Advisory Opinions—Present Status and an Evaluation

George Neff Stevens

Follow this and additional works at: https://digitalcommons.law.uw.edu/wlr

Part of the Courts Commons

Recommended Citation
Available at: https://digitalcommons.law.uw.edu/wlr/vol34/iss1/1

This Article is brought to you for free and open access by the Law Reviews and Journals at UW Law Digital Commons. It has been accepted for inclusion in Washington Law Review by an authorized editor of UW Law Digital Commons. For more information, please contact cnyberg@uw.edu.
As the term is used in the United States today, an advisory opinion1 is a formal opinion by a judge or judges of a supreme court,2 or by a

1 The balance of this paper is in a sense an annotation in support of this proposed definition.

2 Alabama, Delaware, Florida, Maine, Massachusetts, New Hampshire, North Carolina, Oklahoma, Rhode Island, South Dakota.
supreme court, in answer to a question of law, submitted by a legislative body or a governor, a council, or a governor and council, of a state, which question is not related to nor concerned with a case or controversy

Section 36. Briefs may be furnished supreme court.
The justices of the supreme court may request briefs from the attorney general, and may receive briefs from other attorneys as amici curiae, as to such questions as may be propounded to them for their answers. (L. 1923, p. 25).

The Justices of the Supreme Court, whenever the Governor of this State shall require it for public information, or to enable him to discharge the duties of his office with fidelity, shall give him their opinions in writing touching the proper construction of any provision in the Constitution of this State or the United States, or the constitutionality of any law enacted by the Legislature of this State. (Code 1935, § 374; C. 1915, § 402; C. 1852, § 482).

MAINE—Maine Const. art. VI, § 3 (1820).
[The Justices of the Supreme Judicial Court] shall be obliged to give their opinion upon important questions of law, and upon solemn occasions, when required by the governor, council, senate or house of representatives.

Section 1002. Governor to be informed of proceedings
The judge of a court at which a conviction requiring a judgment of death is had, must, immediately after the conviction, transmit to the Governor, by mail or otherwise, a statement of the conviction and judgment, and of the testimony given at the trial. (R.L. 1910, § 5968.)

Section 1003. Governor may require opinion of appellate judges
The governor may thereupon require the opinion of the judges of the criminal court of appeals, or any of them, upon the statement so furnished. (R.L. 1910, § 5969.) Note—Revision of 1910: Crim. Ct. of App. substituted for Sup. Ct.

RHODE ISLAND—R.i. Const. amend. art. 12, § 2 (1903).
The judges of the supreme court shall give their written opinion upon any question of law whenever requested by the governor or by either house of the general assembly.

SOUTH DAKOTA—S.D. Const. art. V, § 13 (1889).
The governor shall have authority to require the opinions of the judges of the supreme court upon important questions of law involved in the exercise of his executive powers and upon solemn occasions.

NORTH CAROLINA—By case law. See Waddell v. Berry, 9 Irew. 361, 31 N.C. 518 (1848).
A word of credit for Ronald F. Mitchell, law student, who prepared the preliminary report for me on "States Using the Advisory Opinion."

in actual litigation at the time,7 and which does not involve private rights.8

At the present time, the advisory opinion procedure is used in eleven states.9 In seven states it is provided for in and by the state constitu-

Section 3. Original jurisdiction—opinion.—It shall have power to issue writs of habeas corpus, mandamus, quo warranto, certiorari, injunction, and other original and remedial writs, with authority to hear and determine the same; and each judge of the supreme court shall have like power and authority as to writs of habeas corpus. The supreme court shall give its opinion upon important questions upon solemn occasions when required by the governor, the senate, or the house of representatives; and all such opinions shall be published in connection with the reported decisions of said court.

4 All quotations are from constitutions or statutes listed in footnotes 2 and 3. ALABAMA: "on important constitutional questions"; COLORADO: "upon important questions upon solemn occasions"; DELAWARE: "touching the proper construction of any provision in the Constitution of this State or of the United States, or the constitutionality of any law enacted by the Legislature of this State"; FLORIDA: "as to the interpretation of any portion of this Constitution upon any question affecting his Executive powers and duties"; MAINE: "upon important questions of law, and upon solemn occasion"; MASSACHUSETTS: "upon important questions of law, and upon solemn occasions"; NEW HAMPSHIRE: "upon important questions of law, and upon solemn occasions"; OKLAHOMA: "upon the statement" "of the conviction and judgment" "of death"; RHODE ISLAND: "upon any question of law"; SOUTH DAKOTA: "upon important questions of law involved in the exercise of his executive powers and upon solemn occasions." NORTH CAROLINA: See Edsall, The Advisory Opinion in North Carolina, 27 N.C. L. Rev. 297 (1949).

