements were "vague" and "ambiguous."

Five days later both the Secretary of Defense, Robert M. Gates, and the Chairman of the Joint Chiefs of Staff, Admiral Mike Mullen, provided testimony regarding the Policy to the Senate Armed Services Committee. Among the subjects covered during their testimony was the topic of "our NATO allies [that] allow gays

[1] Attached as Exhibit A to the Hunnius Declaration is a true and correct copy of the Remarks by the President in State of the Union Address, http://www.whitehouse.gov/the-press-office/remarks-president-state-union-address, last visited Mar. 5, 2010.

and lesbians to serve openly [many of which] have deployed troops who are serving with us in Afghanistan."[2] For example, Admiral Mullen was asked directly:

> SEN. SUSAN COLLINS (R-ME): Are you aware of any impact on combat effectiveness by the decision of our NATO allies to allow gays and lesbians to serve openly?
>
> ADM. MULLEN: Sen. Collins, I've talked to several of my counterparts in countries whose militaries allow gays and lesbians to serve openly. And there has been, as they have told me, no impact on military effectiveness.

Yet when asked to admit, through a series of RFAs, that 24 specific countries – including many of our allies in The War on Terror, including the United Kingdom, Canada, the Netherlands, and others – "permit[] openly gay and lesbian service members to enlist and serve in its armed forces," without documented adverse impacts, the government objected to every single RFA. In other words, the government refuses to admit that *any* nation allows military service by openly gay or lesbian individuals. The government claims that the phrase "openly gay and lesbian" is vague and ambiguous. Moreover, the government disclaims ever having "conducted its own independent study" of whether any of these countries allowed such service.

As explained below, the government's responses and objections to RFAs were both evasive and unfounded. Accordingly, the Court should enter an order deeming the RFAs regarding the President's statements (Nos. 3, 4, 5, 10, 13, 14, and 15) and the RFAs regarding other countries' policies regarding the service of gay and lesbian individuals (Nos. 81-117 and 119) as **admitted**.[3]

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[2] Attached as Exhibit B to the Hunnius Declaration is a true and correct copy of the Testimony Regarding DoD 'Don't Ask, Don't Tell' Policy, http://www.jcs.mil/speech.aspx?id=1322, last visited Mar. 5, 2010 (the "February 2, 2010 Testimony").

[3] For ease of reference and the Court's convenience, the RFAs and government's responses at issue are consolidated into a single document, attached hereto as Appendix A.

Plaintiff must seek the requested relief, *ex parte*, because the government failed to comply with the meet and confer rules, the discovery cutoff (March 15, 2010) is rapidly approaching, and proper responses to the RFAs are essential to an orderly and efficient presentation of evidence at the trial. Shortly after receiving the government's responses to the RFAs, Plaintiff sent the government a letter outlining the deficiencies in the government's responses and requesting a meet and confer. Knowing that the discovery cutoff date was fast approaching, Plaintiff explicitly requested that the government respond to the meet and confer letter within the week. The government never responded, neither by the deadline in the letter or by the ten-day deadline delineated in Local Rule 37-1 of the Local Rules of the United States District Court, Central District of California (the "Local Rules").[4] On March 4, the Court entered a minute order confirming that both the June 14, 2010 trial date and the March 15, 2010 discovery cutoff date will not be continued. Plaintiff provided notice of its intended *ex parte* filing the same day. Hunnius Declaration ("Hunnius Decl."), ¶ 9.

II.

PROCEDURAL BACKGROUND

On October 12, 2004, plaintiff Log Cabin Republicans filed its complaint in this action seeking a declaration that the "Don't Ask, Don't Tell" policy codified in 10 U.S.C. § 654 is unconstitutional.

By order entered on July 24, 2009, the Court established a trial date of June 14, 2010 and a discovery cutoff date of March 15, 2010 (the "Scheduling Order").[5] Hunnius Decl., ¶ 4. Upon entry of the Scheduling Order, the Plaintiff promptly commenced discovery. On December 10, 2009, the Plaintiff served the First Set of

[4] In a letter dated March 5, 2010 (the "March 5 Letter"), the government's counsel notes that Plaintiff "justif[ies] its need for an ex parte application by alleging that Defendants refused to meet and confer." Notably, the government does not contend that it *did* meet and confer regarding the RFAs. See Exhibit C attached to the Hunnius Declaration, which is a true and correct copy of the March 5 Letter.

