RECORD OF PROCEEDINGS
AIR FORCE BOARD FOR CORRECTION OF MILITARY RECORDS

IN THE MATTER OF: [redacted]

DOCKET NUMBER: **93-00015**

COUNSEL [redacted]

HEARING DESIRED: Yes

MAY 23 1994

APPLICANT REQUESTS THAT:

1. He be reinstated into active duty in the grade of major, with all back pay and allowances; all records of his duty status and date of rank be corrected to reflect continuous, uninterrupted service on active duty; and all personnel records similarly corrected to reflect the hiatus in his service to read, "on special academic and legal training duty for the convenience of the Government."

2. He be promoted to the grade of lieutenant colonel by the Calendar Year **1989** Central Lieutenant Colonel Selection Board, effective and with date of rank 1 September **1989.**

3. Any Officer Effectiveness Reports (OERs) reflecting administrative board action between **1989** and **1991,** be voided and removed from his records.

4. He be assigned in the air operations field remote from his recent oppressors and well-suited to his training and experience in which he will be able to compete for promotion fairly and without hindrance.

APPLICANT CONTENDS THAT:

The Board of Inquiry (BOI) that resulted in his discharge, violated numerous provisions of the US Constitution, the Uniform Code of Military Justice (UCMJ), the Manual for Court-Martials, and the governing Air Force regulation (AFR 36-2).

The applicant states that on 12 June **1989,** he was accused of a military crime (making a false official statement) by Col L and interrogated without first being warned of his Article 31 rights. Col L also attempted to strike a "plea-bargain" with him whereby his confession would be accepted in return for a promise of silence. In addition, for a period of two weeks or more, Col L illegally and oppressively withheld and delayed the military due process to which he was entitled. Col L played detective with the charge by investigating it personally, a task for which he

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lacked the requisite training and authority. By so doing, the applicant believes Col L disobeyed the precepts of the UCMJ and MCM which require that suspicions/charges be reduced to writing and a copy served upon the accused.

He also states that the commander was aware of the accusations against him and failed to drop the charges or take appropriate action in accordance with the UCMJ and MCM. In this respect, he notes that the commander neglected to have the charges reduced to writing on Charge Sheets and have them sworn by the accuser. In addition, the commander did not advise him that he was under criminal charges, and the nature and specifications of the charges. He states that the commander adopted the accusations of Col L on the basis of unsworn testimony, and took action to withhold his promotion to lieutenant colonel, thereby denying him of his deserved promotion and his right to the presumption of innocence until proved guilty beyond a reasonable doubt in a competent court of law. He feels he was deprived of equal protection of the laws by referring his case to an administrative forum with its less protective regulations and procedures, rather than to a criminal forum (i.e., court-martial) with its far more protective laws and procedures.

In support of his appeal, the applicant has provided a copy of a special order indicating that he participated in the "Third Lieutenant" program while at the Air Force Academy and flew F-105s. He has also provided an order which assigned him from [redacted] AFB to [redacted] AFB which indicates that a distribution copy was provided to [redacted] AFB.

The applicant's complete submission is attached at Exhibit A.

STATEMENT OF FACTS:

While an Air Force Academy Cadet, Special order [redacted], dated 16 April **1971**, assigned the applicant temporary duty (TDY) to [redacted] AFB as an Assistant Squadron Operations Officer, F-105 for 21 day

Upon graduation from the Air Force Academy, the applicant was commissioned a second lieutenant in the Regular Air Force and entered active duty on 6 June **1973**.

He was assigned to the Air Force Element US Atlantic Command (USLANTCOM) on 17 January **1987**.

On 24 July **1989**, the Deputy Inspector General, USLANTCOM (Col L) provided information to the Air Force Office of Special Investigations (AFOSI), indicating that the applicant made erroneous statements concerning his flying experience and altered his personnel records to substantiate his exaggerated claims.

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Based on this information, the Commander, AFOSI District 4, Andrews AFB initiated an investigation.

On 21 August 1989, Col L provided the AFOSI further information indicating he had a conversation with Col S who told him that the applicant's Promotion Recommendation Form (PRF) had been based on information provided by the applicant and he (Col S) was 75% certain he had seen OERs with F-105 flying time reflected on them.

