No. 14-1189

In The
Supreme Court of the United States

TERRYL J. SCHWALIER,

Petitioner,

v.

ASHTON B. CARTER,
SECRETARY OF DEFENSE, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

BRIEF OF THE MILITARY OFFICERS ASSOCIATION OF AMERICA AND THE FLAG & GENERAL OFFICERS' NETWORK AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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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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INTEREST OF *AMICI CURIAE*[1]

Amicus Curiae, the Military Officers Association of America ("MOAA") is a non-profit independent professional military association dedicated to maintaining a strong national defense and ensuring our nation keeps its commitments to currently serving, retired, and former members of the uniformed services and their families and survivors. With over 390,000 members, MOAA is the largest association of military officers in the United States and advocates on behalf of the entire military and veteran communities with respect to compensation, health care, retirement, and other military personnel issues affecting current and former service members. Accordingly, MOAA has a vital interest in ensuring that statutes and regulations governing military promotions and the processes for correcting errors and injustices in military records are fairly and faithfully administered in accordance with the law and regulatory requirements.

Amicus Curiae, The Flag & General Officers' Network ("TFGON") is a § 501(c)(19) network and forum for over 3,100 Active Duty, Reserve, Guard, and Retired Flag and General Officers from every Armed

[1] Pursuant to Rule 37.2(a), all parties were timely notified of and have consented to the filing of this brief. In accordance with Rule 37.6, counsel affirms that no counsel for any party authored this brief in whole or in part and that no person or entity other than *amici* made a monetary contribution to its preparation or submission.

Service. TFGON supports veteran memorial ceremonies and observations, as well as widows and orphans of fellow war veterans.

SUMMARY OF THE ARGUMENT[2]

Marbury v. Madison provides the rule of decision for this case. 5 U.S. (1 Cranch) 137 (1803). The decision below, *Schwalier v. Hagel*, 776 F.3d 832 (Fed. Cir. 2015) was "control[led]" by *Dysart v. United States*, 369 F.3d 1303 (Fed. Cir. 2004). In *Dysart*, the Federal Circuit considered a provision of the Defense Officer Personnel Management Act ("DOPMA") that established a process for finalizing the appointment of certain military officers. 10 U.S.C. § 624(a)(2). Finding that this law would violate the separation of powers, the Federal Circuit read DOPMA such that "after confirmation," Congress has no power over the appointment process. *Dysart*, 369 F.3d at 1316. This conclusion is contrary to the text and history of the Constitution, as well as *Marbury v. Madison*. 5 U.S. at 158 (1803). The Court should grant certiorari to reaffirm Congress's constitutional authority to "establish[ ] by law" officers of the United States.

First, the Constitution vests Congress with broad authority over the appointments process, "which shall be established by law." Art. II, § 2, cl. 2. This

[2] *Amici* incorporate by reference the description of facts outlined in the petition for writ of certiorari (Pet. Cert. at 3-15).

authority exists both *before* and *after* Senate confirmation. Prior to confirmation, the Congress can establish qualifications for officers. For example, the Solicitor General must be "learned in the law." 28 U.S.C. § 505. Certain military officers must satisfy congressionally-imposed eligibility criteria before receiving a promotion. 10 U.S.C. §§ 611-641.

Congress can also establish the process that finalizes the appointment following confirmation. In *Marbury*, Chief Justice Marshall affirmed that Congress has the power to chart a "precise course accurately marked out by law," to complete the appointment. 5 U.S. at 158. Though the President retains the absolute right not to appoint an officer, this congressionally-designed process "is to be strictly pursued." *Id.* The Court reaffirmed this principle in *Freytag v. Commissioner,* finding that Congress can set the "duties, salary, and *means of appointment* for that office [as] specified by statute." 501 U.S. 868, 881 (1991) (emphasis added).

