

UNITED STATES RESPONSE TO THE 2008  
INTERNATIONAL ASSOCIATION OF JUDGES  
FIRST STUDY COMMISSION QUESTIONNAIRE

The relationship between the executive and the judiciary in a democratic society; the question is - who should be the master?

The independence of the judiciary and the balance of power between the three powers of a democratic state: the legislature, the executive and the judiciary, are core elements of the work of the First Study Commission.

The central role of the legislature will not be part of our consideration this year. In the past the First Study Commission has studied several topics where the relationship between the executive and the judiciary has been an element of the analysis. This year this relationship will be the centre of our investigation.

An examination from this viewpoint may make possible general conclusions on the mutual influence of these two branches of the powers of the state and we hope will throw light on the question of the balance of powers in Member States and this specific aspect of the independence of the judiciary.

For the purpose of this questionnaire we ask everyone:

- (i) to exclude from their consideration the position of the “constitutional court” (if one is part of the judicial system in their country) can be regarded as part of the judicial system; and
- (ii) to exclude the head of state in their country (as opposed to the head of government) from consideration as a part of the executive, unless the head of state exercises power or “influence.” If either might be exercised, then it should be noted.
- (iii) “Influence” may be exercised or not; we think that if it might be exercised, it should be noted.

I. Preliminary statement:

The introductory comments to the 2008 First Study Commission Questionnaire focuses on the relationship between the executive and judicial branches in a democratic society and provides that the central role of the legislature will not be part of our consideration this year. The United States Constitution, adopted in 1789, however, established a fundamental structural relationship between the executive, legislative and judicial branches of the federal government which requires some reference to the role of the legislative branch in response to the twenty-five questions posed below. Those references will be limited, but where included are helpful to provide context.

**Question 1:** Is the principle of independence of the judiciary enshrined in the constitution or a comparable legal source in your country?

Although the United State Constitution does not expressly provide that the federal judiciary is “independent,” the independence of the judiciary is ensured by constitutional guarantees that judges are appointed for life, that their salaries cannot be diminished, and that they cannot be removed from office for unpopular decisions.

**Question 2:** Is the principle of balance of powers enshrined in the constitution or a comparable legal source in your country?

The separation and balance of legislative, executive and judicial powers is expressly provided for in Articles I, II and III of the United States Constitution.

**Question 3:** Is there any influence of the executive on selection and the first appointment of judges? If yes: describe it.

Yes. This process well illustrates the balance of power between the executive and legislative branches contained in our Constitution. The President of the United States nominates candidates for appointment to vacancies on each of the three levels of the federal judiciary, the nine member Supreme Court of the United States, the circuit courts of appeal and the district courts. Before they may take office, however, each judicial nominee must be confirmed by the upper house of

Congress, the United States Senate. Additionally, the number of judgeships available in each particular district or circuit is determined jointly by the legislative and executive branches in consultation with the judicial branch. Currently there are less than one thousand active Article III federal judgeships in the United States.

**Question 4:** Is there any influence of the executive on the promotion of judges? If yes describe it.

Although it is not common, there are occasional opportunities for promotion of a judge from a lower to a higher federal court. When this occurs, the same process described in response to Question 3 is followed.

**Question 5:** Is there any influence of the executive on the selection, or appointment or dismissal of presidents of court? If yes: describe it.

The only circumstance in which this occurs is when a vacancy exists in the position of the Chief Justice of the United States Supreme Court. In such a situation, the President nominates a candidate for Chief Justice and the United States Senate must confirm the nomination. Otherwise, “presidents” of a court of appeals or a district court, which we call “Chief Judges” succeed to those positions generally for terms of seven years based upon seniority, and in accord with statutes passed by Congress and signed into law by the President.

**Question 6:** Is there any influence of the executive on the distribution of cases/assignment of judges to certain cases? If yes: describe it.