The applicant was selected for promotion to the grade of lieutenant colonel by the CY89 Lt Col board; however, the commander delayed his promotion for a period of six months from the promotion effective date (1 September 1989). The commander indicated the reason for this action was that he had reason to believe that the applicant was not professionally qualified to perform the duties of a lieutenant colonel. Specifically, that he altered a public record, his Unit Personnel Record Group.

On 24 October 1989, the commander requested the applicant's reassignment from AFELM USLANTCOM to the 1st Tactical Fight Wing, Langley AFB, for the purpose of initiating AFR 36-2 discharge action. The request was approved and he was reassigned.

AFOSI completed their investigation on 21 November 1989. The Report of Investigation indicates that in February or March 1989, prior to the Lt Col promotion board, the applicant requested access to his record in order to replace OERs which he stated were missing. Witnesses stated his record was later found to contain OERs which reflected duty inconsistent with his permanent military records, including time as an F-105 pilot. Applicant was made aware of these OERs, and on 14 June 1989 was found to have been alone with his records; after which the OERs in question were missing, with the exception of two OERs for the same time period.

On 6 December 1989, he was notified that action had been initiated under AFR 36-2 for serious or recurring misconduct punishable by military or civilian authorities and intentional misrepresentation of facts in officials statements and records. Specifically, that he altered one or more OPRs to indicate that he had fighter pilot experience in the F-105 aircraft and made false official statements misrepresenting his flying experience. The commander specific reasons for the action were as follows:

a. The applicant wrongfully altered one or more OERs to indicate that he had fighter pilot experience in the F-105 aircraft and service at Beale AFB, as well as currency in the T-38A aircraft. These altercations were made with the intent to deceive all those reviewing his OER records.

b. He did make false official statements on diverse occasions misrepresenting his flying experience by professing to be a F-105 pilot to various supervisory personnel and others.

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Specifically, during the period of August 1987 to May 1989, he falsely stated to Col S, his supervisor at the time, that he was a qualified F-105 pilot.

c. He falsely stated to Col L, his supervisor at the time, that he had F-105 pilot experience while assigned to George AFB.

d. He further misrepresented his flying experience to Col S, by stating that he had flown the F-105 "Wild Weasel" at George AFB.

e. He falsely stated to Col S that he received his F-105 checkout at Nellis AFB and completed the USAF Fight Weapons Instructor Course.

f. He falsely stated to Col L that some of his over 1,000 hours of KC-135 flying time should be F-105 time and that he flew F-105s for a number of months before entering KC-135 training.

g. On 1 September 1989, he submitted a statement in response to a Propriety of Promotion Action, in which he falsely states that he flew in the rear seat of the F-105G/F aircraft while at George AFB on TDY status during a period from late August 1974 through mid-October 1974.

After consulting with military counsel, on 12 January 1990, he tendered his resignation in lieu of further action under AFR 36-2. The major air command recommended acceptance of his resignation; however, on 14 March 1990, the Secretary of the Air Force declined to accept his resignation.

On 9 April 1990, he was notified that action was being initiated to discharge him under the provisions of AFR 36-2 and that a board of officers had determined that he be required to show cause for retention in the Air Force. He acknowledged receipt and requested his case be processed under AFR 36-2, indicating that he desired to appear before a Board of Inquiry (BOI).

A BOI convened from 30 May 1990 to 2 June 1990, and recommended that he be removed from active duty with a general discharge. The board found that he engaged in misconduct in that he:

a. Did wrongfully alter one or more OERs to indicate that he had fighter pilot experience in the F-105 aircraft. This alteration was made with intent to deceive all those reviewing the OERs.

b. Did alter an OER to indicate service at Beale AFB as well as to indicate currency in the T-38A aircraft. This alteration was made with intent to deceive all those reviewing the OERs.

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c. Did make false statements on divers occasions misrepresenting his flying experience by professing to be an F-105 pilot to various supervisory personnel.

On 17 January 1991, the case was found legally sufficient to support the recommendation of the BOI and was forwarded to the Air Force Board of Review.

On 10 April 1991, the Secretary of the Air Force directed that he be removed from active duty and issued a general discharge.

He was discharged under the provisions of AFR 36-12 (Involuntary Discharge: Misconduct, Moral, or Professional Dereliction; Serious or Recurring Misconduct) with a general discharge. He completed 17 years, 10 months and 14 days of active service.

