Supreme Court, U.S.
FILED
061289 MAR 23 2007
OFFICE OF THE CLERK

No. 06-

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Defense Officer Personnel Management Act ("DOPMA"), 10 U.S.C. § 611 *et seq.*, provides that military officers who are nominated by the President and confirmed by the Senate "shall be promoted" to the next higher rank unless their names are removed from the promotion list before the end of a prescribed statutory period. The question presented is:

Whether giving effect to the plain language of DOPMA violates *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), and the Appointments Clause, U.S. Const. art. II, § 2, cl. 2.

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Evelyn L. Lewis, M.D. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App., *infra*, 1a-15a) is reported at 458 F.3d 1372. The memorandum and order of the Court of Federal Claims (Pet. App., *infra*, 16a-29a) is reported at 67 Fed. Cl. 158.

JURISDICTION

The judgment of the Court of Appeals was entered on August 14, 2006. A timely petition for rehearing was denied on October 26, 2006. Petitioner filed a timely application for an extension of time to file this petition on January 9, 2007. The Chief Justice granted that application, extending the time to file this petition until March 25, 2007. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULE INVOLVED

The Appointments Clause provides that the President

> shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Officers of the United States . . . but the Congress may by law vest the Appointment of such inferior Officers, as they may think proper, 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 also provides:

> The Congress shall have the power [t]o raise and support Armies . . . ; [t]o provide and maintain a Navy; [t]o make rules and regulations for the Government and Regulation of the land and naval Forces . . . [and] [t]o make all laws which shall be necessary

> and proper for carrying into Execution the foregoing Powers . . . ."

U.S. Const. art. I, § 8.

The texts of 10 U.S.C. §§ 611, 618, 624, 629, and 741, and the Secretary of the Navy's regulations, SECNAVINST 1420.1A (1991), are reproduced in the Appendix, *infra*, at 56a-101a.

STATEMENT OF THE CASE

The Court of Appeals agreed in a prior case that the issue presented in the petition raises "significant questions concerning the appointment process for military officers." *Dysart v. United States*, 369 F.3d 1303, 1306 (Fed. Cir. 2004) (cited in Pet. App. at 30a-54a). Most significantly, this case raises the constitutional question whether the plain language of DOPMA — which provides that military officers who have been nominated by the President and confirmed by the Senate "shall be promoted" unless their names are removed from the promotion list by the end of a prescribed statutory period — violates *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), and the Appointments Clause, U.S. Const. art. II, § 2, cl. 2. The Court of Appeals adopted a tortured interpretation of DOPMA to avoid what it perceived to be constitutional problems otherwise arising from DOPMA's plain meaning.

The Court should grant review to restore Congress' clear intent in enacting DOPMA and to preserve the rights of thousands of military officers to be promoted in accordance with a clear statutory scheme. Because the question presented generally arises only in the Federal Circuit, the decision below effectively creates a nationwide rule. Absent review, the decision will therefore subject qualified military officers to unwarranted denials or delays of promotion. It will do so contrary to the plain language of DOPMA and Congress' equally clear goal of creating an efficient ap-

pointment process for the maintenance of the modern military. And it will do so based on the mistaken constitutional concern that *Marbury*, rather than simply describing the nature of the appointment at issue in that case, instead created an inflexible rule governing *all* appointments over two centuries later. Further percolation of the question presented is neither necessary nor warranted. The Court should grant review.

A. The Statutory Scheme.

This case concerns the meaning and constitutionality of DOPMA, Pub. L. No. 96-513, 94 Stat. 2839 (1980), codified at 10 U.S.C. § 611 *et seq.* (signed into law by President Carter, with technical amendments signed by President Reagan).[1] DOPMA was proposed by the Department of Defense ("DOD") in order to modernize the military's officer personnel law. *See* S. Rep. No. 96-375, at 75 (1980); H.R. Rep. No. 96-1462, at 47 (1980). The House Committee on Armed Services likewise recognized that DOPMA's predecessor statute "was drafted at a time when lawmakers could not have foreseen the requirements for large, ready forces on a[] sustained basis" and therefore did not address management issues faced by the modern military. H.R. Rep. No. 96-1462, at 9. DOPMA was a reaction to that problem, and, according to the DOD, would "provide the services a more equitable, effective, and efficient system to fill officer force structure requirements and manage the officer corps." *Id.* at 56.

DOPMA's efficient and uniform system governing the promotion of military officers is needed more today than it was when DOPMA was enacted. Literally thousands of of-

[1] Certain of DOPMA's provisions that are not relevant here were amended in 2006. *See* John Warner Nat'l Defense Authorization Act for Fiscal Year 2007, Pub. L. No. 109-364, 120 Stat. 2083 (2006). Citations herein refer to the prior version of the statute.

ficer promotions occur every year in the services. *See, e.g.*, 152 Cong. Rec. D1088 (daily ed. Nov. 9, 2006). DOPMA, which governs all such promotions, ensures that they take place when needed to ensure the readiness of our military in the modern era. There can be no question but that DOPMA falls within Congress' core powers. *See* U.S. Const. art. I, § 8 ("The Congress shall have power . . . [t]o raise and support armies . . . [t]o provide and maintain a Navy . . . [and] [t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers.").