Second, contrary to the Federal Circuit's conclusion in *Dysart*, DOPMA bolsters the Constitution's separation of powers. 369 F.3d at 1317. The Framers used the phrase "by law" in ten places in the Constitution to vest Congress with extraordinary authority to legislate over the Executive Branch, the States, individuals, and even its own members. This power includes the ability to design the appointment process to be followed for officers "established by law." Art. II, § 2, cl. 2. The Federal Circuit's decision nullifies this congressional power.

Finally, the appointment process in *Marbury* parallels the appointment process in this case. In *Marbury*, the final act "established by law" was sealing the commission, following Presidential assent. Under § 624(a)(2) of DOPMA, the final act "established by law" was setting the promotion date, following Presidential assent. Consistent with *Marbury,* Congress, and not the President, determines how the Executive's assent is manifested. For § 624(a)(2) of DOPMA, the President's decision to transmit the list of confirmed names to the Secretary of the Air Force manifests his assent to begin the appointment process. Upon the Secretary's receipt of the list of confirmed names, Congress charges him with the duty to set the promotion date. This calculation triggers a congressionally-designed, six-month window for the officer's appointment. While the President retains the absolute power to revoke his previous assent at any point during this period, after six months the officer's appointment "established by law" becomes final.

Consistent with *Marbury v. Madison*, § 624(a)(2) of DOPMA is a permissible exercise of Congress's authority under the Appointments Clause. Certiorari should be granted, as this Court's voice is essential to reaffirm once again Congress's constitutional role in the appointment process. *NLRB v. Noel Canning*, 134 S.Ct. 2550, 2578 (2014).

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ARGUMENT

I. The Constitution Vests Congress With the Power to "Establish[] by Law" the "Means of Appointment"

A. *Marbury* Affirmed Congress's Power to "Establish[] by Law" the Process for Appointing Officers After Confirmation

Marbury v. Madison provides the rule of decision for this case. 5 U.S. (1 Cranch) 137 (1803). Chief Justice Marshall concluded that "since [William Marbury's commission] was signed by the President, and sealed by the secretary of state, [Marbury] was appointed." *Id.* at 162. Even though it was not delivered, "[t]o withhold his commission, therefore, is an act deemed by the court not warranted by law, but violative of a vested legal right." *Id.* That much is black-letter law. But *Marbury* recognizes another, equally important proposition concerning the appointment power. At every juncture – even after the confirmation vote – the laws of Congress established the process through which Marbury would become an officer of the United States. This Court recognized that Congress has the power to "establish[ ] by law" the means of finalizing an appointment.

The pivotal question in this case turned on *when* "the power of the executive over an officer, not removable at his will . . . cease[es]." *Id.* at 157. The answer, is "[w]hen the constitutional power of appointment has been exercised." *Id.* Central to the Court's analysis was:

> "An act of congress [that] *directs the secretary of state* to keep the seal of the United States, 'to make out and record, *and affix the said seal to all civil commissions to officers of the United States*, to be appointed by the President, by and with the consent of the senate, or by the President alone; provided that the said seal shall not be affixed to any commission *before the same shall have been signed by the President of the United States*."

Id. at 155 (emphasis added).

Congress charged the Secretary of State – in this case it was also John Marshall – with affixing the seal on any confirmed-commission that was approved by the President. Based on the application of this statute – during events following confirmation – the Chief Justice concluded that the "last act is the signature of the commission." *Id.* Once the signature was in place, the Secretary of State was "direct[ed]" to "affix the said seal" to the commission. *Id.* At that point, pursuant to the process "established by law," the appointment was final. To the benefit of Marbury, and to the chagrin of President Jefferson, the signing and sealing were the final "thing[s] to be done" to vest Marbury's commission as Justice of the Peace. *Id.* at 170. Delivery, which Secretary of State James Madison refused to do, was immaterial.

