

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

LOG CABIN REPUBLICANS,
Plaintiff-Appellee/Cross-Appellant,

v.

UNITED STATES OF AMERICA and
ROBERT M. GATES, Secretary of Defense

Defendants-Appellants/
Cross-Appellees

Nos. 10-56634,
10-56813

**REPLY IN SUPPORT OF MOTION TO
HOLD APPEAL IN ABEYANCE**

In the government’s Motion to Hold Appeal in Abeyance, we invoked the Court’s broad authority to control cases on its own docket by moving to hold this appeal in abeyance. The government filed this motion as the result of a radical change in the legal landscape – the enactment of legislation establishing an orderly process for repealing the sole statute at issue in this litigation, 10 U.S.C. § 654, entitled “Policy concerning homosexuality in the armed forces.” The new statute provides for repeal of § 654 effective 60 days after the President, the Secretary of Defense, and the Chairman of the Joint

Chiefs of Staff all certify that a number of requirements have been met, including that the Department of Defense “has prepared the necessary policies and regulations” to implement repeal, and that repeal “is consistent with the standards of military readiness, military effectiveness, unit cohesion, and recruiting and retention of the Armed Forces.” Don’t Ask, Don’t Tell Repeal Act of 2010, §§ 2(b)(2)(B), (C), Attachment 1, Abeyance Mtn. Holding this appeal in abeyance is appropriate out of respect for the orderly process mandated by Congress and because when certification occurs no further briefing will be necessary. Indeed, not even Log Cabin can dispute that this case will be moot once certification requirements are met and repeal becomes effective. The motion should be granted.

1. Log Cabin, in opposing the government’s abeyance motion, contends that the Court and the parties should ignore Congress’s decision to establish an orderly process for repeal of § 654, which, Log Cabin suggests, has no bearing on this case. Instead, Log Cabin speculates that “it is likely that the hearing and this Court’s determination of this appeal will take place before repeal is ultimately

effective.” Opp. 7.

There is no reason to credit this prediction. Briefing in this case is currently scheduled to conclude on March 8 and this Court denied a motion to expedite the oral argument date, instead indicating that oral argument would be set in the ordinary course. Expedition Order 2 (Attachment 1). In the ordinary course oral argument would likely not be scheduled for some time, and any panel decision, to say nothing of any final *en banc* determination, would likely issue at least months after argument.

The certification process prescribed by Congress is underway, and the President has made clear that the military’s “service chiefs . . . are all committed to implementing this change swiftly and efficiently,”¹ and that repeal will happen in “a matter of months” and “[a]bsolutely not years.”² Log Cabin notes that the Secretary of Defense and the Chairman of the Joint Chiefs of Staff have stated that the certification process will be undertaken carefully and deliberately. Opp. 6. That is

¹<http://www.whitehouse.gov/the-press-office/2010/12/22/remarks-president-and-vice-president-signing-don't-ask-don't-tell-repeal-a>

²<http://www.advocate.com/printArticle.aspx?id=169908>

true. But in other portions of those very remarks the Secretary of Defense stated that his goal “is to move as quickly but as responsibly as possible,” that he will approach the certification process with the view that “it’s better to do this sooner rather than later,” and that the first two phases of the three-phase process will be complete “within a matter of a very few weeks.” Tr. of Jan. 6, 2011 DOD News Briefing at 12 (Attachment 2). Indeed, the Secretary has directed the Undersecretary of Defense for Personnel and Readiness “to accelerate the first two phases of [the certification] process as much as he possibly can so that we can get on with the training process.” *Id.*

The Secretary has also said that he “endorse[s] the recommendations of the Comprehensive Review Working Group, which will provide the road map for a successful implementation.”

Attachment 2, Abeyance Mtn. That Working Group was charged in March 2010 with assessing the impact of repeal of § 654, and in November 2010 issued a comprehensive analysis of the impact of repeal, assessing the risk to overall military effectiveness of repeal of the statute as low once the Department establishes the necessary

implementation policies.³ The Working Group also created a thorough Support Plan for Implementation, which outlines, in detail, the policies, procedures, and training needed for a successful repeal of § 654.⁴ As a result, the government has already undertaken extensive preparations to implement a repeal of § 654. In short, it is unlikely that this appeal will come to a decision before the Department has implemented those policies and the necessary certification has been made.

2. Much of the rest of Log Cabin's opposition is effectively a collateral attack on this Court's decision to stay pending appeal the district court's worldwide permanent injunction precluding enforcement of § 654, Opp. 11-12, a decision that Log Cabin unsuccessfully urged the Supreme Court to vacate, 2010 WL 4539545. In other words, Log Cabin urges this Court to nullify the orderly process of repeal that has been established by Congress in favor of an immediate court-ordered

³Report of the Comprehensive Review of the Issues Associated with a Repeal of "Don't Ask, Don't Tell" at 9 (Nov. 30, 2010), available at: [www.defense.gov/home/features/2010/0610_gatesdadt/DADTReport_FINAL_20101130\(secure-hires\).pdf](http://www.defense.gov/home/features/2010/0610_gatesdadt/DADTReport_FINAL_20101130(secure-hires).pdf).

⁴Support Plan for Implementation (Nov. 30, 2010), available at: [www.defense.gov/home/features/2010/0610_gatesdadt/DADTReport-SPI_FINAL_20101130\(secure-hires\).pdf](http://www.defense.gov/home/features/2010/0610_gatesdadt/DADTReport-SPI_FINAL_20101130(secure-hires).pdf).

repeal, to overrule the decision of another motions panel of this Court, and to undermine the Supreme Court's refusal to vacate that decision. Log Cabin cites no authority for that extraordinary step, and there is no merit in Log Cabin's suggestion that the government is attempting "to eat its cake and have it too," Opp. 11, by requesting that this Court hold the appeal in abeyance while the district court's injunction remains stayed pending the appeal. Holding the appeal in abeyance would not terminate the pending appeal, but rather would merely defer its final resolution in deference to the ongoing orderly process for repeal of the sole statute at issue in this case.

Log Cabin argues that while the appeal is pending "current and prospective servicemembers will sustain an ongoing deprivation of their Constitutional rights . . . which is *ipso facto* irreparable harm." Opp. 3-4. But whether § 654 is constitutional is the very question that will be before this Court if this case does not become moot before decision, and in any event this Court granted the government's motion for a stay despite similar arguments of irreparable harm.

The district court entered a permanent worldwide injunction

against enforcement of a duly enacted Act of Congress on the basis of alleged injuries to two of plaintiff's members whose standing to sue is dubious. Gov't Stay Mtn. 6-9. In granting the government's request for a stay of the district court order pending appeal, this Court weighed the equities and concluded that they favor the government, not plaintiff.

The Court noted that "Acts of Congress are presumptively constitutional, creating an equity in favor of the government when balancing the hardships in a request for a stay pending appeal" in a case of this kind, Order 3 (Attachment 3), and observed that the immediate, court-ordered repeal of the statute would produce "immediate harm and precipitous injury," Order 5-6. Congress has now provided for an orderly process for repeal of § 654, confirming this Court's concerns about an immediate, chaotic repeal process. There is no basis for Log Cabin's latest request to upend that carefully crafted political compromise.

3. The President signed the Repeal Act on December 22, 2010, and the government filed its abeyance motion on December 29, 2010. Log Cabin filed its opposition on January 10, 2011, and an "amended"

opposition on January 13. The government's opening brief is due on January 24, 2011. In view of that timing, the government respectfully requests a 30-day extension of time within which to file its opening brief and excerpts of record, up to and including February 23, 2011, should the Court decide not to hold this appeal in abeyance in deference to the orderly process for repeal of § 654.

CONCLUSION

For the foregoing reasons, as well as for the reasons stated in the government's motion, this appeal should be held in abeyance. In the alternative, the government respectfully requests a 30-day extension of time within which to file its opening brief and excerpts of record.

