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# THE ADVISORY OPINION IN NORTH CAROLINA

PRESTON W. EDSALL\*

"As generally understood, the advisory opinion is an opinion rendered by the highest judicial officers in the state, acting as individuals and not in a judicial capacity, in response to a request for information as to the state of the law or counsel as to the constitutionality of proposed action, coming from the legislative or executive branches of the government.

\* \* \* \* \*

"We conclude that there is a presumption in favor of the advisory opinion as a useful instrument of government. It seems justified in theory; it has proved its value in practice."

—Albert R. Ellingwood.

"It must be remembered that advisory opinions are not merely advisory opinions. They are ghosts that slay."

—Felix Frankfurter.

The suggestion made last August that the right of the "Dixiecrats" to a place on the North Carolina ballot might be determined by seeking an advisory opinion from the justices of the Supreme Court drew attention once again to a century-old function of the judges. It was on January 18, 1849, that the members of the North Carolina Supreme Court gave to a coordinate branch of the state government what is believed to have been their first advisory opinion.<sup>1</sup> Today, after a somewhat intermittent development, the advisory function has become a powerful factor in legislation and administration. Available to the governor and to the General Assembly or either of its houses, advisory opinions have guided legislative and executive action on many points of constitutional and statutory interpretation. Tense political circumstances have most frequently motivated requests for opinions. In a few instances there has been sharp public criticism of the opinions themselves and of the propriety of the judicial action in rendering them, but, in general, the advisory job has been performed so unobtrusively that distinguished out-of-state jurists and authorities on state government have long solemnly proclaimed that the advisory opinion practice has "waned" or "atrophied" in North Carolina or even that it has been renounced by

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<sup>1</sup> *Waddell v. Berry*, 31 N. C. 516 (1848), 40 N. C. 440 (1848).

the justices themselves.<sup>2</sup> The statements of these authorities truthfully apply to several of the nine states where advisory opinions were once available and are no longer so;<sup>3</sup> but North Carolina remains one of ten states in which the advisory function is far from moribund.

Admittedly, when compared to the advisory opinion practice of Massachusetts, that of North Carolina is small in quantity and limited in subject matter. Nevertheless it is important and will probably become more so unless steps are taken to curb it. On at least twenty-one occasions, seven of them since Professor Frankfurter announced the "atrophy" of the device in North Carolina, formal requests have been addressed to the Court or its members. These requests were distributed chronologically as follows: 1849, 1863, 1866, 1869 (two requests, the replies to the second coming in 1870), 1871, 1894, 1897, 1917, 1919, 1921, 1925 (two requests), 1929, 1933 (two requests), 1934, 1944, 1946, and 1947 (two requests).<sup>3a</sup> Eight requests originated in joint

<sup>2</sup> Examples of the misconception concerning advisory opinions in North Carolina are many. ELLINGWOOD, *DEPARTMENTAL COOPERATION IN STATE GOVERNMENT* 69 (1918), apparently thought no such opinions were rendered after the Legislative Tenure case in 1870. Felix Frankfurter, *Advisory Opinions*, in 1 *ENCYCLOPAEDIA OF THE SOCIAL SCIENCES*, 447, declares that the practice of giving advisory opinions has "atrophied" in North Carolina. MACDONALD, *AMERICAN STATE GOVERNMENT AND ADMINISTRATION* 252 n. 38 (3d ed. 1945), lists North Carolina among the states that "have made provision in their constitutions for advisory opinions" and then, strangely, includes this state among those "where advisory opinions were once given without constitutional or statutory authority" but in which "the practice has long since been discontinued." Relying on Professor Frankfurter, the author of *Advisory Opinions on Constitutionality of Proposed Legislation*, *PROBLEMS RELATING TO LEGISLATIVE ORGANIZATION AND POWERS* 296 (see bibliographical note following the text of this article), asserts that in North Carolina the court now "expressly" denies its power to render advisory opinions, and GRAVES, *AMERICAN STATE GOVERNMENT* 707 n. 4 (3d ed. 1946), cites the above mentioned article and says that "the system" of giving advisory opinions "has fallen into disuse in . . . North Carolina" and that the Supreme Court "now expressly" denies its "power to render" such opinions. BROMAGE, *STATE GOVERNMENT AND ADMINISTRATION* 307-308 (1936), comments on the refusal of the Supreme Court to advise the legislature in 1929 and concludes that in North Carolina the advisory opinion practice "has waned." It is not without interest that each of the quoted statements was written at a time when the advisory function was very active. Aumann, *The Supreme Court and the Advisory Opinion*, 4 *OHIO ST. L. J.* 32 (1937), says that the power to render advisory opinions has been "explicitly denied" in North Carolina and cites the Legislative Tenure case, 64 N. C. 785, 792 (1870).

<sup>3</sup> Judges no longer give advisory opinions in Connecticut, Kentucky, Minnesota, Missouri, Nebraska, New York, Pennsylvania, Oklahoma, and Vermont.

<sup>3a</sup> I furnished a number of hitherto unreported advisory opinions for publication in the *North Carolina Reports*, and these appeared in 227 N. C. 715-723 (1947). The communication *In re Terms of Supreme Court*, *id.* at 723-724, was added by the Reporter. It does not appear to me to be properly classified as an advisory opinion. Neither in my judgment, should the discussion by Justice Rodman, 66 N. C. 655 (1872), have been listed by the Reporter (227 N. C. 724, 725) as an advisory opinion. This discussion was prepared in connection with *Winslow v. Weith*, 66 N. C. 432 (1872). When this case was decided on narrower grounds than those advanced by Rodman, his opinion was ordered to be published in the hope that the members of the bar might be prepared to aid the court in any future case involving the points treated by the learned justice. See note, *id.*

resolutions of the General Assembly; four came from the Senate alone and one from the House of Representatives; eight requests were made by the governor, four of them since 1933. In every instance except the first one in 1925, replies have been made in writing and only two, or perhaps three, requests have failed to produce opinions dealing with the questions raised.

#### UNDER THE FIRST STATE CONSTITUTION

Today the written constitutions of seven states provide for advisory opinions and statute law furnishes an acceptable foundation in two others.<sup>4</sup> In North Carolina, however, not positive law, but usage or custom, now well-established, provides the basis. The custom has emerged from the cooperative labors of those who have sought and those who have granted opinions, and its continued existence depends upon the attitude of the justices toward the function.

*The first opinion, Waddell v. Berry.*—All constitutional usages have their beginnings and this one started in 1849, while the Constitution of 1776 (as revised in 1835) was still the fundamental law of North Carolina. The Senate, in a complicated contested election case in which Hugh Waddell challenged the right of John Berry to the senatorial seat from Orange County, became sharply divided over the meaning of the term "freeholder" as used by the State Constitution in setting the qualifications of electors. A series of questions were therefore formulated and, on January 17, 1849, passed along by the Senate "to the Supreme Court . . . with a request that the said Court would furnish the Senate as soon as practicable, their opinion."<sup>5</sup> Thus, in an almost casual fashion, appeared on the door-step of the Court, over which Chief Justice Thomas Ruffin presided, an opportunity to broaden its functions by giving the desired advice or to establish the rule that the court would deal only with litigated cases.

at 432. Since the appearance of 227 N. C., I have found a number of additional documents, including one advisory opinion, and these appear below in notes 13, 23, 24, and 30.

<sup>4</sup> Constitutions establish the advisory function in Massachusetts, New Hampshire, Maine, Rhode Island, Florida, Colorado, and South Dakota. Under the Florida and South Dakota clauses only the governor is authorized to ask advice; otherwise both executive and legislature are included in the authorizations. Missouri had a constitutional provision concerning advisory opinions from 1865 to 1875. Statutory provisions established the advisory function in Delaware, Minnesota, Vermont, and Alabama, but the Minnesota act was never operative and the Vermont statute was repealed.

The persistence of error in connection with the foundation of the advisory opinion function in North Carolina is illustrated by the statement of AUSTIN F. MACDONALD, *supra* note 2, and by the statement of F. A. Ogg and P. O. Ray that North Carolina is one of ten states in which advisory opinions are provided for either by the state constitution or by statute. INTRODUCTION TO AMERICAN GOVERNMENT 997 (9th ed. 1948).

<sup>5</sup> N. C. SENATE JOURNAL, 1848-49, p. 229. January 17, 1849.