His performance profile since 1979, follows:

PERIOD ENDING	EVALUATION OF POTENTIAL
6 Oct 79	1-1-1
17 Aug 80	1-1-1
17 Aug 81	1-1-1
1 Jul 82	1-1-1
30 Jan 83	1-1-1
30 Jan 84	1-1-1
30 Aug 84	1-1-1
30 Aug 85	1-1-1
28 May 86	1-1-1
16 Jan 87	Training Report (TR)
16 Oct 87	1-1-1
* 16 Oct 88	Meets Standards
1 May 89	Meets Standards
4 Sep 89	Meets Standards

* Top report reviewed by the CY89 Lt Col board.

AIR STAFF EVALUATION:

The Chief, Separations Branch, AFMPC/DPMARS, reviewed the application and states that there is little, if any, new information submitted in the applicant's request. In this respect, they note that the arguments presented were generally presented earlier, either during the BOI or in the member's counsel's lengthy affidavit appended to the BOI proceedings forwarded to the Board of Review. They defer those arguments concerning the legality of the commander's actions to AFMPC/JA. They can conclude, based on their experience with hundreds of officer discharge cases from across the Air Force, that the characterization of discharge applicant received, based on the reasons for discharge and substantiation in the case, was consistent with other similar cases. They have reviewed the

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proceedings of the BOI and resulting discharge action. The state that the board was properly constituted and the evidence of record indicates no inequity or impropriety to the process. They note that applicant's discharge was accomplished in accordance with the regulations in effect at the time. Therefore, they recommend denial of the request.

A complete copy of the Air Staff evaluation is attached at Exhibit C.

The Acting Chief, Promotion Division, AFMPC/DPMAJ, reviewed the application and notes that the applicant's promotion potential has been aptly demonstrated as evidenced by his original selection. They state that this causes them to discern there should be no reason to deny the promotion should subsequent facts reveal the original withholding action and the entirety of his discharge process were unjust and a nullity. Furthermore, if declared unjust, they would not object to placement of an AF Form 77 in the record to reflect, "No report available for period 5 September 1989 through (yet to be determined). Officer restored to active duty by direction of the Secretary of the Air Force under 31-3, Air Force Board for Correction of Military Records." They note that this statement is as prescribed by paragraph 2-24g, AFR 35-44, 11 October 1991. Only two Officer Performance Reports (OPRs), closing 1 May 1989 and 4 September 1989, equate to the period specified. They note that each is complimentary in words and ratings -- neither of the two contain a reference to the contested administrative board action. Without an invalidation of the facts of record and the applicant's complete exoneration, they recommend denial of his requests.

A complete copy of the Air Staff evaluation is attached at Exhibit D.

The Assignment Procedures Advisor, AFMPC/DPMRPP2, reviewed the application and states that if the decision is made to overturn the applicant's separation, then it would be appropriate that he be assigned based on his qualifications and eligibility for specific assignments at that time and consistent with the needs of the Air Force. They note that if the separation is overturned, it cannot be assured an assignment could be made, at that time, which would accomplish all of the stipulations of the application. In this respect, they note that changes in military personnel management concepts, structure changes Air Force-wide and other variables could limit which elements of the application could be fulfilled. However, every reasonable effort would be made to meet as many of the stipulations as possible.

A complete copy of the Air Staff evaluation is attached at Exhibit E.

The Acting Staff Judge Advocate, AFMPC/JA, reviewed the application and states that despite the applicant's counsel's

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contention that the applicant was "charged" with the commission of three military crimes, criminal charges within the meaning of the UCMJ were never preferred against the applicant. As a result, the steps in the criminal justice system which applicant claims were violated were never applicable to his case. Furthermore, the commander was under no obligation to prefer court-martial charges. In this respect, they note that the Manual for Court-Martials (MCM) provides that administrative separation is a perfectly appropriate alternative disposition of an offense in certain circumstances. They state that the Board of Inquiry (BOI) and discharge were fully conducted in accordance with all applicable authorities. It is their opinion that applicant has failed to present material evidence of any error or injustice. Therefore, they recommend denial of his request.

A complete copy of the Air Staff evaluation is attached at Exhibit F.