[5] Attached as Exhibit D to the Hunnius Declaration is a true and correct copy of the Scheduling Order.

Requests for Admission.[6] Id. at ¶ 5. On January 28, 2010, the government served Defendants' Objections and Responses to Plaintiff's First Set of Requests for Admission (the "Objections").[7] Id. at ¶ 6. On February 11, counsel for Plaintiff sent the government's lawyers a "meet and confer" letter regarding the government's Objections to the RFAs (the "Meet and Confer Letter").[8] Id. at ¶ 7. In the Meet and Confer Letter, counsel for the Plaintiff explained why the Objections were insufficient and a violation of Rule 36(a)(6) of the Federal Rules of Civil Procedure (the "Federal Rules") and requested that the government respond to the Meet and Confer Letter by February 17, 2010. Id.

As of the date of the filing of this application, the government has not responded to the Plaintiff's Meet and Confer Letter as required by Local Rule 37-2.1. Id. at ¶ 8.

III.

THE COURT SHOULD DEEM THE REQUESTS FOR ADMISSION AS ADMITTED

"On finding that an answer does not comply with [Federal Rule of Civil Procedure 36(a)(6)] the court may order either that the matter is admitted or that an amended answer be served." FED. R. CIV. P. 36(a)(6).

Here, an order deeming RFAs Nos. 3, 4, 5, 10, 13, 14, 15, 81-117, and 119 admitted is warranted because the government's Objections are insufficient and unfounded. Alternatively, the Court should order the government to serve amended responses to these RFAs.

[6] Attached as Exhibit E to the Hunnius Declaration is Plaintiff's First Set of Requests for Admission.
[7] Attached as Exhibit F to the Hunnius Declaration is Defendants' Objections and Responses to Plaintiff's First Set of Requests for Admission.
[8] Attached as Exhibit G to the Hunnius Declaration is the Meet and Confer Letter sent from Mr. Hunnius to Mr. Freeborn.

A. The Government's Objections on the Grounds of Ambiguity Fail

With respect to the President's statements regarding the Policy, the government objects that the terms, among others, "national security," "essential," "contribute," and "weakens" are vague and ambiguous. The objections are ludicrous: as demonstrated in RFAs Nos. 3, 4, 5, 10, 13, 14, and 15 the Commander in Chief used those precise terms when discussing DADT.

For example, in RFA No. 1, Plaintiff requested that the government "[a]dmit that on June 29, 2009, President Barack Obama made a speech in front of an audience attending the Lesbian, Gay, Bisexual and Transgendered Pride Month Reception held at the White House, the text of which speech is available at http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-at-LGBT-Pride-Month-Reception/." The government admitted that President Obama made such a speech.

In RFA No. 2, Plaintiff requested that the government "[a]dmit that on June 29, 2009, during his speech in front of an audience attending the Lesbian, Gay, Bisexual and Transgendered Pride Month Reception held at the White House, President Barack Obama stated, 'As I said before – I'll say it again – I believe 'don't ask, don't tell' doesn't contribute to our national security. In fact, I believe preventing patriotic Americans from serving their country weakens our national security.'" The government also admitted that President Obama stated the specific words in RFA No. 2.

Yet, when it comes to the succeeding RFAs that follow from this speech, the government contends that the language President Obama used in the speech referred to in RFA No. 1 and quoted in RFA No. 2 is ambiguous.

Such an objection is evasive and improper. Parties should "admit to the fullest extent possible, and explain in detail why other portions of a request may not be admitted."

Marchand v. Mercy Med. Ctr., 22 F.3d 933, 938 (9th Cir. 1994) (finding that respondent's failure to "set forth in detail the reasons why [he could not] truthfully admit or deny the matter" was a violation of the discovery rules). There is no reason why the government cannot admit the truth – and clarity – of its own chief executive's statements regarding the Policy. RFA Nos. 3-5, 10, and 13-15 should be deemed admitted.