5 For authority, see constitutions and statutes listed in footnotes 2 and 3. ALABAMA: either house of the legislature; COLORADO: the senate or the house of representatives; MAINE: the senate or house of representatives; MASSACHUSETTS: each branch of the legislature; NEW HAMPSHIRE: each branch of the legislature; RHODE ISLAND: either house of the general assembly; NORTH CAROLINA: either branch of the legislature; for authority, see Edsall, The Advisory Opinion in North Carolina, 27 N.C.L.Rev. 297 (1949).

6 For authority, see constitutions and statutes listed in footnotes 2 and 3. ALABAMA: the governor; COLORADO: the governor; DELAWARE: the governor; FLORIDA: the governor; MAINE: the governor, and the council; MASSACHUSETTS: the governor and council, which has been interpreted to mean that the governor alone cannot request an opinion, see In re opinion of the Justices, 214 Mass. 602 at 605, 102 N.E. 644 (1913); NEW HAMPSHIRE: the governor and council, which has been interpreted to mean that the request must come from both, see Opinion of Justices, 95 N.H. 557, 66 A.2d 76 (1949); Opinions of the Justices, 64 N.C. 785 (1870).

7 This requirement is implicit in any definition of advisory opinions. See In re Interrogatories, 112 Colo. 294, 148 P.2d 809 (1944); State v. Cleveland, 58 Me. 564, 573 (1870); Johnson v. State, 82 Okla. Crim. 437, 172 P.2d 337 (1946).

8 In re Opinions of the Justices, 209 Ala. 593, 96 So. 487 (1923); In re Senate Bill 65, 12 Colo. 466, 21 Pac. 478 (1889); In re Interrogatories propounded by the Senate Concerning House Bill 456, 131 Colo. 389, 281 P.2d 1013 (1955); Opinion of Justices, 95 N.H. 557, 66 A.2d 76 (1949); Opinions of the Justices, 64 N.C. 785 (1870).

9 Alabama, Colorado, Delaware, Florida, Maine, Massachusetts, New Hampshire, North Carolina, Oklahoma, Rhode Island, and South Dakota. For authority, see footnotes 2 and 3. See also:


Articles:

Note—10 Harv. L. Rev. 50 (1896).

Emery, Advisory Opinions from Justices, 2 Me. L. Rev. 1 (1908).
tion," in two states by general statutes," in one state by statute in a very limited area," and in one state by judicial custom. 

No state has provided for advisory opinions by its constitution since 1890, and the most recent successful attempt to provide for advisory opinions by statute was in 1923. 

Of the eleven states employing advisory opinions, in nine the governor alone may request advisory opinions," in two the governor and council may," in one the council alone may, and in seven either branch of the legislature may. 

The kind of question which may be asked in any one of the eleven states using the advisory opinion procedure depends upon the constitutional or statutory authorization in ten states and upon the willingness of the court in the eleventh. The scope of these provisions, which are set forth in full in footnotes 2 and 3, vary considerably. Yet the annota-

---

Emery, Advisory Opinions of the Justices, 11 Me. L. Rev. 15 (1917).
Frankfurter, A Note on Advisory Opinions, 37 Harv. L. Rev. 1002 (1924).
Clovis and Updegraff, Advisory Opinions, 13 Iowa L. Rev. 188 (1928).
Aumann, The Supreme Court and the Advisory Opinion, 4 Ohio St. L. J. 21 (1937).

