No. 06-1289

In the Supreme Court of the United States

EVELYN L. LEWIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

The Defense Officer Personnel Management Act (DOPMA), 10 U.S.C. 611 *et seq.*, prescribes the procedures by which certain military officers are promoted, including a requirement that military appointments be made by the President, but it does not specify what happens when those procedures are not followed. The question presented is:

Whether the failure to follow DOPMA's procedures results in automatic appointment, by operation of law, of the affected officer to the next higher rank.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 458 F.3d 1372. The opinion of the United States Court of Federal Claims (Pet. App. 16a-29a) is reported at 67 Fed. Cl. 158.

JURISDICTION

The judgment of the court of appeals was entered on August 14, 2006. A petition for rehearing was denied on October 26, 2006 (Pet. App. 55a). On January 12, 2007, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including March 25, 2007, and the petition was filed on March 23, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Defense Officer Personnel Management Act (DOPMA), 10 U.S.C. 611 *et seq.*, prescribes the procedures by which certain military officers are promoted.[1] The promotion process is initiated by the Secretary of a military department, who, in response to departmental needs, "convene[s] selection boards to recommend for promotion [certain military officers] to the next higher permanent grade." 10 U.S.C. 611(a) (Supp. IV 2004). After completing its prescribed tasks, each selection board "submit[s] to the Secretary of the military department concerned a written report * * * containing a list of the names of the officers it recommends for promotion." 10 U.S.C. 617(a). The Secretary of the military department concerned then reviews the report and ultimately submits it, "with his recommendations thereon, to the Secretary of Defense for transmittal to the President for his approval or disapproval." 10 U.S.C. 618(a)-(c). The President has the authority to remove the name of a recommended officer from a selection board's report. 10 U.S.C. 618(d).

After the President has approved the selection board's report and thereby nominated the named officers for a promotion, "the Secretary of the military department concerned shall place the names of all officers approved for promotion within a competitive category on a * * * promotion list, in the order of seniority of such officers on the active-duty list." 10 U.S.C. 624(a)(1).

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[1] Congress amended certain provisions of DOPMA in 2006. See John Warner National Defense Authorization Act for Fiscal Year 2007 (Warner Act), Pub. L. No. 109-364, §§ 511-515, 120 Stat. 2181-2187. Unless otherwise noted, references to DOPMA are to that Act as it existed on February 1, 2002.

That list is used to determine the named officers' promotion dates, which are ultimately set by the Secretary concerned under Sections 624(b)(2) and 741(d). 10 U.S.C. 624(b); 10 U.S.C. 741(d) (2000 & Supp. IV 2004). The statute provides: "Except as provided in subsection (d), officers on a promotion list for a competitive category shall be promoted to the next higher grade when additional officers in that grade and competitive category are needed," in the order in which the officers' names appear on the list. 10 U.S.C. 624(a)(2).

Subsection (d) of Section 624 authorizes the Secretary of the military department concerned to issue regulations delaying the date of an officer's promotion beyond the date on which the officer would otherwise have been promoted (*i.e.*, beyond the date on which the officer would have been selected for promotion from the promotion list). See 10 U.S.C. 624(d) (2000 & Supp. I 2001).[2] Most relevant here, Section 624(d)(2) authorizes the Secretary concerned to delay the promotion of an officer when "there is cause to believe that the officer is * * * professionally unqualified to perform the duties of the grade for which he was selected for promotion." 10 U.S.C. 624(d)(2) (Supp. IV 2004). In cases of delay, the officer whose promotion is being delayed must be given timely, written notice of the grounds for the delay, 10 U.S.C. 624(d)(3), and a promotion "may not be delayed * * * more than 18 months after the date on which such officer would otherwise have been appointed," 10 U.S.C. 624(d)(4). The statute does not specify a consequence for delay beyond eighteen months.

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[2] See SECNAV Instruction 1420.1A para. 23 (Jan. 8, 1991) (Pet. App. 92a-95a). Instruction 1420.1A was cancelled when the Secretary of the Navy issued SECNAV Instruction 1420.1B (Mar. 28, 2006) (which contains similar pertinent provisions). See *id.* para. 23.

After the President has nominated the named officers (by approving the selection board's report), he forwards the nominations to the Senate, as required by Section 624(c), which mandates that appointments under DOPMA "shall be made by the President, by and with the advice and consent of the Senate." 10 U.S.C. 624(c) (Supp. IV 2004). The name of any officer not confirmed by the Senate is removed from the list. 10 U.S.C. 629(b).

