

No. 25-

IN THE
Supreme Court of the United States

ERNEST MITCHELL,

Petitioner,

v.

HUNG CAO,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Lieutenant (“LT”) Ernest F. Mitchell, United States Navy, served our nation on active duty for fifteen years. He was nominated by the President, and confirmed by the Senate, for promotion to the rank of Lieutenant Commander. LT Mitchell’s promotion was delayed, however, more than the statutory maximum Congress mandated and allowed for under 10 U.S.C. § 624(d)(5), which states that the “appointment of an officer may not be delayed under this subsection for . . . more than 18-months after the date on which such officer would otherwise have been appointed.” LT Mitchell filed an application with the Board for the Correction of Naval Records (“BCNR”) which declined to find that LT Mitchell was promoted by operation of law following the end of the 18-month period. LT Mitchell brought suit in the United States District Court for the District of Columbia, which affirmed the BCNR’s decision, and then appealed to the United States Court of Appeals for the District of Columbia Circuit, which also affirmed the District Court.

This raises the question:

1. Did the Circuit Court’s holding that LT Mitchell was not promoted by operation of law, when he was retained on the promotion list longer than the 18 month statutory maximum mandated by Congress in 10 U.S.C. § 624(d)(5), impermissibly override Congressional authority to “make Rules for the Government and Regulation of the land and naval Forces” under Article I, Section 8, Clause 14 of the Constitution of the United States?

LIST OF PARTIES

A list of all parties to the proceeding in the Court whose judgment is the subject of this petition is as follows:

Lieutenant Ernest F. Mitchell, *Petitioner*.

The Honorable Hung Cao, pursuant to his official capacity as acting Secretary of the Navy, and here automatically substituted under Rule 35(3) of the Rules of the Supreme Court of the United States, *Respondent*.

RELATED CASES

Below is a list of all proceedings in other courts that are directly related to the case in this Court:

- *Mitchell v. Del Toro*, No. 1:23-cv-3775, U.S. District Court for the District of Columbia. Judgment entered November 26, 2024.
- *Mitchell v. Phelan*, No. 25-5013, U.S. Court of Appeals for the District of Columbia Circuit. Judgment entered March 13, 2026.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, LT Ernest F. Mitchell, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The Opinion of the United States Court of Appeals is published as *Mitchell v. Phelan*, 169 F.4th 1113 (D.C. Cir 2025), and included in this petition as Appendix A, 1a-8a. The Opinion of the United States District Court is published as *Mitchell v. Del Toro*, 2024 WL 4891906 at *1 (D.D.C. November 26, 2024) and included in this petition as Appendix B, 9a-35a. LT Mitchell's petition to the Board for the Correction of Naval Records ("BCNR"), is included in this petition as Appendix C.

JURISDICTION

The United States Court of Appeals for the District of Columbia Circuit issued its opinion and judgment in this case on March 13, 2026. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, Section 8, Clause 14 of the Constitution of the United States, states as follows:

The Congress shall have Power . . . To make Rules for the Government and Regulation of the land and naval Forces.

Article II, Section 2, Clause 2 of the Constitution of the United States, states as follows:

He [i.e., the President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and 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: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

10 United States Code, Section 624(d)(5), states as follows:

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

The full text of 10 United States Code, Section 624 is available in Appendix D of this petition, 93a-102a.

PRELIMINARY STATEMENT OF THE LAW

Promotions of certain military officers are governed by the Defense Officer Personnel Management Act (“DOPMA”), 10 U.S.C. § 611 *et seq.* In response to the need of a military department for additional qualified officers, the Secretary of the military department “convene[s] selection boards to recommend for promotion [military officers] to the next higher permanent grade.” 10 U.S.C. § 611(a). The selection boards then “submit to the Secretary . . . a written report . . . containing a list of the names of the officers it recommends for promotion.” 10 U.S.C. § 617(a). The relevant Secretary then reviews the report and submits it “to the Secretary of Defense for transmittal to the President for his approval or disapproval.” 10 U.S.C. § 618(a), (c)(1). Following transmittal, “only” the President may remove a recommended officer from a selection board’s report. 10 U.S.C. § 618(d).

When the President has reviewed and approved the selection board’s report and thereby nominated the named officers for a promotion, “the Secretary of the military department concerned shall place the names of all officers approved for promotion . . . on a single list . . . , to be known as a promotion list. . . .” 10 U.S.C. § 624(a)(1). The list determines the officers’ promotion dates, which are set by the Secretary under 10 U.S.C. § 624(b)(2) and § 741(d). Subject to exceptions enumerated in subsection (d) of 10 U.S.C. § 624, “officers on a promotion list . . . shall be promoted to the next higher grade when additional officers in that grade and competitive category are needed,” in

the order in which the officers' names appear on the list. 10 U.S.C. § 624(a)(2).

Once the President has nominated the officers for promotion, the list is then forwarded to the Senate for confirmation. 10 U.S.C. § 624(c). An officer not confirmed by the Senate is removed from the promotion list. 10 U.S.C. § 629(b). Once nominated by the President and confirmed by the Senate, all that remains to effectuate an officer's promotion is Presidential appointment. *See* 10 U.S.C. § 624(c); *see also* 10 U.S.C. § 629(a). An "officer who is appointed to a higher grade under section 624 of this title is considered to have accepted such appointment on the date on which the appointment is made unless he expressly declines the appointment." 10 U.S.C. § 626(a).

But subsection (d) of 10 U.S.C. § 624 permits the Secretary of a military department to delay the appointment date of a Presidentially-nominated and Senate-confirmed officer's promotion beyond the date on which the officer would otherwise have been promoted. *See* 10 U.S.C. § 624(d)(1). Such delay may occur when "an investigation is being conducted to determine whether disciplinary action of any kind should be brought against the officer." 10 U.S.C. § 624(d)(1)(B). Under 10 U.S.C. § 624(d)(1), "if the officer is acquitted of [] charges brought against him," then the officer "shall be retained on the promotion list . . . and shall, upon promotion to the next higher grade, have the same date of rank, the same effective date for the pay and allowances of the grade to which promoted, and the same position on the active-duty list as he would have had if no delay had intervened, unless the Secretary concerned determines that the officer was unqualified for promotion for any part of the

delay.” However, the appointment of the officer “may not be delayed . . . unless the officer has been given written notice of the grounds for the delay, unless it is impracticable to give such written notice before the effective date of the appointment, in which case such written notice shall be given as soon as practicable.” 10 U.S.C. § 624(d)(4)(A).

Nonetheless, once an officer has secured Senate confirmation, in no case may the appointment of an officer be delayed more than 18-months. *See* 10 U.S.C. § 624(d)(5): “An officer’s appointment may not be delayed . . . more than 18-months after the date on which such officer would otherwise have been appointed.” *See also* 10 U.S.C. § 629(c)(1): “If an officer whose name is on a list of officers approved for promotion under section 624(a) of this title to a grade for which appointment is required by section 624(c) of this title to be made by and with the advice and consent of the Senate is not appointed to that grade under such section during the officer’s promotion eligibility period, the officer’s name shall be removed from the list unless as of the end of such period the Senate has given its advice and consent to the appointment.”

STATEMENT OF THE CASE

Petitioner, Lieutenant (“LT”) Ernest Mitchell, began serving in the U.S. Navy in 2009. LT Mitchell earned recommendations for early promotion on five occasions and received three Navy Commendation medals and three Navy Achievement medals. Appendix A, 10a.

On August 23, 2019, pursuant to authority delegated to him by the President, Respondent, the Secretary of the Navy, placed LT Mitchell’s name on the FY-

20 Active-Duty Navy Lieutenant Commander Line Selection list, for permanent promotion to the grade of Lieutenant Commander. Appendix C, 44a. Appointment to the grade of Lieutenant Commander is governed by the Appointments Clause, U.S. CONST. ART. II, § 2, CL. 2, and by 10 U.S.C. § 624. On or about November 25, 2019, LT Mitchell's promotion was confirmed by the Senate. Appendix B, 22a. His appointment to the higher grade was to be effective August 1, 2020. Appendix C, 44a.

In December 2019, Mitchell became the Command Duty Officer aboard the USS *Howard*, moored in San Diego. Appendix A, 2a. Shortly after arriving, on December 11, 2019, LT Mitchell realized that the ship would be leaving the port for a training mission and then returning to a different pier, leaving him without transportation as his vehicle was at the departure pier. This logistical problem would cause him to miss a flight upon the ship's return. Appendix A, 2a; Appendix B, 11a.

Consequently, before the USS *Howard* left the first pier, LT Mitchell left the ship and moved his car to the planned arrival pier, after informing other members of the crew, his Section Leader, and the Officer of the Deck on the quarterdeck where he was going and why. Appendix B, 11a, 12a. Based on his decade plus of prior experience in the Navy, and his knowledge of the specific instructions aboard the USS *Howard*, LT Mitchell mistakenly but genuinely believed that this brief absence was permitted by Naval regulation. *See* Appendix C, 46a.

LT Mitchell was away from the USS *Howard* for between 15 and 60 minutes. Appendix B, 12a. No casualties or other incidents occurred during his brief absence. LT

Mitchell made no attempt to hide his absence. Appendix B, 12a.

Following the incident, LT Mitchell received non-judicial punishment under Article 15, Uniform Code of Military Justice, 10 U.S.C. § 815, and the Deputy Chief of Naval Personnel approved LT Mitchell's detachment for cause from the USS *Howard*. Appendix C, 45a. A Board of Inquiry¹ determined that LT Mitchell had violated Articles 92 and 133, Uniform Code of Military Justice, 10 U.S.C. §§ 992, 933, but recommended his retention in the Navy. Appendix C, 45a.

On January 16, 2020, LT Mitchell was notified that his promotion to Lieutenant Commander, which had been scheduled for August 1, 2020, was delayed while the Secretary reviewed adverse information regarding LT Mitchell's conduct on December 11, 2019, and determined LT Mitchell's suitability for promotion. Appendix C, 45a. After no further action was taken by the Navy regarding his promotion, LT Mitchell requested that the Secretary lift the delay on his promotion in January 2021 and render that promotion retroactive to his originally scheduled date of August 1, 2020. Appendix C, 59a. Over a year later, on April 26, 2022, after LT Mitchell's promotion had been delayed for nearly 21 months, the Secretary removed LT Mitchell from the promotion list. Appendix C, 61a.

1. "The purpose of a BOI is to give officers a full and impartial hearing at which they may respond to and rebut the allegations which form the basis for separation for cause or retirement in the current grade or a lesser grade and present matters favorable to their case on the issues of separation and, if applicable, characterization of service." SECNAVINST 1920.6D, Enclosure (11), para. 1.

10 U.S.C. § 1552 permits servicemembers to submit petitions to correct the servicemember’s record to the Secretary of the military department concerned. Secretaries of the military departments generally make such corrections through “boards of civilians of the executive part of that military department.” 10 U.S.C. § 1552(a)(1). Pursuant to this statute, LT Mitchell subsequently petitioned the Board for the Correction of Naval Records (“BCNR”), seeking, *inter alia*, promotion to Lieutenant Commander effective retroactively to August 2020. Appendix C, 36a-76a. In his application, LT Mitchell argued that his promotion had been delayed more than 18 months, in violation of 10 U.S.C. § 624(d)(5). Appendix C, 43a, 69a-70a. The BCNR denied LT Mitchell’s application on February 3, 2023, and the Secretary approved. Appendix C, 69a-70a, 74a-75a.

On December 19, 2023, LT Mitchell filed suit in the United States District Court for the District of Columbia, seeking judicial review of the BCNR’s decision under the Administrative Procedure Act (“APA”), 5 U.S.C. § 706(2) (A). Appendix B, 16a. The District Court ruled that LT Mitchell’s claim was not justiciable and granted the Secretary’s motion for summary judgment. Appendix B, 20a-26a, citing *Baker v. Carr*, 369 U.S. 186, 198 (1962). While the District Court determined that there had been a breach of the statute – “the Court agrees with the parties that the Navy overly delayed [LT Mitchell’s] promotion beyond 18 months in violation of 10 U.S.C. § 624(d)(5). This was the breach” – the District Court ultimately held that LT Mitchell was owed no duty, and thus could be granted no relief, under 10 U.S.C. § 624(d)(5). Appendix B, 22a. The District Court opined that interpreting 10 U.S.C. § 624(d)(5) as providing for promotion by operation of law

after 18 months would make Presidential appointment not a “voluntary act.” *See* Appendix B, 24a. Instead, the District Court proposed its own novel interpretation of 10 U.S.C. § 624: “[w]hen an officer’s promotion is delayed, he is funneled away from the usual [10 U.S.C. § 624] (a) (2), “as needed” promotion timeline into [10 U.S.C. § 624] (d), as [LT] Mitchell was under [10 U.S.C. § 624] (d)(1) (e) while the Secretary reviewed “substantiated adverse information.” Expiring the 18-month delay in section (d) could just return the officer to section (a) where he awaits the President’s “as needed,” discretionary appointment.” Appendix B. 23a.

LT Mitchell appealed to the United States Court of Appeals for the District of Columbia Circuit on January 15, 2025. Oral argument was held on November 26, 2025, and the Circuit Court rendered its judgment on March 13, 2026. Appendix A, 1a. The Circuit Court reasoned that 10 U.S.C. “§ 624(d)(5) limits only the duration of a permissible delay – it does not by itself effectuate an appointment.” Appendix A, 6a. The Circuit Court mistakenly believed that 10 U.S.C. § 624(d)(1) provided for the indefinite retention of an officer acquitted of misconduct on the promotion list, and therefore LT Mitchell’s “theory makes the outcome for an *unacquitted* candidate whose proceedings have been delayed...more favorable than the outcome for an acquitted candidate.” *Id.* The Circuit Court also stated that reading 10 U.S.C. § 624(d)(5) to require automatic promotion of a candidate “the Executive has decided against” would make appointment not a voluntary act. *Id.* The Circuit Court never clarified what should happen when a military service branch exceeds the clear 18 month time limit found in 10 U.S.C. § 624(d)(5) for an officer’s appointment. *See generally* Appendix A.

REASONS FOR GRANTING THE PETITION

Does Congress have the power to make rules regarding the promotion of military officers? The Constitution says yes. *See* U.S. CONST. ART. I, § 8, CL. 14; ART. II, § 2, CL. 2. Specifically, the President nominates officers and then appoints them after Senate confirmation. U.S. CONST. ART. II, § 2, CL. 2. But the Constitution does not provide for how such an appointment occurs after Presidential nomination and Senate confirmation. Discretion lies with Congress, pursuant to its express Constitutional authority to “make Rules for the Government and Regulation of the land and naval Forces.” U.S. CONST. ART. I, § 8, CL. 14. Under this Constitutional grant of power, Congress enacted DOPMA, which as codified at 10 U.S.C. § 624(d)(5) states: “An officer’s appointment *may not be delayed* . . . more than 18 months after the date on which such officer would otherwise have been appointed” (emphasis added).

Despite the obvious implications of this statutory language, over the past quarter of a century or so, courts have routinely declined to grant service members, including LT Mitchell, petitioner in this case, the protections which Congress determined they deserve. This case raises fundamental issues regarding the separation of powers that mandate review by this Court to consider an important and recurring question of law regarding the application of the Appointments Clause, U.S. CONST. ART. II, § 2, CL. 2, to the appointment of certain military officers.

This case is of immense importance to the nation. According to the Department of Defense, as of March 2025, there are approximately 1.3 million active duty

military servicemembers in all branches of our nation's armed forces, the vast majority of them in the Army, Navy, Air Force, and Marine Corps. *See* <https://dwp.dmdc.osd.mil/dwp/app/dod-data-reports/workforce-reports>. All officers in these branches are subject to the provisions of 10 U.S.C. § 624. *See* 10 U.S.C. § 619. Whether an officer is promoted by operation of law following the 18 month maximum delay period of 10 U.S.C. § 624(d)(5) is therefore an issue of direct and substantial concern to the many thousands of officers in these service branches. It is an issue of indirect concern to the families and loved ones of these officers. And it is of further concern to all Americans, who are or should be alarmed about the rapid expansion of executive power in recent decades, and believe that the legislative branch, not the executive branch, should be the primary authority in our federal system of government, as our Founding Fathers mandated and intended. *See* The Federalist No. 76 (James Madison): "In republican government, the legislative authority necessarily predominates."

Congressional intent to make promotions effective automatically upon the expiration of the 18 month period in 10 U.S.C. § 624(d)(5) is clear and must be enforced by the courts. The judiciary's attempts to read automatic promotion by operation of law out of 10 U.S.C. § 624(d)(5) have rendered Congressional intent a nullity and the express will of Congress mere words on a page, violating the statutory canon against surplusage. And enforcement of Congressional intent here would not infringe upon the freedom of the President to act within his own Constitutional authority. Only this Court can end the chaos created by avoiding Congress's clear language and restore the proper balance between our nation's branches of government.

I. Congressional Intent to Promote By Operation of Law is Clear.

Under 10 U.S.C. § 624(d)(5), “An officer’s appointment may not be delayed . . . more than 18 months after the date on which such officer would otherwise have been appointed.” Ordinarily, “if a statute does not specify a consequence for noncompliance with statutory timing provisions, the federal courts will not . . . impose their own coercive sanction.” *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 159 (2003). But here, there is no need to speculate about what Congress’s intended outcome is. When Congress speaks directly “to the precise question at issue” and its intent “is clear, that is the end of the matter,” and a court “must give effect to the unambiguously expressed intent of Congress.” *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984) (*overturned on other grounds by Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024)); *see also Connecticut Nat’l Bank v. Germain*, 503 U.S. 249 (1992). Because the opposite of a failure to appoint is appointment, that is clearly Congress’s intended remedy once the outer time limit of 10 U.S.C. § 624(d)(5) is met.

And Congressional intent that officers be promoted by operation of law upon the expiration of 10 U.S.C. § 624(d)(5)’s 18 month deadline is clear. “An officer’s appointment may not be delayed . . . more than 18 months after the date on which such officer would otherwise have been appointed.” If, as is the case for LT Mitchell, an officer has been nominated by the President, and confirmed by the Senate, and if that officer’s appointment may not be delayed more than 18 months under 10 U.S.C. § 624(d)(5), it follows logically that the officer is to be appointed at the

conclusion of the 18 month delay period. No other reading of Congressional intent is possible. *See also* 10 U.S.C. § 629(c)(1) (providing that “an officer whose name is on a list of officers approved for promotion under section 624(a) of this title to a grade for which appointment is required by section 624(c) of this title to be made by and with the advice and consent of the Senate is not appointed to that grade under such section during the officer’s promotion eligibility period, the officer’s name shall be removed from the list unless as of the end of such period the Senate has given its advice and consent to the appointment”).

Buttressing this interpretation of 10 U.S.C. § 624(d)(5) is the fact that Congress long ago made certain promotions automatic. *See* 14 Rev. Stat. § 1207 (2d ed. 1878), 18 Stat. pt. 1, at 214 (Corps of Engineers and Ordnance Corps Lieutenants to be promoted to Captain after 14 years’ continuous service and on passing examination); 14 Rev. Stat. § 1168 (2d ed. 1878), 18 Stat. pt. 1, at 210 (assistant surgeons to rank as lieutenants of cavalry for first three years of service and as captains thereafter); *see also* 18 Stat. pt. 3, ch. 458, § 4, at 244-45 (automatic promotion of assistant surgeons after five years); National Defense Act of 1916, ch. 134, § 10 (certain Medical Corps officers to be promoted after five years’ service and on passing examination). According to a February 1880 opinion of the Judge Advocate General of the Army, such promotions result by operation of law “and independently of any action by the appointing power.” W. Winthrop, *Digest of Opinions of the Judge-Advocates General of the Army*, ¶525, at 148 (C. McClure rev. ed. 1901). *See also* *Cloud v. United States*, 43 Ct. Cl. 69, 86, 90 (1907).