No. The assignment of cases is controlled entirely by the judiciary. Congress may, however, from time to time establish specialized tribunals such as the Foreign Intelligence Surveillance Court (FISA), to handle a limited number of specialized cases. When this occurs, the judges appointed to such a tribunal will similarly be nominated by the President and confirmed by the Senate.

**Question 7:** Is there any influence of the executive on the transfer of judges to other courts? If yes: describe it.

As described above, this would only occur where a judge on a lower court is nominated for elevation to fill a vacancy on a higher court within the three tiers of the federal judiciary.

**Question 8:** Is there any influence of the executive on the termination of the office of judges? If yes: describe it.

Not directly. Although a President could publically call for the removal of a federal judge from office, the only mechanism for removal of a federal judge from office is thru the impeachment process provided for in Article I of the Constitution. This involves the vote of a Bill of Impeachment by a majority of the members of the lower house of the United States Congress (the House of Representatives) and conviction at a trial before the upper house (the Senate). The impeachment process is rarely invoked. Only five federal judges were removed by the impeachment process in the last century, after having been previously charged with or convicted of commission of a felony offense.

**Question 9:** Is there any influence of the executive on the disciplinary procedure against judges? If yes: describe it.

No.

**Question 10:** Is there any influence of the executive on the initial training of judges? If yes: describe it.

No.

**Question 11:** Is there any influence of the executive on the in-service training of judges? If yes: describe it.

No.

**Question 12:** Is there any influence of the executive on the salaries of judges? If yes: describe it.

Yes. Salaries of judges can only be increased by legislation passed by the United States Congress and signed into law by the President. Thus, a President could veto such legislation. More commonly, the President will publically support legislation to raise salaries of judges. The greatest challenge to securing salary increases for federal judges in the United States lies with persuading Congress to authorize such legislation.

**Question 13:** Is there any influence of the executive in deciding on:

(a) the overall budget of the judiciary; and/or

(b) how the funds designated for the judiciary are to be spent? Is yes (in either (a) or (b)), describe it.

The federal judiciary formulates its own budget annually which the President submits to Congress as part of the budget for the United States Government. The power to legislate an annual budget, however, rests with Congress and any budget they authorize must also be signed by the President before it becomes effective. How the funds designated for the judiciary are to be spent is determined by the judiciary.

**Question 14:** Is there any influence of the executive on the selection and appointment of clerks of the court? If yes: describe it.

No. The selection of clerks of court and all other court personnel is strictly within the control of the federal judiciary.

**Question 15:** Is there any influence of the executive on the executive on the composition of the Council of the judiciary or a similar body (if such a body exists)? If yes: describe it.

The national governance of the federal judiciary is addressed by the Judicial Conference of the United States which is comprised of the Chief Judge of each of the thirteen circuit courts of appeal and one district judge elected by the

judges within each circuit, and presided over by the Chief Justice of the United States. Similarly, within each circuit, a circuit judicial council is presided over by the Chief Judge of that circuit and equal number of circuit and district judges as provided by statute. Each of the 94 federal district courts is presided over by a Chief District Judge who supervises local governance issues with the majority vote of the judges of that district. The only influence of the executive in the entire court governance process is to the extent the President nominates the Chief Justice of the United States Supreme Court.

**Question 16:** Is there any other influence of the executive on the work of the Council of the judiciary or similar body (if such a body exists)? If yes: describe it.

No.

**Question 17:** What influences (if any) does the judiciary have on the executive power of central/local government? In particular:

(a) does the judiciary have any power to control the exercise of executive power (by virtue of orders that the court can make on the application of parties to the court) and

(b) what power(if any), does the court have to oversee the appointment of members of the executive?

The federal judiciary has no authority to oversee the appointment of members of the executive. The federal judiciary has jurisdiction to consider cases arising under the Constitution and laws of the United States as provided for in Article III of the Constitution. As a result, when an action of the executive is challenged as violating the Constitution or laws of the United States, the federal courts have jurisdiction to consider it, and where appropriate may overrule the action of the executive. This authority of judicial review extends also to acts of Congress as was made explicit in the 1803 decision of the United States Supreme Court in Marbury v. Madison. This process should be distinguished from the judicial power of the various state courts to address actions by the executive

branches of each of the 50 States of the United States which derive from the Constitutions and laws of each State, and which are provided for under the system of federalism contained in the United States Constitution.

