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Office of the
Assistant Attorney General

Washington, D.C. 20530

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Day Book

MEMORANDUM FOR HONORABLE FRED F. FIELDING
Counsel to the President

Re: Appointment of Judge Wilkey to the
Iran-United States Claims Tribunal

This responds to your request for the opinion of the Office of Legal Counsel as to the legality and propriety of the appointment of Circuit Judge Wilkey of the Court of Appeals for the District of Columbia Circuit to be a member of the Iran-United States Claims Tribunal (Tribunal) and the Judge's acceptance thereof. It is our conclusion that there would be no constitutional or statutory objection to his appointment. Nevertheless the propriety of the acceptance of the appointment may depend on the construction of certain Canons of the Code of Judicial Conduct for United States Judges (Code) approved by the Judicial Conference of the United States in 1973. In our view, the proper relationship between the Executive and Judicial Branches of the Government precludes this Office from rendering an opinion purporting to be an authoritative interpretation of those rules. We can, however, discuss arguments, which Judge Wilkey might advance in support of the argument that, notwithstanding the literal wording of the Code, his service on the Tribunal would not violate its prohibitions.

I.

The Tribunal

On January 19, 1981, the United States and Iran entered into an agreement designed to end the crisis involving the fifty-two Americans held hostage in Iran. 81 State Dept. Bull. 1 (Feb. 1981). Article I of the Claims Settlement Agreement (Agreement) requires Iran and the United States to promote

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the settlement of certain categories of claims by the parties directly concerned; those not voluntarily settled are to be submitted to binding third-party arbitration in accordance with the terms of the Agreement.

Article II established an International Arbitral Tribunal, the Iran-United States Claims Tribunal, to hear and decide the claims within the Tribunal's jurisdiction. The categories of claims involved are: commercial claims by nationals of the United States or Iran against the Government of the other; claims of the two Governments against each other that arise out of contractual arrangements for the sale of goods and services; and claims of the two Governments against each other related to non-performance of obligations under the Agreement. It is currently impossible to estimate the number of claims that will reach arbitration. The Department of State estimates that there are about 2,500 claimants, many of whom may have more than one claim. At the time the Agreement was entered, nearly 400 suits against Iran were pending in the courts of the United States involving several billion dollars in claims. The period for filing additional claims will expire May 6, 1981.

The Tribunal is to consist of nine members or such larger multiple of three as the parties decide. Iran and the United States each appoint a third of the members, who in turn appoint the remaining third. The United States has proposed to increase the number of members to be appointed by each party to ten, and has appointed three thus far. Iran has appointed ten. It is anticipated that the United States will appoint seven more and that the members or arbitrators will sit in panels of three, although no formal decision has been made. The Agreement states that "Claims may be decided by the full Tribunal or a panel of three members" Under Article III, the Tribunal is to conduct its business in accordance with the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL), except as modified by the parties or the Tribunal as necessary to carry out the agreements. No provision is made for the salaries of the members; Iran and the United States are to divide expenses equally (Art. VI, § 3).

II.

Constitutional and Statutory Considerations.

We are not aware of any constitutional or statutory impediment to the appointment of Judge Wilkey to, and his

service on, the Tribunal. Indeed, there are many precedents for such appointments: Justice Samuel Nelson (Alabama Claims Arbitration (1871)); Justice John Marshall Harlan (Bering Sea Fur Seal Arbitration (1893)); Chief Justice Fuller and Justice David Brewer (Venezuela-British Guiana Boundary Arbitration (1897-99)); Chief Justice White (Panama-Costa Rica Boundary Arbitration (1914)); Justice Willis Van Devanter (I'm Alone Arbitration (1934)); Chief Justice Hughes (Guatemala-Honduras Boundary Arbitration (1930)); Justice Owen Roberts (Umpire of United States - German Mixed Claim Commission (1932)) 1/; Circuit Judge Putman (Arbitration concerning the seizure of British vessels in the Bering Sea (1896)); Circuit Judge Parker (Additional Member of the Nuremberg International Military Tribunal (1945)). Recently Federal District Judge Stern of New Jersey was assigned to serve on the Military Government Court in Berlin (1979).

Attorneys General have rendered opinions with respect to two of the foregoing appointments. In 1898, Attorney General Griggs ruled that under the then current law Judge Putman could be paid for his services as member of the arbitration tribunal in addition to his judicial salary, 2/ thus upholding by necessary implication the legality of his appointment to the tribunal. 22 Op. A.G. 184 (1898). In 1945, Attorney General Tom Clark held on the basis of the many precedents in which federal judges had served on international tribunals or had performed functions of

1/ In Z. & F Assets Corp. v. Hull, 311 U.S. 470, 481 (1941) (involving an award of the Commission) the opinion referred to the fact that Mr. Justice Roberts had been the Umpire. Justice Roberts recused himself in that case (at p. 490).