Congressional intent that 10 U.S.C. § 624(d)(5) renders an officer on the promotion list longer than the 18-month maximum automatically promoted by operation of law is also apparent in one of the 1981 technical corrections to 10 U.S.C. § 624. As originally enacted, 10 U.S.C. § 624 (d) (3) provided that “[t]he appointment of an officer may not be delayed under this subsection unless the officer has been given written notice of the grounds for the delay.” 94 Stat. 2858. However, before the statute took effect, Section § 4(d)(3)(D) of the DOPMA Technical Corrections Act, Pub. L. No. 97-22, 95 Stat. 127, added the phrase “unless it is impractical to give such written notice before the effective date of the appointment, in which case such written notice shall be given as soon as practicable.” The House Report explained:

[t]his amendment recognizes that information calling into question the qualifications of an officer for promotion may be revealed only shortly before the projected date of the promotion and that, in such cases, the officer may not be reasonably available (e.g., on a weekend, while on leave or while absent without leave) to receive written notice that the promotion is being delayed.

H.R. Rep. No. 97-141, 97th Cong., 1st Sess. 14 (1981), 1981 U.S. Code Cong. & Ad. News 37. Congress was concerned that action to delay a promotion might prove unavailing – and that therefore the promotion would take effect – simply because word could not be passed to the affected officer in time. The premise for this amendment is that under 10 U.S.C. § 624 (d)(5) a promotion cannot be recalled once the delay period ends.

This exception, now codified at 10 U.S.C. § 624(d)(4)(A), makes no sense if officers are not promoted automatically by operation of law. If officers are not promoted by operation of law, there is no need to hurry with the notice. After all, the service branch initiating the delay in the promotion can simply contact the affected officer later, after it has initiated the delay. If, however, officers are promoted automatically, time is of the essence, and the exception in 10 U.S.C. § 624(d)(4)(A) helps avert a very real danger – that information which could impact an officer’s fitness for promotion is discovered prior to the officer’s appointment date but before the officer can be notified, that the officer does not receive notice, and that the officer is therefore promoted automatically by operation of law. And it was this danger which Congress sought to prevent in the 1981 technical amendment. *See* H.R. Rep. No. 97-141, 97th Cong., 1st Sess. 14 (1981), 1981 U.S. Code Cong. & Ad. News 37.

II. The Judiciary Cannot Improve Upon Congressional Intent.

“What happens to an officer whose appointment is delayed beyond the 18 month deadline of 10 U.S.C. § 624(d)(5)?” Reading the statute in line with Congress’ clear intent provides a refreshingly simple answer: “The officer is promoted by operation of law.” By contrast, courts which have considered this issue and found that the officer is *not* promoted by operation of law have often declined to answer the question at all. And when courts have answered the question, their answers have been clearly contradicted by the language of 10 U.S.C. § 624 itself.

Consider *Dysart v. U.S.*, 369 F.3d 1303, 1317 (Fed. Cir. 2004). In *Dysart*, the seminal case regarding whether officers are promoted by operation of law under 10 U.S.C. § 624(d)(5), the Federal Circuit overturned *Rolader v. U.S.*, 42 Fed. Cl. 782, 785-786 (1999), and found that officers whose appointments are delayed beyond the 18 month statutory maximum enacted by Congress are not automatically promoted by operation of law. *Id.* The Federal Circuit reasoned that “Congress does not have the authority to require the President to exercise his appointment power; such authority would be akin to an exercise by Congress of the appointment power itself, which is prohibited.” *Id.* But the procedures enacted by Congress in 10 U.S.C. § 624 are not akin to a requirement for the President to exercise his appointment power, they merely govern what will happen if the President does or does not exercise his appointment power in certain ways. *See* 10 U.S.C. § 624(a)(2) (“officers on a promotion list for a competitive category *shall be promoted* to the next higher grade when additional officers in that grade and competitive category are needed”); 10 U.S.C. § 624 (d)(5) (“appointment of an officer *may not be delayed* under this subsection for more than . . . 18 months after the date on which such officer would otherwise have been appointed”) (emphases added). Nothing in 10 U.S.C. § 624 prohibits the President from removing an officer from the promotion list prior to the 18 month deadline. And the President is further permitted to remove a recommended officer from a selection board’s report prior to the report’s nomination to the Senate. 10 U.S.C. § 618(d).

More to the point, *Dysart* offered no explanation for what happens once an officer’s appointment is delayed for more than 18 months. *See generally* 369 F.3d 1303.

And neither did the Federal Circuit in *Lewis v. United States*, 458 F.3d 1372, 1378–79 (Fed. Cir. 2006), which largely hewed to *Dysart*’s reasoning, declining to revisit the holding of that case in a substantive fashion.

In LT Mitchell’s case, the District Court proposed a novel, and inappropriate, solution: instead of automatically promoting the officer by operation of law, when the 18 month statutory deadline of 10 U.S.C. 624(d)(5) is exceeded, the officer “is funneled away from the usual [10 U.S.C. § 624] (a)(2), “as needed” promotion timeline into [10 U.S.C. § 624] (d), as [LT] Mitchell was under [10 U.S.C. § 624] (d)(1)(e) while the Secretary reviewed “substantiated adverse information.” Expiring the 18-month delay in section (d) could just return the officer to section (a) where he awaits the President’s “as needed,” discretionary appointment.” Appendix B. 23a.

But this solution is at odds with the District Court’s determination that a service branch “cannot use the Secretary’s discretion on the merits to ignore [a] statutory deadline separate from the merits.” *See* Appendix B, 21a. And the District Court’s solution creates a loophole which allows the service branches to ignore Congressional deadlines at their mere whim.

For these reasons, the District Court’s solution also violates the rule against surplusage, rendering Congress’ word, which has binding force of law, into empty and meaningless phrases on a piece of paper. In the District Court’s reading, the 18 month deadline in 10 U.S.C. 624(d)(5) has no practical effect or purpose. Acts of Congress are not to be read this way. Instead, “a statute ought, upon the whole, to be so construed that, if it can be prevented,

no clause, sentence, or word shall be superfluous, void, or insignificant.” *Alaska Dep’t of Env’t Conservation v. EPA*, 540 U.S. 461, 489 n.13 (2004) (internal quotations omitted); *see also TRW Inc. v. Andrews*, 534 U.S. 19 (2001). There is no language in 10 U.S.C. § 624 to support the District Court’s interpretation of the statute. The District Court itself seemed to implicitly recognize this by not citing any language from 10 U.S.C. § 624 itself, or any other legal authority, which directly supports the District Court’s reading. *See generally* Appendix B, *especially* 20a-26a.

Reviewing LT Mitchell’s case on appeal, the Circuit Court reasoned that because 10 U.S.C. § 624(d)(1) provided for the indefinite retention of an officer acquitted of misconduct on the promotion list, therefore LT Mitchell’s “theory makes the outcome for an *unacquitted* candidate whose proceedings have been delayed . . . more favorable than the outcome for an acquitted candidate.” Appendix A, 6a. This is inaccurate. Under 10 U.S.C. 624(d)(1), “if the officer is acquitted of [] charges brought against him,” then the officer

shall be retained on the promotion list . . . and shall, upon promotion to the next higher grade, have *the same date of rank, the same effective date for the pay and allowances of the grade to which promoted, and the same position on the active-duty list as he would have had if no delay had intervened*, unless the Secretary concerned determines that the officer was unqualified for promotion for any part of the delay (emphasis added).

In other words: the officer is promoted automatically retroactive to the date when he would have been promoted had the delay not occurred. This is the exact relief LT Mitchell requested from the BCNR, and the exact relief he would have received had the Circuit Court determined that LT Mitchell was promoted by operation of law under 10 U.S.C. § 624(d)(5). *See* Appendix A, 5a-6a. The Circuit Court never noticed this irony. Nor did it clarify what, in its view, should happen when a military service branch exceeds the 18 month deadline in 10 U.S.C. § 624(d)(5). *See generally* Appendix A, *especially* 5a-6a.

The Circuit Court's incorrect view that there would be any difference between the fate of LT Mitchell under 10 U.S.C. § 624(d)(5) and the fate of an acquitted officer under 10 U.S.C. § 624(d)(1) highlights another problem with the Circuit Court's determination: the Circuit Court's piecemeal reading of 10 U.S.C. § 624. Repackaging an argument the Secretary made in the District Court and the Circuit Court, the Circuit Court essentially held that 10 U.S.C. § 624(d)(1) undercuts the prohibitive language of 10 U.S.C. § 624(d)(5), and so an officer is not promoted by operation of law after 18 months on the promotion list but rather retained on the promotion list. Appendix A, 5a-6a. But acts of Congress are not to be read with their statutory headings hermetically sealed from each other like this. Instead, a "fundamental canon of statutory construction" is that "words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Food and Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000), *superseded by statute on other grounds*, *Food and Drug Admin. v. Wages and White Lion Investments, L.L.C.*, 604 U.S. 542 (2025) (internal citations omitted).

Courts are therefore obligated to interpret a statute as a “symmetrical and coherent regulatory scheme,” and to “fit, if possible, all parts into an harmonious whole.” *Brown & Williamson Tobacco Corp.*, 529 U.S. at 133; *see also Gustafson v. Alloyd Co.*, 513 U.S. 561 (1995).

Reading 10 U.S.C. § 624 with these principles in mind illustrates that 10 U.S.C. § 624(d)(1) and 10 U.S.C. § 624(d)(5) serve two distinct, but complementary, purposes. 10 U.S.C. § 624(d)(1) provides for the reasons by which an officer’s promotion may be delayed. But 10 U.S.C. § 624(d)(5) sets the outer limits for such a delay: 18 months, and not one day more.

The question remains. “What happens to an officer whose appointment is delayed beyond the 18 month deadline of 10 U.S.C. § 624(d)(5)?” The *Dysart* and *Lewis* Courts offered no answer. *See generally* 369 F.3d 1303; 458 F.3d at 1378–79. In LT Mitchell’s case, the District Court offered an answer which flunked the rule against surplusage and clashed with the language of the statute. *See* Appendix B, 23a. The Circuit Court misread 10 U.S.C. § 624(d)(1) and did not answer the question. *See* Appendix A, 5a-6a. The only reading of 10 U.S.C. § 624 which avoids the problem of the rule against surplusage and is supported by the language of 10 U.S.C. § 624 itself is that officers are automatically promoted after 18-months on the promotion list. The service branches themselves recognize Congress’s intent that an officer’s appointment cannot be delayed beyond 18-months. *See* Army Regulation 600-8-29, Paragraph 3-7b (“In no case may an officer’s promotion be delayed . . . more than 18 months after the date on which the officer would otherwise have been appointed”); SECNAVINST 1420.3, paragraph 5(c)(2) (“An officer’s

promotion may not be delayed more than...18 months after the date on which the officer would otherwise have been appointed"); Air Force Instruction 36-2501, Chapter 12, Paragraph 12.3.2 ("An officer's appointment should not be delayed more than . . . 18 months after the date on which such officer would otherwise have been appointed").

And not so terribly long ago, the courts recognized – and the service branches conceded – that this was the proper interpretation. *See Rolader*, 42 Fed. Cl. at 785-786 ("It is worth noting at this point that the other services have not construed [10 U.S.C. §] 624 to permit a removal recommendation to indefinitely extend the time within which delays may continue . . . Absent presidential action within eighteen months, promotion is automatic"), *citing* SECNAVINST 1420.1A, ¶ 23 (removal actions subject to the overall delay limitations stated in 10 U.S.C. § 624(d) (4)); Army Regulation 624-100, *Promotion of Officers on Active Duty*, Update, ch. 2-10(b) (disallowing delays more than eighteen months past an officers original effective promotion date).² *See also Barnes v. United States*, 57 Fed.Cl. 204, 218-219 (2003) (which reached a similar holding to *Rolader*, and was overturned following the Federal Circuit's decision in *Dysart*); *Bigelow v. Peters*, 1:98-cv-00536, ECF No. 31 (D.D.C. 1998) (officer's claim for automatic promotion following delay beyond statutory

2. The *Rolader* Court found that the plaintiff-applicant had been promoted by operation of law pursuant to Air Force regulation. 42 Fed. Cl. at 786. It strains credulity to think that an officer can be promoted automatically by Air Force regulation, but not by Congressional deadline. *Rolader*'s subsequent overruling by *Dysart* and *Lewis* does nothing to address this glaring problem, especially given that the language of 10 U.S.C. § 624 has remained unchanged in any relevant respect following *Rolader*, and the intent of Congress is clear. *See supra*.

period dismissed as moot when Air Force subsequently promoted officer).

The language of 10 U.S.C. § 624 has not changed in any relevant respect since *Rolader*. Congress's intention that promotions take effect automatically once the delay period expires therefore remains apparent. The only thing that has changed is the courts' reading of the statute. The Constitution places the power to "make Rules for the Government and Regulation of the land and naval Forces," U.S. CONST. ART. I, § 8, CL. 14, in the hands of Congress, not the judiciary. Only this Court can right the balance.

III. Congress May Provide for Promotion by Operation of Law.

The Circuit Court also fretted that reading 10 U.S.C. § 624(d)(5) to require automatic promotion of a candidate "the Executive has decided against" would make appointment not a voluntary act. Appendix A, 6a. Set aside that this is not what happened in LT Mitchell's case – no Presidential decision was ever made regarding LT Mitchell's appointment, only a decision by the Secretary. Appendix A, 3a-4a. Even if the Circuit Court were correct, interpreting 10 U.S.C. § 624 (d)(5) to provide for promotion by operation of law after 18 months does not unconstitutionally constrain Presidential authority. *See Rolader*, 42 Fed. Cl. at 787.

The Constitution vests Congress with broad authority over the appointments process, "which shall be established by law." U.S. CONST., ART. II, § 2, CL. 2. Congress retains this power both before and after Senate confirmation. For example, certain military officers must satisfy

Congressionally mandated eligibility criteria before their promotion, 10 U.S.C. §§ 611-641, and the Solicitor General must be “learned in the law.” 28 U.S.C. § 505.

Decisions of this Court reaffirm Congressional control over the appointment process. In *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 158 (1803), the Court held that Congress holds the power to chart a “precise course accurately marked out by law,” for the Presidential appointment power to follow, which must be “strictly pursued.” This Court observed in *Marbury* that Congress held the power to determine the manner in which the appointment power had been exercised by the President. *See id.* at 157 (stating regarding the signature and sealing of Marbury’s commission, “[t]his idea seems to have prevailed with the legislature.”) This Court held similarly in *Freytag v. Commissioner*, 501 U.S. 868, 881 (1991), stating that Congress may “specif[y]” whatever “means of appointment” by “statute.” Similarly, while *Burnap v. United States* 252 U.S. 512, 517 (1920), held that when there is no “statute which provides specifically” how an officer is appointed, Heads of Departments may set the procedure. *Burnap* implies that Congress has the power to regulate the means of appointment otherwise.

True, Presidential appointment must be a “voluntary act,” as the holdings of this Court so clarify. *See, e.g., Marbury*, 5 U.S. at 155-156. But it is well-established that even Presidential inaction can still be an action with the force of law. *See* U.S. CONST., ART. I, § 7: “If any Bill shall not be returned by the President within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a Law, in like manner as if he had signed it, unless the Congress by their Adjournment prevent its return, in which case it shall not be a Law”;

see also The Pocket Veto Case, 279 U.S. 655 (1929). Promotion by operation of law is simply another instance of Presidential action through inaction.³ *See* 50 U.S.C. § 1622(d) (Presidential declaration of national emergency “shall terminate on the anniversary of the declaration of that emergency if, within the ninety-day period prior to each anniversary date, the President does not publish in the Federal Register and transmit to the Congress a notice stating that such emergency is to continue in effect after such anniversary”).

In *Marbury*, this Court also held that “[s]ome point of time must be taken when the power of the executive over an officer, not removable at his will, must cease. That point of time must be when the constitutional power of appointment has been exercised.” 5 U.S. (1 Cranch) at 157. And while in *Marbury* this Court found that Congress had set the point at which “the power of the executive over an officer . . . must cease” to be the “signature of the commission,” *see id.*, there is no reason why Congress, pursuant to its power to “make Rules for the Government and Regulation of the land and naval Forces,” could not fix another moment when the power of the executive ceases – such as after 18 months. *See* U.S. CONST. ART. I, § 8, CL. 14; *see* 10 U.S.C. § 624(d)(5). Provided that the Congressional statute at issue makes the President aware of all the consequences of his inaction, Presidential inaction cannot be accurately said to be involuntary.

3. For this reason, any suggestion that automatic promotion upon the conclusion of the 18-month period in 10 U.S.C. § 624(d)(5) somehow runs afoul of the requirement that the President perform a “public act” to complete the appointment is also invalid – as explained by analogy with pocket vetoes, the ending of the 18-month period is itself the public act. *See Dysart*, 369 F.3d at 1312.

That requirement is met here. Congress has set a limit for a promotion delay: 18 months. The President is aware of this deadline and can remove an officer from the promotion list at any point prior to that deadline. Once the President has failed to act, however, within the Congressionally mandated timeline, promotion occurs automatically. The President's failure to act within 18 months is an act in of itself. Congress is therefore not "forcing" the President to do anything. Within Congress' statutory scheme, the President is free to act in a certain way, or not, bearing in mind, as we all must, that "in law as in life, choices have consequences." *R.R. Donnelley & Sons v. Vanguard Transp. Systems, Inc.*, 641 F. Supp. 2d 707, 722 (N.D. Ill. 2009).

CONCLUSION

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

Dated: June 10, 2026

Respectfully submitted,

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APPENDIX

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**APPENDIX A — OPINION OF THE UNITED STATES
COURT OF APPEALS FOR THE DISTRICT OF
COLUMBIA CIRCUIT, FILED MARCH 13, 2026**

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 25-5013

ERNEST F. MITCHELL, LIEUTENANT,

Appellant,

v.

JOHN PHELAN, HONORABLE, IN HIS OFFICIAL
CAPACITY AS THE SECRETARY OF THE NAVY,

Appellee.

Appeal from the United States District Court
for the District of Columbia
(No. 1:23-cv-03775)

Argued November 21, 2025 Decided March 13, 2026

Before: PILLARD and WALKER, *Circuit Judges*, and
EDWARDS, *Senior Circuit Judge*.

Opinion for the Court filed by *Circuit Judge* WALKER.

WALKER, *Circuit Judge*:

Lieutenant Ernest Mitchell left his post to move his car without telling his Commanding Officer. He was the Command Duty Officer of a guided-missile destroyer.

Appendix A

The Navy penalized Mitchell for his absence from the ship. He sued. The district court held that the Navy's action was reasonable and reasonably explained.

Because we agree, we affirm.

I. Background

Lieutenant Ernest Mitchell began serving in the U.S. Navy in 2009. In August 2019, the Secretary of the Navy placed him on a selection list for permanent promotion to Lieutenant Commander. The Senate confirmed his nomination shortly after that.

Mitchell likely would have received a presidential appointment to his new rank in August 2020 if all had gone according to plan. It didn't. He received a written reprimand in September 2019 and verbal counseling in October 2019, both regarding a failure to meet standards and to communicate with superiors. Then, while serving aboard a guided-missile destroyer named the *USS Howard* on December 11, 2019, Mitchell again failed to meet standards and to communicate with superiors.