---

10 Colorado, Florida, Maine, Massachusetts, New Hampshire, Rhode Island and South Dakota. For constitutional authority, see footnotes 2 and 3.
11 Alabama and Delaware. For statutory authority see footnote 2. For judicial approval, see, In re Opinions of the Justices, 209 Ala. 593, 96 So. 487 (1923) and In re Opinions of the Justices, 47 Del. 117, 88 A.2d 128 (1952).
12 Oklahoma: Upon the statement of a conviction requiring a judgment of death. For statutory authority, see footnote 2. For judicial approval, see Opinion of the Judges, 3 Okla. Crim. 315, 105 Pac. 684 (1909).
13 North Carolina: Waddell v. Berry, 9 Ire. 361, 31 N.C. 518 (1848); and see Edsall, footnote 9.
14 South Dakota, by constitution, in 1889 and Alabama, by statute, in 1923, which statute was upheld by the Alabama Supreme Court the same year. See footnote 11. For dates of earlier constitutions and statutes, see footnotes 2 and 3.
16 Massachusetts and New Hampshire. See footnote 6.
17 Maine. Opinion of the Justices, 72 Me. 542 (1881). And see footnote 2.
tions to these provisions make it abundantly clear that in every state a rule of strict construction is employed.\textsuperscript{20}

For example, the courts have said that they will not answer questions requiring the determination of a question of fact,\textsuperscript{21} nor will they answer questions bearing upon wisdom and expediency, as distinguished from power and authority.\textsuperscript{22} They have refused to give opinions upon matters likely to come before the court for decision.\textsuperscript{23} They have consistently refused to answer questions which involved private rights.\textsuperscript{24} And, they have held that it is for the court to determine whether the question comes within the constitutional or statutory language, such as "solemn occasion,"\textsuperscript{25} or "important questions of law."\textsuperscript{26}

The actual subject matter of the questions upon which advisory opinions have been given covers a wide variety of topics. Ellingwood's classification of the "Nature of Questions" and a later study by Oliver P. Field will serve as excellent examples for those who are interested.\textsuperscript{27}

\textsuperscript{20} In re Senate Bill, 45 Colo. 394, 101 Pac. 410 (1909); In re Opinion of the Justices, 47 Del. 117, 88 A.2d 128 (1952); In re Advisory Opinion to Governor, 103 Fla. 668, 137 So. 881 (1931); Opinion of the Justices, 147 Me. 410, 105 A.2d 454 (1952); In re Opinion of the Justices, 214 Mass. 602, 102 N.E. 644 (1913); Opinion of the Justices, 99 N.H. 524, 113 A.2d 542 (1955); Certain Members of the Senate in the General Assembly, 53 R.I. 142, 191 Atl. 518 (1937); In re Construction of Constitution, 3 S.D. 548, 54 N.W. 650 (1893). The writers in this field, whether favorable or opposed to advisory opinions, have all noted this tendency of the courts to limit the use of the advisory opinion, even under a constitutional grant of power. See footnote 9 for list of authors and citations.

\textsuperscript{21} See, for example, People ex rel. Engly v. Martin, 19 Colo. 565, 36 Pac. 543 (1894); Diun v. Swig, 223 Mass. 516, 112 N.E. 91 (1916); Opinion of Justices, 45 N.H. 607 (1864); In re Construction of Constitution, 3 S.D. 548, 54 N.W. 650 at 652 (1893).

\textsuperscript{22} Opinion of the Justices, 95 Me. 564, 51 Atl. 224 (1901); Opinion of the Justices, 314 Mass. 767, 49 N.E.2d 252 (1943); In re Construction of Constitution, 3 S.D. 548, 54 N.W. 650 at 652 (1893).

\textsuperscript{23} In re Interrogatories of Governor, 126 Colo. 48, 245 P.2d 1173 (1952); Petition of Turner, 97 N.H. 449, 91 A.2d 458 (1952).

\textsuperscript{24} See footnote 8.

\textsuperscript{25} In re Senate Resolution No. 2, 94 Colo. 101, 31 P.2d 325 (1933); Opinion of Justices, 95 Me. 564, 51 Atl. 224 (1901); Opinion of the Justices, 330 Mass. 713, 113 N.E.2d 452 (1953); In re Opinion of Judges, 34 S.D. 650, 147 N.W. 729 (1914).

\textsuperscript{26} Opinion of the Justices, 253 Ala. 111, 43 So.2d 3 (1949); Opinion of the Justices, 254 Ala. 177, 47 So.2d 655 (1950); Opinion of the Justices, 147 Me. 410, 105 A.2d 454 (1952).

\textsuperscript{27} Ellingwood, (1918), footnote 9, Chap. 2, the Advisory Opinion in Practice, B. Nature of Questions, pp. 99-146 (1918). His classification of subjects is as follows:

1. The Legislative Department: (a) Composition of the legislature; (b) Organization and Procedure; (c) Financial Powers and Duties of the Legislature, incl. Taxation, Appropriations and Miscellaneous; (d) Police Power of the Legislature; (e) Eminent Domain; (f) Education; (g) Labor; (h) Miscellaneous Questions as to Legislative Power.