APPLICANT'S REVIEW OF AIR STAFF EVALUATION:

The applicant's counsel reviewed the Air Staff evaluations and states that the applicant was unfairly, unjustly and illegally deprived by the dereliction of his superiors of the only two provisions of military due process that could have saved the applicant and his family from all the degradation, misery and hardship they have undergone. In this respect, counsel notes that applicant was deprived effective assistance of competent counsel and processing of his case according to Article 31 of the UCMJ. Counsel notes that this would have provided, at the earliest possible stage, an Article **32** Investigation which would have developed the evidence required to defend him.

Counsel contends that the BOI was unfairly and unlawfully organized, conducted and adjudicated, and that the interest of justice requires that its findings and sentence be overturned and set aside, and that the applicant be provided the requested relief. In this respect, he notes that AFR **36-2**, paragraph **3-3**, emphasizes that the regulation governs administrative and not criminal offenses, prohibiting its use as a substitute for action under the UCMJ. Counsel also contends that the applicant was not provided the proper notification letter of the BOI action, as required by regulation. In addition in cases involving misconduct that usually would be within the purview of UCMJ a letter indicating what disciplinary or punitive action was taken or the reason why such action was not considered proper is forwarded to the MAJCOM, AFMPC and servicing CBPO. However, this was not done. Counsel states that had the letter been properly transmitted, it possibly would have put higher headquarters on notice that something was going on. It would have told higher headquarters that one of their nits was preparing to "board" one of its officers out of the service for commission of serious military crimes.

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Counsel states that the evidence accepted by the BOI proved that the applicant was in the top 5-10 percent of eligibles for promotion, and that all he had to do was "to keep his nose clean" until the promotion board met, and he would be promoted. In addition, from the documents and testimony received, it was proved that he was an exceptionally intelligent young officer with a brilliant record who certainly did not need to lie in order to get promoted. The evidence accepted by the BOI also proved that all of those who knew him and who had ever had any experience with him were convinced that he was simply constitutionally incapable of indulging in such stupidity. By evaluating the evidence of the BOI by is preponderance and weight, counsel believes that it proves that it was very unlikely that the applicant committed any of the offenses. Counsel states that there is no direct or real evidence that the applicant committed the offenses. However, he feels the evidence does show that Col L had the run of the Langley AFB Consolidated Base Personnel Office (CBPO) and that custodial control of officer records was deficient to non-existent. Counsel states that while the BOI determined the OER was fabricated, it did not prove that it was a fabrication of the applicant or was inserted into his records. Counsel notes that the only evidence against the applicant was obtained by Col L.

In regard to Col L's motives for manipulating the applicant's case, applicant's counsel notes that the applicant became involved in the so-called SR-71 controversy. In this respect, he notes that during his tenure as an aerial reconnaissance specialist at HQ USCINCLANT, the USAF Chief of Staff had identified the SR-71 as a prime candidate for early retirement, his theory being that all the jobs which the SR-71 was doing could just as well be done by other, newer, less-expensive-to-operate, recce platforms. Thus, SR-71 operations were cut back and supplanted by those of other recce machines. However, when the imagery from these replacement vehicles was received, it was considerably inferior to those of the SR-71. Therefore, the Commander USLANTCOM began requesting a return of the SR-71, and various USAF staff deputations began to arrive, all aiming to talk the admirals out of it. At these meetings the admirals required the applicant to sit adjacent to them for ready consultation. During these sessions, the applicant was often observed by the visiting USAF officials to be whispering with the admirals, presumably providing them with ammunition to fire back at the USAF. Counsel contends that applicant failure to "roll over and play dead" regarding the SR-71 issue reached the Pentagon, and that Col L's actions may have been the end result.

Concerning fairness to the applicant, counsel notes that his case was delayed by Col L so that he could "play detective", rather than turning it over immediately to the local military criminal investigation authorities. Furthermore, his demand for trial by court-martial was rejected by the legal advisor and he was tried by an administrative "fact finding" board. Counsel contends that

not only did the BOI lack jurisdiction, they were incapable of conducting such hearing fairly, justly, and professionally. In this respect, counsel notes that members of the BOI were all appointed from the Commander TAC's staff, all of whom were closely associate with the accuser. Counsel states that the state of mind of the board - obviously strongly under improper command influence - can best be adjudged from the exclamation of its senior member when instructed by the recorder "that burden of the proof to show that the Respondent should not remain in the Service is upon the Government", he turned to the legal advisor in obvious astonishment and asked, "Is that correct?".