DOPMA comprehensively prescribes the "appointment" of military officers selected for promotion. It provides that "[a]ppointments . . . shall be made by the President, by and with the advice and consent of the Senate" except in the case of certain low-ranking officers not at issue in this case. 10 U.S.C. § 624(c) (further providing that appointments to the rank of first lieutenant or captain in the Army, Air Force, or Marine Corps, or to lieutenant (junior grade) or lieutenant in the Navy "shall be made by the President alone").[2] The appointment process begins when the Secretary of the relevant military service determines that it is necessary to convene a selection board to recommend the selection of active-duty officers for promotion to the "next higher permanent grade." *Id.* § 611(a). The selection board prepares a report recommending officers for promotion, which is reviewed by the Secretary of the appropriate service, who then forwards the report to the Chairman of the Joint Chiefs of Staff (for certain officers) and to the Secretary of Defense (for all officers). *Id.* §§ 618(a)(1), (b)(1), & (c)(1). The Service Secre-

[2] DOPMA governs promotions for members of the Army, Air Force, Navy, and Marine Corps. The Secretary of the Navy's implementing regulations track the statute. *See* SECNAVINST 1420.1A. Similar statutory schemes govern promotions of officers in the Coast Guard, *see* 14 U.S.C. § 271 *et seq.*, and of reserve officers in the Army, Air Force, Navy, and Marine Corps. *See* 10 U.S.C. § 14001 *et seq.*

taries are not required to accept a report of the selection board and may return the report to the board for further proceedings. *Id.* § 618(a)(2). Likewise, the Chairman may make comments and return a report to the Secretary concerned or in certain circumstances may return the report to the selection board for further proceedings. *Id.* §§ 618(b)(3), (4).

Once a report is approved by all pertinent officials, the Secretary of Defense transmits it to the President for approval or disapproval. *Id.* § 618(c)(1). The President may remove the name of any officer recommended for promotion on the selection board's report. *Id.* § 629(a).

The list of officers approved for promotion by the President is then submitted to the Senate for its advice and consent. *Id.* § 629(b). If the Senate does not confirm an officer, his or her name is removed from the list. *Id.* If the Senate confirms the officer, on the other hand, he or she "*shall be promoted* to the next higher grade when additional officers in that grade and competitive category are needed." *Id.* § 624 (a)(2) (emphasis added).

The Secretary of the relevant service thereafter sets the officer's actual date of "appointment," which is also the effective date of the officer's promotion to the next grade. *Id.* § 741(d)(2) ("Except as otherwise provided by law, the date of rank of an officer who holds a grade *as the result of a promotion is the date of his appointment to that grade*.") (emphasis added); *see also id.* § 624(b)(2). The Secretary informs officers of the projected effective date of their appointment and promotion by transmitting the confirmed promotion list to appropriate personnel. If the Secretary takes no further action, the officer's appointment occurs on that date. *Id.* § 741(d)(2).

The Secretary also has authority to delay the date of an officer's appointment. *Id.* §§ 624(d)(1), (d)(2). For example, the Secretary may delay the appointment if there is

"cause to believe that the officer is mentally, physically, morally, or professionally unqualified to perform the duties of the grade for which he was selected for promotion." *Id.* § 624(d)(2).[3] DOPMA further provides that

> [t]he appointment of an officer may not be delayed under this subsection unless the officer has been given written notice of the grounds for the delay, unless it is impracticable to give such written notice *before the effective date of the appointment*, in which case such written notice shall be given as soon as practicable.

Id. § 624(d)(3) (emphasis added).

During any period of delay, the Secretary has the authority to decide whether to retain an officer on the promotion list. *Id.* §§ 624(d)(1), (d)(2); SECNAVINST 1420.1A ¶ 23(e). On authority delegated by the President, the Secretary may remove an officer's name from the promotion list during the statutory delay period. *Id.*; *see also* Pet. App. 10a-11a (agreeing that the President can delegate both the authority to appoint military officers and the authority to decline to appoint officers) (collecting cases).

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[3] DOPMA also provides that:

> Under regulations prescribed by the Secretary concerned, the appointment of an officer under this section may be delayed if -- sworn charges against the officer have been received by an officer exercising general court-martial jurisdiction over the officer and such charges have not been disposed of; [] an investigation is being conducted to determine whether disciplinary action of any kind should be brought against the officer; [] a board of officers has been convened under chapter 60 of this title to review the record of the officer; or [] a criminal proceeding in a Federal or State court is pending against the officer.

Id. § 624(d)(1).

DOPMA also creates a maximum period of delay of eighteen months from "the date on which the officer otherwise would have been appointed." 10 U.S.C. § 624(d)(4). At the end of that eighteen-month period, unless the officer's name has first been *removed* from the promotion list, that officer is unambiguously promoted under the statute. *See id.* § 624(a)(2) ("Except as provided in subsection (d) [the delay provision], 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.") (emphasis added). The officer is likewise formally appointed on that date. *Id.* § 624(d)(4) ("An *appointment* of an officer may not be delayed under this subsection for more than six months after the date on which the officer *otherwise would have been appointed* unless the Secretary concerned specifies a further period of delay. An officer's *appointment* may not be delayed . . . more than 18 months after the date on which such officer *would otherwise have been appointed.*") (emphases added); *see also id.* § 624(b)(2) ("[t]he date of rank of an officer *appointed to a higher grade under this section* is determined" by the Secretary under § 741(d)) (emphasis added).

The Secretary's decision to set an effective appointment date and leave the officer's name on the promotion list throughout the eighteen-month period, therefore, is the only post-confirmation Executive Branch action required to effectuate the appointment of an officer to the next permanent grade. DOPMA contemplates that the Secretary's inaction at the conclusion of the eighteen-month period constitutes the exercise of Executive discretion in favor of appointment. *See id.* § 624(a)(2) ("Except as provided in subsection (d) [the delay provision], 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.") (emphasis added). The historical record confirms that the Executive Branch fully understands this

operation of the statute. Memoranda from Joseph Califano, a special assistant to President Lyndon B. Johnson, advised President Johnson to take action on the promotion of certain officers prior to their projected promotion dates or those officers would be "automatically appointed" under DOPMA's predecessor statute. *See* JA 120-22.[4] And as explained below, the Government has more recently conceded in litigation conducted in the Court of Federal Claims that, absent the prior removal of an officer's name from the promotions list, appointments are effectuated at the end of DOPMA's prescribed statutory period as a matter of course.[5]