As to RFAs Nos. 81-117, the government objects to Plaintiff's RFAs relating to whether other nations permit openly gay and lesbian service members to enlist and serve in their armed forces on the basis of the term "openly gay and lesbian" being vague and ambiguous. The objection is improper. The government cannot claim the terms to be vague and ambiguous when 10 U.S.C. § 654 uses those very terms to define "homosexual" and "homosexual acts." Further, United States military leaders fully understand what it is to be "openly gay or lesbian." In fact, in testimony to Congress about DADT, Admiral Mullen recently used these terms at least three times. Admiral Mullen first stated, "We believe that any implementation plan for a policy permitting **gays and lesbians** to serve **openly** in the armed forces must be carefully derived, … sufficiently thorough, and thoughtfully executed." He later explained, "it is my personal belief that allowing **gays and lesbians** to serve **openly** would be the right thing to do." February 2, 2010 Testimony. And when Senator Collins posed a question using this exact term on the exact topic posed by these RFAs, Admiral Mullen did not claim vagueness:

> SEN. COLLINS: . . . Adm. Mullen, we know that many of our NATO allies allow **gays and lesbians** to serve **openly** and many of these countries have deployed troops who are serving with us in Afghanistan. Are you aware of any impact on combat effectiveness by the

> decision of our NATO allies to allow **gays and lesbians** to serve **openly**?
>
> ADM. MULLEN: Sen. Collins, I've talked to several of my counterparts in countries whose militaries allow **gays and lesbians** to serve **openly**. And there has been, as they have told me, no impact on military effectiveness.

Id. (emphases added). The term "openly gay and lesbian service members" is not vague or ambiguous.

Similarly, the government claims that the language of RFA No. 119 (regarding the US troops' fighting "side by side with coalition forces from countries that allow lesbian and gay service members") is vague and ambiguous. For example, the government objects to the term "side by side," yet Secretary Gates, the top civilian official in the Department of Defense **and a named defendant herein**, had no trouble with the phrase during the Senate Armed Services Committee hearing:

> SEN. REED: It's my understanding that both Canada and the United Kingdom have allowed gays and lesbians to serve openly – in the case of Canada, since the early '90s, and Great Britain since at least the early 2000.
>
> They are fighting side-by-side with us today in Afghanistan. And, in fact, I would think that we would like to see more of their regiments and brigades there. Does that, I think, suggest, as Adm. Mullen mentioned before, that their combat effectiveness has not been impaired – and we've had the opportunity to work with them, you know, in joint operations;

> does that add credibility, evidence or weight to the discussions that you're undertaking?
>
> SEC. GATES: Well, I think that it is clearly something we need to address. We need to talk to those countries' militaries in a more informal and in-depth way about their experience. I think that their experience is a factor. But I also would say that each country has its own culture and its own society, and has to be evaluated in those terms as well.

Accordingly, these requests should be deemed admitted.

B. <u>The Government's Claimed Ignorance Does Not Excuse Its Failure to Respond</u>

A litigant may not refuse to admit or deny a request for admission unless it "states that it has made a reasonable inquiry and that the information it knows or can reasonably obtain is insufficient to enable it to admit or deny" the request for admission. FED. R. CIV. P. 36(a)(4).

The government attempts to evade RFAs Nos. 81-117 by claiming that the "Department of Defense has not conducted its own independent study of the extent to which service members who engage in homosexual conduct are able to serve in the armed forces of other nations." That was not the request that was posed to the government, and the government may not erect such a straw man in order to claim a lack of knowledge or information as a basis for refusing to admit or deny the RFAs. As stated above, "[t]he answering party may assert lack of knowledge or information … **only if** the party states that it has made reasonable inquiry and that the information it knows or can readily obtain is insufficient to enable it to admit or deny." FED. R.

CIV. P. 36(a)(4) (emphasis added). The government fails to state whether it has made reasonable inquiry on this topic.

In fact, it is clear that the government did not conduct such a reasonable inquiry before serving its objections. The government could begin such an inquiry by asking Admiral Mullen to identify the foreign militaries with which he recently consulted (as noted in the Congressional testimony cited at length above).