On that day, the *Howard* was scheduled to sail from one pier to another pier located two and a half miles away. So before the *Howard* left the first pier, Mitchell left the ship, drove his car to the second pier, and returned in a Navy duty van. Otherwise, Mitchell's car would have been left behind back at the first pier when Mitchell arrived with the ship at the second.

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Mitchell was gone for at most an hour — and possibly for only 15 minutes. But his absence was without authorization. He did not notify the ship’s commanding officer or anyone in his chain of command. Nor did he transfer to a qualified replacement his responsibilities as Command Duty Officer. Those responsibilities included acting as his Commanding Officer’s “direct representative on board,” remaining “readily available to quickly and effectively respond in the event that a casualty does occur,” and preparing the *Howard* to safely depart from port the following day. JA 226.

When Navy officials learned of Mitchell’s brief absence from the *Howard*, a host of disciplinary and administrative actions ensued. Five of them are relevant here.

First, the Deputy Chief of Naval Personnel approved the detachment of Mitchell, for cause, from his assignment on the *Howard*. The cause was an “act of misconduct,” Naval Military Personnel Manual 1611-020(3)(a), and “[s]ubstandard performance of duty over an extended period of time,” *id.* at 1611-020(3)(c).

Second, a Board of Inquiry found that Mitchell had violated Articles 92 and 133 of the Uniform Code of Military Justice by disobeying “a lawful general order” and engaging “in conduct unbecoming an officer and gentleman.” JA 120.

Third, following Mitchell’s Senate confirmation for promotion to Lieutenant Commander, the promotion was delayed, and about twenty months after the projected date

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for the promotion, the Secretary of the Navy removed him from the promotion list.

Fourth, the Board for Correction of Naval Records recommended a denial of Mitchell's application (a) to remove from Mitchell's record certain adverse records regarding his performance on the *Howard* and (b) to promote him to Lieutenant Commander.

Fifth, the Secretary of the Navy approved the Correction Board's recommendation and denied Mitchell's application.

In December 2023, Mitchell sued the Secretary of the Navy in district court. He alleged violations of the Administrative Procedure Act. That law requires courts to "hold unlawful and set aside" agency actions that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

The district court awarded summary judgment to the Secretary of the Navy.

II. Standard of Review

When litigants challenge factfinding by a Board for Correction of military records, we apply "an unusually deferential application of the 'arbitrary or capricious' standard." *McKinney v. Wormuth*, 5 F.4th 42, 45, 453 U.S. App. D.C. 313 (D.C. Cir. 2021) (quoting *Kreis v. Secretary of Air Force*, 866 F.2d 1508, 1514, 275 U.S. App. D.C. 390 (D.C. Cir. 1989)). That deference includes a "strong

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but rebuttable presumption that administrators of the military . . . discharge their duties correctly, lawfully, and in good faith.” *Frizelle v. Slater*, 111 F.3d 172, 177, 324 U.S. App. D.C. 130 (D.C. Cir. 1997) (cleaned up).

We review the district court’s grant of summary judgment de novo. *McKinney v. Wormuth*, 5 F.4th 42, 45, 453 U.S. App. D.C. 313 (D.C. Cir. 2021).

III. Analysis

Mitchell argues that the decision of the Board for Correction of Naval Records was contrary to law when the Correction Board did not recognize Mitchell’s promotion to Lieutenant Commander by operation of law. Mitchell then offers challenges the Board’s review of his performance. He argues that the Board was arbitrary and capricious when it found that Mitchell exhibited “[s]ubstandard performance of duty over an extended period.” *Id.* at 1611-020(3)(c).

We disagree.

A. Appointment by Operation of Law?

Mitchell argues that he was appointed to Lieutenant Commander by operation of law because of the time that passed between the date when his promotion was scheduled to take effect and the date when the Secretary removed Mitchell’s name from the promotion list. He relies on 10 U.S.C. § 624(d). That statute first specifies circumstances under which appointments may be delayed, *id.* § 624(d)(1),

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and then provides that an “officer’s appointment may not be delayed . . . more than 18 months after the date on which such officer would otherwise have been appointed,” 10 U.S.C. § 624(d)(5).

But § 624(d)(5) limits only the duration of a permissible delay — it does not by itself effectuate an appointment. That’s apparent from an adjacent provision, § 624(d)(1), which says that a delayed candidate *acquitted* of misconduct “shall be retained on the promotion list” for a promotion on an as-needed basis. So Mitchell’s theory makes the outcome for an *unacquitted* candidate whose proceedings have been delayed (i.e., according to Mitchell, automatic promotion) more favorable than the outcome for an acquitted candidate (i.e., according to § 624(d)(1), retention on the list for a later promotion as needed).

That theory makes little sense, and it would raise constitutional questions. Appointment is a “voluntary act” of the Executive. *Marbury v. Madison*, 5 U.S. 137, 155, 2 L. Ed. 60 (1803). And a “congressionally mandated act is not a voluntary act.” *Mitchell v. Del Toro*, No. 1:23-cv-3775, 2024 U.S. Dist. LEXIS 214746, 2024 WL 4891906, at *6 (D.D.C. Nov. 26, 2024).

Because the statute is best read not to mandate appointment of a candidate the Executive has decided against, Mitchell was never appointed.

*Appendix A***B. Substandard Performance of Duty Over an Extended Period?**

The Navy Military Personnel Manual provides four reasons for a commanding officer to request that an officer be detached for cause — i.e., removed from the officer’s current duty assignment. Naval Military Personnel Manual 1611-020(3). Those reasons include “[s]ubstandard performance of duty over an extended period of time.” *Id.* at 1611-020(3)(c).

Here, the Correction Board did not act arbitrarily and capriciously when it found that Mitchell had exhibited a “substandard performance of duty between November 2018 and January 2020.” JA 127. Though his fitness reports were often positive, his absence from the *Howard* was unauthorized, and even before then, his record was not unblemished — as documented by the request for detachment. *See, e.g.*, JA 214-15 (written reprimand in September 2019; verbal counseling in October 2019).

The Navy Military Personnel Manual calls for an assessment based on “the facts and circumstances of the particular case,” including whether “specific performance deficiencies . . . continue to exist after corrective action has been taken.” Naval Military Personnel Manual 1611-020(3)(c). And the Navy exercised an expertise that we lack when it assessed the facts and circumstances of Mitchell’s particular case. Given the judicial deference owed to military factfinders and the persistence of Mitchell’s

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deficiencies after his first reprimand, we hold that the Navy’s action was reasonable and reasonably explained.¹

* * *

We affirm the judgment of the district court.

So ordered.

1. Mitchell also argues that the Board was arbitrary and capricious when it found that he exhibited “gross negligence or complete disregard of duty” pursuant to 1611-020(3)(b) of the Naval Military Personnel Manual. Though the Deputy Chief of Naval Personnel who approved Mitchell’s detachment did not use the phrase “gross negligence,” *see* JA 204, 212-17, the Board for Correction of Naval Records did, *see* JA 126-27, and Mitchell has argued, here and in the district court, that his conduct was not “gross negligence,” *see Mitchell v. Del Toro*, Case No. 1:23-cv-3775, 2024 U.S. Dist. LEXIS 214746, 2024 WL 4891906, at *8-9 (D.D.C. Nov. 26, 2024). However, on the record before us, the Board’s finding of “[s]ubstandard performance of duty over an extended period of time” independently supports its decision. Indeed, during oral argument, Mitchell’s counsel agreed with this. *See* Oral Arg. 11:13-11:33. We need not resolve the question of whether the Board erred when it found that his conduct was gross negligence.

**APPENDIX B — MEMORANDUM OPINION
OF THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA,
FILED NOVEMBER 26, 2024**

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Case No. 1:23-cv-3775 (TNM)

ERNEST F. MITCHELL,

Plaintiff,

v.

CARLOS DEL TORO,

Defendant.

Filed November 26, 2024

MEMORANDUM OPINION

LT Ernest Mitchell asks the Court to retroactively promote him to the naval rank he thinks he deserves. The Secretary of the Navy denied his promotion after he was disciplined for failing to meet standards of conduct. Mitchell also insists that his superiors wrongly disciplined him and took too long to do it, so any evidence from the record detailing their criticism should be expunged.

This Court disagrees with Mitchell on all points. First, his retroactive promotion request is not justiciable.

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Second, the Navy's decisions about his military record can be corrected only for the "most egregious" errors. The governing statutes and the D.C. Circuit's precedent establish the motivating principle: "This [Court's] deferential standard is calculated to ensure that the courts do not become a forum for appeals by every soldier dissatisfied with his or her ratings, a result that would destabilize military command and take the judiciary far afield of its area of competence." *Cone v. Caldera*, 223 F.3d 789, 793, 343 U.S. App. D.C. 117 (D.C. Cir. 2000). Under this standard, he is entitled to no relief, so the Court will grant summary judgment to the Secretary.

I.

LT Mitchell has been in the U.S. Navy for nearly fifteen years. AR 0060–61. For much of that time, he successfully performed his duties. He earned recommendations for early promotion five times, AR 0090–99, and received three Navy Commendation medals and three Navy Achievement medals, AR 0112–14, 0348–49, 0379, 0502, 0525. In 2019, just before the incident spurring this case, Mitchell's fitness evaluation concluded that he met standards in five of seven categories. AR 0108–09. The other two categories included an "above standards" rating and a "progressing" rating that was below "meet[ing] standards" but avoided the lowest ranking. *Id.* After this fitness report, the Secretary of the Navy placed Mitchell's name on the promotion list. AR 0182–83.

About a month later, in December 2019, Mitchell became the Command Duty Officer aboard the USS

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Howard, moored in San Diego. AR 0240. He arrived on December 11th with orders to prepare the destroyer for departure the next day. Pl.'s Cross. Mot. Summ. J., ECF 16-1 at 7. He was the skipper's "direct representative on board" responsible for responding to any last-minute malfunctions. AR 0240. Shortly after arriving, he realized that the ship was departing from Pier 12 but it would return to Pier 3, two-and-a-half miles away, at 4:00 p.m. on December 16th. AR 0004, 0057, 0236. Unfortunately, he had parked his car near the ship as he boarded at Pier 12; he estimates that he would have had to walk 45 minutes upon return to retrieve his vehicle. AR 0057. Walking back to his car, he says, would have caused him to miss his flight to take his fiancé to meet his family for the first time over the holidays. AR 0070.

Mitchell decided to move his car. AR 0057–58. He told other members of the crew, his Section Leader, and the Officer of the Deck on the quarterdeck where he was going and why. *Id.*; AR 0237. A Section Leader who had missed dinner asked him to pick up food for him from McDonald's on the way back. AR 0237. Mitchell told no one in his chain-of-command or the destroyer's commanding officer that he was stepping out. AR 0004, 0239. Nor did he transfer his Command Duty Officer responsibilities to anyone before leaving. *Id.*

Mitchell asked a junior sailor to drive him to Pier 3 using an official vehicle. AR 0231. He says that taxis are not allowed on the naval station and that there are no loaner bicycles. AR 0058, 0237. On the way back from the Pier, the sailor explained that he could not use the

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drive-through at McDonald's with a government vehicle because of the governing regulations. AR 0231. So the sailor parked beside the restaurant while Mitchell walked in for the burger. *Id.* The two then returned to the ship. *Id.* He was gone somewhere between 15 and 60 minutes. AR 0248. He did not attempt to hide his absence. AR 0237.

About a month later, Mitchell received notice that his scheduled promotion for 2020 had been delayed while the Secretary reviewed the December 11th incident. AR 0004. After the review, Mitchell received "nonjudicial punishment" for violating Articles 86, 92, and 133 of the Uniform Code of Military Justice, which forbid, respectively, wrongfully leaving one's post, failure to obey a lawful general order by wrongfully using a government vehicle for non-official business, and conduct unbecoming of an officer for ordering a junior sailor to perform a personal errand. AR 0224, 0231. He also received a punitive letter of reprimand. AR 0231–35. Mitchell appealed the decision; he admitted guilt to the offense conduct but denied criminal intent and disputed the punishment's proportionality. AR 0240–42, 0248–49. His commanding officer recommended denying the appeal and headquarters declined to rescind the punishment or downgrade it. AR 0005, 0007–08, 0248–49. The commander described Mitchell's conduct as "incredibly selfish, shortsighted, and not in line with the expectations of a Naval Officer of any rank, but especially a senior Department Head about to be promoted to Lieutenant Commander." AR 0240. He also objected to Mitchell's "gross misuse of power" in commanding a junior sailor to violate Department of Defense regulations,

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putting him in what the commander called an “extremely challenging position.” AR 0240–41.

But that was not all. About six months later, the *Howard*’s skipper requested that Mitchell be detached for cause because of the incident. AR 209–14, Pl.’s Cross Mot. Summ. J. at 10. Detachment for cause “administrative[ly] remov[es] an officer . . . from the officer’s current duty assignment before their normal transfer or planned rotation date.” AR 0168. The action “is one of the strongest administrative measures used in the case of officers” and it portends a “serious effect on the officer’s future naval career.” *Id.* The Naval Military Personnel Manual, or “MILPERSMAN,” allows detachment for cause for several reasons. AR 0169–70.

The parties agree that the commander requested Mitchell’s detachment based on Sections 1611-020(3)(b) and (c). AR 0209–14; Def.’s Mot. Summ. J., ECF 13-1 at 3–4; Pl.’s Cross Mot. Summ. J. at 10–11. Section (b) proscribes “[s]ubstandard performance involving one or more significant events resulting from gross negligence or complete disregard of duty.” AR 0160–70. Section (c) prohibits “[s]ubstandard performance of duty over an extended period of time.” *Id.* at 0170.

The commander’s detachment request described the December 11, 2019, events and enumerated three pages of Mitchell’s other failures that constituted “[s]ubstandard performance of duty over an extended period of time” between November 2018 and January 2020. AR 0211–14. He did not recommend requiring Mitchell

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to show cause why he should remain in the Navy because he thought that he could “learn from these events and provide value” in a “different community.” AR 0214. Other officers in Mitchell’s chain of command endorsed the skipper’s recommendations, even after reading Mitchell’s responsive memorandum. AR 0009. The Deputy Chief of Naval Personnel approved the detachment. AR 0167.

Still, the Navy convened a Board of Inquiry to review the incident to determine whether Mitchell should remain in the Navy. AR 0074. It made two findings. First, it unanimously found by a preponderance of the evidence that Mitchell had violated two articles of the Uniform Code of Military Justice: Article 92 for failure to obey an order, and Article 133 for conduct unbecoming of an officer. *Id.* Second, it decided that separating Mitchell from the Navy was unwarranted, despite his misconduct. *Id.*; *see also* SECNAVINST 1920.6D, Encl. 11 ¶ 13(a)(3) (stating that the preponderance of the evidence standard only applies to the question whether the alleged misconduct occurred, not to the separation decision).

After Mitchell learned that he could remain in the Navy, he began pursuing his long-suspended promotion. In January 2021, he asked the Secretary to lift the pause on his promotion to Lieutenant Commander and to render that promotion retroactive to his originally scheduled date of August 2020. AR 0069–73. In response, the Secretary removed his name from the promotion list. AR 0012. That removal occurred on April 26, 2022, more than 18 months after his promotion had been delayed. *Id.*

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Shortly afterward, Mitchell applied to the Board for Correction of Naval Records (“Correction Board”) requesting: (1) removal from his record of both his fitness report from the 2020-2021 period and all detachment-for-cause reports from the *Howard*; and (2) promotion retroactively effective to August 2020. AR 0048–61.¹ Among other things, he argued that the Navy had unlawfully delayed his promotion beyond the strictures of 10 U.S.C. § 624(d)(5): “An appointment of an officer may not be delayed under this subsection for . . . more than 18 months after the date on which such officer would otherwise have been appointed.” AR 0050.

The Correction Board rejected his claims on all counts. AR 0002–18. First, it found that Mitchell admitted to the December 11th offense conduct. AR 0014–18. Second, it found that the detachment for cause was warranted. *Id.* Third, it agreed that Mitchell’s performance had been substandard for some time, as his commander said. *Id.* Fourth, though it agreed that Mitchell’s promotion had been unduly delayed, the Board concluded that he still had not been promoted by operation of law because the Secretary had not found Mitchell qualified for the promotion, as required to effect the constitutional appointment process. *Id.* Finally, the Board thought that the case did not merit equitable relief because the delay “actually worked to Petitioner’s favor,” enabling him to “accrue more favorable material in his record for consideration” in future promotions. *Id.* The Secretary

1. Mitchell also alleged that he had not been properly notified of his promotion delay, but he does not raise this issue now. Pl.’s Cross Mot. Summ. J., ECF No. 15 *passim*.

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approved the Correction Board's recommendation. *Id.* at 0019.

Mitchell then sought relief from this Court claiming that the Correction Board's decision violated the Administrative Procedure Act. Compl., ECF No. 1. Both parties have moved for summary judgment. ECF Nos. 13–20. Their motions are ripe for consideration. This Court has subject-matter jurisdiction under 28 U.S.C. § 1331. *See Bowen v. Massachusetts*, 487 U.S. 879, 891 n.16, 108 S. Ct. 2722, 101 L. Ed. 2d 749 (1988) (finding federal question jurisdiction for APA claims).

II.

The parties debate at length whether the Court should engage in arbitrary-and-capricious review or substantial evidence review, though they agree that there will be little practical difference. Def.'s Mot. Summ. J. at 6–8; Pl.'s Cross Mot. Summ. J. at 19–20; Pl.'s Reply, ECF No. 19 at 9 n.2 (“To the extent that the Secretary is conceding that in their application to the requirement of factual support the substantial evidence test and the arbitrary-and-capricious test are one and the same, LT Mitchell agrees.”) (cleaned up). The Court agrees with the Government that arbitrary-and-capricious review applies to all justiciable issues in the Corrections Board's decision, and both parties are correct that it will make little difference here.

The Court grants summary judgment “if the movant shows that there is no genuine dispute as to any material

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fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). But when a party seeks APA review, as here, “[t]he entire case on review is a question of law” rather than fact, so that it can be resolved on the administrative record at the summary judgment stage. *Marshall Cty. Health Care Auth. v. Shalala*, 988 F.2d 1221, 1226, 300 U.S. App. D.C. 263 (D.C. Cir. 1993). The Court must decide whether to review questions of law using one of two standards in the APA, “arbitrary and capricious” review or “substantial evidence” review. 5 U.S.C. § 706(2)(A), (E).

The daylight between substantial-evidence and arbitrary-and-capricious review illuminates the Court’s sources of facts. Substantial-evidence review requires the agency’s supportive factual evidence to be found within the annals of closed-record, formal agency proceedings. *Phx. Herpetological Soc’y, Inc. v. Fish & Wildlife Serv.*, 998 F.3d 999, 1006, 452 U.S. App. D.C. 318 (D.C. Cir. 2021). Arbitrary-and-capricious review, however, considers the entire administrative record, including informal proceedings. *Id.*; *Ass’n of Data Processing Serv. Orgs. v. Bd. of Govs. of Fed. Reserve Sys.*, 745 F.2d 677, 684, 240 U.S. App. D.C. 301 (D.C. Cir. 1984). Aside from this distinction, the D.C. Circuit has called the difference between the standards of review “largely semantic” because the arbitrary-and-capricious standard is a catchall provision including decisions that would not pass substantial-evidence review. *Id.* To put it simply, a decision unsupported by evidence would be arbitrary.