2. The Executive Department: (a) Composition and Organization; (b) Financial Administration; (c) Appointment and Removal Powers of Executive Officers; (d) Electoral Duties; (e) Military Questions; (f) The Execution of the Criminal Law; (g) Miscellaneous.

3. The Judiciary, most of them dealing with tenure of justices.

4. Suffrage and Elections.

5. Miscellaneous, such as amendments to state constitution.
The actual coverage in any one of the eleven states using the advisory opinion is of course limited by the constitutional or statutory provision and by the policy of strict interpretation above referred to.

There is authority in each of the eleven states using the advisory opinion procedure to the effect that such opinions are advisory only, result in no judgment or decree, and bind no one. If this be taken literally one wonders why an advisory opinion is either sought or given.

Legally, the statement is, as indicated, amply supported by authority. However, as a practical matter, not only the courts, but also the
writers, recognize that advisory opinions carry real weight. They are almost invariably accepted by those who requested the opinion and are cited quite frequently in later cases both at home and in other jurisdictions as authority.

There is evidence that the advisory opinion practice was once employed in eight states no longer using it. It was abolished by constitutional amendment in one state, probably because of the hostility of the judges. It was rejected by rule of court in another state, probably as a consequence of a vigorous dissent by one of the judges. Apparently, it lapsed through disuse in one state. And the practice was stopped by judicial decision in the remaining five.

(1883) advised the Senate that [a constitutional convention could not be called legally]. "We do not feel bound to follow that opinion. While it is entitled to respect, and we have given it careful attention, it is not a decision of this court, and therefore can have no weight as a precedent.") Interestingly, the stultifying effect of the earlier advisory opinion was the source of Professor, now Mr. Justice, Frankfurter's famous remark—"It must be remembered that advisory opinions are not merely advisory opinions. They are ghosts that slay." 37 HARV. L. REV. 1002 at 1008 (1924).

See, Ellingwood, footnote 9, pp. 154-159, 234-237; Edsall, footnote 9, pp. 330-331; Frankfurter, footnote 9, at 1008; Field, footnote 9, pp. 213-214, 216; Clovis and Updegoff, footnote 9, pp. 192-193, 195. Hudson, footnote 9, apparently felt that they were not given enough recognition, at p. 982-983, where he concludes, "Stare decisis is inapplicable, but short of that there is room for giving advisory opinions great weight.") Field, footnote 9, at p. 216 "Advisory opinions are used as precedents by the bar, by the courts, and by the public. They are cited in briefs, in opinions by the courts, and despite the fact that they are sometimes carefully distinguished from judicial decisions, they are relied on as fully as decisions are, so far as precedent is concerned. For instance, Massachusetts advisory opinions to the legislature have each been cited on an average of fourteen times by the courts. According to Shepard's Citator, the advisory opinions from the five states here studied [Colorado, Maine, Massachusetts, New Hampshire, and South Dakota] have been cited on an average of six times each." See also, book and articles listed in footnote 9.

Connecticut, Kentucky, Missouri, Nebraska, New Jersey, New York, Pennsylvania, and Vermont. Missouri. The clause authorizing advisory opinions which appeared in the 1865 Constitution was omitted from the Constitution of 1875. This is Mr. Ellingwood's opinion, and it seems well taken. See Ellingwood, footnote 9, HISTORY OF THE ADVISORY OPINION, (e) Missouri, pp. 43-46.

Missouri. 37 Neb. XIII, Rule 23, Jan. 4, 1894. This, again, is Mr. Ellingwood's opinion, and, again, it seems well taken. See Ellingwood, footnote 9, (1) Nebraska, pp. 74-76. See also, Justice Noval's dissent in In re Board of Public Lands and Buildings, 37 Neb. 425, 55 N.W. 1092 at 1094 (1893).

The Judges of the Supreme Court of Pennsylvania made a report to the legislature on the English statutes in force in the Commonwealth, which is reported in 3 Binney 359 (Pa. 1808). There is no evidence of any other advisory opinions in Pennsylvania thereafter.

