No. 06-1466

In the Supreme Court of the United States

DANNY T. BARNES, 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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QUESTIONS 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 questions presented are:

1. Whether the court of appeals correctly concluded that petitioner received timely notice of his promotion delay as required by DOPMA.

2. If not, 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-13a) is reported at 473 F.3d 1356. The opinions of the Court of Federal Claims (Pet. App. 14a-40a, 41a-81a) are reported at 66 Fed. Cl. 497 and 57 Fed. Cl. 204, respectively.

JURISDICTION

The judgment of the court of appeals was entered on January 4, 2007. On March 26, 2007, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including May 4, 2007, and the petition was filed on that date. 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). 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 the seniority of such officers on the active-duty list." 10 U.S.C. 624(a)(1). 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

[1] Unless otherwise noted, references to DOPMA are to the 1994 version of that Act.

741(d). 10 U.S.C. 624(b); 10 U.S.C. 741(d) (1994 & Supp. II 1996). 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).[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 * * * 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). A promotion "may not be delayed," however, "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." 10 U.S.C. 624(d)(3).[3] Further,

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[2] See SECNAV Instruction 1420.1A para. 23 (Jan. 8, 1991) (Pet. App. 158a-162a). 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.

[3] Section 624(d)(3) provides:

> The 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

the promotion "may not be delayed * * * for more than six months after the date on which the officer would otherwise have been appointed unless the Secretary concerned specifies a further period of delay." 10 U.S.C. 624(d)(4). The statute does not specify a consequence for failure to provide timely notice or for an unspecified delay beyond six months.

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). 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); 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

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such written notice shall be given as soon as practicable. An officer whose promotion has been delayed under this subsection shall be afforded an opportunity to make a written statement to the Secre tary concerned in response to the action taken. Any such state ment shall be given careful consideration by the Secretary.

10 U.S.C. 624(d)(3).

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) (1994 & Supp. II 1996).

2. Petitioner enlisted in the United States Navy (Navy) in 1983 and was promoted to lieutenant in 1992. Pet. App. 15a. On October 29, 1997, the petitioner's nomination for promotion to the rank of lieutenant commander was submitted to the Senate. *Ibid.* Petitioner's projected promotion date was April 1, 1998. *Id.* at 42a. The Senate confirmed petitioner's nomination on November 8, 1997. *Id.* at 15a.

Subsequent to his confirmation but before his projected promotion date, petitioner was disciplined by his commanding officer "for attempting to arrange off-duty liaisons with five enlisted women, two of whom were his subordinates." Pet. App. 4a; *id.* at 56a-57a. On February 19, 1998, because of this "conduct unbecoming an officer," a formal objection to petitioner's promotion was made. A letter dated March 17, 1998—approximately two weeks before petitioner's projected promotion date—was sent to petitioner notifying him that his promotion was being delayed "until all related administrative or disciplinary action [was] completed." *Id.* at 4a, 56a-57a. This notification letter was sent to petitioner's base in Misawa, Japan, but when it arrived there, petitioner was aboard the U.S.S. *John S. McCain* in the Persian Gulf. *Id.* at 4a. Because petitioner was to be returned to the base as soon as possible, the executive officer at the base decided not to forward the letter to the ship; it was given to petitioner on April 21, 1998, upon his return to the base. *Id.* at 67a.[4]

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[4] In addition, petitioner acknowledges receiving email notification of his promotion delay on April 15, 1998. Pet. App. 4a n.2.

On May 26, 1998, a Board of Inquiry (BOI) was convened to determine if petitioner should be released from the Navy because of his misconduct and conducted a two-day hearing. Pet. App. 4a. On May 27, 1998, BOI found that petitioner had "engaged in conduct unbecoming an officer, failed to demonstrate acceptable qualities of leadership, and failed to conform to prescribed standards of military deportment." *Ibid.* Nonetheless, by a vote of two to one, the BOI recommended that the Navy retain petitioner. *Ibid.* The BOI did not have the authority to decide—and expressed no view on—whether petitioner should be promoted. *Id.* at 4a, 51a. See also SECNAVINST 1920.6A CH-2, Administrative Board Procedures (encl. (8), paras. 2a, 2k (Mar. 17, 1993).