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[4] Citations to the "JA" herein refer to the Joint Appendix filed in the Court of Appeals. The memoranda to President Johnson were obtained from the Lyndon Baines Johnson Library and Museum. *See, e.g.,* JA 121, Dec. 16, 1965 Mem. from Joseph Califano to Pres. Johnson ("Based on these circumstances it is recommended that you remove these officers from the promotion list on the ground that they are not qualified for promotion. [Redacted] will be automatically promoted on December 20 and [redacted] December 18 unless you act before these dates.") (redactions in original); JA 122, Feb. 10, 1966 Mem. from Joseph Califano to Pres. Johnson ("Unless you take the recommended removal action before February 15, 1966 [redacted] will be automatically promoted.") (redaction in original); *see also* JA 120, Dec. 13, 1965 Mem. from James Cross for Joseph Califano ("Presidential approval for the withdrawal of [officers'] names will be necessary in the case of Lieutenant [redacted] before 18 December and for Captain [redacted] before 20 December. These are the dates when the officers complete the service required for advancement to the next higher permanent grade.") (redactions in original).

[5] Moreover, after an officer is promoted, the President and the Service Secretaries, of course, retain the power to dismiss or otherwise discipline those officers. *See, e.g.,* 10 U.S.C. § 625 (providing that the President may vacate promotions to Brigadier General and Rear Admiral (lower half) within eighteen months after promotion); *id.* § 801 *et seq.* (providing for dismissal and other sanctions pursuant to the Uniform Code of Military Justice); *id.* § 1161(b) (providing that the President may drop a commissioned officer from the rolls in certain circumstances); *id.* §§ 1181, 1182 (providing for boards of inquiry to determine whether an officer should be retained on active duty).

B. Factual Background.

The petitioner, Evelyn L. Lewis, M.D., entered active duty in the United States Navy in 1983. She was promoted on schedule to the rank of Commander and was selected on schedule for promotion to the rank of Captain. The President nominated her to that rank on April 21, 1999. *See* 145 Cong. Rec. S4068, S4069 (daily ed. Apr. 21, 1999). She was confirmed by the Senate on June 30, 1999, *id.* at S7966, S7967 (daily ed. June 30, 1999), and was given a projected promotion date of August 1, 2000. JA 202.

On June 27, 2000, however, Dr. Lewis was advised that her promotion had been delayed because it had been reported that she did not possess a valid, unqualified state medical license recognized by the Navy, and that consideration was being given to removing her name from the promotion list.[6] JA 149. On September 7, 2000, she was informed that, for the same reason, her promotion was being delayed for up to eighteen months. JA 207. During this period, several of her supervising officers wrote letters in support of her efforts to demonstrate that she was professionally qualified and should be promoted to Captain even without an unqualified license.[7]

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[6] This occurred despite the fact that, in May 2000, a Naval Board of Inquiry determined that Dr. Lewis had "not committed substandard performance of duty as evidenced by a failure to maintain the required professional licensure to practice medicine," and that she should not be administratively separated from the Navy. JA 147-48.

[7] *See, e.g.,* JA 155-56, July 17, 2000 letter from Peter D. Kent, Captain, Medical Corps, United States Navy, Clinical Investigation Program ("Very clearly, your demonstrated professionalism makes you a substantial asset to the Navy's medical department. Your accomplishments were appropriately recognized by your promotion selection board."); JA 157-58, July 11, 2000 letter from Warren A. Jones, MD, Captain, Medical Corps, United States Navy, Director ("I have had the pleasure of sitting on Selection Boards and in those efforts have seldom seen a record of a Naval Officer with the outstanding skills CDR Lewis possesses.").

Despite having known about the reasons for the delay of Dr. Lewis' promotion for over two years (and having received documentation, including supporting letters from supervising officers, demonstrating that she did not need an unqualified medical license to serve as a Captain in the Navy Medical Corps), by February 1, 2002, the last date to which Dr. Lewis' promotion could have been delayed under DOPMA, her name had not been removed from the promotion list. It was not until May 10, 2002, *ninety-nine days after the last possible date of promotion delay*, that the Secretary of the Navy removed her name from the promotion list. JA 238-39, 247. Dr. Lewis retired from the Navy as a decorated officer effective January 1, 2004. JA 259-60.

C. Procedural History.

1. On September 26, 2000, Dr. Lewis filed a complaint in the United States District Court for the District of Columbia alleging that the Secretary of the Navy's action in delaying her promotion was arbitrary and capricious because her promotion was delayed pursuant to a DOD policy memorandum which misinterpreted 10 U.S.C. § 1094, and which did not apply to her because she did not provide direct patient care requiring an unrestricted license. The District Court granted the government's motion to dismiss. *Lewis v. Rumsfeld*, 154 F. Supp. 2d 56 (D.D.C. 2001).

While Dr. Lewis' appeal from that decision was pending, she applied to the Board for Correction of Naval Records ("BCNR") for a determination that she had been promoted to the rank of Captain because the Secretary had not removed her name from the promotion list before the last possible date of delay. Her application was denied on February 10, 2003. JA 254-55.

On April 30, 2003, the Court of Appeals for the District of Columbia Circuit issued a *per curiam* decision granting Dr. Lewis' motion to remand and, to the extent she sought to have her case transferred to the Court of Federal Claims, in-

structing her to amend her complaint to include a damages claim. *Lewis v. Rumsfeld*, No. 01-5295, 2003 WL 21018861 (D.C. Cir. Apr. 30, 2003). Dr. Lewis did so, and the District Court transferred her case to the Court of Federal Claims. *See Lewis v. Rumsfeld*, No. 1:00CV02292 (RMU) (D.D.C June 2, 2003).

