No. 14-1189

In the Supreme Court of the United States

TERRYL J. SCHWALIER, PETITIONER

v.

ASHTON B. CARTER, SECRETARY OF DEFENSE, ET AL.

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

BRIEF FOR THE RESPONDENTS IN OPPOSITION

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
BENJAMIN C. MIZER
Principal Deputy Assistant Attorney General
ROBERT E. KIRSCHMAN, JR.
BRYANT G. SNEE
ANTHONY J. STEINMEYER
DOUGLAS K. MICKLE
Attorneys
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

TODI CARNES
Attorney
United States Air Force
Washington, D.C. 20330

QUESTION PRESENTED

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

Whether the failure to follow DOPMA's procedures results automatically, by operation of law and without any action by the President, in appointment of the affected officer to the next higher grade.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Federal Circuit (Pet. App. 1a-10a) is reported at 776 F.3d 832. The opinion of the United States Court of Appeals for the District of Columbia Circuit is reported at 734 F.3d 1218. The opinion of the district court is reported at 839 F. Supp. 2d 75.

JURISDICTION

The judgment of the court of appeals was entered on January 8, 2015. The petition for a writ of certiorari was filed on March 27, 2015. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. The Defense Officer Personnel Management Act (DOPMA), 10 U.S.C. 611 *et seq.*, prescribes the procedures by which certain military officers are pro-

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

After the President has approved the selection board's report and thereby nominated the named officers for a promotion, "the Secretary of the military department concerned shall place the names of all officers approved for promotion within a competitive category on a * * * promotion list, in the order of the seniority of such officers on the active-duty list." 10 U.S.C. 624(a)(1). That list is ultimately used to determine the named officers' promotion dates, which are set by the relevant Secretary pursuant to 10 U.S.C. 624(b)(2) and 741(d). The statute provides: "Except as provided in subsection (d), officers on a

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[1] Congress amended certain provisions of DOPMA in 2006. See John Warner National Defense Authorization Act for Fiscal Year 2007, Pub. L. No. 109-364, § 515, 120 Stat. 2185-2187. Unless otherwise noted, references to DOPMA are to the Act as it existed in 1996 and 1997.

promotion list for a competitive category shall be promoted to the next higher grade when additional officers in that grade and competitive category are needed," in the order in which the officers' names appear on the list. 10 U.S.C. 624(a)(2).

After nominating officers for promotion, the President forwards the nominations to the Senate. 10 U.S.C. 624(c) ("Appointments under this section shall be made by the President, by and with the advice and consent of the Senate."). The name of any officer not confirmed by the Senate is removed from the list of promotions. 10 U.S.C. 629(b). Once an officer has been nominated by the President and confirmed by the Senate, the officer must still be appointed by the President. See 10 U.S.C. 624(c); see also 10 U.S.C. 629(a). In many circumstances, appointment occurs through the issuance of a letter to the appointee signed by or on behalf of the President, along with a certificate of appointment. See *Dysart* v. *United States*, 369 F.3d 1303, 1308 (Fed. Cir. 2004). Section 626(a) provides that an "officer who is appointed to a higher grade under section 624 of this title is considered to have accepted such appointment on the date on which the appointment is made unless he expressly declines the appointment." 10 U.S.C. 626(a).

b. Subsection (d) of Section 624 authorizes the Secretary of the military department concerned to delay the date of an officer's promotion beyond the date on which the officer would otherwise have been promoted. See 10 U.S.C. 624(d)(1). Most relevant here, Section 624(d) authorizes the Secretary to delay the promotion of an officer when there is an ongoing "investigation" or when "there is cause to believe that the officer is * * * professionally unqualified to perform

the duties of the grade for which he was selected for promotion." 10 U.S.C. 624(d)(1)-(2). In cases of delay, the officer whose promotion is being delayed must receive timely, written notice of the grounds for the delay. 10 U.S.C. 624(d)(3). Section 624(d)(4) provides that a promotion "may not be delayed * * * for more than six months after the date on which the officer would otherwise have been appointed unless the Secretary concerned specifies a further period of delay." 10 U.S.C. 624(d)(4). The statute does not specify a consequence for delay beyond the six-month period.