On August 24, 1998—five months and one week after the March 17, 1998, delay of petitioner's promotion—an Assistant Secretary of the Navy ratified and extended the delay pursuant to 10 U.S.C. 624(d)(4) until all related administrative actions were completed. Pet. App. 4a-5a, 11a. On April 26, 1999, the Secretary of the Navy approved the removal of petitioner's name from the promotion list after the Chief of Naval Personnel determined that petitioner was not qualified for promotion to lieutenant commander under the criteria set forth in 10 U.S.C. 624(d)(2). Pet. App. 5a. Pursuant to 10 U.S.C. 629(c)(2), the removal of petitioner's name was deemed a nonselection for promotion. Pet. App. 5a. On March 1, 2001, after being subsequently nonselected for the same promotion, petitioner was involuntarily discharged pursuant to 10 U.S.C. 632(a). Pet. App. 5a.

3. On October 21, 1999, petitioner filed this action in the Court of Federal Claims. Pet. App. 5a. He then filed an application for relief with the Board for Correction of Naval Records (BCNR) on May 16, 2000, assert-

ing that he had been automatically promoted by operation of law under Section 624(a)(2) because the Navy had not complied with the procedures required for a valid delay of his promotion. *Id.* at 16a, 51a. The BCNR denied relief, and petitioner pursued his case in the Court of Federal Claims, alleging that the delay of his promotion and the removal of his name from the promotion list were not in accordance with statutory and regulatory requirements, and that he had therefore been automatically promoted by operation of law on his projected promotion date. *Id.* at 5a-6a & n.3. Petitioner further alleged that the failure of the BCNR to grant him relief was contrary to law or arbitrary and capricious. *Id.* at 6a.

The Court of Federal Claims initially held that the delay in petitioner's promotion was improper and that petitioner had been promoted by operation of law. Pet. App. 75a-76a. More specifically, it held that none of the conditions for delay in 10 U.S.C. 624(d)(1) or (2) existed and that, even if there had been a proper cause for delay, the delay expired on May 27, 1998, when the BOI procedure was completed—an event that, according to the court, marked the completion of "all administrative or disciplinary action." Pet. App. 63a-64a. In light of that holding and "because determining when giving notice was practical in the military may impinge more on merits and timing decisions vice procedural determinations," the trial court deemed it "not necessary to resolve" whether the Navy had complied with Section 624(d)(3)'s written notice requirement. *Id.* at 68a.

The Court of Federal Claims subsequently vacated (Pet. App. 18a-19a) its initial ruling, following the Federal Circuit's holding in *Dysart* v. *United States*, 369 F.3d 1303 (2004), that DOPMA does not—and constitu-

tionally cannot—provide for automatic appointment by operation of law. The court, however, again ruled in petitioner's favor, holding that there were no statutory grounds for delaying petitioner's promotion, and that even if there were, the delay had expired at the conclusion of the BOI proceeding. Pet. App. 31a-32a, 38a-39a.

4. A unanimous panel of the Federal Circuit reversed. Pet. App. 1a-13a. It held that "the Navy complied with all relevant statutory and regulatory procedures" (*id.* at 9a) in delaying petitioner's promotion and that because there was no procedural error, the removal of petitioner's name from the promotion list was lawful. *Id.* at 9a-12a. Most relevant here, the Federal Circuit found that the Navy complied with Section 624(d)(3)'s notice requirement because providing written notice to petitioner while he was "at sea" was "impracticable." *Id.* at 11a. In the alternative, the court concluded that any failure to provide timely notice here was "harmless" because petitioner "did not suffer any prejudice," given that "he promptly submitted his written response as soon as he returned to Japan" and the "Navy neither took action against him nor made any decision to do so" until it received his response. *Ibid.* In light of that holding, the court did not reach the government's alternative argument that, if petitioner's promotion had not been validly delayed, *Dysart* nevertheless precluded his being automatically promoted in the absence of Presidential appointment. *Id.* at 12a.

ARGUMENT

Petitioner does not challenge the court of appeals' holding (Pet. App. 10a-11a) that his "conduct unbecoming an officer" constituted a valid ground under 10 U.S.C. 624(d) both for the Navy's initial delay of his pro-

motion and for the extension of that delay pending the Navy's determination of whether to remove his name from the promotion list. Instead, petitioner argues that the Navy violated DOPMA by failing to provide him with timely notice of the delay of his promotion (Pet. 24-27), and that he therefore was automatically promoted, by operation of law, on his projected promotion date (Pet. 19-24), despite the fact that his misconduct constitutes an appropriate basis for the delay and for the ultimate denial of his promotion.