2/ This ruling probably has been superseded by the Dual Compensation Act, 5 U.S.C. § 5533, which generally provides that an individual is not entitled to pay from more than one position. The term "position" is defined in 5 U.S.C. § 5531 as including a civilian office or position in the Legislative, Executive, or Judicial Branch.

an executive nature, that Circuit Judge Parker "would not vacate his judicial office by serving without compensation at the request of the President as an alternate judicial member of the International Tribunal." 40 Op. A.G. 423 (1945).

III.

Consideration of the Code of Judicial Conduct for United States Judges

Although there are no constitutional or statutory impediments to Judge Wilkey's service on the Tribunal, the Code of Judicial Conduct for United States Judges (Code) contains two provisions that Judge Wilkey should consider carefully in connection with his decision to accept or decline this appointment. They are Canon 5E, which provides flatly that "[a] judge should not act as an arbitrator or mediator," and Canon 5G, which provides that a judge should not accept an "extra-judicial" appointment that would interfere with the performance of his judicial duties. 3/

The Code was adopted by the Judicial Conference of the United States in 1973. It is interpreted for the judiciary by the Advisory Committee on Judicial Activities. In view of the existence of this Committee, and in view of the autonomy of the Judiciary in matters concerning the propriety of judicial conduct, this Office cannot issue authoritative pronouncements concerning the applicability of the Code in the circumstances presented by this case. At your request, however, we have undertaken to identify the arguments that might be made by Judge Wilkey concerning the applicability of the Code in this case.

1. Canon 5E. As noted above, Canon 5E declares categorically that a judge shall not act as a arbitrator or mediator. On its face, this Canon would appear to forbid Judge

3/ The full text of Canon 5G is set out on p. 6 below.

Wilkey to accept an appointment to the Tribunal. It may be argued, however, that the purpose of the Canon is more limited than its unqualified language would appear to suggest. Most probably, the Canon's primary purpose is to deal with private arbitration that competes with the functions of the courts. Obviously, it would not be appropriate for federal judges to lend their prestige and competence to private arbitration boards. The awards of private arbitration boards can be vacated for misconduct of the arbitrators or decisions in excess of their jurisdiction. See, e.g., 9 U.S.C. § 10. It would be embarrassing if an award made by a federal judge were challenged in court on the ground that he had conducted himself corruptly or improperly or had exceeded or inadequately executed his powers as an arbitrator.

These concerns do not carry the same force in the field of international arbitration under international agreements to which the United States is a party. Indeed, in our research to date we have found no indication that the draftsmen of Canon 5E intended to cover international arbitration, an activity in which federal judges had distinguished themselves in the past. Federal judges might well be the most qualified candidates for appointment to international arbitral tribunals. It would be unfortunate if this valuable resource were not available to the President in those rare and exceptional circumstances in which the service of highly qualified arbitrators is required to advance the national interest in the international field. These considerations might aid in persuading the appropriate judicial authority that Canon 5E is not applicable in the premises.

We wish to add a cautionary note. We have found no evidence that the drafters of Canon 5E intended to forbid participation on international tribunals, but we have found no evidence that they intended to permit it. The argument in favor of an implied exemption for international arbitration rests in the end upon the special character of international arbitration and on the rarity of its occurrence.

2. Canon 5G. This Canon, briefly entitled "Extra-Judicial Appointments," provides:

G. Extra-Judicial Appointments. 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 an Act of Congress. A judge should not, in any event, accept such an appointment if his governmental duties would interfere with the performance of his judicial duties or tend to undermine the public confidence in the integrity, impartiality, or independence of the judiciary. A judge may represent his country, state or locality on ceremonial occasions or in connection with historical, educational, and cultural activities.

The Commentary to Canon 5G explains that while in the past judges appointed to important extra-judicial assignments have rendered valuable services to the states and Nation, this historical practice had to be reassessed in the light of crowded dockets and the need to protect the courts from potentially controversial assignments. 4/

4/ The Commentary to Canon 5G reads in full:

Valuable services have been rendered in the past to the states and the nation by judges appointed by the executive to undertake important extra-judicial assignments. The appropriateness of conferring these assignments on judges must be reassessed, however, in light of the demands on judicial manpower created by today's crowded dockets and the need to protect the courts from involvement in extra-judicial matters that may prove to be controversial. Judges should not be expected or permitted to accept governmental appointments that could interfere with the effectiveness and independence of the judiciary.