Counsel's complete response, with attachment, is attached at Exhibit H.

THE BOARD CONCLUDES THAT:

1. The applicant has exhausted all remedies provided by existing law or regulations.

2. The application was timely filed.

3. Insufficient relevant evidence has been presented to demonstrate the existence of probable error or injustice. After thoroughly reviewing the evidence of record and noting the applicant's contentions, we are not persuaded that he has been the victim of an error or injustice. In this respect, we note the following:

a. The applicant contends that the BOI that resulted in his discharge, violated numerous provisions of the US Constitution, the UCMJ, the MCM, and AFR 36-2. In addition, he contends he was denied the effective assistance of counsel throughout the discharge process and that the discharge process itself was legally flawed. We disagree. In this respect, we note that criminal charges within the meaning of the UCMJ were never preferred against the applicant. As such, the steps in the criminal justice system which he claims were violated were never applicable to his case. We do not believe an error occurred by virtue of the fact that the allegations against him were never preferred as criminal charges. To the contrary, under the UCMJ and MCM, the preferral of criminal charges would never be appropriate until after the preliminary inquiry is completed and a commander were to determine that trial by court-martial rather than some other less severe disposition was appropriate. Based on the evidence of record, it appears this requirement was complied with. Furthermore, we do not believe he was treated unlawfully by his case having resulted in an AFR 36-2 discharge rather than a prosecution by court-martial.

b. The applicant contends that he should have been advised of his rights during the 12 June 1989 meeting, and that Col L

unlawfully attempted a plea bargain. We believe there was no rights advisement necessary at that time the meeting began because he was not suspected of any criminal wrongdoing. Based on the evidence of record, it appears Col L appropriately interrupted the meeting when he determined it was necessary to advise the applicant of his rights under Article 31. Consequently, we do not believe a violation of law or his rights occurred during this meeting.

c. In regard to his contention that due process was oppressively withheld and delayed, we note that the rights to which he contends he was deprived do not apply to administrative proceedings. As indicated above, he was not charged with a criminal offense, and we believe no error occurred by virtue of the fact that the allegations against him were never preferred as criminal charges.

d. He contends that Air Force officials tried to separate him with a "plea bargain discharge"; however, we find insufficient evidence has been presented to support this contention. We note that he was properly notified that administrative discharge action had been initiated against him under AFR 36-2 and was advised of the basis for the action and his rights. His allegations were considered by a properly constituted BOI and the BOI recommended he be removed from active duty with a general discharge. Based on the BOI's recommendation, the Secretary approved his discharge. Based on the evidence of record, we believe the applicant's discharge was accomplished in accordance with the regulations in effect at that time and find no inequity or impropriety in the processing his discharge. Therefore, in the absence of evidence to the contrary, we find no basis to overturn their recommendation and the decision of the Secretary.

e. He states the action taken against him was due to his assignment to a senior Navy official during a period of debate between Air Force and Navy officials regarding the reduction of SR-71 requirements. In support of this contention, he has provided a copy of a news article, SR-71 Retirement: DoD Mistake. While the article does indicate there was considerable debate between Air Force and Navy officials regarding the retirement of the SR-71, it does not substantiate that Air Force officials plotted to remove him from the Air Force due to his duties while assigned to a senior Navy official. Therefore, in the absence of evidence to the contrary, we find no compelling basis to recommend granting the relief sought in this application.

4. The applicant's case is adequately documented and it has not been shown that a personal appearance with or without counsel will materially add to our understanding of the issue(s) involved. Therefore, the request for a hearing is not favorably considered.

ADDENDUM TO
RECORD OF PROCEEDINGS
AIR FORCE BOARD FOR CORRECTION OF MILITARY RECORDS

AUG 04 1998

IN THE MATTER OF: [redacted]

DOCKET NUMBER: 93-00015

COUNSEL: [redacted]

HEARING DESIRED: YES

RESUME OF CASE:

In an application, dated 29 July 1992, the applicant requested the following:

a. He be reinstated into active duty in the grade of major, with all back pay and allowances; all records of his duty status and date of rank be corrected to reflect continuous, uninterrupted service on active duty; and all personnel records similarly corrected to reflect the hiatus in his service to read, "on special academic and legal training duty for the convenience of the Government."

b. He be promoted to the grade of lieutenant colonel by the Calendar Year 1989 (CY89) Central Lieutenant Colonel Selection Board, effective and with date of rank of 1 September 1989.

c. Any Officer Effectiveness Reports (OERs) reflecting administrative board action between 1989 and 1991, be voided and removed from his records.

d. He be assigned in the air operations field remote from his recent oppressors and well-suited to his training and experience in which he will be able to compete for promotion fairly and without hindrance.

