DEPARTMENT OF THE NAVY
BOARD FOR CORRECTION OF NAVAL RECORDS
2 NAVY ANNEX
WASHINGTON DC 20370-5100

BJG
Docket No: 404-00
28 February 2002

From: Chairman, Board for Correction of Naval Records
To: Secretary of the Navy

Subj: MAJ [redacted], II, USMCR (RET), [redacted]
REVIEW OF NAVAL RECORD

Ref: (a) Title 10 U.S.C. 1552

Encl: (1) DD Form 149 dtd 13 Jan 00 w/attachments, incl Subject's ltr dtd 12 Dec 00
(2) HQMC JAM01 memo dtd 11 Apr 00
(3) HQMC RAM memo dtd 24 Apr 00
(4) Counsel ltr dtd 7 Jun 00
(5) Memo for record dtd 13 Jun 00
(6) OJAG Ser 13 memo dtd 3 Jan 01 w/encls
(7) Counsel ltr dtd 1 Feb 01 w/encls
(8) Subject's naval record

1. Pursuant to the provisions of reference (a), Subject, hereinafter referred to as Petitioner, filed written application, at enclosure (1), with this Board requesting, in effect, the following relief:

Restoration to the Fiscal Year (FY) 1998 Reserve Lieutenant Colonel promotion list, and promotion to lieutenant colonel with a date of rank and effective date of 1 June 1997;

Removal of the failure of selection notation caused by his removal from the FY 1998 Reserve Lieutenant Colonel promotion list, and removal of his failure of selection by the FY 2001 Reserve Lieutenant Colonel Selection Board [he was not considered by the FY 1999 or 2000 Reserve Lieutenant Colonel Selection Board, as he was still on the FY 1998 Reserve Lieutenant Colonel promotion list when those promotion boards convened; and he does not contest his first failure of selection, by the FY 1997 Reserve Lieutenant Colonel Selection Board]; and

Removal of all documentation relating to the delay of his promotion to lieutenant colonel and his removal from the FY 1998 Reserve Lieutenant Colonel promotion list (copies of documents on his Official Military Personnel File (OMPF) at Tab A).

Because of the failures of selection for promotion, he was involuntarily removed from active status in the Marine Corps Reserve and transferred to the Retired Reserve on 1 April 2001.

By letter of 12 December 2000, also at enclosure (1), he amended his petition to add a request that he be reinstated to active status; and that he be awarded constructive point credit to give him satisfactory service, for purposes of eligibility for retired pay at age 60, for the period from 1 April 2001 to his reinstatement.

2. The Board, initially consisting of [redacted]gan reviewing Petitioner's allegations of error and injustice on 8 February 2001. On 20 June 2001, the Board, then consisting of Messrs. Shy and Silberman and Ms. Madison, continued deliberations. This same panel completed their review on 28 February 2002 and, pursuant to the Board's regulations, determined that the corrective action indicated below should be taken on the available evidence of record. Documentary material considered by the Board consisted of the enclosures, naval records, and applicable statutes, regulations and policies.

3. The Board, having reviewed all the facts of record pertaining to Petitioner's allegations of error and injustice, finds as follows:

a. Before applying to this Board, Petitioner exhausted all administrative remedies which were available under existing law and regulations within the Department of the Navy.

b. Enclosure (1) was filed in a timely manner.

c. Petitioner, who had failed of selection before the FY 1997 Reserve Lieutenant Colonel Selection Board, was selected by the FY 1998 Reserve Lieutenant Colonel Selection Board, which met on 15 April 1997. His projected date of rank and effective date was 1 June 1997.

d. On 27 June 1997, Petitioner was involved in an automobile accident in Okinawa, Japan. He was charged with driving under the influence (DUI) of alcohol, after having taken a breathalyzer test which indicated that his blood-alcohol content (BAC) was .05 percent. The Japanese BAC standard is lower than that for Marine Corps Base Ca[redacted], Okinawa, Japan, and the United States in general, which is .10 percent. The military police (MP) were called, and Petitioner was charged with failure to yield to another vehicle and refusal to take another BAC test offered by the MP's. On 13 August 1997, his military driving privileges were revoked for six months, and he was assessed points against his driving record. On 25 August 1997, he appeared in Japanese court, accepted a finding of guilty to DUI, and was fined $500.00. He received an adverse fitness report for 15 May to 12 September 1997 (copy at Tab B), which he does not contest, documenting that he was found guilty of DUI; and the Commandant of the Marine Corps (CMC) was notified accordingly. On 23 September 1997, the Commander, Marine Corps Reserve Support Command (CMCRSC) notified Petitioner that he had delayed Petitioner's promotion to lieutenant colonel. Before delaying Petitioner's promotion, the CMCRSC did not notify him of his intention to impose a delay, nor did he give him a chance to make a statement. On 16 November 1997, CMC notified him that his promotion had been delayed, and that he was

being considered for removal from the FY 1998 Reserve Lieutenant Colonel promotion list. On 27 April 1998, the Assistant Secretary of the Navy (Manpower and Reserve Affairs) (ASN (M&RA)) ratified and extended the CMC delay of his promotion. On 8 July 1998, the Staff Judge Advocate (SJA) to CMC forwarded his recommendation to CMC. The SJA recommended that Petitioner be promoted because the traffic accident was caused by a parked vehicle that obstructed his view, and his BAC of .05 percent was below the presumptive level of intoxication required of a DUI offense in the United States. The Director of the Headquarters Marine Corps (HQMC) Personnel Management Division and the Deputy Chief of Staff, Manpower and Reserve Affairs agreed, and recommended that he be promoted. The Secretary to the General Staff, a Marine Corps major general, in his recommendation to CMC, indicated that CMC had never removed anyone from a promotion list for DUI, only for driving while intoxicated (DWI). However, the Secretary to the General Staff recommended that Petitioner be removed from the promotion list. On 4 August 1998, CMC recommended to the Secretary of the Navy (SECNAV) that Petitioner's name be removed from the promotion list. On 19 October 1998, SECNAV approved removal of Petitioner's name from the "selection board report." On 21 May 1999, the Deputy Secretary of Defense forwarded the SECNAV recommendation to the President, indicating that the SECNAV recommendation had been to remove Petitioner from the "promotion list," rather than the "selection board report." On 1 June 1999, the President removed Petitioner's name from the promotion list.