The dangers attendant upon acceptance of extra-judicial governmental assignments are ordinarily less serious where the appointment of a judge is required by legislation. Such assign-

(Footnote cont'd on p. 7)

The question is, of course, whether Canon 5G was intended to forbid appointments to international tribunals. The Canon is entitled "Extra-Judicial Appointments" and speaks of appointments on governmental committees, commissions, and fact finding bodies, such as the Warren Commission. Thus an argument could be made that the prohibition contained in the Canon is limited to appointments to positions in the Executive branch (or those not calling for the performance of judicial functions) and has no bearing on appointments to an international tribunals.

The argument finds some measure of support in the "legislative history." The Canon seems to have been adopted in reaction to the many appointments of federal judges to positions in the Executive branch especially during and following World War II. Those appointments resulted in a Senate report (S. Executive Rept. No. 7, 80th Cong., 1st

4/. (Footnote cont'd from p. 6)

ments ordinarily do not involve excessive commitments of time, and they typically do not pose a serious threat to the independence of the judiciary. Moreover, it is hardly the function of a Code of Judicial Conduct to compel judges to refuse, without careful regard to the circumstances, tasks Congress has seen fit to authorize as appropriate in the public interest. Accordingly, although legislatively prescribed extra-judicial assignments should be discouraged, where Congress requires the appointment of a judge to perform extra-judicial duties, the judge may accept the appointment provided that his services would not interfere with the performance of his judicial responsibilities or tend to undermine public confidence in the judiciary.

Sess. (1947)) that was sharply critical of the appointment of federal judges to positions in the Executive branch. 5/

5/ The practice of appointing federal judges to executive and fact finding positions goes back to the very beginning of the Republic: Chief Justice Jay negotiated the Jay Treaty with Great Britain (1794-95); Chief Justice Ellsworth served as Presidential Envoy to France (1799-1801); Justices Clifford, Miller, Field, Bradley, and Strong served on the Electoral Commission appointed to resolve the Hayes-Tilden dispute (1877); Justice Lamar headed a delegation to negotiate the end of the diplomatic crisis with Mexico (1914-15); Mr. Justice Roberts investigated the attack on Pearl Harbor (1942), in 1943, he headed a Commission for the Protection and Salvage of Artistic and Historic Monuments in Europe, which catalogued and traced the art objects stolen or destroyed by the Germans; Mr. Justice Jackson served as Chief of Counsel for the U.S. prosecution at the Nuremberg International War Crimes Tribunal (1945-46); Chief Justice Warren headed the Commission to Investigate the Assassination of President Kennedy (1963); Circuit Judges Parker, Learned Hand, and Hutcheson were members of the Advisory Board on Compensation to assist the War Shipping Administration (1943-45); Judge Marvin Jones of the Court of Claims served as War Food Administrator (1943); District Judges Maguire and Holtzoff assisted the Army and Navy in the reform of their court martial systems; District Judge Peirson Hall assisted the Army in the review of court martial sentences; Judge Warren Madden of the Court of Claims served as Legal Advisor to the Military Governor of the United States Zone of Germany (1946-47); District Judge Collet acted as Chairman of the Economic Stabilization Board in 1946; in 1971 District Judge Boldt was appointed to the Pay Board established by Executive Order No. 11627. In 1976, i.e., after the adoption of the Code, this Office advised against the appointment of Judge Boldt to be a Representative of the United States to the General Assembly of the United Nations. Judge Boldt was not nominated. 12

Weekly Compilation of Presidential Documents 1351 (1976).

The conclusion that the term "extra-judicial" could be given a narrow interpretation and need not embrace every non-statutory function that a judge may be asked to perform, even those that are of a judicial nature, finds support in a recent practical interpretation of the Canon. We have been advised by the Clerk of the Military Government Court of Berlin that when Judge Stern (see, supra) accepted the appointment to that court, the Chief Justice gave him written permission to do so on the ground that he would exercise judicial functions, even if they were not the normal ones exercised by a United States District Judge.

From a textual standpoint, the argument in favor of Judge Wilkey's service on the Tribunal notwithstanding Canon 5G is that the Tribunal is not a government committee, commission or fact finding board within the meaning of the first sentence of the Canon. The second sentence of the Canon does refer to appointments that interfere with the performance of judicial duties or undermine public confidence in the judiciary. But the second clause of that sentence, which refers to activities that "undermine public confidence in the integrity, impartiality or independence of the judiciary," may not apply in the present case; and the first clause, by its terms, applies only to appointments that fall within the scope of the first sentence of the Canon -- that is, appointments to government committees, commissions, or fact finding boards. As noted, one could argue that the Tribunal does not fall within the scope of the first sentence. The greatest difficulty with this argument is the fact that the drafters of Canon 5G seemed to be so concerned with the scarcity of judicial resources that they suggested the possibility of a judge refusing even a statutorily mandated appointment. In this light we have some concern with parsing this Canon as finely as the argument above would require.