It is also clear that the government's claim that "The Department of Defense has not conducted its own independent study" regarding other countries' policies regarding gay and lesbian service is a semantic sidestep, intended to disassociate the Department of Defense from studies that other government departments have conducted, and from studies of these matters conducted by third parties on behalf of the Department of Defense. Many such studies exist. For example, a 1993 Government Accounting Office report titled, "Homosexuals in the Military," identified several nations that permitted homosexuals to serve openly in their armed forces. In addition, the Department of Defense commissioned a study in 1993 by the Rand Corporation that found Canada, France, Germany, Israel, the Netherlands, and Norway all permitted known homosexuals to serve in some capacity in their armed forces. Thus, a reasonable inquiry would have permitted the government to admit or deny most, if not all, of these RFAs.

Moreover, the government improperly asserts a lack of knowledge regarding whether abandoning prohibitions on military service by openly gay and lesbian service members resulted in no adverse impact on unit cohesion, troop morale, and national defense in Australia, Israel, Great Britain, and Canada. Again, Admiral Mullen claimed recently that his counterparts in countries that permit openly gay or lesbian service members all reported no impact on military effectiveness. If the Chairman of the Joint Chiefs of Staff possesses sufficient knowledge to make this

statement under oath to Congress, the government cannot claim lack of knowledge in response to these RFAs.

As to RFA No. 119, the government states it can neither admit nor deny "that since members of the U.S. Armed Forces began fighting side by side with coalition forces from countries that allow lesbian and gay service members to serve openly in their respective militaries, there have been no documented adverse effects arising from the proximity of gay and lesbian coalition soldiers to American soldiers on the unit cohesion or morale of any member or members of the U.S. Armed Forces." The government claims it does not keep track of data concerning incidents of U.S. soldiers interacting directly with foreign soldiers who engage in homosexual conduct. This response is insufficient. The government must conduct a reasonable inquiry before claiming lack of knowledge in response to a RFA. The government failed to state whether it did so. For this reason, the government's response is improper.

Finally, Admiral Mullen's recent statements to Congress demonstrate the falsity of the government's response. In response to Senator Levin's inquiry about U.S. soldiers fighting side by side with militaries who do not exclude openly gay and lesbian service members, Admiral Mullen stated, "Since these wars started in 2003, it has not been brought to my attention that there's been any significant impact of the policies in those countries on either their military effectiveness or our ability to work with them." See February 2, 2010 Testimony.

For the above reasons, the Court should reject the government's pretense of ignorance and deem RFAs Nos. 81-117 and 119 as admitted.

C. The Government's Responses Regarding the President's Statements and Other Countries' Policies Do Not "Fairly Respond to the Substance" of the RFAs

As to RFAs Nos. 3, 4, 5, and 10, the government's denials fail to "fairly respond to the substance" of the RFAs, thereby violating Federal Rule 36(a)(4). The

RFAs inquire about the current effect of DADT upon United States national security. Instead of admitting or denying that DADT, and discharging service members under DADT, negatively impacts national security, the government's responses discuss Congress' purported grounds for enacting the statute 17 years ago. The answers are not responsive. Congress' original justification for enacting the policy is irrelevant to the query posed: whether DADT negatively impacts national security today or whether reversing DADT is essential to national security. Pursuant to Federal Rule 36(a)(6), the government should be deemed to have admitted these RFAs.

As to RFAs Nos. 81-117, the government also claims the "Department of Defense has not conducted its own independent study of the extent to which service members who engage in homosexual conduct are able to serve in the armed forces of other nations." This is not a sufficient answer. As discussed above, notably, the answer does not fairly respond to the substance of the RFAs. The RFAs do not ask the government to admit whether it has conducted an independent study on these topics. The RFAs ask the government to admit or deny **facts**. These facts could be derived from, *inter alia*, reports conducted or commissioned by the government or reports prepared by third parties of which the government is aware. If the facts underlying these RFAs, regardless of their source, are at all at the government's disposal – and the government cannot honestly deny that they are – Plaintiff is entitled to a response in which the government admits or denies the RFAs.