Ample precedent existed for either line of action. The justices of the United States Supreme Court had refused to advise President Washington on legal questions in 1793.<sup>6</sup> The justices had told the President that the legislative, executive, and judicial departments "are in certain respects checks upon each other" and that they themselves were "judges of a court in the last resort." These facts, they wrote, "are considerations which afford strong arguments against the propriety of our extrajudicially deciding the questions" submitted. This view would apparently restrict judges to litigated cases as the only legitimate subject matter of the judicial function in the absence of a positive mandate. Had Ruffin and his colleagues chosen this course, they could have pointed, as Jay and his associates could not, to specific constitutional language. "The legislative, executive, and supreme judicial powers of government ought to be forever separate and distinct from each other," read the State Constitution.<sup>7</sup>

Equally good precedent existed, however, for the action taken by the North Carolina judges. That the advisory opinion was not necessarily incompatible with a practical separation of powers was clearly suggested by the fact that the constitutions of Massachusetts, New Hampshire, and Maine contained stronger statements on separation than the Constitution of North Carolina and yet, at the same time, specifically vested an advisory function in the judges of their highest courts.<sup>8</sup> Nor

<sup>6</sup> 1 WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 108-111 (1922). On Aug. 20, 1787, Pinckney proposed the following to the Federal Constitutional Convention: "Each branch of the legislature, as well as the supreme executive, shall have authority to require the opinions of the Supreme Judicial Court upon important questions of law, and upon solemn occasions." 2 FARRAND, *RECORDS OF THE FEDERAL CONVENTION* 341 (1911). Nothing came of this proposal, which was obviously modeled on the advisory opinion provision of the Massachusetts Constitution, *post.* note 8. Albertsworth, in a thoughtful article, maintains that, although the U. S. Supreme Court does not render advisory opinions in a precise sense, it does, after a manner, advise through the media of dissenting opinions and judicial dicta, and he favors the addition of a formal advisory function to the duties of the Court. *Advisory Functions in the Federal Supreme Court*, 23 *GEORGETOWN L. J.* 643-670 (1935).

<sup>7</sup> Declaration of Rights, N. C. CONST., §4 (1776).

<sup>8</sup> MASS. CONST., Pt. I, Art. XXX (1780): "In the government of this commonwealth the legislative shall never exercise the executive and judicial powers, or either of them: the executive shall never exercise the legislative and judicial powers, or either of them: the judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men."—3 THORPE, *FEDERAL AND STATE CONSTITUTIONS* 1893 (1904). Pt. II, Ch. III, Art. II: "Each branch of the legislature, as well as the governor and council, shall have the authority to require the opinions of the justices of the supreme judicial court, upon important questions of law and upon solemn occasions." *Id.* at 1905.

N. H. CONST., Pt. I, Art. XXXVII (1792): "In the government of this State, the three essential powers thereof, to wit, the legislative, executive, and judicial, ought to be kept as separate from, and independent of, each other as the nature of free government will admit, or as is consistent with that chain of connection that binds the whole fabric of the constitution in one indissoluble bond of union and amity."—4 *id.* at 2475. Pt. II, §LXXIV: "Each branch of the legislature,

was the advisory function restricted in 1849 to states whose constitutions provided for it. The function also existed in Pennsylvania and New York and had been exercised in the latter state as recently as 1846.<sup>9</sup> The practice of the judges in these states obviously might, therefore, have been used by Chief Justice Ruffin and his brethren to buttress their own action.

There is, however, no evidence that the North Carolina judges entertained any serious qualms in responding to the Senate. No attempt was made to argue the *pros* and *cons* of advisory opinions; not one precedent was cited to give the sanction of experience to the new departure. Instead the judges placed their response on a narrow base and one over which they would have full future control. "The Resolution of the Senate . . . requesting the Judges of the Supreme Court to furnish the Senate with their opinions on certain questions . . . was laid before the Judges on the evening of yesterday," wrote the Chief Justice on January 18.

"Although not strictly an act of official obligation, which could not be declined, yet from the nature of the questions, and the 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."<sup>10</sup>

Several points in this statement should be especially noted. First, the response disregards the fact that the request was for the *opinion of the Supreme Court* and treats the matter as though a request had been made for *the views of the judges*. Second, the response is made from considerations of courtesy and respect and not from legal obligation. Third, the nature of the questions and the prospective use of the replies are

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as well as the governor and council, shall have authority to require the opinions of the justices of the superior court upon questions of law, and upon solemn occasions." *Id.* at 2486.

ME. CONST., Art. III, §1 (1819): "The powers of this government shall be divided into three district departments, the Legislative, Executive, and Judicial," and, §2: "No person belonging to one of these departments, shall exercise any of the powers properly belonging to either of the others, except in cases herein expressly directed and permitted."—3 *id.* at 1651. Art. VI, §3: "They [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." *Id.* at 1659.

Rhode Island, the only other state having, in 1849, an advisory opinion provision in its constitution, had only a few words on the separation of powers. R. I. CONST., Art. III (1842): "The powers of the government shall be distributed into three departments: the legislative, executive, and judicial." 6 *id.* at 3226.

<sup>9</sup> ELLINGWOOD, *op. cit. supra* note 2, at 64-68; JOHN ALEXANDER JAMESON, *THE CONSTITUTIONAL CONVENTION* 364 (3d ed. 1873); *id.* appendix D, pp. 543-546.

<sup>10</sup> 31 N. C. 518 (1848). The Associate Justices were Frederick Nash and Richmond M. Pearson.

noted. Each of these points might obviously prove useful should other requests follow.

The questions put by the Senate—that is whether the bargainor in a deed of trust, the trustee under a deed of trust, or a *cestui que* trust might lawfully vote if the land involved was of the minimum fifty acre size—all turned on the question whether the estates involved were freeholds. Without entering into the finely spun argument of the advisory opinion, it is sufficient to say that the answer was largely negative. The judges recognized that there might be objection to their conclusions on the ground that they deprived land of representation. The right to vote, however, depended upon a freehold estate in land and might go unexercised or be alienated. Indeed, said the opinion, there was already much land on which no one voted or could vote.<sup>10a</sup>

*The opinions of 1863 and 1866.*—The advisory opinion function established in *Waddell v. Berry* was activated on only two other occasions before the adoption of the present State Constitution: In 1863, at the request of Governor Vance, the judges gave their opinion that the office of adjutant general, which the legislature had declared vacant but to which Brig. Gen. James G. Martin laid claim as the lawful incumbent, was vacant and might be filled by gubernatorial appointment.<sup>11</sup> They made *Waddell v. Berry* their precedent and carefully stated that “we do not act as a Court, but merely as judges of the Court.” They were, wrote Chief Justice Pearson,<sup>12</sup>

“induced to take this action, and felt not only at liberty to do so, but conceived it was in some measure our duty thus to aid a coordinate department of the Government, because we were informed by . . . the Governor, that the subject would in that way be relieved from all further embarrassment, and that the public interest required that it should be adjusted sooner than it could be done by the regular mode of proceeding in court. . . .”

Three years later, the judges, again speaking through the Chief Justice defined for Governor Worth the word *crime* as used in the Federal interstate rendition act of 1793.<sup>13</sup>

<sup>10a</sup> *Id.* at 520-527.

<sup>11</sup> In the matter of J. G. Martin, 60 N. C. 153 (1863). Governor's request, March 2, and justices' reply, March 11, 1863. N. C. Pub. Laws 1862-63, p. 51.

<sup>12</sup> 60 N. C. 156 (1863).

<sup>13</sup> In the matter of Wm. H. Hughes, 61 N. C. 57, 64 (1867). The advisory opinion is quoted at the outset of Chief Justice Pearson's elaborate opinion in a habeas corpus proceeding concerning Hughes and is dated June 21, 1866. I find no conclusive evidence that the advisory opinion had any immediate connection with Hughes. Governor Worth did, however, have considerable difficulty with the Hughes case, as is shown by numerous entries in his letter book between May 1866 and January 1867. The following request for the advisory opinion of 1866 is here for the first time published. It does not mention Hughes and its date

## UNDER THE CONSTITUTION OF 1868

*The Homestead opinion.*—Such then was the status of the advisory opinion when the Constitution of 1868 went into operation. And under the new Constitution, it at first appeared that advisory opinions would no longer be available or, at least, would prove less readily available. For when, in January 1869, the General Assembly asked “the Supreme Court” whether the homestead and personal property exemptions provided in Article X of the new Constitution applied against debts contracted before the ratification of that Constitution, it met prompt and decisive rebuff. Speaking through Chief Justice Pearson, who had participated in all previous advisory opinions, the justices notified the General Assembly that the view which they took “of their constitutional duties” forbade compliance with the legislative request for counsel. And why so? Because, wrote the Chief Justice, “the functions of this court are restricted to cases constituted before it. We are not at liberty to prejudge questions of law.”<sup>14</sup>

Had Pearson stopped here, the day of the advisory opinion might indeed have been ended in North Carolina. But he went on to distinguish the pending request from that of 1849:

“In the contested election between Waddell and Berry, the Judges . . . on request of the Senate, after much hesitation, expressed an opinion in regard to the qualification of voters. That, however, is the only instance in which it was ever done, and it was put on the ground that the questions could not come before the Court in a judicial form. The questions set out in the

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does not indicate any necessary connection with him (Jonathan Worth Letter Book, 1865-67, p. 130) :

Executive Dept. of N. C.  
Raleigh, June 20th 1866.

To The Judges of the Supreme Court of North Carolina—

For my guidance as Executive of North Carolina, I respectfully ask your opinion on certain points of construction growing out of the Act of Congress respecting fugitives from justice.

By the provisions of this Act, a person charged, as provided in this Act, with having committed “Treason, felony, or other crime” in any State, may be demanded by the Governor of the State in which such crime is so alleged to have been committed, from the Governor of any other State in which the criminal may have taken refuge.

