No. _____

IN THE
Supreme Court of the United States

TERRYL J. SCHWALIER, Brig. Gen., USAF, Ret.,
Petitioner,

v.

ASHTON CARTER, Secretary of Defense and
DEBORAH LEE JAMES, Secretary of the Air Force,
Respondents.

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 (1) nominated by the President, (2) confirmed by the Senate, and (3) placed and retained by the President on a list of officers to be promoted "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). DOPMA further specifies that a promotion "may not be delayed under this subsection 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 question presented is:

Does giving effect to the plain language of § 624 of DOPMA violate the Appointments Clause, U.S. Const. art. II, § 2, cl. 2, and *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803)?

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Petitioner Terryl J. Schwalier respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINION AND ORDER BELOW

The opinion of the United States Court of Appeals for the Federal Circuit is published at 776 F.3d 832 (Fed. Cir. 2015) and reprinted at Pet. App. 1a-10a. The opinion of the United States Court of Appeals for the District of Columbia Circuit is published at 734 F.3d 1218 (D.C. Cir. 2013). The opinion of the District Court for the District of Columbia is published at 839 F. Supp. 2d 75 (D.D.C. 2012).

JURISDICTION

The Federal Circuit entered its order on January 8, 2015. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Appointments Clause, U.S. Const. art. II, § 2, cl. 2, provides that the President

> shall nominate, and by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other

> officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law: but the 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 relevant statutory provisions are reprinted in the Appendix to this petition at Pet. App. 81a-86a.[1]

[1] This Appendix contains the statutory provisions in effect today, which have changed in insignificant respects since the times at issue in this case.

INTRODUCTION

This case presents the question whether the Defense Officer Personnel Management Act (DOPMA)—the federal statute governing military promotions—violates the Appointments Clause and *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 155–56 (1803). Under DOPMA's express terms, officers who are (1) nominated by the President, (2) confirmed by the Senate, and (3) placed and retained by the President on a list of officers to be promoted, "shall be promoted" when a vacancy arises. 10 U.S.C. § 624(a)(2). DOPMA further specifies that promotion "may not be delayed more than six months" beyond the date the officer would have otherwise been promoted absent written notice from the relevant military Secretary. 10 U.S.C. § 624(d)(3), (4).

Since 2004, the Federal Circuit has been reading those mandatory terms out of DOPMA to avoid what it perceives as constitutional problems in applying the statute as written. This Court should review that determination, which has frustrated Congress's clear intent, and violated the rights of military officers who were entitled to appointment under DOPMA's express terms.

In this case, Petitioner Brigadier General Terryl J. Schwalier, USAF (Ret.) was approved by the President for promotion to the position of Major General. He was then nominated by the President, confirmed by the Senate, and scheduled to be promoted on January 1, 1997 based on his placement on the promotion list. Six

months passed, and the Secretary of the Air Force did not "specif[y] a further period of delay." § 624(d)(4). Therefore, under the clear terms of DOPMA, Petitioner was entitled to be promoted. On two separate occasions, the Air Force Board for the Correction of Military Records ("AFBCMR") agreed and corrected Petitioner's military records accordingly.

The AFBCMR's determinations in Petitioner's favor were overridden, however, by directives from Department of Defense's General Counsel. Those directives concluded that Petitioner was not entitled to promotion in light of the Federal Circuit's decision in *Dysart v. United States*, 369 F.3d 1303, 1317 (Fed. Cir. 2004) (reprinted at Pet. App. 53a). Petitioner sought judicial review, but the Federal Circuit unsurprisingly upheld the Department of Defense's invocation of that court's precedent, finding that "*Dysart* controls Mr. Schwalier's case." Pet. App. 10a.

In *Dysart*, the Federal Circuit concluded that 10 U.S.C. § 624(d), which lays out in detail the circumstances under which an officer's appointment may be delayed, impermissibly trenched on the President's authority to appoint officers under the Appointments Clause. Relying on *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 155–56 (1803), the Federal Circuit held that an officer's promotion requires the President to perform the "public act" of "appointment," which the President has the absolute discretion to delay indefinitely. Pet. App. 67a. Accordingly, both as a (nominal) matter of statutory construction and as a matter of constitutional law, the

Federal Circuit effectively invalidated § 624(d). It held that when the permissible period of delay in § 624(d) expires, *nothing happens*: The officer is in the same position as he was before the permissible period of delay expired, awaiting the President's appointment which the President has the absolute authority to withhold.

As a statutory matter, the Federal Circuit's construction is wrong because it reads out entire swaths of the statute. And as a constitutional matter, the Federal Circuit's concerns are misplaced. DOPMA does not appoint officers in the absence of a presidential appointment: officers are appointed if and only if the President places them on a promotion list, which by definition publicly expresses his intent to appoint them upon the next available vacancy. The President is free to remove an officer from the list prior to his appointment, and DOPMA's sensible and modest requirement that an officer's appointment not be delayed in excess of six months beyond that promotion date absent specific action by the President or Secretary poses no separation-of-powers concerns.

The Federal Circuit acknowledges that its construction of DOPMA raises "significant questions concerning the appointment process for military officers." Pet App 56a. Just so. That court's interpretation of the Appointments Clause and *Marbury* is not only of obvious jurisprudential importance, but it has resulted in the invalidation of provisions that the military had relied upon for decades to ensure that officer grades are effectively, efficiently,

and timely replenished. Moreover, because the Federal Circuit has exclusive jurisdiction over military back pay appeals, it is the sole court to address this issue and further percolation is neither necessary nor warranted.

The petition for certiorari should be granted.

STATEMENT OF THE CASE

A. Statutory Overview

In 1980, Congress passed DOPMA,[2] which sought to provide "common law for the appointment of regular officers and for the active-duty service of reserve officers" and "uniform laws for promotion procedures for officers in their separate services." H.R. Rep. No. 96-1462, at 3 (1980), *partially reprinted in* 1980 U.S.C.C.A.N. 6333. DOPMA began with a proposal by the Department of Defense intended to modernize the officer personnel laws, which had stood "largely unchanged" since a prior officer personnel act in 1947. *Id.* at 47. The intent of DOPMA was to institute a "more equitable, effective, and efficient system to fill officer force structure requirements and to manage the officer corps." *Id.* at 56.

DOPMA establishes the promotion process for officers of specified grades in the Army, Air Force, Marine Corps, and Navy, including promotion from brigadier general to major general. 10 U.S.C. § 611(a). Under DOPMA, the promotion process starts with the

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[2] DOPMA has since been amended multiple times without significant change to the provisions discussed herein.

creation of a promotion list by selection boards convened by the relevant military department. *Id.* The selection boards are convened subject to regulations prescribed by the Secretary of Defense, 10 U.S.C. § 611(c), and the selection board members are appointed by the Secretary of the relevant military department, 10 U.S.C. § 612(a)(1).

The selection boards then recommend for promotion the officers that they consider best qualified within each competitive category. 10 U.S.C. § 616(a). The Secretary of the relevant military department establishes the number of officers that the board may recommend for promotion, subject to certain restrictions. 10 U.S.C. § 616(b). The resulting promotion list is in order of seniority. 10 U.S.C. § 624(a). The selection boards submit to the Secretary of the relevant military department a written report, containing the names of the officers recommended for promotion. 10 U.S.C. § 617. The reports of selection boards then go through a process of review involving the Secretary of the relevant military department and, where applicable, the Chairman of the Joint Chiefs of Staff. 10 U.S.C. § 618.

The report and recommendations are submitted "to the Secretary of Defense for transmittal to the President for his approval or disapproval." 10 U.S.C. § 618(c)(1). The President has the complete discretion to remove any officer from the recommended list. 10 U.S.C. § 618(d)(1), § 629(a).

Once the President decides which officers from the recommended list should be promoted, he creates a list known as the "promotion list." 10 U.S.C. § 624(a). The President nominates officers from the promotion list and forwards the nominations to the Senate. *See* 10 U.S.C. § 624(c).[3] If the Senate refuses to confirm an officer, his name is removed from the promotion list. 10 U.S.C. § 629(b)–(c). In addition, the President has the complete discretion to remove an officer from the promotion list at any time prior to his promotion. 10 U.S.C. § 629(a); H.R. Rep. No. 96-1462, at 74 ("It is intended that such removal could be effected by the President at any time prior to the promotion of the officer.").

If the Senate confirms an officer, DOPMA provides that, "[e]xcept 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." 10 U.S.C. § 624(a)(2) (emphasis added). The officer's promotion date is determined by the Secretary of the officer's military department pursuant to certain regulations. 10 U.S.C. §§ 624(b)(2), 741(d).

"Subsection (d)," *i.e.*, 10 U.S.C. § 624(d), sets forth, in extensive detail, the exceptions to § 624(a)'s requirement that "officers on a promotion list for a competitive category shall be promoted to the next higher grade when additional officers in that grade and

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[3] For certain lower-level officer positions, Senate confirmation is not required. 10 U.S.C. § 624(c).

competitive category are needed." It states that the Service Secretary may delay a promotion if certain statutory conditions are met, such as if the officer is subject to a pending court-martial or 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." § 624(d)(1), (2). Delay of an officer's promotion requires written notice. § 624(d)(3). Pertinent here, the statute provides: "An appointment of an officer may not be delayed under this subsection 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." § 624(d)(4).

B. Petitioner's Appointment and Delayed Promotion

In 1995, the Major General Promotion Selection Board placed Petitioner on the list of candidates for promotion to major general. Pet. App. 2a. President Clinton received the list, and nominated Petitioner for promotion to major general on December 2, 1995. *Schwalier*, 839 F. Supp. 2d 75, 77 (D.D.C. 2012). The Senate confirmed the nomination on March 15, 1996. Pet. App. 16a. Petitioner's scheduled promotion date was January 1, 1997. Pet. App. 45a, 51a.

At the time of his nomination and confirmation, Petitioner was in command of the 4404th Wing (Provisional) at King Abdulaziz Airbase, Dhahran, Saudi Arabia. Pet. App. 2a. On June 25, 1996 a

terrorist bombing, just outside the compound perimeter of the Khobar Towers apartment buildings, killed nineteen Air Force personnel and wounded hundreds of others. Pet. App. 2a; Fed. Cir. JA A43. Four investigations regarding the bombing followed: one by the House National Security Committee; one by General Wayne Downing, who was appointed by Secretary of Defense William Perry; and two investigations by Air Force officials appointed by the Secretary of the Air Force and the Chief of Staff of the Air Force. Pet. App. 39a; Fed. Cir. JA A44.

On August 14, 1996, the House National Security Committee released its report, which concluded that "[o]verall, theater commanders exercised an aggressive and proactive approach to security." Fed. Cir. JA A47. One month later, General Downing released a contrary finding that the Petitioner "failed to adequately protect his troops." Pet. App. 39a. In response, the Secretary of the Air Force and the Chief of Staff of the Air Force asked Lieutenant General James Record to perform a disciplinary review. Lieutenant General Record's review determined, like the House National Security Committee, that Petitioner and his chain of command had acted "in a reasonable and prudent manner under the circumstances known at the time." Fed. Cir. JA A93. The review did not find that any individual was derelict in the performance of his or her duties or that any offenses had been committed under the Uniform Code of Military Justice. Fed. Cir. JA A93.

On December 20, 1996, General Thomas Moorman, Vice Chief of Staff of the Air Force, informed

Petitioner that his promotion would be delayed because "the Air Force needed thirty days to work on the 'perception problem.'" Fed. Cir. JA A1005. In a memorandum dated January 28, 1997, General Moorman advised Petitioner that he would recommend to the Secretary of the Air Force that Petitioner's promotion be delayed for a maximum of six months due to the continuing investigation into the bombing. Pet. App. 45a; Fed. Cir. JA A135. The Secretary of the Air Force approved the recommendation. Fed. Cir. JA A134.

On January 29, 1997, the Deputy Secretary of Defense directed the Secretary of the Air Force to conduct a further investigation into force protection and personal accountability issues related to the Khobar Towers bombing. Fed. Cir. JA A94–95. The Secretary of the Air Force and Chief of Staff of the Air Force appointed the Inspector General of the Air Force and the Judge Advocate General of the Air Force to conduct further review. Fed. Cir. JA A96–97. Their report was released on April 12, 1997, and concluded that Petitioner had acted "reasonably and prudently" based on his knowledge at the time. Fed. Cir. JA A41.

Despite these favorable reports, Petitioner learned that Secretary of Defense Cohen would take action against him and applied for retirement on July 28, 1997. *Schwalier*, 839 F. Supp. 2d at 78. On July 31, 1997—more than six months after his January 1, 1997 promotion date—Secretary of Defense Cohen recommended that President Clinton remove Petitioner from the promotion list. Fed. Cir. JA A50.

President Clinton removed Petitioner from the promotion list on July 31, 1997. Pet. App. 3a. Petitioner retired from active duty effective September 1, 1997. Fed. Cir. JA A26.

C. Secretarial Corrections Actions

On April 7, 2003, Petitioner filed an application with the AFBCMR, requesting that his records be corrected to reflect his promotion to major general. Fed. Cir. JA A34. Petitioner's application likewise asked the AFBCMR to correct his military record to reflect that he retired as a major general and was owed appropriate back pay. *Id.* Petitioner alleged that Secretary of Defense Cohen's removal of his name from the promotion list was an error and an injustice. Fed. Cir. JA A34–54; 10 U.S.C. § 1552(a)(1) (allowing correction of military record "to correct an error or remove an injustice").

The AFBCMR received an advisory opinion from the Administrative Law Division of the Office of the Judge Advocate General ("AF/JAA"), and the AF/JAA concluded that Petitioner had been promoted by operation of law. Pet. App. 49a. The AF/JAA reached this conclusion having determined that Petitioner's effective promotion date was January 1, 1997 and that Secretary Cohen's removal of Petitioner from the promotions list on July 31, 1997 was an error and without effect because it occurred outside of the permissible six-month period specified by 10 U.S.C. § 624(d)(4). Pet. App. 43a–49a. The AF/JAA thus

recommended correction of Petitioner's records to reflect his promotion to major general. Pet. App. 49a.

On August 2, 2004, the AFBCMR unanimously voted to recommend correction of Petitioner's records under 10 U.S.C. § 1552(a)(1), based on a finding that Petitioner's removal from the promotion list was ineffective due to administrative error. Pet. App. 50a-52a. On October 6, 2004, the Air Force Review Boards Agency ("AFRBA") Director, acting on behalf of the Secretary of the Air Force, adopted this recommendation and directed correction of Petitioner's record. Pet. App. 19a.

The Department of Defense ("DOD") General Counsel overruled the AFBCMR's decision. Pet. App. 30a–34a. The DOD General Counsel asserted that the cases relied upon by the Department of the Air Force in approving of Petitioner's promotion had been overturned by *Dysart v. United States*, 369 F.3d 1303 (Fed. Cir. 2004) (reprinted at Pet. App. 53a), and thus that the correction action was *ultra vires*. Pet. App. 30a–34a. On August 19, 2005, the AFRBA Director informed Petitioner that the DOD General Counsel's position—which was directly contrary to the secretarial decision reached by the AFRBA Director—was "final legal authority" and thus binding on the Air Force. Pet. App. 20a. Therefore, the final Air Force decision on the matter was that Petitioner was not promoted and thus not entitled to a correction of his military record. Pet. App. 20a–21a.

On September 24, 2007, Petitioner submitted a reconsideration application to the AFBCMR. Pet. App. 22a. On November 19, 2007, the AFBCMR again unanimously recommended correction of Petitioner's records. Pet. App. 29a. This time the AFBCMR found that the removal of Petitioner's name from the promotion list was an injustice. Pet. App. 25a–28a. The AFRBA Director, acting on behalf of the Secretary of the Air Force, adopted and approved of this recommendation and directed correction of Petitioner's records on December 20, 2007. Pet. App. 11a. Once again, the General Counsel of the DOD objected to the records correction, and instructed the DOD Comptroller to prevent any additional payments to Petitioner based on the AFRBA Director's decision. Fed. Cir. JA A408. On March 28, 2008, the Secretary of the Air Force directed that the records correction be rescinded once more, and Petitioner was notified of this decision on April 3, 2008. Pet. App. 11a–15a.

D. Complaint and Appeal

On January 20, 2011 Petitioner filed a complaint against the Secretary of Defense and the Secretary of the Air Force in the District Court for the District of Columbia, seeking injunctive, mandatory, and declaratory relief under the Administrative Procedure Act ("APA") in light of the reversals of the two favorable secretarial records correction decisions. Fed. Cir. JA A13, A1000.

On March 14, 2012 the district court granted summary judgment for the defendants. *Schwalier v.*

Panetta, 839 F. Supp. 2d 75 (D.D.C. 2012). The district court noted that the Department of the Air Force "considers the treatment of Brigadier General Schwalier to have been unjust and believes that his records should be corrected to grant his promotion to major general." *Id.* at 86. Nevertheless, the court also found that "DOD has determined that the Air Force lacked legal authority to promote Brigadier General Schwalier after his name was removed from the promotion list," and it concluded that neither the Air Force nor the DOD had acted arbitrarily or capriciously in reversing the secretarial decisions. *Id.*

On appeal, the United States District Court for the District of Columbia Circuit held that it lacked jurisdiction because the complaint was partly based on the Little Tucker Act, 28 U.S.C. § 1346, and the case was transferred to the Federal Circuit. *Schwalier v. Hagel*, 734 F.3d 1218, 1222 (D.C. Cir. 2013). On January 8, 2015, the Federal Circuit affirmed the judgment of the district court, concluding that the government "did not act arbitrarily or capriciously by declining to correct Mr. Schwalier's records." Pet. App. 10a.