c. In *Dysart* v. *United States*, 369 F.3d 1303 (2004), the Federal Circuit rejected an argument that DOPMA provides for promotion by operation of law if a service member's promotion is delayed by more than six months, the Secretary has not specified a further period of time, and the service member's name is not removed from the selection list in that time. *Id.* at 1310-1311. The Federal Circuit explained that DOPMA requires that appointments be made "by the President, by and with the advice and consent of the Senate." *Id.* at 1313 (quoting 10 U.S.C. 624(c)). The court reasoned that the inclusion of such language indicates that Congress did not intend that any military officers be "automatically" appointed without an act of appointment by or on behalf of the President. *Id.* at 1314. And, the court of appeals observed, that makes sense. In *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137 (1803), this Court "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." *Dysart*, 369 F.3d at 1311. The interpretation of the

statute the court of appeals embraced in *Dysart* "follows the constitutional design." *Id.* at 1312.

2. a. In 1995, an Air Force Major General Promotion Selection Board placed petitioner on a list of candidates to be promoted to major general. Pet. App. 2a. Such an appointment is governed by the Appointments Clause, U.S. Const. Art. II, § 2, Cl. 2, and by 10 U.S.C. 624. Pet. App. 2a. Pursuant to the procedures set forth in Section 624, President Clinton nominated petitioner for promotion by approving the Selection Board's promotion list and in March 1996 the Senate confirmed petitioner's nomination. *Ibid.* Petitioner's projected effective date of promotion was either January 1, 1997 (according to petitioner), or February 1, 1997 (according to the government). See *ibid.*[2]

Before the effective date of his promotion, petitioner assumed a command in Saudi Arabia. Pet. App. 2a. Soon thereafter, a terrorist group detonated a truck bomb at an apartment complex where many of the personnel under petitioner's command were housed, killing 19 airmen and injuring hundreds of others. *Ibid.* Congress, the Department of Defense, and the Air Force commenced investigations into the attack. *Id.* at 2a-3a. In December 1996 and again in January 1997, petitioner was informed that his promotion would be delayed. *Id.* at 2a. The Department of Defense's investigation was ultimately unfavorable to petitioner and the Secretary of Defense recommended that President Clinton remove petitioner from the Selection Board's promotion list. *Id.* at 3a. On July

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[2] As discussed at pp. 9-10, *infra*, petitioner's original projected promotion date is disputed by the parties. See *Schwalier* v. *Panetta*, 839 F. Supp. 2d 75, 77 & n.1 (D.D.C. 2012).

31, 1997, President Clinton removed petitioner from the promotion list. *Ibid.* In September 1997, petitioner retired from the Air Force. *Ibid.*

b. In 2003, petitioner filed with the Air Force Board for Correction of Military Records (Corrections Board or Board) an application to correct his military records to reflect that he had, in fact, been promoted to major general. Pet. App. 3a. Petitioner argued that the permissible six-month delay under Section 624(d)(4) had ended before the President removed him from the promotion list—and that petitioner was therefore automatically promoted on July 1, 1997, at the expiration of that six-month period. *Ibid.* The Corrections Board initially agreed with petitioner and recommended that the Secretary of the Air Force amend petitioner's records to reflect that, *inter alia*, he was promoted to major general. The Board ultimately denied petitioner's application, however, when the Department of Defense, relying on the Federal Circuit's decision in *Dysart*, disagreed with the Board's recommendation. *Ibid.* Petitioner requested reconsideration of his application in 2007, and the result was the same. *Id.* at 3a-4a.

c. In 2011, petitioner filed suit against the Secretary of Defense and the Secretary of the Air Force in the United States District Court for the District of Columbia. Pet. App. 4a. Petitioner sought back pay and other relief under the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.*, arguing that the government acted arbitrarily and capriciously by refusing to promote petitioner retroactively. Pet. App. 4a. The district court granted summary judgment to the government, concluding that the Department of Defense "did not act arbitrarily or capriciously" in "deter-

min[ing] that the Air Force lacked legal authority to promote [petitioner] after his name was removed from the promotion list by the President of the United States." *Ibid.*; *Schwalier* v. *Panetta*, 839 F. Supp. 2d 75, 86 (D.D.C. 2012).

Petitioner appealed to the D.C. Circuit, which determined that the appeal should be heard by the Federal Circuit because the district court's jurisdiction was based in part on the Little Tucker Act, 28 U.S.C. 1346(a)(2). Pet. App. 4a. The D.C. Circuit transferred jurisdiction over the appeal to the Federal Circuit. *Id.* at 5a. The Federal Circuit affirmed. *Id.* at 1a-10a.