Respectfully submitted,

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JANUARY 2011

CERTIFICATE OF SERVICE

I certify that on January 14, 2011, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I further certify that the following counsel for appellee is a registered CM/ECF user and that service on him will be accomplished by the appellate CM/ECF system:

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UNITED STATES COURT OF APPEALS

DEC 01 2010

FOR THE NINTH CIRCUIT

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U.S. COURT OF APPEALS

LOG CABIN REPUBLICANS,
a non-profit corporation,

Plaintiff - Appellee/
Cross-Appellant,

v.

UNITED STATES OF AMERICA and
ROBERT M. GATES, Secretary of
Defense, in his official capacity,

Defendants - Appellants/
Cross-Appellees.

Nos. 10-56634, 10-56813

D.C. No. 2:04-cv-08425-VAP
Central District of California,
Los Angeles

ORDER

The joint motion to expedite is granted in part. The previously established cross-appeal briefing schedule is vacated. The court adopts the briefing schedule proposed in the parties' joint motion as follows: the government's opening brief and excerpts of record are due January 24, 2011; Log Cabin Republicans' answering brief and supplemental excerpts of record are due February 22, 2011; and the government's reply brief is due March 8, 2011.

The court also adopts the parties' proposed expansion of the word limits for the answering brief and reply brief to 16,500 words and 8,000 words, respectively.

The court denies the parties' request to schedule oral argument in this case for a date certain. The case will be calendared in due course.

The motion to expedite filed by Log Cabin Republicans on November 19, 2010 is denied as moot.

FOR THE COURT:

Molly Dwyer
Clerk of Court

By: Liz Noteware
Motions Attorney/Deputy Clerk
9th Cir. R. 27-7
General Orders/Appendix A



U.S. Department of Defense
Office of the Assistant Secretary of Defense (Public Affairs)

News Transcript

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Presenter: Secretary of Defense Robert M. Gates and Chairman, Joint Chiefs of Staff Adm. Mike Mullen

**January 06,
2011**

DOD News Briefing with Secretary Gates and Adm. Mullen from the Pentagon

SEC. GATES: The first hint that the presentation is long is that the chairman brought a book with him.
(Laughter.)

ADM. MULLEN: Just to read along. (Laughter.)

SEC. GATES: Good afternoon. First, I want to take a moment to announce that I am recommending to the president the nomination of General Martin Dempsey to be the new Army chief of staff, replacing General George Casey. General Dempsey is presently the commander of Army Training and Doctrine Command, and previously was acting commander of Central Command. He also led the multinational training effort in Iraq, and commanded the 1st Armored Division in Baghdad. General Casey is scheduled to finish his tour later this spring, and we obviously will have more to say at that point about his nearly four decades of dedicated service to the Army and to the country.

Today, I'm announcing a number of decisions and measures that mark the next major step in this department's reform agenda. First, I'll provide an update on our efforts within the military services and in the department as a whole to generate efficiency savings by reducing overhead costs, improving business practices or culling excess or troubled programs.

Second, I'll summarize the substantial investments that the military departments will be able to make in high-priority capabilities and programs, investments made possible by the savings identified by the service leadership.

And third, I'll describe how these reform efforts, if followed through to completion, will make it possible to protect the U.S. military's size, reach and fighting strength despite a declining rate of growth and eventual flattening of the defense budget over the next five years.

I believe it is important to present all of these interconnected changes in full and in context. So my opening remarks will be long. And I want to thank you and Admiral Mullen for your patience in advance. And copies of the statement will be passed out following the briefing.

At the outset, I want to emphasize that while America is at war and confronts a range of future security threats, it's important not to repeat the mistakes of the past by making drastic and ill-conceived cuts to the overall defense budget. At the same time, it is imperative for this department to eliminate wasteful, excessive and unneeded spending, to do everything we can to make every defense dollar count.

As a reminder, over the last two defense budgets submitted by President Obama, we have reformed and rebalanced the department's spending habits and priorities, curtailing or canceling troubled or excess programs that would have cost more than \$300 billion if seen through to completion.

At the same time we increased investments in proven capabilities most relevant, both to the current wars and to the most likely and lethal future threats. This follows the overall approach to budgeting set by the president: use precious taxpayer dollars to invest in key priorities critical to the core mission while cutting or reforming programs that are outdated, duplicative or ineffective.

At this point I should note the failure of the Congress to pass a defense appropriations bill for fiscal year 2011. Operating at significantly reduced funding levels under a continuing full-year resolution would cause this department severe problems, likely requiring us to curtail critical activities needed to support our troops and carry out our national security mission.

Last spring, in recognition of the fiscal pressures the country is facing, we launched a comprehensive effort to reduce the department's overhead expenditures. The goal was, and is, to sustain the U.S. military's size and strength over the long term by reinvesting those efficiency savings in force structure and other key combat capabilities. The military services were instructed to find at least a hundred billion dollars in savings that they could keep and shift to higher-priority programs. Undersecretary Ash Carter also launched an effort to get better value and results in the contracting arena for defense goods and services.

Then, in August, I announced a set of initiatives aimed at reducing overhead costs and improving efficiency across the department as a whole, with special attention to the massive headquarters and support bureaucracies outside the four military services.

First, the military department savings. To achieve the savings targets set last year, the uniformed service leadership conducted a thorough and vigorous scrub of our military's bureaucratic structures, business practices, modernization programs, civilian and military personnel levels, and associated overhead costs, identifying savings that totaled approximately a hundred billion dollars over five years.

The Air Force proposed efficiency measures that will total some \$34 billion over five years. Among those proposals are consolidating two air-operations centers in the United States and two in Europe; consolidating three numbered Air Force staffs; saving \$500 million by reducing fuel and energy consumption within the Air Mobility Command; improving depot and supply-chain business processes to sustain weapons systems, thus improving readiness at lower cost; and reducing the cost of communications infrastructure by 25 percent.

The Army proposed \$29 billion in savings over the five years. These include reducing manning by more than a thousand civilian and military positions by eliminating unnecessary task forces and consolidating six installation-management commands into four; saving \$1.4 billion in military construction costs by sustaining existing facilities, and beginning consolidating the services' e-mail infrastructure and data centers, which should save \$500 million over five years.

The Department of the Navy proposed savings of more than \$35 billion over five years. Some of their measures include reducing manpower ashore and reassigning 6,000 personnel to operational missions at sea; using multi-year procurement to save more than \$1.3 billion on the purchase of new airborne surveillance, jamming and fighter aircraft; disestablishing staffs for submarine patrol aircraft and the destroyer squadrons plus the staff of one carrier strike group.

The Navy also proposes to disestablish the headquarters of Second Fleet in Norfolk.

During the Cold War, this command had distinct and significant operational responsibilities. Today its primary responsibility is training and mission preparation, a function that will be transferred to the Navy's Fleet Forces Command. This change would affect approximately 160 military positions, and no ships will depart Norfolk, as a result.

Now let me turn to DoD-wide savings. We also examined how the department is staffed, organized and operated as a whole. Special attention was paid to those DoD headquarters, administration and support elements outside the four services -- the Office of the Secretary of Defense, the Joint Staff, the combatant commands and the defense agencies and field activities -- all of which have seen significant growth in budget, staff and contractors over the last decade.

This effort, combined with a government-wide freeze on civilian salaries, has yielded about \$54 billion in additional savings over the next five years, savings that include, with some very limited exceptions, a DoD-wide freeze on the number of civilian positions.

Several actions do not require budgetary approval, and we will begin implementation immediately. First, reforming how the department uses information technology, which costs us about \$37 billion a year. At this time, all of our bases and headquarters have their own separate IT infrastructure and processes, which drive up costs and create cyber-vulnerabilities. The department is planning to consolidate hundreds of data centers and move to a more secure enterprise system, which we estimate could save more than a billion dollars a year.

