No. 06-1289

IN THE
Supreme Court of the United States

EVELYN L. LEWIS, M.D.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

REPLY BRIEF FOR PETITIONER

EUGENE R. FIDELL
MATTHEW S. FREEDUS
FELDESMAN TUCKER LEIFER FIDELL LLP
2001 L Street, N.W.
Second Floor
Washington, D.C. 20036

WALTER DELLINGER
(*Counsel of Record*)
MATTHEW M. SHORS
NILAM A. SANGHVI
ANNE N. CORTINA*
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300
**Admitted only in New York*

Attorneys for Petitioner

Blank Page

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

CONSTITUTIONAL PROVISIONS

STATUTES

TABLE OF AUTHORITIES
(continued)

Page

OTHER AUTHORITIES

Blank Page

REPLY BRIEF FOR PETITIONER

The Government insists that the Defense Officer Personnel Management Act ("DOPMA"), 10 U.S.C. § 611 *et seq.*, requires the President, following Senate confirmation, to issue letters of appointment in order to effectuate the appointment of promoted military officers. But nothing in DOPMA requires or even contemplates such presidential action. The single provision the Government invokes does not remotely support its position. And even if it did, other provisions the Government ignores conclusively disprove the Government's contention. Section 624(a)(2) could not be clearer: Officers who have been nominated by the President and confirmed by the Senate for promotion "shall be" appointed *unless* their names are removed from the promotion list by the end of a prescribed statutory period. There is no plausible textual basis, therefore, for avoiding consideration of whether DOPMA violates *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), and the Appointments Clause, U.S. Const. art. II, § 2, cl. 2.

That pure question of law warrants review. The Government agrees that the Federal Circuit is the only court that will face the issue and that it has conclusively resolved the question. When considered with *Dysart v. United States*, 369 F.3d 1303 (Fed. Cir. 2004), the decision below therefore effectively creates a nationwide rule. Absent review, it will subject countless military officers to unwarranted denials or delays of promotion. This result is precisely what Congress sought to avoid in enacting DOPMA, which was designed to bring certainty and efficiency to a process that affects thousands of military officers every year. Far from being a basis for denying certiorari, the fact that no other circuit will interpret DOPMA's delay provisions or consider the important statutory and constitutional issues raised here demonstrates the necessity of this Court's review.

A. The Question Presented Is Important and Recurring.

The Federal Circuit has correctly acknowledged that the interpretation of DOPMA's delay provisions raises "*significant questions* concerning the appointment process for military officers." *Dysart*, 369 F.3d at 1306 (emphasis added). Nevertheless, the Government contends that, for three reasons, the Court should deny review: First, that there is no conflict among the circuits; Second, that the question is a not recurring one; and Third, that recent amendments to the statute limit the future significance of the Federal Circuit's decision. These arguments are without merit.

1. The Government agrees that the Federal Circuit has addressed the issue, Opp. at 8, and that no other court of appeals will have the opportunity to interpret DOPMA's delay provisions because claims like Dr. Lewis's are litigated exclusively in the Federal Circuit. *Id.* In the Government's view, the absence of a split in the circuits warrants denying the petition. Not so. Although the absence of a split ordinarily counsels against review, here the opposite is true. It is precisely because the only court faced with the Question Presented has conclusively—and wrongly—decided it that the Court should grant the petition.[1] The Federal Circuit's flawed interpretation creates a *de facto* nationwide rule regarding DOPMA's meaning. Absent review and correction here, the decision below will continue to subject the officer corps of all of the military services—including the thousands of officers who are promoted each year—to uncertainty that

---

[1] This Court routinely grants review in patent cases from the Federal Circuit, where "conflict among and with other federal courts . . . has been virtually eliminated," based "largely on the importance of the questions presented." Robert L. Stern et al., *Supreme Court Practice* 263 (8th ed. 2002). The same is true in this case.

Congress not only never intended but in fact affirmatively sought to prevent.