The Federal Circuit found that the secretarial decisions were without force because by removing Petitioner from the promotion list on July 31, 1997, "the President chose not to exercise his appointment power." Pet. App. 8a. An interpretation of DOPMA rendering the President's act without legal force, the Federal Circuit found, "would effectively allow Congress to compel the President to appoint senior officers of the United States." *Id.* Relying on its prior

decision in *Dysart*, the court held that "Congress does not have the authority to require the President to exercise his appointment power; such authority would be akin to an exercise by Congress of the appointment power itself, which is prohibited." *Id.* (quoting *Dysart*, Pet. App. 78a) (quotation marks omitted).

The Federal Circuit expressly rejected Petitioner's contention that the government had acted unlawfully by rescinding the correction of his records. As the court explained, the recommendations to correct Petitioner's records were based on a theory that the Federal Circuit had previously rejected in *Dysart*. The court stated: "as the General Counsel for the Department of Defense correctly determined, *Dysart* controls Mr. Schwalier's case, and the government did not act arbitrarily or capriciously by following the General Counsel's advice." Pet. App. 9a-10a.

REASONS FOR GRANTING THE PETITION

The Federal Circuit's 2004 decision in *Dysart*, and its successor decisions applying *Dysart*, have quietly invalidated key sections of DOPMA and denied appointments to officers, like Brigadier General Schwalier, who were entitled to promotions under the express terms of that statute. The Federal Circuit's repeated refusal to follow DOPMA raises important questions about the Appointments Clause and rests on a deeply flawed understanding of what the Constitution requires. DOPMA does not appoint officers "by operation of law" or encroach on the President's powers

because only those officers whom the President *chooses* to be appointed in fact receive appointments.

This Court alone can correct the Federal Circuit's position on this issue. Because the Federal Circuit has exclusive jurisdiction over claims of military back pay, it is the only court that is likely to address this question. And as the decision in this case illustrates, the Federal Circuit shows no sign of reconsidering its position. This Court's review is warranted to address this important and recurring constitutional question.

I. The Federal Circuit Erred In Invalidating Key Portions Of DOPMA.

Petitioner was approved by the President for promotion; nominated by the President and confirmed by the Senate to his new position; given a promotion date of January 1, 1997; and was subjected to the maximum period of delay from that date authorized by statute. The Secretary could have delayed Petitioner's promotion for an additional period, but chose not to. Yet, the Federal Circuit held that Petitioner was not entitled to be promoted. It justified that result by relying on its decision in *Dysart*, which held that officers were *not* entitled to appointment under DOPMA even when their promotions were delayed more than the statutory six-month maximum, and that DOPMA would be unconstitutional if it required otherwise.

The Federal Circuit's decision was incorrect. DOPMA could not be more clear that it prohibits delay in excess of six months, absent additional action by the

Secretary not taken here. The Federal Circuit held otherwise based only on its view that applying the statute as written would be unconstitutional. But the Federal Circuit's constitutional holding was incorrect. Contrary to the Federal Circuit's interpretation of *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 155-56 (1803), DOPMA complies with the Appointments Clause.

A. Petitioner Was Entitled To Promotion Under DOPMA's Plain Language.

DOPMA sets forth a straightforward statutory scheme for promotion of military officers. First, a selection board recommends promotion candidates to the President. 10 U.S.C. § 624(a)(1). When a selection board report is "approved by the President, the Secretary of the military department concerned shall place the names of all officers approved for promotion" on a "promotion list," in "order of … seniority." *Id.*

After an officer is placed on a promotion list, DOPMA provides: "Except as provided in [§ 624(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." *Id.* § 624(a)(2). The promotion date (*i.e.*, the date that "additional officers in that grade and competitive category are needed") is determined by the Secretary of the officer's military branch. *Id.* §§ 624(b)(2), 741(d). Section 624(c) states that appointments are made "by the President, by and with the advice and consent of the Senate," except in the

case of certain more junior officers for which Senate confirmation is not required.

As noted above, § 624(a)(2) says that the officer "shall be promoted" on his promotion date, "*except as provided in [§ 624](d)*." Pertinent here, § 624(d)(4) states: "An appointment of an officer may not be delayed under this subsection 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."

Applying these provisions to Petitioner is straightforward. The Air Force selection board recommended his promotion, and the President approved that recommendation; therefore, he was placed on the "promotion list." § 624(a)(1). He was given a promotion date of January 1, 1997. Pet. App. 46a. He was confirmed by the Senate. § 624(c). Thus, § 624(a)(2) specified that "[e]xcept as provided in [§ 624](d)," Petitioner "shall be promoted" on January 1, 1997.

Under § 624(d)(4), "the date on which [Petitioner] would otherwise have been appointed" was January 1, 1997. Thus, Petitioner's appointment could not be delayed beyond July 1, 1997 "unless the Secretary concerned specifie[d] a further period of delay." *Id.* The Secretary never did. Thus, Petitioner was entitled to his appointment as of July 1, 1997. 10 U.S.C. § 624(d)(1), (2) (providing for retroactive appointment dates). As the AFBCMR recognized, it is as simple as that.

B. *Dysart*'s "Interpretation" of DOPMA Effectively Invalidates Key Portions Of DOPMA.

The Federal Circuit rejected Petitioner's and the AFBCMR's straightforward reading of DOPMA in light of *Dysart*. *Dysart* effectively invalidates § 624(d), and it is wrong both as a matter of statutory interpretation and as a matter of constitutional law.

Like this case, *Dysart* addressed an officer's challenge to the illegal delay of his promotion. Dysart was placed on a promotion list, § 624(a)(1), and was given a promotion date of September 1, 1997. Pet. App. 59a-60a. More than six months later, the President removed Dysart's name from the promotion list. Pet. App. 60a. Dysart argued that his removal from the promotion list violated § 624(d)(4); he contended that six months after his promotion date he was promoted as a matter of law. Pet. App. 62a–63a. The Federal Circuit never disputed Dysart's contention that his appointment was "delayed under this subsection for more than six months after the date on which the officer would otherwise have been appointed." § 624(d)(4). Instead the Federal Circuit decided that the violation of § 624(d)(4) must be ignored because of § 624(c), which says: "Appointments 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." § 624(c).

According to the Federal Circuit, even after the officer is confirmed by the Senate and receives his promotion date, § 624(c) imposes the requirement that the President make some separate act of "appointment." Pet. App. 67a, 70a-71a. Thus, according to the Federal Circuit, the extremely detailed provisions of § 624(d), setting forth the circumstances and timelines under which an appointment may be delayed, are all totally meaningless, because when the maximum period of delay authorized by statute expires, nothing happens: the officer, like any other officer, must simply wait for the President to appoint him under § 624(c). *Id.* The Federal Circuit further opined that if § 624(d) was enforced as written, it would be unconstitutional. Pet. App. 71a-73a.

As a matter of statutory interpretation, this was obviously wrong. The Federal Circuit's construction makes § 624(d) meaningless and violates the "cardinal principle of interpretation that courts must give effect, if possible, to every clause and word of a statute." *Loughrin v. United States*, 134 S. Ct. 2384, 2390 (2014) (internal quotation marks omitted).

In addition, numerous provisions of DOPMA plainly presuppose that an officer will be promoted on his promotion date absent some action by the President or Secretary to delay his promotion, and do not make sense under the Federal Circuit's view that an

additional act of appointment is required. For instance, under 10 U.S.C. § 629(a), "[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." This provision reflects Congress's "inten[t] that such removal could be effected by the President at any time prior to the promotion of the officer." H.R. Rep. No. 96-1462, at 74. This provision makes sense if *without* such removal from the list, the officer would be promoted on his scheduled promotion date—precisely the interpretation advanced by Petitioner. By contrast, this provision is unnecessary if a distinct act of "appointment" by the President is required for the promotion to occur. There would be no need to specify the President's discretion to remove someone from the promotion list if the President's failure to appoint that person would accomplish the identical result.

Similarly, § 624(d)(3) 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." This provision presupposes that on the "effective date of the appointment," the appointment will simply *happen* unless some action is taken to delay the appointment, and that this action might sometimes have to be taken on an expedited basis to prevent the promotion from occurring. Again, this provision is consistent with Petitioner's interpretation, and

inconsistent with the Federal Circuit's view that *nothing* happens on the "effective date" until the President makes a distinct, discretionary decision to effectuate the appointment.

Moreover, contrary to the Federal Circuit's reasoning, ruling in favor of Dysart would have been entirely consistent with § 624(c)'s requirement of presidential appointment. Subsections 624(a)(1) and (a)(3) state specifically that the *President* must approve the inclusion of the officer on the promotion list, from which the officer is eventually appointed under the procedures set forth elsewhere in § 624. Both here and in Dysart's case, the President did just that, satisfying the requirement in § 624(c) that appointments be made by the President. Section 624(c)'s function is to identify the classes of officers who do and do not require Senate confirmation; it does not impose some kind of additional post-confirmation "appointment" requirement that nullifies § 624(d).[4]

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[4] As part of its statutory analysis, the Federal Circuit also cited the legislative history of DOPMA, but its argument was exceedingly weak. The Federal Circuit quoted the statements in the legislative history describing the general purpose of DOPMA to provide "uniform laws for promotion procedures." Pet. App. 71a. It then found that the legislative history did not explicitly "discuss an attempt to ensure" automatic appointments of officers on promotion lists, from which it inferred that the legislative history did not "show that Congress intended to provide" for such appointments. *Id.* But contrary to the Federal Circuit's view, the absence of an affirmative statement in the legislative history describing the purpose of § 624(d) does not justify refusing to follow the plain terms of that provision.

The Federal Circuit also concluded that the provisions stating that officers "*shall be promoted*" and that appointments "*may not be delayed*" for more than six months, §§ 624(a)(2), (d)(4) were not mandatory in any case—rather, they were purely hortatory suggestions to the President regarding when he should exercise his discretion to delay appointments. Pet. App. 77a-78a.

Again, that interpretation cannot be squared with the statutory language, which is framed in mandatory terms. *See National Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 661 (2007) ("The word 'shall' generally indicates a command that admits of no discretion on the part of the person instructed to carry out the directive") (quotation marks and citation omitted). And if it were not clear enough, the previous iteration of the statute said that the President "*may*"—not "shall"—fill vacancies, a fact the Federal Circuit expressly acknowledged. Pet. App. 77a-78a. For this statutory amendment to be given any meaning, the word "shall" must be construed to be mandatory.

The Federal Circuit nevertheless found that "shall" was discretionary because "there is no indication in the legislative history that Congress intended to cabin the President's authority" in changing "may" to "shall." Pet. App. 78a. To repeat this reasoning is to refute it. The absence of an explicit statement in the legislative history that Congress *intended* to change "may" to

"shall" should not override the fact that Congress *did* change "may" to "shall."[5]

The Federal Circuit's statutory analysis, which effectively wiped § 624(d) from the U.S. Code, was a makeweight. It was plainly motivated by the court's view that applying the statute as written would be unconstitutional—indeed the Court *held* that applying the statute as written would be unconstitutional. As explained below, however, the Federal Circuit's constitutional analysis was wrong too.

C. *Dysart*'s Constitutional Holding Was Incorrect.

The Federal Circuit erred in holding that § 624(d), applied as written, is unconstitutional. DOPMA ensures that the President has the complete control to remove any officer he chooses from the promotion list. It merely sets forth an orderly timeline for the officer's promotion *after* the President has selected the officer, the Senate has confirmed the officer, and the Service Secretary has set the officer's promotion date. That scheme in no way offends the Appointments Clause.

The Appointments Clause of the Constitution provides in pertinent part that the President "shall

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[5] The Federal Circuit also cited 10 U.S.C. § 629(a), which gives the President the authority to remove an officer from the promotion list. Pet. App. 78a. But this provision simply states that *while an officer is on the list*, the President can remove him. Once an officer is promoted, he is no longer on the list. Indeed, as explained above, *supra*, §629(a) is irreconcilable with the Federal Circuit's interpretation.

nominate, and by and with the advice and consent of the Senate, shall appoint … all … officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law: but the 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." U.S. Const., art. II, § 2, cl. 2. Historically, this Court's Appointments Clause cases have addressed the question of whether a particular individual is an "officer[] of the United States," and if so, whether he qualifies as an "inferior officer" for purposes of that provision. *See, e.g.*, *Morrison v. Olson*, 487 U.S. 654, 670-71 (1988); *Buckley v. Valeo*, 424 U.S. 1, 128-31 (1976).

This case, however, presents a different type of constitutional dispute. It does not concern *whether* presidential appointment is required; it concerns *how* that appointment must occur. Petitioner acknowledges that major generals are "officers of the United States" for purposes of the Appointments Clause, and that both Presidential appointment and Senate confirmation is required. But he contends that DOPMA, as written, complies with this requirement.

As described above, 10 U.S.C. § 624(a)(1) expressly requires that the President approve the *recommended* promotion list. Two separate statutory provisions give the President unfettered discretion to remove any officer from the recommended list. § 618(d)(1), § 629(a). Once the President approves that officer's name on the promotion list, however, the constitutional requirement

of presidential appointment is satisfied. To be sure, the promotion does not take effect right away. An officer is not actually promoted until a vacancy arises (§ 624(a)(2)), and for some officers, Senate confirmation is required (§ 624(c)). But nothing in the Appointments Clause requires the presidential act of appointment to occur immediately prior to the new officer taking office.

Further, the Secretary's setting of a promotion date constitutes an act of appointment that independently satisfies the Appointments Clause. As *Dysart* acknowledged, this Court has expressly held that the President may delegate his Appointments Clause authority over military officers to the Secretary of a military department. *Orloff v. Willoughby*, 345 U.S. 83, 90 (1953) (becoming an Army officer "requires appointment by or *under authority of* the President." (emphasis added)); *United States v. Moore*, 95 U.S. 760, 762 (1877) ("The place of passed assistant-surgeon is an office, *and the notification by the Secretary of the Navy was a valid appointment to it*." (emphasis added)); *see also Dysart*, Pet. App. 68a (acknowledging this authority). When the Secretary set Petitioner's promotion date, the Appointments Clause was satisfied. To be sure, Petitioner's appointment was delayed for six months. But the Secretary declined to delay his promotion any further. Therefore, Petitioner was entitled to his promotion. § 624(d)(4). Again, given that both the President and the Secretary took affirmative action to effectuate Petitioner's appointment, nothing in the Appointments Clause prohibited Congress from prescribing a six-month deadline for that appointment to take effect.

Indeed, the Appointments Clause specifically contemplates a role for Congress in the appointments process. The Appointments Clause states that the President will appoint all "officers of the United States, whose appointments are not herein otherwise provided for, *and which shall be established by law*" (emphasis added). Obviously Congress may not *select* the appointees—that is the job of the President. And under DOPMA, Congress exercises no role in the selection of military officers whatsoever: that is entirely the task of the President and his subordinates. But through its constitutional power to "establish" appointments, Congress has the power to set forth the "duties, salary, and *means of appointment*." *Freytag v. Comm'r*, 501 U.S. 868, 881 (1991). Nothing in the Constitution prohibits Congress, through its power over the "means of appointment," to create a six-month deadline for that appointment to occur as stated in § 624(d)(4).

Through its constitutional power to establish appointments, Congress has constrained the President's discretion over appointments in numerous respects. For instance, Congress has required that officers have particular qualifications before being appointed to higher office. Military officers must meet particular congressionally-imposed eligibility criteria to be promoted, *see* 10 U.S.C. §§ 611-641, and such eligibility criteria exist for civilian officers as well. *E.g.*, 28 U.S.C. § 505 (requiring Solicitor General to be "learned in the law"). Congress may also prescribe what the President must *do* for the appointment to be effective—indeed, *Marbury* itself acknowledged that

the Constitution does not set forth any *particular* act necessary for an appointment to occur, but merely specifies that the appointment occurs upon the performance of *whatever* public act is required for the appointment. 5 U.S. (1 Cranch) at 156 ("[I]f an appointment was to be evidenced by any public act, other than the commission, the performance of such public act would create the officer."). And of course, Congress has famously imposed limits on the post-appointment removal power that have been upheld by this Court. *See generally Humphrey's Ex'r v. United States*, 295 U.S. 602 (1935).

The Constitution thus prohibits Congress from *forcing* the President to nominate a particular person. But it does not prohibit Congress from imposing a six-month deadline to appoint a person who the President *has already selected.* This Court "ha[s] never held that the Constitution requires that the three branches of Government operate with absolute independence." *Morrison v. Olson*, 487 U.S. 654, 693-94 (1988) (internal quotation marks omitted). DOPMA's minimal incursion on executive authority transgresses no constitutional line.

The Federal Circuit's analysis of this issue went badly astray. In the Federal Circuit's view, the Constitution requires a public act of "appointment," even after the President's approval of the selection list and nomination of the officer to the Senate, and "Congress could not have permissibly altered the appointment process set forth in the Constitution by providing for automatic appointments." Pet. App. 71a.