2. In the Court of Federal Claims, Dr. Lewis again alleged that the regulation regarding licensing did not apply to her and further argued that, under the clear language of DOPMA, she was promoted to the rank of Captain and was therefore was entitled to back pay for the period she would have been a Captain while still on active duty (August 1, 2000 to December 31, 2003), as well as the retired pay of a Captain.[8]

At the time the case was transferred to the Court of Federal Claims, a decision of that court fully supported Dr. Lewis' reading of DOPMA. *Rolader v. United States*, 42 Fed. Cl. 782 (1999), held that an officer whose name was never removed from the promotion list before the last possible date of statutory delay had been "promoted" under DOPMA — precisely the reading Dr. Lewis asserted in her complaint. Indeed, the Government conceded the point in *Rolader*. *See id.* at 786-87 (stating that "[t]he Government *concedes* that if no recommendation for removing plaintiff's

[8] Under DOPMA, if no action is taken during a promotion delay and the officer's name is retained on the promotion list, then "the officer shall upon ... promotion ..., have the same date of rank, the same effective date for pay and allowances in the higher grade to which appointed, and the same position on the active-duty list as he would have had if no delay had intervened." 10 U.S.C. § 624(d)(2). Dr. Lewis therefore claimed that she was entitled to back pay and retirement pay effective back to the date she was promoted to Captain under this provision and the Military Pay Act, 37 U.S.C. § 204. The Court of Federal Claims held that it had Tucker Act jurisdiction over Dr. Lewis' case because she had properly invoked a money-mandating statute in the Military Pay Act. Pet. App. 21a-22a.

name from the promotions list was initiated prior to [the last date of possible delay], he was *automatically promoted*, irrespective of the subsequent removal") (emphases added).

While Dr. Lewis' case was pending before the Court of Federal Claims, however, the Government took precisely the opposite view, convincing the Federal Circuit in *Dysart* that an officer whose name is removed from the promotion list after the prescribed statutory period has ended is *not* promoted under DOPMA. Foreshadowing the decision below, *Dysart* held that the President has discretion under DOPMA to remove an officer's name from the promotion list even after the last possible date of delay provided for by 10 U.S.C. § 624(d) has passed. 369 F.3d at 1311, 1315-17 (deciding issue without reference to contrary Court of Federal Claims precedent). On the basis of that intervening precedent, the Court of Federal Claims dismissed Dr. Lewis' complaint. Pet. App. 26a-28a.

3. The Federal Circuit affirmed, holding, first, that Dr. Lewis was not denied promotion based on an incorrect interpretation of the physician licensing statute. Pet. App. 11a-14a.[9] In reaching the additional question whether Dr. Lewis had been "promoted" under DOPMA, and was therefore entitled to back pay and retirement pay, the Court of Appeals relied solely on its prior decision in *Dysart*. The Court held that DOPMA does not provide for appointment when the eighteen-month statutory delay period expires. Pet. App. 10a. In so holding, the Court of Appeals relied on the provision of DOPMA that provides, in pertinent part, that appointments are made "by the President, by and with the advice and consent of the Senate." 10 U.S.C. § 624(c).

Rather than addressing the meaning of that provision — which effectively repeats the language of the Appointments

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[9] Although Dr. Lewis disagrees with the Federal Circuit's decision on the licensing issue, she does not seek review on that ground.

Clause — within the broader context of *any* (let alone all) of DOPMA's other provisions cited above, the Court of Appeals reasoned that "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.'" Pet. App. 10a (quoting *Dysart*, 369 F.3d at 1313, 1315) (emphasis added). The Court concluded, as it had in *Dysart*, that *Marbury* and the Appointments Clause categorically bar Congress from imposing *any* limits on the "discretion of the President" to make appointments. *See Dysart*, 369 F.3d at 1311-12. According to the Court of Appeals, *if* DOPMA required the President to remove an officer's name before the statutory delay period expired in order to prevent that officer from being "appointed," it would violate the Appointments Clause and *Marbury*. Pet. App. 10a-11a; *Dysart*, 369 F.3d at 1312-17.

REASONS FOR GRANTING THE PETITION

This case raises significant and recurring questions regarding how military officers are promoted — questions that potentially impact thousands of officers each year and require analysis of whether DOPMA violates *Marbury* and the Appointments Clause by creating a statutory scheme that provides for an efficient and modern appointments process. The Federal Circuit's interpretation of the statute is deeply flawed and rests on an erroneous premise regarding the separation of powers and *Marbury*. Properly understood, DOPMA neither vests Congress with any appointment power nor encroaches on the power of the Executive Branch. The statute clearly has the effect that Dr. Lewis attributes to it, and that effect is entirely compatible with the Constitution.

Because of its exclusion jurisdiction over claims asserted by military officers seeking back pay, the Federal Circuit is in all likelihood the only court of appeals that will have the

opportunity to pass on this issue. Absent review, the decision below will therefore wrongly inject uncertainty into an area where certainty and predictability are paramount; thousands of officers proceed through the military promotions system each year, and the efficiency of this system is integral to the national defense effort. And there is no chance that the Federal Circuit will correct its own error in interpreting DOPMA: twice since *Dysart*, including in the decision below, the Court of Appeals has reaffirmed that Petitioner's reading of DOPMA violates *Marbury* and the Appointments Clause. The Court should grant the petition.

I. THE QUESTION PRESENTED IS IMPORTANT AND RECURRING.

A. The Question Is Recurring.

Literally thousands of military appointments take place each year. From January 3 through September 30, 2006 alone, Congress considered 7,800 Air Force nominations, 8,855 Army nominations, 6,968 Navy nominations, and 1,293 Marine Corps nominations. *See* 152 Cong. Rec. D1088 (daily ed. Nov. 9, 2006).[10] DOPMA governs the appointment of all such military officers. It is hardly surprising, then, that the question presented here is a recurring one. To the contrary, it has repeatedly been the subject of litigation in the Court of Federal Claims and the Federal Circuit. *See, e.g.*, Pet. App. 1a-15a; *Dysart*, 369 F.3d 1303; *Rolader*, 42 Fed. Cl. 782; *see also Law v. United States*, 11 F.3d 1061 (Fed. Cir. 1993) (raising same issue under statute governing Coast Guard promotions).