At the same time, I'm not satisfied with the progress we've made in this area since August, and expect to make a follow-on announcement with a specific plan of action by next month.

Second, as I've said before, this department has become far too reliant on contractors to perform functions that should either be done by full-time employees or in some cases to staff activities that could and should be discontinued.

As a result of the reviews conducted since August, several DoD components are moving ahead with significant reductions in contractor staff support. For example, OSD's Policy Division and Acquisitions, Technology and Logistics Office between them will cut nearly 270 contractors, the Defense TRICARE agency more than 780, and the Missile Defense Agency more than 360. Overall, we will cut the size of the staff-support contractor cadre by 10 percent per year for three years and realize nearly \$6 billion in total savings.

Third, since the beginning of this fiscal year, which began October 1st, we've been operating under a freeze in the number of positions, with very limited exceptions, such as the acquisition workforce within the Office of the Secretary of Defense, the defense agencies and field activities and the combatant commands. These entities were also directed to conduct a clean-sheet review to rebalance resources, staff and functions within and across their components to reflect the department's most pressing priorities.

The resulting review produced a number of opportunities to trim the size of the workforce, yielding more than \$4 billion in savings over the next five years. I will recommend to the president that we hold to these limits in overall DoD staff levels for the next three years. While new requirements may emerge that require further staff support, those needs should be met by shifting personnel from other less important activities within the organization.

Fourth, in consultation with the Director of National Intelligence, we examined the Defense Department's sprawling intelligence apparatus. Since September 11th, the U.S. government as a whole has seen a proliferation of new intelligence organizations, many that are excess and duplicative, many that are spread out among the different services, agencies, task forces of various kinds and combatant commands.

Based on this review, I have approved a number of changes. They include downsizing the new intelligence organizations that have grown up around a number of the combatant commands in recent years, most of which are not directly engaged in the post-9/11 military conflicts. In place of having a large, permanent, organic apparatus, staffed on a wartime level, the department will transition to an arrangement that can surge intelligence support as needed from the Defense Intelligence Agency (DIA). The review also found that many intelligence organizations across the department and among military services focus on counterterrorism and terrorism finance. We will consolidate the various redundant programs into two task forces located within DIA.

Fifth, I have approved the elimination of more than a hundred general-officer and flag-officer positions out of the roughly 900 currently on the books. Of those, 28 are billets that were created after 9/11, primarily for the wars in Iraq and Afghanistan. They will be reduced as appropriate, as major troop deployments wind down. More than 80 general- or flag-officer billets in the services, OSD and the combatant commands will be eliminated or downgraded. Additionally, I have directed the elimination or downgrading of nearly 200 civilian senior executive positions, or equivalent positions, out of a total of 1,400 civilian executives. The monetary savings from these reductions in senior personnel will be relatively modest, and mostly consist of the extra staff and amenities that by tradition follow high rank. The primary purpose behind this shift is to create fewer, flatter, more agile and thus more effective organizations.

Sixth, and related, we looked at the department's organizational charts, command structures, force posture and basing arrangements. As announced in August, the Office of the Assistant Secretary of Defense for Network Intelligence and Information, the Business Transformation Agency, and the Joint Forces Command (JFCOM) are in the process of being eliminated or disestablished, with a reduced number of their most essential functions transferred to other organizations.

In the case of JFCOM, we have identified a number of missions since the August announcement that should be retained in the Norfolk-Suffolk, Virginia area. We are still refining the details, but expect that roughly 50 percent of the capabilities under JFCOM will be kept and assigned to other organizations.

And seventh, another area of focus was European Command. Based on our review, it is clear we have excess force structure in Europe. We are looking closely at alternative courses of action, but none would be implemented before 2015 or without consulting with our allies.

It is also no longer necessary to retain four-star service component headquarters for the Army, Navy and Air Force in European Command, each of which is too large and too senior given the number of troops they lead and the military operations they oversee. These commands will be reduced to the three-star level, with concurrent streamlining in the headquarters and personnel staff. The change to U.S. Navy Europe will take place over a longer period because of that command's unique role in the NATO transformation effort.

Eighth, we are eliminating nearly 400 internally generated reports that over the years have consumed vast

amounts of staff time and energy, often to produce documents that are of questionable relevance, value, and in many cases have been rarely read. Nearly a third of the total reporting requirements originated decades ago, and in some cases date back to the 1950s. Overall, this reduction in DoD's reporting -- internal reporting burden -- about 60 percent of all non-statutory reports -- when coupled with the reduction in funding for studies represents an estimated \$1.2 billion in savings over the next five years.

I'm also instructing that, effective April -- in April, the requirement for any internal report with a commissioning date prior to 2006 will be canceled. Furthermore, starting in February, every report must include the cost of its production.

For all of these DoD-wide initiatives, a major objective beyond creating monetary savings is to make this department less cumbersome, less top-heavy and more agile and effective in the execution of its responsibilities. My hope and expectation is that as a result of these changes over time, what had been a culture of endless money where cost is rarely a consideration will become a culture of savings and restraint.

I'll now turn to some of the significant program decisions included in the hundred billion dollars identified by the services for reinvestment that will be incorporated in the FY '12 budget request. Given the variety and complexity of the threats America faces, we need a portfolio of affordable and versatile military capabilities that can be produced on a reasonable schedule and in sufficient quantities. So at the same time the military services are digging -- were digging deep for excess overhead, they were also taking a hard look at their modernization portfolios for weapons programs that were having major development problems, unsustainable cost growth, or had grown less relevant to world -- real-world needs.

As a result, the Army has decided to cancel procurement of the SLAMRAAM surface-to-air missile. The Army leadership also recommended terminating the non-line-of-sight launch system, the next-generation missile launcher originally conceived as part of the Future Combat System.

The Joint Strike Fighter (JSF) program received special scrutiny, given its substantial cost, ongoing development issues, and its central place in the future of U.S. military aviation.

In short, two of the JSF variants, the Air Force version and the Navy's carrier-based version, are proceeding satisfactorily.

By comparison, the Marine Corps' short take-off and vertical-landing (STOVL) variant is experiencing significant testing problems. These issues may lead to a redesign of the aircraft's structure and propulsion, changes that could add yet more weight and more cost to an aircraft that has little capacity to absorb more of either.

As a result, I am placing the STOVL variant on the equivalent of a two-year probation. If we cannot fix this variant during this time frame and get it back on track in terms of performance, cost and schedule, then I believe it should be canceled.

We will also move the development of the Marine variant to the back of the overall JSF production sequence. And to fill the gap created from the slip in JSF production schedule, we will buy more Navy FA-18s.

Today, I'm also announcing my agreement, with the recommendation of the Secretary of the Navy and the Commandant of the Marine Corps, to cancel the Expeditionary Fighting Vehicle (EFV). This program is of great interest to the Marine community, so I'd like to explain the reasons behind what I know will be a controversial decision.

The EFV's aggressive requirements list has resulted in an 80,000- pound armored vehicle that skims the surface of the ocean for long distances at high speeds before transitioning to combat operations on land. Meeting these demands has, over the years, led to significant technology problems, development delays and cost increases. The EFV, originally conceived during the Reagan administration, has already consumed more than \$3 billion to develop, and will cost another \$12 billion to build, all for a fleet with the capacity to put 4,000 troops abroad -- ashore.

To fully execute the EFV, which costs far more to operate and maintain than its predecessor, would essentially swallow the entire Marine vehicle budget, and most of its total procurement budget for the foreseeable future.

To be sure, the EFV would, if pursued to completion without regard to time or cost, be an enormously capable vehicle. However, recent analysis by the Navy and Marine Corps suggest that the most plausible scenarios requiring power projection from the sea could be handled through a mix of existing air and sea systems employed in new ways, along with new vehicles, scenarios that do not require the exquisite features of the EFV. As with several other high-end programs cancelled in recent years, the mounting costs of acquiring this specialized capability must be judged against other priorities and needs.

