

a support proceeding, in which paternity is in issue, unless the alleged father is married to the child's mother, Vital Statistics Law of June 29, 1953, P. L. 304, § 810, 35 P. S. § 450.810. Statements as to the paternity of the child by the mother or the mother's husband are therefore acceptable for purposes of birth registration.

You are further advised that the provisions you have outlined for notice to the mother's husband are adequate for your purpose. When the rights of the presumptive father may be affected, even in the limited fashion contemplated by this procedure, it is essential that some effort be made to notify him of the proposed action. The notification provisions that you have submitted are identical to those prescribed for notice to an absent father in adoption proceedings, Adoption Act of July 24, 1970, P. L. 620 (No. 208), § 313, 1 P. S. § 313. Personal service is not necessary in such cases; the parent must keep his whereabouts known or risk court proceedings affecting his rights, *Adoption of Turner*, 92 Montg. 186 (1969). The same level of protection for the husband in birth registrations is perfectly proper.

Birth registration in accordance with this option will not preclude a subsequent court challenge by a husband or child who believes that he has been adversely affected by the administrative record and who wishes to establish paternity in a court of law.

Consequently, you are advised that, under the conditions you propose, the Department of Health is empowered to promulgate regulations to allow children of married women to be registered as the illegitimate children of their natural fathers with the surname of the natural father.

Attorney General's Informal Opinion No. 780, October 8, 1936, is hereby rescinded insofar as it is inconsistent with this Opinion.

Very truly yours,

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OFFICIAL OPINION No. 75-9

*Court Administrator—Representation of State Judicial Officers By the Department of Justice—Separation of Powers.*

1. The Judicial Branch is not a department, board or commission of the Commonwealth within the meaning of Section 903 of the Administrative Code, 71 P. S. § 293.

2. The Constitutional doctrine of separation of powers requires that the total independence of each of the three branches of government be protected and maintained.
3. Representation of state judicial officers by the Department of Justice violates the constitutional doctrine of separation of powers.
4. The Court Administrator of Pennsylvania has authority under Article V, § 10(b) of the Constitution of the Commonwealth of Pennsylvania to hire attorneys to represent the judiciary.

Harrisburg, Pa.  
February 24, 1975

Honorable Alexander P. Barbieri  
Court Administrator of Pennsylvania  
Philadelphia, Pennsylvania

Dear Judge Barbieri:

In the past, the Department of Justice, when requested to do so, has represented members of the judicial branch of the government of the Commonwealth in litigation to which they have been parties. The basis of this policy has been Section 903(b) of the Administrative Code, 71 P. S. § 293(b), which requires the Attorney General to "represent the Commonwealth, or any department . . . board, commission, or officer thereof, in any litigation to which the Commonwealth or such department, board, commission, or officer, may be a party, or in which the Commonwealth or such department, board, commission, or officer, is permitted or required by law to intervene or interplead." After reconsidering this policy, it is our opinion, and you are so advised, that the judicial branch is not such a department, board or commission of the Commonwealth as is contemplated by the statute and, further, that members of the judiciary are not such officers as are within the statutory language. It is our opinion that any other interpretation of the statute would violate the Constitutional principle of separation of powers and, that, therefore, our prior practice of representing the judicial branch and members thereof in litigation must be discontinued.

Under our Constitution, the powers of the government are divided between three independent co-ordinate branches: the legislature, the executive and the judiciary. The Supreme Court of Pennsylvania has made it clear that the principle of separation of powers was established to maintain and protect the independence of the three branches. For example, in a discussion of the constitutional provisions referring to the compensation of judges the Court said:

"They are independent and co-ordinate, because distinct rights, powers and privileges are assigned to them by the Constitution. Each is entitled to the free, unbiassed, uninfluenced and independent exercise of all their rights, powers and privileges in as ample extent as the Constitution allows." *Commonwealth v. Mann*, 5 W. & S. 403, 407 (1843); Accord. *Commonwealth v. Mathues*, 210 Pa. 372, 59 A. 961 (1904).

That Court has also observed that:

“in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them. The executive not only dispenses the honours, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction of either the strength or of the wealth of society, and can take no active resolution whatever. It may be truly said to have neither *force* nor *will*, but merely judgment, and to be ultimately dependent upon the aid of the executive arm for the efficacious exercise even of this faculty. This simple view of the matter suggests several important consequences. It proves incontestably, that the judiciary is, beyond comparison, the weakest of the three departments of power; that it can never attack with success either of the other two, and that *all possible care is requisite to enable it to defend itself against their attacks*. . . .

. . . liberty can have nothing to fear from the judiciary alone, but would have everything to fear from its union with either of the other departments; . . . the effects of such an union must ensue from a dependence of the former on the latter, notwithstanding a nominal and apparent separation, . . . from the natural feebleness of the judiciary it is in continual jeopardy of being overpowered, awed or influenced by its co-ordinate branches. . . . The complete independence of the judiciary is a fundamental principle of the Constitution, designed mainly for the protection of public and private rights. . . .” *Commonwealth v. Mann, supra* at 410-11.

In *Mathues*, relying in substantial part on the *Mann* holding, the Supreme Court of Pennsylvania held that members of the judicial branch were not “public officers” within the meaning of the term as used in a Constitutional provision barring an increase in the salary of such officers during their terms of office, concluding that to hold otherwise would violate a specific provision of the Constitution quaranteeing the judges “adequate compensation” and, more importantly, the general Constitutional principle of separation of powers which, according to the *Mann* decision, that provision was intended to protect. *Commonwealth v. Mathues, supra*.

It is our opinion that this same constitutional theory of separation of powers excludes members of the judicial branch from the coverage of 71 P. S. § 293(b), as it is a theory which requires the existence of a certain tension between the separate branches of government which the legal representation of one branch by another tends to eliminate.

Such a relationship of dependency by one branch on another creates just that possibility of influence of which the Court spoke in *Mann*.

In saying this, we do not mean to indicate that this relationship has been or will be improperly used. However, as the Supreme Court noted in *Mann*, it is not intentional disrespect to either the judicial or executive branches of government to suppose it possible that cases may arise where successful resort may be had to the potential lever of influence in order to accomplish executive goals. See, *Commonwealth v. Mann*, *supra* at 409. It is this very potential for conflict and influence which, in itself, violates the constitutional doctrine of separation of powers and which must, therefore, be eliminated.

In passing, we should also note that the Department of Justice and agencies whose legal matters it controls employ over 350 attorneys who are involved in litigation in all the courts of the Commonwealth on a continuing basis; thus, the possibility that the Department might be representing a judge in litigation to which he is a party and at the same time be involved in litigation before him is not insubstantial. This potential conflict of interest, while apparently not explicitly barred by the Canons of Ethics, borders on the improper and may, in itself, justify the termination of any representation of judges by the Department of Justice.

Accordingly, you are hereby advised that the Department of Justice will no longer represent in litigation either individual judges or the judiciary itself. In this regard, we believe, and you are so advised, that under Article V, § 10(b) of the Constitution of the Commonwealth of Pennsylvania you, as Court Administrator, have the power to hire an attorney or attorneys to represent the judiciary who would be independent of the control of either the executive or legislative branches of government.

Very truly yours,

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OFFICIAL OPINION No. 75-10

*Liquid Fuels Tax Fund—Incidental Expenses—County Engineer—Reimbursement to County Treasury.*

1. The Liquid Fuels Tax Fund may be used to pay for costs and expenses incident to the construction, reconstruction, maintenance and repair of public highways.