For this proposition, the Federal Circuit relied on *Buckley v. Valeo*, 424 U.S. 1, 128–31 (1976), and *Springer v. Philippine Islands*, 277 U.S. 189, 201 (1928); *see also* Pet. App. 72a–73a. But both *Buckley* and *Springer* are easily distinguishable from this case. Both cases concern situations in which a non-executive entity *selected* individuals to fill positions which, the Court found, were exclusively within the province of the executive. In *Buckley*, the Court reviewed a provision of the Federal Election Campaign Act under which two members of the Federal Elections Commission were to be appointed by the President *pro tempore* of the Senate based on recommendations from the majority and minority leaders. 424 U.S. at 113. Likewise, in *Springer*, the Philippine legislature passed an act that vested the power to elect directors and managing agents of the Philippine National Coal Company and National Bank in a board (in one case) and a committee (in another case), both of which had a majority of members that were members of the legislature. 277 U.S. at 200–01.

DOPMA, by contrast, does not alter the President's authority to select members of the military. Instead, it simply sets up an orderly process for promoting military officers *after* (a) the President has selected them, (b) the President's delegee has set a promotion date, and (c) neither the President nor his delegee has decided to delay the promotion or remove the officer from the promotion list. It does not diminish the President's executive power, *cf. Bowsher v. Synar*, 478 U.S. 714, 724 (1986); it simply provides for a predictable mechanism for processing the tens of thousands of

military appointments that take place annually. *See* 161 Cong. Rec. D225 (daily ed. Mar. 4, 2015).

The Federal Circuit also relied heavily on the well-known dicta in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 155-56 (1803). According to the Federal Circuit, "*Marbury* set forth three separate actions that are ordinarily required for a person, subject to Senate confirmation, to be appointed to office: the President's nomination; confirmation by the Senate; and the President's appointment." Pet. App. 64a-65a. The Federal Circuit quoted *Marbury*'s statement that "The appointment being the sole act of the president, must be completely evidenced, when it is shown that he has done every thing to be performed by him. … Some point of time must be taken when the power of the executive over an officer ... must cease. That point of time must be when the constitutional power of appointment has been exercised. And this power has been exercised when the last act, required from the person possessing the power, has been performed." *Id.* at 66a (quoting *Marbury*, 5 U.S. (1 Cranch) at 157). Based on those statements from *Marbury*, the Federal Circuit concluded that the Constitution requires a "public act of appointment," *after* the officer's Senate confirmation, and an appointment occurring in the absence of such a public act was unconstitutional. *Id.* at 67a.

The Federal Circuit's reliance on *Marbury* was in error. *Marbury* is of course a case with many layers, distinguishable in a multitude of factual and legal respects from this case. Of particular import here,

Marbury stated that an appointment requires a "public act," and occurs "when it is sh[o]wn that [the President] has done everything to be performed by him." 5 U.S. (1 Cranch) at 155, 157. *Marbury* concluded that on the facts of that case, the "thing" to be performed by the President was the act of signing Marbury's commission, which in fact President Adams accomplished. *Id.* at 156–57.

Here, DOPMA provides that the "thing to be performed" is the approval of the promotion list (by the President) and the setting of the promotion date (by the Secretary). These acts do not result in the officer's immediate promotion, but they set an orderly legal process in motion which ultimately results in the officer's promotion, unless it is canceled at the discretion of the President or his delegee. *Marbury*, which addressed President Adams' last-minute appointment of "Midnight Judges," had no occasion to address such a statutory scheme. *Marbury*'s discussion of the presidential appointments process, which occurred in the context of a small number of presidential commissions delivered on horseback, should not be construed as passing judgment on the constitutionality of DOPMA, enacted for the purpose of regularizing the tens of thousands of officer appointments that take place in the modern military.

II. Review Is Warranted Because The Federal Circuit Struck Down An Important Federal Statute.

Review in this case is warranted for several reasons. *First*, and most notably, the Federal Circuit has effectively invalidated a federal statute. *United States v. Bajakajian*, 524 U.S. 321, 327 (1998) ("Because the Court of Appeals' holding . . . invalidated a portion of an Act of Congress, we granted certiorari").

To be sure, *Dysart* included a nominal statutory analysis as well, but that statutory analysis should not dissuade the Court from granting review. As explained above, the Federal Circuit's statutory holding was clearly wrong and motivated by the fact that on its view, DOPMA, as written, was unconstitutional. Moreover, even framed as a statutory holding, the Federal Circuit rendered § 624(d) completely meaningless. The invalidation of a federal statute warrants this Court's review, even if labeled a "statutory" holding in addition to a "constitutional" one. And in fact, the statutory questions are weighty in themselves—this case concerns which persons will occupy the highest positions in the Nation's military, a question of obvious national importance. Thus, the Federal Circuit's statutory analysis does not reduce the importance of this case or justify denying review.

Second, this case is of great practical importance to the military, a point recognized by *Dysart*, *see* Pet. App. 54a (noting that "[t]his case presents significant questions concerning the appointment process for

military officers"). In 2014, the Senate confirmed 4,424 Air Force nominations, 6,379 Army nominations, 3,877 Navy nominations, and 874 Marine Corps nominations. 161 Cong. Rec. D225 (daily ed. Mar. 4, 2015). All of those officers were promoted pursuant to DOPMA. To put those numbers in perspective, in 2014 the Senate confirmed only 3,076 civilian nominations. *Id.* Thus, DOPMA establishes the procedures for a substantial majority of all appointments in the United States. Not surprisingly, therefore, the issue of whether an individual in Petitioner's situation is properly deemed promoted has arisen with some frequency.

In addition to this case and *Dysart*, the very same issue has arisen multiple other times in the Federal Circuit, which is the only court authorized to hear such challenges. *See, e.g.*, *Barnes v. United States*, 473 F.3d 1356 (Fed. Cir. 2007); *Lewis v. United States*, 458 F.3d 1372 (Fed. Cir. 2006); *Law v. United States*, 11 F.3d 1061 (Fed. Cir. 1993) (raising the same issue under the statute governing Coast Guard promotions), and the Court of Federal Claims, *see Rolader v. United States*, 42 Fed. Cl. 782 (1999). And of course, that list does not include cases in which military officers declined to seek records correction or judicial review in light of their expectation that *Dysart* would foreclose their claims. This Court's review would thus serve to clarify an important area of military law and correct the Federal Circuit's mistaken constitutional ruling that has denied multiple officers a promotion to which they are entitled.

Third, this issue is important because it raises substantial questions about the separation of powers

and the allocation of authority between the President and Congress. Congress has broad constitutional powers to maintain the armed forces and regulate military affairs, *see* U.S. Const. art I, § 8, and for this reason an efficient military appointment process is an issue in which Congress has a significant interest. Stretching as far back as 1916, Congress has exercised its authority to regulate aspects of the military appointments process, *see* Act of Aug. 29, 1916, ch. 417, 39 Stat. 556, 578–79, and DOPMA is just another in a long line of validly promulgated enactments in this area. The Federal Circuit's determination that DOPMA encroaches on the President's appointments power not only invalidates Congress' acts in this particular statute, but casts doubt on Congress' ability to regulate other military personnel issues as well.

Moreover, *Dysart* relied in large part on *Marbury* in reaching its flawed interpretation of the bounds of Congress' power, *see* Pet. App. 64a-65a, yet it did so without any serious consideration of whether Congress could vary the means through which the steps of the appointments process are accomplished. The question of whether *Marbury* dictated a single means through which appointments must be effectuated, or whether it permits multiple appointments processes so long as they do not encroach on the President's core appointments power, is a basic and fundamental question that merits this Court's attention.

Fourth, only this Court can resolve these constitutional questions. Claims like Petitioner's 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 application 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). *Dysart* is now more than a decade old, and this case is only the latest to attest to the fact that the Federal Circuit shows no sign of changing course.

Fifth and finally, this case is an ideal vehicle for the Court to address the question of whether § 624(d)(4) is constitutional. Petitioner prevailed, *twice*, in the Air Force records correction process. Remarkably, as the District Court stated, even the Department of the Air Force itself "considers the treatment of Brigadier General Schwalier to have been unjust and believes that his records should be corrected to grant his promotion to major general." *Schwalier*, 839 F. Supp. 2d at 86. Yet the DOD General Counsel overruled the Air Force and the Federal Circuit affirmed his determination, stating: "[A]s the General Counsel for the Department of Defense correctly determined, *Dysart* controls Mr. Schwalier's case." Pet. App. 10a.

Thus, this case squarely presents the issue decided in *Dysart* of whether an individual otherwise fully qualified and entitled to promotion must nevertheless be denied that promotion because the means Congress has chosen to effectuate the promotions process are

unconstitutional. The Court should grant certiorari to consider that significant issue.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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March 2015

APPENDIX

Appendix A

United States Court of
Appeals for the Federal Circuit

TERRYL J. SCHWALIER, Brig. Gen., USAF, Ret.,
Plaintiff-Appellant,

v.

CHARLES T. HAGEL, Secretary of Defense AND
DEBORAH LEE JAMES, Secretary of the Air Force,
Defendant-Appellees.

2014-1113

Appeal from the United States District Court for the District of Columbia in No. 1:11-CV-00126, Judge Rosemary M. Collyer.

Decided: January 8, 2015

Before PROST, *Chief Judge*, REYNA and HUGHES, *Circuit Judges*.

HUGHES, Circuit Judge.

Following nomination by the President and confirmation by the Senate, Brigadier General Terryl J. Schwalier was scheduled to be appointed to major general in early 1997. Before that time, however, his appointment was delayed and the President later chose not to appoint him. Nonetheless, Mr. Schwalier argues that he was appointed by operation of law after the delay of his appointment expired and

before the President's decision. The appointment process for senior military officers does not allow for automatic appointments, and a President's decision not to appoint an officer is unreviewable. Because the district court correctly held that the Air Force and the Department of Defense did not act arbitrarily or capriciously by not retroactively appointing Mr. Schwalier, we affirm.

I

In 1995, a Major General Promotion Selection Board placed Mr. Schwalier on a list of candidates to be promoted to major general. Promotion to major general constitutes an appointment that must be made by the President, by and with the advice and consent of the Senate. *See* U.S. Const. art. II, § 2, cl. 2; 10 U.S.C. § 624(c). Pursuant to 10 U.S.C. § 624, President Clinton received the list and nominated Mr. Schwalier for the promotion. The Senate confirmed the nomination in March 1996, and Mr. Schwalier's projected effective date of promotion was to be in January or February of 1997.

Before the effective date of his promotion, Mr. Schwalier assumed command of the 4404th Wing (Provisional) at the King Abdulaziz Airbase in Saudi Arabia. Many of the Wing's personnel lived in the Khobar Towers, a nearby apartment complex. On June 25, 1996, a terrorist group detonated a truck bomb at the Khobar Towers, killing 19 airmen and injuring hundreds of others. In December 1996 and in January 1997, Mr. Schwalier was told that his promotion would be delayed. Meanwhile, Congress, the Department of Defense, and the Air Force

commissioned investigations of the attack. The Department of Defense's investigation was unfavorable to Mr. Schwalier, and the Secretary of Defense recommended that President Clinton remove Mr. Schwalier from the Selection Board's list. On July 31, 1997, President Clinton removed Mr. Schwalier's name from the list.

Mr. Schwalier retired in September 1997. In 2003, he filed an application to correct his military records with the Air Force Board for Correction of Military Records. According to Mr. Schwalier, the permissible length of promotion delay under 10 U.S.C. § 624(d)(4) ended before the President removed Mr. Schwalier from the list. He argued that he was therefore promoted by operation of law when the delay ended.

Initially, the Corrections Board agreed with Mr. Schwalier. It recommended that the Secretary of the Air Force "correct an error" under 10 U.S.C. § 1552(a)(1) in Mr. Schwalier's records to reflect that, among other things, he was promoted to major general. The Department of Defense, however, disagreed with the recommendation. Its General Counsel determined that, according to this court's decision in *Dysart v. United States*, 369 F.3d 1303 (Fed. Cir. 2004), promoting Mr. Schwalier retroactively would be without legal effect. Based on the determinations of the General Counsel for the Department of Defense, the Corrections Board ultimately denied Mr. Schwalier's application.

In 2007, Mr. Schwalier requested that the Corrections Board reconsider his application. The

Corrections Board found in favor of Mr. Schwalier. In November 2007, it determined that the decision to remove Mr. Schwalier from the list caused an "injustice" under 10 U.S.C. § 1552(a)(1), warranting the requested corrections. The Air Force then issued a letter in December 2007, stating that Mr. Schwalier was appointed to major general, effective January 1, 1997. Shortly after, the General Counsel for the Department of Defense again advised the Secretary of the Air Force that the implementation of the Corrections Board's recommendations would be without legal effect and that the Secretary of Defense agreed. Accordingly, the Secretary of the Air Force rescinded all corrections of Mr. Schwalier's records on April 3, 2008.

In 2011, Mr. Schwalier filed a complaint against the Secretary of Defense and the Secretary of the Air Force (collectively, the government) in the United States District Court for the District of Columbia. The complaint sought back pay and other relief under the Administrative Procedure Act (APA). The district court granted summary judgment to the government, finding that it did not act arbitrarily or capriciously by refusing to retroactively promote Mr. Schwalier.

Mr. Schwalier then appealed to the United States Court of Appeals for the District of Columbia Circuit. The D.C. Circuit determined that the district court had jurisdiction over Mr. Schwalier's case because it was based in part on the Little Tucker Act, 28 U.S.C. § 1346(a)(2), and in part on the APA. Given this holding, the D.C. Circuit held that it lacked

jurisdiction over Mr. Schwalier's case. Consequently, the D.C. Circuit transferred the appeal to this court.

II

As an initial matter, the government argues that Mr. Schwalier's complaint should have been dismissed as barred by the statute of limitations applicable to Little Tucker Act claims, depriving the trial court of jurisdiction. But Mr. Schwalier's complaint is also based on the APA. Actions for judicial review under the APA accrue at the time of final agency action and are subject to the six-year statute of limitations in 28 U.S.C. § 2401(a). *See Preminger v. Sec'y of Veterans Affairs*, 517 F.3d 1299, 1307 (Fed. Cir. 2008); *Mendoza v. Perez*, 754 F.3d 1002, 1018 (D.C. Cir. 2014). Mr. Schwalier filed his complaint in 2011, requesting review under the APA of the government's final action in 2008. Accordingly, Mr. Schwalier filed his complaint within the statute of limitations.

Moreover, we are satisfied that we have jurisdiction over Mr. Schwalier's appeal, as it is based "in whole or in part" on the Little Tucker Act. 28 U.S.C. § 1295(a)(2). And even "when a mixed case is presented and the nontax Little Tucker Act claim is dismissed, the other claims may be reviewed provided the Little Tucker Act claim was nonfrivolous." *Banks v. Garrett*, 901 F.2d 1084, 1088 (Fed. Cir. 1990). As the D.C. Circuit held, Mr. Schwalier's request for back pay in his complaint is "unambiguously monetary in nature" and based "in part" on the Little Tucker Act. *Schwalier v. Hagel*, 734 F.3d 1218, 1222 (D.C. Cir.

2013). Thus, we have jurisdiction over Mr. Schwalier's appeal.[1]

III

Applying D.C. Circuit law here, we review a grant of summary judgment de novo. *Epos Techs. Ltd. v. Pegasus Techs. Ltd.*, 766 F.3d 1338, 1341 (Fed. Cir. 2014). Summary judgment is appropriate when there is "no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

The APA entitles "a person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action . . . , to judicial review thereof." 5 U.S.C. § 702. The reviewing court must set aside a final agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

A

The Secretary of the Air Force may correct a military record when it is "necessary to correct an error or remove an injustice." 10 U.S.C. § 1552(a)(1). The procedures for such corrections are established by the Secretary of the Air Force and must be

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[1] To the extent Appellees suggest we must retransfer Mr. Schwalier's appeal, doing so at this point would create the "jurisdictional ping-pong" the Supreme Court has cautioned against. *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 818 (1988). "Under law-of-the-case principles, if the transferee court can find the transfer decision plausible, its jurisdictional inquiry is at an end." *Id.* at 819.

approved by the Secretary of Defense. 10 U.S.C. § 1552(a)(3). The regulations provide that if a Corrections Board's recommendation would affect an appointment or promotion requiring confirmation by the Senate, as is the case here, the recommendation must be forwarded to the Secretary of the Air Force for final decision. 32 C.F.R. § 865.4(l)(3). After a final decision has been made, it is "final and conclusive on all officers of the United States." 10 U.S.C. § 1552(a)(4).

Mr. Schwalier interprets 10 U.S.C. § 1552 as turning the Air Force's December 2007 retroactive appointment letter into a final decision that is binding on all officers of the United States, even though the President chose not to appoint Mr. Schwalier in 1997. He argues that the underlying Corrections Board's recommendation to retroactively appoint him was proper, as he was promoted by operation of law before the President acted to remove Mr. Schwalier from the promotion list.

Under the Constitution, three actions are ordinarily required for a person to be appointed to a senior military office: the President's nomination; confirmation by the Senate; and the President's appointment. *Dysart*, 369 F.3d at 1311 (citing *Marbury v. Madison*, 5 U.S. 137, 155–56 (1803)). For a promotion of a senior military officer to be effective, including a promotion to major general, all three acts must be completed. *Id.* at 1311–12. And 10 U.S.C. § 624, the statute under which Mr. Schwalier was to be appointed in 1997, incorporates this constitutional design. *See* 10 U.S.C. § 624(b)–(c); *Dysart*, 369 F.3d at 1313. Importantly, § 624 does not provide for an

appointment by operation of law without a final act of appointment by the President. *Dysart*, 369 F.3d at 1313. Here, the President chose not to exercise his appointment power by removing Mr. Schwalier's name from the promotion list in 1997. Accordingly, the third and final act required for an appointment is missing altogether in this case.