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But the distinction is irrelevant here because no facts lurk below the surface. Mitchell’s adjudication was an informal proceeding, so substantial-evidence review does not apply and there is no formal record to review. In general, Congress has “specifie[d] by statute” that “[a]djudications to correct a military record must be supported by substantial evidence” when the Secretary has specifically “designated” the reviewing board as a “special board.” *McKinney v. Wormuth*, 5 F.4th 42, 46 n.1, 453 U.S. App. D.C. 313 (D.C. Cir. 2021); 10 U.S.C. § 1558(f)(3).² When the Secretary has not so designated the board, then the adjudication is informal and arbitrary-and-capricious review applies. *McKinney*, 5 F.4th at 46 & n.1. There is no indication in the record or in the parties’ briefing that the Secretary designated this review board as a “special” one reviewed for substantial evidence only. Def.’s Mot. Summ. J. at 10; Pl.’s Cross Mot. Summ. J. at 19–21. So Mitchell’s adjudication was informal. Arbitrary-and-capricious review applies.

This Court also agrees with the Government that arbitrary-and-capricious review is unusually deferential here. The D.C. Circuit has concluded that the statute governing “[c]orrection of military records,” 10 U.S.C. § 1552(a), “fairly exudes deference” to the Secretary and the Board. *Kreis v. Sec’y of Air Force*, 866 F.2d 1508, 1513, 275 U.S. App. D.C. 390 (D.C. Cir. 1989). “The Secretary of a military department *may* correct any military

2. Mitchell argues that the Circuit precedent stating as much is wrongly decided. Pl.’s Cross Mot. Summ. J. at 19–20. Merits aside—and the argument likely is not meritorious—*McKinney* binds this Court.

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record . . . when the Secretary *considers it necessary* to correct an error or remove an injustice.” 10 U.S.C. § 1552(a)(1) (emphasis added). “[T]he question whether a particular action is arbitrary or capricious must turn on the extent to which the relevant statute, or other source of law, constrains agency action.” *Kreis*, 866 F.2d at 1514. “While the broad grant of discretion implicated here does not entirely foreclose review of the Secretary’s action, the way in which the statute frames the issue for review does substantially restrict the authority of the reviewing court to upset the Secretary’s determination.” *Id.* For example, the Secretary could “exercise[e] his discretion not to correct an error” for various reasons, including “mootness,” redressability, lack of injury, or avoiding any follow-on injustice and institutional cost. *Id.*

So the Secretary reviewing record correction under Section 1552 “must give a reason that a court can measure” against the “arbitrary or capricious” standard, but “[p]erhaps only the most egregious decisions may be prevented under such a deferential standard of review.” *Id.* at 1516. The Court applies that standard of review to the Corrections Board’s decision because it was assembled under Section 1552, no matter which Military Personnel Manual provisions Mitchell violated. *See* Pl.’s Cross. Mot. Summ. J. at 2 (discussing Mitchell’s violations of the Military Personnel Manual provisions 1611-020(3)(b) and (c) separately as if arbitrary-and-capricious review applied to the former and substantial-evidence review applied to the latter).

*Appendix B***III.**

Now that the Court has decided how to review, it must determine what to review. Mitchell seeks an order to the Navy to promote him to Lieutenant Commander, retroactively effective to February 1, 2022. Compl. at 25. The parties argue about whether any aspect of Mitchell's promotion is justiciable.

Justiciability is distinct from subject matter jurisdiction. *Oryszak v. Sullivan*, 576 F.3d 522, 526, 388 U.S. App. D.C. 64 (D.C. Cir. 2009). The justiciability inquiry turns on the "inappropriateness of the subject matter for judicial consideration." *Baker v. Carr*, 369 U.S. 186, 198, 82 S. Ct. 691, 7 L. Ed. 2d 663 (1962). Courts consider whether the "duty asserted can be judicially identified and its breach judicially determined, and whether protection for the right can be judicially molded." *Id.*

Mitchell and the Secretary agree, at least, that the promotion decision itself is not justiciable because it is committed to agency discretion. Def.'s Mot. Summ. J. at 10–11; Pl.'s Cross Mot. Summ. J. at 24–25. The Court concurs. *Kreis*, 866 F.3d at 1511; *cf.* 10 U.S.C. § 628(b) (1) (entrusting the Secretary with determining whether promotion selection was "unfair"). But Mitchell maintains that the Navy's procedural error in delaying his promotion is reviewable even if the decision itself is not. The D.C. Circuit has "emphasize[d]" when reviewing military Boards of Correction that it "attempt[ed] to identify whether the decision making process was deficient, not whether [the] decision was correct." *Dickson v. Sec'y of*

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Def., 68 F.3d 1396, 1405, 314 U.S. App. D.C. 345 (D.C. Cir. 1995) (cleaned up). The statutory timeline violation falls into the procedural side of the Secretary’s decision because it governs only how long the Secretary may take to make the decision, not what that ultimate decision is.

The Navy would collapse these questions of substance and procedure because the procedural delay was not the reason for his promotion removal; his lack of qualifications merited removal. *Def.’s Reply to Cross Mot.* at 6–7. But the removal’s motivation is irrelevant to the statutory violation. 10 U.S.C. § 624(d)(5). Indeed, the statute suggests that this 18-month outer limit applies to the entire subsection, including the provision allowing delay for reviewing “adverse information,” as the Secretary was doing here. *Id.* (“An appointment of an officer may not be delayed *under this subsection* . . . more than 18 months”); *id.* § 624(d)(1)(E) (allowing delay for reviewing “substantiated adverse information”). The Court cannot use the Secretary’s discretion on the merits to ignore the statutory deadline separate from the merits.

So, standing alone, is the statutory violation itself justiciable? Recall that the answer turns on whether the “duty asserted can be judicially identified and its breach judicially determined, and whether protection for the right can be judicially molded.” *Baker*, 369 U.S. at 198. The parties agree that there was a statutory breach. But a violation of 10 U.S.C. § 624(d) is not justiciable because the Court cannot judicially mold relief. The “duty” question is more complicated and, ultimately, unhelpful for Mitchell.

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To begin, the Court agrees with the parties that the Navy overly delayed his promotion beyond 18 months in violation of 10 U.S.C. § 624(d)(5). This was the breach. The Secretary placed Mitchell’s name on the promotion list in late 2019, and the Senate confirmed his position on November 25th of that year. AR 0182–83. Nearly 21 months later, the Navy removed his name from the promotion list in April 2022. AR 0012. The Corrections Board reviewing Mitchell’s case agreed with him that the “overall period of delay exceeded” the time permitted by internal Navy regulations, which mirror 10 U.S.C. § 624. AR 0015–16.

Mitchell’s momentary success founders on the other two prongs of the test. First, duty. The best version of his argument is that because Section 624 promotes officers automatically by process of law when the 18-month delay period expires, the Secretary had a duty to promote him that this Court can enforce. Pl.’s Cross Mot. at 25. But this interpretation fails to honor the statute’s text and raises significant constitutional concerns.

For starters, the statute read holistically does not make promotion automatic. Subsection (a) states that “[e]xcept as provided in subsection (d) [authorizing delay for certain reasons], officers on a promotion list for a competitive category shall be promoted to the next higher grade *when* additional officers in that grade and competitive category *are needed*.” 10 U.S.C. § 624(a)(2). So the statutory default is promotion on an as needed rather than an automatic basis. Subsection (c) elaborates. And “[a]ppointments under this section shall be made

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by the President, by and with the advice and consent of the Senate” 10 U.S.C. § 624(c). Putting these two subsections together, the President appoints officers as “needed” from the promotion list, where they were placed with the “advice and consent of the Senate.”

So how does the delay provision fit? When an officer’s promotion is delayed, he is funneled away from the usual (a)(2), “as needed” promotion timeline into subsection (d), as Mitchell was under (d)(1)(E) while the Secretary reviewed “substantiated adverse information.” Expiring the 18-month delay in section (d) could just return the officer to section (a) where he awaits the President’s “as needed,” discretionary appointment. Section (a), after all, excepts the delays enumerated in section (d), and neither section indicates what happens upon their expiration.

Adopting this reading comports better with the Constitution than Mitchell’s interpretation. *Marbury v. Madison* explains the process when the President appoints officers “by and with the Advice and Consent of the Senate.” U.S. Const. art. II, § 2, cl. 2; 5 U.S. (1 Cranch) 137, 155–56, 2 L. Ed. 60 (1803); 10 U.S.C. § 624(c) (requiring Navy officers to be appointed “by and with the advice and consent of the Senate”). Senate-confirmed officers must be (1) nominated by the President, (2) confirmed by the Senate, and then (3) appointed by the President. *Marbury*, 5 U.S. (1 Cranch) at 155–56.

Mitchell effectively argues that after an officer has been nominated by the President—here, placed on the promotion list—and confirmed by the Senate, then

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Section 624 automatically appoints the officer after 18 months. Not so. The Supreme Court has called the presidential “appointment” a “voluntary act.” *Id.* at 155. A congressionally mandated act is not a voluntary presidential act. And equating the two would undermine the “livelier sense of duty and [] more exact regard to reputation” that the Founders envisioned when vesting the Appointment Power in the President. The Federalist No. 76 (Alexander Hamilton) (Harold C. Syrett ed., 1962).

The Federal Circuit has twice reached the same conclusion when rejecting a nearly identical argument about 10 U.S.C. § 624. *Dysart v. United States*, 369 F.3d 1303, 1311–12 (Fed. Cir. 2004); *Lewis v. United States*, 458 F.3d 1372, 1378–79 (Fed. Cir. 2006). In *Dysart*, a Naval officer argued that the Secretary had improperly delayed his promotion beyond the proper subsection (d) period. *Dysart*, 369 F.3d at 1310–11. The Federal Circuit looked toward the *Marbury* tripartite framework, an early Attorney General opinion, and the statute’s subsection (c) requiring that “appointments” be made “by the President” to conclude that Presidential “nomination is not an appointment.” *Id.* at 1311. In other words, the President placing the officer on the promotion list does not render him eligible for automatic appointment. The Federal Circuit declared automatic appointments likely unconstitutional. *Id.* at 1314. Congress can omit the Senate’s role for inferior officers, *see* U.S. Const. art. II, § 2, cl. 2, a step it has taken with officers below the rank of Lieutenant Commander, 10 U.S.C. § 624(c). But for any officer of the United States, inferior or otherwise, final appointment authority lies with the President or his

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designee. *Dysart*, 369 F.3d at 1314–15. The Federal Circuit construed § 624 consistently with the constitutional appointment process: “The current statutory language itself does not clearly compel the President to appoint military officers.” *Id.* at 1316.

The military’s reasoning echoes this logic. The Corrections Board concluded that “[t]he constitutional appointment process requires an appointment to be tendered to the officer to be effective, and that requirement was not fulfilled in this case because the [Secretary] never determined [Mitchell] to be mentally, physically, morally, or professionally qualified for the promotion after it was delayed.” AR 0016. The Secretary placed Mitchell on the promotion list, he was confirmed by the Senate, and then he never received the final, voluntary appointment. AR 0052, 0182–83. The facts follow the constitutional process. Automatic appointment would upend the constitutional, statutory, and internal military standards that apply.

This Court concludes that the only “duty” the military had was to funnel Mitchell back into the promotion list where he could be elevated “when” he was “needed.” 10 U.S.C. § 624(a)(2). That does little for his desired result. Mitchell’s alternative reading, which fixates on § 624(d)’s timeframe, ignores the important preceding text in subsections (a) and (c), flouts the Federal Circuit’s considered statutory construction, and upends the Constitution’s appointment process.

Finally, Mitchell asks for a remedy that cannot “be judicially molded.” His complaint prays for a judicial order

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to the Corrections Board to “promote LT Mitchell to Lieutenant Commander, effective as of February 1, 2022.” Compl. at 25. Mitchell requests retroactive promotion.

As both parties agree, the promotion decision itself is not justiciable. Def.’s Mot. Summ. J. at 10–12; Pl.’s Cross Mot. Summ. J. at 24–25. Retroactive promotion is the remedial version of the promotion because it assumes the truth of the matter asserted—that a promotion was merited. The D.C. Circuit also has been clear that a “request for retroactive promotion falls squarely within the realm of nonjusticiable military personnel decisions.” *Kreis*, 866 F.2d at 1511.

The Circuit previously has reinstated military officers to active duty when the board evaluating their promotions was improperly constituted under the governing statutes. *Dilley v. Alexander*, 603 F.2d 914, 924, 195 U.S. App. D.C. 332 (D.C. Cir. 1979), *decision clarified*, 627 F.2d 407, 200 U.S. App. D.C. 354 (D.C. Cir. 1980). But the Circuit did not retroactively promote the officers; instead, it reinstalled them to active duty “to be considered again by two promotion selection boards constituted in accordance with applicable statutes and regulations.” *Id.* at 926. That remedial move avoids the Appointments Clause concern here. Faced more squarely with a request for retroactive promotion, this Court will hew to both *Dilley* and *Kreis* in declining to appoint Mitchell retroactively.

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IV.

Mitchell also raises a more modest and constitutionally permissible request. He asks the Court to find that the Corrections Board was arbitrary or capricious when it declined to correct his record of detachment for cause based on (1) an incident of “gross negligence” and (2) a history of substandard performance. Pl.’s Cross Mot. Summ. J. at 16–23. These other claims “require [this Court] merely to evaluate, in light of familiar principles of administrative law, the reasonableness of the Secretary’s decision not to take certain corrective action with respect to appellant’s record.” *Kreis*, 866 F.2d at 1511. “Adjudication of these claims requires [this Court] to determine only whether the Secretary’s decision-making process was deficient, not whether his decision was correct.” *Id.* On remand, “[t]he Secretary would remain free” to “reaffirm his original determination to deny appellant further relief.” *Id.* at 1512.

Recall that the Court must apply an unusually deferential arbitrary-or-capricious standard because the governing statute “fairly exudes deference” to the Secretary and the Board. *See supra* Section II. The Secretary “*may* correct any military record” when he “*considers it necessary* to correct an error.” 10 U.S.C. § 1552(a)(1). “Perhaps only the most egregious decisions may be prevented under such a deferential standard of review.” *Kreis*, 866 F.2d at 1515.

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First consider Mitchell's "gross negligence" record-correction claim. He contends that the Corrections Board was arbitrary or capricious when it failed to correct his record showing detachment for cause based on the December 11th incident. Pl.'s Cross Mot. Summ. J. at 16. The Court disagrees.

The military personnel manual allows detachment for cause based on "[s]ubstandard performance involving one or more significant events resulting from gross negligence or complete disregard of duty." MILPERSMAN 1611-020(3)(b). The parties agree that the manual does not define "gross negligence." Pl.'s Cross Mot. Summ. J. at 16; Def.'s Opp., ECF No. 18 at 2–3. Mitchell argues that the military has effectively defined "gross negligence" and that it has not treated his case in accordance with its own standards. Def.'s Opp. at 17. So, he continues, this Court should defer to the agency's interpretation of its own regulation under *Auer v. Robbins*, 519 U.S. 452, 117 S. Ct. 905, 137 L. Ed. 2d 79 (1997). And evaluating his case under the agency's own interpretation, he says, requires correcting his record.

Mitchell's argument fails at the outset: The military's definitions of "gross negligence" would counsel the same decision that the Navy made here. So the Court need not determine whether to defer to any military definitions that might apply.

The Court found only one instance when the military adopted a definition of "gross negligence" under

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MILPERSMAN 1611-020, which Mitchell failed to raise. *See Shelly v. Frank*, 171 Fed. Cl. 392, 404 (2024). In 2024, the Board of Corrections for the Navy affirmed an officer's detachment for cause under MILPERSMAN 1611-020 due to gross negligence. *Id.* It adopted "by analogy" the Secretary of the Navy Instruction's definition of "substandard performance of duty" to elaborate "gross negligence" in MILPERSMAN: the "[i]nability of an officer to maintain adequate levels of performance or conduct as evidenced by one or more of these reasons." *Pol'y Governing Involuntary Separation for Cause or Parenthood*, SECNAVINST 1920.6, Encl. 6(1)(a).³ Nine examples follow this definition in the Secretary of the Navy Instruction Manual. *Id.* Encl. 6(1)(a)(1)–(9). They include "[f]ailure to demonstrate acceptable qualities of leadership required of an officer in the member's grade," "[f]ailure to properly discharge duties assigned to or expected of an officer in the member's grade," and "failure to conform to prescribed standards of dress, weight, personal appearance, or military deportment." *Id.* Encl. 6(1)(a)(1), (3).

Even if the Court were to consider this definition, deferring to it as Mitchell requests would not help. "[G]ross negligence" includes "[f]ailure to properly discharge duties assigned to or expected of an officer in the member's grade." Mitchell's commander described Mitchell's conduct as "not in line with the expectations of a Naval Officer of any rank, but especially a senior Department Head about to be promoted to Lieutenant Commander." AR 0239–42. Further, if "failure to conform to prescribed

3. <https://perma.cc/3K8F-4BCV>.

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standards of dress” qualifies, then it is hard to imagine that Mitchell’s unapproved absence does not. In any event, the Navy’s decision hardly rises to the “most egregious decisions” that the statute’s standard of review allows courts to correct. *Kreis*, 866 F.2d at 1515.

Mitchell otherwise makes two attempts to define gross negligence, but neither succeeds. First, he invokes a District of Columbia case interpreting D.C. tort law as a definition for “gross negligence.” *District of Columbia v. Walker*, 689 A.2d 40, 44 (D.C. 1997). But this case defines “gross negligence” under the D.C. Code Employee Non-Liability Act, specifically “in the context of emergency vehicle operation.” *Id.* It is neither binding nor relevant here.

Next, he asserts that the military has effectively defined “gross negligence” through adjudication of other military detachments. Def.’s Opp. at 17. Among the few federal cases citing MILPERSMAN 1611, one shows that the military detached an officer for cause for the offense of drinking alcohol after work hours with his colleagues in violation of an order that prohibited it for servicemembers on his assignment. *See Debor v. United States*, 2023 WL 4417362, at *1, *5 (Fed. Cl. July 7, 2023). Even if a singular case could establish a standard by adjudication, it almost certainly would not exclude Mitchell’s conduct here. Mitchell’s cited cases, Pl.’s Cross Mot. Summ. J. at 17, admittedly display worse facts leading to detachment for cause. *See, e.g., Powe v. Sec’y, Dep’t of Navy*, 1994 U.S. App. LEXIS 22082, 1994 WL 445695 *1 (4th Cir. Aug. 18, 1994) (detaching an officer for cause after running two

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ships aground in seven months). But none define “gross negligence” under MILPERSMAN 1611-020. *See, e.g., Piersall v. Winter*, 507 F. Supp. 2d 23, 27–28 (D.D.C. 2007).

In sum, Mitchell has not shown that the military has adopted a gross-negligence standard under MILPERSMAN that would exclude his conduct. Only if the agency had adopted an interpretation that might be dispositive here would the Court need to analyze whether it merited deference.⁴

B.

Finally, Mitchell requests record correction regarding his substandard performance of duty over an extended period. Pl.’s Cross. Mot. Summ. J. at 21–22. He claims that the Board’s decision was arbitrary and capricious because (1) his performance was not substandard and (2) any allegedly substandard performance was very short-lived so that it did not qualify for MILPERSMAN’s “extended period” language. MILPERSMAN § 1611-020(3)(c). Again, this Court may correct “only the most egregious” of errors. *Kreis*, 866 F.2d at 1515.

Reviewing Mitchell’s record raises questions, but none that rise to the level of a “most egregious” error.

4. The record suggests that the parties are litigating the wrong legal standard. The commander’s letter repeatedly references “misconduct” without mentioning “gross negligence,” which could invoke MILPERSMAN 1611-020(3)(a) instead of (3)(b). AR 0167, 0248. But because neither party raises the issue, the Court assumes they are correct. *Wannall v. Honeywell, Inc.*, 775 F.3d 425, 428, 413 U.S. App. D.C. 384 (D.C. Cir. 2014).