e. As shown on Petitioner's Career Retirement Credit Record, a copy of which is at Tab C, he has attained the 20 qualifying years needed to be eligible for retired pay at age 60. However, his removal from active status on 1 April 2001 made him ineligible to earn any additional point credit for the purpose of increasing the amount of his pension.

f. Petitioner's counsel argued that Petitioner was not given proper written notice before his promotion was delayed, and that the delay was effected before giving Petitioner an opportunity to make a written statement. He noted that a promotion may be delayed for only six months, unless SECNAV specifies a further delay. He contended that Petitioner's promotion was effective on 1 June 1997, and that no action was taken to delay his promotion until after this date had passed. He also argued that even if Petitioner's effective date of promotion were taken to be 1 October 1997, the date likely to be urged by the Department of the Navy in light of ALMAR (All Marine Corps) message 319/97 (counsel erroneously referred to this message as "ALNAV [All Navy]" 319/97), SECNAV still did not comply with the six-month delay limitation. Counsel further argued that the only permissible grounds for delaying an officer's promotion are if that officer is mentally, physically, morally, or professionally unqualified to perform the duties of the grade for which he was selected for promotion; however, the letter of 23 September 1997 notifying Petitioner of the delay of his promotion indicated that his promotion was delayed for poor judgement, and failed to state a permissible basis for delay. Finally, he argued that the intent of SECNAV was to remove Petitioner from the report of the selection board, not the promotion list. He erroneously cited statutory (title 10, subtitle A, United States Code, Chapter 36) and regulatory (SECNAV Instruction (SECNAVINIST) 1420.1A) provisions applicable to active-

duty list promotions, rather than Reserve active-status list promotions. The statutory provisions applicable to Reserve active-status list promotions are in title 10, subtitle E, United States Code, Part III; there is no applicable regulation comparable to SECNAVINST 1420.1A.

g. In correspondence attached as enclosure (2), the HQMC Military Law Branch, Judge Advocate Division (JAM01) has commented to the effect that Petitioner's request should be denied. JAM01 stated there was no defect in the delay of his promotion and removal from the FY 1998 Reserve Lieutenant Colonel promotion list. They stated that Petitioner mistakenly relied on the "running mate" system for Reserve officers, which would have established his date of rank and effective date of promotion as 1 June 1997. They described as "misguided" Petitioner's argument that the 23 September 1997 notification of delay was defective, because it occurred after his effective date of promotion. In this regard, JAM01 opined that ALMAR 319/97 (as counsel had done, JAM01 also erroneously referred to this message as "ALNAV [All Navy] 319/97") established Petitioner's effective date of promotion, the date it was to be delivered, as 1 October 1997. JAM01 concluded that the 23 September 1997 notification of delay was valid. They found no merit in Petitioner's allegation that his delay was a nullity because the notification letter did not state the reason for his promotion delay; they pointed out that Petitioner's notification letter of 23 September 1997 (Tab 11 to enclosure (1)) stated that he need not be promoted if he was found to be "professionally unqualified," and the letter cited the DUI as a basis for the delay. In response to his objection that the delay was effected before Petitioner had been given a chance to submit a statement, JAM01 further commented that there is no requirement in law or regulation to consider an officer's comment before delaying a promotion. Concerning the argument that the delay was a nullity because the ASN (M&RA) action of 27 April 1998 (Tab 6 to enclosure (1)), which ratified and extended Petitioner's promotion delay, occurred more than six months after his scheduled promotion date of 1 October 1997, JAM01 stated that this ignores the fact that Petitioner had submitted a request for an additional delay on 6 March 1998, which was granted on 30 March 1998. Furthermore, JAM01 stated, the applicable regulation requires only that an extension of a promotion delay be "timely." Regarding Petitioner's argument that the failure to submit additional requests for extensions of delay invalidated the delay and removal, JAM01 stated that neither statute nor regulation requires such additional requests. Concerning Petitioner's allegation that the erroneous reference by SECNAV to removal from the "selection board report" instead of the "promotion list" (Tab 9 to enclosure (1)) made Petitioner's removal from the promotion list invalid, JAM01 opined that this was merely a scrivener's error that had no effect on the validity of the President's decision to remove him from the promotion list. Finally, concerning Petitioner's removal from the promotion list for DUI, rather than DWI, and the fact that the Japanese had stricter BAC requirements than the United States, JAM01 concluded that the President removed Petitioner from the promotion list on the basis of the specific facts of the case, and that his action was in accordance with the United States Constitution. As counsel had done, JAM01 erroneously cited statutory and regulatory provisions applicable to active-duty list promotions, rather than Reserve active-status list promotions.