Chief Justice Marshall's opinion explained that the President could not unilaterally change the rules for how officers were appointed, but must comply with the process spelled out by Congress. The Court observed that it was Congress, and not the President,

that determined that the signature and sealing were the final acts. *Id.* at 157. Chief Justice Marshall noted "[t]his idea seems to have prevailed with the legislature." *Id.* Through the act that created the "department of state," Congress provided that the Secretary of State "*shall* keep the seal of the United States, 'and shall make out and record, and *shall affix the said seal* to all civil commissions to officers of the United States, to be appointed by the President.'" *Id.* at 157-58 (emphasis added). The seal could only be affixed after the officer had been confirmed, and the commission had been "signed by the President." *Id*. at 157. Or in the words of Chief Justice Marshall, "[w]hen the constitutional power of appointment has been exercised." *Id.*

Once the ink on the signature had dried, the Secretary, acting pursuant to an order from Congress, was required to affix the seal. Even if the President instructed the Secretary of State not to seal it, "[h]e is to affix the seal of the United States to the commission, and is to record it." *Id.* at 158. The Court referred to this obligation as the "subsequent duty of the secretary of state [that] is prescribed *by law*, and not to be guided by the will of the President." *Id.* (emphasis added). The Chief Justice's discussion that the duty is prescribed "by law" refers back to Article II, which gives Congress the power to "establish[ ] *by Law*" officers of the United States, and how they are appointed. Art. II, § 2, cl. 2 (emphasis added).

With this statute, Congress provided "by law" how the appointment must vest following Senate

confirmation, even going so far as to command the Secretary of State to disobey an order from the President not to seal the signed commission. The Congress, and not the President, designed the process for an appointment to become final. Once the President approved the commission – thus providing assent to the officer confirmed by the Senate – and transmits it to the Secretary of State, the appointment is out of the President's hands, both literally and figuratively. At "this point of time" as specified by Congress, "the power of the executive over an officer, not removable at his will, must cease." *Id.* at 157.

B. Congress Charted a "Precise Course Accurately Marked Out by Law" to Finalize Appointments

Beyond the finality of the act, the Court's opinion in *Marbury* specified that the "proceeding" established by Congress may not "be varied." *Id.* Rather, the statute offered a "*precise course* accurately marked out *by law*, and is to be strictly pursued." *Id.* (emphasis added). Again, Chief Justice Marshall repeated the phrase, "by law," emphasizing that Congress, not the President, structures the process to finalize the appointments. To make the point more directly, the Court stressed that it is Congress that determined that "[n]o other solemnity is required by law" beyond the sealing of the commission. *Id.* at 159. For "it is the duty of the secretary of state to conform to *the law*," established by Congress, as he is an "an officer

of the United States, bound to obey the laws." *Id.* at 158 (emphasis added).

To support this conclusion, Chief Justice Marshall praised Marbury's arguments that were "very properly stated at the bar." *Id.* A recitation of the arguments by "their counsel, Charles Lee, esq., late attorney General of the United States" is instructive of the role Congress plays in structuring the appointment process following Senate confirmation. *Id.* at 137. In creating the office of the Secretary of State, Congress instructed that officer "to affix the seal of the United States to all civil commissions, after they shall have been signed by the President." *Id.* at 140-41. Even though the Secretary of State is "responsible only to the President," the President cannot "prevent him . . . [from] affixing the seal to civil commissions of such officers as hold not their offices at the will of the President, after he has signed them and delivered them to the secretary for that purpose." *Id.* at 140. Stated succinctly, "[t]he secretary is called upon to perform a duty over which the President has no control, and in regard to which he has no dispensing power, and for the neglect of which he is in no manner responsible." *Id.* If the Secretary of State refused to do so, "he may be compelled by mandamus, in the same manner as other persons holding offices under the authority of the United States." *Id.*

After the President has signed the commission, pursuant to the procedures "established by law," the Secretary of State is obligated to seal the commission.