According to Mr. Schwalier, the Air Force's December 2007 retroactive appointment letter overrides the President's decision in 1997 to remove Mr. Schwalier from the promotion list because the letter issued pursuant to § 1552. It is true that § 1552 states that a record correction decision is "final and conclusive." But in this case, the President chose not to appoint Mr. Schwalier in 1997—long before any record correction decision arose—and § 1552 does not apply here. In any event, interpreting § 1552 as allowing for the reversal of the President's decision to withhold Mr. Schwalier's appointment cannot be the correct interpretation of the statute. *See Dysart*, 369 F.3d at 1316–17. Indeed, accepting Mr. Schwalier's interpretation of § 1552 would effectively allow Congress to compel the President to appoint senior officers of the United States. "Congress does not have the authority to require the President to exercise his appointment power; such authority would be akin to an exercise by Congress of the appointment power itself, which is prohibited." *Dysart*, 369 F.3d at 1317. Thus, we hold that § 1552 does not allow for appointment by operation of law when the President has chosen not to appoint a person to office.

B

Mr. Schwalier also argues that the General Counsel for the Department of Defense acted arbitrarily and capriciously when it "coerced" the Secretary of the Air Force into rescinding the corrections of his records. Appellant's Br. 18–19. But the Air Force is a subcomponent of the Department of Defense. 10 U.S.C. § 111(a)(8). It acts "subject to the authority, direction, and control of the Secretary of Defense," 10 U.S.C. § 8013, who has prescribed that the General Counsel for the Department of Defense will resolve legal disagreements within itself, Department of Defense Directive 5145.01 §§ 3.01, 3.10 (May 2, 2001). Accordingly, the Secretary of Defense and the General Counsel for the Department of Defense did not violate the law when they stepped in to resolve the issue of whether the Air Force legally could correct Mr. Schwalier's records.

Additionally, the government's decision to rescind the corrections of Mr. Schwalier's records itself was not arbitrary or capricious. Mr. Schwalier was slated to be promoted to major general under 10 U.S.C. § 624. The recommendations to correct Mr. Schwalier's records were based on the theory that he was promoted by operation of law before the President removed him from the list. But § 624 does not allow for such "automatic" appointments, and "Congress could not have permissibly altered the appointment process . . . by providing for automatic appointments." *Dysart*, 369 F.3d at 1313–14. Moreover, the President's decision not to appoint Mr. Schwalier "is simply unreviewable." *Id.* at 1316. In sum, as the

General Counsel for the Department of Defense correctly determined, *Dysart* controls Mr. Schwalier's case, and the government did not act arbitrarily or capriciously by following the General Counsel's advice.

IV

We have considered Mr. Schwalier's remaining arguments and find them unpersuasive. Because the government did not act arbitrarily or capriciously by declining to correct Mr. Schwalier's records, the judgment of the district court is affirmed.

AFFIRMED

No costs.

Appendix B

DEPARTMENT OF THE AIR FORCE
WASHINGTON, DC

APR 3 2008

SAF/MRB
1535 Command Drive, Suite E-302
Andrews AFB, MD 20762-7002

Brigadier General Terryl J. Schwalier, USAF, Retired

Dear General Schwalier

By letter dated December 20, 2007, I adopted the recommendation of a panel of the Air Force Board for Correction of Military Records (AFBCMR) that you should have your military records corrected to show that you were promoted to the grade of major general with date of rank of January l, l997. Subsequently, I have been directed by the Secretary of the Air Force to rescind that directive because the Acting General Counsel of the Department of Defense believes the action taken by the AFBCMR regarding your case was beyond the authority of the Board.

I enclose the directive with attachments.

Sincerely,

JOE G. LINEBERGER
Director
Air Force Review Boards Agency

Attachment:
SAF/MRB Directive, dated April 3, 2008

DEPARTMENT OF THE AIR FORCE
WASHINGTON DC

APR 3 2008

AFBCMR BC 2003-01270A

MEMORANDUM FOR THE CHIEF OF STAFF

The directive previously issued in this case, dated December 20, 2007, is rescinded.

JOE G. LINEBERGER
Director
Air Force Review Boards Agency

Attachment:
SECAF Memorandum, dated March 28, 2008

SECRETARY OF THE AIR FORCE
WASHINGTON

MAR 28 2008

MEMORANDUM FOR THE DIRECTOR OF THE
AIR FORCE REVIEW BOARDS AGENCY

SUBJECT: Air Force Board for the Correction of Military Records Recommendation - Brigadier General Terryl J. Schwalier (USAF - Ret.)

The Secretary of Defense has informed me that the Acting General Counsel of the Department of Defense has advised that the Air Force's implementation of an Air Force Board for the Correction of Military Records (AFBCMR) recommendation that the records of Brig Gen Schwalier be corrected to reflect that he was promoted to the grade of major general and subsequently retired in that grade is directly at odds with the opinion of the General Counsel of the Department of Defense, dated March 24, 2005 (attached). The Department of Justice supports the Acting General Counsel's conclusion of law. ·

The Acting General Counsel advises that, notwithstanding the AFBCMR's position that this second recommendation is based on equity to remove an injustice while the first recommendation was based on interpretations of law and policy, the legal principles are the same for both the first and second AFBCMR recommendations. Thus, the Acting General Counsel

concludes that the second AFBCMR recommendation and the Air Force's purported implementation of that recommendation, like the first AFBCMR recommendation, are *ultra vires* and without legal effect, and that all actions taken in implementation of this second AFBCMR recommendation are void. The Secretary of Defense agrees. I therefore direct you to rescind all actions to correct Air Force records pertaining to Brig Gen Schwalier that resulted from the December 20, 2007 implementation of the recommendation of the AFBCMR.

I appreciate your prompt action in response to this memorandum.

Michael W. Wynne

Attachment:
a/s

Appendix C

DEPARTMENT OF THE AIR FORCE
WASHINGTON DC

DEC 20 2007

AFBCMR BC-2003-01270A

MEMORANDUM FOR THE CHIEF OF STAFF

Having received and considered the recommendation of the Air Force Board for Correction of Military Records and under the authority of Section 1552, Title 10, United States Code (70A Stat 116), it is directed that:

The pertinent military records of the Department of the Air Force relating to TERRYL J. SCHWALIER, , be corrected to show that:

a. He was not retired on 1 September 1997, in the grade of brigadier general, but on that date was continued on active duty.

b. His name was not removed from the list of officers selected for promotion to the grade of Major General by the CY 95 Major General Selection Board and confirmed by the Senate on 15 March 1996 and he was promoted to the grade of major general effective and with a date of rank of 1 January 1997.

c. He applied for retirement to be effective 1 February 2000, when he would have had the

statutorily-required time in grade to retire at the requested grade, which request was approved by competent authority, and he retired in the grade of major general on 1 February 2000.

JOE G. LINEBERGER
Director
Air Force Review Boards Agency

ADDENDUM TO
RECORD OF PROCEEDINGS
AIR FORCE BOARD FOR CORRECTION OF
MILITARY RECORDS

IN THE MATTER OF:

Terryl J. Schwalier

DOCKET NUMBER: BC-2003-01270A
INDEX NUMBER: 131.00
COUNSEL: Michael T. Rose

HEARING DESIRED: No

APPLICANT REQUESTS THAT:

His military records be corrected as previously directed by the Secretary of the Air Force through his delegees [sic], the AFBCMR and the Director, Air Force Review Boards Agency, on or before 6 October 2004. Specifically, the applicant requests the following:

a. He was not retired on 1 September 1997, in the grade of brigadier general, but on that date was continued on active duty;

b. He was promoted to the grade of major general effective and with a date of rank of 1 January 1997; and

c. He applied for retirement under the provisions of AFI 32-3203 to become effective 1 February 2000, his request was approved by competent

authority, and he retired in the grade of major general on 1 February 2000.

RESUME OF CASE:

On 2 August 2004, the panel voted to recommend granting the following requested relief (Exhibit I):

a. He be promoted to the grade of major general (0-7) with a date of rank (DOR) and effective date of 1 Jan 97 and paid all back pay and allowances entitled to in that grade.

b. He be retired in the grade of major general effective 1 Sep 97 and paid all back pay he would be entitled to.

The panel granted relief on the basis that an administrative error was made in the action to delay the applicant's promotion and that as a matter of law the applicant was promoted to the grade of major general effective 1 January 1997, thereby rendering his removal from the major general promotion list null and void. On 6 Oct 2004, the Director, Air Force Review Boards Agency, as the Secretary of the Air Force's designee, signed the directive granting the relief.

Subsequent to the directive being signed and prior to its release, the Acting Secretary of the Air Force forwarded an info memorandum, dated 8 February 2005 (Exhibit J), to the Deputy Secretary of Defense advising of the Board's decision and intent to release the decision to the applicant on 1 March 2005. In a memorandum dated 30 March 2005 (Exhibit K), the Air Force General Counsel advised the Director of the Air Force Review Boards Agency (AFRBA) that given the

DoD General Counsel's role as the final legal authority for the Department of Defense, his determination was binding upon the Director, AFRBA, and the Board. The Air Force General Counsel also recommended the applicant be provided with a copy of her correspondence, with attachments, and be given a reasonable opportunity to comment, after which the Board then obtain an advisory regarding such comments, the options remaining to the Board, and the final action to be taken in the case. Attached to the Air Force General Counsel's memorandum were a memorandum, dated 18 February 2005 from SAF/GCM to the DoD Deputy General Counsel (Personnel and Health Policy) providing analysis and conclusions requested by them in light of *Dysart v. United States, 369 F. 3d 1303 (2004)* and a memorandum, dated 24 March 2005, from the General Counsel of the Department of Defense in which they advised the Acting Secretary of the Air Force that the action taken by the AFBCMR was *ultra vires* (beyond the authority of the board) and without legal effect. He concluded that the applicant was not promoted by authority of the president, or otherwise, prior to the President taking personal action to remove him from the promotion list.

By memorandum, dated 11 May 2005 (Exhibit L), the Director, AFRBA, forwarded the Air Force General Counsel's memorandum, with attachments, and requested the applicant provide any comments he found appropriate within 30 days.

In a letter, dated 1 July 2005 (Exhibit M), applicant's counsel responded to the Director, AFRBA with reasons why he believed the relief signed on 6 October

2004 should be implemented. Counsel made two key arguments:

a. The Board has two separate and independent statutory mandates - to "correct an error" and to "remove an injustice." Assuming for the sake of argument the DoD General Counsel legal opinion is correct, counsels argues that any inability to correct an error in no way interferes with the Board's independent ability (indeed its obligation) to remove an injustice. Counsel opines the Board should now proceed to address the injustice prong of applicant's appeal. Counsel discusses issues he believes supports the granting of relief on the basis of an injustice.

b. Pursuant to Title 10 U.S.C., Section 1552, a duly approved AFBCMR recommendation, except when procured by fraud, is final and conclusive on all officers of the United States. Counsel argues that the DoD General Counsel's determination the Board's action was "*ultra vires* and without legal effect" was patently wrong. Counsel outlines his argument for his position.

In a memorandum, dated 19 Aug 05 (Exhibit N), the Director, AFRBA, advised applicant's counsel that, as previously advised, given the DoD General Counsel's role as the final legal authority for the Department of Defense, his determination was binding on the Air Force and that in view of this and the fact the applicant was not seeking a correction within the purview of the AFBCMR, the Board was not in a position to take further action on his client's request. Counsel was also advised this was the final Air Force decision on his client's application.

The Director, AFRBA was advised in a memorandum dated 16 November 2005 (Exhibit O) that the applicant was being represented by new counsel. Applicant's new counsel advised that his reading of the statute was that the Director's opinion was final. Counsel inquired whether "DoD ever overruled the BCMR on any other case." In a response, dated 27 December 2005 (Exhibit P), the Director, AFRBA, advised counsel that although he was not sure he would use the term "overruled" to describe what happened in the applicant's case, he was not aware of any other case where the Department of Defense has told the AFBCMR that its attempted relief exceeded its legal authority. The Director, AFRBA, also pointed out he was not in a position to express either agreement or disagreement as regards counsel's belief the AFBCMR statute rendered his "purported decision" final.

In a new DD Form 149, dated 24 September 2007 (Exhibit R) applicant, represented by new counsel makes requests as stated above.

CONTENTIONS:

In the current submission (applicant's counsel presents a 64-page brief of counsel with 21 exhibits. Two significant attachments include a letter to the current Secretary of the Air Force from the former Secretary of the Air Force (SecAF) , James G. Roche, who was serving at the time of applicant's initial appeal and approval, and an affidavit from General John P. Jumper, Chief of Staff of the Air Force during the period of the applicant' s appeal.

Key points made by Secretary Roche include the following:

a. He was aware of the AFBCMR's recommendations to grant the applicant relief and that the Director, AFRBA, granted and directed the implementation of the recommendations. He approved the granting of the applicant's favorable AFBCMR recommendations by the Director, AFRBA, as his lawful designee. He believed the Director, AFRBA, was acting as his lawful designee when he granted those recommendations and he believed then, and believes now, that the granting of those recommendations by the Director, AFRBA, was a final decision by him as SecAF that was legally binding on the Air Force.

b. He expresses concern with, and disapproval of, the actions of the DOD lawyers in this case and questions their timing in waiting until he had left office to intrude in the case He believes the SecAF, and not staff lawyers, are entrusted with the final authority to decide whether to grant AFBCMR recommendations. He finds it particularly inappropriate for DOD lawyers to have intervened since it involved some of the same lawyers who were instrumental in pressing for the original findings against the applicant.

c. His interest in the case comes from its merits. He has never met or spoken with the applicant. However, he had extensive conversations with Air Force counsel who reviewed all relevant investigations and other materials at his request. Aside from the technical legal merits, he concluded, based on new

evidence, the applicant's records should be corrected as recommended by the AFBCMR because of the unjustness of the underlying actions "sought to be corrected." For example, he became aware of new evidence that strongly suggested that intelligence predictions about the particular location of the Khobar Towers attack were known by US intelligence officials but that information had not been provided to the applicant in an actionable form.

d. In addition to the above, and, most relevant to the applicant's case, when no one in the chain of command was penalized for the attack on the Pentagon on 9/11/2001, or for other terrorist attacks against American embassies, and given the level of knowledge of Al Qaeda terrorist goals and method not available at the time of the Khobar Towers attack, it made him seriously question the justness of singling out the applicant. This position was enhanced by the judgment of the US Navy with the knowledge of Al Qaeda obtained after 9/11, that the Commanding Officer of the USS Cole was not to be held responsible for the attack against the ship.

The former Chief of Staff of the Air Force discusses his receipt of the memorandum addressed to him (COS Memorandum) directing correction of the applicant's records and that it was his understanding the COS Memorandum was a legally binding directive requiring the Air Force to insure the specific actions stated in the memorandum were taken to implement the recommendations favorable to the applicant made by the AFBCMR and granted by the SecAF through his designee, the Director, AFRBA.

THE BOARD CONCLUDES THAT:

1. In our original consideration of this case we agreed with the opinion of AF/JAA, dated 8 July 2004, and concluded the applicant had been the victim of an administrative error regarding the delay of his promotion to the grade of major general. Consequently, we recommended correction of the applicant's record to show that he was promoted to the grade of major general effective and with a date of rank of 1 January 1997. Subsequently we learned our recommended correction was never implemented due to the view of the Deputy DoD General Counsel that the recommended correction exceeded the authority of this Board. At the time of the first directive, we reasoned that our recommendation to correct the record on the basis of administrative error constituted full relief and thus addressing the merits of whether the removal action was also an injustice was not necessary. Since the recommended relief was not implemented, we have decided to grant the request for reconsideration and consider all of the arguments on the merits of this case previously submitted, as well as those submitted subsequent to the panel vote.

2. In the latest request for reconsideration, applicant's counsel makes several arguments that are consistent with those advanced by General Jumper and Secretary Roche as to the finality of the first AFBCMR directive discussed above. To support these arguments he provides wide-ranging statutory and regulatory analysis. Although the panel has serious concerns about DOD involvement after it issued the first directive and its potential impact upon the Air Force Secretary's statutory authority to correct records, its

primary responsibility at this juncture is to consider the request for correction in this case on its merits and not act as a forum to evaluate such complex legal issues. The AFBCMR finality and authority issues may in fact be resolved in other forums, in a manner favorable or unfavorably to the applicant. If it were necessary to resolve these legal issues to decide the case, the panel would do so, but given its final decision on the merits of the case, (discussed below) revisiting the promotion procedural and AFBCMR authority arguments is not necessary to reach our determination on the ultimate question of whether the applicant has demonstrated the decision to remove the applicant's name from the list of officers promoted by the CY 95 Major General Selection Board constituted an error or injustice warranting correction of his Air Force record.