h. In correspondence attached as enclosure (3), the HQMC Career Management Team, Reserve Affairs Manpower Branch, Reserve Affairs Division has commented to the effect that Petitioner's request to remove the failure of selection notation caused by his removal from the FY 1998 Reserve Lieutenant Colonel promotion list has no merit, because he did not incur a failure of selection. Title 10, United States Code, section 14310, dealing with removal from a Reserve active-status list promotion list, includes no language corresponding to the language in title 10, United States Code, section 629(c)(2) to the effect that if an officer below the grade of colonel who has been removed from an active-duty list promotion list fails of selection by the next promotion board to consider the officer, the officer is to be considered to have twice failed of selection for promotion.

i. Petitioner's counsel submitted a rebuttal letter, enclosure (4), to the JAM01 advisory opinion. He argued that Petitioner's effective date of promotion was 1 June 1997, so the 23 September 1997 delay was a nullity, because a delay must occur before the effective date of a promotion. Counsel stated that 1 October 1997 was merely the delivery date, not the effective date of Petitioner's promotion. Counsel further stated that in accordance with the applicable law (he erroneously cited title 10, United States Code, section 624(d)(4), but the same rule is established in the counterpart provision for Reserve active-status list promotions, title 10, United States Code, section 14311(d)) and regulation (he still erroneously cited SECNAVINST 1420.1A), a promotion may not be delayed longer than 18 months, so Petitioner's removal from the promotion list on 1 June 1999 exceeded the limitation. Counsel noted that even if the case is viewed in the light most favorable to the Government, where Petitioner's effective date of promotion is treated as 1 October 1997, the President's removal action on 1 June 1999 exceeded the 18-month delay limitation. Finally, counsel concluded that Petitioner was promoted on 1 June 1997 by "operation of law."

j. The memorandum for the record at enclosure (5) shows the HQMC Promotion Branch has advised that Petitioner initially failed of selection before the FY 1997 Reserve Lieutenant Colonel Selection Board; that he was selected, despite a failed of selection status, by the FY 1998 Reserve Lieutenant Colonel Selection Board; and that if he had been promoted pursuant to selection by the FY 1998 Reserve Lieutenant Colonel Selection Board, he would have been assigned a date of rank and effective date of 1 June 1997.

k. In correspondence attached as enclosure (6), the Office of the Judge Advocate General (OJAG) has commented to the effect that Petitioner's case should be denied. OJAG, which correctly cited the statutory provisions applicable to Reserve active-status list promotions, stated that since Petitioner was never appointed to the grade of lieutenant colonel, he does not have an effective date of rank. OJAG said that Petitioner's name was placed on the promotion list on 8 September 1997. They stated that because being placed on a promotion list is a condition precedent to being promoted, Petitioner could not have been promoted before this occurred. OJAG said that ALMAR 319/97 (enclosure (5) to the OJAG opinion) was released on 26 September 1997, but Petitioner's name was not on it, so there was no promotion authority, date of rank, or effective date for him. They stated that had his name appeared on ALMAR 319/97, he would have been appointed on 26 September 1997,

the date the message was released, and his effective date of rank would have been adjusted to 1 June 1997. Regarding Petitioner's contention that a promotion delay may not exceed 18 months, OJAG stated that while the 18-month outer limit may have been exceeded, this does not result in promotion by "operation of law." OJAG concluded that there is no statutory authority for or requirement to promote an officer by "operation of law" if notice of delay is not properly provided, or if the limitation of delay is exceeded.

1. By letter at enclosure (7), Petitioner's counsel replied to the OJAG advisory opinion. He maintained that Petitioner warranted promotion to lieutenant colonel with an effective date of 1 June 1997, the date his active duty running mate was promoted to that grade. He also noted that not only was the six-month delay period exceeded, but the statutorily mandated 18-month outer limit for delays was exceeded as well. Counsel quoted from a prior decision of this Board, where a promotion delay limitation was exceeded, and the ASN (M&RA) agreed that the delay period had been exceeded, so the officer received his promotion. Counsel stated that because the 18-month delay period had been exceeded in Petitioner's case, he was promoted by "operation of law." Counsel noted that in the case [redacted] United States, 42 Fed.Cl. 782 (1999), a decision the Air Force did not appeal, the court held that because an Air Force officer had been improperly removed from a promotion list, that officer was promoted by "operation of law."

CONCLUSION:

Upon review and consideration of all the evidence of record, and notwithstanding enclosures (2) and (6), the Board finds an injustice warranting approval of Petitioner's application.

The Board finds that Petitioner is entitled to the requested relief regarding his promotion and removal of documentation of his promotion delay and removal from the promotion list. In this connection, they find it was unduly harsh to delay his promotion and remove him from the promotion list for a DUI where his BAC was only .05 percent. Further, and more importantly, they note that whether the date on which he would have been promoted, but for the intervening delay, is considered to be 1 October 1997, as JAM01 believes, or 26 September 1997, as OJAG indicates, the 18-month statutory outer limit on delay expired before 1 June 1999, when the President acted to remove Petitioner from the promotion list. While the Board does not embrace the concept of promotion by "operation of law," they do find that affirmative steps should have been taken, when the 18-month period had expired and Petitioner had not been removed from the promotion list, to effect his promotion effective 1 June 1997. Since the Board finds that Petitioner's promotion should have been effected before the President acted to remove him from the promotion list, they conclude that the President's removal action was a nullity.

The Board finds that Petitioner's failure of selection by the FY 2001 Reserve Lieutenant Colonel Selection Board should be removed. They note that had he been promoted when they feel he should have been, he would not have been eligible for consideration by the FY 2001 promotion board.

