

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
v.) Civil Action No.
)
STATE OF ALABAMA, and) 2:06-cv-0392-WKW
NANCY L. WORLEY, Secretary of State;)
in her official capacity,)
)
Defendants.)
_____)

**PLAINTIFF'S RESPONSE TO
MOTION TO MODIFY EX PARTE COMMUNICATIONS ORDER**

Plaintiff United States of America respectfully takes exception to the motion of the State of Alabama to modify the Court's *ex parte* communications Order to allow unlimited communications between the Office of the Attorney General and Ms. Beth Chapman, Secretary of State.

1. The United States recognizes that on November 7, 2006, Ms. Chapman was elected as Alabama's Secretary of State and sworn into that office on or about January 15, 2007, replacing Defendant Nancy L. Worley in her official capacity.

2. The United States acknowledges that there will be a transition period during which a need may arise for the Office of the Attorney General to communicate directly with the Secretary of State, as a new official, concerning subject matter that is not related to this lawsuit.

3. The United States believes that the Court's Order of September 14, 2006, made it clear that the prohibition on *ex parte* communications was limited to HAVA-related matters, and, therefore, the United States waives any claim against the Office of the Attorney General and the

Secretary of State-elect regarding any *ex parte* communications that are non-HAVA related and that are otherwise not related to the subject of this lawsuit.

4. However, the United States emphasizes that this lawsuit did not pertain to any individual official, but to the operation of the Secretary of State's Office and the State with regard to compliance with the Federal law, specifically the provisions of the Help America Vote Act.

5. Absent any communication or information to the contrary, the United States must assume that the Special Master and Ms. Chapman both intend that Ms. Chapman will continue to serve on the HAVA Implementation Committee for its duration and the duration of the appointment of the Special Master.

6. The Special Master's appointment and powers are temporary and presumably will end upon successful implementation of an HAVA-compliant database. During her membership on the HAVA Implementation Committee, and during the appointment of the Special Master, the Secretary of State's role with regard to HAVA matters coincides with the responsibilities of Special Master, thereby temporarily altering her relationship with the Office of the Attorney General on HAVA matters.

7. The United States believes it is premature to assume that the prohibition on *ex parte* communication should be modified to allow unlimited *ex parte* communication between the Office of the Attorney General and the new Secretary of State on HAVA matters, as proposed by the State of Alabama.

8. Recognizing that the HAVA implementation process may benefit from the ability of the Office of the Attorney General to communicate directly with the Secretary of State, the United States proposes that the Court's Order on *ex parte* communications be modified as follows:

“The United States may waive its participation in *ex parte* consultative proceedings in those instances where it is notified at least two business days in advance of the *ex parte* contact or proceeding and is provided with an agenda or list of topics to be discussed during the proposed *ex parte* contact or proceeding. If Counsel for the United States sees a useful purpose in participating in the *ex parte* proceeding, it shall notify the Office of the Attorney General of its intent to participate. If Counsel for the United States expressly waives its opportunity to participate, or, if Counsel for the United States makes no response to such notification prior to the meeting, it shall be deemed to have waived its opportunity to participate, and the communication can proceed consistent with the agenda provided to the United States.

Notification of a proposed *ex parte* contact or proceeding between the Office of the Attorney General and the Secretary of State shall be sent from the Office of the Attorney General by email to Counsel for the United States, i.e., Robert Popper (Robert.Popper@usdoj.gov); Christy McCormick (Christy.Mccormick@usdoj.gov); and Donald Palmer (Donald.Palmer@usdoj.gov).

If the United States waives its right to be present at the *ex parte* contact or proceeding, the Office of the Attorney General shall, within one business day of the *ex parte* contact or proceeding, provide an email to Counsel for the United States briefly describing what was discussed and any outcome of the discussion.”

9. As set forth herein, the United States takes exception to the State of Alabama’s motion to modify the Court’s Order on *ex parte* communications and respectfully requests that the Court instead modify its Order on *ex parte* communications as indicated above.

Respectfully submitted this 16th day of January 2007.

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CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of January 2007, a copy of the foregoing has been electronically filed with the Clerk of the Court using the CM/ECF system, which will electronically send a copy of the same to the following:

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