3. In this instant consideration, after reviewing the applicant's complete original submission to the Board, his current submission, and additional classified material referenced by the applicant but not provided, we conclude that the decision to remove the applicant's name from the CY 95 Major General promotion list caused an injustice. We note that of four investigations conducted of the Khobar Tower's bombing, only one, the second investigation conducted, set forth a finding that the applicant failed to adequately protect his troops. Ironically, although several flaws were subsequently pointed out in this report, it was the only report available to the public prior to the Secretary of Defense's announced decision regarding the applicant. Two investigations conducted subsequent to the damning finding of the second report found that the applicant had acted reasonably and prudently in carrying out his duties. Our own exhaustive review of

the evidence, including classified material, indicates that he implemented all identified force protection steps that he could, took steps to resource those that required resourcing and acted within the limits of his authority to have the remaining addressed. Additionally, this view is bolstered by the view of several senior level officials with intimate knowledge of this case and who have provided statements to this Board in support of the applicant. Particularly relevant to these findings is the statement of Secretary Roche that he became aware of new evidence that strongly suggested that intelligence predictions about the particular location of the Khobar Towers attack was known by US intelligence officials but that information was never provided to the applicant in an actionable form.

4. The second key area of concern to this Board, and one we believe that goes to the issue of fundamental fairness is the lack of an accountability response even remotely similar to that taken in this case against commanders for terrorist attacks before or after this incident, including those where there was specific warning in intelligence channels and the attacks resulted in loss of life. These incidents include terrorist attacks against military and civilian targets in Europe during the 1970s, the USMC barracks bombing in Lebanon, as well as attacks on embassies, the USS Cole and the attack on the Pentagon on 9/11/2001. In responding to these attacks, especially the more recent ones, there was a general recognition that in a Global War on Terror, commanders are held to a very high standard, but a standard that is reasonable and that is informed by what we reluctantly must acknowledge about our enemy's persistence, skill and ingenuity. We

simply do not find in any of the voluminous amount of information reviewed by this Board evidence of a failure of performance by the applicant warranting the action taken against him. In fairness, we note some of the information we rely upon to reach our conclusion may not have been available to those who made the decision in question here, but that only lends further support for removing what clearly must now be seen as an injustice. Therefore, we recommend the applicant's records be corrected as indicated below.

THE BOARD RECOMMENDS THAT:

The pertinent military records of the Department of the Air Force relating to APPLICANT be corrected to show that:

a. He was not retired on 1 September 1997, in the grade of brigadier general, but on that date was continued on active duty.

b. His name was not removed from the list of officers selected for promotion to the grade of Major General by the CY 95 Major General Selection Board and confirmed by the Senate on 15 March 1996 and he was promoted to the grade of major general effective and with a date of rank of 1 January 1997.

c. He applied for retirement under the provisions of AFI 36-3203 to become effective 1 February 2000, his request was approved by competent authority, and he retired in the grade of major general on 1 February 2000.

The following members of the Board considered Docket Number BC-2003-01270 in Executive Session on 19 November 2007, under the provisions of AFI 36-2603:

Mr. Michael K. Gallogly, Panel Chair
Mr. John B. Hennessey, Member
Mr. Joseph D. Yount, Member

All members voted to correct the records, as recommended. The following documentary evidence was considered:

Exhibit I. Record of Proceedings, undated, w/atchs.
Exhibit J. Memo, Acting SECAF, dated 8 Feb 05. .
Exhibit K. Memorandum, SAF/GC, dated 30 Mar 05.
Exhibit L. Letter, SAF/MRB, dated 11 May 05.
Exhibit M. Letter, Counsel, dated 1 Jul 05.
Exhibit N. Letter, SAF/ ;MRB, dated 19 Aug 05.
Exhibit O. Letter, Counsel, dated 16 Nov 05.
Exhibit P. Letter, SAF/MRB, dated 27 Dec 05.
Exhibit Q. DD Form 149, dated 24 Sep 07, w/atchs.·

MICHAEL K. GALLOGLY
Panel Chair

Appendix D

GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE
1600 DEFENSE PENTAGON
WASHINGTON, D.C. 20301-1600

MAR 24 2005

MEMORANDUM FOR ACTING SECRETARY OF THE AIR FORCE

SUBJECT: Air Force Board for the Correction of Military Records (AFBCMR) Decision – Brig Gen Terryl J. Schwalier, United States Air Force (Ret.)

This memorandum sets forth my opinion of law with respect to whether Brigadier General Terryl J. Schwalier, USAF (Ret.), was promoted to the grade of major general. As discussed below, I answer the question in the negative.

In reaching this conclusion, I have reviewed a memorandum, dated February 18, 2005, from the Deputy General Counsel of the Department of the Air Force for Military Affairs and again reviewed your memorandum to the Deputy Secretary of Defense, subject as above, dated February 8, 2005. I have also considered the AFBCMR recommendation concerning General Schwalier and related Air Force documents.

I disagree with the conclusion of the Deputy General Counsel of the Air Force for Military Affairs

that General Schwalier was promoted to the grade of major general. In the Deputy General Counsel's view, "in accordance with the procedures of the Secretary of the Air Force acting on behalf of the President (not the Congress), the appointment was effected by Presidential decision relating back to the original promotion date (there being no action to adjust it) well before the President was erroneously (although in good faith) advised by the Secretary of Defense that authority continued in his office to remove the individual from the promotion list." Deputy General Counsel of the Air Force Memorandum at p. 6. The Air Force Deputy General Counsel's argument is that General Schwalier was promoted to the grade of major general by action of the President before the President personally removed General Schwalier from the major general promotion list.

The fundamental issue presented is the nature and extent of the President's appointment authority under the United States Constitution. Much of the legal analysis concerning General Schwalier's grade revolves around a case decided last year by the United States Court of Appeals for the Federal Circuit, *Dysart v. United States*, 369 F. 3d 1303 (2004), and the benchmark Supreme Court case of *Marbury v. Madison*, 5 U.S. 137 (1803).

With regard to the appointment of military officers, the *Dysart* court held that the President or his duly authorized delegee must appoint such officers, as commanded by the Constitution. As the *Dysart* court explained, the United States Supreme Court in *Marbury* "set forth three separate actions that are ordinarily required for a person, subject to Senate

confirmation, to be appointed to office: the President's nomination; confirmation by the Senate; and the President's appointment." 363 F. 3d at 1311. Again under *Marbury*, the *Dysart* court noted "if an appointment was to be evidenced by any public act, other than the commission, the performance of such public act would create the officer." 363 F. 3d at 1312. Accordingly, following nomination by the President and confirmation by the Senate, *Dysart* teaches that in the absence of a commission appointing a military officer, the President, or an official acting on his behalf, must make a public act of appointment for an officer to be promoted.

The Air Force procedures for appointing Air Force general officers are described by Colonel Kimberly Toney, the Deputy for General Officer Matters, Air Force Senior Leader Management Office (AFSLMO), in her affidavit dated February 18, 2005, which is attached to the Air Force Deputy General Counsel's memorandum. To summarize, following Senate confirmation, officers are promoted from the promotion list as vacancies occur. Approximately 7-10 days prior to the promotion date, an AFSLMO representative informs the officer by telephone or email that his or her promotion will occur on a date certain. No writing is used by AFSLMO to make the notification. According to Colonel Toney, promotion is effective on the established promotion date without further action and an order is published after the promotion date to reflect the appointment.

In my opinion, the described Air Force procedures do not constitute the public act of appointment required by *Marbury and Dysart.* Even if

those procedures pass Constitutional muster, however, the evidence does not reflect that any authorized Air Force official informed General Schwalier that he was to be promoted on January 1, 1997 prior to that date. Instead, General Moorman stated that on December 20, 1996, he called General Schwalier to tell him that his promotion was delayed and that he would *not* be promoted on January 1, 1997. There is no evidence to indicate that anyone in the Air Force was otherwise aware that General Schwalier was to be promoted to the grade of major general on January 1, 1997. In fact, to the contrary, until recently Air Force senior officials appeared unanimously to believe that General Schwalier was to be promoted on February 1, 1997, which is consistent with the documentation supporting the official delay of General Schwalier's promotion date. Had a valid public act been taken by appropriate Air Force officials to effect his appointment to the grade of major general between July 1 and July 31, 1997, General Schwalier's appointment to the grade of major general arguably would have been completed. I am not aware of any such act, nor has the Department of the Air Force pointed to one.

I am not satisfied that the mere passage of a scheduled promotion date constitutes the public act required by the Constitution to complete the appointment process. Accordingly, because there was no valid public act of appointment, General Schwalier's appointment to the grade of major general was not accomplished under the *Marbury* case, as interpreted in *Dysart*. The President's action to remove General Schwalier's name from the major general promotion list on July 31, 1997, consequently, was lawful and effective. Accordingly, the action by the AFBCMR, as adopted

by the Director, Air Force Review Boards Agency, is *ultra vires* and without legal effect.

William J. Haynes II

cc: Under Secretary of Defense for Personnel and Readiness
General Counsel of the Department of the Air Force

Appendix E

DEPARTMENT OF THE AIR FORCE
WASHINGTON DC

OCT 6 2004

AFBCMR BC-2003-01270

MEMORANDUM FOR THE CHIEF OF STAFF

Having received and considered the recommendation of the Air Force Board for Correction of Military Records and under the authority of Section 1552, Title 10, United States Code (70A Stat 116), it is directed that:

The pertinent military records of the Department of the Air Force relating to TERRYL J. SCHWALIER, , be corrected to show that:

d. He was not retired on 1 September 1997, in the grade of brigadier general, but on that date was continued on active duty.

e. His was promoted to the grade of major general effective and with a date of rank of 1 January 1997.

f. He applied for retirement under the provisions of AFI 36-3203 to become effective 1 February 2000, his request was approved by competent authority, and he retired in the grade of major general effective 1 February 2000.

JOE G. LINEBERGER
Director
Air Force Review Boards Agency

OCT 6 2004

RECORD OF PROCEEDINGS
AIR FORCE BOARD FOR CORRECTION OF
MILITARY RECORDS

IN THE MATTER OF:

Terryl J. Schwalier

DOCKET NUMBER: BC-2003-01270
INDEX NUMBER: 131.00
COUNSEL: None

HEARING DESIRED: No

APPLICANT REQUESTS THAT:

He be promoted to the grade of major general (0-7) with a date of rank (DOR) and effective date of 1 Jan 97 and paid all back pay and allowances entitled to in that grade.

He be retired in the grade of major general effective 1 Sep 97 and paid all back pay he would be entitled to.

APPLICANT CONTENDS THAT:

The Secretary of Defense's (SecDef) decision to take action against him following a terrorist bombing in 1996 abrogated due process. In· making this decision, the SecDef went against the will of the Regional Military Commander, the military service chief, the recommendations of two Air Force investigation boards specifically tasked with evaluating his actions,

and the area US Consul General who well understood the threat and knew what actions US commanders were taking in response.

In his submission, the applicant develops the following seven points to support his primary contention above:

1. That the SecDef changed the charter of the initial investigation conducted into the bombing as a result of political pressure.

2. That the SecDef ignored the written authorization given to the investigator in the first Air Force investigation board to "fully dispose of the case as he saw fit" because the findings did not meet the right political conclusion.

3. That the Office of the Secretary of Defense did not allow the public release of the two Air Force investigation reports while giving full media exposure to the badly flawed initial investigation report.

4. That the Deputy SecDef improperly influenced the Secretary of the Air Force (SecAF) and Chief of Staff of the Air Force (CSAF) to "reconsider administrative action" against him in a 29 Jan 97 letter giving guidance on what the second Air Force investigation should include.

5. That the SecDef chose to go against the recommendations of the investigators in both of the two Air Force investigations regarding him without taking the time to listen to them brief/argue their recommendations.

6. That the SecDef never advised him of the range of punitive/administrative options being considered nor allowed him an audience. That the SecDef also violated the timeline and written notification provisions of AFI 36-2510 [sic] (AFI 36-2501), "Promotion of Active Duty List Officers."

7. The SecDef advised him of the actions he decided to take over national television on 31 Jul 97.

In support of his case, the applicant includes the testimony of third party regional experts who compared the actions taken in his unit with those of other units in the region at the time. He also provides current statements from individuals with unique insight into the case based on the positions they held during the timeframe in question.

To further make his case, the applicant indicates that by using the "tragic" but clearer hindsight of additional terrorist attack experience, he compares the effectiveness of his force protection measures at the time with those taken in later attacks.

Finally, the applicant provides a chronological listing of the events that he refers to in arguing his appeal.

The applicant's complete submission, with attachments, is at Exhibit A.

STATEMENT OF FACTS:

The applicant was recommended for promotion to major general by the CY95 Major General Selection Board and confirmed by the Senate on 15 Mar 96. His projected effective date of promotion was 1 Feb 97. In

Jul 96, the applicant was serving as commander of a unit in Saudi Arabia that became the victim of a terrorist bombing, resulting in the deaths of 19 airmen and the injury of approximately 240. Consequently, four investigations were conducted, the first by the House National Security Committee, the second by a retired Army general officer appointed by the SecDef, and two by Air Force officials appointed by the SecAF and CSAF. As a result of these investigations, the applicant's promotion to Major general was delayed. A key finding of the investigation completed by the retired Army General for the SecDef concluded that the applicant failed to adequately protect his troops. The other investigations did not find that the applicant failed to take responsible actions. The results of the final investigation were released in Apr 97.

In Jul 97, the SecDef determined that the applicant did not "adequately assess the implications of a possible attack" and recommended to the President that the applicant's name be removed from the major general promotion list. The President approved the recommendation. The applicant retired from active duty effective 1 Sep 97, in the grade of brigadier general.

AIR FORCE EVALUATION:

AF/JAA provided an evaluation to address what actions the Board could take should it find an error or injustice warranting correction.

AF/JAA opines that since the decision not to promote the applicant to the grade of major general was a discretionary act by the President, the Board is without

authority to correct any existing military record to now effect the applicant's promotion. At best, the AFBCMR could recommend to the SecAF that he forward a request for reconsideration through DOD to the current President for reconsideration. AF/JAA discusses the doctrine that weighs against this, the doctrine of administrative finality, which generally precludes a President from reconsidering Presidential discretionary actions once they have become final. The one accepted exception to this doctrine is when an official has acted (exercised discretion) without full or accurate information regarding the determination. They believe it could be argued that qualitatively new and different information has been learned since Jul 97 about the nature of the threat the applicant faced. However, AF/JAA opines that it is unlikely that their office or the AFBCMR could get access to the information and intelligence necessary to support this option.

AF/JAA discusses what they believe is the only other viable option, recompeting the applicant for promotion. Because the applicant was on the CY95 promotion list to major general until his removal in Jul 97, he would have otherwise been eligible to meet subsequent promotion boards. It is not without precedent that a general officer removed from a promotion list by the President has later been recommended and subsequently promoted. If the AFBCMR decides on this remedy, it could correct the applicant's records to show that he was eligible for any subsequent boards between the CY95 board and retirement and direct special selection board(s) (SSB) for those years. If selected by SSB, the promotion recommendation would have to go through the same process as the original

promotion. The SecAF could also reestablish the applicant's original date of rank under 10 USC 629(c)(1).

The complete evaluation is at Exhibit C.

APPLICANT'S REVIEW OF AIR FORCE EVALUATION:

In his response to the Air Force evaluation, the applicant makes two key points. He first addresses two errors that he states AF/JAA made in providing the background of his case and second, he expands on the involvement of the President in the promotion process.

The first error made in the background of his case was in providing the incorrect date of 1 Feb 97 for his projected pin-on to major general, vice the correct date of 1 Jan 97. The applicant states that the correct pin-on date is important due to the issue of compliance with the Defense Officer Personnel Management Act (DOPMA) and Air Force Instruction 36-2510 [sic]. Based on the 1 Jan 97 date, his promotion delay went beyond DOPMA' s maximum six-month restriction on delaying a promotion without additional written notification. In support of his assertion that his correct pin-on date was 1 Jan 97, the applicant provides a copy of a response to his query of the Air Force Senior Leader Management Office (AFSLMO). The applicant also discusses not being given ten days to respond to the notification of promotion delay he signed, although the letter stated he had ten days.

The second error in the background of his case was in the indicated number of investigations conducted in his

case. The AF/JAA evaluation indicates three and does not acknowledge the House National Security Committee effort as an investigation. The applicant points out that the House National Security Committee was the first investigative team to arrive at the incident location and their report was the first to be publicly released.

In AF/JAA's description of the President's involvement in the promotion process, they imply that the President is actively involved in extending promotion to an officer after Senate confirmation. The applicant indicates that the President actually extends promotion by an act of omission, that is, by not exercising his authority to remove an officer from the confirmed promotion list. The applicant believes an argument can be made that the President extended promotion to him on 1 Jul 97 by not taking further action in writing to delay or remove his name from the major general promotion list before the end of the allowable six-month promotion delay time period.

The applicant provides final comments on what he sees as the main concern in his case, the inappropriate involvement of the SECDEF in manipulating the process and driving a judgment to remove him from the major general promotion list.

Regarding AF/JAA' s opinion that the AFBCMR does not have the authority to correct his record because the action falls into the realm of presidential discretionary authority, he hopes the Board will request AF/JAA to reassess the statutory and regulatory realms based on his correct pin-on date and his not being given time to

respond to the written notification of his promotion delay.

The applicant further discusses the options AF/JAA presents as possible alternatives to correcting his records. He also indicates that he has concerns that the option to recompete him for promotion acknowledges that the promotion removal that he is seeking to have overturned was appropriate.

The applicant provides six attachments in conjunction with his response.

The applicant's complete submission, with attachments, is at Exhibit E.