Do the words “other crime” embrace every offence (including petty misdemeanors,) made indictable in the criminal courts? If not, what class of offences is embraced under the words “other crime”?

In determining what is “crime,” am I to look to the Common law, or the Statutes of the State in which the offence was committed, or to the criminal law of this State, when the criminal has taken refuge here?

Jonathan Worth,  
Gov<sup>r</sup> of N. C.

<sup>14</sup> The request appears in N. C. Pub. Laws 1868-69, p. 703, and the reply in N. C. SENATE JOURNAL, 1868-69, pp. 219-220, and both may now be found in 227 N. C. 715-716 (1947).



resolutions [now] under consideration, not only may, but in all probability will, come before us for decision."<sup>14</sup>

Was it to be understood from this language that advisory opinions would not be available in the future? Or that they might be available if, in the opinion of the justices, the questions raised could not come before them in a litigated case? Pearson's statement, in which it is presumed all his brethren concurred, left to the future the answer to these questions.

*Legislative tenure opinion.*—The unanimity displayed in the *Homestead* case proved temporary, for controversy soon broke out among the justices over the constitutionality of advisory opinions. The catalyst in the dispute was a request by the General Assembly made in December 1869 for an indication of "its [the Court's] construction of the constitutional provisions relating" "to the tenure of office of members of this General Assembly" if the subject should come up "in due course of law."<sup>15</sup> Three carefully prepared replies were returned in answer to, or in evasion of, this question. One, upholding the right of the justices to give advice under appropriate circumstances and declaring the tenure of the General Assembly of 1868 to be limited to two years, was written by Chief Justice Pearson and concurred in by Associate Justice Dick; another reply, somewhat ambiguous in character, bore Associate Justice Rodman's name; and the third, from the pen of Associate Justice Reade, condemned the advisory opinion practice altogether. Justice Settle in a fourth reply simply declined to express an opinion. The reasoning of the Pearson, Rodman, and Reade replies is important to this discussion. Chief Justice Pearson complied fully with the legislative request. The Chief Justice was, he said, "relieved from all doubt" concerning the right of the justices to advise the legislature in the present instance "by the precedent in . . . *Waddell v. Berry*." That case and the present one seemed of the same character to Pearson, though of different magnitudes in that *Waddell v. Berry* had involved but one Senate seat whereas the present problem involved all the seats in both houses. Pearson also deemed the interstate rendition opinion of 1866 in point, but, said he, "the action of the Justices of this Court in declining to express an opinion, at the request of the General Assembly, in regard to a Homestead Act affecting preexisting debts, is not relevant . . . for it is put on the ground that the question [on which advice had

<sup>14</sup> *Id.* at 716. See *Jacobs v. Smallwood*, 63 N. C. 112 (1869) and *Hill v. Kessler*, *id.* at 438 (1869) for cases relating to the same general problem raised by the request for the advisory opinion concerning the Homestead article of the Constitution.

<sup>15</sup> *Opinions of the Justices of the Supreme Court in Regard to the Term of Office of the General Assembly That was Elected in April, 1868*, 64 N. C. 785 (1870).

then been asked] involved 'the rights of property,' and 'would in all probability come before the Court for decision.'"<sup>16</sup>

Justice Rodman's opinion was apparently finished before either of the others but it occupies ground somewhat between them.<sup>17</sup> "The Constitution has wisely separated the judicial from the political departments of the government," he declared and continued:

"The sole duty of the Judges is to decide controversies between parties concerning their rights under the law; and in the case of the Justices of the Supreme Court, this duty is limited to such cases as come before that Court on appeal. \* \* \* The judiciary is set apart, in order that in all the revolutions of political power, it may pass without bias on questions of private right. The reasons which induced the framers of the Constitution to confine judicial duty within the limits mentioned, are equally strong to restrain the Legislature from asking the judges from doing so [*sic*], except on occasions of the most manifest necessity."

The members of the General Assembly in their request had not indicated that, were they advised that their terms would expire in 1870, they would act on the judges' advice. If there should result

"a contest between rival bodies for the possession of the legislative power, . . . it must be obvious that nothing could be more unfortunate for the State, than for the Supreme Court to have made itself, in advance [,] the partisan of either. Courts must recognize the actual possessors of political power without inquiry into the lawfulness of their possession.

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[The question presented by the legislature] is an exclusively *political* one. It can never . . . be made a legal question, or a subject of judicial determination. Its ultimate decision must rest with the political departments . . . and any attempt by the courts to prejudge it, or influence it, at the request of either of them [the governor or the legislature, as the political departments], would be an encroachment on their powers, opposed at least to the spirit of the Constitution, and hurtful in its consequences. I am, therefore, constrained, respectfully, to decline expressing any opinion professing to be either judicial or legal, on the question presented. If I could suppose that the Legislature desired my opinion as an individual merely, I should consider myself at liberty to give it on this as on any other subject."

Then follows a lecture designed to teach the General Assembly by example how to proceed in deciding its tenure problem. In it Rodman strongly advises his inquisitors to seek out and follow the meaning of the people when they adopted the Constitution. "If you should con-

<sup>16</sup> Pearson's opinion appears *id.* at 785-791.

<sup>17</sup> Rodman's reply appears *id.* at 793-795.

clude that the people supposed they were electing you for two years only, you would not hesitate about your course. And even if you should be left in doubt, it seems to me that a wise and becoming policy would require you to give to the people the benefit of the doubt." This is undoubtedly wise counsel, but it cannot possibly be regarded as legal advice.

Rodman's position when examined critically seems to be rather strongly faced against advisory opinions. Judicial duty is limited to the field of litigation; only "on occasions of the most manifest necessity" should the legislature ask the judges to over-step this limitation. Judges even in such cases should refuse to answer "political" questions. Rodman's language shows clearly that he regarded these restrictions as applying alike to the Court and to its members in their capacity as justices. When he said he would feel free to express his views "as an individual merely," he obviously meant that, when he assumed his judicial post, he had not surrendered his right to speak as a private citizen. He certainly did not at this time take Pearson's view that, while the Court could not speak as a Court, its members could speak as justices.

Justice Reade took sharp issue with Chief Justice Pearson and, unlike Rodman, uttered no words that can be construed in a manner favorable to the giving of advisory opinions under any exigency. His Chief's treatment of the precedents did not impress Reade:<sup>18</sup> "I had supposed," he said, referring to the Homestead refusal, that "our action then was decisive, and that it would be a precedent on all future occasions." Both precedents cited by Pearson antedated the new Constitution and, in Reade's judgment, could not properly be used to justify the rendering of advisory opinions under it, because

"the Court is not constituted now as then. The duties and powers of the old Court were not prescribed in the Constitution at all. That was done by act of the Legislature. It may be that the Legislature had the power to make it the duty of the Judges to give their opinions when asked for; and although the act which organized the Court did not impose such duty, yet, if it might have been done by *that* act, then it might have been done by any *subsequent* act. And, treating a *request* that they *would*, as a *command* that they *should*, the giving the opinion became, not a courtesy, but a duty."

Reade might have added that the requests for advice cited by Pearson did not come from the General Assembly, which alone under Reade's doctrine might have *commanded*, but originated in the first instance with one house thereof and in the second with the governor, who certainly possessed no power to command the judges.

<sup>18</sup> Reade's reply appears *id.* at 791-793.

Unlike its predecessor, the new Court was established and its duty prescribed by the Constitution of 1868, and, Reade pointed out, the new Constitution "does not make it the duty of the Court to give its opinion to the Legislature, except in the instance of claims against the State. And is not the requiring it in this *one* instance, the same as to *forbid* it in *all* others?"

Reade's main argument, however, was based upon the separation of powers clause which had been carried over from the old Constitution into the new.<sup>19</sup> To him this clause meant that no one of the great departments—legislative, executive, judicial—should "exercise the functions, nor influence or control" another. In view of this prohibition, Reade rejected the easy-going view that to advise or not to advise was "a mere question of propriety" and that he was free to respond or remain silent at pleasure. "I think it is substantially an interference with the legitimate business of the Legislature, and that the Constitution forbids it." The strength of the learned justice's conviction on this point led him to declare that the separation of powers clause "did forbid" the members of the old Court quite as much as their successors to give advice. Concerning his own participation in the last advisory opinion under the old Constitution, Justice Reade said simply: "I now doubt whether it was proper."

The argument that advisory opinions were given as a courtesy to a coordinate branch of the government was inadequate to justify a breach in the wall between departments: "Nor is the objection met by saying that we do not meddle with the Legislature officiously, but only courteously, and at their request. The Legislature has no more right to ask, than we have to answer. We must let each other alone—'forever separate and distinct.'"

The suggestion that the justices might advise the Legislature as individuals rather than as justices or as the Court seemed evasively unrealistic to Reade. "This," said he, "may *evade* the *letter* of the difficulty, but it leaves its *spirit* in full force. And, with my convictions, to *evade*, is to *break* the Constitution." Furthermore, the request for advice did not come before the justices as individuals. "We are asked how we will 'decide' the question 'when it comes before us lawfully.' And in whatever form we might answer, the Legislature and the public will understand it to be the opinion of the Supreme Court."