The sealing – not the delivery – becomes the final act for purposes of the appointment, because that is how Congress designed the process. *Id.* at 150. This authority was instrumental in Chief Justice Marshall's conclusion that William Marbury's commission was fully vested, according to the "precise course" charted by Congress.

C. This Court's Precedents Confirm *Marbury*'s Recognition of Congress's Powers to "Establish[ ] by Law" the "Means of Appointment"

Marbury demonstrates that Congress has significant authority over how an appointment is finalized following Senate confirmation. This Court recognized this conclusion in *Freytag v. Comm'r,* noting that the "office of special trial judge is 'established by Law,' Art. II, § 2, cl. 2, and the duties, salary, and *means of appointment* for that office are specified by statute." 501 U.S. 868, 881 (1991) (emphasis added). In *Burnap v. United States*, Justice Brandeis observed that when "[t]here is no statute which provides specifically" how an officer is appointed, that duty devolves onto the Heads of Departments. 252 U.S. 512, 517 (1920). However, if there is such a statute, *Burnap* implies that Congress would have the power to regulate the means of appointment. *Id.*

To support this conclusion, Justice Brandeis cited an Opinion by Attorney General Judson Harm, who observed, "the sole responsibility of every appointment

in an Executive Department rests upon the head of that Department, *except where otherwise specially provided by statute*." Department Clerks-Delegation of Power, 21 U.S. Op. Atty. Gen. 355 (U.S.A.G. 1896). Harm's opinion also reflected *Marbury*'s conclusion that Congress can regulate the manner of appointment. In *Glavey v. United States*, Justice Harlan found that an inspector's appointment "was complete, at least, when he took the required oath and transmitted evidence of that fact to the Secretary," as required by the statute in question. 182 U.S. 595, 604 (1901). This further supports the conclusion that Congress – and not the President acting unilaterally – can decide the process to make an appointment final.

II. The Framers Used "by Law" in the Constitution to Vest Congress With Extraordinary Authority Over the Executive Branch, the States, Individuals, and its Own Members

Marbury's construction of the Appointments Clause gives Congress the authority to establish the process through which the executive branch finalizes appointments. Chief Justice Marshall's conclusion is bolstered by how the Framers used the phrase "by law" to vest Congress with extraordinary authority in areas that may otherwise disrupt the checks and balances. The phrase "by law" is used ten times in the Constitution and Bill of Rights. In each instance, it explicitly gives Congress a power to legislate over the

Executive Branch, the states, individuals, or even self-deal for its own members.

First, the Enumeration Clause empowers Congress to design the census "by law." Art. I, § 2, cl. 3 ("The actual Enumeration shall be made . . . in such Manner as they shall *by Law* direct.") (emphasis added). Congress's selection of one census method over another – such as using estimates rather than actual counts – could affect how representatives are allocated. *See Department of Commerce v. United States House of Representatives*, 525 U.S. 316, 346-47 (1999) (Scalia, J., concurring). Such an authority directly impacts how the body is constituted, and which states will gain or lose in representation. The Enumeration Clause poses a temptation for self-dealing and a risk of self-aggrandizement – particularly by the Representatives and Senators of less populous states seeking to expand their apportionment.

Second, Congress can alter the "time, place, and manner" of the elections of its own members. Art. I, § 4, cl. 1 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time *by Law* make or alter such Regulations, except as to the Places of chusing Senators.") (emphasis added). While the state legislatures traditionally had plenary authority over structuring all elections – providing a federalist balance – this clause creates a specific carve-out for the Congress to trump state sovereignty. (Pending before the Court is a case that implicates this provision.

Arizona State Legislature v. Arizona Independent Redistricting Comm'n, 13-1314.)