Petitioner's primary argument to the Federal Circuit was that the Department of Defense had no authority to overrule the determination of the Corrections Board. Pet. C.A. Br. 25-38, 48-57. Petitioner also argued that he had been promoted by authority of the President before the President removed his name from the promotion list. *Id.* at 39-48. Petitioner expressly disclaimed any argument "that *Dysart* should be overturned" or "that he was automatically promoted in 1997." Pet. C.A. Reply Br. 18. In response to a statute-of-limitations argument, moreover, petitioner embraced *Dysart*'s holding that, "if a promotion is delayed more than six months and the Secretary specifies no further delay, there are no consequences; no entity is compelled to act and the appointment remains in stasis." *Id.* at 8 n.1.

The Federal Circuit rejected petitioner's claim for relief. Pet. App. 1a-10a. As relevant here, the court of appeals held that the Department of Defense correctly rejected the Corrections Board's rationale for recognizing a retroactive promotion of petitioner. *Id.* at 9a-10a. The court explained that the Board's rea-

soning was "based on the theory that [petitioner] was promoted by operation of law before the President removed him from the list," and that such a theory of "'automatic' appointments" was rejected in *Dysart*. *Id.* at 9a.

ARGUMENT

Petitioner does not challenge the basis for the President's decision to remove him from the promotion list in 1997. Instead, he argues (Pet. 18-19) that the President's decision had no effect because the Air Force violated DOPMA by failing to provide him with timely notice of a delay in his promotion beyond six months—and that, as a result, he was automatically promoted six months after what he views as his initial projected promotion date. In support of that argument, petitioner contends (Pet. 16-18) that the Federal Circuit's decision in *Dysart* v. *United States*, 369 F.3d 1303 (2004), was wrongly decided. The Federal Circuit's unanimous decision rejecting petitioner's challenge to the government's refusal to recognize a retroactive promotion is correct and does not warrant review. Moreover, this would be a particularly inappropriate vehicle for addressing the question presented because, under the government's view of the facts, petitioner was not promoted even under his interpretation of DOPMA because he was removed from the promotion list within six months of his projected promotion date. Thus, as it has twice previously in petitions presenting this same question, the Court should deny review. See *Lewis* v. *United States*, 552 U.S. 810 (2007) (No. 06-1289); *Barnes* v. *United States*, 552 U.S. 813 (2007) (No. 06-1466).

1. Petitioner argues (Pet. 18-32) that the Federal Circuit improperly invalidated key provisions of

DOPMA in its decision in *Dysart* and in decisions applying *Dysart*. Petitioner contends (Pet. 20-32) that *Dysart* was incorrectly decided because once his expected promotion date was announced, DOPMA required that his "appointment" would "simply *happen* unless some action [was] taken to delay the appointment." Pet. 22; see Pet. 21 (arguing that *Dysart* "was obviously wrong"). Review of the question presented is unwarranted because a critical predicate factual question remains unresolved.

Petitioner fails to mention in his petition for a writ of certiorari that the parties disagree about what his original projected promotion date was. He asserts throughout his petition (Pet. 3, 9, 10, 11, 12, 17, 19) that his original projected promotion date was January 1, 1997. But, as the district court and the court of appeals recognized, that fact remains disputed. *Schwalier* v. *Panetta*, 839 F. Supp. 2d 75, 77 & n.1 (D.D.C. 2012); Pet. App. 2a. Based on contemporaneous documents in the record, see C.A. App. 134-136, the government contends that petitioner's projected promotion date was February 1, 1997—less than six months before the President removed him from the promotion list on July 31, 1997. See, *e.g.*, *id.* at 171 (2005 memorandum from Counsel of the Department of Defense noting that, during the relevant time, "Air Force senior officials appeared unanimously to believe that [petitioner] was to be promoted on February 1, 1997, which is consistent with the documentation supporting the official delay of [petitioner's February 1] promotion date"). If that is so, then even under petitioner's interpretation of DOPMA, he was not automatically promoted because the President removed him from the promotion list within the initial six-

month period of delay from his original projected promotion date. Because the question presented does not even arise in this case unless this unresolved factual question is decided in petitioner's favor, review by this Court is unwarranted.