CONNECTICUT: Reply of the Judges, 33 Conn. 586 (1867), where the Judges of the Connecticut Supreme Court of Errors, after having given advice on two previous occasions, declined to do so further; KENTUCKY: In re Constitutionality of House Bill No. 222, 262 Ky. 437, 90 S.W.2d 692 (1936). The Kentucky court had rendered an advisory opinion in Opinion of Judges of Court of Appeals, 79 Ky. 621 (1881); NEW JERSEY: Hester v. Miller, 8 N.J. 81, 83 A.2d 773 (1951). For an early case in which an advisory opinion was given under a statute giving the court power to issue advisory opinions as to whether a statute was properly enacted see In re an Act to Amend an Act Entitled "An Act Concerning Public Utilities," 83 N. J. L. 303, 84 Atl. 706 (1912); NEW YORK: Matter of State Industrial Commission, 224
The reasons given by these five courts in rejecting the advisory opinion practice are interesting and significant:

1) The practice is extra-judicial—no parties before the court and therefore nothing to adjudicate.\(^{39}\)

2) Such opinions are merely advisory, "except perhaps as we ourselves, if sitting upon an actual case might be inclined to adhere to an opinion which we had expressed," formed ex parte, and without assistance of counsel.\(^{40}\)

3) Conflicts with judicial duties—danger of pre-judgment of questions likely to come before the court.\(^{41}\)

4) It interferes with the separate and independent rights and duties of the legislature.\(^{42}\)

5) Under the doctrine of separation of powers, it is not a judicial function; so the legislature is without power to charge the court with non-judicial functions.\(^{43}\)

6) A supreme court, by constitution, has appellate jurisdiction only, and rendering an advisory opinion is not a "review."\(^{44}\)

7) "This we will not do."\(^{45}\)

Requests for advisory opinions have been refused from the outset by the Supreme Court of the United States,\(^{46}\) and by the supreme courts of ten states.\(^{47}\) The reasons given by the Supreme Court of the United

N.Y. 13, 119 N.E. 1027 (1913). For the early history of advisory opinions in New York see Ellingwood, footnote 9, at pp. 65-68; VERMONT: In re Opinion of the Justices, 115 Vt. 524, 64 A.2d 169 (1949), in which the court pointed out that although it had given advisory opinions in the past, it had no such power under the constitution, nor could the legislature confer any such power on the court. Vermont had had a statute authorizing advisory opinions, enacted in 1864 and repealed in 1915.

\(^{39}\) Connecticut and Kentucky. See footnote 38.

\(^{40}\) Connecticut, footnote 38. Compare, footnote 29.

\(^{41}\) Connecticut, footnote 38.

\(^{42}\) Connecticut, footnote 38.

\(^{43}\) Kentucky, New York and Vermont. See footnote 38.

\(^{44}\) Kentucky, footnote 38.

\(^{45}\) New Jersey, footnote 38.

\(^{46}\) For a history of the advisory opinion in the Supreme Court see Ellingwood, footnote 9, at pp. 55-64; the footnote to Hayburn's Case, 2 Dall. 409, at 410-414 (1792); and, Chicago and Southern Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, at 113 (1948), in which the Supreme Court said: "This Court early and wisely determined that it would not give advisory opinions even when asked by the Chief Executive."

\(^{47}\) LOUISIANA: State ex rel. Day v. Rapides Parish School Board, 158 La. 251, 103 So. 757 (1925); MARYLAND: The Maryland-National Capital Park and Planning Comm'n v. Randall, 209 Md. 18, 120 A.2d 195 (1956); MICHIGAN: Connor v. Herrick, 349 Mich. 201, 84 N.W.2d 427 (1957); MINNESOTA: Re Senate of State, 10 Minn. 78, 10 Gil. 56 (1865); Rice v. Austin, 19 Minn. 103, 19 Gil. 74 (1872); MISSISSIPPI: In re Opinion of the Justices, 148 Miss. 427, 114 So. 887 (1928); NORTH DAKOTA: Langer v. North Dakota, 69 N.D. 129, 284 N.W. 238 at 250-252 (1939); OHIO: State v. Baughman, 38 Ohio St. 455 (1952); TEXAS: Morrow v. Corbin, 122 Tex. 553, 62 S.W.2d 641 at 646 (1933); TENNESSEE: DeSausure v. Hall, 297 S.W.2d 90 (1956); WISCONSIN: State ex rel. La Follette v. Dammann, 220 Wis. 17, 264 N.W. 627 (1936).
ADVISORY OPINIONS