2. Although it acknowledges that "thousands of military promotions are made annually under DOPMA," Opp. at 12, the Government claims that the Question Presented is not recurring because only a few reported cases—another of which, *Barnes v. United States*, No. 06-1446, is currently pending before this Court—have addressed DOPMA's delay provision, 10 U.S.C. § 624(d). But reported cases are not even close to the best indicator of the frequency with which the Question Presented arises. The vast majority of military personnel issues are adjudicated by record correction boards created by 10 U.S.C. § 1552, and never reach the courts because the affected service-member lacks the financial resources needed for litigation. As a practical matter, it is impossible for anyone outside the Government to know precisely how many § 624(d) cases have come before—or are currently pending in—the correction boards. But the bipartisan congressional correspondence reproduced as an appendix to this Reply shows that violations of § 624(d) are by no means a rarity. Reply App. 1ra-3ra. Considering the sheer number of officers who undergo the promotion process each year, that correspondence suggests that the reported cases to which the Government has restricted itself in seeking to minimize the scope of the problem are only the tip of the iceberg.

3. The 2006 DOPMA amendments do not relate to the Question Presented. They clarify the *Legislative* dimension of the appointment process and do not speak to the role of the Executive in that process or to the delay provisions at issue in this case. They thus shed no light on how the provisions pertinent here should be interpreted,[2] except to the ex-

---

[2] The Government concedes that the 2006 amendments are inapplicable to Dr. Lewis. Opp. at 13-14. They do not change the provisions

tent that their legislative history confirms that uncertainty in the promotion process is unacceptable. *See* S. Rep. 109-254 (2006), at 316 ("Relegation of any officer to a . . . 'limbo' status serves the interest of neither the individual officer nor the officer corps."). The Federal Circuit's interpretation of DOPMA allows the President to act upon a military officer's appointment at any time, with the potential result that officers who have been nominated and confirmed will nevertheless languish interminably on the promotion list, awaiting some further Executive act nowhere specified in the statute to effectuate their appointments. This "limbo" has quite

---

that govern this case, and to the extent they can shed light on congressional intent in earlier-enacted legislation, they demonstrate that DOPMA was intended to provide for appointments when its requirements are met. The main amendment on which the Government relies provides that if an officer "is not appointed to [the next] grade 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.*" John Warner National Defense Authorization Act for Fiscal Year 2007 § 515(a), Pub. L. No. 109-364, 120 Stat. 2185 (to be codified at 10 U.S.C. § 629(c)(1) and (3)) (2006) (emphasis added). By its terms, that amendment is irrelevant to the Question Presented here, i.e., what occurs under DOPMA when a *confirmed* officer like Dr. Lewis is retained on the promotion list past the maximum statutory delay period.

Moreover, the Conference Report states that the amendment was intended as a "clarification." H.R. Rep. No. 109-702 (2006), at 105. The report and amendment make sense only if one understands that it was already clear that the Executive could delay an officer's appointment and remove the officer from the promotion list in defined circumstances and within a defined period. Although the prior version of the statute required Senate confirmation, it was not clear what would happen if the officer was never confirmed. The amendment answers that question by specifying a time frame for Legislative action; it does not change the fact that, under DOPMA, a nominated, confirmed officer is promoted on his or her projected promotion date—absent a delay that complies with § 624(d). Far from altering the operation of § 624(d), the amendment harmonizes the arrangements for delays of confirmation and delays of appointment.

wisely been condemned by Congress and provides a substantial reason for granting the petition.

In addition to resting its argument on these unsound bases, the Government glosses over the Federal Circuit's essential constitutional holding concerning *Marbury* and the Appointments Clause. Like the Court of Appeals, the Government does not grapple with whether Congress may vary in any way the manner in which the steps in the appointments process are accomplished.[3] The Court should grant review.

B. The Government's Interpretation of DOPMA Wrongly Subjects Thousands of Military Officers to Unwarranted Promotion Denials and Delays.