Indeed, even more recently than the decision below, the Federal Circuit rejected a cross-appeal from an officer contending that he had been promoted under DOPMA after his

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[10] Of these, the following nominees were confirmed: 7,783 in the Air Force; 8,831 in the Army; 6,694 in the Navy; and 1,289 in the Marine Corps. *See* 152 Cong. Rec. D1088 (daily ed. Nov. 9, 2006).

appointment had been improperly delayed even though the Court of Federal Claims initially agreed, before reconsidering its decision in light of *Dysart*, that the officer had been promoted under the statute. *See Barnes v. United States*, 473 F.3d 1356, 1363 (Fed. Cir. 2007) ("Although he argues that it was wrongly decided, Barnes himself recognizes that this panel is bound to follow *Dysart* unless and until it is overturned by the court sitting en banc. . . . Nor are we persuaded, as requested, to propose en banc review ourselves."); *see also Barnes v. United States*, 66 Fed. Cl. 497 (2005) (vacating prior opinion, 57 Fed. Cl. 204 (2003), that had held Barnes was promoted under DOPMA, in light of *Dysart*), *rev'd*, 473 F.3d 1356.

These questions also arise before the BCNR. *See, e.g.*, Amicus Br. of Dr. Lewis, et al., in *Dysart v. United States*, 2003 WL 24305578, at *3. Because record correction proceedings are covered by the Privacy Act, 5 U.S.C. § 552a, the exact number of these cases pending before the BCNR and its sister boards in other military departments is unknown.

B. The Question Is Important.

The Federal Circuit acknowledged that these cases "present[] significant questions concerning the appointment process for military officers." *Dysart*, 369 F.3d at 1306. For several reasons, the Court of Appeals is correct on that score.

First, this case implicates the interpretation of an important federal statute governing the appointment of thousands of military officers every year. In both this case and *Dysart*, the Federal Circuit disguised what is essentially a constitutional holding that DOPMA violates *Marbury* and the Appointments Clause as a holding that DOPMA's plain terms mean something other than what they say. The Court of Appeals' interpretation cannot survive serious review. Properly understood, DOPMA provides that Dr. Lewis was "appointed" to the next higher rank when her name was not re-

moved from the promotions list by the end of the statutory period. The Court of Appeals' contrary holding not only misreads the statute but places military officers in limbo by imposing a system under which the President or his delegate can delay military promotions indefinitely despite the statute's plain language.

Second, this case raises core questions about the separation of powers. The statutory scheme is critical to maintaining an efficient military appointment process. The appointment of military officers is unquestionably an area in which Congress has a significant interest in light of its broad constitutional powers to maintain a navy and regulate other military affairs. *See* U.S. Const. art. I, § 8 (Congress has "the power to . . . raise and support Armies; [t]o provide and maintain a Navy; [t]o make Rules for the Government and Regulation of the land and naval forces," and to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing powers . . . ."); *see also* 125 Cong. Rec. 34209 (1979) (statement of Sen. John Stennis) (recognizing that the "[Armed Services] committee is charged with the responsibility of making rules for the government and regulation of our military forces" and that DOPMA "goes to the very heart of that congressional responsibility with our military system").

In fact, Congress' interest in maintaining an efficient system for appointments is at an apex today given the current size of the officer corps, the need for the deployment of officers at the appropriate rank and grade levels all around the world, and current plans to expand the size of the military. *See* Department of Defense: Active Duty Military Personnel by Rank/Grade, *available at* http://siadapp.dior.whs.mil/personnel/MILITARY/rg0612.pdf (Dec. 31, 2006) (last visited Mar. 22, 2007) (stating that, as of Dec. 31, 2006, there were 221,726 active duty officers in the armed forces); *see also, e.g.,* Peter Baker, *U.S. Not Win-*

ning War in Iraq, Bush Says for 1st Time: President Plans to Expand Army, Marine Corps to Cope with Strain of Multiple Deployments, Wash. Post, Dec. 20, 2006, at A1. Despite the fact that, in enacting DOPMA, Congress was legislating in an area involving its core powers, the Federal Circuit perceived DOPMA as encroaching on Executive power. It did not even address the possibility that DOPMA is instead a balanced approach to military promotions that respects the appointments system and also carries out Congress' duty to provide for and regulate the armed forces.

Third, this case raises the issue whether *Marbury* created an inflexible constitutional rule regarding what particular Executive action is necessary to effectuate any and all appointments under the Constitution. The Federal Circuit based its analysis on a flawed reading of *Marbury*. The Federal Circuit did not grapple with the question whether Congress could vary in any way the way in which the steps in the appointment process are accomplished. The Court should grant review to determine whether *Marbury*'s *description* of the appointment at issue in that case in fact created a baseline constitutional rule governing all appointments over two centuries later.

C. Absent The Court's Review, The Court Of Appeals' Decision Creates A Nationwide Rule Governing The Appointment Of Military Officers.

Claims like Dr. Lewis' are litigated almost exclusively in the Federal Circuit, because it is the only court with jurisdiction to hear appeals regarding officers' claims for back pay and retirement pay at the level applicable to the ranks to which they assert they were promoted. *See* 28 U.S.C. §§ 1295(a)(2), (3) (vesting the Federal Circuit with exclusive jurisdiction over appeals from district court decisions regarding claims for money damages against the United States); *see also United States v. Hohri*, 482 U.S. 64, 72 (1987) (stating that Tucker Act claims for damages of more than $10,000

against the United States "may be brought only in the United States Claims Court" and "are appealable only to the Federal Circuit. . . . Claims for less than $10,000 . . . may be brought either in a federal district court or in the United States Claims Court. These claims . . . also are appealable only to the Federal Circuit") (citing 28 U.S.C. §§ 1491(a)(1), 1346(a)(2), 1295(a)(2), (3)).