Third, Congress is given the power to alter when it meets. Art. I, § 4, cl. 2 ("The Congress shall assemble at least once in every Year, and such Meeting shall be on the first Monday in December, unless they shall *by Law* appoint a different Day.") (emphasis added). This clause may seem inconsequential today, but this "extraordinary" authority allows Congress to adjourn itself for extended periods of time to shut down the government. The Constitution contemplates that Congress may abuse this power, as such an "extraordinary Occasion[ ]" would offer the President the ability to "convene both Houses." Art. II, § 3. *NLRB v. Noel Canning*, 134 S.Ct. 2550, 2569 (2014) ("the President can always convene a special session of Congress."). Conversely, as this Court also recognized last term, if the Congress never adjourns, "the Constitution also gives the President (if he has enough allies in Congress) a way to force a recess." *Id.* at 2577. This congressional power, though extraordinary, was reaffirmed by Section 2 of the Twentieth Amendment, which pushed back the mandatory meeting from the "first Monday in December" to the "3d day of January." Amend. XX.

Fourth, Congress can set its own salary, the most self-serving of all powers. Art. I, § 6, cl. 1 ("The Senators and Representatives shall receive a Compensation for their Services, to be ascertained *by Law*, and paid out of the Treasury of the United States") (emphasis added). During the Constitutional Convention,

the phrase "to be ascertained by law" was added to the Compensation Clause by a unanimous vote to assure that Senators, who "will be detained longer from home," could be paid more than Representatives. 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, p. 293 (M. Farrand ed. 1911). The Constitution does prevent a "Senator or Representative" from being "appointed to any Civil Office" for which "the Emoluments whereof shall have been increased" while the member was in Congress. Art. I, § 6, cl. 2. But no similar provision blocks members of Congress from setting their own salary. This power to change their own pay proved so controversial that in the First Congress, the second proposed amendment provided that members of Congress could not give themselves a pay raise "until an election of representatives have intervened." *Transcription of the 1789 Joint Resolution of Congress Proposing 12 Amendments to the U.S. Constitution*, http://consource.org/document/amendments-to-the-constitution-1789-9-28/. This amendment was finally ratified in 1992 as the Twenty-Seventh Amendment.

Fifth, only Congress through appropriations can decide when the executive branch can withdraw funds from the Treasury. Art. I, § 9, cl. 7 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made *by Law*") (emphasis added). "By law," the Constitution vests this absolute "power of the purse" with Congress. THE FEDERALIST NO. 58 (Madison) ("The House of Representatives cannot only refuse, but they alone can propose, the supplies

requisite for the support of government. . . . This power over the purse may, in fact, be regarded as the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people, for obtaining a redress of every grievance, and for carrying into effect every just and salutary measure."). Through denying appropriations, the Congress could cripple the Presidency, and inflict serious damage to the separation of powers. Unlike adjourning and convening Congress, the President has no choice, but to comply with whatever appropriations Congress affords him.

Sixth, Congress could provide "by law" for presidential succession during emergencies. Art. II, § 1, cl. 6 ("the Congress may *by Law* provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected.") (emphasis added). Selecting who will serve in the executive branch during a constitutional crisis is a critical authority that is prone to abuse. This provision posed such a significant power struggle that it was later abrogated by the 25th Amendment – Congress alone could no longer be trusted with this transformative power.

Seventh, Congress can delegate the appointment power "by law" for the "inferior officers, as they think proper" to the President or the Courts. Art. II, § 2, cl. 2 ("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") (emphasis added). While Congress cannot unconditionally delegate its legislative power, *Whitman v. American Trucking Assns., Inc.*, 531 U.S. 457, 474 (2001), here Congress can expressly delegate the confirmation power to the Executive branch or even the Courts, as they "think proper." No "intelligible principle" is necessary. *Id.* This provision offers another significant carve-out to the usual separation of powers.

Eighth, Congress can decide where crimes "not committed within any state" should be tried. Art. III, § 2, cl. 3 ("but when [crimes are] not committed within any State, the Trial shall be at such Place or Places as the Congress may *by Law* have directed.") (emphasis added). This is a significant power over the due process rights of individuals – even before the due process clause was ratified. The Sixth Amendment's vicinage clause, which references the districts "previously ascertained by law," partially abrogates this authority vested in Congress. Amend. VI.