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His superiors issued a Letter of Instruction on September 9, 2019, intended to help him improve after “failing to effectively communicate and an inability to complete routine tasks [within] prescribed timelines.” AR 0109. The reprimand stemmed from a pattern, not an incident, of poor performance. Def.’s Mot. Summ. J. at 14. His skipper details four types of unsatisfactory performance stretching from November 2018 through January 2020:

- (1) submitting weekly reports that were “routinely late and substandard”;
- (2) “lax administrative oversight” causing his superiors to “personally oversee and supervise the work of those under him”;
- (3) neglecting to develop action plans for critical events and training; and
- (4) lacking required communication with other ships and his officers when preparing for a combat trial. AR 0211–12.⁵

Then, in October 2019, a commanding officer again orally counseled Mitchell for “inappropriate behavior toward subordinates,” “failure to meet standards as

5. Mitchell contends that it helps his case to count the *Howard* commander’s comments in the detachment letter as the same piece of evidence as the Letter of Instruction because the two writings detail the same events. Pl.’s Cross. Mot. Summ. J. at 21–22. But this just collapses two pieces of evidence rather than rendering one irrelevant or controverted. It does not move the needle for him.

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a watch stander,” and “failure to accomplish assigned tasks.” AR 0212–13.

To contradict these negative narratives, Mitchell proffers his “positive” fitness report for the period between February through November 2019, the time during which the USS *Howard* skipper claimed that he was performing poorly. Pl.’s Cross Mot. Summ. J. at 22; AR 0108–09. But the report is less rosy than he suggests. Pl.’s Cross Mot. Summ. J. at 22. He lauds scoring “at or above Naval standards in six out of seven possible categories.” *Id.* In the seventh category, Mission Accomplishment and Initiative, Mitchell scored below standards in a ranking called “progressing,” which was between “below standards” and “meets standards.” AR 0108. He merely “met standards” in five of other categories. *Id.* For the sixth, he was in a ranking called “above standards,” between “meets standards” and “greatly exceeds standards.” *Id.* The rankings are hardly “gush[ing].” Pl.’s Cross Mot. Summ. J. at 22. Finally, Mitchell’s emphasis on the overall “promotable” is misplaced. *Id.* There are five overall rankings in ascending order: “Significant Problems,” “Progressing,” “Promotable,” “Must Promote,” and “Early Promote.” AR 0109. “Promotable” is no glowing endorsement. While the overall fitness evaluation was not dismal, it cannot do the work that Mitchell needs to undermine the *Howard* commander’s assessment.

In one final effort, Mitchell asserts that any misconduct detailed in the record only occurred between September 9, 2019, when he received the Letter of Instruction, and the December 11th incident. Pl.’s Cross Mot. Summ. J.

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at 23. This “short, three-month timeframe” could not possibly match the “extended period of time” language in MILPERSMAN 1611-020(3)(c), he argues. *Id.* But as the record evidence shows, the misconduct occurred over a longer period. Mitchell has never combated his commander’s evidence; he has only minimized its importance. *Id.* (dismissing supervisor feedback that he received the month after the Letter of Instruction as “minor verbal counseling”). More, the MILPERSMAN explicitly states that the “extended period of time” in Section 1611-020(3)(c) has “no fixed time period” to qualify as a basis for detachment for cause. Rather, the period “is dictated by the facts and circumstances of the particular case and the efforts expended by the command to assist the officer in overcoming perceived performance deficiencies.” MILPERSMAN 1611-020(3)(c). For these reasons, Mitchell’s appeals to cases in which officers misbehaved for seven or nine months do not rescue his cause. Pl.’s Reply at 10; *see, e.g., Powe*, 1994 U.S. App. LEXIS 22082, 1994 WL 445695, at *1. Mitchell has not proven the Board erred factually or legally, much less egregiously so, when determining that he had engaged in a “substandard performance of duty over an extended period of time.”⁶

6. If Mitchell argues that the Correction Board found that he did not exhibit substandard performance of duty, he misreads the record. Pl.’s Cross Mot. Summ. J. at 10. That page of the Board’s decision recites procedural history showing that a Naval Board of Inquiry determined that “substandard performance of duty” should not be a “basis for involuntary separation,” by a preponderance of the evidence. AR 0010. Deciding whether to expel a servicemember from the Navy against his will is

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V.

For these reasons, the Defendant's Motion for Summary Judgment will be granted. The Plaintiff's Cross-Motion for Summary Judgment will be denied. A separate Order will issue.

2024.11.26
/s/ Trevor N. McFadden 14:56:34 -05'00'
TREVOR N. McFADDEN
United States District Judge

Dated: November 26, 2024

different from removing him from a certain assignment for poor performance. *Compare* MILPERSMAN 1611-020(3)(c) (discussing the policy governing detachment from a certain duty assignment for cause) *with* SECNAVINST 1920.6D, Encl. 7 (showing the policy governing involuntary separation from the Navy overall for cause).

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**APPENDIX C — OPINION OF THE BOARD
FOR CORRECTION OF NAVAL RECORDS,
DEPARTMENT OF THE NAVY,
FILED APRIL 17, 2023**

**DEPARTMENT OF THE NAVY
BOARD FOR CORRECTION OF NAVAL RECORDS
701 S. COURTHOUSE ROAD, SUITE 1001
ARLINGTON, VA 22204-2490**

SEA
Docket No. 5320-22
Ref: Signature Date

LT ERNEST F MITCHELL USN
919 BOTETOVRT GARDENS
NORFOLK VA 23507

Dear Petitioner:

This is in reference to your application for correction of your naval record pursuant to Section 1552 of Title 10, United States Code. After careful and conscientious consideration of relevant portions of your naval record and your application, the Board for Correction of Naval Records (Board) found the evidence submitted insufficient to establish the existence of probable material error or injustice. Consequently, your application has been denied.

The Board determined that your personal appearance, with or without counsel, would not materially add to their understanding of the issues involved. Therefore, the Board determined that a personal appearance was not necessary and considered your case based on the evidence of record.

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You are entitled to have the Board reconsider its decision upon submission of new matters, which will require you to complete and submit a new DD Form 149. New matters are those not previously presented to or considered by the Board. In this regard, it is important to keep in mind that a presumption of regularity attaches to all official records. Consequently, when applying for a correction of an official naval record, the burden is on the applicant to demonstrate the existence of probable material error or injustice.

Sincerely,

4/17/2023

/s/ Bradley J. Goode
BRADLEY J. GOODE
Deputy Director
Signed by: GOODE.BRADLEY.J.1139935450

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**DEPARTMENT OF THE NAVY
BOARD FOR CORRECTION OF NAVAL RECORDS
701 S. COURTHOUSE ROAD, SUITE 1001
ARLINGTON, VA 22204-2490**

SEA
Docket No. 5320-22
Ref: Signature Date

From: Chairman, Board for Correction of Naval Records

To: Secretary of the Navy

Subj: REVIEW OF NAVAL RECORD OF LTERNEST
F. MITCHELL, USN, XXX-XX--XXXX

Ref: (a) 10 U.S.C. § 1552

(b) HOWARDINST 3121.1C of 29 Dec 18,
Standing Order Number Eleven

(c) DODM 4500.36, Acquisition, Management,
and Use of DoD Non-Tactical Vehicles,
7 July 2015

(d) 10 U.S.C. § 624

(e) DODI 1320.14, DoD Commissioned
Officer Promotion Program Procedures,
16 December 2020

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- (f) SECNAVINST 1420.3, Department of the Navy Commissioned Officer Promotion Program, 28 March 2019
- (g) MILPERSMAN 1611-020, Officer Detachment for Cause, 30 March 2007

- Encl:
- (1) DD Form 149 w/enclosures
 - (2) ALNAV 060/19, subj: FY-20 Active-Duty Navy Lieutenant Commander Line Selections, 231500Z Aug 19
 - (3) NPC Memo 1420 Ser 833/0281, subj: Delay and Possible Removal of Your Permanent Promotion to Lieutenant Commander, 16 January 2020
 - (4) USS HOWARD CO Memo 1621 DDG 83, subj: Punitive Letter of Remand, 17 January 2020
 - (5) NAVPERS 1626/7, Report and Disposition of Offense(s), 20 December 2019
 - (6) Petitioner's Memo, subj: Acknowledgment of Promotion Delay and Intent to Submit a Statement, 21 January 2020
 - (7) Petitioner's Memo, subj: Appeal of Nonjudicial Punishment, 24 January 2020

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- (8) USS HOWARD CO Memo 5800 Ser DDG 83-LGL/190, First Endorsement of Enclosure (6), subj: Appeal of Non-Judicial Punishment Imposed on 17 January 2020 ICO [Petitioner], 19 February 2020
- (9) Petitioner's Counsel Memo, subj: Appeal of Nonjudicial Punishment ICO [Petitioner], 27 February 2020
- (10) Carrier Strike Group Eleven CO Memo 5812 Ser. N00J/061, subj: Denial of Appeal of Nonjudicial Punishment ICO [Petitioner], 1 May 2020
- (11) Petitioner's Memo, subj: Statement in Response to Punitive Letter of Reprimand, 5 May 2020
- (12) USS HOWARD CO Memo 1611 Ser DDG 83-LGL/251, subj: Report of Nonjudicial Punishment and Request for Detachment for Cause ICO [Petitioner], 29 June 2020
- (13) Petitioner's Counsel Memo, subj: Report of Nonjudicial Punishment and Request for Detachment for Cause ICO [Petitioner], 14 July 2020
- (14) USS HOWARD CO Memo 1611 Ser DDG 83/261, Second Endorsement on Enclosure (12), subj: Report of Nonjudicial Punishment

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and Request for Detachment for Cause ICO
[Petitioner], 16 July 2020

- (15) Destroyer Squadron Nine CO Memo 1611 Ser N00/192, Third Endorsement on Enclosure (14), subj: Report of Nonjudicial Punishment and Request for Detachment for Cause ICO [Petitioner], 29 July 2020
- (16) Carrier Strike Group Eleven CO Memo 1611 Ser N00J/183, Fourth Endorsement on Enclosure (14), subj: Report of Nonjudicial Punishment and Request for Detachment for Cause ICO [Petitioner], 14 August 2020
- (17) Board of Inquiry Report in the case of [Petitioner], 16 November 2020
- (18) NPC Action Memo, subj: Fourth Quarter FY-20 Ratification and Extension for Delay of Promotion, 13 November 2020
- (19) BUPERS Memo 1611 BUPERS-00B/534, subj: Detachment for Cause ICO [Petitioner], 14 December 2020
- (20) NPC Memo 1920 Ser 834/672, subj: Status in the U.S. Navy, 21 December 2020
- (21) Petitioner's Memo, subj: Delay and Possible Removal of Promotion to Lieutenant Commander ICO [Petitioner], 4 January 2021

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- (22) USS HOWARD CO Memo 1420 DDG 83/350, First Endorsement of Enclosure (21), 12 January 2021
- (23) PERS-833 Head E-mail, subj: RE: PERS 833, sent Sunday, February 21, 2021 @ 7:53 PM (and preceding e-mail trail)
- (24) Expeditionary Strike Group Three CO Memo 1420 Ser N00 040, Third Endorsement on Enclosure (21), 23 February 2021
- (25) NAVPERS 1610/2, Fitness Report & Counseling Record (W2-O6) (20000201 – 20210121)
- (26) Carrier Strike Group Eleven CO Memo 1420 Ser N00/108, Fourth Endorsement on Enclosure (21), 19 April 2021
- (27) Petitioner's Memo, subj: Statement of Rebuttal Delay and Possible Removal of Promotion to Lieutenant Commander ICO [Petitioner], 14 May 2021 (with enclosures)
- (28) CNO Action Memo, subj: Removal of Permanent Promotion to Lieutenant Commander ICO [Petitioner], 17 March 2022
- (29) NPC Memo 1420 Ser 833/0398, subj: Removal of Your Name from the Fiscal Year 2020 Active-Duty Navy Lieutenant

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Commander Line (Unrestricted Line) (URL)
Promotion List, 5 May 2022

- (30) PERS-32 Memo 1610, subj: [Petitioner],
24 August 2022
- (31) BUPERS-00J Memo, subj: Advisory Opinion
ICO [Petitioner], 4 October 2022

1. Pursuant to the provisions of reference (a), Subject, hereinafter referred to as Petitioner, filed enclosure (1) with the Board for Correction of Naval Records, hereinafter referred to as the Board, requesting promotion to Lieutenant Commander (LCDR). Petitioner also requested the removal of his fitness report (FITREP) for the reporting period of 1 February 2020 to 31 January 2021, and the removal of all documents from his record which characterize his detachment from the U.S.S. HOWARD (DDG-83) as a detachment for cause (DFC).

2. The Board reviewed Petitioner's allegations of error or injustice on 12 December 2022 and, pursuant to its regulations, determined that no corrective action is warranted. Documentary material considered by the Board included the enclosures, relevant portions of Petitioner's naval record, and applicable statutes, regulations, and policies.

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

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a. Before applying to this Board, Petitioner exhausted all administrative remedies available under existing law and regulation within the Department of the Navy (DON).

b. On 23 August 2019, the results of the Fiscal Year (FY) 2020 Active-Duty Navy LCDR (Line) Promotion Selection Board (PSB) were announced. Petitioner was among those officers selected for promotion to LCDR. See enclosure (2). Petitioner's projected promotion date pursuant to this selection was 1 August 2020. See enclosure (3).

c. On or about 11 December 2019, Petitioner was assigned to performance duties as the U.S.S. HOWARD Command Duty Officer (CDO). While on this duty and without proper relief or authority, Petitioner departed the ship for between 15 and 60 minutes to move his personal vehicle and to pick up food from McDonalds.¹ In doing so, he had the duty driver, an E-3, follow him in the duty vehicle so that he could park his personal vehicle in closer proximity to the pier at which the U.S.S. HOWARD was scheduled to dock upon its return to port. After parking his vehicle, Petitioner had the duty driver take him to McDonalds to pick up food. When the duty driver explained that he was unable to go through the drive-thru

1. Other documentation in the record reflects that Petitioner sought to move his personal vehicle because the ship was scheduled to sail on the following day, and he realized that he would face a long walk to retrieve it upon return to the pier to which it was scheduled to dock. The length of this walk would reportedly have jeopardized Petitioner's ability to catch the flight that he had booked for holiday leave scheduled for the evening of the ship's return to port.

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lane at McDonalds in a government vehicle, Petitioner had him stop so that he could get the food inside, and then had the driver take him back to the ship. Petitioner did not turn over his duties as CDO during this period, or inform his CDO under instruction or his superiors, of his departure. See enclosure (4).

d. By memorandum dated 16 January 2020, Petitioner was notified that his promotion to LCDR, scheduled for 1 August 2020, was immediately delayed based upon the report of potentially adverse or reportable information related to the events of 11 December 2019. He was further informed that if the Commander, Navy Personnel Command (NPC), did not rescind the delay of his promotion in writing prior to 1 August 2020, the Secretary of the Navy (SECNAV) would determine whether the adverse information reported about him materially affects his qualification for promotion and whether his entire record makes him qualified for promotion. See enclosure (3).

e. On 17 January 2020, Petitioner received nonjudicial punishment (NJP) for the misconduct described in paragraph 3c above. Specifically, he was charged with being absent without leave from his duty as the CDO onboard the U.S.S. HOWARD in violation of Article 86, Uniform Code of Military Justice (UCMJ); failure to obey a lawful general order, to wit: reference (c), by wrongfully utilizing a Department of Defense non-tactical vehicle for non-official business as a means of personal conveyance, in violation of Article 92, UCMJ; and conduct unbecoming an officer and gentleman by wrongfully and dishonorably abusing and compromising his position of authority as an officer by ordering the U.S.S. HOWARD duty driving to

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drive him on a personal errand at McDonalds while both in were a duty status and utilizing the duty vehicle. He received a punitive letter of reprimand (PLOR) for this misconduct. See enclosure (5).

f. By memorandum dated 17 January 2020, Petitioner received the PLOR awarded at NJP. This PLOR described the misconduct described in paragraph 3c above. See enclosure (4).

g. By memorandum dated 21 January 2020, Petitioner acknowledged receipt of enclosure (3) and indicated his intention to submit a statement regarding this action. See enclosure (6).

h. By memorandum dated 24 January 2020, Petitioner appealed his NJP, asserting that his punishment was unjust and disproportionate under the circumstances. He explained that he departed the ship to move his personal vehicle because the ship was scheduled to sail on the following day and he realized that he would otherwise face a long walk from the pier to which it was scheduled to dock on 16 December 2020 to his parking location which might jeopardize his ability to making his flight for holiday leave. He also claimed that he interpreted the provisions of reference (b) pertaining to “watchstander liberty” to permit the CDO to leave the ship for brief periods of less than an hour to attend to personal matters which, if left unattended, could later interfere with the performance of official duties. As such, he claimed to believe his brief absence to be authorized. He further explained that his diversion to McDonalds was to retrieve food for his Section Leader, who had missed evening chow due to a work detail. See enclosure (7).

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i. By memorandum dated 19 February 2020, Petitioner's commander forwarded Petitioner's NJP appeal to the appeal authority, strongly recommending its denial. In making this recommendation, Petitioner's commander indicated that the circumstances of Petitioner's CDO duty were not unique and that it was not the normal course of duty for the CDO to leave the ship without relief or authority to tend to personal matters. He stated that it was imperative that he have his direct representative (i.e., the CDO) on board and readily available to respond to any problems involving any one of the many evolutions that the ship goes through leading up to the underway, which in this case was scheduled for the following morning. Furthermore, the CDO is required to obtain and provide permission to complete evolutions and maintenance required to get underway, and that Petitioner failed in his duty to serve as this representative because he was absent from his post. Petitioner's commander described Petitioner's decision to leave his post because he was concerned about missing his flight to be "incredibly selfish, shortsighted, and not in line with the expectations of a Naval Officer of any rank, but especially a senior Department Head about to be promoted to [LCDR]." Petitioner's commander also reported that this was not the first time that Petitioner had failed to perform his duties, as his predecessor for suspended Petitioner's CDO qualifications and verbally counseled him for failing to execute his CDO duties just two months prior.² See enclosure (8).

j. By memorandum dated 27 February 2020, Petitioner's counsel supplemented his NJP appeal to

2. Petitioner had failed to make a required report about a casualty that occurred during his watch.

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alleged legal deficiencies in the proceedings.³ Specifically, he made the following allegations of legal error:

(1) The specification of absence without leave in violation of Article 86, UCMJ, was defective in that it did not specify that his absence was for a particular period of time. He asserted that such language is required by federal law. By failing to assert his absence for a particular period of time, Petitioner's counsel argued that the specification failed to state a crime and that the finding of guilty against him was therefore illegal.⁴

(2) The specification alleging a failure to obey a lawful order in violation of Article 92, UCMJ, morphed over time, asserting different violations at different times in a manner that violated Article 15, UCMJ. Specifically, he claimed that Petitioner was originally notified of two specifications of violations of Article 92, UCMJ. The first specification for which he was notified alleged a violation, but failed to identify the order violated, while the second specification alleged a violation of reference (c), without specifying the conduct constituting the violation. As

3. As noted in enclosure (10), this supplement was not submitted in a timely manner. Petitioner was excused from a sailing of the U.S.S. HOWARD in the wake of his NJP so that he could seek legal counsel and submit a timely appeal.