Two judges of the Court of Federal Claims have read DOPMA to provide for military promotions without raising any constitutional issues. *See Barnes*, 57 Fed. Cl. at 218 (holding that the Navy's delay in removing Lieutenant Barnes from the promotion list until after the statutory delay period had expired "accomplished his promotion"), *opinion vacated by* 66 Fed. Cl. 497 (reversing prior holding in light of *Dysart*), and *Rolader*, 42 Fed. Cl. at 787 (holding that because officer's name was not removed from promotion list prior to the expiration of the delay period, he was promoted as a matter of law).

The Federal Circuit decided this case solely based on its prior holding in *Dysart* and denied rehearing. *See* Pet. App. 10a (resolving Dr. Lewis' argument that she had been promoted because her name was not removed from the promotion list by the last possible date of statutory delay based on *Dysart* because *Dysart* was binding on the panel and "Lewis' claim is not distinguishable"); Pet. App. 55a. Even more recently, the Federal Circuit again refused to reconsider *Dysart*. *See Barnes*, 473 F.3d at 1363. The Federal Circuit has thus conclusively demonstrated that it will not revisit this issue. Absent review, the decision below will create a *de facto* nationwide rule.

II. THE DECISION BELOW WRONGLY SUBJECTS THOUSANDS OF QUALIFIED MILITARY OFFICERS TO UNWARRANTED PROMOTION DENIALS AND DELAYS.

A. DOPMA's Plain Language Provides For Appointment When An Officer Is Retained On The Promotion List.

The Federal Circuit held that Dr. Lewis was not promoted even though her name remained on the promotion list after the last date of statutory delay had expired because "'the language of [section 624] does not provide for automatic appointment . . . .'" Pet. App. 10a (alteration in original) (quoting *Dysart*, 369 F.3d at 1313). Rather, the Court held, "the statute provides that appointments are made 'by the President, by and with the advice and consent of the Senate.'" *Dysart*, 369 F.3d at 1313 (quoting 10 U.S.C. § 624(c)). However, reading DOPMA as a whole compels the conclusion that a military appointment is effected after the specific steps set forth in the statute have taken place.

The promotion process under DOPMA is perfectly obvious. As already explained, the relevant statutes provide 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, after confirmation, action by the Secretary to project a promotion date for the officer, *id.* §§ 624(b), 741(d), or to delay the officer's "*appointment under this section*" (an action that carries with it the possibility that a confirmed officer's name will be removed from the promotion list and that he or she will therefore never be appointed). *Id.* § 624(d) (emphasis added). Thus, under DOPMA, an officer's appointment to the next highest rank and grade occurs after confirmation, on the projected effective date of promotion given the officer by the Secretary of his or her service, unless the Secretary takes some action to

delay the appointment and remove the officer from the promotion list.

This understanding of the military appointments process is the only sensible way to read the statute. As already explained, the Executive Branch is aware of DOPMA's provisions, *see* JA 120-22 (Mem. from Joseph Califano to Pres. Johnson), and, indeed, the Government has conceded in prior litigation that DOPMA operates exactly as Dr. Lewis asserts it does. Therefore, 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 action by the Secretary of the relevant service to delay the appointment and potentially remove the officer's name from the promotion list during the statutorily-defined period. As such, the appointment phase is hard-wired into the nomination process for officers whose appointments are not delayed at the discretion of the Secretary.

The Federal Circuit ignored this straightforward process in holding that DOPMA does not provide for appointments. In particular, it utterly disregarded the particular provisions of DOPMA applicable to Dr. Lewis' case, *i.e.*, those governing promotions delayed by the Secretary.[11] DOPMA explicitly states that "[u]nder regulations prescribed by the Secretary concerned, the *appointment* of an officer *under this sec-*

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[11] As discussed above, the Federal Circuit focused only on the part of DOPMA restating the requirements of the Appointments Clause. This approach runs afoul of this Court's directive that "[s]tatutory construction . . . is a holistic endeavor." *United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988). The Federal Circuit likewise engaged in a piecemeal reading of DOPMA's legislative history, relying solely on snippets reflecting the constitutionally-mandated premise that appointments are made by the President with the advice and consent of the Senate, *see Dysart*, 369 U.S. at 1314, while ignoring the overarching purpose of the statute to modernize military personnel laws and to "[p]rovide common law *for the appointment* of Regular officers." S. Rep. 96-375, at 76 (emphasis added).

tion may be delayed . . . ." 10 U.S.C. § 624(d)(1) (emphases added); § 624(d)(2) (same). It further states that "[t]he *appointment of an officer may not be delayed under this subsection* unless the officer has been given written notice of the grounds for the delay, unless it is impracticable to give such written notice *before the effective date of the appointment*." *Id.* § 624(d)(3) (emphases added). These provisions would be meaningless if officers had no expectation of appointment unless — as would be the case under the Federal Circuit's view — the President took some additional action, beyond the steps set forth in DOPMA, at some unknown future time. Nothing in the statute (or the Court of Appeals' decision) remotely indicates what that action might be, or when it might take place. The result is manifest uncertainty.

Under a reading that ensures certainty, by contrast, the language of the delay provisions instead assumes that an appointment will occur if the Secretary of the relevant service does not invoke them, and, if they are invoked, that an appointment will not occur unless the officer concerned is "retained on the promotion list." *Id.* §§ 624(d)(1), (2).[12] There would likewise be no reason to require that an officer be in-

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[12] The subsection of the statute dealing with delays due to pending disciplinary or other proceedings against an officer provides that:

> If no disciplinary action is taken against the officer, if the charges against the officer are withdrawn or dismissed, if the officer is not ordered removed from active duty under Chapter 60 of this title, or if the officer is acquitted of the charges brought against him, as the case may be, then unless action to delay an appointment has also been taken under paragraph (2) the officer shall be retained on the promotion list . . . .
>
> *Id.* § 624(d)(1).