The Board further observes that had Petitioner been promoted to lieutenant colonel, he would not have been removed from active status in the Marine Corps Reserve. Accordingly, they find that his record should be corrected to show he never lost active status.

Finally, the Board recommends granting Petitioner non-pay point credit at the rate of 50 points per anniversary year, the minimum needed for satisfactory participation, for the period from his involuntary retirement on 1 April 2001 to the date of his reinstatement to active status. In this regard, they note that through no fault of his own, he was unable to earn any retirement point credit during this period; and they feel this relief must be granted to make Petitioner as whole as current circumstances permit.

In view of the above, the Board recommends the following corrective action:

RECOMMENDATION:

a. That Petitioner's naval record be corrected to show he was not removed from the FY 1998 Reserve Lieutenant Colonel promotion list.

b. That his record be corrected further to show he was promoted to lieutenant colonel with a date of rank and effective date of 1 June 1997; and that his lineal precedence be adjusted accordingly.

c. That his record be corrected further to show he did not fail of selection by the FY 2001 Reserve Lieutenant Colonel Selection Board (leaving his failure of selection by the FY 1997 Reserve Lieutenant Colonel Selection Board).

d. That his record be corrected further by removing all documentation relating to the delay of his promotion to lieutenant colonel or his removal from the FY 1998 Reserve Lieutenant Colonel Selection Board promotion list (OMPF, S fiche continuation, frames C5 through 14 and D1 through 5; C fiche, frames F7 through 14, and G1 through 14 (including material relating to Petitioner's civil conviction, a matter adequately documented in his uncontested adverse fitness report for 15 May to 12 September 1997); and C fiche continuation, frames A3 through 14 and B1 through 5).

e. That his record be corrected further to show that he was not involuntarily removed from an active status in the Marine Corps Reserve and transferred to the Retired Reserve on 1 April 2001, but remained in an active status after that date; and that he be reinstated to an active status in the Marine Corps Reserve accordingly.

f. That his record be corrected further to show he earned non-pay retirement point credit at the rate of 50 points per anniversary year for the period from 1 April 2001 to the date of his reinstatement to an active status, prorating as necessary for an anniversary year beginning before the date of reinstatement but ending after that date.

g. That any material or entries inconsistent with or relating to the Board's recommendation be corrected, removed or completely expunged from Petitioner's record and that no such entries or material be added to the record in the future.

h. That any material directed to be removed from Petitioner's naval record be returned to this Board, together with a copy of this Report of Proceedings, for retention in a confidential file maintained for such purpose, with no cross reference being made a part of Petitioner's naval record.

4. It is certified that a quorum was present at the Board's review and deliberations, and that the foregoing is a true and complete record of the Board's proceedings in the above entitled matter.

Jonathan S. Ruskin

ROBERT D. ZSALMAN
Recorder

JONATHAN S. RUSKIN
Acting Recorder

5. The foregoing report of the Board is submitted for your review and action.

W. Dean Pfeiffer

W. DEAN PFEIFFER

Reviewed and approved:

404-00

DEPARTMENT OF THE NAVY
OFFICE OF THE SECRETARY
1000 NAVY PENTAGON
WASHINGTON, D.C. 20350-1000

OCT 24 2002

MEMORANDUM FOR THE EXECUTIVE DIRECTOR, BOARD FOR CORRECTION OF NAVAL RECORDS

Subj: REVIEW OF NAVAL RECORD OF MAJ [redacted] USMCR, [redacted]

I have considered the recommendations of the Board for Correction of Naval Records (BCNR) that petitioner's record be corrected to show that he was not removed from the FY 1998 Reserve Lieutenant Colonel promotion list. While I approve the relief recommended by the Board, I do not accept its rationale. Contrary to the BCNR, I find that the Department of the Navy complied with the time standards required by 10 U.S.C. Sec. 14311(d) to effect petitioner's delay and removal from the FY 1998 Reserve Lieutenant Colonel promotion list. However, under the particular circumstances of this case, I find that petitioner's removal from the promotion list is an injustice warranting relief. Depriving petitioner of his promotion to Lieutenant Colonel [redacted] on the basis of a traffic incident in which he was not at fault is disproportionate to the offense. Accordingly, I approve the relief recommended by the Board.

[redacted]
Assistant General Counsel
(Manpower and Reserve Affairs)

4141-00

DEPARTMENT OF THE NAVY
HEADQUARTERS UNITED STATES MARINE CORPS
2 NAVY ANNEX
WASHINGTON, DC 20380-1775

IN REPLY REFER TO:
1070
JAMO1
11 APR 2000

MEMORANDUM FOR THE EXECUTIVE DIRECTOR, BOARD FOR CORRECTION OF NAVAL RECORDS

Subj: BOARD FOR CORRECTION OF NAVAL RECORDS (BCNR) APPLICATION IN THE CASE OF MAJOR [redacted] USMCR

1. We are asked to provide an opinion on Petitioner's request for removal of all documents relating to his removal from the FY98 USMCR Lieutenant Colonel Promotion List. Petitioner also requests that BCNR recommend action by the Secretary of the Navy (SecNav) that would lead to his being reinstated by the President, *nunc pro tunc*, that is, retroactively -- to the FY98 Lieutenant Colonel USMCR Promotion List.

