MEMORANDUM

July 29, 1995 DRAFT

To: David G. Marwell
Executive Director
Assassination Records Review Board

cc: John Tunheim
Chairman
Assassination Records Review Board

From: T. Jeremy Gunn
Acting General Counsel
Assassination Records Review Board

Re: Ability of John Tunheim to Continue, to 1997, His Part-Time Membership on the Assassination Records Review Board If His Nomination to the Federal Bench is Confirmed by the U.S. Senate

The current Chairman of the JFK Assassination Records Review Board ("Review Board"), John Tunheim, recently was nominated by President Clinton to become a United State Judge for the District of Minnesota. You have asked me to provide a legal opinion regarding Mr. Tunheim's ability to continue to serve in his part-time role as a member of the Review Board if his nomination is confirmed by the Senate. It is my understanding that Mr. Tunheim wishes to comply fully with all applicable Federal law and with all relevant standards of judicial ethics. I understand that he is prepared to sever his relationship with the Review Board if it were necessary to comply with applicable law.

Based upon my review of the facts and the law, it is my opinion that if Mr. Tunheim's nomination is confirmed by the Senate he may continue to serve on the Review Board. I believe that there is no Federal law and that there is no Canon in the Code of Conduct for United States Judges ("Code") that precludes his serving concurrently on the Review Board and as an Article III judge.[1] However, I

[1]There may, of course, be a question about whether Mr. Tunheim would be able to supplement his judicial salary with the modest part-time income he currently receives from the Review Board. I do not evaluate this issue in this memorandum. It is my understanding that, in any case, Mr. Tunheim would not seek to supplement his salary if there were any applicable restriction on his doing so and that, if necessary, he would continue to serve on the Review Board without compensation.

strongly recommend that Mr. Tunheim obtain an Advisory Opinion on the Code from the Hon. R. Lanier Anderson III, Chairman, Committee on the Codes of Conduct, Judicial Conference of the United States, P.O. Box 977, Macon, Georgia 31202.

I have evaluated the question you raised under the three applicable laws and rules: (a) the Review Board's enabling legislation; (b) the Constitutional doctrine of the Separation of Powers; and (c) the Code of Conduct for United States Judges (September 22, 1992), 150 F.R.D. 307 (1994). The reasons for my conclusion are set out as follows.

The President John F. Kennedy Assassination Records Collection Act of 1992

The Review Board was created by The President John F. Kennedy Assassination Records Collection Act of 1992, 44 U.S.C. § 2107 (ARCA). ARCA is a unique and unusual Federal statute that was enacted for the limited purpose of collecting records relating to the assassination of President Kennedy and forwarding them to a newly established records collection at the National Archives. Because many Federal assassination records continue to be classified for national security reasons (or are otherwise restricted), ARCA created a new standard -- much broader than that of the Freedom of Information Act -- for the declassification and public release of records. (See 44 U.S.C. § 2107.6.) Under ARCA, all Federal agencies (including the FBI, CIA, Secret Service, and others), are required to review and declassify their assassination records under the new ARCA standards and forward those records to the National Archives.

ARCA also created a part-time, five-person Review Board, which is characterized as an "independent agency" within the Federal government. 44 U.S.C. § 2107.7(a). The Review Board has an automatic sunset provision that requires it to complete its operations by 1997 at the latest. The members of the Review Board were nominated by the President and confirmed by the Senate. In order to ensure that the Review Board would be professional and non-partisan, ARCA required that the members be selected "without regard to political affiliation," 44 U.S.C. § 2107.7(b)(1), and that they "shall be impartial private citizens, none of whom is presently employed by any branch of the Government," 44 U.S.C. § 2107.7(b)(5)(A), and they "shall be distinguished persons of high national professional reputation in their respective fields who are capable of exercising . . . independent and objective judgment . . . ." 44 U.S.C. § 2107.7(b)(5)(B). The Review Board members typically work for only two to three days per month. (The Review Board also has hired a professional staff of approximately 30 persons.)