Once an officer has been nominated by the President and confirmed by the Senate, the officer must still be appointed by the President. See 10 U.S.C. 624(c) (Supp. IV 2004); see also 10 U.S.C. 629(a). Appointment generally occurs through the issuance of a letter signed by or for the President to each appointee, along with a certificate of appointment. See *Dysart* v. *United States*, 369 F.3d 1303, 1308 (Fed. Cir. 2004). Under Section 626(a), an "officer who is appointed to a higher grade under section 624 of this title is considered to have accepted such appointment on the date on which the appointment is made unless he expressly declines the appointment." 10 U.S.C. 626(a). The relevant Secretary determines the date of the appointment, pursuant to Sections 624(b)(2) and 741(d). See 10 U.S.C. 624(b)(2); 10 U.S.C. 741(d) (2000 & Supp. IV 2004).

2. Petitioner entered active duty in the United States Navy as a physician in 1983. Pet. App. 16a. Since 1991, petitioner's state-issued medical license restricted her practice of medicine to federal facilities. *Id.* at 2a, 16a. On April 21, 1999, the President nominated petitioner for promotion to the rank of captain. *Id.* at 2a. Petitioner's projected promotion date was August 1, 2000. *Id.* at 17a. The Senate confirmed petitioner's nomination on June 30, 1999. *Id.* at 2a.

On October 17, 1998, Congress amended 10 U.S.C. 1094. Strom Thurmond National Defense Authorization Act for Fiscal Year 1999 (Thurmond Act), Pub. L. No. 105-261, § 734(a), 112 Stat. 2072. Before October 1, 1999, the effective date of the amendment (Thurmond Act § 734(c)(1), 112 Stat. 2073), Section 1094 required all Department of Defense (DoD) healthcare professionals to have a "current license." Pet. App. 2a (quoting 10 U.S.C. 1094(a)(1) (1994)). The amendment added the requirement that the license also be unrestricted. *Ibid.*

In December 1999, the Navy Bureau of Medicine and Surgery directed petitioner to demonstrate why the Navy should retain her services, given her lack of an unrestricted medical license. Pet. App. 2a. A Navy Board of Inquiry determined that petitioner should be retained. *Id.* at 2a-3a. The Chief of Naval Personnel determined, however, that petitioner might no longer be eligible for promotion to captain because her medical license was restricted. *Id.* at 3a. On June 27, 2000, the Navy notified petitioner that her promotion would be delayed pending resolution of the issue by the Secretary of the Navy. *Ibid.*

3. On September 26, 2000, petitioner filed this action in the United States District Court for the District of Columbia. Pet. App. 3a. Petitioner claimed that the delay in her promotion was arbitrary and capricious. *Ibid.* The district court dismissed petitioner's complaint, and she appealed. *Ibid.*

On February 1, 2002, while petitioner's appeal was pending before the District of Columbia Circuit, the eighteen-month delay period set forth in Section 624(d)(4) expired. Pet. App. 3a-4a. Recognizing that this expiration had occurred without her name being removed from the promotion list, on March 5, 2002, petitioner ap-

plied to the Board of Correction for Naval Records (BCNR), seeking a determination that she had been automatically promoted to captain by operation of law as of February 1, 2002. *Id.* at 4a. Subsequently, on May 10, 2002, the Secretary of the Navy removed petitioner's name from the promotion list. *Ibid.* And on February 10, 2003, the BCNR denied petitioner's application for relief. *Ibid.* Thereafter, the Secretary of the Navy granted petitioner's request for retirement effective January 1, 2004. *Ibid.*

Meanwhile, on April 30, 2003, the D.C. Circuit remanded petitioner's appeal to the district court and advised her to seek leave of the district court to amend her complaint to add a monetary claim and to transfer her case to the United States Court of Federal Claims. Pet. App. 4a. Petitioner did so, and the district court granted her motion. *Ibid.*

4. a. In the Court of Federal Claims, petitioner alleged that she had been promoted to captain by operation of law under Section 624(d). Pet. App. 4a. Petitioner also argued that Section 1094's unrestricted medical-license requirement did not apply to her because she was in an administrative position and did not provide direct patient care. *Id.* at 4a-5a, 11a-14a. Petitioner requested pay and allowances for the rank of captain beginning on August 1, 2000, her projected promotion date. *Id.* at 5a, 17a.