Let me be clear. This decision does not call into question the Marines' amphibious assault mission. We will budget the funds necessary to develop a more affordable and sustainable amphibious tractor to provide the Marines a ship-to-shore capability into the future. The budget will also propose funds to upgrade the existing amphibious vehicle fleet with new engines, electronics and armaments to ensure that the Marines will be able to conduct ship-to-shore missions until the next generation of systems is brought online.

Finally, for some time, I've spoken about the department's unaffordable health costs, and in particular the benefits provided to working-age retirees under the TRICARE program. Many of these beneficiaries are employed full-time while receiving their full pensions, and often forego their employers' health plan to remain with TRICARE. This should not come as a surprise given that the current TRICARE enrollment fee was set in 1995 at \$460 a year for the basic family plan, and has not been raised since.

During this time, insurance premiums paid by the private sector and other government workers have risen dramatically.

For example, the fees for a comparable health insurance program for federal workers costs roughly \$5,000 a year.

Accordingly, with the fiscal year 2012 budget, we will propose reforms in the area of military health care to better manage medical cost growth and better align the department with the rest of the country. These will include initiatives to become more efficient, as well as modest increases to TRICARE fees for working area -- working-age retirees, with fees indexed to adjust for medical inflation. Potential savings from these initiatives could amount to nearly \$7 billion over the next five years.

So now let me turn to the areas -- having identified \$100 billion in savings in the services, let me turn to the areas where they are now going to invest those savings from overhead and weak programs. To recap, approximately \$100 billion was identified by the services through shedding excess overhead, improving business practices or troubled programs. Another \$54 billion in savings was generated by DoD-wide overhead efficiencies and freezes and civilian positions and salaries.

Of the \$100 billion identified by the military departments, approximately \$28 billion will be used over the next five years by the Army, Air Force, Navy and Marine Corps to deal with higher than expected operating costs. These costs include health care, pay and housing allowances, sustainment of weapon systems, depot maintenance, base support and flight hours and other training.

Frankly, using these savings in this way was not my original intent or preference, but we have little choice but to deal with these so-called must-pay bills. And better to confront them honestly now than through raiding investment accounts later.

Nonetheless, the military services' reform efforts have left them more than \$70 billion from overhead and program savings to spend on high-priority military capabilities, funds that would not otherwise be available.

I'll now summarize some of these new areas of investment. For the Air Force, this process made it possible to buy more of the most advanced Reaper UAVs [unmanned aerial vehicles], and move essential intelligence, surveillance and reconnaissance programs from the temporary war budget to the permanent base budget.

Going forward, advanced unmanned strike and reconnaissance capabilities must become an integrated part of the Air Force's regular institutional force structure. The Air Force will increase procurement of the Evolved Expendable Launch Vehicle to assure access to space for both military and other government agencies while sustaining our industrial base. The Air Force will modernize the radars of F-15s to keep this key fighter very viable well into the future. And it will also buy more simulators for Joint Strike Fighter aircrew training.

Finally, a major area of new investment for the Air Force will be a new long-range, nuclear-capable penetrating bomber. This aircraft, which will have the option of being remotely piloted, will be designed and developed using proven -- using proven technologies, an approach that should make it possible to deliver this capability on schedule and in quantity.

It is important that we begin this project now to ensure that a new bomber can be ready before the current aging fleet goes out of service. The follow-on bomber represents a key component of a joint portfolio of conventional deep-strike capabilities, an area that should be a high priority for future defense investment, given the anti-access challenges our military faces.

The Army intends to use its savings, first, to provide improved suicide prevention and substance abuse counseling for soldiers; second, to modernize its battle fleet of Abrams tanks, Bradley fighting vehicles and Stryker wheeled vehicles; and to accelerate fielding to the soldier level of the Army's new tactical communications network.

The demand from ground commanders for intelligence, surveillance and reconnaissance assets continues to exceed the military's supply. In response, the military, with the Army, will buy more MC-12 reconnaissance aircraft, accelerate procurement of the service's most advanced Gray Eagle UAVs, and begin development of a new vertical unmanned air system to support the Army in the future.

The Department of the Navy, as a result of the efficiencies savings, is proposing to accelerate the development of a new generation of electronic jammers to improve the Navy's ability to fight and survive in an anti-access environment. They'll increase the repair and refurbishment of Marine equipment used in Iraq and Afghanistan. They will develop a new generation of seaborne unmanned strike-and-surveillance aircraft. They will buy more of the latest model F-18s, and extend the service life of 150 of these aircraft as a hedge against more delays in the deployment of the Joint Strike Fighter. And finally, the Navy will purchase additional ships, over the next five years, including a destroyer, a littoral combat ship, an ocean-surveillance vessel and fleet oilers.

In the area of missile defense, I'm proposing more funding for long-range defense interceptors that will support the phased adaptive approach in Europe, and extend that level of protection to the continental United States. In order to improve theater missile defenses, we will also purchase additional advanced radar systems that have been requested by combatant commanders in Europe, Pacific and the Middle East.

Now, let me close with discussion of future budget projections. Meeting real-world requirements, doing right by our people, reducing excess, being more efficient, squeezing costs, setting priorities and sticking to them, making tough choices -- these are all things that we should do as a department and as a military, regardless of the time and circumstance.

But they are more important than ever at a time of extreme fiscal duress, when budget pressures and scrutiny fall on all areas of government, including defense.

When every dollar spent on excess overhead or unneeded programs, such as the extra engine for the JSF, there's a dollar not available to support our troops and prepare for threats on the horizon.

Which brings me to the President's defense budget outlook. The president's base budget request for fiscal year 2012 will be approximately \$553 billion. This is some \$13 billion less than we expected for FY '12 in last year's five-year budget plan that represents about 3 percent real growth over the funding the department would receive in FY '11 under the current continuing resolution and about 1.5 percent real growth over the Appropriations Committee's defense bills for FY '11.

The proposed budget plan will reduce real growth in the department's top line in FY '13 and in FY '14, and then provide zero real growth in FY '15 and '16.

In all, this budget proposal anticipates a total reduction of roughly \$78 billion to the five-year defense plan submitted last year. Even with this top-line reduction, we were able to adhere to the original intent of the reform initiative and permit the military services to keep and reinvest the roughly hundred billion dollars they identified for savings.

So where did we come up with the \$78 billion for the top-line reduction? First, the approximately \$54 billion in DOD-wide overhead reductions and efficiencies I described earlier in this statement, which include a freeze on all government civilian salaries.

Second, roughly \$14 billion, reflecting shifts in economic assumptions and other changes relative to the previous five-year Defense plan -- for example, decreases in the inflation rate and projected pay raises.

Third, \$4 billion in savings to the Joint Strike Fighter program, to reflect re-pricing and more realistic production schedule, given recent development delays.

And fourth, more than \$6 billion was saved by our decision to reduce the size of the active Army and Marine Corps starting in FY 2015. Under this plan, the U.S. Army's permanent active-duty end strength would decline by 27,000 troops, while the Marine Corps would decline by somewhere between 15 [thousand] and 20,000, depending on the outcome of their force structure review. These projected reductions are based on an assumption that America's ground combat commitment in Afghanistan would be significantly reduced by the end of 2014, in accordance with the president's strategy.

Ever since taking this post, now more than four years ago, I have called for protecting force structure and for maintaining modest but real growth in the Defense top line over the long term. I would prefer that this continue to be the case, but this country's dire fiscal situation and the threat it poses to American influence and credibility around the world will only get worse unless the U.S. government takes its finance -- gets its finances in order.

And as biggest part of the discretionary federal budget, the Pentagon cannot presume to exempt itself from the scrutiny and pressure faced by the rest of our government.

No doubt these budget forecasts and related program decisions will provoke criticism on two fronts: that we're either gutting defense or we have not cut nearly enough.