Petitioner insists that his original projected promotion date was January 1, 1997. He accounts for the contemporaneous documents stating that his projected promotion date was February 1, 1997, by contending that, as a result of the ongoing investigations, the Air Force Vice Chief of Staff notified petitioner by telephone in December 1996 that his alleged projected promotion date of January 1, 1997, would be delayed for one month. See Complaint ¶ 26. It is undisputed that such a call was made to inform petitioner that his promotion would be delayed generally, see *Schwalier*, 839 F. Supp. 2d at 77, but the government does not agree that petitioner was informed that his promotion would be delayed one month beyond January 1. In any event, undisputed record evidence does establish that, on January 28, 1997, the Air Force Vice Chief of Staff notified petitioner in writing that he was recommending that petitioner's projected promotion to major general be delayed for up to six months from February 1, 1997. See C.A. App. 136 (letter noting that petitioner's projected promotion date was February 1, 1997, and that the Vice Chief of Staff was recommending a delay of up to six months); *id.* at 134-135 (supporting memoranda); see also Complaint ¶ 28 (acknowledging written notification that petitioner's promotion would be delayed for up to six months). Petitioner signed the January 28, 1997, notification, expressly acknowledging that he would "not assume the higher grade even if [his] name appears on a pro-

motion order." See Administrative Record 117-118. On February 18, 1997, petitioner submitted a response in which he stated he did not expect to "pin on" (*i.e.* be promoted) until the investigation was closed. See *id.* at 119-120. On February 22, 1997, the Secretary of the Air Force issued a memorandum approving the Air Force Vice Chief of Staff's recommendation that petitioner's promotion be delayed for six months. See *id.* at 115.

Thus, even if petitioner were correct that his original projected promotion date was January 1, 1997, undisputed record evidence establishes that, even under petitioner's interpretation of DOPMA, petitioner's promotion did not take effect before the President removed him from the promotion list—and therefore did not take effect at all—because petitioner was timely notified that his promotion would be delayed first for 30 days, and then for up to six months from February 1, 1997, and the President removed him from the list within that six-month period. Resolution of any disputed facts relevant to petitioner's initial projected promotion date—and when, how often, or in what manner that date was delayed—would be necessary before the Court could be sure that the question presented is actually presented in this case. Because those factual disputes were not resolved by the courts below, this case is not a suitable vehicle for consideration of that question.

2. Review is in any event unwarranted because the Federal Circuit's decision was correct. Petitioner argues (Pet. 18-19) that DOPMA's plain language provides for automatic appointment when an officer's name is retained on the promotion list for longer than six months after the officer's initial projected promo-

tion date (absent proper notification of a further delay). He further contends (Pet. 20-32) that the Federal Circuit determined in *Dysart* that adopting the type of construction petitioner would give to DOPMA would render the statute unconstitutional. He is wrong on both counts.

a. With respect to the statutory language, petitioner relies principally on Section 624(a)(2), which states: "Except as provided in subsection (d), officers on a promotion list for a competitive category shall be promoted to the next higher grade when additional officers in that grade and competitive category are needed." 10 U.S.C. 624(a)(2). Subsection (d) provides in relevant part that "[a]n 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." 10 U.S.C. 624(d)(4). Petitioner contends that Section 624(a)(2) mandates that an officer whose name is on a promotion list approved by the President and confirmed by the Senate must be—and, therefore, automatically is—promoted if the officer's name is not removed from the promotion list within the time frame set forth in Section 624(d)(4), even if, as in petitioner's case, the President has determined that the individual is not qualified for the promotion.

Petitioner's interpretation of DOPMA is incorrect because it reads Section 624(c) out of the statute. Section 624(c) requires that "[a]ppointments under this section shall be made by the President." 10 U.S.C. 624(c). This language plainly requires Presidential appointment of all officers promoted under the statute—an appointment that is separate and distinct

from the statute's separate requirement that the President approve the Selection Board's report before preparation of the promotion list. Cf. *Weiss* v. *United States*, 510 U.S. 163, 170 n.4 (1994) ("10 U.S.C. § 624 requires a new appointment by the President, with the advice and consent of the Senate, each time a commissioned officer is promoted to a higher grade—*e.g.*, if a captain is promoted to major, he must receive another appointment."). As the *Dysart* court explained, "the language of the statute does not provide for automatic appointment without action by the President. Rather, the statute provides that appointments are made 'by the President, by and with the advice and consent of the Senate.'" 369 F.3d at 1313 (quoting 10 U.S.C. 624(c)). DOPMA, in short, does not contemplate appointments without Presidential action.