On 19 April 1994, the Board considered his request in Executive Session and was not persuaded that he had been the victim of an error or injustice. A complete copy of the Record of Proceedings containing applicant's contentions and the Board's findings is attached at Exhibit I.

In a letter, dated 7 April 1997, the applicant's counsel requested de novo consideration of the application and amended applicant's requests to include the following:

a. The Officer Effectiveness Reports (OERs) rendered for the periods 17 October 1988 through 1 May 1989, and 2 May 1989 through 4 September 1989, be declared void and removed from his records.

b. Voiding his 19 April 1991 discharge from the Air Force.

c. Retroactive restoration to active duty in a commissioned status, effective 19 April 1991.

d. His records be corrected to show that he continuously served on active duty in a commissioned status from 19 April 1991 to 5 June 1993.

e. He was promoted to the grade of lieutenant colonel, effective 1 September 1989, and served on active duty in that grade from 1 September 1989 to 5 June 1993.

f. He was retired in the grade lieutenant colonel on 6 June 1993 by reason of years of service.

g. Voiding and expunging his records of any and all documentation relating to the administrative discharge proceedings; the promotion propriety actions taken to delay his promotion to lieutenant colonel and to remove him from the list of officers selected for promotion by the CY89 Central Lieutenant Colonel Selection Board; the 6 September 1989 revocation of his SCI clearance; and his tendering of resignation on 12 January 1990.

h. A nonprejudicial statement be placed in his records indicating that he was not rated during the period 19 April 1991 to 5 June 1993.

i. Such other and/or further relief as may be deemed necessary and/or appropriate in order to accord applicant full and complete relief including, but not limited to, the payment of any pay and allowances due as a result of the correction to his records.

Counsel's complete submission is attached at Exhibit J.

THE BOARD CONCLUDES THAT:

1. Insufficient evidence has been presented to demonstrate the existence of a probable error or an injustice warranting favorable action on the applicant's request that we vacate the prior decision in this case and consider his amended application de novo. Counsel submits that:

a. The Board's denial of relief on 19 April 1994 was legally objectionable in that the panel of the Board that adjudicated applicant's basic application was improperly constituted by reason of Walter A. Willson, Esquire, Assistant General Counsel, Department of the Air Force, having served as a voting.member of the Board panel. The impropriety of this

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individual's having served as a voting member of the Board panel is readily demonstrated and proven by the elements of the documentation being submitted with this brief.

b. In his letter to applicant, dated 28 January 1991, the Director, Secretary of the Air Force Personnel Council (SAFPC), advised applicant, in pertinent part, that if the Air Force Board of Review (AFBR) concluded that applicant should not be retained on active duty that the SAFPC would send the entire record and allied documentation "through the Air Force General Counsel to the Deputy for Air Force Review Boards..."

c. On 15 April 1996 he requested information and documentation from the OGC relating to applicant including, but not limited to, "any review(s) and/or advisory opinion(s) conducted and/or rendered by the [OGC] in connection with the processing of [AFR] 36-2 proceedings relating to [applicant], as referred to in the SAFPC Director's letter of 28 January 1991, or to the subsequent adjudication of [applicant's] application for correction of military records (Docket No. 93-00015". Counsel's request for information and documentation from the OGC was addressed in letters dated 8 August 1996 and 18 November 1996,

d. In the OGC's 8 August 1996 letter he was advised that a "search of the files of the [OGC] had found the following records pertaining to [applicant]: two memoranda to the General Counsel, dated February 19, 1991, and signed by Mr. Barret E. Kean, an attorney in that office, and a memorandum to the Deputy for Air Force Review Boards (SAF/MIB), dated March 17, 1991 and signed by Mr. Kean." The OGC asserted that these memoranda were not releasable to applicant in that they were, among other things, privileged communications. The claims of privilege were restated by the OGC in its letter of 18 November 1996.