Ninth, the "by law" formula was adopted in the Third Amendment's prohibition of quartering of troops. Amend. III ("No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed *by law*.") (emphasis added). While it would normally be unconscionable for Congress to require Americans to board soldiers, during a "time of war," Congress can "prescribe[ ] by law" the quartering of soldiers. The framers gave Congress an extraordinary

power to infringe on individual freedom "by law." No other provision in the Bill of Rights gives the government a *safety valve* to waive a liberty interest. *Cf. Noel Canning*, 134 S.Ct. at 2599 (Scalia, J., concurring) ("the Solicitor General has asked us to view the recess-appointment power as a 'safety valve' against Senatorial 'intransigence.'"). Article I also gives Congress – and not the President – an extraordinary "safety valve" with the power to "suspend[ ]" the "Writ of Habeas Corpus" when "the public Safety may require it." Art. I, § 9, cl. 2.

This formula appears to have become entrenched in the Constitutional tradition via the Thirteenth, Fourteenth, Fifteenth, Eighteenth, Nineteenth, Twenty-Fourth, and Twenty-Sixth Amendments, which similarly declare that "Congress shall have power to enforce this article *by* [. . .] *legislation*." With the enforcement powers of these amendments, Congress is authorized to intrude on state and individual sovereignty to serve higher constitutional purposes.

Finally – and at issue in this case – it falls to Congress to "establish[ ] by law" the appointment process for officers. Art. II, § 2, cl. 2 ("He 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*") (emphasis added). The "by law" formulation, consistent with the other usages, affords Congress powers not normally

exercised within the traditional sphere of the legislative branch.

In comparison with some of the other extraordinary constitutional powers that Congress can authorize "by law" – Congress can block all appropriations or determine Presidential succession – the authority found in the Appointments Clause is rather benign. All it says is that a President must adhere to the appointment process for an officer he already nominated, and the Senate confirmed. It has only the slightest impact on the office of the Presidency, as he can always block the nomination before giving his assent.

III. Through DOPMA, Congress "Established by Law" the "Means of Appointment" for Military Officers

A. DOPMA Imposes Qualifications on the Nomination Process Prior to Confirmation

Through the Defense Officer Personnel Management Act ("DOPMA"), Congress "attempted to regularize the promotion process for military officers." *Dysart*, 369 F.3d at 1306. Like with any appointment, the initial step is the President's nomination of the officer to be confirmed. Art. II, § 2, cl. 2. Under DOPMA, however, the President cannot nominate an officer by himself. Rather, Congress created a systematic process to facilitate a "more equitable, effective, and efficient system to fill officer force structure

requirements and to manage the officer corps." H.R. Rep. No. 96-1462, at 56 (1980), partially reprinted in 1980 U.S.C.C.A.N. 6333.

First, a "selection board [is] convened." 10 U.S.C. § 624(a)(1). The members of the board are appointed by the Secretary of the relevant military department (in this case, it is the Secretary of the Air Force). § 612(a)(1). Second, before the board meets, the Secretary "shall establish the number of officers such a selection board may recommend for promotion." § 616(b). Third, after the board is convened, it creates a report listing the officers eligible for promotion – those that it "considers best qualified." § 616(a). Fourth, that written report is submitted to the Secretary. § 617. Fifth, "upon receipt of the report," the Secretary "shall review the report to determine whether the board has acted contrary to law or regulation or to guidelines." § 618(a). At this stage, the Secretary can "return the report" if it is "contrary to law or regulation or to guidelines." § 618(b).

Sixth, after this review is complete, the report is submitted "to the Secretary of Defense for transmittal to the President for his approval or disapproval." § 618(c)(1). Following the transmittal, the President has the unfettered power to remove any name from the report. § 618(d)(1). Seventh, after the report 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." § 624(a)(1).