The more general delay provision states: "If the Secretary concerned later determines that the officer is qualified for promotion to such grade, the officer shall be retained on the promotion list . . . ." *Id.* § 624(d)(2).

formed of any delay before the effective date of his or her appointment unless the officer would expect to be promoted on that date absent notification to the contrary. *Id.* § 624(d)(3).

The history of the notification provision confirms this understanding. When DOPMA was passed in 1980, it provided only that "[t]he appointment of an officer may not be delayed under this subsection unless the officer has been given written notice of the delay." 94 Stat. 2858. This language was amended in 1981, when Congress added the phrase "unless it is impracticable to give such written notice before the effective date of the appointment, in which case such written notice shall be given as soon as practicable." Defense Officer Personnel Management Act Technical Corrections Act, Pub. L. No. 92-22 § 4(d)(3)(D), 95 Stat. 127. The House Report recognized that under the language of the original provision, an officer might be promoted simply because notice of a delay had not been transmitted to him or her in a timely fashion.[13]

The provision of DOPMA that the Federal Circuit pointed to in reaching the opposite conclusion is simply a restatement of the language of the Appointments Clause. Thus, although the Federal Circuit couched its holding in terms of statutory construction, the true question here is whether DOPMA is inconsistent with *Marbury* and the Appointments Clause. As we now explain, it is not.

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[13] *See* H.R. Rep. No. 97-141, at 14 (1981) ("This amendment recognizes that information calling into question the qualifications of an officer for promotion may be revealed only shortly before the projected date of the promotion and that, in such cases, the officer may not be reasonably available (e.g., on a weekend, while on leave or absent without leave) to receive written notice that the promotion is being delayed.").

B. DOPMA Does Not Violate The Appointments Clause.

The Federal Circuit's tortured statutory construction was colored by the underlying premise of its decision — namely, the Court's belief that the statute raised Appointments Clause problems because: (1) the President has absolute discretion regarding whether to appoint an officer who has been confirmed to the next highest rank and grade; and (2) the "shall be promoted" language of the statute improperly cabins that discretion.[14] *See, e.g.,* Pet. App. 10a (noting that in *Dysart* the court "further held that 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'") (quoting *Dysart*, 369 F.3d at 1313, 1315); *Dysart*, 369 F.3d at 1314 (stating that "[p]rotecting the role of the President in the appointment process from legislative encroachment was in fact one of the goals of the Constitutional Convention"); *see also Dysart*, 369 F.3d at 1316 ("The Constitution contemplates that, after confirmation, the President may refuse to execute the appointment."). Under the Federal Circuit's view of the Appointments Clause, therefore, no

[14] To support this conclusion, the Federal Circuit pointed to language in DOPMA providing that "'[t]he President may remove the name of any officer from a list of officers recommended for promotion by a selection board convened under this chapter.'" *Dysart*, 369 F.3d at 1317 (quoting 10 U.S.C. § 629(a)). As the Court of Federal Claims correctly observed, however, this language cannot be read in isolation but must be considered in the context of the overall statutory scheme. *See Rolader*, 42 Fed. Cl. at 786 (noting that the Army and the Navy "construe sections 624 and 629 as operating in tandem, so that the eighteen month outer limit on delay precludes removal of a name after that point") (citing SECNAVINST 1420.1A ¶ 23 (1991); Army Regulation 624-100, *Promotion of Officers on Active Duty*, Update, ch. 2-10(b) (1984)).

limits may be placed on the President's discretion to appoint or choose not to appoint officers.

That view is incorrect. This Court has held that the Appointments Clause is violated when Congress enlarges its own power in the appointments process. For example, Congress ran afoul of the Appointments Clause when it vested the power to make appointments *in itself*. *See Buckley v. Valeo*, 424 U.S. 1 (1976) (holding that Congress could not constitutionally provide for appointment of members of the Federal Election Commission by the President *pro tempore* of the Senate and the Speaker of the House). DOPMA does not involve any similar expansion of congressional power. The only power Congress itself has under the statute is the Senate's power to confirm (or choose not to confirm) military officers who have been nominated by the President. *Cf. Morrison v. Olson*, 487 U.S. 654, 694 (1988) (upholding independent counsel statute and observing that the "case [did] not involve an attempt by Congress to increase its own powers at the expense of the Executive Branch").

Unlike the appointments scheme at issue in *Buckley*, DOPMA amply protects the constitutionally mandated role of the Executive in the appointment process. The President makes the decision regarding which officers to nominate for promotion and has the sole power to remove officers' names from the list recommended by the selection board. 10 U.S.C. § 629(a). The Service Secretary, to whom even the Federal Circuit agreed the appointment power may be delegated, has a period of time from an officer's confirmation to the projected promotion date during which he or she can determine whether an officer's appointment should be delayed. (In Dr. Lewis' case, the gap between the date of her confirmation and her projected promotion date was over a year.)

The Secretary's power to delay an appointment is quite broad; in addition to being able to delay an appointment if the officer is subject to court-martial, disciplinary, or other

similar proceedings, the Secretary may delay an officer's appointment "in any case in which there is cause to believe that the officer is mentally, physically, morally, or professionally unqualified to perform the duties of the grade for which he was selected for promotion." 10 U.S.C. § 624(d)(2). If an officer's appointment is not delayed, that implicitly reflects a determination by the Secretary that it should go forward on the projected date. The statute further provides the Secretary with the discretion to ultimately remove an officer whose appointment has been delayed from the promotion list such that he or she would not be appointed. *Id.* § 624(d); *see also* SECNAVINST 1420.1A ¶ 23.