This understanding of DOPMA is confirmed by the fact that Section 624(d)(4) does not specify that automatic appointment is the consequence of a delay beyond the prescribed time period. As this Court has explained on numerous occasions, "if a statute does not specify a consequence for noncompliance with statutory timing provisions, the federal courts will not in the ordinary course impose their own coercive sanction." *Barnhart* v. *Peabody Coal Co.*, 537 U.S. 149, 159 (2003) (quoting *United States* v. *James Daniel Good Real Prop.*, 510 U.S. 43, 63 (1993)). Cf. *Regions Hosp.* v. *Shalala*, 522 U.S. 448, 459 n.3 (1998) ("The Secretary's failure to meet the [statutory] deadline, a not uncommon occurrence when heavy loads are thrust on administrators, does not mean that official lacked power to act beyond it."). Because Congress did not provide for automatic appointment in DOPMA,

the court of appeals was correct not to reach out to do so.

Petitioner errs in arguing (Pet. 22) that Section 629(a)'s statement that the President may remove an officer from a promotion list indicates that Congress intended automatic appointment. Congress simply confirmed in Section 629(a) that the President has authority to manage the promotion list (which is precisely what the President did in this case) and that the President is not bound to actually appoint all officers whom he nominated and the Senate confirmed. DOPMA's statutory recognition of the President's power to remove an individual from a promotion list cannot be construed to *require* the President to appoint a candidate the President views as unqualified if the President does not remove him from the list within a particular period of time, much less to provide for automatic appointment if the President fails to act altogether.

Petitioner argues (Pet. 19, 26-27) that, under DOPMA, an officer who has been nominated by the President and confirmed by the Senate is appointed to the higher grade at the time his projected promotion date is determined, even if the promotion "does not take effect right away." Pet. 27. That argument finds no support in the statute. Nothing in DOPMA elevates the creation of a promotion list or the contemporaneous establishment of projected promotion dates to the constitutionally significant (and required) level of a presidential appointment. Indeed, Section 624(a)(1) requires the creation of a promotion list (which includes initial projected promotion dates) at the time the officers on the list *are nominated* by the President, but before they are confirmed by the Senate. 10

U.S.C. 624(a)(1) ("When the report of a selection board convened under * * * this title is *approved by the President*, the Secretary of the military department concerned shall place the names of all officers approved for promotion within a competitive category on a * * * promotion list, in the order of the seniority of such officers on the active-duty list.") (emphasis added). That event surely cannot qualify as the President's act of appointment—otherwise, appointment and nomination would be the same thing and an officer could be automatically appointed regardless of whether he had been confirmed by the Senate.[3]

Petitioner's reliance on Section 624(a)(2) does not help him. That provision specifies the manner in which the government shall determine which officer from a promotion list is next in line for promotion (*i.e.*, when an officer will be promoted). 10 U.S.C. 624(a)(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

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[3] Subsequent amendments to DOPMA underscore the error in petitioner's reasoning. In 2006, Congress amended DOPMA by, *inter alia*, adding a new provision that defines "promotion eligibility period" as the period beginning on the date on which the President approved the promotion list under Section 624(a) and ending on the "first day of the eighteenth month following the month during which the list is so approved." John Warner National Defense Authorization Act for Fiscal Year 2007, Pub. L. No. 109-364, § 515(a)(2)(B), 120 Stat. 2186 (codified at 10 U.S.C. 629(c)(3) (2006)). That provision expressly recognizes that promotion lists (which include projected promotion dates) are prepared regardless of whether Senate confirmation has yet occurred.

list and after officers previously selected for promotion in that competitive category have been promoted."). But that provision plainly contemplates some additional act of promotion before an appointment is effectuated—and nothing in Section 624(a)(2) (or elsewhere in DOPMA) suggests that the administrative calculation of an initial projected promotion date itself qualifies as an act of presidential appointment.

b. Contrary to petitioner's suggestion (Pet. 25-32), the holding in *Dysart* was one of statutory—not constitutional—interpretation. To be sure, the Federal Circuit's construction of DOPMA correctly took account of the doctrine of constitutional avoidance. But petitioner errs in contending (*ibid.*) that this Court should overrule *Dysart* because his interpretation of DOPMA would not raise significant constitutional questions.