Reade thought the whole operation but an effort on the part of the General Assembly to delegate a legislative function to the justices. The desire of the legislators to act on the fullest information was under-

<sup>19</sup> Reade quoted the separation of powers clause incorrectly. Where the clause actually says the three powers "ought to be" separate and distinct, he says "shall be."

standable, but "legislators are responsible to their constituents. They cannot shift that responsibility. \* \* \* I think the Justices are forbidden to interfere."

Both Ellingwood, the outstanding authority on advisory opinions generally, and the North Carolina Supreme Court have attached great importance to the 1870 opinions, but for divergent and somewhat erroneous reasons. Ellingwood wrote in 1918, apparently without any knowledge of the several advisory opinions rendered after 1870. He regarded the action of the justices in 1870 as a rebuff and, because of his somewhat puzzling unawareness of subsequent events, incorrectly declared that "this rebuff apparently discouraged the legislature from further interrogations—and the governor as well."<sup>20</sup> The Supreme Court, in expounding the advisory function in 1929, took the view that the justices of 1870 had been divided, three supporting and two opposing the advisory practice.<sup>21</sup> Actually, as the record shows, the division was more truly three *against* to two *for* advising the legislature in this case, for Justice Rodman's reply places him clearly with the opponents.

*The constitutional convention opinion, 1871.*—Neither Ellingwood nor the Supreme Court of 1929 would have written as they did had they been aware of the next episode: The Conservatives gained control of the legislature in 1870 and moved swiftly to reform the government. In an effort to bring about a revision of the Constitution of 1868, which they regarded as a cause of much of their trouble, they drove through the legislature a bill providing for a popular vote on the question of a constitutional convention.<sup>22</sup> Lieutenant Governor Caldwell, as presiding officer of the Senate, had attempted to block the bill when it was before that body by insisting that the Constitution required a two-thirds majority on such a measure, but the Senate overruled him.<sup>23</sup> When the bill

<sup>20</sup> ELLINGWOOD, *op. cit. supra* note 2, at 69.

<sup>21</sup> In the Matter of Advisory Opinions, 196 N. C. 828, 829 (1929). See below, p. 318.

<sup>22</sup> N. C. Pub. Laws 1870-71, c. LXIII, pp. 119-125 (Feb. 8).

<sup>23</sup> HAMILTON, RECONSTRUCTION IN NORTH CAROLINA 564-565 (1914). In 1871 the Amending Article of the Constitution merely provided that "No Convention of the people shall be called by the General Assembly unless by the concurrence of two-thirds of all the members of each House of the General Assembly." The Act of February 8, 1871, did not, in the opinion of its supporters, actually call a convention but merely submitted to the people the question "Convention or No Convention." Such a submission, they maintained, did not come within the limitations of the Amending Article. How the justices dealt with this argument may be seen in their advisory opinion: (Governors' Papers, Tod R. Caldwell, Dec.-May, 1870-71; Governors' Letter Books, Tod R. Caldwell, 1870-74, pp. 57-58.)

State of North Carolina  
Supreme Court  
Raleigh, Feb. 11, 1871

To his Excellency Gov. Caldwell

Sir: In reply to your communication of the 9th inst., I have the honor to say: The Chief Justice, and Justices Rodman, Dick and Settle are of the opinion that

was finally adopted and ratified, Caldwell had replaced Holden as governor. The act imposed certain obligations on the governor and these he was reluctant to perform. "I am forced to the conclusion," he declared, "that it [the act] is in direct conflict with the Constitution of the State, which I have taken a solemn oath to support."<sup>24</sup> He therefore betook himself "to the great fountain of law in North Carolina and sought information from the Supreme Court on this vital question."<sup>25</sup> The new governor explained carefully to the justices the pre-

the act to which you refer, is in violation of the constitution.

All legislative power is vested in the General Assembly. Calling a convention is an act of legislation. It follows that no convention can be called unless it be done by the General Assembly.

The people have reserved to themselves no power of Legislation. It follows that a convention cannot be called by a vote of the people, nor will such voting enable the General Assembly to call a convention in a manner not authorized by the constitution.

Justice Reade, for the reason stated by him, when the opinion of the Justices was requested, by the General Assembly in regard to the tenure of office [,] declines to give an opinion.

Upon the several questions in regard to your duty provided you believe the act to be unconstitutional, the Justices do not feel at liberty to offer any opinion.

Very respectfully &c &c

R. M. Pearson Ch.J.S.C.

When the Constitutional Convention of 1875 revised the amending article it made Caldwell's contention into law.

<sup>24</sup> Governor Caldwell to the Justices, Feb. 9, 1871. Caldwell's request appears in *Governors' Letter Books*, Tod R. Caldwell, 1870-74, pp. 56-57, and is as follows:

Executive Department,  
State of North Carolina,  
Raleigh, 9th February 1871.

To the Honorable

The Chief Justice and the Associate Justices  
of the Supreme Court of North Carolina  
Gentlemen:

Enclosed herewith I send you a copy of an act passed by the present General Assembly entitled "An act concerning a Convention of the people." By the first section of the act, the Governor is required to issue his proclamation commanding the Sheriffs to open polls and hold an election, &c, &c.

After carefully reading the various provisions of said act and giving to it such examination as I have been able to bestow, I am forced to the conclusion that it is in direct conflict with the Constitution of the State, which I have taken a solemn oath to support, in that it proposes to amend said Constitution in a way and by a method not recognized nor warranted by the Constitution itself. Entertaining this view, I feel that I would be unfaithful to my trust were I in any way, even at the behest of the General Assembly, to become an instrument to assist in violating the Supreme law of the State, enacted by the people themselves. I am willing, however, to surrender my own opinion upon this vital question to the better opinion of the Supreme Court, which is the final arbiter of all questions involving the constitutionality of an act of the General Assembly.

I desire not to act rashly or unadvisedly, and therefore most respectfully ask the opinion of your honorable Court as to the constitutionality of said act; and whether if unconstitutional, it is my duty as Governor to assist in the execution thereof, as provided in the first and third sections of said act?

An early answer will confer a great favor.

Very respectfully  
Your obt. servant  
Tod R. Caldwell,  
Governor

<sup>25</sup> Governor Caldwell to the General Assembly, *id.* at 65.

dicament in which he found himself. "I desire," he wrote, "not to act rashly or unadvisedly and therefore most respectfully ask the opinion of your honorable Court as to the constitutionality of said act; and whether, if un-constitutional, it is my duty as Governor to assist" in its execution.<sup>26</sup> Perhaps it was one of Justice Rodman's objections of the previous year that prompted Caldwell to assure the Court of his willingness to surrender his own opinion "to the better opinion of the Supreme Court, which is the final arbiter of all questions involving the constitutionality of an act of the General Assembly." Two days later, on February 11, Chief Justice Pearson, speaking for himself and all his associates except Reade, expressed "the opinion that the act to which you refer is in violation of the constitution. \* \* \* Justice Reade, for the reasons stated by him, when the opinion of the Justices was requested by the General Assembly in regard to the tenure of office declines to give an opinion."<sup>27</sup>

Evidently the attitude of Justice Settle toward advisory opinions had changed. He had refused advice in the Homestead and Legislative Tenure cases but gave it here. Justice Rodman's readiness to give an opinion in this instance can be rationalized with his two earlier refusals by saying that he may have looked upon this as a "legal" as distinguished from a "political" question and that the facts made this an occasion of "the most manifest necessity." Be that as it may: The fact leaps out that a group of five judges in 1869 had momentarily unanimously opposed advice giving and now, two years later, were, with one exception, quite ready to advise.

To the General Assembly Governor Caldwell reported "that as at present advised, I cannot discharge the duties required of me by said act."<sup>28</sup> The legislature responded sharply. The convention act was re-passed<sup>29</sup> in such form as to require no administrative action by the governor and a devastating joint resolution was adopted censuring the governor, the chief justice, and certain associate justices for transcending "the limits of official duty and propriety" and encroaching "upon the rights, powers and privileges" of the General Assembly in a manner "subversive of the fundamental principles of the constitution."<sup>30</sup> And,

<sup>26</sup> See note 24.

<sup>27</sup> See note 23.

<sup>28</sup> *Governors' Letter Books*, Tod R. Caldwell, 1870-74, p. 60.

<sup>29</sup> N. C. Pub. Laws 1870-71, c. CCXI, 326-332. Ratified, April 3, 1871.

<sup>30</sup> *Id.* at 501-502. The joint resolution follows:

Whereas, The constitution provides that the supreme court shall have jurisdiction to review, upon appeal, any decisions of the courts below upon any matter of law or legal inference, to issue certain remedial writs, and to hear claims against the state; and whereas, the powers and duties of the governor are prescribed by the same instrument; and whereas, the constitution further provides that the "legislative, executive and supreme judicial powers of the government ought to be forever separate and distinct from each other," and that "all power of suspending laws or the execution of laws, by any authority, without the consent

concluded the resolution, "this general assembly doth, in the discharge of its duty to itself, and in the behalf of the people of North Carolina, protest against and condemn this usurpation as of evil example and dangerous tendency."