As to the former, some perspective and a reality check are in order.

Even after the projected reductions in the active army beginning in 2015, the services' permanent end strength would continue to be larger by nearly 40,000 soldiers than it was when I became defense secretary four years ago.

And as I've described in previous speeches, when it comes to global reach and striking power, the gap between the U.S. military and the rest of the world, including our biggest potential rivals, will continue to be vast, and in some key areas will grow even wider.

We must come to realize that not every defense program is necessary, not every defense dollar is sacred and well spent, and that more of nearly everything is simply not sustainable. Under the proposed budget plan, the Defense Department will continue to see real, albeit steadily diminishing, growth for the next three fiscal years before flattening out in the fourth and fifth year.

What is important is to have a budget baseline with a steady, sustainable and predictable rate of growth that avoids extreme peaks and valleys in defense spending that can be enormously harmful to readiness, planning and financial management. This budget proposal is such a plan. It represents a reasonable, responsible and sustainable level of defense spending for the next five years. But only with the continued reform of business practices, reduction in overhead and smarter acquisitions can we execute this plan and realize the savings for reinvestment without increasing risk to America's security or hollowing out our military.

This plan represents, in my view, the minimum level of defense spending that is necessary, given the complex and unpredictable array of security challenges the United States faces around the globe: global terrorist networks, rising military powers, nuclear-armed rogue states, and much, much more.

In recent weeks, there have been calls from various quarters for major reductions in defense spending, to include substantial cuts in modernization, force structure, troop levels and overseas bases. I consider such proposals risky at best, and potentially calamitous.

For more than 60 years, the United States, backed up by the strength, reach and unquestioned superiority of our military, has been the underwriter of security for most of the free world. The benefits in terms of stability, prosperity and the steady expansion of political freedom and economic growth have accrued not only to our allies and partners, but above all to the American people. We shrink from our global security responsibilities at our peril, as retrenchment brought about by short-sighted cuts could well lead to costlier and more tragic consequences later -- indeed, as they always have in the past.

Surely we should learn from our own national experience since World War I that drastic reductions in the size and strength of the U.S. military make armed conflict all the more likely and with an unacceptably high cost in American blood and treasure. To maintain the kind of military needed for America's leadership role requires not only adequate levels of funding, but also fundamentally changing the way our defense establishment spends money and does business. That is why it is so important to follow through on the program of reform and overhead reduction that I've spoken about today.

This department simply cannot risk continuing down the same path where our investment priorities, bureaucratic habits and lax attitudes toward costs are increasingly divorced from the real threats of today, the growing perils of tomorrow and the nation's grim financial outlook. These times demand that all of our nation's leaders rise above the politics and parochialism that have too often plagued considerations of our nation's defense, whether from inside the Pentagon, from industry and interest groups, and from one end of Pennsylvania Avenue to the other.

I look forward to working through this next phase of the president's defense reform effort with Congress in the weeks and months ahead, to do what's right for our armed forces and to do what's right for our country.

Admiral, thanks for your patience.

ADM. MULLEN: Actually, I too want to thank you for your patience. I know we've got about 20 or 25 minutes, and that's actually the length of my remarks. (Laughter.) Thank you, Mr. -- actually, I'll be very brief. Thank you, Mr. Secretary.

And I would only add that the chiefs and I are in complete support of these decisions. These were decisions that we helped the secretary make, and I applaud the process that he led. This is the second time we've been through this sort of review with the secretary, and it's been managed in a most inclusive, detailed, deliberate and thoughtful way. He gave us broad guidance. We helped craft the specifics.

And these are our decisions, too. I've been a service chief myself. The way it typically works is we get large bills at the end of a process, it forces bad decisions, and it offers absolutely no maneuvering room. That was not the case here. It was avoided here because of the up-front work by the secretary and by the services and the ownership that we all took with respect to the efficiency initiatives.

I believe it's our job in the military to eliminate security threats as best we can. And these reforms and budget proposals help us do exactly that. The secretary's right, we can't hold ourselves exempt from the belt-tightening. Neither can we allow ourselves to contribute to the very debt that puts our long-term security at risk.

This isn't about just cutting or saving; it is about readiness.

Not only do reforms preserve -- these reforms preserve essential capabilities, which is the highest priority of this process, but I believe will actually improve our readiness. We'll be able to do things smarter, more efficient -- more efficiently and more in line with the challenges we face in the fiscal environment that we're in.

The services have been able to reinvest savings significantly into programs and capabilities most -- that most meet their needs as they see and we see the future.

Finally, I want to strongly support the recommendation to nominate General Marty Dempsey. I don't think there's anybody more qualified, more in step with the challenges and opportunities facing our Army and our military. He's an extraordinary leader with whom I've worked closely and have great confidence in him. And I look forward to working with him throughout the confirmation process.

Thank you, sir.

SEC. GATES: Anne.

Q: The budget decrease -- the cuts that you propose in the later years seem to presume that you'll need fewer troops overseas total and that you can end the war in Afghanistan on time. Given that that war and the one in Iraq didn't -- weren't something you planned for ahead of time; and given the rise of new threats in places like Yemen, Somalia and the Persian Gulf, what assurances can you give that your successors won't come back in a few years' time and say, guess what, we were wrong, we need more money?

SEC. GATES: Well, I think that, you know, when you're looking out five years, you have to accept the reality that conditions around the world can change. The fact is, these are relatively modest reductions. In the case of the Marine Corps, both General Conway and General Amos have talked for some time about the need -- their view that the Marine Corps is too large now that they're out of Iraq and so on.

And they have talked for some time about getting back to some point between 175 [thousand] -- between where they were before I increased the size of the Marine Corps to 175,000 and the addition of the 27,000 that brought them to 202,000. So I think they see this as -- this has been more of an organic process within the Marine Corps in terms of their priorities and their needs.

In the case of the Army, this is a situation where the Army is supportive of this decision. I think it is a product of -- that support derives from understanding the importance of this in terms of their other priorities as well. And again, I would -- I would emphasize, both of these services will be larger after these cuts than they were when I became secretary: the Army almost 40,000 troops larger, and the Marine Corps anywhere from 7 [thousand] to 12,000 troops larger. So I think it's important to keep some perspective here as well.

Q: Got a couple -- one -- a macro budget question. I --

SEC. GATES: Did you want to add anything?

ADM. MULLEN: Only thing I would add to that, again, is the risk -- we've looked at the risk, and I think to your point, obviously, predicting the future's very difficult. But I would echo what the secretary said in terms of, these are modest changes and ones that we think are well within the risk envelope as we understand things right now, particularly given where we think we'll be with respect to Afghanistan in 2015, when these force structure changes start to kick in, and with the -- this world of persistent conflict that we talk about and the need to have forces to be able to engage, but an understanding of the total force, all services that will be required to do that.

So the risk -- there's certainly some risk there, but we think it's acceptable risk right now.

Q: One of your primary goals was to grow modernization and research accounts by 2 to 3 percent real growth over the Future Years Defense Plan (FYDP), in layman's language. Was that accomplished or not? It doesn't seem to be, given that there's no growth, it looks like, in the budget.

SEC. GATES: Well, what I -- let's be clear. When I talked about the \$100 billion last year, it was in the recognition that the overall defense budget was not going to grow at 2 to 3 percent real growth a year. So the objective was, by cutting overhead, to ensure that the investment accounts, force structure and taking care of our people -- that part of the budget would in fact grow at 2 to 3 percent. I think with this transfer of \$100 billion to that, we've accomplished that objective.

Q: One on the F-35, that's getting special scrutiny. How close did the STOVL come to cancellation? And how much of this \$4 billion in savings comes from delaying purchases beyond 2016? You cut 122 aircraft in this current five-year plan. Is there more there coming?

SEC. GATES: Well, first of all, the plan is to -- what we will do in 2012 is keep the production rate at the same level as FY '11. So 32 aircraft. So we get a year further into the development before we really begin to ramp up production.