These statutory provisions demonstrate that, contrary to the Federal Circuit's view, the President and his delegates maintain their discretion in appointments under DOPMA. All that Congress has required through the statute is that the Executive power to appoint or decline to appoint military officers be exercised within a reasonable time period — either during the period between confirmation and the officer's projected promotion date or, in the case of officers like Dr. Lewis whose promotions are delayed, before the expiration of the delay period. The President and the Service Secretaries still have the power to remove the officer or take other actions against him or her. *See, e.g.*, 10 U.S.C. §§ 625, 801, 1161(b), 1181, 1182. DOPMA's reasonable time limitation does not result in any significant decrease of Executive power. *Cf. Bowsher v. Synar*, 478 U.S. 714, 726 (1986) (holding that under separation of powers principles, Congress could not "reserve for itself the power of removal of an officer charged with the execution of the laws except by impeachment").

Rather than violating the separation of powers, DOPMA simply strikes a necessary balance between the President's power in the area of appointments and Congress' core constitutional power to provide for and regulate the military. *See,*

e.g., 126 Cong. Rec. 30781 (1980) (statement of Sen. Sam Nunn) ("[W]e must recognize the responsibilities of Congress and the President in officer management. We need an officer system controlled by Congress which will also give the President, as Commander in Chief, as much management flexibility as he can [] constitutionally be granted . . . ."). This Court "ha[s] never held that the Constitution requires that the three branches of Government operate with absolute independence." *Morrison*, 487 U.S. at 693-94 (internal quotation marks omitted). When proposing and enacting DOPMA, the DOD and Congress both recognized the need for an efficient, modern process to manage the high volume of military promotions in today's military. *See* S. Rep. No. 96-375, at 75; H.R. Rep. No. 96-1462, at 9, 47, 56. The Act's reasonable time limitation on the exercise of the appointment power is merely a mechanism to ensure that this need is met, and the time limitation thus falls squarely within Congress' core powers. *See* U.S. Const. art. I, § 8.

If there were any doubt about this conclusion, it is resolved by the fact that Congress has greater flexibility in the appointment of inferior officers like Dr. Lewis.[15] *See, e.g., Weiss*, 510 U.S. at 186-87 (Souter, J., concurring). In particular, Congress may vest the appointment of these officers in the President alone or in other government entities. *See*

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[15] There are thousands of naval captains (or their equivalent, colonels) in the military, all of whom are removable, and none of whom qualify as principal officers. *See Weiss v. United States*, 510 U.S. 163, 182 (1994) (Souter, J., concurring) ("Military officers performing ordinary military duties are inferior officers, and none of the parties to this case contends otherwise. Though military officers are appointed in the manner of principal officers, no analysis permits the conclusion that each of the more than 240,000 active military officers is a principal officer.") (internal citations omitted); *cf. Morrison*, 487 U.S. at 671-72 (holding that independent counsel was an inferior officer because, *inter alia*, she was "subject to removal by a higher Executive Branch official," she had no authority to formulate policy for the Government or the Executive Branch, and her office was of limited jurisdiction and tenure).

U.S. Const. art. II, § 2, cl. 2 ("[T]he Congress may by law vest the Appointment of such inferior officers, as they think proper, in the President alone, in the Courts of Law, or in the heads of Departments."). The Federal Circuit recognized that Congress may vary the appointments process for such officers, *see Dysart*, 369 F.3d at 1314, but utterly failed to address the import of this fact for the appointment of military officers.

It is true that Congress has not chosen to vary the appointment process for most military officers. However, given its greater power to disregard the role of the President in the appointments process for inferior officers altogether, it follows that Congress must, at the very least, have the flexibility to set up a scheme for the appointment of such officers that ensures that all the constitutionally required steps of the military promotion process occur as efficiently as possible. That is all that it has done with the current statutory framework.

C. DOPMA Does Not Violate *Marbury*.

Marbury provides that an appointment is made "when it is shewn that [the President] has done everything to be performed by him." 5 U.S. at 157. It does not create any rule, much less a *constitutional* rule, regarding precisely what kind of action is required for that showing. In *Marbury*, the President's signature on the commission was the executive act required to effectuate the appointments of justices of the peace in the District of Columbia, the position for which Marbury had been nominated and confirmed. *Id.* at 150-51. Accordingly, Marbury's appointment was effective when signed; delivery of the appointment to him was not required. DOPMA simply creates a modern-day version of this scenario. When an officer's projected promotion date, or the last permissible date of delay, comes and goes without removal of the officer's name from the promotion list, the Executive has effectively signed the appointment.

The Federal Circuit was wrong to assume that *Marbury* requires the appointments process to occur in a particular manner.[16] *Marbury* dealt with a particular appointment process; it did not foreclose the possibility that other processes could also satisfy the requirements of the Appointments Clause. Dr. Lewis and other officers like her are nominated by the President under a statute that the President understands will make a confirmed officer's appointment effective unless his or her name is removed from the promotion list. Thus, the President's nomination and failure to take action to remove an officer from the promotion list within the requisite time frame is the showing *Marbury* requires — that the President "has done everything that is to be performed by him." 5 U.S. at 157; *see also id.* ("[T]his [appointment] power has been exercised when the last act, required from the person possessing the power, has been performed.").

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[16] Under the Federal Circuit's interpretation of DOPMA, giving the President unfettered discretion in appointments, Congress would never be able to craft efficient appointments schemes and the statutes currently providing similar mechanisms for appointments in the Coast Guard and the reserve officer corps, *see* 14 U.S.C. § 271 *et seq.* and 10 U.S.C. § 14001 *et seq.*, would be unconstitutional. Moreover, taking the Federal Circuit's position to its logical extreme, Congress would never be able to require that military officers have any particular qualifications for their positions as the Executive Branch would have unlimited decision-making power regarding who is nominated and appointed to be an officer. As even the Court of Appeals acknowledged, that is simply not the law. *See* Pet. App. 7a (recognizing that "Congress can restrain the President's authority to appoint particular classes of persons to officer positions or bar appointment unless particular procedures are followed").

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

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March 23, 2007

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