2. We recommend that the requested relief be denied. Our analysis follows.

3. Background

a. The FY98 USMCR Lieutenant Colonel Selection Board (Board) recommended Petitioner for promotion. On 26 June 1997, prior to his promotion date, Petitioner was arrested and charged with Driving Under the Influence (DUI) by Japanese authorities in Okinawa, Japan. On 25 August 1997, Petitioner was found guilty of DUI in Japanese Summary Court and fined the equivalent of $500.00.

b. As a result of this misconduct, on 23 September 1997, the Commander, Marine Corps Reserve Support Command, requested that Petitioner's promotion be delayed. On 6 November 1997, the Commandant of the Marine Corps (CMC) notified Petitioner that he would make a recommendation to SecNav on whether to approve Petitioner's promotion delay and, if applicable, whether to recommend his removal from the promotion list. On 8 September 1998, CMC recommended that SecNav remove Petitioner's name from the Promotion List. On 19 October 1998, SecNav approved the recommendation. On 1 June 1999, the President of the United States removed Petitioner's name from the FY98 USMCR Lieutenant Colonel Promotion List.

Subj: BOARD FOR CORRECTION OF NAVAL RECORDS (BCNR) APPLICATION IN THE CASE OF MAJOR [redacted] USMCR

4. Analysis

a. Petitioner presents two broad arguments in support of his petition. First, Petitioner claims that the Department of the Navy failed to comply in material respects with the controlling statute and regulation governing delay, thus rendering Petitioner's delay and subsequent removal a nullity. Second, Petitioner argues that the facts and circumstances of his removal constitute an injustice that warrants correction by BCNR. Neither of these claims provides a basis for the requested relief.

b. There was no legal defect in the processing of Petitioner's promotion delay and subsequent removal from the FY98 USMCR Lieutenant Colonel Promotion List. Petitioner incorrectly relies on the "running mate" system for Reserve Officers, claiming that his effective date of promotion was 1 June 1997 and arguing that the 23 September 1997 notification of delay was a nullity because it occurred after his effective date of promotion. Although SECNAVINST 1420.1A does require notification of delay prior to the effective date of the appointment, unless impractical, ALNAV 319/97 established Petitioner's effective date of promotion -- i.e., the specific date the appointment would be delivered -- as 1 October 1997. Accordingly, the 23 September 1997 notification complies with the regulation.

c. Petitioner also argues that his delay was a nullity because his notification letter did not specifically state the reason for the delay and because he was not given an opportunity to comment on the delay before its imposition. These arguments are without merit. First, the 27 September 1997 delay notification letter correctly states that a promotion may be delayed "if there is cause to believe the officer is . . . professionally unqualified" and cites the DUI as the basis for the delay. Second, there is no requirement, in law or regulation, to consider an officer's comment before the imposition of a promotion delay.

d. Petitioner also argues his delay was a nullity because the Assistant Secretary of the Navy's 27 April 1998 letter ratifying and extending Petitioner's delay occurred more than 6 months after his scheduled promotion date of 1 October 1997. This argument ignores the fact that Petitioner had submitted a

request for additional delay on 6 March 1998, that was granted on 30 March 1998. Moreover, SECNAVINST 1420.1A paragraph 23(d) does not impose a requirement that requests for additional delay be submitted within six-months of the scheduled promotion date, only that such requests be submitted in a "timely" manner. Petitioner also argues that his delay and removal were invalid because additional requests for extensions of delay were not submitted. Neither statute nor regulation imposes such a requirement.

e. Petitioner next argues that his removal from the promotion list was invalid because SecNav's 19 October 1998 signature approving CMC's request to remove Petitioner from the promotion list was appended next to a stamped reference to "removal . . . from a selection board report." Petitioner contends that SecNav's erroneous use of a stamp referring to "selection board report" vice "promotion list" nullifies the President's removal of Petitioner from the Lieutenant Colonel (USMCR) Promotion List. This argument is without merit. Because the correspondence forwarded to the President for action clearly contemplates Petitioner's removal from the Promotion List, incidental use of the wrong stamp on SecNav's forwarding endorsement amounts to no more than a scrivener's error. Furthermore, the President was the only authority authorized to remove any name from the FY98 USMCR Lieutenant Colonel Promotion List, and the President -- by his 1 June 1999 signature -- not SecNav, ordered that removal.

f. Finally, Petitioner argues that his removal from the Promotion List constitutes an injustice that warrants correction. Petitioner cites differences between Japanese and U.S. law governing DUI offenses, claims that he is the first Marine to be removed from a promotion list due to a DUI incident, and argues that his removal creates a new legal standard. As demonstrated above, the removal process in Petitioner's case was performed correctly according to law and regulation. The decision of the President of the United States to remove Petitioner's name was, and should be, based upon the specific facts of the case and made in accordance with his authority under the U.S. Constitution. Thus, Petitioner's arguments are without merit.

Subj: BOARD FOR CORRECTION OF NAVAL RECORDS (BCNR) APPLICATION IN THE CASE OF MAJOR [redacted] USMCR

5. Conclusion. Accordingly, for the reasons noted, we recommend that the requested relief be denied.

[redacted]
Head, Military Law Branch
Judge Advocate Division

DEPARTMENT OF THE NAVY
HEADQUARTERS UNITED STATES MARINE CORPS
3280 RUSSELL ROAD
QUANTICO, VIRGINIA 22134-5103

IN REPLY REFER TO:

1610
RAM
24 Apr 00

MEMORANDUM FOR THE EXECUTIVE DIRECTOR, BOARD FOR CORRECTION OF NAVAL RECORDS

Subj: BCNR APPLICATION IN THE CASE OF [redacted] USMCR

Ref: (a) MMER Request for Advisory Opinion in the case of Maj[redacted] USMCR

1. Recommend disapproval of [redacted] request for removal of failure of selection.

2. We have reviewe[redacted] record and offer the following opinion regarding his request for removal of failure of selection. [redacted] was selected for promotion to the rank of Lieutenant Colonel by the FY-98 USMCR LtCol Selection Board. [redacted] promotion to Lieutenant Colonel was delayed and ultimately his name was removed from the promotion list by the President of the United States prior to becoming effective.