The Review Board's principal responsibility is to review Federal agencies' application of the ARCA declassification standards by examining all assassination records that the agencies continue to classify

in whole or in part. Although the President has final declassification authority, the Review Board examines each redacted document and makes a "formal determination" that is then forwarded to the President. The agencies may choose to appeal to the President the Review Board's formal determinations.

There is only one statutory provision under ARCA that raises a question regarding Mr. Tunheim's ability to serve in his part-time role as Chairman of the Review Board while also serving as an Article III judge. As quoted above, the statutory section pertaining to the initial nomination by the President provides that "[p]ersons nominated to the Review Board . . . shall be impartial private citizens, none of whom is presently employed by any branch of the Government, and none of whom shall have had any previous involvement with any official investigation or inquiry . . . relating to the assassination of President John F. Kennedy." 44 U.S.C. § 2107.7(b)(5)(A). These three statutory restrictions on nominees (*i.e.,* they shall be private citizens, not employed by the government, and not involved with any investigation of the assassination) -- by the statute's express terms -- apply solely to the potential nominees at the time of their nomination and cannot be understood to continue to apply after confirmation. These restrictions cannot plausibly be read to apply after confirmation because in becoming Review Board members they *necessarily* become: (a) public officials rather than "private citizens"; (b) employees of the Federal government; and (c) involved with an "official investigation or inquiry" related to the assassination of President Kennedy.[2] Therefore, there is nothing in ARCA precluding Mr. Tunheim from continuing his service on the Review Board if he were to be confirmed by the Senate.

Constitutional Questions Relating to an Article III Judge Serving on Boards of Independent Federal Agencies

Prior to the Supreme Court's decision in *Mistretta v. U.S.*, 488 U.S. 408 (1989), there had been a substantial debate regarding the constitutionality of Article III judges serving concurrently in executive branch agencies, particularly on Presidential commissions. It had sometimes been argued that such concurrent service by Article III judges violated the Separation of Powers doctrine of the Constitution. Although there had been a long history of judges (including justices on the Supreme Court) having served the nation concurrently in judicial and executive branch roles, the Supreme Court had not clearly and firmly resolved the Separation of Powers question. In *Mistretta*, however, the Court, over the dissent of only one Justice, decided that there is no necessary constitutional

[2]Moreover, a principal reason that then-serving governmental officials were precluded from membership on the Review Board was to ensure that the Board would not be unduly influenced by Federal agencies that may have a vested interest in the outcome of the Board's work. Such concerns do not, of course, apply to a person who subsequently is nominated to a Federal judgeship.

impediment to an Article III judge serving concurrently in a non-judicial agency. 488 U.S. at 404.

The *Mistretta* plaintiffs argued that the Sentencing Commission's Guidelines violated the Separation of Powers doctrine because some members of the Commission were Article III judges who had been nominated by the President. In rejecting the plaintiffs' argument and deciding that there was no *per se* rule precluding concurrent service, the Court held that the "ultimate inquiry remains whether a particular extrajudicial assignment undermines the integrity of the Judicial Branch." 488 U.S. at 404. Even though the work of all Article III judges effectively involves the application of the Sentencing Guidelines, and even though many judges were called upon to render decisions on the constitutionality of the Sentencing Guidelines, the Court found that the service of judges on the Commission did not undermine the integrity of the judicial process or the ability of judges to carry out their duties with integrity and fairness. Citing by analogy the work of judges in drafting the Federal Rules of Civil Procedure, the Court held that the fact that "federal judges participate in the promulgation of guidelines does not affect their or other judges' ability impartially to adjudicate sentencing issues." 488 U.S. at 406-07.

Code of Conduct for United States Judges

The current version of the Code of Conduct for United States Judges ("Code"), adopted on September 22, 1992, "governs the conduct of United States . . . District Judges . . . ." 150 F.R.D. 307 n.1. The Code provides that "[a]ll judges should comply with this Code . . . ." 150 F.R.D. at 321. Although the provisions of the Code are not, strictly speaking, *mandatory*, there is no question that a District Court Judge should comply with the Code and Mr. Tunheim has, in any case, expressed his intent to comply fully with its Canons.