*Judicial tenure opinion.*—After this episode twenty-three years elapsed and a complete change in the Court's membership took place before another advisory opinion was requested or rendered. And when, in 1894, a request did come the problem involved was the tenure of judges. Several judicial vacancies had been filled first by gubernatorial appointment and then by election in accordance with the provisions of the Constitution.<sup>31</sup> The question shortly arose whether judges so elected were entitled to serve full eight-year terms or whether they were limited to the unexpired portions of the term of the judges whose places they had taken. As the election of 1894 approached the issue grew critical. On the one side, Attorney General Osborne took a position favorable to

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of the representatives of the people, is injurious to their rights and ought not to be exercised"; and whereas, the governor has refused to give effect to an act of this general assembly entitled "an act concerning a convention of the people," ratified the eighth day of February, one thousand eight hundred and seventy-one, and ignoring the attorney general of the state, who by the constitution is made his legal adviser, has taken the opinion of the chief justice and certain associate justices of the supreme court as to the validity of said act, without authority of law, and when no case involving the validity thereof was before the said court, and now claims that he is sustained in his action by the said opinion; now therefore this general assembly, in maintenance of its rights and in defense of its privileges doth resolve,

Sec. 1. That the supreme court hath no other or larger jurisdiction than is expressly given to it by the constitution.

Sec. 2. That the opinion of the justices of said court, in a case not properly constituted therein, hath no binding force or effect, and doth not establish the law in such case.

Sec. 3. That the said chief justice and his associates, in giving said opinion, have transcended the limits of official duty and propriety, the more especially as they have a direct interest in the question submitted to them by the executive.

Sec. 4. That the governor of North Carolina has no veto power, nor any power equivalent thereto, and cannot dispense with laws or suspend the execution thereof.

Sec. 5. That the governor is not at liberty in his official character to feel or to affect constitutional scruples, and to sit in judgment himself on the validity of any act of this general assembly duly ratified, and to nullify it if he so chooses, but it is his duty to execute such act until it shall have been decided unconstitutional in due course of law.

Sec. 6. That the action of the governor and chief justice and associate justices of the supreme court in relation to said act, is a manifest encroachment upon the rights, powers and privileges of this department of the government, and is subversive of the fundamental principles of the constitution, and this general assembly doth, in the discharge of its duty to itself, and in behalf of the people of North Carolina, protest against and condemn this usurpation as of evil example and dangerous tendency.

Ratified the 5th day of April, A.D., 1871.

<sup>31</sup> N. C. CONSR., Art. IV, §25: "All vacancies occurring in the offices provided for by this article . . . shall be filled by the appointments of the Governor, unless otherwise provided for, and the appointees shall hold their places until the next regular election for members of the General Assembly, when elections shall be held to fill such offices." The remainder of the section is not pertinent.



an eight-year term; on the other, "a considerable number of able members of the legal profession" supported the narrower view. To resolve the issue Governor Carr turned to the justices for advice.<sup>32</sup>

It so happened that the tenure of two members of the Supreme Court was involved in the question, and, because they had a direct interest in the answer, they took no part in the subsequent proceedings of their colleagues.<sup>33</sup> At first the unaffected members, Chief Justice Shepherd and Associate Justices Avery and Burwell, refrained from giving advice on grounds of propriety and because the various judges whose "rights of property" in the offices were involved had not joined in the governor's request.<sup>34</sup> Governor Carr succeeded in overcoming this difficulty by furnishing the justices a suitable request from their colleagues and from the other judges concerned.<sup>35</sup> Consequently, on May 11, 1894, an advisory opinion was rendered. Relying largely upon legislative construction of the constitutional provision in question, the three responding justices took the position that the persons elected to the judgeships in question would hold their offices *only* for the unexpired portions of the terms.<sup>36</sup> "It is considered a safe and sound rule of construction," said the opinion, "that when 'the duration of a term of office which is filled by popular election is in doubt . . . the interpretation is to be followed which limits it to the shortest time, and returns to the people at the earliest period the power and authority to refill it.'"

*Railroad lease opinion.*—Three years after the judicial tenure opinion, the Court became involved in one of the most heated controversies

<sup>32</sup> 114 N. C. 923 (1894). While the normal practice had been that a judge elected to fill a vacancy held only for the unexpired balance of his predecessor's term, *id.* at 926-927, a practice had grown up under Governor Fowle of giving commissions for full eight-year terms, Justice Walter Clark being one beneficiary of Fowle's interpretation. A rather full story of the dispute under Governor Carr may be traced through his papers and letter books. Probably the most informative single document is an open letter written about May 22 by George A. Shuford, one of the Superior Court judges concerned in the tenure question, for publication in the Asheville Citizen and sent to Governor Carr for review prior to publication. Governors' Papers, Elias Carr, May-Aug. 1894. The accuracy of Shuford's account was recognized by Governor Carr. Governors' Letter Books, Elias Carr, April 13-July 4, 1894, p. 369.

<sup>33</sup> Walter Clark and James C. MacRae, Associate Justices of the Supreme Court, and Superior Court Judges R. F. Armfield, John Gray Bynum, George A. Shuford, Spier Whitaker, and E. T. Boykin were the members of the judiciary whose tenures were immediately at issue. 114 N. C. 924 (1894).

<sup>34</sup> *Ibid.*

<sup>35</sup> Copies of Governor Carr's letters requesting the cooperation of the judges concerned appear in his letter book, and the replies are among his papers. See note 32. Unlike the others, all of whom expressed their desire for an advisory opinion in letters to the Governor, Judge Armfield enclosed to Carr a letter dated April 13, 1894, addressed to the three unaffected members of the Supreme Court saying that "I desire hereby to join most earnestly with Governor Carr in his request that the Supreme Court, or such of its members as feel at liberty to do so, give a construction of said 25th sect. of the 4th article of the constitution. I believe that this is imperatively demanded by the public interest."

<sup>36</sup> 114 N. C. 925-929 (1894).

of the 1890's. The partially state-owned North Carolina Railroad had been leased in 1871 to the Richmond and Danville Railroad for a period of 30 years. The latter road became a part of the newly organized Southern Railway Company in 1894 and, in 1895, Governor Carr took the lead in causing a renewal of the lease for a 99-year period, with the Southern as lessee.<sup>37</sup> That this action should have stimulated a violent political reaction is hardly surprising; certainly it played a part in making possible the Republican-Populist fusion victory in 1896. The new governor, Daniel L. Russell, attacked the lease in his inaugural<sup>38</sup> and the legislature began an effort to cancel or modify it. The House of Representatives adopted a bill directing that action be taken to annul the lease. In the Senate, however, friends of the railroad succeeded in passing a substitute measure which proposed a reduction of the life of the lease to 36 years and required the Southern to deliver an appropriate instrument agreeing to the reduction. The lease thus modified was then to be approved by the Board of Directors of the North Carolina Railroad.<sup>39</sup> When the Senate substitute was brought to the House, question arose whether the bill, if passed and ratified, could become operative "before its ratification by the stockholders" of the latter road. The special committee charged with the lease problem desired to secure judicial advice on this point and a struggle ensued. During the debate, Representative Cook, the committee chairman, demanded to know how, "if the House refuses to allow a ruling by the Supreme Court, . . . the committee [could be expected to] report that which involves the gravest constitutional question, and say to this House, [that] this [Senate] bill is the best thing."<sup>40</sup> And Representative Lusk argued that "the committee, uncertain as to its duty, could do nothing else than want leave to have the question referred to the Supreme Court so the latter could say whether the bill should be reported to the House."<sup>41</sup> Representative

<sup>37</sup> Governor Carr in his final message to the legislature invited investigation, saying: "I favored the lease . . . and it was done by the Board of Directors with my full concurrence and endorsed by the stockholders without a dissenting vote. I believed and still believe, it is the best thing that could have been done by the State, and the future will determine the wisdom of the transaction." N. C. PUBLIC DOCUMENTS, Session 1897, Doc. No. 1, p. 18. See also, HAMILTON, HISTORY OF NORTH CAROLINA SINCE 1860, 254, 268-269 (1919).

<sup>38</sup> Governor Russell declared: "The lease for ninety-nine years of all the rights, franchises, and property . . . of this railroad to a foreign non-resident corporation was made without the sanction of the Legislature or of the people . . . at a time when nobody expected it . . . within a few months of the adjournment of our General Assembly . . . without due discussion or submission to the people . . . six years before the existing lease expired . . . substantially by one man . . . the Governor of the State . . . without inviting competition among the [possible] bidders . . . under circumstances that indicate intentional secrecy. It was called a lease. It was, in reality, an attempted sale." N. C. PUBLIC DOCUMENTS, Session 1897, No. A, Russell Inaugural, 8-9.

<sup>39</sup> In the matter of Leasing the North Carolina Railroad, 120 N. C. 623 (1897).

<sup>40</sup> Raleigh News and Observer, March 6, 1897.