The Federal Circuit's unanimous decision that the Navy provided petitioner with timely notice of the delay in his promotion is correct and that fact-specific determination does not warrant this Court's review. Because resolution of that factbound question is necessarily antecedent to the question whether DOPMA provides for automatic appointment in the absence of timely notification, this case is not a suitable vehicle for addressing the broader constitutional and statutory questions raised by petitioner. Indeed, the Federal Circuit declined to reach those issues in this case. Moreover, as explained in the government's opposition in *Lewis* v. *United States*, petition for cert. pending, No. 06-1289 (filed Mar. 23, 2007), and restated here (pp. 13-18, *infra*), petitioner's argument is without merit and does not warrant review in this Court.

1. The Federal Circuit correctly held that petitioner received timely notice of the grounds for the delay of his promotion as required by 10 U.S.C. 624(d)(3). Section 624(d)(3) states that an officer's promotion "may not be delayed * * * 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 no-

tice shall be given as soon as practicable." 10 U.S.C. 624(d)(3) (emphasis added).

Here, on March 17, 1998, fifteen days before petitioner's projected promotion date, the Chief of Naval Personnel sent written notice to inform petitioner that, because of his misconduct, his promotion was being delayed. Pet. App. 56a. The notice was addressed to petitioner and sent to his commanding officer at the base where petitioner was stationed in Japan. *Id.* at 56a, 67a. When the letter arrived, petitioner was aboard the U.S.S. *John S. McCain* in the Persian Gulf. *Id.* at 4a, 67a. Because petitioner was to be returned to the base "as soon as possible," the executive officer at the base decided not to forward the written notice to the ship "because it may not have arrived until after [petitioner] had already departed from the ship." *Id.* at 67a. The notice was given to petitioner on April 21, 1998, upon his return to the base. *Ibid.*

Petitioner contends (Pet. 11, 25) that providing him with written notice while at sea was not impracticable because he was reachable aboard the U.S.S. *John S. McCain* via email, fax, telephone, and electronic message. Petitioner's argument is based largely on his contention that "impracticable" means "impossible." Pet. 26. But an action need not be impossible to be impracticable; instead, it must simply be infeasible. See *Webster's Third New International Dictionary* 1136 (1961) ("not practicable: incapable of being performed or accomplished by the means employed or at command: infeasible"). And, in this context, the military's judgment about what is impracticable, especially in the context of persons serving on active duty, should be given deference by the courts. Cf. *Hamdan* v. *Rumsfeld*, 126 S. Ct. 2749, 2791-2792 n.51 (2006); *id.* at 2801(Kennedy, J.,

concurring in part) (explaining that "practicability judgments are entitled to some deference," and that the statutory language there—"insofar as is practicable"—"is best understood to allow the selection of procedures based on logistical constraints" and other practical considerations).

Here, the court of appeals correctly sustained the executive officer's determination that it was impracticable to forward the written notice of delay to the ship and ensure that it arrived before petitioner departed for the base. Pet. App. 11a. Further, the written notice was given to petitioner as soon as practicable—*i.e.*, upon his return to his base. Thus, the Federal Circuit correctly concluded that the Navy complied with Section 624(d)(3)'s notice requirements.

Moreover, the court of appeals also correctly held that petitioner "did not suffer any prejudice, as he promptly submitted his written response as soon as he returned to Japan" and "the Navy neither took action against him nor made any decision to do so" before he responded. Pet. App. 11a. Any procedural error in delivering the notice was therefore harmless. See *Wagner* v. *United States*, 365 F.3d 1358, 1361 (Fed. Cir. 2004). Indeed, petitioner concedes (Pet. 26 n.19) that any delay in providing notice could be deemed harmless, if DOPMA does not provide for automatic appointment—which, as discussed below, it does not.

In all events, the Federal Circuit's unanimous and factbound conclusion that the written notice provided to petitioner satisfied Section 624(d)(3) presents no question of general applicability and does not warrant this Court's review.