States for declining to give advisory opinions are these: The judges deemed it improper to enter the field of politics by declaring their opinions on questions not growing out of cases before them; 48 the jurisdiction of the Supreme Court of the United States "is limited to cases and controversies in such form that judicial power is capable of acting on them"; 49 and the doctrine of separation of powers prohibits the executive or legislative branches from imposing any but judicial duties upon the courts. 50

In the ten states where the judges have refused to give advisory opinions, the underlying reason was, and is, their belief that, since the giving of such opinions is not the exercise of a judicial function, the practice is, in the absence of specific constitutional authorization, a violation of the doctrine of separation of powers. 51 The judges from these ten states added these comments:

48 See footnote 46.
49 Keller v. Potomac Electric Power Co., 261 U.S. 428 at 444 (1923). The opinion, following the material quoted in the text continues, "... and does not extend to an issue of constitutional law framed by Congress for the purpose of invoking the advice of this court without real parties or a real case, or to administrative or legislative issues or controversies. Hayburn's Case, 2 Dall. 410, note: ...".
50 Gordon v. United States, 117 U.S. 697 at 700 (1864). "... Its jurisdiction and powers and duties being defined in the organic law of the government, and being all strictly judicial, Congress cannot require or authorize the court to exercise any other jurisdiction or power, or perform any other duty...."
51 LOUISIANA, footnote 47, at 760 of 103 So.—"In some states the court of last resort renders advisory opinions at the request of other departments of the government, but not in this state."; MARYLAND, footnote 47, at 199 of 120 A.2d—"It has been held specifically by this Court that it will not render advisory opinions to the Legislature or to anyone else."; MICHIGAN, footnote 47, at 439 of 84 N.W.2d—"The case currently pending before us in its present form represents in essence an attempt to secure an advisory opinion as to the validity of a bond issue from a Supreme Court not constitutionally authorized to issue same...."; MINNESOTA, footnote 47, at 57 of 10 Gil.—"... By the constitution, the power of the state government is divided into three distinct departments, legislative, executive and judicial. The powers and duties of each department are distinctly defined. The departments are independent of each other to the extent, at least, that neither can exercise any of the powers of the others not expressly provided for.... This not only prevents an assumption by either department of power not properly belonging to it, but also prohibits the imposition, by one, of any duty upon either of the others not within the scope of its jurisdiction;... Any departure from these important principles must be attended with evil....", and at p. 58, "The duty sought to be imposed by the section of the act referred to, is, clearly, neither a judicial act, nor is it to be performed in a judicial manner."; MISSISSIPPI, footnote 47, at 888 of 114 So.—"Section 1 of the Constitution, which divides the powers of government into three departments, impliedly prohibits the giving of advisory opinions by one department to another, except in so far as another section of the Constitution may provide therefor."; NORTH DAKOTA, footnote 47, at 252 of 284 N.W.—"The debates of the Constitutional Convention leave no doubt that it was the deliberate judgment of the framers of the State Constitution that Judges of the Supreme Court, as part of their official duties, should not be required, or authorized, to give advisory opinions."; OHIO, footnote 47, 38 Ohio (St.) 455, at 459—"The division of the powers of the state into legislative, executive and judicial, and the confiding of these powers to distinct departments, is fundamental.... even though the decision 'would be of great value to the general assembly' in the discharge of its duties, it would, nevertheless, be an unwarranted interference with the function of the legislative department that would be unauthorized, and dangerous in
Generally failure has met attempts by legislation or litigation to employ the courts for legal advice rather than for decision of justiciable controversies between adverse parties.52

The impropriety of an unauthorized expression of opinion by a judge or court, especially one of last resort, upon a matter which may subsequently come before the court for adjudication, will immediately suggest itself.53

The Attorney General is the officer to advise the civil officers, and when questions come before the Supreme Court, that court is then untrammeled.54

[It] would be an attempt to settle questions of law involving the rights of persons without parties before it, or a case to be decided in due course of law, thus violating that provision of the Bill of Rights which declares that every person shall have a remedy for an injury done him by due course of law.55

In several instances, judges of courts in this group questioned the wisdom of the practice, while conceding its legality, even in those states where authority came from the state constitution.56

There is of course no problem with the doctrine of separation of powers in the seven states operating under constitutional provisions.57
Yet, one cannot read the cases set forth in the annotations to these provisions without sensing opposition to the practice. It comes out quite clearly in the policy of strict interpretation, referred to earlier in this article, resulting in a limitation on the authority of the judges to render advisory opinions—a policy which, by the way, produces restrictive opinions which appear to be readily accepted by the judges as binding on them!