Relying on *Dysart*, *supra*, the Court of Federal Claims held that the President has complete discretion concerning the appointment of military officers and that the expiration of the eighteen-month period therefore did not result in the automatic appointment of petitioner in the absence of Presidential action. Pet. App. 28a. Ac-

cordingly, the court granted the government's motion for judgment on the administrative record. *Id.* at 29a.

b. A unanimous panel of the Federal Circuit affirmed. Pet. App. 1a-15a. It held that, under its decision in *Dysart*, petitioner was not, and could not have been, automatically promoted because "the language of [Section 624] does not provide for automatic appointment." *Id.* at 10a (quoting *Dysart*, 369 F.3d at 1313). In addition, the court reasoned that, even if the language did so provide, "the statute could not constitutionally provide for automatic appointment because 'military officers must be appointed pursuant to the constitutional process, which requires appointments at the discretion of the President, not automatic appointments pursuant to statute.'" *Ibid.* (quoting *Dysart*, 369 F.3d at 1315). The court held also that the Navy's denial of petitioner's promotion was not contrary to Section 1094's requirement that DoD healthcare professionals hold unrestricted medical licenses. *Id.* at 11a-14a. Accordingly, the court of appeals upheld the Navy's determination that petitioner was not qualified for promotion. *Id.* at 14a.

ARGUMENT

Petitioner does not challenge the court of appeals' holding that she was not qualified for promotion because she lacked the requisite medical license. See Pet. 12 n.9; Pet. App. 11a-14a. Instead, petitioner argues only that, despite her lack of professional qualifications for the promotion, she was automatically promoted by operation of law because her name was not removed from the promotion list within the eighteen-month time frame set forth in Section 624(d)(4). See Pet. 19-28. The Federal Circuit's unanimous decision rejecting that argument is correct, and this case has limited prospective importance.

Moreover, as petitioner acknowledges (Pet. 17), there is no conflict with any other court of appeals because claims like petitioner's "are litigated almost exclusively in the Federal Circuit," and thus "only" the Federal Circuit has addressed this issue. Further review is therefore unwarranted.

1. Petitioner contends that DOPMA's plain language provides for automatic appointment when an officer's name is retained on the promotion list beyond the eighteen-month time frame set forth in Section 624(d)(4), regardless of whether the President has actually appointed the officer to the new position and regardless of whether the officer is even qualified for the new position. See Pet. 19-22. She further contends that the Federal Circuit incorrectly concluded that her interpretation of DOPMA would render the statute unconstitutional. See Pet. 23-28. Petitioner is wrong on both counts.

a. First, regarding the statutory language, petitioner relies principally upon Section 624(a)(2), which states: "Except as provided in subsection (d), officers on a promotion list for a competitive category shall be promoted to the next grade when additional officers in that grade and competitive category are needed." 10 U.S.C. 624(a)(2). Petitioner contends that this provision mandates that an officer whose name is on a promotion list approved by the President and confirmed by the Senate must be—and, therefore, automatically is—promoted if the officer's name is not removed from the promotion list within the eighteen-month time frame set forth in Section 624(d)(4), even if, as in petitioner's case, the officer is professionally unqualified for the promotion.

Petitioner's interpretation is incorrect, because it reads Section 624(c) out of the statute. Section 624(c) requires that "[a]ppointments under this section shall be

made by the President." 10 U.S.C. 624(c) (Supp. IV 2004). This language unambiguously and without exception requires Presidential appointment of all officers promoted under the statute—an appointment that is separate and distinct from Section 624(a)'s requirement that the President approve the selection board's report before preparation of the promotion list. Cf. *Weiss* v. *United States*, 510 U.S. 163, 170 n.4 (1994) ("10 U.S.C. § 624 requires a new appointment by the President, with the advice and consent of the Senate, each time a commissioned officer is promoted to a higher grade—*e.g.*, if a captain is promoted to major, he must receive another appointment.").

As the *Dysart* court explained, "the language of the statute does not provide for automatic appointment without action by the President. Rather, the statute provides that appointments are made 'by the President, by and with the advice and consent of the Senate.'" 369 F.3d at 1313 (quoting 10 U.S.C. 624(c)). DOPMA, in short, does not permit appointments without Presidential action. Petitioner's claim to the contrary flatly contradicts the plain language of the statute.