ADDITIONAL AIR FORCE EVALUATION:

Pursuant to the Board's request, AF/JAA provided an additional evaluation of the applicant's appeal. They note that the applicant requested that his request to be advanced to the grade of major general and retired in that grade be reevaluated based on administrative error in the delay of his promotion. More specifically, the applicant asserts the evaluation prepared by AF/JAA on 21 Oct 03 at Exhibit C contained several errors. Of consequence, the applicant maintains that his promotion date was cited incorrectly as 1 Feb 97 rather than 1 Jan 97. The applicant believes that this is critical to the AFBCMR's consideration of his application. AF/JAA also notes that the applicant points out several errors, which they consider of lesser consequence to his application, i.e., their description of the number of investigations conducted at Khobar Towers and the role of the Secretary of Defense in

removing the applicant from the major general promotion list.

AF/JAA states that their initial evaluation concluded that all statutory and regulatory requirements were met in processing the delay of the applicant's promotion and his later removal from the promotion list. However, that conclusion was based solely on the administrative file provided them for review by the AFBCMR. The documents in this file indicated the applicant's promotion date as 1 Feb 97. Additional information provided by the applicant and the Air Force Senior Leader Management Office (AFSLMO) led them to conclude that the 1 Feb 97 date was incorrect.

AF/JAA discusses the timeline of the applicant's recommendation and confirmation for promotion. They note that based on AFSLMO's database, there was sufficient "headroom" (room to promote within Congressional limits) for the applicant to have been promoted effective 1 Jan 97. They further discuss the longstanding practice of promoting general officers based on vacancies and note that AFSLMO indicates that absent action to delay or remove the applicant from the promotion list, he would have been promoted effective 1 Jan 97.

Based on the expectation that the applicant would have been promoted effective 1 Jan 97, the Vice Chief of Staff of the Air Force (AF/CV) verbally notified the applicant that his promotion would be delayed. AF/CV's action was consistent with the requirements of the statute, 10 U.S.C. 624 (d) (3), Air Force Instruction 36-2501, Para 12.3.2 (2 Jan 96), and

AFSLMO practice, all of which allow verbal notification as long as it is followed by written confirmation as soon as "practicable" thereafter. The requirements of the statute, Air Force implementation of the statute, AFSLMO' s records, the practice of promoting to vacancies, and the notification by AF/CV establish clearly that the applicant's effective .date of promotion to major general was 1 Jan 97.

AF/JAA notes that AF/CV made written notification on 28 Jan 97 of his intent to recommend to the SECAF that the applicant's scheduled promotion of 1 Feb 97 be delayed for "a period up to six months." AF/JAA does not know why the 1 Feb 97 date was used, administrative error or oversight, but state that the discrepancy in the two dates, verbal and written notification, raises the seminal issue for resolution in this case: was the delay and subsequent removal of the applicant's promotion to major general procedurally correct?

On 18 Feb 97, the applicant submitted matters for consideration in response to AF/CV' s notification. Although the applicant expressed concerns that his matters were not considered, the records shows that his response was discussed and provided to the SECAF. On 22 Feb 97, the SECAF approved AF/CV's recommendation and delayed the applicant's promotion "for a period of up to six months, unless terminated earlier."

AF/JAA concludes from all of the evidence provided, the applicant would have been promoted effective 1 Jan 97, except for the delay of his promotion. They opine that there are essentially two ways to analyze the

discrepancy in the facts of this case. Both analyses start with the presumption that AF/CV properly verbally notified the applicant of the delay of his promotion and that the effective date of his promotion was 1 Jan 97.

To be effective, AF/CV's verbal notification had to be followed by written notification and, ultimately needed the approval of the SECAF. If the 1 Feb 97 date listed in all the pertinent documentation to the SECAF is viewed as administrative error, then the period "for up to six months" would have ended no later than 30 Jun 97. Barring further action to extend the delay, it would have automatically terminated on 30 Jun 97, and the applicant would have been promoted retroactively to 1 Jan 97, unless the SECAF took some affirmative action to adjust the promotion date, which there is no evidence that she did. Under this analysis, the SECDEF's recommendation to the President to remove the applicant from the major general promotion list and the President's approval of the recommendation would have had no legal effect, coming after the period of the delay had expired.

As stated above, the second analysis starts with the same presumption regarding AF/CV's notification, but adds the element that the delay was temporary and subject to the approval of the SECAF. Although the statute does not require the SECAF to act on promotions for up to six months, Air Force Instructions require the SECAF to approve all general officer promotion delays. Under this analysis the period of the delay approved by the SECAF would have begun on 1 Feb 97 and continued to the end of Jul 97, making the President's removal fall within the period of the delay,

but leaving the period from 1 to 31 Jan 97 unapproved by the SECAF. Again, because AF/CV' s authority to initiate the delay of the promotion was subject to the SECAF's later approval and the SECAF failed to later approve the period from 1 to 31 Jan 97, AF/JAA opines that the applicant was promoted to major general as a matter of law on 1 Jan 97.

AF/JAA notes that by law the SECAF had the authority to delay the applicant's promotion for up to 18 months. However, they opine that the facts do not support an analysis that attempts to combine the administrative error theory and extension of the period of the promotion delay to encompass the period from 1 Jan 97 to the period in Jul 97 when the SECDEF and President acted to remove the applicant from the promotion list. In any event, in late Jul 97, the SECDEF, relying on the record indicating that the delay of the applicant's promotion did not terminate until the end of Jul 97, recommended to the President that the applicant's name be removed from the major general promotion list. The President approved the recommendation and the applicant's name was removed. They are not aware of any impropriety associated with the role of the SECDEF or President in this process. However, it is clear that a removal action is of no effect after an officer has been promoted. They provide reference and discussion of two U.S. Court of Federal Claims cases relevant to the applicant's application because they bear on the treatment by the courts of the Services' failure to follow their own regulations in regard to promotion propriety actions. The remedy in both cases was for the court to find that the officer involved had been

promoted by operation of law on the original promotion effective date.

Based on the procedural errors related to the initial promotion delay in this case, AF/JAA believes that the AFBCMR should recognize the applicant's retroactive promotion to major general. This however raises the additional issue of the applicant's retirement grade. The applicant voluntarily retired on 31 Aug 97, some nine months after his promotion effective date. To voluntarily retire in the grade of major general, the applicant must have served on active duty for not less than three years. By exception there was a provision authorizing the SECDEF to allow the SECAF to reduce this period to not less than two years. In order to grant the applicant relief the AFBCMR would have to correct his record to reflect promotion to major general effective 1 Jan 97 and adjust his date of retirement to reflect two years of service in grade and retirement in the grade of major general.

They note that the President has the authority to waive the time in grade requirement in individual cases involving extreme hardship or exceptional circumstances. This authority may not be delegated. They believe the applicant's case involves circumstances qualifying as "exceptional or unusual" enough to warrant Presidential consideration. They also believe the AFBCMR has the authority to direct generation and processing of such a request.

AF/JAA also discusses the common law doctrine of administrative finality, where generally a President is precluded from reconsidering presidential discretionary actions once they become final unless

there are indications of fraud, miscalculation, or newly discovered evidence. They opine that the applicant's case arguably involves newly discovered evidence, not apparent from the administrative files, but only known to the applicant and the AF/CV at the time.· The evident procedural error regarding the approved date for the initiation of the applicant's promotion delay renders unnecessary any discussion regarding this doctrine in regards to the applicant's removal from the promotion list.

In summary, they conclude that the applicant was promoted to the grade of major general effective 1 Jan 97 and recommend that the AFBCMR correct the date of his promotion in recognition of such. Upon additional action by the AFBCMR to adjust the applicant's years of service and retirement date or action by the President under 10 U.S.C. 1370 (a) (2) (D), the applicant may be retired in the grade of major general.

The complete evaluation, with attachments, is at Exhibit F.

APPLICANT'S REVIEW OF ADDITIONAL AIR FORCE EVALUATION:

In his response to the additional Air Force evaluation, the applicant states that since one of the recommendations presented in his case deals with establishing a retirement date that will allow him to retire in the grade of major general, he feels it is important to explain his 1997 "voluntary" retirement decision. He requested immediate retirement on 29 Jul 97 after learning of the SECDEF's decision to strike his name from the promotion list, believing that he had

no other ethical choice. Absent the SECDEF's improper action to remove him from the list, he clearly would have had additional choices.

The applicant further notes that the AF/JAA additional evaluation chooses not to comment on the involvement of the SECDEF other than to say they had observed nothing "procedurally deficient" in his actions. Regardless, he asks the Board to consider the fairness and justice of the SECDEF's extraordinary involvement in his case as argued in his original submission. The applicant further discusses the SECDEF's role by referencing a current letter provided to the Board by the SECAF of the time in question.

As a final input the applicant states that while recognizing that AF/JAA concludes in their evaluation that the obvious procedural errors in the delay of his promotion are sufficient to invalidate SECDEF's removal action, he disagrees with their conclusion that the SECAF considered his inputs in her 22 Feb 97 directive to delay his promotion.

The applicant's complete response is at Exhibit H.

THE BOARD CONCLUDES THAT:

1. The applicant has exhausted all remedies provided by existing law or regulations.

2. The application was not timely filed; however, it is in the interest of justice to excuse the failure to timely file.

3. Sufficient relevant evidence has been presented to demonstrate the existence of error or injustice. After reviewing the complete evidence of record, we believe that AF/JAA has presented a cogent analysis of the facts surrounding the applicant's removal from the major general promotion list. As such, we agree with and adopt their rationale for the conclusion that an administrative error was made in the action to delay his promotion and that as a matter of law he was promoted to the grade of major general effective 1 Jan 97, thereby rendering his removal from the major general promotion list null and void. We also note that the applicant indicates he applied for voluntary retirement after learning of the decision by the Secretary of Defense to remove his name from the list. In that regard, we find it reasonable and fairly certain that absent this instigation, he would have continued to serve, as a minimum, until eligible to retire in the grade of major general. Since we accept the fact that the applicant was, in fact, promoted to the grade of major general, we believe that he should enjoy the benefits of that grade, which at this juncture, some seven years after the fact, would be in retirement. Therefore, in the interest of equity and justice, we recommend that the applicant's records be corrected as indicated below.

THE BOARD RECOMMENDS THAT:

The pertinent military records of the Department of the Air Force relating to APPLICANT, be corrected to show that:

a. He was not retired on 1 September 1997, in the grade of brigadier general, but on that date was continued on active duty.

b. He was promoted to the grade of major general effective and with a date of rank of 1 January 1997.

c. He applied for retirement under the provisions of AFI 36-3203 to become effective 1 February 2000, his request was approved by competent authority, and he retired in the grade of major general on 1 February 2000.

The following members of the Board considered Docket Number BC-2003-01270 in Executive Session on 2 August 2004, under the provisions of AFI 36-2603:

Mr. Michael K. Gallogly, Panel Chair
Mr. John B. Hennessey, Member
Mr. Joseph D. Yount, Member

All members voted to correct the records, as recommended. The following documentary evidence was considered:

Exhibit A. DD Form 149, dated 7 Apr 03, w/atchs.
Exhibit B. Applicant's Master Personnel Records.
Exhibit C. Memorandum, AF/JAA, dated 21 Oct 03.
Exhibit D. Letter, AFBCMR, dated 23 Oct 03.
Exhibit E. Letter, Applicant, dated 18 Nov 03, w/atchs.
Exhibit F. Memorandum, AF/JAA, dated 8 Jul 04, w/atchs.
Exhibit G. Letter, AFBCMR, dated 12 Jul 04.
Exhibit H. Letter, Applicant, dated 14 Jul 04.

MICHAEL K. GALLOGLY
Panel Chair

Appendix F

United States Court of Appeals,
Federal Circuit.

Rear Admiral (LH) Noel K. DYSART, Medical Corps, U.S. Navy (Ret.), Plaintiff–Appellant,
v.
UNITED STATES, Defendant–Appellee.

No. 03–5106.
DECIDED: May 26, 2004.

Before RADER, DYK, and PROST, Circuit Judges.

DYK, Circuit Judge.

On June 12, 1998, the President removed appellant Rear Admiral (Lower Half) Noel K. Dysart from the promotion list for the grade of rear admiral in the United States Navy ("Navy"). The appellant filed suit in the Court of Federal Claims, asserting that he had been automatically promoted to that grade as of September 1, 1997, and that he was entitled to the corresponding pay and benefits. In addition, the appellant sought reinstatement to the Navy and asserted a separate claim for medical additional special pay ("MASP"). The Court of Federal Claims granted summary judgment for the government on the administrative record. *Dysart v. United States*, No. 02–294C (Fed.Cl. May 5, 2003). We affirm.

BACKGROUND

I

This case presents significant questions concerning the appointment process for military officers. The Constitution provides that the President has the authority to nominate and, "by and with the Advice and Consent of the Senate," to appoint "Officers of the United States." U.S. Const. art. II, § 2, cl. 2. Three separate actions are ordinarily required for a person to be appointed to office pursuant to this provision: the President's nomination, confirmation by the Senate, and the President's appointment after Senate confirmation. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 155–56, 2 L.Ed. 60 (1803). In accordance with this process, the President first selects a nominee and sends the nomination to the Senate. The Senate acts on the nomination and determines whether or not to confirm the nominee. If the nominee is confirmed, the President appoints the officer and signs a commission or performs some other public act as evidence of the officer's appointment. *See id.* at 157. The Constitution also provides that "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." U.S. Const. art. II, § 2, cl. 2.

A naval officer is an "Officer of the United States" in accordance with Article II. *See United States v. Mouat*, 124 U.S. 303, 307, 23 Ct.Cl. 490, 8 S.Ct. 505, 31 L.Ed. 463 (1888) (holding that a naval officer who "holds his place by virtue of an appointment by the president" is an "officer of the United States"). The permanent promotion of a military officer to a higher

grade, as well as his initial appointment, is subject to this constitutional process. *See Weiss v. United States*, 510 U.S. 163, 174, 114 S.Ct. 752, 127 L.Ed.2d 1 (1994) (holding that "the Appointments Clause [cannot be circumvented] by unilaterally appointing an incumbent to a new and distinct office"), *aff'g* 36 M.J. 224, 227 (C.M.A.1992) ("All regular officers of the military services are appointed by the President and confirmed by the Senate. Active duty military officers are appointed and confirmed again upon each promotion to a grade above pay grade O–3."); *Shoemaker v. United States*, 147 U.S. 282, 300–01, 13 S.Ct. 361, 37 L.Ed. 170 (1893).[1]

Beginning in 1916, Congress attempted to regularize the promotion process for military officers, including naval officers. In particular, Congress directed the Navy to use a process involving selection boards for promoting naval officers to fill vacancies in the grades of commander, captain, and rear admiral. *See* Act of Aug. 29, 1916, ch. 417, 39 Stat. 556, 578–79. Pursuant to the statute, a selection board selected officers in a particular grade to fill vacancies in the next higher grade and submitted a report with its recommendations "to the President for approval or disapproval." *Id.*, 39 Stat. at 579. The selection board process was expanded in 1947 to encompass the promotions of all naval officers to grades above lieutenant (junior grade). *See* Officer Personnel Act of 1947, § 104(a), 61 Stat. 795, 800.

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[1] The President has the authority to make temporary appointments and promotions outside of the constitutional process in times of war or national emergency. *See* 10 U.S.C. § 603 (2000).

In 1980, the Defense Officer Personnel Management Act ("DOPMA"), Pub.L. No. 96–513, 94 Stat. 2835 (1980), was enacted. DOPMA provides for selection boards, which recommend officers between the grades of lieutenant (junior grade) and rear admiral (lower half)[2] (in the Navy) and first lieutenant and brigadier general (in the Army, Air Force, and Marine Corps) for promotion to the next higher permanent grade. *See* 10 U.S.C. § 611(a) (Supp. I 2001). The board submits its recommendations in a written report to the Secretary of the appropriate military branch. *See* 10 U.S.C. § 617 (2000). After reviewing the report, the Secretary submits the report "to the Secretary of Defense for transmittal to the President for his approval or disapproval." *Id.* § 618(c)(1). The statute also requires the Secretary concerned to place the names of the approved officers within particular categories (called "competitive" categories) on a promotion list in order of their seniority once the President has approved the selection board's report. *See id.* § 624(a)(1). The statute provides:

> [O]fficers 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. Promotions *shall be made* in the order in which the names of

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[2] DOPMA originally designated this grade as "commodore admiral." *See* § 105, 94 Stat. at 2851. In 1981, the grade was changed to "commodore," *see* Department of Defense Authorization Act, 1982, Pub. L. No. 97–86, § 405, 95 Stat. 1099, 1105 (1981), and it was again changed to "rear admiral (lower half)" in 1985, *see* Department of Defense Authorization Act, 1986, Pub. L. No. 99–145, § 514, 99 Stat. 583, 628 (1985).

> officers appear on the promotion list and after officers previously selected for promotion in that competitive category have been promoted.

Id. § 624(a)(2) (emphases added).

The statute also provides that the Secretary may prescribe regulations that provide for the delay of an officer's 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). Pursuant to this authority, the Secretary has promulgated regulations in paragraph 23 of Secretary of the Navy's Instruction ("Secretary's Instruction") 1420.1A. The statute and regulations impose two limitations on the Secretary's authority to delay an officer's appointment in accordance with subsection 624(d). First, the officer whose appointment has been delayed must be "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). Second, the officer's appointment "may not be delayed under this subsection 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." *Id.* § 624(d)(4). The regulations include similar provisions. *See* Secretary's Instruction 1420.1A ¶ 23 (1991).