Only after these steps are completed does the President formally nominate the officers for promotion, and transmit the promotion list to the Senate. § 624(c).

B. DOPMA Provides the Process to Finalize Appointments After Confirmation

Following the nomination, the Senate has an absolute right to confirm, or not confirm the nominees through the "advice and consent" process. Art. II, § 2, cl. 2. Once the officer is confirmed, Congress "established by law" the "means of appointment." *Freytag*, 501 U.S. at 881. DOPMA provides the process to finalize the appointment. After the return of the confirmation by the Senate, the President transmits the confirmed names to the Secretary. Once this transmittal is complete, Congress charges the Secretary with the duty to calculate and set the officer's promotion date. 10 U.S.C. §§ 624(b)(2), 741(d). This date is a necessary condition to determine when the promotion takes effect.

After the promotion date is set, the statute specifies that "officers on a promotion list for a competitive category shall be promoted to the next higher grade," "[e]xcept as provided in subsection (d)." § 624(a)(2). The statute offers two detours for delay. First, the Secretary may delay the promotion if the officer is subject to a court-martial, is under investigation for disciplinary actions, or if criminal proceedings are pending against him. § 624(d)(1). If the

charges are dismissed, subject to some exceptions, the "officer shall be retained on the promotion list . . . and shall, upon promotion to the next higher grade, have the same" promotion date "as he would have had if no delay had intervened." *Id.* Here, the Secretary's initial determination of the promotion date controls the appointment for purposes of grade and back pay, even though there was a delay.

Beyond the more formal delay based on official charges, the promotion "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. . . . or is mentally, physically, morally, or professionally unqualified to perform the duties of the grade for which he was selected for promotion." § 624(d)(2). This provision offers a bypass if the Secretary has second thoughts about the candidate. If he is found to be qualified, the officer shall have the same promotion date "as he would have had if no delay had intervened." *Id.*

Section 624(d)(4) provides a limit on how long the delays in parts (d)(1) and (d)(2) can last. Specifically, "[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." § 624(d)(4). According to this provision, after a promotion date is calculated and set by the Secretary, the President has up to six months to reject the list of confirmed names he previously transmitted to the Secretary. Even if the

six-month period proves inadequate, the Secretary can "specif[y] a further period of delay." § 624(d)(4). That window can be extended up to "18 months after the date on which such officer would otherwise have been appointed." *Id.* During this window, the President retains an unlimited right to remove a name from the list. § 629(a).

C. The President Assenting, Followed by the Secretary Setting the Promotion Date, Triggers the Appointment Process

The appointment process at issue in *Marbury* parallels the appointment process with DOPMA. In *Marbury*, the final act designated "by law" was sealing the commission, following Presidential assent. Under DOPMA, the final act designated "by law" was setting the promotion date, following Presidential assent. 10 U.S.C. §§ 624(b)(2), 741(d). All of the essential elements recognized in *Marbury* – nomination, confirmation, and appointment – are present with DOPMA. That Congress did not require a formal signature to indicate assent is immaterial, in much the same way that delivery was unnecessary two centuries earlier. In *Marbury*, Congress provided that the seal must be affixed after the President signed the commission. But Congress could have chosen some other form of assent, such as the President's verbal authorization, or even the President's transmission of the commission to the Secretary of State.

In conflict with *Marbury*, the Federal Circuit adopted the Jeffersonian view that it is the President who decides how to finalize an appointment. *Dysart*, 369 F.3d at 1313 (the "final public act of appointment" is "the signing and issuance of the letter of appointment . . . on behalf of the President."). A letter to that effect – not required by Congress – is but a mere formality, akin to the delivery of William Marbury's commission. Even if the letter was destroyed by fire, a "copy would, equally with the original, authorize the justice of peace to proceed in the performance of his duty." *Marbury*, 5 U.S. at 159. Rather, as *Marbury* demonstrated, it is Congress that can "establish[ ] by law" *how* the President's assent is manifested.