This understanding of DOPMA is confirmed by the fact that Section 624(d)(4) does not specify that automatic appointment is the consequence of a delay beyond the eighteen-month time frame. Indeed, if Congress had provided for automatic appointment in Section 624(d)(4), that would have directly contradicted the Presidential appointment requirement in Section 624(c). As this Court has explained on numerous occasions, "if a statute does not specify a consequence for noncompliance with statutory timing provisions, the federal courts will not in the ordinary course impose their own coercive sanction." *Barnhart* v. *Peabody Coal Co.*, 537 U.S. 149, 159 (2003)

(quoting *United States* v. *James Daniel Good Real Prop.*, 510 U.S. 43, 63 (1993)). Cf. *Regions Hosp.* v. *Shalala*, 522 U.S. 448, 459 n.3 (1998) ("The Secretary's failure to meet the [statutory] deadline, a not uncommon occurrence when heavy loads are thrust on administrators, does not mean that official lacked power to act beyond it."). Because Congress did not provide for automatic appointment in DOPMA, the court of appeals was correct not to do so.

Moreover, as discussed below, such an automatic-appointment provision would, at a minimum, create significant constitutional concerns. Congress's silence regarding the consequence of a delay beyond eighteen months therefore should not be read as implicitly providing for automatic appointment. See *Ashwander* v. *TVA*, 297 U.S. 288, 346-348 (1936) (Brandeis, J., concurring). Accordingly, petitioner's claim that the Federal Circuit erred in interpreting DOPMA is without merit.

b. Petitioner's contention (Pet. 23-28) that her interpretation of DOPMA would not raise significant constitutional problems is equally without merit. As the *Dysart* court correctly explained, the "constitutional process allows the President complete discretion in choosing whether or not to appoint an officer." 369 F.3d at 1311. Chief Justice Marshall said as much in *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137 (1803), in which he explained that the appointment is "the sole act of the President." *Id.* at 157. Thus, even if it intended to provide for automatic appointments in DOPMA, "Congress could not have permissibly altered the appointment process set forth in the Constitution by providing for automatic ap-

pointments." *Dysart*, 369 F.3d at 1314.[3] The Federal Circuit appropriately recognized this obvious constitutional problem arising from petitioner's interpretation of DOPMA and declined to adopt that interpretation.[4]

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[3] Petitioner's alternative argument (Pet. 26-27) that Congress can provide for automatic appointment through the use of its constitutional authority over the appointment of inferior officers is similarly without merit. To the extent the Constitution permits Congress to alter the process for the appointment of inferior officers, the Constitution gives Congress only the power to "vest the Appointment of such inferior Officers * * * in the President alone, in the Courts of Law, or in the heads of Departments." U.S. Const. Art. II, § 2, Cl. 2. The Constitution does not give Congress the power to provide for automatic appointment. Under petitioner's reading, however, that is precisely what Congress has done in DOPMA.

[4] Indeed, not only would petitioner's reading of the statute permit promotion without Presidential appointment, it also would permit promotion without Senate confirmation, even in cases in which DOPMA and the Constitution require such confirmation. Under petitioner's reading of 10 U.S.C. 624 (2000 & Supp. I 2001), automatic promotion occurs immediately upon the expiration of the eighteen-month period specified in Section 624(d)(4)—a period that begins on the officer's projected promotion date. See Pet. 5. Although petitioner suggests (*ibid.*) that the projected promotion date is not set until after Senate confirmation, nothing in DOPMA requires the projected promotion date to be set after Senate confirmation. In fact, the statute contemplates that the projected promotion date will be set immediately upon the President's approval of the selection board's report, regardless of whether Senate confirmation has occurred. See 10 U.S.C. 624(a)(1) ("When the report of a selection board convened under * * * this title is *approved by the President*, the Secretary of the military department concerned shall place the names of all officers approved for promotion within a competitive category on a * * * promotion list, in the order of the seniority of such officers on the active-duty list.") (emphasis added). The 2006 amendments to Section 629(c) make this clear. See Warner Act § 515(a)(2)(B), 120 Stat. 2185 (to be codified at 10 U.S.C. 629(c)(1) and (3) (2006)) (recognizing that promotion lists, which include projected promotion dates, are prepared regardless of whether Senate

In any event, there is no warrant for review by this Court of a constitutional question that is easily—and properly—avoided by the court of appeals' correct interpretation of DOPMA. Cf. *City of Monterey* v. *Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 707 (1999) ("Under our precedents, '[b]efore inquiring into the applicability of [a provision of the Constitution], we must "first ascertain whether a construction of the statute is fairly possible by which the constitutional question may be avoided."'") (citation omitted).