The current statute, like its predecessor, states that appointments are made "by the President, by and with the advice and consent of the Senate," *id.* § 624(c); 10

U.S.C. § 5791 (1976) (repealed 1980).[3] The Navy follows a formal process of nomination, confirmation, and appointment for its officers, apparently designed to take account of the constitutional requirements. In accordance with the statute, the Secretary of the Navy convenes selection boards and approves their selections. *See* 10 U.S.C. §§ 611(a), 618(a). The selections are forwarded to the Chairman of the Joint Chiefs of Staff, if required; the Secretary of Defense; and the President, who may remove names from the recommended list. *See id.* § 618(b)-(d). The President then nominates officers from the recommended list and forwards the nominations to the Senate. *See generally* Department of Defense Instruction 1320.4 (1995) (providing regulations governing the nomination processes of the military branches). If an officer is not confirmed by the Senate, his name must be removed from the promotion list. 10 U.S.C. § 629(b). Once the officer has been confirmed by the Senate, he must next be appointed. For example, when an officer is appointed to the grade of rear admiral, the Special Assistant for Flag Officer Management and Distribution prepares a letter of appointment, which can only be signed with the express approval of the Secretary of the Navy, acting for the President. This letter is issued to the appointee, along with a certificate of appointment. The appointee need not formally

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[3] The statute provides that appointments of junior officers—to the grades of lieutenant (junior grade) or lieutenant (in the Navy) and first lieutenant or captain (in the Army, Air Force, and Marine Corps)—are "made by the President alone." 10 U.S.C. § 624(c). The President has delegated this authority to the Secretary of Defense. *See* Exec. Order No. 12,396, § 1(c), 3 C.F.R. 234 (1983), *reprinted in* 3 U.S.C. § 301 (2000).

accept the appointment, as "[a]n 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 Secretary concerned determines the date of the appointment, pursuant to 10 U.S.C. § 741(d).[4] *See id.* § 624(b)(2).

II

A

In this case, a selection board selected the appellant for promotion to rear admiral in the fall of 1995. The President approved the selection board's recommendation, and the appellant was nominated by the President to be rear admiral on March 20, 1996. *See* 142 Cong. Rec. 5,626 (1996). The appellant was

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[4] Section 741(d) provides, in pertinent part: (1) The date of rank of an officer of the Army, Navy, Air Force, or Marine Corps who holds a grade as the result of an original appointment shall be determined by the Secretary of the military department concerned at the time of such appointment. The date of rank of an officer of the Army, Navy, Air Force, or Marine Corps who holds a grade as the result of an original appointment and who at the time of such appointment was awarded service credit for prior commissioned service or constructive credit for advanced education or training, or special experience shall be determined so as to reflect such prior commissioned service or constructive service. Determinations by the Secretary concerned under this paragraph shall be made under regulations prescribed by the Secretary of Defense which shall apply uniformly among the Army, Navy, Air Force, and Marine Corps. (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. 10 U.S.C. § 741(d)(1)-(2) (Supp. I 2001).

confirmed by the Senate on June 20, 1996, *see* 142 Cong. Rec. 14,827 (1996), and he was placed on the Staff Corps Flag Officer Promotion List with a projected promotion date of September 1, 1997. On January 24, 1997, the Office of the Chief of Naval Operations informed the appellant that the Secretary of the Navy was considering recommending that the appellant's name be removed from the promotion list. The officer who was next in line behind the appellant for promotion to rear admiral was promoted on September 1, 1997. On September 11, 1997, Chief of Naval Personnel notified the appellant that his promotion to the grade of rear admiral was delayed. Two additional officers were promoted to rear admiral on March 1, 1998, and June 1, 1998, respectively.

On September 26, 1997, the Secretary of the Navy recommended that the appellant's name be removed from the promotion list, and the President removed the appellant's name from the promotion list on June 12, 1998, more than six months after the September 1, 1997, date on which the officer next-in-line to the appellant was promoted.[5] The reasons for the President's removal of the appellant's name from the promotion list need not detain us. In essence, the Secretary of the Navy recommended to the President that the appellant's name be removed because the appellant had received an adverse fitness report from

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[5] The President has the authority to "remove the name of any officer from a list of officers recommended for promotion." 10 U.S.C. § 629(a). He has delegated this authority to the Secretary of Defense, but only for grades below rear admiral (lower half) (in the Navy) and brigadier general (in the Army, Air Force, and Marine Corps). *See* Exec. Order No. 12,396, § 1(b).

his commanding officer, Vice Admiral Koenig, concerning the conduct of the appellant's relationship with a woman during the period after he had become separated from his wife. As discussed in greater detail below, one question is whether the appellant had automatically been promoted in accordance with subsection 624(a)(2) before the President removed his name from the promotion list. Another is whether the President was obligated to appoint him. Because the Navy viewed him as not promoted, the appellant was required to retire from active duty on February 28, 2002, when he reached the maximum permissible tenure in the grade of rear admiral (lower half).

B

The appellant also submitted a request for MASP to the Chief of the Bureau of Medicine and Surgery on December 4, 1996. MASP is "[a]n entitlement for medical corps officers who agree to remain on active duty for a period of not less than 1 year as computed from the effective date of the [MASP] agreement," provided as additional pay to enhance the retention rate of such officers. Secretary's Instruction 7220.75C ¶ 7 (1990). The appellant sought MASP in the amount of $15,000 for the period from January 1, 1997 to December 31, 1997. An officer seeking MASP must "[d]emonstrate an adequate level of military and professional performance as determined and documented by the commanding officer." *Id.* ¶ 7a(1). The appellant's request for MASP was denied, based at least in part on Vice Admiral Koenig's adverse fitness report, on January 13, 1997. The appellant argues that the fitness report was improper and that he is entitled to MASP if the fitness report is held invalid.

On March 26, 1998, the appellant applied to the Board for Correction of Naval Records ("Board"), seeking removal of Vice Admiral Koenig's fitness report from his records. The appellant also sought the restoration of his name to the promotion list, promotion to rear admiral effective September 1, 1997, and payment of MASP, arguing that the removal of his name from the promotion list and the denial of MASP were based on the allegedly improper fitness report. On January 29, 2002, the Board recommended that the Secretary of the Navy provide all of the relief sought by the appellant. However, the Assistant Secretary of the Navy for Manpower and Reserve Affairs[6] rejected the Board's recommendation and denied the appellant's requested relief.

On April 8, 2002, the appellant brought suit in the Court of Federal Claims, alleging that he had been automatically promoted to rear admiral as of September 1, 1997. He sought the corresponding pay and benefits of that grade along with the MASP of $15,000 that he had been denied. In addition, because the appellant was required to retire from active duty on February 28, 2002, he sought reinstatement to the Navy. The Court of Federal Claims granted the government's motion for summary judgment on the administrative record. The court held that the President's removal of the appellant's name from the promotion list was proper and, therefore, that he had not been promoted by operation of law. *Dysart*, slip op.

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[6] The Secretary of the Navy has delegated the responsibility for supervision of the Board to the Assistant Secretary of the Navy for Manpower and Reserve Affairs. *See* 32 C.F.R. § 700.324(b) (2003).

at 15–16. The court also held that the appellant's claim for MASP was non-justiciable because there was no procedural error in the Navy's denial of MASP. *Id.* at 17–18 (citing *Voge v. United States*, 844 F.2d 776, 779 (Fed.Cir.1988)). The appellant timely appealed, and we have jurisdiction pursuant to 28 U.S.C. § 1295(a)(3).

DISCUSSION

We review legal determinations such as the Court of Federal Claims' decision to award summary judgment on the administrative record without deference, applying the same standard of review as the Court of Federal Claims. *Haselrig v. United States*, 333 F.3d 1354, 1355 (Fed.Cir.2003). Accordingly, we must uphold the Secretary's decision denying the appellant's relief unless the Secretary "acted in a manner that is arbitrary, capricious, contrary to law, or unsupported by substantial evidence." *Id.*

I

The appellant argues that he was promoted by operation of law on September 1, 1997, when the officer next-in-line to him was promoted, and before the President removed his name from the promotion list on June 12, 1998. The appellant recognizes that the statute and regulations provide a mechanism for delaying an appointment, *see* 10 U.S.C. § 624(d); Secretary's Instruction 1420.1A ¶ 23, but he alleges that the attempt to delay his appointment was improper and ineffective under the statute and regulations. First, the appellant argues that the January 24, 1997, letter did not constitute "written notice of the grounds for the delay." 10 U.S.C. § 624(d)(3); Secretary's Instruction 1420.1A ¶ 23c.

Second, he argues that the September 11, 1997, letter informing him that his promotion was delayed came after he had already been automatically promoted. Third, he argues that, even if his promotion were properly delayed, it could not have been delayed for more than six months after September 1, 1997, when the officer next-in-line to the appellant was promoted, because the Secretary did not specify any "further period of delay," 10 U.S.C. § 624(d)(4). The government responds with three arguments. First, the government argues that the statute cannot provide for automatic appointments because the appointment power is entirely within the President's discretion. Second, the government argues that the promotion was properly delayed. Finally, the government argues that any violation of section 624(d) was harmless. We need not reach the government's second two arguments because we agree with the first. The constitutional process allows the President complete discretion in choosing whether or not to appoint an officer. The statute does not and cannot alter that process by providing for automatic appointment.

A

1

The constitutional appointment process for Senate-confirmed officers of the United States is most famously described in *Marbury v. Madison*. Under the Constitution, the President is given the authority to appoint officers "by and with the Advice and Consent of the Senate." U.S. Const. art. II, § 2, cl. 2. As noted above, *Marbury* set forth three separate actions that are ordinarily required for a person, subject to Senate confirmation, to be appointed to office: the President's

nomination; confirmation by the Senate; and the President's appointment. *See* 5 U.S. (1 Cranch) at 155–56. Each discrete action—nomination, confirmation, and appointment—must be made for a promotion to be effective. As an early opinion of the Attorney General correctly noted:

> To constitute an appointment under [Article II], it is necessary—1st, that the President should nominate the person proposed to be appointed; 2d, that the Senate should advise and consent that the nominee should be appointed; and, 3d, that, in pursuance of such nomination and such advice and consent, the appointment should be actually made.
>
> The nomination is not an appointment; nor is that nomination followed by the signification of the advice and consent of the Senate, that it should be made sufficient of themselves to confer upon a citizen an office under the constitution. They serve but to indicate the purpose of the President to appoint, and the consent of the Senate that it should be effectuated; but they do not divest the executive authority of the discretion to withhold the actual appointment from the nominee. To give a public officer the power to act as such, an appointment must be made in pursuance of the previous nomination and advice and consent of the Senate, the commission issued being the evidence that the

> purpose of appointment signified by the nomination has not been changed.

4 Op. Atty. Gen. 217, 219–20 (1843). For judicial officers, such as those involved in *Marbury* itself, the appointment is manifested by the President's signing of a commission. *See also United States v. Le Baron*, 60 U.S. (19 How.) 73, 78, 15 L.Ed. 525 (1856). However, the granting of a commission is not always required for a Presidential appointment. The Court noted that, "[i]n order to determine whether [an officer] is entitled to [a] commission, it becomes necessary to enquire whether he has been appointed to the office." *Marbury*, 5 U.S. (1 Cranch) at 155. The Court ruled:

> The appointment being the sole act of the president, must be completely evidenced, when it is shown that he has done every thing to be performed by him.
>
> Some point of time must be taken when the power of the executive over an officer ... must cease. That point of time must be when the constitutional power of appointment has been exercised. And this power has been exercised when the last act, required from the person possessing the power, has been performed.

Id. at 157. In *Marbury*, the "last act to be done by the president" to show that Marbury had in fact been appointed was "the signature of the commission." *Id.* However, the Court noted that, "if an appointment was to be evidenced by any public act, other than the commission, the performance of such public act would create the officer." *Id.* at 156.

The actual process followed with respect to senior military officers follows the constitutional design. The President nominates officers from the promotion list provided to him by the military department, and those officers are confirmed by the Senate.[7] In accordance with the Constitution, the President must then make a public act of appointment for an officer to be promoted.

2

In the case of a promotion to the grade of rear admiral, the final public act of appointment is the signing and issuance of the letter of appointment by the Special Assistant for Flag Officer Management and Distribution on behalf of the President. Although the letter of appointment is typically accompanied by a certificate of appointment, which is the formal document most like a commission for promoted naval officers, the certificate is not required.

"[T]he Special Assistant must have specific authority" from the Secretary of the Navy to sign and issue a letter of appointment. (Supp. Br. for Def.-Appellee at 3.) Although there is apparently no express delegation from the President to the Secretary of the Navy pursuant to 3 U.S.C. § 301 of the authority to appoint naval officers on behalf of the President, such an express delegation is not required for the letter to serve as the public act of appointment required by the Constitution. The statute provides:

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[7] As noted above, appointments to the grades of lieutenant (junior grade) or lieutenant (in the Navy) and first lieutenant or captain (in the Army, Air Force, and Marine Corps) are "made by the President alone." 10 U.S.C. § 624(c).

> This chapter [3 U.S.C. § 301 *et seq.*] shall not be deemed to limit or derogate from any existing or inherent right of the President to delegate the performance of functions vested in him by law, and nothing herein shall be deemed to require express authorization in any case in which such an official would be presumed in law to have acted by authority or direction of the President.

3 U.S.C. § 302. We have previously held that, in view of section 302, the President need not expressly delegate authority. *See Law v. United States*, 11 F.3d 1061, 1067 (Fed.Cir.1993) (holding that the Secretary of Transportation had properly removed a Coast Guard officer's name from a promotion list, even though such authority had not been expressly delegated by the President).

The Supreme Court has assumed that the authority to appoint military officers can be delegated. *See, e.g., Orloff v. Willoughby*, 345 U.S. 83, 90, 73 S.Ct. 534, 97 L.Ed. 842 (1953) ("It is obvious that the commissioning of officers in the Army is a matter of discretion within the province of the President as Commander in Chief. Petitioner, like every conscript, was inducted as a private. To obtain a change of that status requires appointment by *or under authority of* the President." (emphasis added)); *United States v. Moore*, 95 U.S. 760, 762, 24 L.Ed. 588 (1877) ("The place of passed assistant-surgeon is an office, and the *notification by the Secretary of the Navy was a valid appointment to it.*" (emphasis added)).

Our predecessor court addressed the issue more directly in *O'Shea v. United States*, 28 Ct.Cl. 392 (1893).

In *O'Shea*, the Secretary of War informed O'Shea on November 21, 1887, "that the President of the United States has appointed you post chaplain in the service of the United States." *Id.* at 398. Nevertheless, another person was nominated for the position and appointed to fill the vacancy on March 5, 1888. *See id.* at 399. O'Shea claimed that he had been appointed to the position by the Secretary of War's letter, and sought pay for the position from November 24, 1887, to March 5, 1888. *See id.* The Court of Claims held that the Secretary of War's letter served as O'Shea's appointment:

> [O'Shea's] appointment is in the form then used for recess appointments to the Army; the President had the power to make the appointment, and the act of the Secretary [of War] (which expressly declares that the President had made the appointment) is conclusive evidence of the fact that it was made.

Id. at 401. As in *O'Shea*, the letter from the Special Assistant for Flag Officer Management and Distribution expressly states that the appointment is made by the President: "The President of the United States has appointed you to the grade of Rear Admiral (Upper Half) (O–8)." (Supp. Br. for Def.-Appellee at 2.) Thus, the signing and issuance of a letter of appointment is the final public act for a naval officer to be promoted to rear admiral. The complaint in this case does not allege that a letter of appointment promoting the appellant to rear admiral was signed and issued, and there is no evidence that any such appointment letter was in fact signed and issued.

B

1

However, the appellant contends that he was automatically appointed to the grade of rear admiral by virtue of 10 U.S.C. § 624(a)(2). The statute provides:

> [O]fficers 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. Promotions *shall be made* in the order in which the names of officers appear on the promotion list and after officers previously selected for promotion in that competitive category have been promoted.

10 U.S.C. § 624(a)(2) (emphases added). Although section 624(a) refers to the "promotion" of an officer, section 624(b) provides that "[a] regular officer who is promoted under this section *is appointed* in the regular grade to which promoted." *Id.* § 624(b) (emphasis added). In addition, section 624(d) prescribes the procedure for delaying "the appointment of an officer under this section." *Id.* § 624(d). The appellant argues that, pursuant to section 624, his appointment was automatic once he was confirmed by the Senate and a rear admiral position became vacant while his name was at the top of the promotion list. However, 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." *Id.* § 624(c); *see also* U.S. Const. art. II, § 2, cl. 2.

Nor does the legislative history provide any reason here to believe that Congress intended the statute to provide for automatic appointments. Both the House and Senate reports focus on providing uniform promotion procedures for all branches of the armed forces. *See, e.g.*, H.R.Rep. No. 96–1462, at 3 (1980), *reprinted in* 1980 U.S.C.C.A.N. 6333, 6334 (stating that the bill was meant to "[p]rovide uniform laws for promotion procedures for officers in the separate services"); S.Rep. No. 96–375, at 1 (1979) (stating that the bill was meant to "[p]rovide uniform laws governing officer promotions in each military service"). Neither report discusses an attempt to ensure that those officers placed on promotion lists would automatically be appointed as part of such a uniform statutory scheme. In addition, the House Report states that the bill was intended to "provide common general authority for the permanent appointment of officers *by the President* with the advice and consent of the Senate." H.R.Rep. No. 96–1462, at 36, *reprinted in* 1980 U.S.C.C.A.N. at 6367 (emphasis added). Therefore, the legislative history does not show that Congress intended to provide for automatic appointments.

