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UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
EASTERN DIVISION

LOG CABIN REPUBLICANS, Plaintiff, v. UNITED STATES OF AMERICA AND ROBERT M. GATES, Secretary of Defense, Defendants.	No. CV04-8425 VAP (Ex) DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS' MOTION FOR REVIEW OF MAGISTRATE JUDGE'S DISCOVERY RULING DATE/TIME: EXPEDITED RULING REQUESTED; DISCOVERY MATTER BEFORE: Judge Phillips

INTRODUCTION

Pursuant to Local Rule 72-2.1, Defendants the United States and Secretary Gates object to, and seek relief from, the portion of the Magistrate's ruling dated March 16, 2010 (Doc. 127) requiring Defendants to "unqualifiedly admit or deny"

Plaintiff's Requests for Admission Nos. 3, 4, and 5 of Plaintiff's First Set of Requests for Admission (Doc. 127 at 3) (hereafter sometimes "Plaintiff's Requests" or "Requests"). In the unique circumstances of this case, Defendants cannot in good faith "unqualifiedly admit or deny" these particular Requests because the United States does not have a single position on the questions presented; simply put, the positions of the Executive Branch (as articulated by the President) and Congress differ on these questions. Fed. R. Civ. P. 36(a)(4) expressly permits a party to provide a qualified response to a request for admission precisely so that the party can respond in good faith. Defendants respectfully submit that the Magistrate Judge's order directs a response in a manner beyond the scope of what is contemplated by the Federal Rules of Civil Procedure, and thus Defendants hereby seek reversal or modification of the Order so as to permit Defendants to respond in good faith.[1]

ARGUMENT

Fed. R. Civ. P. 36(a)(4) expressly permits a party to provide a qualified response to a request where "good faith" requires such a response. "A responding party that cannot admit or deny a request outright may make an admission with a qualification or deny only part of a request." *Loudermilk v. Best Pallet Co.*, No. 08-68869, 2009 WL 3272429, at *2 (N.D. Ill. Oct. 8, 2009) (citation omitted). This rule permits a party to, "in good faith, qualify its answer or deny only part of a matter." *Wiwa v. Royal Dutch Petroleum*, No. 96-8386, 2009 WL 1457142, at * 4 (S.D.N.Y. May 26, 2009). And while any qualification should "provide clarity and lucidity to the genuineness of the issue[s] and not . . . obfuscate, frustrate, or

[1] Defendants note that they already have complied or fully intend to comply with all other aspects of the Magistrate Judge's March 16, 2010 order, including as by stipulation of the parties related thereto (Doc. 134), and herein only seek relief from this one narrow but important aspect of the order.

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compound the references," *Henry v. Champlain Enter*., 212 F.R.D. 73, 78 (N.D.N.Y. 2003), the bar for a qualified admission "should not be set too high. A response under [Fed. R. Civ. P. 36(a)(4)] should be deemed sufficient if it reasonably informs the requesting party what is being admitted or denied." *Wiwa*, 2009 WL 1457142 at *4 (citing JP *Morgan Chase Bank v. Liberty Mut. Ins. Co*., No. 01-11523, 2002 WL 31159139, at *1 (S.D.N.Y. Sept. 27, 2002)).

Plaintiff's Requests 3, 4, and 5 ask as follows:

3. Admit that DADT does not contribute to our national security.

4. Admit that DADT weakens our national security.

5. Admit that discharging members pursuant to DADT weakens our national security.

These particular Requests were juxtaposed with separate Requests by which Plaintiff asked Defendants to admit that in certain speeches President Obama made particular statements regarding the effect on national security of the "Don't Ask Don't Tell" policy (10 U.S.C. § 654 and its implementing regulations) (sometimes hereafter "DADT").[2] In response to those separate Requests, Defendants admitted that the President in fact made the statements.

In response to Requests 3, 4, and 5, at issue here, Defendants made explicit reference to the responses to the separate Requests regarding the President's statements about the DADT, but also stated that Congress was of a different view

[2] Specifically, Defendants admitted that President Obama made the statement that the DADT policy "does not contribute to national security," and that President Obama made the statement that the DADT policy "weakens the national security." *See* Defendants' Responses to Plaintiff's Requests For Admission (Nos. 1 and 2), attached hereto at Attachment 1. A copy of the transcript of the hearing before the Magistrate Judge is attached hereto as Attachment 2.

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when it enacted Section 654 in 1993.[3] Such a qualified response was appropriate; indeed, a qualified response is the only response possible under the circumstances. The President's statements set forth the Executive's view that the statute does not contribute to national security and, indeed, that it weakens it. But it was the considered judgment of Congress in 1993 that the statute was necessary for military effectiveness, and thus to ensure national security, and that statute remains in force today. Importantly, it is the rationality of Congress' determination that is relevant and controlling for purposes of litigation in which a statute is called into question.

In light of the Court's ruling that this case is governed by rational basis review, the only question presented, thus, is whether Congress "rationally could have believed" that the conditions of the statute would promote its objective. *Western & Southern Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 671-72, 101 S. Ct. 2070, 68 L. Ed. 2d 514 (1981). Whether the President has a view about the need for the statute that differs from the considered judgment of Congress is thus irrelevant for purposes of the litigation.[4]

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[3] Defendants also lodged objections to these requests, which objections they stand by as appropriate. Contrary to Rule 36, these requests fail to relate to "facts, the application of law to fact, or opinions about either," *see* Fed. R. Civ. P. 36(a)(1)(A). Moreover, the terms "contribute," "weakens," and "national security" in the context of this litigation are vague and ambiguous, and thereby further render these requests improper.

[4] It is the Government's view that, when presented with a facial challenge to the constitutionality of a statute, as here, the relevant legal consideration is whether Congress had a rational basis for the statute at the time it was enacted. Indeed, a statute is not subject to challenge on the ground of changed circumstances. *See, e.g.*, *United States v. Jackson*, 84 F.3d 1154, 1161 (9th Cir. 1996); *Montalvo-Huertas v. Rivera-Cruz*, 885 F.2d 971, 977 (1st Cir. 1989); *United States v. Teague*, 93 F.3d 81, 84 (2d Cir. 1996). Courts have found that, even where Congress has determined that a previous enactment is no longer necessary, such a

Defendants respectfully submit that the responses to Request Nos. 3, 4, and 5, therefore, were made in good faith and that they accurately reflect the position of the United States: the Executive being of the view that Section 654 does not contribute to and even weakens our national security, and the Congress being of the view that enactment of the statute furthered a governmental interest in military effectiveness, and thus national security, in the unique setting of the military. In these circumstances, the only appropriate response is a qualified one, and that is precisely why Fed. R. Civ. P. 36(a)(4) expressly permits qualified answers. The Magistrate Judge's Order goes beyond the bounds of Rule 36 to direct the United States to "unqualifiedly admit or deny," thus placing the United States in an untenable situation of picking between two words, neither of which alone, in the circumstances, would constitute a good faith response as to the position of the United States as contemplated by Rule 36.

For all of the reasons set forth herein, Defendants request that the Magistrate Judge's Order directing Defendants to "unqualifiedly admit or deny" Plaintiff's Requests for Admission 3, 4, and 5 be modified or reversed.

Dated: March 26, 2010

Respectfully submitted,

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finding does not render the statute unconstitutional. *See Smart v. Ashcroft*, 401 F.3d 119, 123 (2d Cir. 2005); *Howard v. U.S. Dept. of Defense*, 354 F.3d 1358, 1361-62 (Fed. Cir. 2004).

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