As to RFA No. 119, the government's statement does not fairly respond to the substance of the RFA. Whether U.S. service members come in direct contact with foreign soldiers who engage in homosexual conduct is not the substance of the RFA. The RFA asks a broader question – whether the government possess any documentation of adverse effects on unit cohesion or morale arising from U.S. soldiers serving with coalition forces that are known to include openly gay or lesbian soldiers. Since the government contends that it does not track data on such

interactions, it follows that the government must admit this RFA. It should be deemed admitted.

For the above reasons, the Court should deem such RFAs admitted.

IV.

OPPOSING COUNSEL

Pursuant to Local Rule 7-19, the names, address and telephone number of counsel for opposing parties, the United States of America and Secretary of Defense Robert Gates, are as follows:

PAUL G. FREEBORNE
U.S. DEPARTMENT OF JUSTICE
CIVIL DIVISION
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Counsel for Log Cabin Republicans has provided notice of this motion to opposing counsel, as explained in paragraph 9 of the accompanying Declaration of Patrick Hunnius.

V.

CONCLUSION

For all the reasons described above, Log Cabin Republicans ask the Court to order the government's responses deemed admitted or, in the alternative, order the government to amend its responses.

Respectfully submitted,

DATED: March 8, 2010

PATRICK HUNNIUS
WHITE & CASE LLP

By: */s/ Patrick Hunnius*
Patrick Hunnius
Attorneys for Plaintiff
LOG CABIN REPUBLICANS

DECLARATION OF PATRICK HUNNIUS

I, Patrick Hunnius, say that:

1. I am an attorney licensed to practice law before this Court. I am a partner in the law firm of White & Case LLP, counsel for plaintiff Log Cabin Republicans ("Plaintiff") in this action. I have personal knowledge of the following facts, and if called as a witness I could and would competently testify thereto.

2. A true and correct copy of the transcript of the Remarks by the President in State of the Union Address, as posted at http://www.whitehouse.gov/the-press-office/remarks-president-state-union-address, last visited Mar. 5, 2010, is attached hereto as Exhibit A.

3. A true and correct copy of the Testimony Regarding DoD "Don't Ask, Don't Tell" Policy, available at http://www.jcs.mil/speech.aspx?id=1322, last visited Mar. 5, 2010, is attached hereto as Exhibit B.

4. By order entered on July 24, 2009, the Court established a trial date of June 14, 2010 and a discovery cutoff date of March 15, 2010 (the "Scheduling Order"). A copy of the Scheduling Order is attached hereto as Exhibit D.

5. On December 10, 2010, the Plaintiff served the government with the First Set of Requests for Admission. A true and correct copy of the First Set of Request for Admissions is attached hereto as Exhibit E.

6. On January 28, 2010, the government served Defendants' Objections and Responses to Plaintiff's First Set of Requests for Admission (the "Defendants' Objections"). A true and correct copy of the Defendants' Objections is attached hereto as Exhibit F.

7. On February 11, 2010, I sent Mr. Freeborne a meet and confer letter regarding, among other things, the Defendants' Objections (the "Meet and Confer Letter"). In the Meet and Confer Letter, I explained why Defendants' Objections were insufficient and a violation of Rule 36(a)(6) of the Federal Rules of Civil

Procedure. Also, in the Meet and Confer Letter, I requested that the government respond to such letter by February 17, 2010. A true and correct copy of the Meet and Confer Letter is attached hereto as Exhibit G.

8. As of the date of the filing of this Motion, the government has failed to respond to the Plaintiff's Meet and Confer Letter.

9. On March 4, 2010, at approximately 3:53 p.m., I notified Mr. Freeborne via electronic mail that Plaintiff would be seeking the relief in the instant Motion on an *ex parte* basis. A copy of such electronic mail is attached hereto as Exhibit H.

10. On March 5, 2010, the government sent the Plaintiff a letter in response to Plaintiff's notification of intention to file this Motion on an *ex parte* basis (the "March 5 Letter"). A true and correct copy of the March 5 Letter is attached hereto as Exhibit C.

I declare under penalty of perjury under the laws of the United States of America that foregoing is true and correct.

Executed on March 8, 2010 at Los Angeles, CA

/s/ Patrick Hunnius
Patrick Hunnius

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