In terms of the internal process, you know, all of these things were -- everything I've talked about has been debated for hours over the last number of months. I think that -- I think that the Marine Corps made a compelling case that they need some time to try and get things right with the STOVL. And we will give them that opportunity.

Q: Mr. Secretary, regarding the \$78 billion in cuts over the next five years, how confident are you, given the fiscal realities facing the Hill and the administration, that this isn't just the first shoe to drop, that there will be pressure to cut more?

SEC. GATES: Well, I mean, you've got two ends to this debate, as I suggested in my remarks -- those who felt -- feel we've already gone too far, and those who feel like we haven't gone nearly far enough. My view is that we've got it about right. And there clearly will be a lot of debate on the -- on the Hill about this.

But let me be very clear about something. When we're starting to talk -- a lot of the stories last year were about how I was cutting the defense budget by \$100 billion. I was not cutting the defense budget by \$100 billion. I was moving \$100 billion from what I thought was waste and unnecessary spending to higher-priority issues.

What we are talking about, over the next five years, is a decline in the rate of growth. And zero real growth means we get inflation. So the reality is, every year for the next five years, according to our plan, because of inflation and the modest growth rate for the first three years, the defense budget in absolute dollars will be bigger than the year before.

So my message to both our allies and to our friends, and in light of what some of our closest allies have had to do in terms of their own military capabilities, is that this President understands and accepts our global responsibilities. And we will continue to invest in the defense capabilities that are necessary to sustain our military strength and meet our global responsibilities.

So I think, as you write your stories, the focus here is on a reduction in the rate of growth, as opposed to absolute cuts.

ADM. MULLEN: I'd just -- the only thing I would add to that is -- to one of the points in your question is, I believe that we're pretty close to the limit in terms of what we can do to sustain our force structure overall and that, you know, any significant additional budget cuts can almost only be met -- keeping us whole, not hollowing us out -- can only be met through substantial reductions in force structure, and that's against the national security requirements that we see in the world we're living in. And we think this budget and this future and its capabilities is about right.

SEC. GATES: [Julian].

Q: I want you to talk a little bit more about the Army cut. You've talked -- as you mentioned before, you've cautioned against drastic declines in defense budgets after wars. What it looks like here is, after the Afghanistan war is scheduled to wind down, we'll have a dramatic force cut. So, A, why is that not a taking of a peace dividend?

And two, a lot of the problems you confronted over the course of being Defense secretary had to do with an overstretched Army, suicides, extended tours, all of which had to be solved in part by growing the Army. Why don't you -- are you -- how can you be confident that we're not going to need an Army the size that we've had? Because you've used all of your Army that you've had.

So why isn't this a peace dividend, and why aren't we inviting more problems by cutting the size of the Army?

SEC. GATES: Well, first of all, over the past year-and-a-half, we have brought 120,000 soldiers out of Iraq. Over that same period of time, we have increased the number of soldiers in Afghanistan by about half that number. And we will begin a process of conditions- based gradual drawdowns in Afghanistan beginning next -- beginning this coming July.

As I say, I think perspective here is important. First of all, the numbers that we're talking about are relatively small, and the Army is still left significantly larger than it was four years ago. And, you know, we've had -- we've had several increments in the increase in military -- in Army strength, partly to deal with the dwell time problem, partly to get rid of stop-loss. In addition to the 65,000 increase in the Army that I approved in 2007, I approved last year an additional 22,000. That 22,000 was temporary, and the Army itself acknowledged that that will begin coming out and basically be gone in 2013. So the Army's planning for these things.

You know -- I mean -- let's be realistic. Looking five years into the future -- and the chairman referred to this, and I referred to it also, earlier -- looking five years into the future is through a pretty cloudy crystal ball. And any number of these decisions could be reversed or changed in some respect if the situation around the world were to change in some dramatic way beyond what we see right now.

We plan for -- we are the only place in government, I think, that plans on a five-year basis. But obviously, the further out in that five years you go, the more uncertain things become. But you still have to do some planning along these lines. But because we are still engaged in Iraq, because we are still in Afghanistan, that's why we're not even going to begin this process in our plan until 2015. That's a long time from now.

Yoshi.

Q: Mr. Secretary, you seem to be saying two somewhat different things: on the one hand, that the Pentagon can't exempt itself from the belt-tightening that's happening across the government; on the other hand, as you emphasize again and again, some of these are fairly modest costs. I mean, the Army and Marine Corps remaining bigger than when you took office, for instance.

How do you square those? I mean, if the Pentagon can't exempt itself, why not make bigger cuts? I mean, the deficit reduction commission -- these were serious people making serious recommendations, and the recommendations were for much deeper cuts than what you've outlined.

And Admiral, you talked before about the force structure. Our closest allies, the British, obviously, have just gone through a very similar review, and their conclusions were again quite different. They thought that they could cut more, mothball more.

Why is there this difference in strategic -- in understanding between us and between our closest ally?

SEC. GATES: First of all, we are having to tighten our belt. The FY '12 budget will be \$13 billion smaller than we thought it would be a year ago. And overall defense spending for the next five years, that top line will be a total of \$78 billion smaller.

Now, the 13 [billion dollars], by the way, is included in the 78 [billion dollars], so it's not additive. So we are tightening. But we also have to realize that we are still engaged in a very active war in Afghanistan and a -- and still have 50,000 troops in Iraq. We confront the problems that we have in Iran and in North Korea. We obviously have very ambitious military programs in both China and Russia, and modernization programs.

So I think, you know, the -- defense also needs to be looked at, and I obviously have a very parochial view here,

okay? The defense of the republic is one very unambiguous responsibility of the federal government, and we face a very complex world. We think we are -- have tightened up a good bit. We think that this is a sustainable budget. But I would say, you know -- and again, I would go back to remind that last year we cut programs that, had they been -- gone to completion over a period of years, would have cost the taxpayers about \$330 billion. So it's not like we haven't been trying to be responsible in the management of this process.

In terms of the recommendations for much, much deeper cuts, I would respond the same way that I did a few weeks ago. As far as I'm concerned, that's math, not strategy.

ADM. MULLEN: And with respect to our allies who've cut their defense budgets significantly before this, I'd -- I would just pick up, I think, on what the secretary said in his remarks, which is this budget, and not just this year, the '12 budget, but as we look out for the next four or five years, just reaffirms the responsibility, the global responsibility, and the security environment that the United States has filled for a significant period of time.

We're also at a time where we do this with our allies. There's no question about that, whether it's Iraq or Afghanistan or operating in other parts of the world. We do routinely. So certainly cognizant of that, but the United States' leads in this, empowers, I think, the security environment globally in ways that we have for the last 60 years and that we'll continue to do this.

And then one other comment I'd make -- and Julian, you talked about peace dividend, and you used the term "drastic." And we think it's modest, and I understand trying to frame it. But, you know, we have -- this budget has basically doubled in the last decade. And my own experience here is in that doubling, we've lost our ability to prioritize, to make hard decisions, to do tough analysis, to make trades. We're now, I think, in a very good environment here in the building because of this effort to do exactly that. And that's the output that you see that is this budget that meets national security needs and at the same time recognizes the fiscal reality that this country is in. And I think we can do both.

SEC. GATES: The thing to stress -- and I mentioned it in the prepared remarks -- is that the only way we can realize the savings for reinvestment is by the execution of the efficiencies and the changes in doing business. The two are integrally linked.

There won't be any more money coming from the outside to feed those programs. We're going to have to do it ourselves. We think we can do it, but we've got to execute this program.

Q: There's a lot of speculation about whether you plan to step down this year, as you said in the past. Does this budget mean that you plan to stay through the budget process? And can you give assurances that you plan to say longer: to the end of the year, till next year, until the end of this term?

SEC. GATES: No. (Laughter.)