Assuming, arguendo, that the term "extra-judicial appointment" is to be given a broad interpretation and that it refers to any and every appointment that is not within the scope of a judge's statutory duty, an argument could nonetheless be made that an appointment to the Tribunal would be consistent with the purposes of the Canon. As noted above, the Canon appears to have been adopted for two reasons: (a) the belief that extra-judicial appointments have an adverse

effect on scarce judicial resources and (b) the belief that these appointments can involve the judiciary in controversial activities. As regards the second point, it may be urged that the appointment of a federal judge to the Tribunal is not likely to involve the judiciary in a controversial activity. As regards the first point, it is true that acceptance of this appointment by Judge Wilkey would cause him to be absent from his court, possibly for quite some time; but the adverse effect of his absence on the federal judiciary at large will be balanced by the fact that the Tribunal will handle thousands of disputes that might otherwise have burdened the federal courts. It is true that the benefit to the federal courts would be even greater if no federal judges were appointed to the Tribunal. Moreover, the fact that the Tribunal will be handling claims irrespective of Judge Wilkey's participation has already been determined (and the claims might conceivably have been resolved in another forum in any event). But it may well be felt that appointment of one experienced and respected federal judge to the Tribunal will enhance its quality and reputation and therefore advance the interests of the United States. Since the net effect of the creation of the Tribunal is to ease the burden on the federal courts, it could be argued that none of the reasons for the apparent prohibition against acceptance of "extra-judicial appointments" is present in this special case.

IV. The Effect of the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980

The Judicial Councils Reform and Judicial Conduct and Disability Act, effective October 1, 1981, P.L. 96-458, 94 Stat. 2035, establishes a new procedure for investigating and resolving allegations that a member of the federal judiciary has been unable to discharge efficiently all the duties of his office by reason of disability or by reason of "conduct prejudicial to the effective and expeditious administration of the business of the courts." See P.L. 96-458, § 3, 94 Stat. 2036. The new procedure will be administered, in the first instance, by the chief judge and the judicial councils for each of the judicial circuits. Under the Act, the procedure begins when "any person" files a complaint against a federal judge charging

disability or conduct prejudicial to the effective and expeditious administration of the business of the courts. After review by the chief judge of the circuit and investigation by a committee appointed by the chief judge, the complaint may be considered by the judicial council; and the council may, upon consideration, "take such action as is appropriate to assure the effective and expeditious administration of the courts." Id. That action may include, among other things, censure or an order directing action that the council considers appropriate in the circumstances. The council may also refer any complaint, together with a record of the associated proceedings, to Judicial Conference of the United States. Id.

The Act is entirely procedural. It defines the category of complaints that will trigger the procedure, but it does not attempt to prescribe the rules of decision by which the complaints are to be judged. While the Act has no direct bearing on the substantive question of the propriety of accepting an appointment to an international commission such as the Tribunal, there is the possibility that a complaint might be filed, charging that Judge Wilkey's prolonged absence from the Court of Appeals while serving on the Tribunal constitutes conduct prejudicial to the effective and expeditious administration of the business of the courts, within the meaning of § 3(a) of the Act, 28 U.S.C. § 372(c)(1), as amended, effective October 1, 1981.

If Judge Wilkey obtains from the Chief Justice written permission to serve on the Tribunal and the prior endorsement of such service by the members of the court on which he presently serves, the Chief Judge of the Circuit is likely to reject any such complaint pursuant to 28 U.S.C. § 372(c)3(A), as amended.

V. Conclusion

We recommend that Judge Wilkey seek the guidance of the Chief Justice and the members of the court on which he sits. If he obtains the approval of the Chief Justice, and if the members of his court concur that his service on the Tribunal would be valuable to the Nation and ultimately beneficial to the judiciary and would not impose a hardship on the court, those conclusions could provide a strong response to those who would take the position that his service on the Tribunal would

violate the Canons. Of course, it would also be appropriate to recommend that Judge Wilkey obtain an advisory opinion from the appropriate committee of the Judicial Conference of the United States; but Judge Wilkey may find it necessary to decide whether to accept or decline the appointment before such an opinion could be obtained. If that proves to be the case, advance consultation with, and approval by, the Chief Justice and the judges of the United States Circuit Court for the District of Columbia would certainly be advisable.

Theodore B. Olson
Assistant Attorney General
Office of Legal Counsel