Although there is more than one provision of the Code that might be construed as pertaining to the situation at hand, certainly the most important provision is contained in Canon 5(G): Extra-judicial appointments.[3] In pertinent part, Canon 5(G) provides that a "judge should not accept appointment

[3]Canon 4 of the Code essentially provides a "safe harbor" that permits Federal judges to engage in certain specified extra-judicial activities. The Canon provides that "[a] judge, subject to the proper performance of judicial duties, may engage in [specified] law-related activities, if in doing so the judge does not cast reasonable doubt on the capacity to decide impartially any issue that may come before the judge . . . ." The permissible law-related activities that are specified in Canon 4 include legal teaching and writing, testifying before legislative bodies on the legal system and the administration of justice, and serving as a member of organizations, including governmental agencies, that are devoted to the improvement of the law and the administration of justice.

to a governmental committee, commission, or other position that is concerned with issues of fact or policy on matters other than the improvement of the law, the legal system, or the administration of justice, unless appointment of a judge is required by Act of Congress."

Canon 5(G) could be construed to preclude the appointment of judges to governmental commissions other than those that are narrowly involved in legal reform and judicial administration. Such a narrow reading of 5(G), however, is not required by the language of the Canon. Technically, of course, the Canon restricts only sitting judges from receiving new governmental appointments and does not prohibit a person with a pre-existing appointment from completing his part-time service for an agency whose existence will expire in the very near future. Even more importantly, the Supreme Court has interpreted Canon 5(G) as "intend[ing] to ensure that a judge does not accept extrajudicial service *incompatible with the performance of judicial duties or that might compromise the integrity of the Branch as a whole.*" *Mistretta v. U.S.*, 488 U.S. at 404 n.27 (emphasis added).

There are at least three reasons that Mr. Tunheim's continued service on the Review Board would be both compatible with his judicial duties and with the integrity of the judiciary as required by the Supreme Court in *Mistretta.*

First, the Review Board's work is very different in both form and substance from the work of the typical Presidential commissions contemplated by the Code. The Board's work does not, for example, involve determining "issues of fact or policy" as do other commissions. The Review Board, unlike the more typical Presidential commissions, does not make factual determinations or policy recommendations on controversial issues such as health care, military base closings, women in the military, AIDS, affirmative action, civil rights, or other heated social issues that must be resolved in the halls of Congress and in the Executive Branch. Rather, the Review Board acts in a quasi-judicial capacity to evaluate whether certain documents can be released to the public under standards established by ARCA. The Review Board's work simply does not involve the detailed fact-finding and policy recommendations for which the typical Presidential boards are established.

To the extent that the Review Board is "a government agency devoted to the improvement of the law, the legal system, or the administration of justice," Canon 4 would clearly permit Mr. Tunheim to continue to serve on the Review Board. Although an argument could fairly be made that the work of the Review Board may lead to the improvement of the law and the legal system, the Canon presumably contemplates activities of a different character. The types of activity presumably contemplated under Canon 4 would relate to such activities as academic and philosophical writing, testifying before Congress on matters affecting the judiciary, and working on committees that seek to improve the justice system.

Second, although the Review Board's work is very important, it does not consume a substantial amount of time of its members. According to what Mr. Tunheim has informed us, he devotes, on average, only two to three days per month to the Board's activities. Moreover, the Review Board is already well into its short, three-year tenure.

Third, the substantive areas of the Review Board's activities do not pertain to issues that would lead either to bias or to the appearance of bias in matters that would come before a judge. Although there has been Freedom of Information Act litigation related to JFK assassination records, the litigation is largely limited to the Federal courts in Washington, D.C., and involves the FOIA standards that are not applicable to the Review Board's work. In the extremely remote chance that such an issue were to arise in Federal court in Minnesota, Mr. Tunheim would easily be able to recuse himself from any involvement with such a case.

Thus there is no law or rule that prohibits Mr. Tunheim from continuing his important work as Chairman of the Review Board while accepting new judicial responsibilities.