2. Petitioner contends (Pet. 19-21) that DOPMA's plain language provides for automatic appointment when

an officer is not provided timely notice pursuant to Section 624(d)(3), 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. He further contends (Pet. 21-24) that precedent in the Federal Circuit, including the decision below, incorrectly holds that his interpretation of DOPMA would render the statute unconstitutional.

a. As an initial matter, because the court of appeals concluded that petitioner received timely notice of the delay in his promotion, it expressly declined to reach the question whether petitioner would have been automatically appointed by operation of law in the absence of timely notice. Pet. App. 12a. This case is therefore not a suitable vehicle to resolve the second question presented. The factbound question of the timeliness of petitioner's notice is necessarily antecedent to the constitutional and statutory arguments raised by the second question, and resolution of the timeliness question against petitioner would obviate any need for the Court to address those broader questions. Moreover, because the court of appeals did not pass on the issues raised by the second question, if the Court were to grant review, it would be doing so without the benefit of a thorough discussion by the court of appeals in the context of petitioner's case.

b. In any event, as the government has explained in its brief in opposition to the petition filed by the same counsel in *Lewis* v. *United States*, petition for cert. pending, No. 06-1289, petitioner is wrong on the merits of both of his arguments.

First, regarding the statutory language, petitioner relies principally upon Section 624(a)(2), which states: "Except as provided in subsection (d), officers on a pro-

motion list for a competitive category shall be promoted to the next higher grade when additional officers in that grade and competitive category are needed." 10 U.S.C. 624(a)(2). Petitioner contends (Pet. 19-21) 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 is not provided timely notice pursuant to Section 624(d), even if, as in petitioner's case, the officer is 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). 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)(1)'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.5 (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)(3) does not specify that automatic appointment is the consequence of a failure to provide timely notice. Indeed, if Congress had provided for automatic appointment in Section 624(d)(3), 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 correctly declined to recognize such an appointment.

Petitioner's assertion (Pet. 20-21) that the 1981 amendment to Section 624(d)(3), which added the impracticability provision, demonstrates that Congress understands DOPMA to provide for automatic appointment is unavailing. That technical correction to DOPMA does not suggest that DOPMA provides for automatic appointment in the absence of timely notice, but instead clarifies two ambiguities that existed in the original provision. First, it clarifies that, except in cases of impracticability, written notice must be provided to the officer *before* the officer's projected promotion date. The original provision did not specify *when* notice had to be provided. See Pet. 20 ("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 [grounds for the] delay.'") (quoting DOPMA, Pub. L. No. 96-513, § 105, 94 Stat. 2858). Requiring written notice before an officer's projected promotion date, except in cases of impracticability, is consistent with Congress's objective of creating a fair and efficient promotion system. Second, it clarifies that when, as here, providing written notice before the projected promotion date is impracticable, the military can still comply with the statute if it provides written notice to the officer as soon as practicable.

The legislative history cited by petitioner (Pet. 20-21) confirms this understanding of the amendment. Indeed, the impracticability provision, which expressly sanctions the provision of a notice of delay *after* the projected promotion date, would make little sense if Congress believed that automatic appointment occurs on the projected promotion date.

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 failure to provide timely notice 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 claims are without merit.

Second, petitioner's contention (Pet. 21-24) that his 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 appointments." *Dysart*, 369 F.3d at 1314.[5] Although the Federal Circuit did not address the issue in this case, the Federal Circuit has appropriately recognized this obvious constitutional problem arising from petitioner's interpretation of DOPMA and declined to adopt that interpretation.

In any event, there is no warrant for review by this Court of a constitutional question that is easily—and properly—avoided by a 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."'") (quoting *Feltner* v. *Columbia Pictures Television, Inc.*, 523 U.S. 340, 345 (1998)).

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[5] Petitioner's alternative argument (Pet. 23 n.13) 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.

3. Review is also unwarranted because the question presented concerning the operation of Section 624 has limited prospective importance. Although thousands of military promotions are made annually under DOPMA, petitioner cites only three reported cases (excluding this case) in which this question has arisen under DOPMA. *Ibid.*[6] The existence of four reported cases in the roughly twenty-six years since DOPMA took effect in 1981 hardly makes this question a "recurring" (Pet. 3, 16) one. To the contrary, history shows that DOPMA has helped ensure that military promotion decisions are made timely, fairly, 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.

4. Finally, even apart from its limited practical importance, this case would be an inappropriate vehicle to address either of the questions presented. As discussed, petitioner does not challenge the court of appeals' ruling that, in light of his personal misconduct, the Navy had an appropriate basis for delaying—and ultimately denying—his promotion. Whatever else is true, there is no reason to reach out and decide the constitutional and statutory questions framed by petitioner when he is manifestly unqualified for the position at issue.

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[6] As noted, a petition for a writ of certiorari is pending before this Court in one of those three cases, *Lewis* v. *United States*, No. 06-1289. The government has filed a brief in opposition to that petition.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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