MEMORANDUM

July 28, 1995

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

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

Re: Ability of John Tunheim to Continue as Member of 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 ("ARRB" or "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 as a member of the ARRB if his appointment 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 ARRB if it were necessary to comply with applicable law.
It is my legal opinion that Mr. Tunheim may continue to serve on the ARRB. I believe that there is no Federal law or Canon in the Code of Conduct for United States Judges ("Code") that precludes him from serving simultaneously on the Review Board and as an Article III Judge. However, I would strongly recommend that he 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: (a) the ARRB'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 ARRB was created by The President John F. Kennedy Assassination Records Collection Act of 1992, 44 U.S.C. § 2107 (ARCA). ARCA is a unique Federal statute that was enacted for the limited purpose of collecting all records relating to the assassination of President Kennedy and

forwarding them to a newly established collection at the National Archives. Because many JFK assassination records continue to be classified for national security reasons (or for other purposes), ARCA created a new standard -- much broader than that of the Freedom of Information Act -- for the declassification 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 their assassination records to the National Archives.

ARCA also created the ARRB, which is described as an "independent agency" within the Federal government. 44 U.S.C. 2107.7(a). The Review Board itself is comprised of five members who, by law, were nominated by the President and confirmed by the Senate. ARCA requires that the Review Board members would be individuals selected "without regard to political affiliation," 44 U.S.C. 2107.7(b)(1), who "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 who "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). (In addition to the five members of the Review Board, the ARRB has hired a professional staff of approximately 30 persons.)

The principal responsibility of the ARRB is to review the agencies' application of the ARCA declassification standards by examining all records that continue to be redacted. Although the President continues to have 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 on 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). This provision, by its express terms, applies solely to the status of the individual at the time of his or her nomination. Moreover, it cannot plausibly be read to prohibit activities of Review Board members for the very reason that, as Board members, they *necessarily are:* (a) public officials rather than "private citizens"; (b) employees of the Federal government; and (c) involved with and "official investigation or inquiry" related to the assassination of President Kennedy. Therefore, there is nothing in ARCA precluding continued service by Mr. Tunheim on the Review Board.

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 with appointments to executive branch agencies, particularly Presidential commissions. It had been argued that concurrent service effectively violated the separation of powers doctrine of the Constitution.[1] 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 issue. In *Mistretta*, however, the Court, with only one dissenter, decided that there was no necessary constitutional impediment to Article III judges serving concurrently in non-judicial agencies. 488 U.S. at 404.

The *Mistretta* plaintiffs argued that the Guidelines promulgated by the U.S. Sentencing Commission were constitutionally infirm because, in part, some members of the Commission were Article III judges who had been nominated by the President. In 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. Citing by analogy the work of judges in promulgating 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 Code of Conduct for United States Judges ("Code"), adopted 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.

[1]For discussions of these issues *see* **********.

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.[2] In pertinent part, Canon 5(G) provides that a "judge should not accept appointment 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) certainly 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, however, is not required by the language of the Canon. Technically, of course, the Canon refers to sitting judges receiving other governmental appointments rather than the opposite, as is the case with Mr. Tunheim. More importantly, however, 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.

First, the Review Board's work is very different in both form and substance from the work of the typical Presidential commissions contemplated in the Code. The Board's work does not, for

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[2]Canon 4 of the Code essentially provides a "safe harbor" that permits Federal judges to engage in certain specified extra-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 the extent that the ARRB 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 ARRB 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.

example, involve determining "issues of fact or policy" (Canon 5(G)) as do other commissions. Rather, the Review Board, unlike the more typical Presidential commissions, does not make factual determinations or policy recommendations on issues such as health care, base closings, women in the military, AIDS, affirmative action, civil rights, or other controversial political issues that need to be resolved in the halls of Congress or in the Courts. 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.

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 me, he devotes, on average, only two to three days per month to the Board's activities.

Third, the substantive areas of the Review Board's activities do not pertain to issues that would lead either to bias or the appearance of bias in matters that would come before a judge. Although there has been Freedom of Information litigation related to government records related to the assassination, the litigation is largely limited to the Washington, D.C. area and involves, typically, the FOIA standards that are not applicable to the Review Board's work.