<sup>41</sup> *Ibid.*

Walter Murphy, however, declared that "the Supreme Court had no business in this matter, save to construe a law after its enactment; that there are three coordinate branches of the government, each in its own place. \* \* \* Who [he asked] would be bound by a horse-back opinion of the Supreme Court?"<sup>42</sup> But the opposition of Murphy and his pro-lease colleagues proved futile, for the House, by a narrow margin, voted to ask an advisory opinion.

Doubt expressed during the debate that an advisory opinion would be rendered proved groundless, for the justices responded with celerity over the signature of Chief Justice Faircloth.<sup>43</sup> If the power to lease the railroad was vested in the company—and on this point the justices intimated no opinion either way—the stockholders, not the directors, possessed that power, the House was informed. The proposed bill, therefore, "would be an amendment of the charter transferring power from the stockholders, and [would be] invalid unless accepted by the stockholders in general or special meeting assembled." Faced by this view of the proposal, the House dropped the subject and the session adjourned without final action, thus leaving the whole problem in Governor Russell's ample lap.<sup>44</sup>

*Advisory opinions under Chief Justices Clark and Hoke.*—Following the railroad lease opinion there occurred another long period during which the advisory function was dormant. Then beginning in 1917 came a series of opinions relating to constitutional limitations on special or local legislation and to problems concerning the judiciary. It is interesting that none of this series of opinions except that of 1929 was published in the *North Carolina Reports* until 1948 and indeed that they were wholly lost sight of until the present writer unearthed them. More important, however, is the fact that every request made during this period from 1917 to 1929 inclusive asked the opinion of the Supreme Court rather than the opinions of its members. And the justices responded as a Court in the first two instances; in the other instances, the replies came as from individual justices and finally, in 1929, the justices took the position that they could not give advice as a Court.

In 1916 three constitutional amendments limiting special, private, and local legislation were approved by the voters.<sup>45</sup> The 1917 General Assembly found itself faced, partly as a result of these amendments, with a number of comprehensive legislative problems among which was

<sup>42</sup> *Ibid.* Representative Murphy also remarked that "it made no difference what the Supreme Court said; that the reference to that court was wrong, when this very court might be called on to pass upon this very question. He said the court had never before passed upon such a matter as this."

<sup>43</sup> 120 N. C. 433-434 (1897).

<sup>44</sup> Governor Russell ultimately confirmed the lease. HAMILTON, *op. cit. supra* note 37, at 269.

<sup>45</sup> N. C. MANUAL, 1917, p. 294.

the adoption of general laws relative to municipal government and finance. While preparing the municipal government act, the legislature encountered the question whether any provision in the new amendments "would require the General Assembly to provide by general law the machinery for annexation by cities and towns of outlying and adjacent territory; or whether . . . the General Assembly could make these annexations by special act, as the circumstances of each city or town might . . . require." This problem was, by a joint resolution originating in the Senate, referred to *the Supreme Court* for advice "as to the court's interpretation. . ."<sup>46</sup> On the very day of the request, Chief Justice Walter Clark replied that because of "the public importance of the matter *the Supreme Court* has decided to respond. . . . After due consideration *the Court* is unanimously of opinion that the [1916] amendments do not take from the General Assembly jurisdiction and power to enact special laws relating to annexation by a city or town of adjacent territory."<sup>47</sup> Presumably this interpretation satisfied the legislature for the general municipal government act subsequently passed contained no provisions on annexation.

One of the 1916 amendments specifically prohibited local, special, or private acts or resolutions relating to the appointment of justices of the peace, and, in the 1919 General Assembly, the question arose whether the legislature was thereby barred from enacting the usual omnibus justice of the peace bill. Again by a joint resolution originating in the Senate, *the Supreme Court's* opinion was asked and promptly gotten.<sup>48</sup> "The Court," wrote Chief Justice Clark, "has conferred together . . . and are of the opinion that the [omnibus] bill is constitutional and not in contravention of the recent amendment." Thus fortified by the Court's opinion, the Senate gave its approval to the bill and it became law.<sup>49</sup>

In the next advisory opinion, the Senate, which made the request, got what it asked and more to boot.<sup>50</sup> The Municipal Finance Act passed at the regular session of 1921 had been declared unconstitutional by the Supreme Court,<sup>51</sup> and, in December, a special session called by Governor Morrison undertook to revise the law and make it constitu-

<sup>46</sup> N. C. Pub. Laws 1917, p. 627; *In re* Municipal Annexations, 227 N. C. 716 (1917). Italics mine.

<sup>47</sup> SENATE JOURNAL, 1917, p. 427; 227 N. C. 716-717. The joint resolution was ratified on Feb. 26, 1917, and the advisory opinion was rendered on the same day. Italics mine.

<sup>48</sup> N. C. Pub. Laws 1919, p. 576; SENATE JOURNAL, 1919, p. 327; 227 N. C. 717 (1919). The request was ratified on Feb. 26 and the opinion was rendered on Feb. 27.

<sup>49</sup> N. C. Pub. Laws 1919, c. 99, pp. 255-272, ratified March 11.

<sup>50</sup> Resolution of request, Dec. 15, 1921, SENATE JOURNAL, Extra Session 1921, pp. 152, 252; opinions in response, Dec. 15, *id.* 173; 227 N. C. 718-719 (1921).

<sup>51</sup> *Allen et al. v. City of Raleigh*, 181 N. C. 453, 107 S. E. 463 (1921).

tional and effective. As passed by the House, the revised act exempted the incorporated towns of Madison County from its operation. Doubt arose whether such exemption would invalidate the act under the relevant special legislation restrictions and the matter was "most respectfully" referred for "an expression of opinion from the Supreme Court." Four of the justices, including Associate Justice Walter P. Stacy, replied that "the mere omission of Madison County from certain provisions will not itself invalidate the act, if properly passed by both Houses. . . ."<sup>52</sup> Chief Justice Clark, however, disregarded the question raised by the Senate and gave the Senate advice upon another question.<sup>53</sup> "It appeared to us [the justices] in conference with the committee of the Senate that said bill was materially amended on its passage through the House. . . ." Under this circumstance, if the leading case, *Glenn v. Wray*, were to be followed, "it would be necessary that the amended bill should be read over again three times in each House, with a ye and nay vote on the second and third readings entered on the Journal. *It is the bill in its final shape, not in another and different form*, which requires these preliminaries to its validity," wrote the Chief Justice. He explained his action in going beyond the formal limits of the Senate's request for advice by saying that he understood "that the object of your [the Senate's] resolution was to ascertain the constitutionality of the pending bill should it pass, in its present shape, the second and third readings in your body. Candor compels me to say . . . that the bill as passed by you under present circumstances, would be unconstitutional, and the bonds issued thereunder void, unless all previous decisions . . . are to be overruled. . . . This renders it unnecessary for me to express any opinion on any mere detail in the bill."

What the Chief Justice volunteered was quickly heeded by the House, which recalled the bill from the Senate and put it through the formal stages with celerity.<sup>54</sup> No one will deny that Clark's opinion probably saved the state another legislative fiasco, but the question may, nevertheless, be raised—as it was indeed by Justice Reade in 1870<sup>55</sup>—whether, as a matter of propriety, courtesy, or punctilio, the judges should venture their advice upon questions not put to them.

When the 1921 opinion was rendered, the United States was already launched upon "a great social and economic experiment, noble in motive and far-reaching in purpose," and, by 1925, the judiciaries of the states generally, and of North Carolina in particular, found themselves faced with congested dockets due in part to prohibition. Various proposals designed to alleviate this condition were considered by the General

<sup>52</sup> 227 N. C. 719 (1921).

<sup>53</sup> *Ibid.*

<sup>54</sup> N. C. HOUSE JOURNAL, Extra Session 1921, pp. 274-275.

<sup>55</sup> 64 N. C. 793 (1870).

Assembly of 1925. Circuit judgeships, emergency judgeships, additional judicial and solicitorial districts, and various other palliatives were suggested, but in view of the language of the Constitution grave doubts arose as to legality of these devices. On January 31, 1925, therefore, the General Assembly decided to shift the burden of separating constitutional from unconstitutional proposals to the "honorable, the Supreme Court," which was asked, in an omnibus resolution, to construe Article IV, sections 10 and 11 of the Constitution, in their bearing upon six different points and also to pass upon the constitutionality of four bills.<sup>56</sup> This amazing example of legislative buck-passing was accorded no formal response by the Court. Instead, if press accounts are to be credited, a conference was held between the justices and members of the committees of the two houses, and an "informal ruling" or an "informal oral opinion" was given to the effect that a proposed circuit judgeship plan was unconstitutional.<sup>57</sup> In all probability the justices objected to answering any such galaxy of queries as the joint resolution put to them, and there is strong evidence that the request was withdrawn by the committees.<sup>58</sup>

With circuit judgeships out of the question, both houses turned to other expedients, and, in the Senate, a bill was brought forward to authorize gubernatorial appointment of emergency judges to help reduce crowded dockets in the Superior Courts. Senator Dunlap, the introducer of this bill, simultaneously obtained approval of a resolution calling attention to confusion that had arisen among legislators about the "meaning of the verbal opinion of the . . . Supreme Court . . . recently given upon a questionnaire presented to it," and requesting the Court's opinion on the constitutionality of his bill.<sup>59</sup> The opinion, rendered three days later, treated the request as though addressed to the judges as individuals rather than as a court and all justices signed the reply: "[WE] beg to say that after due consideration, and as now advised, we are unable to discover any constitutional inhibition to the provisions of said bill. We therefore give it as our opinion that if said bill should become a law, it would be constitutional."<sup>60</sup> A few days later the Dunlap bill had passed both houses of the General Assembly without amendment and was duly ratified and enrolled.<sup>61</sup>

*The Court denies advice, 1929.*—The Court was not yet through with legislative problems concerning the Superior Courts, for the 1929

<sup>56</sup> N. C. Pub. Laws 1925, Resolution No. 20; 227 N. C. 721-723 (1925).