4. The specific statute cited by Petitioner's counsel was Article 86, UCMJ (10 U.S.C. § 886). That statute lists the elements of the offense, but does not establish any requirements for the drafting of specifications. The specification for this offense detailed on enclosure (5) mirrored the model specification for "failing to go or leaving place of duty" found in the Manual for Courts-Martial (2019 ed.), page IV-15, 10(e)(1).

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such, he claimed that both specifications were legally insufficient, and that Petitioner's command must have recognized this deficiency since it issued enclosure (5) on the day of his NJP. Petitioner's counsel alleged further error in the revised specification of enclosure (5), in that the timing of its revision deprived Petitioner of sufficient notice.

(3) The specification of conduct unbecoming an officer and a gentleman, in violation of Article 133, UCMJ, is defective on its face as the conduct alleged is in no way comparable to the conduct legally considered sufficient to support such a charge. In support of this contention, Petitioner's counsel cited to the paragraph in the Manual for Court-Martial providing examples of offenses constituting conduct unbecoming an officer and gentleman to assert that the act of purchasing food at McDonald's does not compare with the kind of conduct which would constituted a violation of Article 133."⁵⁶

5. Manual for Courts-Martial (2019 ed.), page IV-135, paragraph 90(c)(3), regarding Article 133, UCMJ, states:

(3) Examples of offenses. Instances of violation of this article include knowingly making a false official statement; dishonorable failure to pay a debt; cheating on an exam; opening and reading a letter of another without authority; using insulting or defamatory language to another officer in that officer's presence or about that officer to other military persons; being drunk and disorderly in a public place; public association with known prostitutes; committing or attempting to commit a crime involving moral turpitude; and failing without good cause to support the officer's family."

6. The Board notes that Petitioner's counsel grossly misstated the gravamen of the conduct alleged as unbecoming an officer and

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See enclosure (9).

k. By memorandum dated 1 May 2020, the NJP appeal authority denied Petitioner's appeal.⁷ This action referenced both enclosures (7) and (9), and indicated that the NJP was referred to his Staff Judge Advocate for advice prior to action. Although the appeal authority stated that the submission of and arguments made in enclosure (9) were waived as being untimely, he nonetheless found those arguments to be incorrect as to the law and facts. He made the following findings with regard to each offense:

(1) Petitioner's argument that his absence was authorized since he was on self-approved "watchstander liberty" was without merit because such liberty may only be authorized by the CDO "in an emergency." In the absence of an emergency, such liberty must be approved by the commander. As Petitioner claimed that he believed his absence to be authorized based upon his experience and "perceived authority as CDO," the NJP appeal authority rejected his assertion that this represented, at worst, "an aberrant, negligent error" as it "shows a level of calculus

a gentlemen. That conduct was obviously not the act of "purchasing food at McDonald's" as Petitioner's counsel suggested, but rather it was the "abuse and compromise [of] his position of authority as an Officer by ordering the USS HOWARD duty driver to drive [him] on a personal errand." The specific errand was irrelevant in this regard, and the gravamen of the conduct alleged was not unlike the examples of such conduct provided in the Manual for Courts-Martial.

7. The NJP appeal authority was the Commander, Carrier Strike Group Eleven. This higher command was located remotely from the homeport of the U.S.S. HOWARD.

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that is more than an unintentional or negligent error.” The NJP appeal authority rejected the allegation of legal error made by Petitioner’s counsel, as the actual violation of Article 86, UCMJ, alleged was “going from appointed place of duty,” for which all of the elements were met.

(2) Regarding the Article 92, UCMJ, offense, the NJP appeal authority noted that Petitioner’s counsel acknowledged in enclosure (9) that this was a proper charge. He further noted that enclosure (7) demonstrates that Petitioner was sufficiently on notice as to the charge to allow him to present a defense. Petitioner’s counsel’s argument that he was denied the opportunity to present a defense was rejected, as he was notified of the alleged violation on 8 January 2020, provided until 11 January 2020 to consult with an attorney, and did, in fact, consult with an attorney. Further, the revised specification provided on 17 January 2020 only synthesized the two separate specifications of which he had already been notified, and Petitioner had requested and was afforded addition time to consult with legal counsel after it was received. Finally, the NJP authority noted that service members embarked on a ship have no right to consult an attorney between the notification and imposition of NJP, and that the inability to consult with an attorney does not prejudice the NJP but rather denies the Government’s ability to use such NJP at a subsequent court-martial. As such, the NJP appeal authority found that Petitioner was afforded all rights due to him.

(3) With regard to the Article 133, UCMJ, offense, the NJP appeal authority noted that Petitioner’s counsel mischaracterized both the law and facts. He found that as a Surface Warfare-qualified, LCDR-select officer

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with 10 years of experience, Petitioner knew, or should have known, that the E-3 duty driver would interpret his “request” to be an order. Accordingly, Petitioner ordered the duty driver to follow him in a government vehicle on a personal errand to move his personal vehicle, and then to drive him to McDonalds to get food.” This put the E-3 duty driver in a difficult position, and set a horrible example. He noted that this “violation was so obvious that even [the duty driver] recognized the error and had to correct [Petitioner].” Accordingly, the NJP appeal authority found sufficient evidence to support the alleged violation of conduct unbecoming an officer and gentleman in violation of Article 133, UCMJ.

After addressing the challenges made to each of the specific offenses, the NJP appeal authority found that the punishment was not disproportionate to the offenses, that Petitioner’s commander did not abuse his discretion, and that Petitioner’s requested alternative relief of a letter of instruction (LOI) in lieu of a PLOR was both inappropriate and unavailable.

See enclosure (10).

1. By memorandum dated 5 May 2020, Petitioner made a statement in response to his PLOR. The content of this response essentially mirrored the content of his NJP appeal, as discussed in paragraph 3h above.⁸ See enclosure (11).

8. The Board presumes this response was provided simply for filing with the PLOR in order to provide Petitioner’s version of the events described in the PLOR.

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m. By memorandum dated 29 June 2020, Petitioner's commander submitted a Report of NJP and request for DFC pertaining to Petitioner through the chain of command to NPC.⁹ Within this request, Petitioner's commander opined that Petitioner's misconduct "warrants promotion delay or removal," but that he "should not be required to show cause for retention in the naval service." In arguing for Petitioner's DFC, his commander cited to Petitioner's "substandard performance over an extended period of time" in addition to the misconduct which was the basis his NJP. Specifically, he stated that "[f]rom approximately November 2018 until approximately January 2020, despite extensive efforts by the previous Commanding Officer, myself, and my command to rehabilitate and develop him, [Petitioner's] performance remained substandard and would have, on its own accord, necessitated his detachment for cause."¹⁰ He cited the

9. This memorandum also served as the command's endorsement of Petitioner's acknowledgement of his promotion delay.

10. This assertion referenced Petitioner's FITREPs covering the periods from 1 February 2019 to 8 November 2019 and from 9 November 2019 to 31 January 2020, as well as a LOI dated 9 September 2019. The LOI addressed Petitioner's inability to maintain a direct line of communication with the commander, his deficient administrative reports, and his inability to properly plan for or meet administrative requirements or to carry out his responsibilities, despite engagement by both the commander and executive officer; unsatisfactory oversight of the Integrated Training Team (ITT) and Combat Systems Training Team (CSTT) and failure to develop a plan to ensure the tactical proficiency of watchstanders, resulting in lagging progress towards readiness for Crew Certification and Ready for Sea Assessments; failure to properly execute assigned duties as the Combat Systems Ship Qualification Trials (CSSQT) Coordinator, including keeping the

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following specific failures in Petitioner's role as Plans and Tactics Officer and Department Head:

(1) Failure to maintain a direct line of communication with the previous commanding officer, the current commanding officer, and the executive officer, while also failing to ensure that the commanding officer was fully informed regarding the condition of all of his equipment, personnel and noteworthy evolutions within his Department.

(2) Failure to execute routine administrative tasks in accordance with prescribed timelines while in charge of the ship's administrative executive department.

(3) Failure to prepare the CSTT and ITT for Crew Certification and Ready for Sea Assessment.

(4) Failure to ensure that the executive officer and commander were kept apprised of information received during the ship's preparation for CSSQT.

He also cited to verbal counseling delivered to Petitioner by the former commander on 8 October 2019, addressing Petitioner's inappropriate behavior towards subordinates;¹¹

executive officer and commander apprised of important decision and discussion during teleconferences and other planning meetings with outside entities; and failure to properly execute designated responsibilities.

11. Petitioner used his positional authority over the ship's legal clerk to question her about legal matters not pertaining to

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failure to meet standards as a watchstander;¹² and failure to accomplish assigned tasks.¹³ In addition to all of these specific instances of substandard performance, his commander asserted that Petitioner “has had an overall negative impact upon good order and discipline within his Department and USS HOWARD as a whole. In multiple instances, Sailors in his Chain-of-Command made comments to [the commander] or the Executive Officer regarding his ineffectiveness as a leader.” Petitioner’s commander deemed these comments to be credible based upon his knowledge of the complaining Sailors, his own observations, and Petitioner’s performance. As such, Petitioner’s commander expressed no confidence in Petitioner’s ability to lead, motivate, or provide for a ship’s good order and discipline. He also opined that Petitioner has not demonstrated the capacity to perform at the level of a LCDR, and therefore recommended his removal from the FY 2020 Active-Duty Navy LCDR (Line) promotion selection list. See enclosure (12).

n. By memorandum dated 14 July 2020, Petitioner, through counsel, provided a response to the Report of NJP and request for DFC described in paragraph 3m above.

him after viewing documents on the commander’s desk that he erroneously believed pertained to him.

12. Petitioner failed to inform the commander of an equipment casualty that had been incurred by NR4 Air Conditioning Plant on 5 October 2019, in violation of the commander’s standing orders.

13. Petitioner failed to properly report for duty and execute his assigned responsibilities as the Visual Information (VI) Coordinator by not planning or conducting VI drills and training.

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He asserted that the DFC request was “legally deficient, factually inaccurate, incomplete to the point of being misleading and lacking in required documentation,” and therefore requested that the DFC request be denied and that Petitioner’s promotion to LCDR be approved. First, he reiterated the version of the events of 11 December 2019 provided by Petitioner in his unsuccessful rebuttal to the PLOR at enclosure (7), asserting that the severity of this misconduct was exaggerated by the U.S.S. HOWARD commander and did not warrant DFC. Next, Petitioner’s counsel challenged the claim of Petitioner’s commander that Petitioner’s performance of duty was substandard, challenging each of the specific bases for this claim with counter arguments and references to previous FITREPs.¹⁴ See enclosure (13).

o. By memorandum dated 16 July 2020, Petitioner’s commander forwarded the Report of NJP and Petitioner’s response to it through the chain of his command, with the statement that his request and recommendations remained unchanged. See enclosure (14).

p. By memorandum dated 29 July 2020, the next higher commander in Petitioner’s chain of command endorsed the Report of NJP and DFC request package, to include Petitioner’s response, concurring with his commander’s recommendation.¹⁵ See enclosure (15).

14. Petitioner’s counsel referred to the effort of Petitioner’s commander in this regard as “shooting with blanks.”

15. This individual was the Commander, Destroyer Squadron Nine. In concurring with the recommendation of the U.S.S. HOWARD commander, he stated “[Petitioner] demonstrated poor

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q. By memorandum dated 14 August 2020, the next higher commander in Petitioner's chain of command endorsed the Report of NJP and DFC request package, to include Petitioner's response, also concurring with his commander's recommendation that Petitioner be removed from the FY 2020 Active-Duty Navy LCDR (Line) promotion selection list and DFC request.¹⁶ Despite the original recommendation that Petitioner not be required to show cause for retention, this commander exercised his delegated Show Cause Authority to direct that Petitioner be required to show cause for retention. See enclosure (16).

r. On 16 November 2020, a Board of inquiry (BOI) unanimously found that the preponderance of the evidence supported the allegations that Petitioner violated a lawful general order in violation of Article 92, UCMJ, and engaged in conduct unbecoming an officer and gentleman in violation of Article 133, UCMJ.¹⁷ By a vote of 2-1, the

and declining performance on USS HOWARD [sic]. Following a positive first observed fitness report in January 2019, he received a letter of instruction in September 2019, and verbal counseling from the Commanding Officer (CO) in October 2019. He then received a declining performance fitness report in November 2019. Despite these intrusive attempts by the CO to improve his performance, [Petitioner] failed to respond with any noticeable effort. On the contrary, he demonstrated poor judgement, which led to CO's Non-Judicial Punishment in January 2020."

16. This individual was the Commander, Carrier Strike Group Eleven. He appears to have been the successor in command to the officer who denied Petitioner's NJP appeal in enclosure (10).

17. It does not appear that the allegation of going from his appointed place of duty in violation of Article 86, UCMJ, was referred to the BOI.

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BOI found that the preponderance of the evidence did not support substandard performance of duty as a basis for involuntary separation. Despite its unanimous finding that the preponderance of the evidence supported the allegations of misconduct, the BOI voted to recommend Petitioner's retention by a vote of 2-1. See enclosure (17).

s. On 20 November 2020, the Commander, NPC, exercised his delegated authority to ratify and extend Petitioner's promotion delay beyond six months in accordance with references (d)–(f).¹⁸ See enclosure (18).

t. By memorandum dated 14 December 2020, the Deputy Chief of Naval Personnel approved the request for Petitioner's DFC due to misconduct and substandard performance of duty. See enclosure (19).

u. By memorandum dated 21 December 2020, Petitioner was notified that he was being retained in the naval service pursuant to the recommendation of the BOI. He was further notified, however, that this determination did not preclude or limit the use of the information and opinions contained in enclosure (12) in future administrative or other proceedings. See enclosure (20).

18. Per reference (d), "[a]n appointment of an officer may not be delayed . . . for more than six months after the date on which the officer would otherwise have been appointed unless the Secretary concerned specifies a further period of delay." Per enclosure (17), this authority was delegated to the Commander, NPC, on 2 November 2007.

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v. By memorandum dated 4 January 2021, Petitioner submitted his response to enclosure (3), requesting that the SECNAV approve his permanent promotion to LCDR effective on his previously scheduled promotion date of 1 August 2020. In this response, he admitted to his “error of judgment” on 11 December 2019, and claimed to have learned from it while reiterating his version of the incident that he had previously stated in enclosure (7) (see paragraph 3h above). In further support of his request, he cited to the BOI findings and recommendation, suggesting that the entirety of his service record rebutted the allegation of substandard performance of duty. See enclosure (21).

w. By memorandum dated 12 January 2021, the U.S.S. HOWARD commander endorsed and forwarded enclosure (21), maintaining his recommendation that Petitioner’s name be removed from the promotion list. See enclosure (22).

x. By e-mail dated 19 February 2021, Petitioner’s new command sought authority from NPC to promote him to LCDR subject to his “expired” promotion delay.¹⁹ In a response dated 21 February 2021, the NPC Post Selection Board Matters Section (PERS-833) Head responded that Petitioner’s promotion delay had not expired and that he cannot be promoted until a final determination of his qualifications for promotion is made by the SECNAV. This response also indicated that the promotion determination

19. Petitioner was temporarily assigned to Expeditionary Strike Group Three (ESG-3) following his after his NJP while pending action on the DFC request.

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could not be acted upon until his personal statement and command endorsement are received, indicating that enclosure (21) had not been received by PERS-833 with the required command endorsement as of that date. See enclosure (23).

y. By e-mail dated 23 February 2021, the Commander, ESG-3, endorsed and forwarded enclosure (21), with his recommendation that Petitioner be promoted. In making this recommendation, he specifically withheld comment on Petitioner's conduct and performance onboard the U.S.S. HOWARD, but noted that Petitioner had performed admirably and at the level of his other LCDRs during his year of temporary duty on the ESG-3 staff. See enclosure (24).

z. On 24 February 2021, Petitioner received an adverse FITREP for the reporting 1 February 2020 to 21 January 2021 documenting his NJP and DFC. Petitioner indicated his intention not to submit a statement in response to this FITREP. See enclosure (25).

aa. By memorandum dated 19 April 2021, the Commander, Carrier Strike Group Eleven, endorsed and forwarded enclosure (21) without further comment. See enclosure (26).

bb. By memorandum dated 14 May 2021, Petitioner supplemented his response to the possible removal of his name from the promotion list, noting the favorable endorsement at enclosure (24) and providing a copy of his

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favorable FITREP for the reporting period 6 February 2021 to 14 May 2021, and the certificate for a Navy and Marine Corps Commendation Medal, awarded to him by the same flag officer for his “meritorious service while serving as Deputy Assistant Chief of Staff for Material and Readiness for ESG-3 from February 2020 through May 2021, both of which were issued by the author of Enclosure (24).²⁰ See enclosure (27).

cc. By memorandum dated 17 March 2022, the Chief of Naval Operations (CNO) recommended that the SECNAV remove Petitioner’s name from the FY 2020 Active-Duty Navy LCDR (Line) promotion list. In making this recommendation, the CNO stated that “[a] promotion board should have the opportunity to consider [Petitioner’s] misconduct and DFC” and that he did “not have the necessary trust and confidence to recommend [Petitioner’s] promotion to [LCDR].” See enclosure (28).

dd. On 26 April 2022, the SECNAV approved the recommendation of the CNO and removed Petitioner’s name from the FY 2020 Active-Duty Navy LCDR (Line) promotion list. See enclosure (28).

ee. By memorandum dated 5 May 2022, Petitioner was notified of the SECNAV’s decision to remove his name from the FY 2020 Active-Duty Navy LCDR Line promotion list, and that this action constituted a failure of selection (FOS) for promotion. See enclosure (29).

20. An e-mail message contained within the record reflects that these materials were added to Petitioner’s promotion package upon receipt on 14 May 2021.

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ff. Petitioner requests relief on the following bases:

(1) The removal of his name from the FY 2020 Active-Duty Navy LCDR (Line) promotion list violated references (d)–(f) because he was not notified in writing of the further delay in his promotion beyond the initial six months and because the total period of delay exceeded that authorized by law.²¹

(2) The removal of his name from the FY 2020 Active-Duty Navy LCDR (Line) promotion list based upon the conduct alleged constituted excessive punishment in violation of the Eighth Amendment to the U.S. Constitution and the “Law of Proportionality.” He admitted to his mistake and lapse of judgment and was appropriately punished for it, but that conduct should not result in the removal of his promotion selection and the resultant FOS for promotion which may ultimately result in his discharge, especially considering the totality of his naval career.

(3) The decision to remove Petitioner’s name from the FY 2020 Active-Duty Navy LCDR (Line) promotion list was made without consideration of his performance in his subsequent temporary assignment to ESG-3 or his current assignment to Maritime Expeditionary Security Group Two (MESG-2), or the favorable endorsements from members of the chain of command.

21. Petitioner cited to 10 U.S.C. § 14311 in his application, but that statutory provision did not apply to his promotion status. Petitioner’s promotion was governed by reference (d).

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(4) Petitioner's misconduct was not of the type which typically warrants DFC. Specifically, he cites to reference (g), which provides that DFC requests based upon a significant event must show the officer's "disregard or gross negligence associated with the performance of [the officer's] duties," and suggests that his reported conduct did not suggest gross negligence. Rather, he received NJP for misconduct which "was isolated, minor, occurred in a matter of minutes, and was neither malicious, nor violent, nor associated with substance abuse, nor blatantly criminal, nor inherently wrongful." He also disputed the substandard performance of duty basis for the DFC request, on the same bases as his attorney had challenged it in enclosure (13), and asserted that the substandard performance of duty basis for the DFC request was not adequately documented in accordance with reference (g).

(5) Finally, Petitioner asserts that this isolated incident should not outweigh his 13 years of honorable service.