3. [redacted] was selected for promotion by the FY-98 USMCR LtCol Selection Board. He did not incur a failure of selection, therefore there is no failure of selection to be removed.

4. Point of contact regarding this matter is the undersigned at [redacted]

[redacted]
Major, U.S. Marine Corps
Head, Career Management Team
Reserve Affairs Manpower Branch
Reserve Affairs Division

4/04-00

MEMORANDUM FOR THE RECORD

BOARD FOR CORRECTION OF NAVAL RECORDS (BCNR)
PERFORMANCE SECTION
2 NAVY ANNEX, SUITE 2432
WASHINGTON, DC 20370-5100
TELEPHONE: DSN 224-9842 OR COMM (703) 614-9842
FAX: DSN 224-9857, COMM (703) 614-9857

DATE: 13JUN00

DOCKET NO: 404-00

PETITIONER (PET) [redacted] USMCR

PARTY I CALLED: [redacted] HQMC MMPR

TELEPHONE NUMBER: (703) 784-9707

WHAT I SAID: I ASKED [redacted] OR PET'S PROM HISTORY, AND HIS DOR AND EFF DATE FROM THE FY-98 USMCR LTCOL SEL BD. BD

WHAT PARTY SAID [redacted] FORMED ME THAT PET FOS BEFORE THE FY-97 USMCR LTCOL SEL BD. HE WAS SEL ABOVE ZONE BY THE FY-98 USMCR LTCOL SEL BD, AND HIS DOR AND EFF DATE WOULD HAVE BEEN 1JUN97.

Brian J. George

BRIAN J. GEORGE

1/CU/-CC

DEPARTMENT OF THE NAVY
OFFICE OF THE JUDGE ADVOCATE GENERAL
WASHINGTON NAVY YARD
1322 PATTERSON AVENUE SE SUITE 3000
WASHINGTON DC 20374-5066

IN REPLY REFER TO

1400
Ser 13/1MA11954.00
3 Jan 01

From: Deputy Assistant Judge Advocate General (Administrative Law)
To: Chairman, Board for Correction of Naval Records

Subj: REQUEST FOR COMMENTS AND RECOMMENDATION IN THE CASE OF [redacted]

Ref: (a) Your ltr BJG Docket No 404-00 of 5 Jul 00

Encl: (1) Legal Analysis
(2) Cover sheet to FY98 USMCR Lieutenant Colonel promotion selection board
(3) Appointment scroll of 8 Sep 97
(4) ALNAV 064/97
(5) ALMAR 319/97

1. This responds to your reference (a) request for our comments and recommendation on subject case.

2. Issue. Whether [redacted] II, USMCR (Petitioner), could have had an effective promotion date of 1 June 1997?

3. Short answer. No. Because Petitioner was never appointed to the grade of lieutenant colonel, he does not have an effective promotion date.

4. Discussion. Through counsel, Petitioner raises several issues, including the central issue identified above. Enclosure (1) provides a detailed legal analysis of the central issue and addresses Petitioner's procedural claims related to the delay of his appointment. Enclosures (2) through (5) are provided for your reference, as these documents are noted in enclosure (1).

5. Point of contact: My point of contact for this matter is LCDR [redacted]

Legal Analysis

1. Issue. Whether [redacted]CR (Petitioner), could have had an effective promotion date of 1 June 1997?

2. Short answer. No. Because Petitioner was never appointed to the grade of lieutenant colonel, he does not have an effective promotion date.

3. Background. Petitioner was selected for promotion to the grade of lieutenant colonel by the FY98 Marine Corps Reserve promotion selection board. The President approved the report of that board on 8 September 1997, at which time Petitioner's name was placed on a promotion list.[1] Petitioner's appointment to the grade of lieutenant colonel was delayed on 23 September 1997 based on the commission of the offense of driving under the influence of alcohol in Okinawa. On 1 June 1999, the President removed Petitioner's name from the promotion list.

4. Discussion. Petitioner, through counsel, challenges the validity of the appointment delay and removal from the promotion list and alleges a number of errors. The primary claim Petitioner makes is that his appointment was effective on 1 June 1997 and therefore could not have been delayed on 23 September 1997. Petitioner also claims that his appointment was not properly delayed under applicable law and, therefore, that he was promoted "by operation of law."

a. Effective date of promotion

(1) Legal framework for promotion. The promotion of a military officer, whether on the active-duty list or the Reserve active-status list, is an appointment to a higher grade. This fundamental conclusion is evident from statutory language. Language throughout title 10 of the U.S. Code, denotes a "promotion" as an "appointment to a higher grade."[2] The necessity of an appointment has also been recognized by the Supreme Court. In [redacted] *United States*, the Court addressed the necessity for a military judge to be properly appointed under the Constitution, concluding that the appointment as a military officer satisfied this requirement.[3] Referring to an active-duty list case, the

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[1] *See* 10 U.S.C. § 14308(a). I note that Petitioner erroneously states that the board report was approved by a delegate and that the appointment was confirmed by the Senate. Because the approval authority of 10 U.S.C. § 14111(a) has not been delegated, the President personally approved this report. Also, per 10 U.S.C. § 12203, Senate advice and consent is not required for appointment to grades below colonel in the Marine Corps Reserve.