<sup>57</sup> Raleigh News and Observer, Feb. 7, 1925; see also N. C. SENATE JOURNAL, 1925, p. 632; 227 N. C. 720 (1925).

<sup>58</sup> 196 N. C. 828, 829 (1929).

<sup>59</sup> Resolution of request, Feb. 14, 1925, N. C. SENATE JOURNAL, 1925, pp. 631-632; opinion, Feb. 17, *id.* at 205-206; 227 N. C. 720-721 (1925).

<sup>60</sup> *Ibid.*

<sup>61</sup> N. C. Pub. Laws 1925, c. 216.

Senate submitted to the Supreme Court two bills concerning the administration of justice in Mecklenburg County and the Fourteenth Judicial District together with a resolution respectfully requesting "the Supreme Court of North Carolina . . . to inspect said bills and advise the Senate . . . whether in the opinion of the Court, said bills are in contravention of the Constitution."<sup>62</sup>

The Court, which had now come under the leadership of Chief Justice Stacy, apparently decided that the time had arrived to clarify its relationship to the advisory function and to introduce some regularity into the exercise of that function. Hence the Court returned the bills to the Senate without passing on their constitutionality,<sup>63</sup> and, speaking through the Chief Justice, made the following statement:

"It has long been a mooted question, and one not easy of decision, as to whether the Constitution of 1868 does, or does not, prohibit the Supreme Court from giving advisory opinions. When the matter first arose in 1870 . . . *Justices Reade* and *Settle* took the position that it does, while *Chief Justice Pearson* and *Justices Rodman* and *Dick* were of the opinion that the members of the Court, as Justices, but not as a Court, might give such opinions to the General Assembly simply as a matter of courtesy, and out of respect, to a coordinate branch of the government. The present resolution, it will be observed, is addressed to the Court in its official capacity."<sup>64</sup>

The Court recognized that advisory opinions had previously been furnished "on constitutional questions, affecting the structure of the government and matters of grave public moment, when it appeared, with reasonable certainty, that a course of action had been agreed upon by the General Assembly" as the one to be taken if not contrary to the organic law. "This is as far as our predecessors have gone, and we do not feel at liberty to extend the precedents established by them, in the absence of a more urgent showing." If the General Assembly should settle upon its course of action and bring the matter "within the limits above stated, the members of the Court would not then hesitate to express their opinions."<sup>65</sup>

Some out-of-state writers, unaware of subsequent developments, concluded that the 1929 refusal marked the end of advisory opinions in North Carolina.<sup>66</sup> Nothing could be less true. What the refusal did achieve was a regularization of practice. Not once since that year has a request been addressed to the Court; instead, the Chief Justice and Associate Justices are asked for their opinions. Nor has the General Assembly sought advice unless its course was so clearly determined that

<sup>62</sup> In the Matter of Advisory Opinions, 196 N. C. 828 (1929).

<sup>63</sup> *Id.* at 829.

<sup>65</sup> *Ibid.*

<sup>64</sup> *Ibid.*

<sup>66</sup> See note 1 *supra*.

only the approval of the justices was necessary for action to be taken.

*Repeal Election and the Proposed New State Constitution, 1933-1934.*—After the Court's refusal in 1929 to advise the legislature *as a court*, no further request was made upon the justices until 1933. The General Assembly of 1933 on May 8 approved for submission to the electorate a new state constitution; on the following day, it provided that an election should be held in November to decide whether a constitutional convention should be called to act on the pending Twenty-First, or Prohibition Repeal, Amendment to the Federal Constitution.<sup>67</sup>

The second of these actions the legislature had taken only after the justices had twice been called upon to help resolve differences of opinion between the houses: The Constitution of North Carolina provides that "No convention of the people . . . shall ever be called by the General Assembly, unless by the concurrence of two-thirds of all the members of each House . . . and except the proposition, Convention or NO Convention, be first submitted to the qualified voters . . . *at the next general election*. . . ."<sup>68</sup> Should this provision control legislative action in calling a convention to act on an amendment to the United States Constitution? The Senate Committee on Constitutional Amendments thought it should and reported the McLean bill designed to follow the procedure outlined in the State Constitution; the corresponding House Committee thought otherwise and reported the Murphy bill calling a repeal convention and directing the choice of delegates at a special election to be held in November 1933. An agreement was reached to submit the two bills to the justices of the Supreme Court and ask them to advise the General Assembly whether "said bills, either or both of them, set up the constitutional procedure" for calling the necessary convention.<sup>69</sup> The legislature assured the justices that it intended to pass one or the other of the bills if it could do so constitutionally; thus the reference was brought well within the 1929 limitations.

The justices replied "as individuals" on April 5, a week having elapsed since the reference of the question.<sup>70</sup> None of them doubted the complete constitutionality of the Senate bill; but there was difference of opinion about the House bill, "the majority being of the opinion that such a convention [as it provided in disregard of the State Constitution] would not be valid for any purpose, the minority being of a contrary opinion."

<sup>67</sup> N. C. Pub. Laws 1933, c. 383 and 403.

<sup>68</sup> Art. XIII, §1. Italics mine.

<sup>69</sup> Resolution of request and summary of McLean and Murphy bills, 204 N. C. 806-808 (1933).

<sup>70</sup> *Id.* at 808-809. Discussion of the matter went on for several days in the newspapers, *e.g.*, Raleigh News and Observer, March 28, April 6 and 7, 1933, which expressed the view, among other things, that the election must take place in Nov. 1934.



From this opinion the press and the legislature concluded that the course of wisdom would be to follow the State Constitution, and the committees acting jointly therefore agreed to modify the Murphy bill by calling for a simultaneous vote on the question "convention or no convention" and on the election of delegates. The election, following the original Murphy bill, was to be held in November 1933, a year before the regular time for a statewide election, but was to be termed "general" instead of "special." Because some members believed that the legislature was exceeding its authority in describing as "general" an election held for a single purpose at an unusual time, an advisory opinion was asked concerning the constitutionality of the revised bill.<sup>71</sup>

After a lapse of nearly two weeks, the desired advice was received. Justices Adams and Connor held that the revised Murphy bill was constitutional and that a convention thus called and elected would be authorized to act on prohibition repeal.<sup>72</sup> With this position, Chief Justice Stacy did not disagree, but, in a carefully written opinion, he took the view that the provisions of Article XIII of the State Constitution need not be followed when the amendment of the National Constitution was involved.

"It is my opinion [wrote the Chief Justice] that the General Assembly \* \* \* may exercise its own judgment and provide for the submission of the question under . . . Article XIII of the State Constitution, or it may call such convention in exercise of its plenary powers without regard to . . . said section. It follows, therefore, . . . that it can make no difference, so far as the constitutionality of the present bill is concerned, whether the election be designated a general or a special one."<sup>73</sup>

Justice Brogden, although he agreed with the Chief Justice that Article XIII of the State Constitution was not necessarily activated by a proposal to amend the Federal Constitution, nevertheless wrote an elaborate dictum on the presumption that Article XIII was applicable.<sup>74</sup> To him, therefore, the question whether the proposed election was a general election became important. Realistically and with adequate precedent, he declared that an election held "throughout the entire State, called and conducted in accordance with legislative fiat" was "general."

Associate Justice Clarkson thought otherwise. The revised Murphy bill was, in his opinion "practically the same" as its predecessor except for its "calling a special election 'for the sole and exclusive purpose,' a general election." To Justice Clarkson the next general election was "well understood to be the general election in November, 1934."<sup>75</sup>

<sup>71</sup> Resolution of request and summary of bill, 204 N. C. 809-811 (1933).

<sup>72</sup> *Id.* at 815, 816-817.

<sup>73</sup> *Id.* at 811-814.

<sup>74</sup> *Id.* at 817.

<sup>75</sup> *Id.* at 815.

Thus supported by all members of the Court except Justice Clarkson, the General Assembly proceeded to enact the Murphy bill, and, subsequently the voters of North Carolina elected dry delegates to a repeal convention which they simultaneously voted should not be held.<sup>76</sup> The student familiar with constitutional law cannot but be somewhat amazed that any of the Court should have believed that the legislature must abide by Article XIII of the State Constitution when exercising power derived from the United States Constitution. The opinion of the Chief Justice was thoroughly sound on this point; Justice Brogden would have done well had he omitted his discussion of Article XIII and the term "general elections." The justices probably did not foresee, as they wrote their opinions in April 1933, that they were setting a booby-trap for the new State Constitution, which was even then making its way through the General Assembly.