e. Review of the August 1993 and December 1994 issues of the Department of Defense Telephone Directors shows, in pertinent part, that the attorney in question was serving as Assistant General Counsel for Civilian Personnel and Fiscal Law in the OGC during the August 1993 to December 1994 time interval, In this regard, the attorney, as a member of the staff of the OGC, would have or could have had access to the ex parte February and March 1991 memoranda cited in the OGC's 8 August 1996 letter which, in turn, would have or could have "impacted" on his ability to serve as a member of the Board's panel on an impartial or objective basis. In this frame of reference it is self-evident that this attorney should have recused himself from serving as a member of the 19 April 1994 panel of the Board.

We disagree. The Office of The General Counsel performs many different legal functions and is responsible for providing legal advice on a wide variety of subjects. Among those functions are advice to the AFBCMR on individual cases, and on FOIA matters. That office also reviews all FOIA appeals. These functions, however, are performed in different offices within the large

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General Counsel organization. The member counsel takes exception to considering his client's case had the responsibility within SAF/GC for, among other things, reviewing and deciding FOIA appeals. When he recognized that a FOIA appeal related to an AFBCMR case in which he had participated, he referred the FOIA appeal to other attorneys in SAF/GC. Similarly, when this attorney and other AFBCMR members have previously been involved in a matter during the course of their regular duties, they will not participate in an AFBCMR case related to that matter. Since the attorney in question did not recuse himself, it is reasonable to presume that he did believe that his participation in the applicant's case constituted a conflict of interest. Therefore, given the presumption of regularity and in the absence of substantive evidence to the contrary, we find no compelling basis to conclude that the original panel: that decided the applicant's case was improperly constituted. Since we do not believe that every advisory writer in the Air Force participated in applicant's AFR 36-2 case, we would also have found no compelling reason to grant counsel's request that we not seek the advice, assistance, and/or counsel of the Office of The Judge Advocate General, the Staff Judge Advocate, Air Force Personnel Center (AFPC), and/or the Office of the General Counsel in adjudication of applicant's amended application. However, in view of our decision to grant reconsideration based on the submission of new evidence without the benefit of additional advisory opinions, this request is moot. Lastly, because the staff failed to timely respond to counsel's request for a waiver of the page limitation contained in AFI 2603, this request is considered to be constructively granted.

2. Sufficient relevant evidence has been presented to demonstrate the existence of probable error or injustice. The applicant states that while he was assigned to LANTCOM, there was a heated and highly visible disagreement between Air Force and Navy officials regarding the retirement of the SR-71. The applicant contends that as a result of providing his commander (a Navy Admiral) with material supporting the Admiral's position that the SR-71 should be retained, action was taken against him to insure that he was severely punished. Although we find insufficient evidence to support this contention, after thoroughly reviewing the additional documentation submitted by applicant's counsel, and considering the totality of the evidence of record, we believe the applicant has been the victim of an error or injustice. In this respect, we note the following:

a. We are not persuaded that the applicant altered one, or more OERs to reflect that he had fighter pilot experience in the F-105 aircraft or currency in the T-38A aircraft. To believe otherwise, we would have to assume that the applicant was able to alter the OER forms, place them in his records undetected, and then remove them from his records. We find no evidence the applicant placed altered OERs in his records. We note too, that the President of the BOI nonconcurred with the findings of the majority of the membership of the BOI regarding this issue.

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b. We also believe that had the applicant been tried by a General Court-Martial, there was insufficient evidence to convict him of the alleged offenses, Although the applicant did voluntarily tender his resignation, he did so by attaching a copy of a successful polygraph examination that he was unable to present into evidence at the BOI.

c. The Deputy Inspector General, LANTCOM, (Colonel Linder) was apparently obsessed with prosecuting the applicant. This is evident by the fact that he notified OSI of the allegations (without the applicant's supervisor's knowledge), conducted his own investigation in which he elicited testimony (later recanted during the BOI), and called over 70 people in an attempt to gain damaging testimony against the applicant. Colonel Linder testified that on 13 June 1989, the applicant stated he really wanted to get his F-105 time added in his records before the CY89 board convened. However, we find this difficult to accept since the applicant knew at the time that the CY89 board had already convened on 15 May 1989 and that he had received a "Definitely Promote" recommendation from the Management Level Evaluation Board (MLEB) President.