See enclosure (1).

gg. By memorandum dated 24 August 2022, the NPC Performance Evaluation Section provided an advisory opinion (AO) regarding Petitioner's request to remove his FITREP for the reporting period 1 February 2020 to 31 January 2021 for the Board's consideration, finding no error in the FITREP given the finality of Petitioner's NJP and DFC.²² See enclosure (30).

22. This AO was e-mailed to Petitioner on 14 October 2022 to provide him that opportunity to respond. No response was subsequently received from Petitioner.

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hh. By memorandum dated 4 October 2022, the NPC Office of Legal Counsel provided an AO for the Board's consideration, recommending that Petitioner's request for relief be denied.²³ This AO addressed Petitioner's contentions as follows:

(1) Petitioner's argument that relief is warranted because his promotion delay exceeded the maximum period fails because the constitutional process provides the President with complete discretion in choosing whether or not to appoint an officer for promotion and no statute can alter the President's discretionary authority by providing for an automatic promotion, even after a delay in said promotion. The AO also noted that the statutory provision upon which Petitioner relies clearly states that officer promotions are discretionary and that an officer does not have a right to promotion.²⁴

(2) Petitioner's argument that his removal from the promotion list was unjust punishment and an abuse of discretion fails because officer promotions are discretionary and an officer does not have a right to promotion per reference (e). Further, the AO notes that it is DON policy "to ensure that officers recommended for promotion remain mentally, physicaly, morally, and professionally qualified for promotion." The SECNAV carefully considered the information adverse to Petitioner's

23. See footnote 22 above.

24. As noted previously, the statute which Petitioner cited does not apply to Petitioner's promotion since he is not a Reserve Component officer.

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promotion, the CNO's recommendation, and the matters submitted by Petitioner for his consideration.

See enclosure (31).

CONCLUSION:

Upon careful review and consideration of all the evidence of record, the Board found insufficient evidence of any probable material error or injustice warranting relief.

The Board notes from the outset that Petitioner does not dispute the misconduct for which he received NJP. While he disputes the substandard performance of duty described by the U.S.S. HOWARD commander in his DFC request, he has repeatedly admitted to a lapse in judgment on 11 December 2019. Accordingly, the controversy regarding that conduct involves its relative severity, and whether such misconduct warranted the consequences incurred. In this regard, the Board found the consequences to be appropriate under the circumstances. The Board found that Petitioner has minimized the severity of his misconduct throughout this process. As an experienced officer who had been selected for promotion to LCDR, he knew or should have known not to abandon his post without relief. Petitioner was the command's representative on-board the U.S.S. HOWARD when preparations were underway throughout the ship for sailing on the following day. Any number of things could have happened during this period which required his immediate attention and guidance. Yet, despite this responsibility with which he was entrusted, he left the ship and utilized government resources in the form of the ship's duty driver and a

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government vehicle to perform a clearly personal errand. Petitioner could have sought permission to leave the ship to perform this task on his own, or he could have ensured that his duties were adequately covered by other qualified personnel, but instead he elected to leave his post without ensuring adequate coverage of his responsibilities simply to avoid a long walk upon the ship's return to port. He exacerbated this misconduct by further utilizing the duty driver and the government vehicle to pick up food at McDonald's before returning to the ship. In doing so, he not only placed the duty driver in the untenable position of having to correct the behavior of a commissioned officer, but he also continued to demonstrate a blatant disregard for or ignorance of the urgency of his CDO duties. This conduct was far more egregious than Petitioner has repeatedly characterized it, as reflected in the rejection of his argument by every single senior leader who has considered his argument, to include the SECNAV. Despite the egregiousness of Petitioner's misconduct, the only actual "punishment" that he received was the PLOR issued through NJP. That was the minimum level of punishment that Petitioner should have expected under the circumstances. The other consequences suffered by Petitioner did not constitute his "punishment," but rather were the natural collateral consequences of NJP for such blatant and egregious conduct received by an officer with Petitioner's experience. That the Petitioner appealed the decision of the SECNAV to remove his name from the FY 2020 Active-Duty Navy LCDR (Line) promotion list less than three months after that decision was made, without offering any new information which was not available to either the SECNAV or any of the other senior officials

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and legal advisors who would have reviewed the action before he acted upon it, validated the Board's conclusion in this regard.

The Board found no merit in Petitioner's contention that the removal of his name from the FY 2020 Active-Duty Navy LCDR (Line) promotion list constituted disproportionate punishment for his offense. First, as stated above, Petitioner's conduct was far more egregious than he believes it to be. His failure to recognize the quality of his behavior alone not only calls into question his readiness to serve as a LCDR, but it also negates the credibility of his contention in this regard. Next, as also stated above, the denial of Petitioner's promotion was not a "punishment" per se, but rather is the natural collateral consequence of an officer of Petitioner's experience receiving NJP for such conduct. Petitioner's conduct on 11 December 2019 raised reasonable doubts regarding the determination of the FY 2020 Active-Duty Navy LCDR (Line) PSB that he was among the best qualified officers for promotion to LCDR. It also raised reasonable doubts regarding Petitioner's qualifications to effectively serve in the next grade. Petitioner's removal from the promotion list ensured that those qualifications could be assessed by a PSB in light of the conduct which drew them into question. This action did not foreclose the possibility of Petitioner's future selection by the next PSB (although the Board agrees with Petitioner that such selection is unlikely given the NJP in his record), but rather assures that Petitioner's entire record is considered against those of his peers to ensure that only the best qualified officers are promoted to LCDR. Finally, the Board did

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not find the overall consequences to be disproportionate to the misconduct. The PLOR received through NJP was the minimum punishment that Petitioner should have expected under the circumstances – he easily could have received worse. That he lost his promotion as a result of this misconduct was a natural consequence of that misconduct and NJP; Petitioner was never entitled to that promotion and it was denied to him because his conduct raised reasonable doubts regarding his qualification for it. The Navy cannot afford to promote officers into positions or grades for which they are not qualified. Finally, the removal of Petitioner's name from the promotion list does not preclude his selection by either a subsequent PSB or a selective continuation board. Accordingly, if Petitioner's misconduct truly did not warrant the denial of his promotion pursuant to his selection by the FY 2020 Active-Duty Navy LCDR (Line) PSB as he contends, then he should theoretically have no problem being selected for either promotion by the next LCDR PSB which considers him for promotion or for continuation in his current grade (if available) with the benefit of his more recent favorable performance records.²⁵

25. The Board does not mean to imply that it believes Petitioner's selection by a subsequent PSB to be likely under the circumstances, but notes that the unlikelihood of such selection (which Petitioner himself acknowledges) highlights the error in his argument that he should have been promoted despite his misconduct. The fact that his misconduct makes his future selection for promotion unlikely validates the determination that the same misconduct rendered him unqualified for promotion pursuant to his previous selection.

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The Board found no merit in Petitioner's contention that he was not properly notified of the delay to his promotion. Petitioner is correct that references (d)–(f) require an officer to be notified in writing of the grounds for a promotion delay. Petitioner was so notified by enclosure (3), and acknowledged receipt of that notification in enclosure (4), long before his projected promotion date. While those references require written notice of a promotion delay, they contain no such notification requirement when action is taken to extend an existing delay beyond the initial six month period. Petitioner's original promotion delay was properly extended beyond the six month period on 20 November 2020 per enclosure (18), less than four months after his projected promotion date of 1 August 2020. As there was no statutory or regulatory requirement to do so, the failure to provide Petitioner notice of this extension was not an error. Even so, Petitioner was clearly aware that his promotion delay had been extended, as he did not submit his response to that delay until 4 January 2021.

Petitioner was correct that the overall period of delay exceeded that permitted by references (d)–(f). Those references provide that the appointment of an officer may not be delayed more than 18 months after the date on which the officer would otherwise have been appointed, and action on Petitioner's promotion was not taken by the SECNAV until 26 April 2022, nearly 21 months after the date that he would otherwise have been appointed. The expiration of this maximum period of delay does not, however, trigger the automatic appointment of such an officer to the next higher grade. The constitutional appointment process requires an appointment to be tendered to the officer to

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be effective, and that requirement was not fulfilled in this case because the SECNAV never determined Petitioner to be mentally, physically, morally, or professionally qualified for the promotion after it was delayed. The Board also found that this excessive delay did not warrant equitable relief. While the Board does not condone the excessive delay in resolving Petitioner's case, that delay did not prejudice Petitioner in any way. The SECNAV ultimately decided to remove Petitioner's name from the promotion list, so he was not deprived of any benefit that he would have received if his promotion delay had been acted upon in a more timely manner. Additionally, the delay in this case actually worked to Petitioner's favor, as it enabled Petitioner to accrue more favorable material in his record for consideration by the next PSB which considers him for promotion. It also extended the time since Petitioner's misconduct until his next promotion consideration, thus limiting any "recency bias" against Petitioner in future PSB's deliberations. Ironically, the excessive length of Petitioner's promotion delay actually benefits Petitioner in the end, as it enhances the admittedly small likelihood of his promotion selection by a subsequent PSB.

Petitioner's contention that the decision to remove his name from the FY 2020 Active-Duty Navy LCDR (Line) promotion list did not take into consideration his subsequent performance while temporarily assigned to ESG-3 or the favorable endorsement provided is false. Petitioner was allowed to supplement his response to the potential removal of his name from the promotion list with evidence of this performance at ESG-3 at enclosure (27), and the record reflects that those matters were incorporated into the promotion package prepared for SECNAV action.

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Further, the CNO referenced the favorable endorsement of Petitioner's promotion made by the ESG-3 commander based upon his personal observation of Petitioner's performance in enclosure (28). Accordingly, the SECNAV did consider Petitioner's subsequent performance at ESG-3 when he decided to remove Petitioner's name from the promotion list. Petitioner's performance at MESG-2 obviously was not considered in this decision since no record of it was available at the time that the decision was made, and because it was irrelevant to the matter at hand. The Board considered all of the matters that Petitioner provided with his application, including character references from numerous senior officers, but did not find that these matters warranted the relief that Petitioner seeks. These matters may be used to influence the decision of a future PSB, but they are not sufficient to render the SECNAV's decision to remove Petitioner's name from the promotion list as an injustice warranting relief. The decision to remove Petitioner's name from the promotion list was based upon Petitioner's conduct on 11 December 2019, and his subsequent performance did not change the nature of that conduct.

Finally, the Board found no error or injustice in Petitioner's DFC. Step 3 of paragraph 5 to reference (g) requires the officer requesting DFC based upon a significant event to "[p]rovide a detailed statement describing the facts and circumstances, which support the basis for the request" and to "describe the event involved, the officer's duties, and the disregard or gross negligence associated with the performance of those duties." Petitioner claims that the U.S.S. HOWARD did not comply with this requirement because enclosure (12) "failed to suggest that [he] showed

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utter disregard for [his] duty or committed an act of “gross negligence.” Review of enclosure (12) reveals, however, that the U.S.S. HOWARD commander did in fact describe the event involved, Petitioner’s duties as a CDO, and Petitioner’s disregard and gross negligence associated with the performance of those duties. In addition to providing a brief narrative of Petitioner’s conduct on 11 December 2019, the U.S.S. HOWARD commander incorporated by reference Petitioner’s NJP and PLOR. These documents provided a very detailed description of the event of 11 December 2019 and, contrary to Petitioner’s contention, they demonstrate both a clear disregard for and gross negligence in the performance of Petitioner’s duties. As discussed above, Petitioner has repeatedly minimized the severity of his misconduct throughout this process, and he does so again here in suggesting that his conduct this conduct did not warrant a DFC. Petitioner’s conduct on 11 December 2019 was absolutely of the type which would warrant DFC.

Petitioner also claims that enclosure (12) did not support the claim of substandard performance of duty made by the U.S.S. HOWARD commander. Step 4 of paragraph 5 to reference (g) requires the officer requesting DFC based upon substandard performance of duty over an extended period of time to “indicate what corrective actions were taken to improve or correct the officer’s performance and the results of those actions. A special report of fitness is not required to support a DFC request; however, the request should document a chronology of precipitating events and evidence of command counseling and guidance.” Enclosure (12) clearly complied with this requirement, as it revealed that Petitioner received a LOI

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on 9 September 2019 regarding the deficiencies discussed in footnote 10 above, and was verbally counseled for the deficiencies discussed in paragraph 3m above on 8 October 2019. These events, along with Petitioner's conduct on 11 December 2019, clearly establish Petitioner's substandard performance of duty between November 2018 and January 2020, despite extensive but unsuccessful efforts by the command to improve his performance. Although the verbal counseling of 8 October 2019 was not documented in the record, it was documented in enclosure (12) in significant detail and Petitioner does not dispute that it occurred. Petitioner's contention that there is "no evidence set forth anywhere to the effect that [he] ignored the guidance offered therein or failed to take the corrective measures suggested" is belied by the fact that corrective measures continued to be necessary for an officer of his experience. Finally, Petitioner's contention that the evidence of his favorable performance while subsequently assigned to ESG-3 and MESG-2 is irrelevant, as such subsequent conduct has no bearing on whether he should have been DFC from the U.S.S. HOWARD.

The Board found no relevance to the findings of the BOI with regard to Petitioner's DFC. Although the BOI found that the preponderance of the evidence did not support the allegation of substandard performance of duty over an extended period, that finding was not unanimous and was not supported by the multiple senior officers in the chain of command who either made or endorsed the DFC request. The BOI reviewed the evidence of Petitioner's alleged substandard performance over an extended period through a different lens and for a different purpose than did the chain of command which considered it for DFC

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purposes. Further, there was sufficient evidence for a reasonable person to find the substandard performance of duty over an extended period in the record, as evidenced by the fact that one BOI member and the entire chain of command did so. Accordingly, the Board did not find the conclusion of the BOI in this regard to be persuasive.

Having found no error or injustice in Petitioner's DFC, the Board also found no error in the adverse FITREP issued to Petitioner for the reporting period 1 February 2020 to 31 January 2021 which referenced that DFC or in the presence of other materials in Petitioner's record referencing that DFC.

RECOMMENDATION

In view of the above, the Board recommends that no corrective action be taken on 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 titled matter.

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

2/3/2023

/s/ Elizabeth A. Hill
ELIZABETH A HILL
Executive Director

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SECRETARY OF THE NAVY DECISION:

CDT Board Recommendation Approved (Deny Relief – I concur with the Board’s findings and recommendation, and therefore direct that no corrective action be taken on Petitioner’s naval record.)

— Petitioner’s Request Approve (Full Relief – Petitioner has demonstrated that his DFC and my previous decision to removal his name from the FY 2020 Active-Duty Navy LCDR (Line) promotion list was an injustice under the circumstances. Accordingly, I do not concur with the Board’s findings and recommendation, and direct that Petitioner’s naval record be corrected to remove all references to his DFC, to include his adverse FITREP for the reporting period 1 February 2020 to 31 January 2021. I also direct the removal from Petitioner’s naval record of any reference to my previous decision to remove Petitioner’s name from the FY 2020 Active-Duty Navy LCDR (Line) promotion list, and that he be promoted off of that list with an effective date of rank of 1 August 2020.)

— Petitioner’s Request Partially Approved (Partial Relief – I concur with the Board’s findings with regard to my previous decision to remove Petitioner’s name from the FY 2020 Active-Duty Navy LCDR (Line) promotion list due to his misconduct, but do not concur with those findings as they pertain to Petitioner’s DFC. Petitioner has demonstrated that his DFC from the USS

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HOWARD was unjust. Accordingly, I direct that Petitioner's naval record be corrected to remove all references to his DFC, to include his adverse FITREP for the reporting period 1 February 2020 to 31 January 2021. No corrective action is to be taken with regard to the removal of his name from the FY 2020 Active-Duty Navy LCDR (Line) promotion list.)

— Petitioner's Request Partially Approved (Partial Relief – I concur with the Board's findings with regard to Petitioner's DFC from the USS HOWARD, but do not concur with those findings as they pertain to my previous decision to removal Petitioner's name from the FY 2020 Active-Duty Navy LCDR (Line) promotion list. Petitioner was demonstrated that this decision was unjust under the circumstances. Accordingly, I direct the removal from Petitioner's naval record of any reference to my previous decision to remove Petitioner's name from the FY 2020 Active-Duty Navy LCDR (Line) promotion list, and that he be promoted off of that list with an effective date of rank of 1 August 2020. No corrective action is to be taken with regard to Petitioner's DFC or his FITREP for the reporting period 1 February 2020 to 31 January 2021.

/s/ Carlos Del Toro
Carlos Del Toro
Secretary of the Navy

Date: APR 12 2023

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RECORDER'S LOG

BOARD MEMBERS:	BOARD DATE: 12 December 2022
Mr. Cash: Board Chair	RECORDER: Ms. Ritchie
Mr. Newman	EXAMINER: Ms. Aldridge
Ms. Ritchie	

	Last Name, First Name, MI	Docket No.	Grant
1	Mitchell, Ernest F.	5320-22	
	[REDACTED]		
	[REDACTED]		
	[REDACTED]		
	[REDACTED]		

Deny Merit	Deny Statute	PA Req*	Comments
DDD		*	SECNAV – Prev Acted No PA Concur w/ AOs
[REDACTED]			
[REDACTED]			
[REDACTED]			
[REDACTED]			

Enter “” if hearing requested

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Vote Key: **G** = Full Grant **P** = Partial Grant **D**=Deny

[REDACTED]	
[REDACTED]	
[REDACTED]	
[REDACTED]	

12/12/2022

/s/ Jane Ritchie
Recorder or Board Chair
Signed by: RITCHIE.JANE.D.1091936786

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THIS DOCUMENT IS AN ADMINISTRATIVE RECORD OF THE
BOARD FOR CORRECTION OF NAVAL RECORDS AND MAY
CONTAIN INFORMATION PROTECTED BY THE PRIVACY ACT.
DO NOT RELEASE WITHOUT APPROPRIATE AUTHORIZATION.

Docket No.: **5320-22**

Military Status: O-3/USN Active Duty

**Issue Category: Promotion/fitness report/derogatory
material**

Personal Appearance Requested: Yes

Personal Appearance Approved: Yes/No

Claims of Error/Injustice:

SPECIFIC ISSUES:

RECORD CHANGE REQUESTED:

1. Promotion to the grade of lieutenant commander (LCDR/O-4) effective 1 August 2020
2. Remove the fitness report for the reporting period 1 February 2020 to 31 January 2021
3. Remove the documents that characterize his detachment from the USS HOWARD (DDG 83) as detachment for cause

PETITIONER CONTENTION(S): He was not properly notified of the 12-month extension of his promotion delay and the delay exceeded a maximum permissible delay of 18 months. Because the delay of his promotion exceeded

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18 months, he should have been promotion to LCDR upon the lapse of the 18-month period.

Per reference (a), sections 624 and 14311, the appointment of an officer selected for promotion may not be delayed for more than six months after the date on which the officer would otherwise have been appointed, unless the SECNAV, or designee, specifies a further period of delay. (2) Ratification and 12-Month Extension. The CNP and DC M&RA), or their designees, will approve requests, with supporting rationale, for any ratification and 12-month extension of an officer's promotion delay. Such requests should normally be approved prior to the expiration of the initial six-month period of delay, but delay may be ratified and extended after the initial six-month period provided that the request is approved within the statutory 18-month delay limit under reference (a), section 624(d) (4) or 1431 l(d).

He never received a paper copy or electronic copy of additional notification for a 12-Month extension from CNP and DC (M&RA), or their designees. This decision was made outside the 18-month maximum statutory time, which fully expired on 1 February 2022. The reviewing authorities in his case failed to consider his subsequent service at ESG-3 and MESG-2. This can be seen as an abuse of discretion. He submits that he made a mistake. He also submitted that he had been punished for this mistake. However, should this one mistake of 15 minutes undo 13 years of naval service to this country? Losing LCDR does not fit the punishment for this incident.