**Question 18:** What power does the judiciary have over other public bodies (e.g. the police, or other quasi - governmental powers) in your country?

See response to Question 17.

**Question 19:** Who fulfils the task of prosecution in your country?

Federal prosecutions for violation of the laws of the United States are conducted by the executive branch Department of Justice through the Offices of the United States Attorney present in each of the 94 federal districts. State and local prosecutions for violations of State and local laws are similarly conducted by the Office of the State Attorney General which exist in each of the 50 States and by local District Attorney's offices.

**Question 20:** Is there a common career of public prosecutors and judges?

No. The background of federal judges is quite diverse. It is not uncommon for federal judges to have had experience as a public prosecutor or defender, just as most have had experience in private law practice or on the state bench prior to their appointment to the federal bench.

**Question 21:** Can judges be appointed as public prosecutors and vice versa?

As indicated in response to Question 20, qualified individual from all sectors of the legal profession, including public prosecutors may be appointed to the bench. Service as a federal judge is, however, considered to be a position of significant prestige and it would be rare for a judge to leave the bench to undertake the role of a public prosecutor. It is not unheard of, however. In 1945, Robert H.

Jackson, Associate Justice of the United States Supreme Court, took an 18 month leave from the Court to serve as Chief United States Prosecutor at the Nuremberg International Military Tribunal. Additionally, Michael Mukasey, the current Attorney General of the United States, is a former United States district judge who had retired to private law practice in New York prior to his appointment as Attorney General.

**Question 22:** Is there an influence of the executive on the appointment/promotion of public prosecutors?

Yes. The President nominates the Attorney General of the United States and other high level official within the Department of Justice as well as the United States Attorneys for each of the 94 federal districts. While each of them is an official within the executive branch, their appointments must be confirmed by the United States Senate just as is the case with federal judges. The many other prosecutors within the Department of Justice are, however, appointed by the Attorney General of the United States.

**Question 23:** Is there a possible influence of the executive on the cases public prosecutors are in charge of?

Certainly. Prosecution for violation of the laws of the United States is at the discretion and under the direction of the executive branch of government. Naturally, the President is not involved in the day to day operation of public prosecutions. However, the Attorney General of the United States as the head of the Department of Justice, is a member of the President's Cabinet and they jointly participate in establishing general guidelines for criminal prosecution.

**Question 24:** Which problems (if any) do you see in the relationship between the executive and the judiciary in your country?

Our Constitution contemplates, and 220 years of history illustrates that there is an inevitable tension between the judiciary and the more political executive and legislative branches. The executive and legislative branches by design respond to the will of the people through the democratic process, whereas the judiciary is charged with applying the Constitution and laws of the country. This is precisely



why an independent judiciary is so fundamentally important to the viability of the rule of law in a democracy. Hence, judges should expect to hear public criticism of judicial decisions from time to time by members of the executive and legislative branches, as well as the public and the media. The most common current example of this would be public criticism by the executive of some judicial decisions as being “activist.” Such comments/criticisms are not particularly alarming to judges so long as they do not elevate to actual threats against the independence of the judiciary, most notably through the threat of impeachment.

The most serious current problem faced by the federal judiciary in its relationship with the executive and legislative branches is the inability we have experienced in recent years to secure a meaningful increase in judicial salaries. The challenge in this area relates more to the lack of will on the part of Congress to authorize a salary increase more than with the executive branch which has been far more supportive. This is an issue which over time can have an inimical influence on the independence of the judiciary in the United States.

**Question 25:** Are there concrete projects to change elements in the relations between the executive and the judiciary? What would this change mean?

No.