Q: (Off mic) -- briefed this Congress this morning on your initiatives. Can we ask you what their reactions were? And how much of the total that you're presenting today actually hinges on congressional support? Because potentially some of these weapons -- funding for these weapons programs could come back. How much of that would impact your proposal and --

SEC. GATES: Well, I would say that, first of all, I think -- and I certainly don't want to speak for them, but I think the amount of information that we communicated in a relatively short period of time was a little overwhelming, and they're clearly going to need to take some time and look at our proposals in detail. And what I told them was that we would be prepared -- the president authorized me to go forward with these changes. Obviously there's a great deal more to do with the FY '12 budget than what I've talked about here today. And getting into those details will have to await the finalization of the budget and then its presentation to the Congress.

On those aspects that I've talked about today, the services and the department are prepared to go up and start briefing the committees next week, and so they will begin to have greater understanding of the -- of these -- as to the details of this.

Some aspects of this, the details probably won't be nailed down until the budget itself is finalized in a couple weeks or so.

But we will -- we will go up there. And I would say that I think a fair characterization of the meeting was that there were a number of questions but very little editorial comment.

Q: And how much of this -- how much of this will actually --

SEC. GATES: Well, everything having to do with the FY '12 budget will go through the regular congressional budget process. So a lot of these program changes that I talked about clearly will have to -- have to go through them.

Q: (Off mic) -- "don't ask, don't tell," it's been a few weeks since the repeal. Can you give us an update on how anything has proceeded since then, given the promise was no foot-dragging?

SEC. GATES: Yeah. Our goal here is to -- is to move as quickly but as responsibly as possible. I see this as a -- as a three-step process. The first is to finalize changes in regulations, policies, get clearer definition on benefits.

The second phase is to then prepare the training materials for use first of all with the experts, if you will, the personnel people, the chaplains, the judge advocate generals; and second, the leaders, commanders; and then third, the troops. So there's the policy piece, the training -- preparation piece, and then the actual training.

We're trying to get the first two phases of that process done as quickly as possible. My hope is that it can be done within a matter of a very few weeks so that we can then move on to what is the real challenge, which is providing training to 2.2 million people.

And we will -- we will do that as expeditiously as we can. But as the -- to use the term the chairman's used, there's just a certain element of physics associated with the number of people involved in this process.

But we are moving it as -- and I have asked Under Secretary [Cliff] Stanley to accelerate the first two phases of this process as much as he possibly can so that we can get on with the training process. I was very struck by one of the chief's comments that it's better to -- better to do this sooner rather than later. So we're kind of approaching it with that -- with that philosophy in mind.

ADM. MULLEN: The only thing I'd add is, just to remind, you know, the law has not changed, won't until it is certified; and there's 60 days after certification. And so now is not -- from my perspective, you know, now is not the time to "come out," if you will. We'll get through this. We'll do it deliberately. We certainly are focused on this. And we won't -- we won't dawdle.

Q: Thank you, Mr. Secretary. My question is about your upcoming trip to Asia this weekend. The first stop is China.

What are your expectations on this visit, and what are the key messages you will be delivering to your Chinese counterpart after such a rocky year with China?

SEC. GATES: Well, I think -- I think that I would say two things. First, I am eager to explore where we can further develop and deepen a dialogue on a number of issues of mutual concern and where we have -- and where we both have interests -- North Korea is an obvious example, but Iran, a number of other areas where we are engaged with the Chinese and where there are security issues involved.

I think expanding that dialogue is really important.

The second is to explore areas where we might be able to do more in a military-to-military sense together, as partners. Whether it's in training and exercising for humanitarian assistance, disaster relief, counter-piracy, there are variety of areas where actually our interests coincide and where I think we can explore working together as equal partners and develop the relationship further.

Q: (Off mic.)

SEC. GATES: Okay.

Q: Mr. Secretary --

SEC. GATES: Yeah, two more questions.

Q: Can you take another question on the JSF? I'm just curious. With regard to the program, I'm curious. What

has to happen in the next two years for STOVL to, you know, avoid termination?

And do you still expect the -- (inaudible) -- to be ready for international release in 2014 -- as earlier planned for our allies?

And finally, there's sort two pressures there. You've got a pressure to reduce per-unit costs, but you might be pushing production back, which will increase near-term per-unit costs. So how do you square that?

SEC. GATES: Well, first of all, I think that -- I think that we manage the costs. I think we've been able to -- the fourth production package we were very successful, I think, in negotiating cost reductions. And so I think Under Secretary [Ash] Carter is doing a really good job in that respect. And better to get it right at the front end. I think we will end up saving money by getting it right at the front end, rather than having to go back and refit planes that have already been produced, as we learn things in the -- in the development and test program.

As far as the other two questions, I'll have to ask Bryan or somebody to get back to you from Ash. I just don't know the answer.

Last question.

Q: Mr. Secretary, you talked about real growth versus the continuing resolution. What would you say to those who argue that 553 [billion dollars] in FY '12, 553 billion [dollars], would in fact be a cut versus the plan and program baseline? They argue that that's less than 1 percent growth over what you asked for in FY '11, and less than 1 percent doesn't even keep up with inflation.

SEC. GATES: Well, you know, one of the things that I've learned in this job is how you end up -- how you answer a question like that begins on the number you start with. And I've got four numbers.

So the first number is \$530 billion. That's the continuing resolution. That's an \$18 billion cut below -- that's \$18 billion below what our request -- the President's request was. That will be a disaster for us. We will have real problems.

The second number is the number that the Appropriations Committee's mark to. And let me just go back from the continuing resolution number of 530 [billion dollars] to the 553 [billion dollars] is 3 percent real growth.

Q: Right.

SEC. GATES: So if you start with the Appropriations Committee's mark, which was in the omnibus, which was 538 [billion dollars] to 553 [billion dollars], that's a percent and a half real growth.

If you go from our original budget request of 548 [billion dollars] to 553 [billion dollars], it's actually, I think, a little less than real growth. And then you've got the 566 [billion dollars], which is where we were last year.

You know, my point here is that we are -- we are not exempt from scrutiny and from being asked to figure out how to do what we are doing with less dollars.

Nobody has come to us and said stop doing something. So the only way we can continue to do what we're doing, in terms of modernization, in terms of our forces, in terms of our force structure, is to take money out of overhead and to provide the 2 to 3-percent real growth in the part of the budget that really matters to executing our mission, and that is the forces and capabilities.

So I would argue -- overall pressure on the defense budget? Absolutely. And that's not a surprise to anybody, and it sure shouldn't be. And there are those on the Hill, in both parties, saying that the defense budget ought to be cut more.

And so my view is, we have come down, I think, in a pretty good place in terms of responsibly dealing with less money than we thought we would have, but figuring out a way to move money from overhead to the business end of the Department of Defense, which is our ability to fight, our capabilities.

So, you know, my point is, you're going to see all kinds of conclusions about these numbers, because it will all depend on where you start. And my view is, as I said and as the chairman endorsed, if we can get this budget, we believe we can do what we wanted to do, which is protect our force structure, protect our modernization investments and take care

of our people. And we think we've been pretty responsible in figuring out how to do that, and to ensure that in those three categories, we have a real rate of growth that is where it matters.

Q: Is it only -- is it only correct to look at it the way you're doing, you know, when you say versus the continuing resolution? Or are the other perspectives also valid from --

SEC. GATES: Well, as I -- I actually put in here that -- in my prepared remarks that you'll see, that if you look at it from the standpoint of the Appropriations Committee marks, it's a percent and a half real growth for FY '12.

Q: Fine.

SEC. GATES: Thank you.

FILED

UNITED STATES COURT OF APPEALS

NOV 01 2010

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

LOG CABIN REPUBLICANS,
a non-profit corporation,

Plaintiff - Appellee,

v.