The Government's reading of DOPMA suffers from the same flaws as the Federal Circuit's interpretation. DOPMA plainly provides for nomination of an officer by the President, 10 U.S.C. §§ 618(c)(1), 629(b), consideration of nominations by the Senate, *id.* § 629(b), and, following confirmation by the Senate, action by the service secretary either to project a promotion date for the officer, *id.* §§ 624(b),

---

[3] Instead, the Government falls back on the avoidance canon, suggesting that review is unwarranted because the lower court's interpretation of DOPMA avoids any constitutional issues. Opp. at 12. That canon, however, is not applicable where, as here, the Court would have to ignore clear statutory language and congressional intent, adopt an implausible reading of a statute, or write language out of a statute. *See, e.g.*, *HUD v. Rucker*, 535 U.S. 125, 134-35 (2002) (error to apply canon where meaning of statute is clear); *Miller v. French*, 530 U.S. 327, 337 (2000) (rejecting construction that would avoid difficult separation of powers questions when that construction was implausible and would have subverted plain meaning of statute); *United States v. Locke*, 471 U.S. 84, 95-96 (1985) (rejecting argument that deadline should be read out of statute to avoid due process issue because "[t]here is a basic difference between filling a gap left by Congress' silence and rewriting rules that Congress has affirmatively and specifically enacted") (internal quotation marks omitted). The Government asks the Court to do all three.

741(d), or to delay the officer's "appointment under this section," the latter of which may result in removal of the officer's name from the list. *Id.* § 624(d). If an officer's name is not removed from the list within eighteen months, however, the officer is promoted. *Id.* § 741(d)(2); *see also id.* § 624(b)(2).

Despite this clear statutory scheme—which sets forth the role of both the Executive and Legislative branches in the appointments process and delineates clear mechanisms and timeframes for Executive action—the Government argues that the President has unlimited discretion to delay military appointments. *E.g.*, Opp. at 9. It relies almost exclusively on § 624(c), which provides that:

> Appointments made under this section shall be made by the President, by and with the advice and consent of the Senate, *except that* appointments under this section in the grade of first lieutenant or captain, in the case of officers of the Army, Air Force, or Marine Corps, or lieutenant (junior grade) or lieutenant, in the case of officers of the Navy, shall be made by the President alone.

(Emphasis added.)

According to the Government, § 624(c) requires some presidential action beyond § 624(a)'s requirement that the President approve the list of officers recommended for nomination by the selection board. Opp. at 9. But § 624(c) requires nothing of the kind. On the contrary, because most military officers are "inferior officers" within the meaning of the Appointments Clause, *Weiss v. United States*, 510 U.S. 163, 182 (1994) (Souter, J., concurring), for whom Congress has the power to vary the appointments process, § 624(c) simply clarifies that certain lower-grade officers are exempt from the advice and consent requirement. *See* U.S. Const. art. II, § 2, cl. 2 ("[T]he Congress may by law vest the Ap-

pointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."). This exemption from Senate confirmation does not remotely support the Government's view about what kind of presidential action is required to effectuate an appointment, but it is the only provision the Government cites to support its position.

Moreover, even if § 624(c) otherwise supported the Government's view, myriad other provisions of the statute undercut that view. Under the Government's view, the default rule for confirmed officers would be that they would not be appointed absent some additional Executive act following Senate confirmation. But the delay provisions would make no sense if that were the statute's meaning. For example, the provision requiring notice of a delay prior to an officer's projected promotion date would be completely unnecessary if an officer would not expect to be appointed on that date unless otherwise notified in advance. The default contemplated by the statutory scheme is plainly that an officer will be appointed on his or her projected promotion date.[4]

At a minimum, therefore, the Government reads the following provisions entirely out of DOPMA: (1) § 624(a)(2) ("officers on a promotion list . . . shall be promoted" except as provided in the delay provisions); (2) § 624(d)(1) ("the

---

[4] The Government further argues that a "coercive sanction" cannot be imposed by the courts if a statute does not specify a consequence for non-compliance with timing provisions. Opp. at 9. This is unpersuasive. Appointment of an officer nominated by the President and confirmed by the Senate is in no sense a "sanction." Promotion under DOPMA occurs by operation of the statute, and a court upholding such a promotion is merely recognizing the result Congress guaranteed in passing this legislation. *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 159 (2003), and *Regions Hospital v. Shalala*, 522 U.S. 448, 459 n.3 (1998), on which the Government relies, are inapposite because the courts in those cases were imposing the restrictions on agency behavior themselves, rather than applying a law that specified the appropriate result.

appointment of an officer under this section may be delayed" due to pending disciplinary or other proceedings); (3) § 624(d)(2) (providing additional grounds for delay and setting forth procedures for the promotion of delayed officers who are ultimately retained on the promotion list); (4) § 624(d)(3) ("[t]he appointment of an officer may not be delayed" without written notice "unless it is impracticable to give such written notice before the effective date of the appointment"); and (5) § 624(d)(4) (prescribing time limits for promotion delays).