The inherent danger in an advisory opinion, even though given under constitutional authority by judges as individuals and all too frequently without the benefit of argument, has been recognized. Thus, the judges have been admonished to make every effort to guard against any influence flowing from an earlier opinion when the question therein considered comes before them in the course of litigation. Or, as one court put it:

It may not be improper for us to further suggest that a satisfactory response to the resolution would require vast research, and extraordinary caution. Whenever we assume the right to answer such questions, we must act, both as court and counsel, upon ex parte proceedings. It is a principle declared by our constitution, (section 2, art. 6) and of universal recognition, that no person shall be deprived of life, liberty, or property without due process of law. There can be no due process of law unless the party to be affected has his day in court. Yet a hasty construction and application of this provision might lead to the ex parte adjudication of private rights by means of an executive question, without giving the party interested a day or voice in court.

In another opinion in justification of a restrictive interpretation, it was pointed out that any other position would “impose upon the court a burden it would be impossible to carry.” This same opinion went on to suggest that if advisory opinions were given too freely it would give the court “an influence upon prospective legislative action not contemplated by the Constitution.” And, finally, a court with advisory opinions responsibility said:

as a fundamental principle in a constitutional republic and one strongly emphasized in the Maine constitution, viz.—the independence of the judiciary, the complete separation of the judicial power and functions from both the legislative and executive.”

See, for example, the cases cited in footnotes 7, 8, and 20-26.

See, for example, City of Boston v. Treasurer and Receiver General, 237 Mass. 403, 130 N.E. 390 at 391 (1921); and Building Inspector of Lowell v. Stoklosa, 250 Mass. 52, 145 N.E. 262 at 263 (1924)—“Such opinions... are given without the benefit of argument, are liable to error.... When called upon to decide the same question coming before them as a court, the justices guard themselves most sedulously against any influences flowing from their previous consideration.”


In re Interrogatories by the Governor, 71 Colo. 331, 206 Pac. 383 (1922).

See footnote 61; and see Sands, footnote 9, at pp. 35-38.
As a general proposition we seriously doubt the wisdom of prejudging involved legal problems and fundamental constitutional interpretations in ex parte proceedings of this nature, and it has been, and is, the policy of our Court to accommodate the legislature only in such cases as are clear and wherein no possible prejudice to anyone may later result.\footnote{In re Interrogatories propounded by the Senate concerning House Bill 456, 131 Colo. 389, 281 P.2d 1013 at 1016 (1955).}

As noted, the judges of the supreme courts of four states give advisory opinions without the benefit of a constitutional provision.\footnote{Alabama, Delaware and Oklahoma under statute, and North Carolina by court decision. See footnote 2.} In two of these states, operating under statutory authority, the judges are of the opinion that under their respective constitutions the legislatures have the power to assign non-judicial functions to the judges by statute and that, therefore, the doctrine of separation of powers is not applicable.\footnote{In re Opinions of the Justices, 209 Alabama 593, 96 So. 487 (1923) ; In re Opinions of the Justices, 47 Del. 117, 88 A.2d 128 (1952), wherein at p. 139 of 88 A.2d, the justices said: "... It may be observed, however, that the dangers to popular government to be apprehended from an intermingling of the functions of the three departments seems to be of least gravity in the case of the performance of minor executive or administrative duties by members of the judiciary—traditionally the weakest of the three departments of government." The justices pointed out that no question of constitutionality of the advisory opinion statute was suggested at the time they gave their opinions in In re School Code of 1919, 7 Boyce 406, 30 Del. 406, 108 Atl. 40 (1919).} In a third state, operating under statutory authority, the judges refused to consider the question of constitutionality, on the ground that the opinion was advisory only.\footnote{Opinion of the Judges, 3 Okla. Crim. 315, 105 Pac. 684 (1909).}

Interestingly, a recent opinion in one of these states reminded the legislature that "the court ... is one of appellate review and the constitutionality of statutes should be tested by appropriate adversary proceedings when available or when at all possible."\footnote{In re Opinions of the Justices, 254 Ala. 177, 47 So. 2d 655 at 656-657 (1950). See, Sands, footnote 9, especially his conclusions at pp. 51-33.}

Interestingly, a recent opinion in one of these states reminded the legislature that the individual justices were privileged, but not required, under statute, to give advisory opinions. It was also said:

You must know the vast volume of work under which the court is laboring from cases properly submitted to it for review from inferior tribunals, and we do not think ... that these labors be distracted by the individual justices departing from the duties of their office to take the time necessary in studying the law to give answers to such hypothetical questions.