As the *Dysart* court correctly explained, the "constitutional process allows the President complete discretion in choosing whether or not to appoint an officer." 369 F.3d at 1311. Chief Justice Marshall said as much in *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137 (1803), explaining that the appointment of an officer is "the sole act of the President" under the Appointments Clause of the Constitution, U.S. Const. Art. II, § 2, Cl. 2. *Marbury*, 5 U.S. (1 Cranch) at 157. Thus, even if it intended to provide for automatic appointments in DOPMA, "Congress could not have permissibly altered the appointment process set forth in the Constitution by providing for automatic appointments." *Dysart*, 369 F.3d at 1314. The Federal Circuit appropriately recognized this obvious constitutional problem arising from petitioner's interpretation

of DOPMA and, consistent with *Dysart*, declined to adopt that interpretation.

Petitioner also urges that Section 624(c) "does not impose some kind of additional post-[Senate] confirmation 'appointment' requirement." Pet. 23. He contends that, once the President nominates an officer by approving his name on the promotion list, "the constitutional requirement of presidential appointment is satisfied." Pet. 26-27. Petitioner erroneously argues (Pet. 28-31) that Congress can provide for such automatic appointment (or merging of nomination and appointment) through the use of its constitutional authority over the appointment of inferior officers. To the extent the Constitution permits Congress to alter the process for the appointment of inferior officers, the Constitution gives Congress only the power to "vest the Appointment of such inferior Officers * * * in the President alone, in the Courts of Law, or in the Heads of Departments." U.S. Const. Art. II, § 2, Cl. 2. The Constitution does not give Congress the power to provide for automatic appointment. Under petitioner's reading of DOPMA, however, that is precisely what Congress has done. At the very least, such a novel appointment process surely raises a serious constitutional question, which the Federal Circuit was wise to avoid in *Dysart* by adopting a reasonable interpretation of the statute. *City of Monterey* v. *Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 707 (1999) ("Under our precedents, [b]efore inquiring into the applicability of [a provision of the Constitution], we must first ascertain whether a construction of the statute is fairly possible by which [the constitutional] question may be avoided.") (citation and internal quo-

tation marks omitted; first and third sets of brackets in original).[4]

3. In any event, review is not warranted because the decision below does not conflict with any decision of another court of appeals and because the question presented does not arise with any frequency.

Petitioner asserts that no circuit conflict will arise because the Federal Circuit is "the only court that is likely to address this question" of promotion delays. Pet. 17, 35-36. It may be true that claims by officers seeking back pay will be decided on appeal by the Federal Circuit. But any officer who does not seek back pay may file suit in a district court and pursue an appeal in the appropriate regional court of appeals. And the limited analogous case law outside the Federal Circuit is consistent with the decision in *Dysart*. See *Millican* v. *United States*, 744 F. Supp. 2d 296 (D.D.C. 2010) (deciding APA suit brought by a reserve officer where applicable statutes are highly analogous to DOPMA). Moreover, this Court has previously rejected petitions for writs of certiorari raising the same question presented. See *Lewis* v. *United States*, 552 U.S. 810 (2007) (No. 06-1289); *Barnes* v. *United States*, 552 U.S. 813 (2007) (No. 06-1466).

Petitioner points to (Pet. 34) the number of military promotions that take place every year, apparently to suggest that the question presented is one of recurring and ongoing importance. To the contrary, that large number of promotions each year (approximately

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[4] Petitioner also errs in arguing (Pet. 33-37) that the Federal Circuit struck down an act of Congress in *Dysart*. Adopting a reasonable construction of a statute, with the doctrine of constitutional avoidance in mind, is a far cry from striking down a federal statute.

10,000) generates only a very small number of claims to automatic appointment, demonstrating that the question presented is not one of broad significance. See Pet. 34 (citing three other Federal Circuit decisions and one Court of Federal Claims decision).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General
BENJAMIN C. MIZER
Principal Deputy Assistant Attorney General
ROBERT E. KIRSCHMAN, JR.
BRYANT G. SNEE
ANTHONY J. STEINMEYER
DOUGLAS K. MICKLE
Attorneys

TODI CARNES
Attorney
United States Air Force

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