Because the Government's solitary focus on § 624(c) ignores the fact that DOPMA's other provisions clearly provide that an officer is "appointed" following Senate confirmation *unless* the President takes affirmative action to remove the officer's name from the promotion list following Senate confirmation, the Government violates the principle that statutory construction "is a holistic endeavor." *See, e.g., United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988). And because the Government offers no other defense of the decision below, the Court should grant review.

The constitutional concerns that drive the Government's reading of DOPMA are equally misplaced. When it enacted DOPMA, Congress neither enlarged its own appointment power nor impermissibly infringed on the Executive's appointment power. Similarly, DOPMA does not violate *Marbury*, as that case does not mandate that the requisite steps in the appointments process take place in any particular order. Rather, *Marbury* makes clear that appointment occurs "when it is shewn that [the President] has done everything to be performed by him." 5 U.S. at 157. As explained in the petition, when the President nominates an officer for promotion, he does so with the understanding that the officer will be appointed after Senate confirmation absent some Executive action to delay the appointment and remove the officer's name

from the promotion list during the statutorily-defined period. Pet. at 20, 28. Thus, the showing that *Marbury* requires—that the President has done all that is required of him—is made when the President nominates an officer and then chooses not to remove the confirmed officer from the promotion list within the requisite time frame.[5] *See also* Pet. at 28. The Government does not address whether *Marbury* creates an inflexible rule governing all appointments over *two centuries* later and thus barring an efficient, modern military appointments process, and that question merits review.

Finally, the Government argues that the Court should not grant the petition because Dr. Lewis is not qualified for promotion. Opp. at 7, 14. As the Government acknowledges, that *ad hominem* attack is irrelevant to the Question Presented. Opp. at 7. Dr. Lewis is a decorated officer who served with distinction and retired honorably. A board of naval officers voted to retain her despite any issue regarding her medical license. Pet. at 9-10.[6] The Government's attack is therefore as unfair as it is gratuitous, and it should not distract the Court from deciding whether the Federal Circuit's reading of DOPMA flouts the repeatedly expressed intent of Congress and the plain meaning of the statute. That reading wrongly subjects thousands of military officers to uncertainty in the promotion process, all based on a misplaced

---

[5] The Government's insistence that a letter of appointment or some comparable document must be delivered to an officer to effectuate his or her promotion is unfounded. The Government points to no provision in DOPMA that requires such an additional Executive act, and it therefore cannot be the "last necessary act" to effectuate an appointment unless *Marbury* requires it. The important question of what *Marbury* requires is squarely raised here.

[6] Contrary to the Government's claim, Opp. at 7, Dr. Lewis has not conceded that the Navy properly applied 10 U.S.C. § 1094 to her. As the petition makes clear, Pet. at 12 n.9, she disagrees with the Federal Circuit's decision on the licensing issue but does not believe that question satisfies the Court's exacting criteria for a grant of certiorari.

concern about *Marbury* and the Appointments Clause. The Question Presented thus warrants review.

CONCLUSION

For the foregoing reasons and those previously stated, the petition should be granted.

Respectfully submitted,

EUGENE R. FIDELL
MATTHEW S. FREEDUS
FELDESMAN TUCKER LEIFER FIDELL LLP
2001 L Street, N.W.
Second Floor
Washington, D.C. 20036

WALTER E. DELLINGER
(Counsel of Record)
MATTHEW M. SHORS
NILAM A. SANGHVI
ANNE N. CORTINA*
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300

**Admitted only in New York*

Attorneys for Evelyn L. Lewis, M.D.

July 10, 2007