d. Based on the evidence of record, the applicant's statement that he flew in the F-105 is true. While participating in the 3rd Lieutenant program at the USAFA, he was assigned TDY as an F-105 Assistant Operations Officer with the 57th Fighter Weapons Wing at Nellis AFB. While in this position, he was given orientation rides in the F-4 and F-105, and had an opportunity to have operated the aircraft when permitted to do so. In fact, during the BOI the applicant provided a photograph of himself standing at the side of an F-105 being given a certificate as a honorary "Wild Weasel". In addition, the applicant's T-38 instructor corroborated this by indicating that applicant, "was able to get an F-105 spot" and "shag some rides in an F-105." Although the applicant's statements regarding his time in the F-105 may have been misconstrued, we do not believe he intended to deceive anyone. During the BOI, Colonel Squiers (the applicant's supervisor and one of the officers the applicant was alleged to have made the false statement to) testified that during an informal impromptu gathering, the applicant indicated that he flew an F-105 one time and never said that he was a qualified F-105 pilot. In addition, Colonel Squiers indicated that he never authorized anyone to bring the charges against the applicant in his name. Colonel Squiers testified during the BOI that he reviewed the applicant's records (in early 1989) in conjunction with the preparation of the PRF for the CY89 board and never saw anything that said F-105 on it.

e. In view of the above, we see no reasonable motive for the applicant to have falsified his record. He had established a superior record as a U-2/TR-1 and KC-135 pilot, as evidenced by him being selected for promotion below-the-zone (BTZ). He was the recipient of the Koren Kolligian, Jr. Trophy for

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extraordinary airmanship and the 1986 Jabara Award for Airmanship for heroic actions. Furthermore, since he had already received a "Definitely Promote" recommendation on the PRF prepared for the CY89 board, he had nothing to gain by altering his records to indicate that he had fighter pilot experience in the F-105 aircraft or currency in the T-38A aircraft.

f. The applicant is not requesting reinstatement to active duty. The applicant has amended his application to reflect that he was retired in the grade of lieutenant colonel. Based on the circumstances of this case, we agree. In view of the above, and given the strong support from the applicant's supervisor, we recommend the applicant's records be corrected to the extent indicated below.

THE BOARD RECOMMENDS THAT:

The pertinent military records of the Department of the Air Force relating to APPLICANT, be corrected to show that:

a. All documents and references to the applicant's administrative discharge and removal from the list of officers selected by the Calendar Year 1989 Central Lieutenant Colonel Selection Board, be declared void and removed from his records.

b. Upon Senate confirmation, he be promoted to the grade of lieutenant colonel, effective and with date of rank of 1 September 1989.

c. On 6 September 1989, his Special Compartmented Information (SCI) clearance was not revoked.

d. The Officer Effectiveness Reports, AF Forms 707, rendered for the periods 17 October 1988 through 1 May 1989, and 2 May 1989 through 4 September 1989, be declared void and removed from his records.

e. On 12 January 1990, he did not tender his resignation.

f. He was not removed from active duty on 19 April 1991, but was continued on active duty and was ordered Permanent Change of Station (PCS) to his home of selection.

g. An AF Form 77, Supplemental Evaluation Sheet, be prepared and inserted in the record in its proper sequence indicating that no performance report is available for the period when member was not serving on active duty and containing the statement, "Report for this period not available for administrative reasons which were not the fault of the member."

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h. On **31** June **1993,** he was released from extended active duty and on 1 July **1993,** he retired in the grade of lieutenant colonel for length of service.

The following members of the Board considered this application in Executive Session on 21 January **1998,** under the provisions of AFI **36-2603:**

Mr. Vaughn E. Schlunz, Panel Chair
Mr. Henry R. Romo, Member
Mr. Kenneth L. Reinertson, Member
Mr. Phillip E. Horton, Examiner (without vote)

All members voted to correct the records, as .recommended. The following documentary evidence was considered:

Exhibit I. Record of Proceedings, dated **23** May **94,** w/atchs.
Exhibit J. Letter, Counsel, dated **7** Apr **97,** w/atchs.

Vaughn E. Schlunz

VAUGHN E. SCHLUNZ
Panel Chair

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