2. Review is also unwarranted because the decision below not only does not conflict with any decision of this Court or of another court of appeals, but also because it has limited continuing importance.

a. Although thousands of military promotions are made annually under DOPMA, see Pet. 14, petitioner's claim that the question presented is a recurring one is incorrect. Indeed, excluding this case, petitioner cites only three other reported cases in which this question has arisen under DOPMA. See Pet. 14-15.[5] Four reported cases in the roughly twenty-six years since DOPMA took effect in 1981—with no reported cases within the first seventeen years of DOPMA's enactment—hardly make this question a recurring one. To the contrary, the question has arisen infrequently be-

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confirmation has yet occurred); see pp. 13-14, *infra* (discussing 2006 amendment). Thus, it logically follows from petitioner's reading of DOPMA that an officer could be promoted without having been either confirmed by the Senate or appointed by the President. Such a result cannot be reconciled with DOPMA's, not to mention the Constitution's, requirement of Senate confirmation and Presidential appointment.

[5] A petition for a writ of certiorari is pending before this Court in one of those three cases. See *Barnes* v. *United States*, No. 06-1466 (filed May 4, 2007).

cause, as history demonstrates, virtually all promotion decisions under DOPMA occur before the conclusion of the eighteen-month time frame set forth in Section 624(d)(4). Thus, the statute has helped ensure that military promotion decisions are made timely and efficiently, without significant involvement by the courts. This Court's review of a question that has arisen—and is likely to arise—only sparingly is not warranted.

b. Recent amendments to DOPMA also make this case a poor vehicle to resolve the meaning of DOPMA's delay provisions. In 2006, Congress amended DOPMA and, in doing so, partially addressed the issue of delay under Section 624(d). Congress inserted, among other provisions, the following subsection into Section 629(c):

> (1) If an officer whose name is on a list of officers approved for promotion under section 624(a) * * * is not appointed * * * under such section during the officer's promotion eligibility period, the officer's name shall be removed from the list unless as of the end of such period the Senate has given its advice and consent to the appointment.

Warner Act § 515(a)(2)(B), 120 Stat. 2185-2186 (to be codified at 10 U.S.C. 629(c)(1) (2006)).[6] Section 629(c)(3), also a new subsection, defines "promotion eligibility period" as the period beginning on the date on which the President approved the promotion list under Section 624(a) and ending on the "first day of the eighteenth month following the month on which the list is so approved." Warner Act § 515(a)(2)(B), 120 Stat. 2186 (to be codified at 10 U.S.C. 629(c)(3) (2006)). No similar provi-

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[6] The Warner Act redesignated the former Section 629(c) as Section 629(d). § 515(a)(2)(A), 120 Stat. 2185.

sions were contained in DOPMA before the 2006 amendments.

By specifying a consequence when there is a delay beyond (approximately) eighteen months from Presidential approval and when no Senate confirmation has yet occurred, these new provisions shed further light on whether 10 U.S.C. 624 (2000 & Supp. I 2001) requires automatic appointment of the affected officer after eighteen months of delay. These amendments support the government's interpretation of DOPMA because, though Congress could easily have done so (in light of the Federal Circuit's prior decision in *Dysart*), it did not specify that automatic appointment is the result of a delay beyond eighteen months when Senate confirmation has already occurred. These amendments also undermine petitioner's suggestion (Pet. 5) that the projected promotion date is not set until after Senate confirmation. Accordingly, even if the Court were inclined to conclude that its review of the meaning of DOPMA's delay provisions were warranted, the Court should await a case that involves, and takes into consideration, the significance of these relevant amendments.

3. Finally, even apart from its limited practical importance, this case would be an inappropriate vehicle to address the question presented. As discussed, petitioner does not challenge the court of appeals' ruling that she was not qualified for a promotion because she lacked the requisite medical license. See Pet. 12 n.9; Pet. App. 3a, 11a-14a. Whatever else is true, there is no reason to reach out and decide the constitutional question framed by petitioner when the plaintiff is manifestly unqualified for the position at issue.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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