



SECRETARY OF THE AIR FORCE  
WASHINGTON

MAR 28 2008

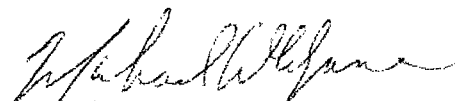
MEMORANDUM FOR THE DIRECTOR OF THE AIR FORCE REVIEW  
BOARDS AGENCY

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



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



ATTACHMENT  
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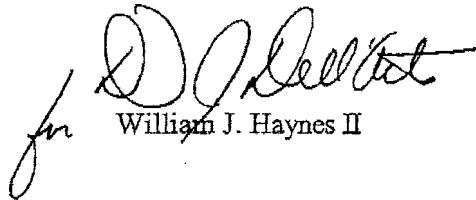
forth three separate actions that are ordinarily required for a person, subject to Senate confirmation, to be appointed to office: the President's nomination; confirmation by the Senate; and the President's appointment." 363 F. 3d at 1311. Again under *Marbury*, the *Dysart* court noted "if an appointment 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.

for  
William J. Haynes II

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