In *Marbury*, Chief Justice Marshall highlighted the significance of the Presidential transmission of the commission to the Secretary of State, which triggered the duty to affix the seal. *Id.* at 139 ("When a commission for an officer not holding his office at the will of the President, is by him signed and *transmitted to the secretary of state to be sealed and recorded*, it is irrevocable; the appointment is complete."); *Myers v. United States*, 272 U.S. 52, 140 (1926) ("the Senate had consented to such an appointment, that the President had signed the commission as provided by the Constitution, and had *transmitted it to the Secretary of State*, who, as provided by statute, had impressed the seal of the United States.") (emphasis added). Under DOPMA, even without a signature, the President's assent is manifested through the

transmittal, which triggers the Secretary's duty to calculate and set the promotion date. In this case, the President's transmission of the names to the Secretary of the Air Force could only occur if the President himself concurred with that decision.

The Federal Circuit implicitly acknowledged that other means are available for the President to offer his assent, noting that in addition to "sign[ing] a commission," the President can engage in "some other public act as evidence of the officer's appointment." *Dysart*, 369 F.3d at 1306. The "public act" of transmission, just as much as a signature, manifested the President's approval of the names the Senate confirmed. This assent then triggered the Secretary's duty to set the promotion date. Determining the promotion date sets in motion the process to complete the appointment. This process, established by Congress is the "*precise course* accurately marked out *by law* [that] is to be strictly pursued." *Marbury*, 5 U.S. at 558 (emphasis added). The Federal Circuit permitted the President to deviate from this "precise course."

D. DOPMA's Appointment Process Bolsters the Separation of Powers

The Federal Circuit found that "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. But this is not an "automatic appointment." Rather, the

President's manifestation of assent through transmitting the list of confirmed names to the Secretary triggers the calculation of the promotion date, which implements the path Congress designed to finalize the appointment. This process does not amount to Congress attempting to both "create an office" and "appoint the officer." *Weiss v. United States*, 510 U.S. 163, 174 (1990) (quoting *Shoemaker v. United States*, 147 U.S. 282, 300 (1893)). Rather, it merely provides the process and means by which the officer is appointed.

Contrary to the Federal Circuit's characterization that the officer would be appointed "by operation of law," *Dysart*, 369 F.3d at 1310, it is actually an act of the President's delegee, the Secretary, that triggers the appointment process, following the President's affirmative transmission of the list of confirmed names. The President could have easily declined to transmit the names, killing the appointment. Even if he did not spike the appointment at that juncture, Congress affords the President ample opportunity to revoke his earlier assent. 10 U.S.C. § 629(a). But doing so after the six-month window is contrary to law, and violates the powers afforded to Congress by the appointments clause to "establish[ ] by law" the "means of appointment." *Freytag v. Comm'r*, 501 U.S. 868, 881 (1991).

DOPMA's appointment process is a permissible exercise of Congress's authority under the Appointment Clause. The Federal Circuit erred in its *sub silentio* invalidation of 10 U.S.C. § 624(a)(2), as it negated Congress's role in ensuring an orderly and

fair appointment process for military officers of the United States. As this Court recognized last term, "the separation of powers can serve to safeguard individual liberty . . . [and] it is the 'duty of the judicial department' – in a separation-of-powers case as in any other – 'to say what the law is.'" *Noel Canning*, 134 S.Ct. 2559-60 (quoting *Clinton v. City of New York*, 524 U.S. 417, 449-50 (1998) (Kennedy, J., concurring); *Marbury*, 5 U.S. at 177).

The Court should grant certiorari to reaffirm Congress's constitutional role in the appointment process.

CONCLUSION

For these reasons, and those stated by petitioners, the petition for writ of certiorari should be granted.

Respectfully submitted,

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