[2] *See, e.g.*, 10 U.S.C. § 12203 (stating that an appointment to a higher grade is made by the President); 10 U.S.C. § 14309 (stating that acceptance of an appointment to a higher grade is considered accepted unless declined and that a new oath is not necessarily required "upon appointment to a higher grade"); 10 U.S.C. § 741(d)(2) ("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").

[redacted]nited States, 510 U.S. 163, 169-71 (1994).

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Court explicitly stated "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."[4] While advice and consent of the Senate is not required for certain Reserve promotions, the conclusion is still valid. Thus, the promotion of an officer in the military requires an appointment to a higher grade.

(2) Constitutional considerations. Because the promotion of an officer is an appointment, the Appointments Clause of the Constitution[5] is implicated. In [redacted] the Supreme Court summarized this implication by stating that

> all officers of the United States are to be appointed in accordance with the [Appointments] Clause. Principal officers are selected by the President with the advice and consent of the Senate. Inferior officers Congress may allow to be appointed by the president alone, by the heads of departments, or by the Judiciary. No class or type of officer is excluded because of its special functions.[6]

Finally, in his concurring opinion in [redacted] Justic[redacted] explained the status of military officers as inferior officers under the Constitution.[7] This discussion is instructive, as it clearly shows that constitutional appointment law applies to military officers.

(3) Law of appointments. The legal effects of an appointment and the steps necessary to make such an appointment have been well settled since the Supreme Court decide[redacted] *M*[redacted][8] In *Marbury*, the Court held that there are three distinct operations necessary to effect an appointment. These are: the nomination, which "is the sole act of the President;" the appointment, which is also the act of the President "performed by and with the advice and consent of the Senate;" and, the commission, which may be considered as providing evidence of the appointment.[9] An appointment is only effective when the President has performed the "last act to be done."[10] The Court continued to state that "[t]he power of nominating to the Senate, and the power of appointing the person nominated, are political powers, to be

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[4] *Id.* at 170 n.5.

[5] U.S. CONST. art. II, § 2, cl. 2.

[redacted] 4 U.S. 1, 132 (1976).

[redacted] 510 U.S. at 182 (Souter, J., concurring).

[8] [redacted] 5 U.S. 137 (1803).

[9] *Id.* at 155-6.

[10] *Id.* at 157.

exercised by the President according to his own discretion."[11] Thus, because the appointment power is solely vested in the President, an appointment may not be compelled by law, by Congress, or by the judiciary. Only where the "whole power" of the President has been applied, and the final act of an appointment performed, will an appointment arise.[12] At such point, and not before, the officer will have a legal claim to the office to which appointed.

(4) Promotion procedure. Procedures for promoting commissioned officers must be determined in accordance with the law of appointments. For officers on the Reserve active-status list, the President appoints officers to grades below colonel, without the advice and consent of the Senate.[13] While the President may sign an appointment scroll on a certain date, the officers listed on the scroll are not immediately appointed.[14] Because promotions occur throughout a fiscal year, the President's appointment is not immediately effective. Thus, the appointment is conditioned on the establishment of an effective date[15] and the arrival of such date. In terms of the law of appointments, the "last act to be done" is to allow the effective date to arrive without delaying or otherwise interrupting the appointment. If the established effective date arrives and a projected appointment is not delayed, the appointment is made and cannot be rescinded. On the other hand, if the appointment is delayed before the effective date is established and announced or before the effective date arrives, then the appointment has not been made. In such a case, an affirmative decision to exercise the appointment power will be required in order to make the appointment.

(5) Effective date of appointment. As a general principle, appointments are effective when made. When the final act is performed, the appointment is made. While constitutional law determines when an appointment is actually made, statutory provisions may authorize a subsequent adjustment of effective date.[16] For an officer on the Reserve active-status list who is

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[11] *Id.* at 167.

[12] *Id.*

[13] 10 U.S.C. § 12203.

[14] Per 10 U.S.C. § 14308(d) and the implementation of the running mate system through SECNAVINST 1427.1C, the promotion of officers on the Reserve active-status list are tied to promotions of officers on the active-duty list. Under 10 U.S.C. § 624(a)(2), officers on the active-duty list are promoted "when additional officers in that grade and competitive category are needed." Need-based promotion throughout a fiscal year is implemented through paragraph 21 of SECNAVINST 1420.1A.

[15] Establishment of the effective date involves determining when a vacancy occurs and announcing the promotion. For officers on the active-duty list, this procedure is explicit in paragraph 21 of SECNAVINST 1420.1A. For officers on the Reserve active-status list, the same procedures are implicitly adopted through monthly promotion authority messages that can reasonably be considered as "regulations prescribed by the Secretary of the military department concerned" under 10 U.S.C. § 14308(b)(2).

[16] [redacted] v. United States, 177 U.S. 20 (1900). In [redacted] the Court confirmed that Congress may provide for retroactive applicability after an appointment has been made. Congress may also limit entitlements that are to be retroactively applied. Implicit in this holding is the conclusion that the appointment must be

governed by a running mate system, 10 U.S.C. § 14308(d) provides that "[t]he effective date of the promotion of that officer shall be the same as that of the officer's running mate in the grade to which the running mate is promoted."[17] Retroactive applicability of this provision is recognized in 10 U.S.C. § 14308(c)(2), which addresses the consequences "if the effective date of the officer's promotion is adjusted to reflect a date earlier than the actual date of the officer's promotion."[18] Thus, retroactive establishment of an effective date is only applicable where an appointment is actually made.