The court further informed the legislature that "the court ... is one of appellate review and the constitutionality of statutes should be tested by appropriate adversary proceedings when available or when at all possible."
judges some concern. Apparently, the point was not raised, or, if so, not discussed in the opinion which established the practice. It has been raised on several occasions since then, but a majority of the judges have gone along with the practice.

Conclusions

The principal objective of the advisory opinion practice is to provide a speedy and inexpensive means of passing upon the constitutionality of proposed legislation or proposed executive action in order to reduce the possibility of enacting unconstitutional statutes or taking unconstitutional action. It is contended that the practice would save the taxpayers and the public the expense of prolonged litigation and prevent the disruptions arising out of reliance by the public on unconstitutional statutes and actions.

The principal objections to the practice are procedural and philosophical. The procedural objections go to the lack of adequate argument, oral and written; burden on the judges, since they must do their own research in most instances; insufficient time to give the matter proper consideration, because the legislative body or executive officer wants an answer immediately; and the difficulties encountered in interpretation, because questions are presented in the abstract, rather than with reference to particular facts. The principal philosophical objection stems from the doctrine of separation of powers. The advisory opinion practice does place in the judges a degree of control over legislative and executive conduct, duties, and obligations above and beyond the judicial function which can and does have serious implications on the operation of government under the doctrine of separation of powers.

---

69 Waddell v. Berry, 9 Ire. 361, 31 N.C. 518 (1848), wherein it is stated, "Although not strictly an act of official obligation, which could not be declined, yet from the nature of the questions and purposes to which the answers are to be applied—being somewhat of a judicial character—the Judges have deemed it a duty of courtesy and respect to the Senate to consider the points submitted to them and to give their opinions thereon."

70 See, Edwards, footnote 9.

71 See, in particular, Ellingwood, chap. V, The Place of the Advisory Opinion, pp. 248-257; Clovis and Updegraff; and Field; cited in footnote 9.

72 Frankfurter, footnote 9, at p. 1007—"Perhaps the most costly price of advisory opinions is the weakening of legislative and popular responsibility."; Aumann, footnote 9, at p. 52—"If the holders of legislative power are careless, or ineffective, the courts cannot improve the matter by attempting a function not their own"; Field, footnote 9, at p. 213—"The advisory opinion restricts the legislature more than the regular operation of judicial review does. . . . More proposed legislation is declared invalid, than courts find invalid in litigated cases."; Sands, footnote 9, at p. 38—"If advisory opinions were not available, then legislative and executive officials would be forced to face up
The advisory opinion practice as it has developed in this country serves a very limited area. Furthermore, even in this limited area, it has not been used extensively. Its disadvantages far outweigh its actual and potential advantages, for the steps necessary to cure the defects would wipe out most, if not all, the few advantages which the practice now offers—principally, speedy determination. Procedural reform, looking to a speedier determination of litigated cases, and a wider use of the prerogative writs and the declaratory judgment procedure will accomplish far more, in a sounder manner, than could be obtained under any extension of the advisory opinion practice.

Field lists cases between Annotations show Between Between
Colorado 105 1886-1937 9 more 1937-1957
Maine 75 1820-1937 17 more 1937-1957
Massachusetts 152 1780-1937 12 more 1937-1957
New Hampshire 74 1810-1937 9 more 1937-1957
South Dakota 22 1890-1937 0 more 1937-1957
Delaware: The annotations show 2 between 1852 and 1957.
Florida: The annotations show around 100 between 1868 and 1957.
Oklahoma: The annotations show 26 between 1890 and 1957.
Rhode Island: The annotations show 8 between 1843 and 1957.

For the Alabama picture, see Sands, footnote 9.
For the North Carolina picture, see Edsall, footnote 9.