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He mistakenly thought a brief absence from the USS HOWARD, despite being CDO on 11 December 2019, to address his transportation needs would be permitted. Before leaving the ship to move his car, he advised the Section leader, the affected members of the crew and the Officer of the Deck on the Quarterdeck of his intentions and he took his radio along with my cellphone.

Date	CHRONOLOGY OF RELEVANT EVENTS
	Petitioner was selected for promotion to LCDR by the FY20 Active Duty Navy Lieutenant Commander Line Promotion List. His projected promotion date was 1 Aug 20
11 Dec 19	Petitioner was the CDO and left his position to move his vehicle and to get food from McDonald's.
16 Jan 20	The CNP notified Petitioner that his promotion was delayed due to a report of misconduct
17 Jan 20	Petitioner received NJP for violating Articles 86, 92, and 133. For leaving his appointed place of duty on 11 Dec 19 without permission and without relief to move his personal vehicle from one pier to the other. He was awarded a PLOR. His appeal was denied.

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29 Jul 20	The CDR, Destroyer Squadron NINE concurred with the recommendation for DFC. He also noted that Petitioner demonstrated poor and declining performance. Petitioner received a LOI in Sep 19, a verbal counseling from the CO in Oct 19, and then received a declining performance fitness report in Nov 19. Despite these attempts, Petitioner failed to respond with a noticeable effort. His poor judgment led to NJP.
14 Aug 20	The CDR, Carrier Strick Group ELEVEN issued a Report of NJP and Request for DFC. Recommended that the Deputy CNP approve the DFC and directed Petitioner to show cause.
16 Nov 20	The BOI unanimously found that the preponderance of evidence supported violations of Article 92 and 133, and voted that the misconduct does not warrant separation.
26 Nov 20	NPC approved the extension of Petitioner's promotion delay
14 Dec 20	Deputy CNP approved the DFC
1 Feb 20 to 31 Jan 21	Periodic/Regular report. Block 41 comment: this fitrep documents . . . NJP and DFC. Petitioner was found guilty of violating article 86, 92, and 1333 at CO's NJP, which became final on 1 May 2020. Petitioner was DFC by reason of misconduct and substandard performance over time effective 14 December 2020.

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17 Mar 22	CNO's Action Memo. Petitioner left the ship to attend to personal business while serving as CDO and informed no one. As an experienced surface warfare officer and department head his lack of professionalism is compounded by documented substandard performance prior to the incident. A promotion board should have the opportunity to consider his misconduct and DFC. As a result, he does not have the necessary trust and confidence to recommend promotion to LCDR.
26 Apr 22	SECNAV removed Petitioner from the promotion list
5 May 22	CDR, NPC notified Petitioner that his name was removed from the FY20 promotion list

**SUMMARY OF CASE/ AUTHORITIES:
BUPERSINST 1610.10F (EVALMAN), SECNAVEINST
1420.3, DODI 1320.14, AND 10 USC 14311**

Delay. The statutory action of postponing an officer's promotion when adverse or reportable information concerning the officer must be reviewed by the SECNAV to determine if the officer remains qualified for promotion in accordance with reference (a), section 624 or 14311. An officer's name remains on the board report and promotion list until the officer is either promoted or removed from the promotion list by proper authority or by operation of law.

Notification to Officer. The CNP or DC (M&RA), or their designees, and commanders and COs, shall initiate delay by written notification to the officer that explains the basis for the delay. Notification of delay should occur prior to the member's effective date of promotion.

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Ratification and 12-Month Extension. The CNP and DC (M&RA), or their designees, will approve requests, with supporting rationale, for any ratification and 12-month extension of an officer's promotion delay. Such requests should normally be approved prior to the expiration of the initial six-month period of delay, but delay may be ratified and extended after the initial six-month period provided that the request is approved within the statutory 18-month delay limit under reference (a), section 624(d) (4) or 14311(d).

Promotion Eligibility Period. The 18-month promotion eligibility period, may be extended by the SECDEF to a total period of 30 months. This promotion eligibility period is a significant staffing consideration in the case of an officer who is the subject of a withhold action and whose nomination requires the advice and consent of the Senate.

Action by SECNAV. Upon receipt of the individual promotion action, the SECNAV may either support the office's promotion by terminating the delay; remove the officer's name from an O-6 and below promotion list . . .

Removal by SECNAV. The SECNAV is delegated the authority to remove an officer's name from an O-6 and below promotion list.

When an ADL officer is nominated for promotion to the grade of O-4 or above, the nomination must receive the advice and consent of the Senate during the statutory promotion eligibility period, otherwise the officer's name will be removed from the promotion list by operation of law.

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24 Aug 22 – NPC memo 1610 PERS-32:

- The original report is on file. Petitioner signed the report and indicated that he did not intend to submit a statement.
- The EV ALMAN permits general commenting on misconduct whenever the facts are clearly established to the RS's satisfaction.
- Petitioner received NJP for violating of Article 86, 92, and 133 that concluded on 1 May 2020.
- The CO documents the NJP within the fitness report in which Petitioner was found guilty of misconduct and received punishment.
- Petitioner has to show that either there is no rational support for the RS's action or that the RS acted for an illegal or improper purpose. In this case, the CO found Petitioner guilty at NJP and imposed punishment.
- Nothing in the petition indicates the RS acted for illegal or improper purposes or that the fitness report lacks rational support.
- The evidence is insufficient to establish the existence of probable error or injustice concerning the fitness report.
- Recommend the Petitioner's record remain unchanged.

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4 Oct 22 – Office of Legal Counsel (BUPERS-00J):

- Petitioner failed to provide any evidence that a material error or an injustice occurred. His request for relief should be denied.
- The constitutional process provides the President with discretion in choosing whether to appoint an officer or promotion. There is no statute that can alter the President's discretionary authority by provided for automatic promotion, even after a delay in the promotion.
- Any delay that exceeds 18 months does not and cannot, by automatic consequence; result in the promotion of the service member.
- Officer promotions are discretionary and an officer does not have a right to promotion.
- The authority to promote an officer lies with the President. As such, Petitioner's argument fails. There is no material error or injustice.
- It is Department of Navy policy to ensure that officers recommended for promotion remain mentally, physically, morally, and professionally, qualified for promotion.
- As such, the SECNA V is delegated total authority to remove an officer's name from the 0-4 promotion list.

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- In this case, the CNO recommended Petitioner's removal, and the SECNAV carefully considered the adverse information, the CNO's justification, and Petitioner's lengthy statement.
- SECNA V was within his authority to remove Petitioner from the promotion list.
- There is no basis for relief.

ADVISORY OPINION (AO): Unfavorable

AO PROVIDED TO MBR: Yes/14 Oct 22

REBUTTAL RECD: NO

CONGRESSIONAL INTEREST: No

Board Date
12 Dec 22

Examiner Initials (SEA)

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THE ASSISTANT SECRETARY OF THE NAVY
(MANPOWER AND RESERVE AFFAIRS)
1000 NAVY PENTAGON
WASHINGTON, D.C. 20350-1000

ACTION MEMO

February 15, 2023

FOR: SECRETARY OF THE NAVY
UNSECNAV _____

FROM: Franklin R. Parker, Assistant Secretary of
the Navy (Manpower and Reserve Affairs)

SUBJECT: REVIEW OF NAVAL RECORD OF
LT ERNEST F. MITCHELL, USN,
[REDACTED]

- Mr. Secretary, this case is forwarded for your review and decision because the Subject sought review of your previous decision in his case. On 26 April 2022, you approved the recommendation of the Chief of Naval Operations (CNO) that the Subject's name be removed from the Fiscal Year (FY) 2020 Active-Duty Navy Lieutenant Commander (LCDR) (Line) promotion list.
- Pursuant to the provisions of Section 1552 of Title 10, U.S. Code, the Subject filed a DD Form 149 with the Board for Correction of Naval Records [hereinafter referred to as the Board] requesting that your decision be reversed and that he be promoted to LCDR with an effective date of

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rank of 1 August 2020. He also requested the removal from his naval record of all references to his detachment for cause (DFC) from the U.S.S. HOWARD, to include the adverse fitness report (FITREP) that he received for the reporting period 1 February 2020 to 31 January 2021 which documented that DFC.

- The Subject was among the officers selected for promotion by the FY 2020 Active-Duty Navy LCDR (Line) Promotion Selection Board, the results of which were announced on 23 August 2019. His projected promotion date pursuant to this selection was 1 August 2020. On 11 December 2019, the Subject was assigned as the Command Duty Officer (CDO) on-board the U.S.S. HOWARD on the day prior to a scheduled sailing. While performing this duty as the ship was undergoing evolutions in preparation for departure on the following day, the Subject disembarked the ship without authority and without informing the command of his intended absence in order to move his personal vehicle to a parking spot closer to the pier at which the ship was scheduled to dock upon its return to port. His motivation for doing so was his realization that the walk from that pier to his vehicle's parking spot at the time would jeopardize his ability to make the flight that he had booked for the evening of the ship's return to port. To accomplish this task, Petitioner had the U.S.S. HOWARD duty driver, an E-3, follow him in a Government vehicle. Upon relocating his personal vehicle, the Subject had the duty driver take him to McDonalds to pick up food. He originally asked

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the driver to pull through the drive-thru lane, but ultimately had the driver park the Government vehicle after being informed by the driver that he could not take the Government vehicle through the drive-thru lane. Prior to this incident, the Subject had received a Letter of Instruction and verbal counseling for various performance deficiencies in September and October 2019 respectively.

- On 16 January 2020, the Subject's 1 August 2020 promotion was delayed pending resolution and review of the adverse information pertaining to the events of 11 December 2019. On 17 January 2020, he received nonjudicial punishment (NJP), through which he was issued a punitive letter of reprimand (PLOR). His appeal of this NJP, on both substantive and legal grounds, was subsequently denied. After the NJP was finalized, the U.S.S. HOWARD commander forwarded it for filing with a request that the Subject be DFC and the recommendation that the Subject's name be removed from the FY 2020 Active-Duty Navy LCDR (Line) promotion list but that he not be required to show cause for retention in the naval service. Despite this recommendation, the Show Cause Authority directed that the Subject be required to show cause for retention. The Board of Inquiry (BOI) convened for this purpose subsequently substantiated the misconduct alleged against the Subject, but unsubstantiated the allegation of substandard performance of duty and recommended his retention.
- Upon conclusion of the BOI, the DFC request was approved and the Subject submitted his response

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to the promotion delay and potential removal of his name from the promotion list, requesting that he be promoted to LCDR pursuant to his selection by the FY 2020 Active-Duty Navy LCDR (Line) PSB. In this response, he admitted to his “error in judgment” on 11 December 2019, and claimed to have learned from it. He also cited to the BOI findings, and suggested that this single isolated error should not deprive him of promotion given the totality of his naval service. This response was forwarded through the command for endorsements with the U.S.S. HOWARD commander continuing to recommend the Subject’s removal from the promotion list, and with the Expeditionary Strike Group Three (ESG-3) commander, under whom the Subject had been temporarily assigned since his NJP, recommending the Subject’s promotion based upon his own observation of the Subject’s performance. On 26 April 2022, you approved the CNO’s recommendation to remove the Subject’s name from the FY 2020 Active-Duty Navy LCDR (Line) promotion list.

- The Subject submitted his current application to the Board on 13 July 2022, less than three months after you acted to remove his name from the promotion list. He asserts errors/injustices in both his removal from the promotion list and his DFC, with his primary complaint being that these actions were not warranted by his misconduct. He also raises concerns with the timeliness of your action, and procedural and substantive errors in the DFC action.

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- The Board reviewed the Subject's allegations of error or injustice on 12 December 2022, and determined that no relief is warranted. In doing so, the Board addressed each the Subject's contentions in detail (TAB A), finding that the Subject minimizes the severity of his misconduct and that the consequences were, in fact, warranted. Although the Subject was correct that the period of his promotion delay exceeded that permitted by law and regulation, the Board found that the expiration of that authorized period of delay does not trigger an automatic promotion and that equitable relief is not warranted on this basis. The Board also found no error in the process by which the Subject was DFC from the U.S.S. HOWARD, nor in the substance upon which that action was taken.
- Docket No. 5320-22 supporting documentation is contained in TAB B.

RECOMMENDATION: SECNAV sign BCNR Docket No. 5320-22 (TAB A).

COORDINATION: TAB C

Attachments: As stated

Prepared by: Franklin R. Parker, ASN (M&RA),
(703) 692-6162

**APPENDIX D — CONSTITUTIONAL STATUTORY
PROVISIONS INVOLVED**

10 U.S.C. § 624 – Promotions: how made

(a)

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

(2) Except as provided in subsection (d), officers on a promotion list for a competitive category shall be promoted to the next higher grade when additional officers in that grade and competitive category are needed. Promotions shall be made in the order in which the names of officers appear on the promotion list and after officers previously selected for promotion in that competitive category have been promoted. Officers to be promoted to the grade of first lieutenant or lieutenant (junior grade) shall be promoted in

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accordance with regulations prescribed by the Secretary concerned.

(3)

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

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

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

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

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

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

(E) If the Secretary of the military department concerned determines that one or more officers or former officers were not placed on an all-fully-qualified-list under this paragraph because of administrative error, the Secretary may prepare a supplemental all-fully-qualified-officers list containing the names of any such officers for approval in accordance with this paragraph.

(b)

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

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

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(c) Appointments under this section shall be made by the President, by and with the advice and consent of the Senate, except that appointments under this section in the grade of first lieutenant or captain, in the case of officers of the Army, Air Force, Marine Corps, or Space Force, or lieutenant (junior grade) or lieutenant, in the case of officers of the Navy, shall be made by the President alone.

(d)

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

(A) sworn charges against the officer have been received by an officer exercising general court-martial jurisdiction over the officer and such charges have not been disposed of;

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

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

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

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

(F) the Secretary of the military department concerned determines that credible information of an adverse nature, including a substantiated adverse finding or conclusion described in section 615(a)(3)(A) of this title, with respect to the officer will result in the convening of a special selection review board under section 628a of this title to review the officer and recommend whether the recommendation for promotion of the officer should be sustained.

If no disciplinary action is taken against the officer, if the charges against the officer are withdrawn or dismissed, if the officer is not ordered removed from active duty by the Secretary concerned under chapter 60 of this title, if the officer is acquitted of the charges brought against him, or if, after a review of substantiated adverse information about the officer regarding the requirement for exemplary conduct set forth in section 7233, 8167, or 9233 of this title, as applicable, the officer is determined to be among the officers best qualified for promotion, as the case may be, then unless

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action to delay an appointment has also been taken under paragraph (2) the officer shall be retained on the promotion list (including an approved all-fully-qualified-officers list, if applicable) and shall, upon promotion to the next higher grade, have the same date of rank, the same effective date for the pay and allowances of the grade to which promoted, and the same position on the active-duty list as he would have had if no delay had intervened, unless the Secretary concerned determines that the officer was unqualified for promotion for any part of the delay. If the Secretary makes such a determination, the Secretary may adjust such date of rank, effective date of pay and allowances, and position on the active-duty list as the Secretary considers appropriate under the circumstances.

(2) Under regulations prescribed by the Secretary of Defense, the appointment of an officer under this section may also be delayed in any case in which there is cause to believe that the officer has not met the requirement for exemplary conduct set forth in section 7233, 8167, or 9233 of this title, as applicable, or is mentally, physically, morally, or professionally unqualified to perform the duties of the grade for which he was selected for promotion. If it is later determined by a civilian official of the Department of Defense (not below the level of Secretary of a military

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department) that the officer is qualified for promotion to such grade and, after a review of adverse information regarding the requirement for exemplary conduct set forth in section 7233, 8167, or 9233 of this title, as applicable, the officer is determined to be among the officers best qualified for promotion to such grade, the officer shall be retained on the promotion list (including an approved all-fully-qualified-officers list, if applicable) and shall, upon such promotion, have the same date of rank, the same effective date for pay and allowances in the higher grade to which appointed, and the same position on the active-duty list as he would have had if no delay had intervened, unless the Secretary concerned determines that the officer was unqualified for promotion for any part of the delay. If the Secretary makes such a determination, the Secretary may adjust such date of rank, effective date of pay and allowances, and position on the active-duty list as the Secretary considers appropriate under the circumstances.

(3) In the case of an officer whose promotion is delayed pursuant to paragraph (1)(F) and whose recommendation for promotion is sustained, authorities for the promotion of the officer are specified in section 628a(f) of this title.

(4)

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(A) Except as provided in subparagraph (B), the appointment of an officer may not be delayed under this subsection unless the officer has been given written notice of the grounds for the delay, unless it is impracticable to give such written notice before the effective date of the appointment, in which case such written notice shall be given as soon as practicable. An officer whose promotion has been delayed under this subsection shall be afforded an opportunity to make a written statement to the Secretary concerned in response to the action taken. Any such statement shall be given careful consideration by the Secretary.

(B) In the case of an officer whose promotion is delayed pursuant to paragraph (1)(F), requirements applicable to notice and opportunity for response to such delay are specified in section 628a(c)(3) of this title.

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

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than 18 months after the date on which such officer would otherwise have been appointed, whichever is later.

(e) Notwithstanding subsection (a)(2), in the case of an officer who is selected for promotion by a selection board convened under this chapter, and prior to the placement of the officer's name on the applicable promotion list as approved for transfer to the reserve active-status list of the same or a different armed force, the Secretary concerned may place the officer's name on a corresponding promotion list on the reserve active-status list without regard to the officer's competitive category. An officer's promotion under this subsection shall be made pursuant to section 14308 of this title.

(f) Notwithstanding subsection (a)(3), in the case of an officer who is placed on an all-fully-qualified-officers list, and is subsequently approved for transfer to the reserve active-status list, the Secretary concerned may place the officer's name on an appropriate all-fully-qualified-officers list on the reserve active-status list. An officer's promotion under this subsection shall be made pursuant to section 14308 of this title.

(Added Pub. L. 96 -513, title I, § 105, Dec. 12, 1980, 94 Stat. 2857; amended Pub. L. 97 -22, § 4(d), July 10, 1981, 95 Stat. 126; Pub. L. 97 -295, § 1(8), Oct. 12, 1982, 96 Stat. 1289; Pub. L. 98 -525, title V, § 526, Oct. 19, 1984, 98 Stat. 2525; Pub. L. 107 -107, div. A, title V, § 505(a)(1), (c)(2)(A),

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(d)(1), Dec. 28, 2001, 115 Stat. 1085, 1087, 1088; Pub. L. 107 -314, div. A, title X, § 1062(a)(2), Dec. 2, 2002, 116 Stat. 2649; Pub. L. 109 -364, div. A, title V, § 511(a), (d)(1), Oct. 17, 2006, 120 Stat. 2181, 2183; Pub. L. 110 -181, div. A, title X, § 1063(c)(3), Jan. 28, 2008, 122 Stat. 322; Pub. L. 114 -92, div. A, title V, § 502(a), Nov. 25, 2015, 129 Stat. 806; Pub. L. 115 -232, div. A, title V, § 504(c), title VIII, § 809(a), Aug. 13, 2018, 132 Stat. 1742, 1840; Pub. L. 116 -283, div. A, title V, § 505(a)(3), title IX, § 924(b)(3)(G), Jan. 1, 2021, 134 Stat. 3568, 3821; Pub. L. 118-31, div. A, title V, § 503(b)(1), Dec. 22, 2023, 137 Stat. 241; Pub. L. 118-159, div. A, title XVII, § 1701(a)(14), Dec. 23, 2024, 138 Stat. 2203.)