UNITED STATES OF AMERICA;
ROBERT M. GATES, Secretary of
Defense, in his official capacity,

Defendants - Appellants.

No. 10-56634

D.C. No. 2:04-cv-08425-VAP
Central District of California,
Los Angeles

ORDER

Before: O'SCANNLAIN, TROTT and W. FLETCHER, Circuit Judges.

Appellee's motion for leave to file an oversize response to appellant's motion for stay pending appeal is GRANTED.

Appellant's motion to stay the district court's October 12, 2010, order pending appeal is GRANTED.¹ The briefing schedule established previously shall remain in effect.

¹ As to oral argument, both sides have provided us with satisfactory information and argument to make this decision, and, in accord with our General Orders, we have decided that oral argument is not necessary.

I

On October 12, 2010, the district court entered a permanent injunction enjoining the enforcement or application of an Act of Congress known as the “Don’t Ask, Don’t Tell Act,” codified at 10 U.S.C. § 654. Although the government, including the President, the Secretary of Defense, and the Chairman of the Joint Chiefs of Staff, tells us that “[t]he Administration does not support § 654 as a matter of policy and strongly believes Congress should repeal it,” the government nevertheless asks us to “stay enforcement of the district court’s order pending resolution on the merits by our Court of the constitutional issues involved.” The government argues that the district court’s plenary order—mandating that its injunction be given immediate worldwide effect—will seriously disrupt ongoing and determined efforts by the Administration to devise an orderly change of policy. The government asserts that successfully achieving this goal will require as a preliminary matter the preparation of orderly policies and regulations to make the transition. We are advised by the government that, in legal terms, a precipitous implementation of the district court’s ruling will result in “immediate harm” and “irreparable injury” to the military. To make this point, the government avers that a successful and orderly change in policy of this sort will not only require new policies, but proper training and the guidance of those

affected by the change. The government persuasively adds that “[t]he district court’s injunction does not permit sufficient time for such appropriate training to occur, especially for commanders and servicemen serving in active combat.” We also note that the government takes issue with the district court’s constitutional conclusions.

II

In addition to the fact that this case raises “serious legal questions,” Golden Gate Restaurant Association v. City and County of San Francisco, 512 F.3d 1112, 1115 (9th Cir. 2008), there are three reasons that persuade us to grant a stay pending appeal.

First, Acts of Congress are presumptively constitutional, creating an equity in favor of the government when balancing the hardships in a request for a stay pending appeal. Bowen v. Kendrick, 483 U.S. 1304 (1987) (Rehnquist, C.J., in chambers). In fact, “[w]henever called upon to judge the constitutionality of an Act of Congress—‘the gravest and most delicate duty that this Court is called upon to perform’—the Court accords ‘great weight to the decisions of Congress.’” Rostker v. Goldberg, 453 U.S. 57, 64 (1981) (quoting Blodgett v. Holder, 275 U.S. 142, 148 (1927), and Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. 94, 102 (1973)).

Second, “‘judicial deference . . . is at its apogee’ when Congress legislates under its authority to raise and support armies.” Rumsfeld v. Forum for Academic & Institutional Rights, 547 U.S. 47, 58 (2006) (quoting Rostker v. Goldberg, 453 at 70). Rostker advises us in turn that courts must be “careful not to substitute [their] judgment of what is desirable for that of Congress” where the military is concerned. 453 U.S. at 68. “Courts are ill-suited to second-guess military judgments that bear upon military capability and readiness.” Able v. United States, 155 F.3d 628, 634 (2d Cir. 1998). Moreover, “the Constitution contemplates that Congress has ‘plenary control over rights, duties, and responsibilities in the framework of the Military Establishment, including regulations, procedures, and remedies related to military discipline.’” Weiss v. United States, 510 U.S. 163, 177 (1994) (quoting Chappell v. Wallace, 462 U.S. 296, 301 (1983)). These principles do not mean, of course, that the individual rights guaranteed by our Constitution have no place in this calculus, but they do counsel careful consideration before final judgment. Rostker, 453 U.S. at 67 (“None of this is to say that Congress is free to disregard the Constitution when it acts in the area of military affairs.”).

Third, the district court’s analysis and conclusions are arguably at odds with the decisions of at least four other Circuit Courts of Appeal: the First, Second,

Fourth, and Eighth. See Cook v Gates, 528 F.3d 42 (1st Cir. 2008) (holding that § 654 does not violate constitutional substantive due process, the principle of equal protection, or the Free Speech Clause of the First Amendment); Able v. United States, 155 F.3d at 631-36 (§ 654(b) does not violate the Constitution’s Equal Protection Clause of the Fifth Amendment); Richenberg v. Perry, 97 F.3d 256, 260-62 (8th Cir. 1996) (§ 654 does not violate the First Amendment or the Equal Protection component of the Fifth Amendment); Thomasson v. Perry, 80 F.3d 915, 927-31, 934 (4th Cir. 1996) (en banc) (holding that § 654 does not violate any provision in the Constitution). As we said in United States v. AMC Entertainment, Inc., 549 F.3d 760 (9th Cir. 2008),

Principles of comity require that, once a sister circuit has spoken to an issue, that pronouncement is the law of that geographical area. Courts in the Ninth Circuit should not grant relief that would cause substantial interference with the established judicial pronouncements of such sister circuits. To hold otherwise would create tension between circuits and would encourage forum shopping.

Id. at 773. The Appellees’ answer to our sister circuits’ decisions is that they are now “irrelevant,” but only a final merits decision by an appellate court can render this judgment.

Accordingly, we conclude that the government’s colorable allegations that the lack of an orderly transition in policy will produce immediate harm and

precipitous injury are convincing. We also conclude that the public interest in ensuring orderly change of this magnitude in the military—if that is what is to happen—strongly militates in favor of a stay. Golden Gate Restaurant Ass’n, 512 F.3d 1115. Furthermore, if the administration is successful in persuading Congress to eliminate § 654, this case and controversy will become moot.

Although our respected colleague in dissent agrees generally with the gist of our decision to grant this stay, he would allow the district court’s permanent injunction to remain in effect with respect only to the military’s authority to discharge any member who violates the “Don’t Ask, Don’t Tell” policy while the issues remain on appeal. In our view, this “carve out” is inconsistent with the stay itself and would be subject to the vagaries of the rule of unintended consequences. It could have the unfortunate effect of encouraging violations of § 654 in the interim, which, if the statute were ultimately to be found valid (an issue on which we express no opinion), would leave the persons involved in a precarious position, because even Appellees admit that the government could resume discharges if the district court judgment is reversed.

In light of these concerns, we believe that prudence mandates restraint until the final judgment is rendered.

W. FLETCHER, Circuit Judge, dissenting:

I respectfully dissent.

I would have preferred to hear argument to assist our panel in deciding whether, or in what degree, to grant the Defendants' motion to stay the district court's order. However, our General Orders provide that one judge requesting oral argument on a motion is not enough. G. O. 6.3.g.(4) ("If two judges determine that oral argument on a motion is necessary, the panel shall direct the motions attorney to make the necessary arrangements.").

I would stay the district court's order in all respects except one: I would allow the district court's order to continue in effect insofar as it enjoins the Defendants from actually discharging anyone from the military, pursuant to the Don't Ask Don't Tell policy, during the pendency of the appeal. Defendants would not be required during the pendency of the appeal to change their recruiting practices, to change their personnel manuals, or, subject only to the requirement that they not actually discharge anyone, otherwise to change their practices. If the hardship that would be imposed on plaintiffs by actual discharge is removed, the balance of hardships would tip sharply in favor of the Defendants. A partial stay of the district court's order, such as I have just described, would then be appropriate. See Golden Gate Rest. Ass'n v. City & Cnty. of San Francisco, 512

F.3d 1112, 1115-16 (9th Cir. 2008) (a stay is appropriate when there are “serious legal questions” and the balance of hardships tips sharply in favor of the party seeking the stay).