In any event, Congress could not have permissibly altered the appointment process set forth in the Constitution by providing for automatic appointments. The limited role for Congress in the appointment process is specified in the Constitution itself, which provides only that Congress may vary the process for "inferior Officers." 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."). Protecting the role of the President in the appointment process from legislative encroachment was in fact one of the goals of the Constitutional Convention. *See Buckley v. Valeo*, 424 U.S. 1, 128–31, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976); *see also Weiss*, 510 U.S. at 184–87, 114 S.Ct. 752 (Souter, J., concurring); *Freytag v. Comm'r of Internal Revenue*, 501 U.S. 868, 883–85, 111 S.Ct. 2631, 115 L.Ed.2d 764 (1991).

In *Buckley*, the Court considered the constitutionality of the Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93–443, § 208(a), 88 Stat. 1263, 1280–81, which provided for a Federal Election Commission composed of six voting members, two of whom were to be appointed by the President pro tempore of the Senate, and two of whom were to be appointed by the Speaker of the House of Representatives. *See Buckley*, 424 U.S. at 126, 96 S.Ct. 612. The Court held this provision unconstitutional because the members of the commission, who qualified as officers of the United States, were not appointed pursuant to the constitutional appointment process. *See id.* ("[A]ny appointee exercising significant authority pursuant to the laws of the United States is an 'Officer of the United States,' and must, therefore, be appointed in the manner prescribed by § 2, cl. 2, of [Article II].").

Similarly, the Court in *Springer v. Philippine Islands*, 277 U.S. 189, 48 S.Ct. 480, 72 L.Ed. 845 (1928), considered Congress's attempt in the Organic Act, ch. 416, 39 Stat. 545 (1916), to create a government for the Philippine Islands in which the legislative branch had the power to "provide for the appointment and removal

of the heads of the executive departments by the Governor General." *Springer*, 277 U.S. at 201, 48 S.Ct. 480 (quoting Organic Act, ch. 416, § 22, 39 Stat. 545, 553 (1916)). The Court held this provision unconstitutional, stating: "It may be stated ..., as a general rule inherent in the American constitutional system, that, unless otherwise expressly provided or incidental to the powers conferred, the legislature cannot exercise ... executive ... power." *Id.* The Court further ruled: "Legislative power, as distinguished from executive power, is the authority to make laws, but not to enforce them or *appoint the agents charged with the duty of such enforcement.* The latter are executive functions." *Id.* at 202, 48 S.Ct. 480 (emphasis added). The Court has consistently prohibited attempts by Congress to exercise the appointment power, which properly lies with the President, holding that, "while Congress may create an office, it cannot appoint the officer." *Weiss*, 510 U.S. at 174, 114 S.Ct. 752 (quoting *Shoemaker*, 147 U.S. at 300, 13 S.Ct. 361). Thus, 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.[8]

2

Finally, even though the statute cannot provide for automatic appointments, we must consider whether the

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[8] Although Congress may permissibly change an officer's pay and direct that an officer be paid as though he had been appointed to a higher grade, it cannot change an officer's grade, which requires an appointment. *See Wood v. United States*, 107 U.S. (17 Otto) 414, 417, 18 Ct.Cl. 761, 2 S.Ct. 551, 27 L.Ed. 542 (1882).

statute can be read as compelling appointment in accordance with the statutory scheme.

In general, the subject of military promotions is beyond the competence of courts to review. *See, e.g.*, *Orloff*, 345 U.S. at 91, 73 S.Ct. 534; *Adkins v. United States*, 68 F.3d 1317, 1324 (Fed.Cir.1995) ("Courts will not interject themselves into the promotion process."). However, the Military Pay Act, 37 U.S.C. § 204 (2000), provides for suit in the Court of Federal Claims when the military, in violation of the Constitution, a statute, or a regulation, has denied military pay. *See, e.g.*, *Holley v. United States*, 124 F.3d 1462, 1465 (Fed.Cir.1997); *Sanders v. United States*, 219 Ct.Cl. 285, 594 F.2d 804, 810–11 (1979) (*en banc*). The Corrections Board statute, 10 U.S.C. § 1552, provides for correction of military records if a promotion has been improperly denied (and for the convening of special selection boards in appropriate cases to determine whether the officer should be promoted), and for judicial review of the Board's decision. *See Richey v. United States*, 322 F.3d 1317, 1323–25 (Fed.Cir.2003); *Porter v. United States*, 163 F.3d 1304, 1311–12 (Fed.Cir.1998); *Sanders*, 594 F.2d at 810–11; *see also Adkins*, 68 F.3d at 1326; *Law*, 11 F.3d at 1064. Because the Military Pay Act is a money-mandating statute, the general rule "that one is not entitled to the benefit of a position until he has been duly appointed to it," *United States v. Testan*, 424 U.S. 392, 402, 96 S.Ct. 948, 47 L.Ed.2d 114 (1976), is inapplicable.[9] In such

[9] *Testan* prohibited a claim for retroactive benefits pursuant to the Classification Act, 5 U.S.C. § 5101 *et seq.* (2000), which the Court held was not money-mandating, as is required for the Court of Federal Claims to take jurisdiction pursuant to the Tucker Act, 28 U.S.C. § 1491 (2000). 424 U.S. at 399–400, 96 S.Ct. 948. The Court

cases, redress may be afforded for a promotion improperly denied. It is apparently assumed that the constitutionally-mandated steps in the appointment process—nomination, confirmation, and actual appointment—would be followed absent improper action by subordinate officials, and that the rare exercise of Presidential (or Senate) discretion not to make the appointment creates no Article III bar to the action in the Court of Federal Claims. *See Glidden Co. v. Zdanok*, 370 U.S. 530, 568–71, 82 S.Ct. 1459, 8 L.Ed.2d 671 (1962); *see also Chicago & S. Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103, 113–14, 68 S.Ct. 431, 92 L.Ed. 568 (1948).

The appellant argues that the Secretary's action here, declining to follow the Board's decision recommending his promotion, is contrary to law. This case, however, is fundamentally different from the cases on which the appellant relies. The appointment was not derailed as a result of action by a subordinate official acting in his own authority, but by the President, who decided not to make the appointment. Such action by the President or an officer acting for the President is simply unreviewable. *See, e.g.*, *Orloff*, 345 U.S. at 92, 73 S.Ct. 534; *Curry v. United States*, 221 Ct.Cl. 741, 609 F.2d 980, 983 (Ct.Cl.1979); *Cooper v. United States*, 203 Ct.Cl. 300, 303 (1973); *D'Arco v. United States*, 194 Ct.Cl. 811, 441 F.2d 1173, 1175 (1971).

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held that, because the Classification Act was not money-mandating, it did not alter the "established rule ... that one is not entitled to the benefit of a position until he has been duly appointed to it." *Id.* at 402, 96 S.Ct. 948. Unlike *Testan*, there is a money-mandating statute here—the Military Pay Act.

The Constitution contemplates that, after confirmation, the President may refuse to execute the appointment. All Presidential appointments, particularly those to senior positions, involve a discretionary decision. What the Supreme Court has said with respect to appointments generally applies particularly in this context:

> The appointment to an official position in the Government, even if it be simply a clerical position, is not a mere ministerial act, but one involving the exercise of judgment. The appointing power must determine the fitness of the applicant; whether or not he is the proper one to discharge the duties of the position. Therefore it is one of those acts over which the courts have no general supervising power.

Keim v. United States, 177 U.S. 290, 293, 35 Ct.Cl. 628, 20 S.Ct. 574, 44 L.Ed. 774 (1900). Our predecessor court has specifically held that the President or an officer acting for him may remove an officer's name from a promotion list "at any time before the appointment is consummated." *D'Arco*, 441 F.2d at 1175. In *D'Arco*, the Secretary of the Navy, acting for the President, removed D'Arco's name from a promotion list after he had been confirmed by the Senate. *Id.* at 1174. The Court of Claims upheld this action, holding that, in accordance with *Marbury*, the President (and the Secretary acting for the President) "could still refuse to complete the appointment, after Senate confirmation, by failing to prepare or sign the commission." *Id.* at 1175; *see also Doggett v. United*

States, 207 Ct.Cl. 478, 482 (1975) ("We believe that in the absence of any contrary requirement, a power ... to recommend a promotion, implies a power to withdraw the recommendation *at any time before it is acted on*." (emphasis added)).

The current statutory language itself does not clearly compel the President to appoint military officers. As the appellant notes, the statute provides that officers "*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) (emphasis added); *see also* S.Rep. No. 96–375, at 21 ("[A]fter confirmation by the Senate and unless a promotion is delayed for good reason, *promotions shall be made* to fill vacancies in order of seniority." (emphasis added)).

This language contrasts with the language of the previous statute, which provided that "[t]he President *may fill vacancies* in any grade in the line of the Regular Navy" in accordance with the statutory provisions. 10 U.S.C. § 5780 (1976) (repealed 1980) (emphasis added). Our predecessor court interpreted the previous statute's language in *D'Arco* as permitting the President to remove an officer's name from a promotion list "at any time before the appointment is consummated." 441 F.2d at 1175; *see also Doggett*, 207 Ct.Cl. at 482. In *D'Arco*, the court held that the provision that "[t]he President may terminate any temporary appointment," 10 U.S.C. § 5779 (1964) (repealed 1980), permitted the President (or the Secretary acting for the President) to withhold a commission. 441 F.2d at 1175.

Although DOPMA changed the statutory language, there is no indication in the legislative history that Congress intended to cabin the President's authority or to overrule our predecessor court's decision in *D'Arco*. As noted above, the House Report states that the bill was intended to "provide common general authority for the permanent appointment of officers by the President with the advice and consent of the Senate." H.R.Rep. No. 96–1462, at 36 (1980), *reprinted in* 1980 U.S.C.C.A.N. 6333, 6367. Indeed, the statute provides 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." 10 U.S.C. § 629(a). In any event, Congress does not have the authority to require the President to exercise his appointment power; such authority would be akin to an exercise by Congress of the appointment power itself, which is prohibited.

Nor does the judiciary have a role in reviewing such decisions. The President's decision not to appoint is a discretionary act that cannot be reviewed by a court. *See, e.g.*, *Marbury*, 5 U.S. (1 Cranch) at 165–67. In *Marbury*, the Court held that it could not review the President's exercise of his appointment power because it is discretionary: "The power of nominating to the senate, and the power of appointing the person nominated, are political powers, to be exercised by the president according to his own discretion." *Id.* at 166–67. Similarly, the Court in *Dalton v. Specter*, 511 U.S. 462, 114 S.Ct. 1719, 128 L.Ed.2d 497 (1994), held that it could not review the President's discretionary determination of which military bases to close pursuant to the Defense Base Closure and Realignment Act of 1990, 10 U.S.C. § 2687, even if subordinate officials had

failed to comply with legal requirements. *Id.* at 476–77, 114 S.Ct. 1719. The Court held: "Where a statute ... commits decisionmaking to the discretion of the President, judicial review of the President's decision is not available." *Id.* at 477, 114 S.Ct. 1719. The same is necessarily true where the President is afforded discretion by the Constitution itself. The President's decision here whether or not to exercise his appointment power is discretionary, and we hold that the President cannot be compelled to appoint military officers.

Therefore, the appellant was never appointed to the grade of rear admiral, and we cannot review the President's decision not to appoint him. Because he was never appointed, the appellant is not entitled to the pay and benefits he would have received if he had been promoted to that grade. We therefore affirm the Court of Federal Claims' denial of that relief.

II

Finally, the appellant contends that he is entitled to $15,000 of MASP because the pay was denied on the basis of Vice Admiral Koenig's improper fitness report. However, that issue is not justiciable. The Court of Federal Claims may only review a denial of MASP "for compliance with established procedures"; it may not review "the substantive merits of the decision." *Voge*, 844 F.2d at 779. In *Voge*, we held that "there are no tests or standards for the court to apply in determining whether the decision to terminate [M]ASP is correct. Instead, Congress provided only that the determination to deny [M]ASP may be made 'at any time' by the Secretary." *Id.* at 780 (quoting 37 U.S.C. § 302(c)(2)) (citations omitted). The appellant argues that Vice

Admiral Koenig violated regulations in formulating the fitness report, but he does not contend that the Secretary violated established procedures in denying MASP. Therefore, the Court of Federal Claims correctly held that it could not review the Secretary's decision to deny the appellant's request for MASP because the issue was not justiciable. Accordingly, the court's denial of the appellant's claim for MASP is affirmed.

CONCLUSION

For the foregoing reasons, we affirm the decision of the Court of Federal Claims.

AFFIRMED.

COSTS

No costs.

Appendix G

Statutory Provisions Involved

10 U.S.C. § 624*

(a)(1) When the report of a selection board convened under section 611(a) of this title is approved by the President, the Secretary of the military department concerned shall place the names of all officers approved for promotion within a competitive category on a single list for that competitive category, to be known as a promotion list, in the order of the seniority of such officers on the active-duty list. A promotion list is considered to be established under this section as of the date of the approval of the report of the selection board under the preceding sentence.

(2) 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. Promotions shall be made in the order in which the names of officers appear on the promotion list and after officers previously selected for promotion in that competitive category have been promoted. Officers to be promoted to the grade of first lieutenant or lieutenant (junior grade) shall be promoted in accordance with regulations prescribed by the Secretary concerned.

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* This Appendix contains the statutory provisions in effect today, which have changed in insignificant respects since the times at issue in this case.

(3)(A) Except as provided in subsection (d), officers on the active-duty list in the grade of first lieutenant or, in the case of the Navy, lieutenant (junior grade) who are on an approved all-fully-qualified-officers list shall be promoted to the next higher grade in accordance with regulations prescribed by the Secretary concerned.

(B) An all-fully-qualified-officers list shall be considered to be approved for purposes of subparagraph (A) when the list is approved by the President. When so approved, such a list shall be treated in the same manner as a promotion list under this chapter.

(C) The Secretary of a military department may make a recommendation to the President for approval of an all-fully-qualified-officers list only when the Secretary determines that all officers on the list are needed in the next higher grade to accomplish mission objectives.

(D) For purposes of this paragraph, an all-fully-qualified-officers list is a list of all officers on the active-duty list in a grade who the Secretary of the military department concerned determines--

(i) are fully qualified for promotion to the next higher grade; and

(ii) would be eligible for consideration for promotion to the next higher grade by a selection board convened under section 611(a) of this title upon the convening of such a board.

(b)(1) A regular officer who is promoted under this section is appointed in the regular grade to which promoted and a reserve officer who is promoted under

this section is appointed in the reserve grade to which promoted.

(2) The date of rank of an officer appointed to a higher grade under this section is determined under section 741(d) of this title.

(c) Appointments 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.

(d)(1) Under regulations prescribed by the Secretary of Defense, the appointment of an officer under this section may be delayed if--

(A) 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;

(B) an investigation is being conducted to determine whether disciplinary action of any kind should be brought against the officer;

(C) a board of officers has been convened under chapter 60 of this title to review the record of the officer;

(D) a criminal proceeding in a Federal or State court is pending against the officer; or

(E) substantiated adverse information about the officer that is material to the decision to appoint the officer is under review by the Secretary of Defense or the Secretary concerned.

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 by the Secretary concerned under chapter 60 of this title, if the officer is acquitted of the charges brought against him, or if, after a review of substantiated adverse information about the officer regarding the requirement for exemplary conduct set forth in section 3583, 5947, or 8583 of this title, as applicable, the officer is determined to be among the officers best qualified for promotion, 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 (including an approved all-fully-qualified-officers list, if applicable) and shall, upon promotion to the next higher grade, have the same date of rank, the same effective date for the pay and allowances of the grade to which promoted, and the same position on the active-duty list as he would have had if no delay had intervened, unless the Secretary concerned determines that the officer was unqualified for promotion for any part of the delay. If the Secretary makes such a determination, the Secretary may adjust such date of rank, effective date of pay and allowances, and position on the active-duty list as the Secretary considers appropriate under the circumstances.

(2) Under regulations prescribed by the Secretary of Defense, the appointment of an officer under this

section may also be delayed in any case in which there is cause to believe that the officer has not met the requirement for exemplary conduct set forth in section 3583, 5947, or 8583 of this title, as applicable, or is mentally, physically, morally, or professionally unqualified to perform the duties of the grade for which he was selected for promotion. If it is later determined by a civilian official of the Department of Defense (not below the level of Secretary of a military department) that the officer is qualified for promotion to such grade and, after a review of adverse information regarding the requirement for exemplary conduct set forth in section 3583, 5947, or 8583 of this title, as applicable, the officer is determined to be among the officers best qualified for promotion to such grade, the officer shall be retained on the promotion list (including an approved all-fully-qualified-officers list, if applicable) and the officer shall, upon such 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, unless the Secretary concerned determines that the officer was unqualified for promotion for any part of the delay. If the Secretary makes such a determination, the Secretary may adjust such date of rank, effective date of pay and allowances, and position on the active-duty list as the Secretary considers appropriate under the circumstances.

(3) 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 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 Secretary concerned in response to the action taken. Any such statement shall be given careful consideration by the Secretary.

(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 would otherwise have been appointed unless the Secretary concerned specifies a further period of delay. An officer's appointment may not be delayed more than 90 days after final action has been taken in any criminal case against such officer in a Federal or State court, more than 90 days after final action has been taken in any court-martial case against such officer, or more than 18 months after the date on which such officer would otherwise have been appointed, whichever is later.