(6) Application. In Petitioner's case, because he was never appointed to the grade of lieutenant colonel, he does not have an effective date of promotion. The sequence of events is that on 8 September 1997, the promotion selection board report was approved and Petitioner's name was placed on a promotion list.[19] Because being on a promotion list is a condition precedent to appointment, Petitioner could not have been actually appointed prior to this date. In addition, on 8 September 1997, the President signed an appointment scroll with Petitioner's name on it. As noted above, this appointment was conditioned on the establishment of an effective date and announcement of promotion authority. On 26 September 1997, ALMAR 319/97 was released, announcing promotion authority and effective dates for Reserve officers. Because Petitioner's name was not on ALMAR 319/97 promotion was not authorized and Petitioner was not appointed to a higher grade.[20] Had Petitioner's name appeared on ALMAR 319/97, he would have been actually appointed on 26 September 1997 and his effective date of rank would have then been adjusted to 1 June 1997.

b. Procedural claims related to appointment delay. In addition to his primary claim, Petitioner asserts that there was noncompliance with statutory and regulatory requirements for delaying appointments. Specifically, Petitioner claims that the initial six-month delay was not extended in a timely manner, that no period was specified, and that the total limit of 18 months was exceeded. Statutory authority for appointment delay is provided by 10 U.S.C. § 14311.[21] Under this section, an appointment may not be delayed "for more than six months after the date on which the

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actually made and the consequences of such appointment are then retroactively applied. If an appointment could be truly retroactive, benefits would be fixed by law and could not be partially applied.

[17] 10 U.S.C. § 14308(d).

[18] 10 U.S.C. § 14308(c)(2).

[19] *See* 10 U.S.C. § 14308(a).

[20] Petitioner's name did not appear on ALMAR 319/97 because his appointment was delayed on 23 September 1997.

[21] While SECNAVINST 1420.1A provides regulatory guidance for delaying the appointment of officer on the active-duty list, no comparable regulation applies to officers on the Reserve active-status list.

officer would otherwise have been promoted unless the Secretary concerned specifies a further period of delay."[22] Establishing an outer limit, the section continues to state that "a promotion may not be delayed more than 18 months after the date on which the officer would otherwise have been promoted." In this case, Petitioner would have been promoted on 26 September 1997 if his appointment had not been delayed. Thus, the initial six-month period of delay expired on 26 March 1998. On 26 April 1998, the Assistant Secretary of the Navy (Manpower and Reserve Affairs) extended the delay "as necessary in the public interest, to allow consideration of all relevant materials in this case."[23] This delay continued until the President removed Petitioner's name from the promotion list on 1 June 1999.

c. Remedial or corrective authority. Even if it is determined that the maximum period of delay authorized by statute was exceeded, the result cannot be promotion "by operation of law."

(1) Permissible statutory interpretation. As noted by Justice Souter, Congress may establish an office and authorize the President to appoint an officer to fill such office; however, Congress may not compel an appointment.[24] Also, under its power "[t]o provide and maintain a Navy" and "make rules for the government and regulation of the land and naval forces,"[25] Congress may establish procedural requirements for promotion or qualifications for appointment as an officer; however, Congress may not make or compel the appointment of an officer. Because significant constitutional issues would be raised by an assertion that the relevant statute requires "promotion by operation of law," an important rule of statutory construction must be applied. This rule is that "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress."[26] The relevant statutory provisions at 10 U.S.C. § 14311(d) are discussed above. The language of this section does not provide a consequence for action that is contrary to the statutory requirements. Most notably, there is no statutory authority for or requirement to effect a promotion "by operation of law" in the event that notice is not provided or the period of delay is exceeded. Because such a consequence is not compelled by statute and raises significant constitutional issues, implying such a consequence would be an impermissible construction of the statute. A more reasonable

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[22] 10 U.S.C. § 14311(d).

[23] Contrary to Petitioner's claim, this specified a "further period of delay." In other words, the delay period was not indefinite. Bounding a period of time by an event and not a certain date reasonably complies with the requirement to specify a "further period of delay."

[24] *See* [redacted] 510 U.S. at 184 [redacted]

[25] U.S. CONST. art. I, § 8, cl. 13, 14.

[26] [redacted]. Florida Gulf Coast Building & Construction Trades Council, 485 U.S. 568, 575 (1988).

conclusion is that Congress elected to provide guidance for delaying officer appointments and impose duties on those officials charged with administering officer promotion programs.

(2) Permissible action. Just as the courts and Congress cannot direct an appointment, the Board for Correction of Naval Records also has no such authority.[27] If the Board were to find that Navy action failed to comply with statutory provisions related to the delay of Petitioner's appointment and that such failure resulted in an error or injustice, it is reasonably within the Board's authority[28] to recommend corrective action in the form of returning Petitioner's name to the promotion list. If Petitioner's name is returned to the promotion list, he could either be appointed to the higher grade or processed again for removal of his name from the list. Alternatively, it would not be unreasonable for the Board to conclude that the President's final action removing Petitioner's name from the promotion list rendered any remedy for claims related to improper delay of appointment moot.[29]

5. Conclusions. While Petitioner was projected to have an effective date of rank based on his position on the promotion list, because promotion authority was never issued, Petitioner was never appointed to the grade of lieutenant colonel. Accordingly, he does not have an effective date of appointment. Because the Constitution vests appointment authority in the sole discretion of the President and his delegates, the concept of promotion "by operation of law" is not legally supportable. To avoid serious constitutional issues, applicable statutes must be read in consonance with this principle.

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[27] *See* 41 Op. Atty. Gen. 10 (1958).

[28] *See* 10 U.S.C. § 1552.

[29] *See* [redacted] 107 F. Supp. 2d 37, 45 (D.D.C. 2000).