

May 3, 1995

TO: Jack

FROM: Sheryl

RE: Materials on ability of federal judges to serve on executive branch boards

I meant to give you this packet of background materials on the issue of whether federal judges can serve on boards or commissions of the executive branch before you left today but didn't get the copies in time. You may want to review them for your meeting on Friday with the Justice Department.

I've skimmed the articles and cases but have not studied them in detail. Also, I've only given you part of what I have on this but these seem the most on point. The short answer seems to be that there is no constitutional separation of powers problem with concurrent service of a judge on a commission in another branch of government, based on the litigation that arose out of the President's Commission on Organized Crime (see the Scarfo case) and the Supreme Court's decision in Mistretta. Also, the focus is usually on whether a sitting judge can or should accept a concurrent executive branch appointment, not whether someone currently sitting on an executive branch board can continue to do so should they be put on the bench.

The canons of judicial ethics do speak more approvingly of judges being involved in extrajudicial historical organizations as opposed to acting in a more policy-making role in another branch of government. Finally, there are issues as to whether the judge's participation in a particular extrajudicial activity harms the judiciary as a whole in terms of the appearance of impartiality, in time that is taken away from doing judicial business, and in the possibility of the need for recusal when parties affected by the judge's extrajudicial work (here, it could be the federal agencies as well as individuals) may appear before him or her in court. Another consideration here is that the work of the Review Board is more akin to what judges do in FOIA cases than it is policy-making in the way that judges sitting on the Sentencing Commission or even on the Organized Crime Commission might be viewed.

Let me know if you have any questions or need any additional information.