In the year following the repeal election, while the nation as a whole was writing *finis* after the "noble experiment" of prohibition, the battle over the pending State Constitution took form. Although ably led, the supporters of change faced an uphill fight. The new basic law had been proposed as a unit, a fact that enabled the opposition to combine into one camp those who disliked different parts. Consequently, as fall approached, indications pointed to defeat of the proposed change unless a way out could be found.<sup>77</sup>

At this juncture, the ghost of the repeal election appeared. Amendments to the State Constitution were, in the language of Article XIII, "to be submitted at the next general election" after their proposal by the General Assembly. Someone now—it was September 1934—raised the question whether the "next general election" had not been that held

<sup>76</sup> The vote on the convention question was 120,190 for to 293,484 against; on the delegates the vote was 115,482 for those favoring repeal to 300,054 for those opposing repeal. N. C. MANUAL 233 (1947).

<sup>77</sup> So far as the writer has traced the prophecies of the press, it appears that opinion was running strongly against ratification of the new constitution. R. A. Doughton, chairman, and Banks Arendell, executive secretary, of the organization opposing ratification declared in a joint statement that "it is generally agreed that the proposed new constitution would have been overwhelmingly defeated." Raleigh News and Observer, Sept. 30, 1934. It is difficult to explain the aggressive effort of the friends of the new constitution to secure an advisory opinion unless they saw in it a means of salvaging some of their handiwork from impending catastrophe. Nevertheless, in all fairness to another point of view, the following question put by the writer to Mr. Kemp D. Battle and his reply thereto must be quoted: *Question*: "Is it true that the leading supporters of the proposed constitution foresaw its outright defeat at the polls and therefore desired an advisory opinion, holding that the 'next general election' after the 1933 General Assembly had been the year-past 'repeal election'?" *Answer*: "I would answer this in the negative. The revised constitution had encountered much more opposition than was anticipated in view of the eminence of the commission which had prepared it and in view of its bi-partisan support. Whether its defeat was foreseen doubtless varied from individual to individual, but its ultimate adoption still seemed a reasonable expectation." Correspondence with Mr. Battle, July 16 and 21, 1947.

in November 1933. "It does look as if some of us may have gone to considerable unnecessary trouble," ruefully observed Revenue Commissioner A. J. Maxwell, a framer and strong supporter of the new Constitution, "it is a grave question."<sup>78</sup> At the instance of Kemp D. Battle, chairman of the Committee for the Proposed New Constitution, a conference was held on or about September 14 at which Governor Ehringhaus, Attorney General Brummitt, Assistant Attorney General [now Justice] A. A. F. Seawell, and Mr. Battle were present. Presumably various alternative courses were discussed and the decision was reached to seek the advice of the Supreme Court.<sup>79</sup>

Governor Ehringhaus accordingly addressed a letter to the justices asking that, "if it be in keeping with the proprieties and functions of the Court," they advise him whether the forthcoming election or the over-and-gone repeal election was the "next general election" within the meaning of Article XIII. With such advice at hand, the governor would "be able to . . . direct the Chairman of the Board of Elections and other election officials in accordance with sound law."<sup>80</sup>

The Supreme Court at this moment included two of the Commission that had drafted the proposed Constitution, so that document had friends in court.<sup>81</sup> They, along with two of their brethren, in two short sentences ruled that the 1933 repeal election had been held under Article XIII of the State Constitution and was therefore the next general election after the General Assembly of 1933.<sup>82</sup> Even Justice Clarkson accepted this view. He had, he noted in a separate reply, taken the position in 1933 "that calling a 'special election' a 'general election' did not make it so," but "the majority decided otherwise" and "the majority opinion of this Court [in the 1933 case] I consider a mandate binding on me."<sup>83</sup>

Announcement of these views led to the immediate abandonment of the planned election; hence North Carolinians never got an opportunity to ballot on the proposed Constitution. Neither the supporters of change nor its opponents revealed any deep disappointment at this result.

<sup>78</sup> Raleigh News and Observer, Sept. 19, 1934. Just when doubt was first cast on the legality of the 1934 election is a question of some interest. A story in the Raleigh News and Observer, Sept. 21, 1934, states that a North Carolina attorney had brought the matter to the attention of Governor Ehringhaus in September 1933. Governor Ehringhaus, in an interview in July 1947 told the writer he could remember no such communication, though it was not impossible that there had been one. Mr. Battle, in the correspondence cited above, states that the question was new to him in September 1934.

<sup>79</sup> Raleigh News and Observer, Sept. 18, 1934. The news account states that "members of the Supreme Court" were present at the conference. I have been unable to determine whether this statement is true.

<sup>80</sup> 207 N. C. 879 (1935).

<sup>81</sup> Chief Justice Stacy and Associate Justice Michael Schenck.

<sup>82</sup> 207 N. C. 880 (1935).

<sup>83</sup> *Ibid.*

What of the intrinsic merit of the opinions? If the alleged purpose—saving the proposed Constitution from defeat at the polls—justifies the means, the decisive share of the justices in cancelling the election may find approval; if, however, the means itself must stand analysis, approval becomes more difficult. Did the justices give adequate consideration to the problem before them? Perhaps not. If the repeal election was the first general election held in North Carolina after the adjournment of the 1933 General Assembly, it was also the first after that of November 8, 1932. Presumably, then, the proposed Constitution should have been submitted to the voters at the repeal election; presumably also elective state offices vacated by death more than thirty days before the repeal election should have been filled at that election.<sup>84</sup> Therefore the voters in November 1933 should have voted on at least two state-wide matters in addition to repeal: the proposed Constitution and the state treasurership—then and for a year thereafter filled by Charles M. Johnson under executive appointment dated November 17, 1932.<sup>85</sup> Why, in view of these facts, were these matters not submitted to the voters in 1933? The answer is simple. The repeal election act specifically stated that the election was for the “sole and exclusive purpose” of passing on the convention question and choosing delegates thereto and that “it shall not be competent or lawful to elect any officers of the State or local governments, or to vote or pass on any other proposition at said election.”<sup>86</sup>

Everyone had assumed that the regular election of 1934 was the proper one for the Constitution vote, and, by discountenancing this assumption, the advisory opinion created the following absurd state of facts: The Constitution vote could not be held in 1934 because the repeal election of the previous year had been the next general election. The act providing for that election prohibited any vote on the Constitution. Therefore *there never was a lawful time to vote on the new Constitution*. This interpretation, however, raises the question whether North Carolina had a *de jure* state treasurer from November 1933 to November 1934, when, interestingly enough, a state treasurer was elected to fill out the unexpired term.<sup>87</sup>

These constitutional absurdities would have been avoided had the justices—even as late as 1934—taken the view that the passage of the

<sup>84</sup> If the office of any of the state executive officers mentioned in N. C. CONST., Art. III, §13, is vacated before the expiration of the term, the governor fills the vacancy temporarily by appointment. “Every such vacancy shall be filled by election at the first general election that occurs more than thirty days after the vacancy has taken place, and the person chosen shall hold office for the remainder of the unexpired term. . . .”

<sup>85</sup> N. C. MANUAL 349 (1947).

<sup>86</sup> N. C. Pub. Laws 1933, c. 403.

<sup>87</sup> See Raleigh News and Observer, Sept. 21, 1934, for a discussion of this question.

repeal election act was an exercise by the General Assembly of power derived from Article V of the United States Constitution. If they had done this, they might have said of the 1933 election, as Justice Clarkson actually did say, that "calling a 'special election' a 'general election' did not make it so." The ghost of the second 1933 advisory opinion had slain the proposed Constitution before the voters got their chance to knife it. Page Mr. Justice Frankfurter!

*Yelton and Phillips opinions, 1944-1946.*—Nearly a decade passed before another advisory opinion was rendered and then in the brief space of three and a half years four requests brought replies. The first two involved leaves of absence to state officers desiring to enter the service of the United States. The Constitution of North Carolina, Art. XIV, sec. 7, provides as follows:

"No person who shall hold any office or place of trust or profit under the United States, or any department thereof, or under this State, or under any other state or government, shall hold or exercise any other office or place of trust or profit under the authority of this State, or be eligible to a seat in either house of the General Assembly: *Provided*, that nothing herein contained shall extend to officers in the militia, notaries public, justices of the peace, commissioners of public charities, or commissioners for special purposes."

Nathan Yelton, Comptroller of the State Board of Education, accepted a commission as captain in the United States Army, was assigned for work with the Allied Military Governments, and entered upon his duties on December 27, 1943. He applied to Governor Broughton for a leave of absence under the provisions of Chapter 121, Public Laws of 1941, and the governor, upon the advice of Attorney General McMullan, asked the opinion of the justices concerning his legal right to grant the requested leave.<sup>88</sup>

In their unanimous reply, the justices recognized the broad significance of the case as bearing upon leave-granting for all state officials who might desire to accept commissions in the armed forces of the United States. The right of the governor to grant the leave was recognized. There would, the opinion pointed out, be no question at all were Yelton entering the service as a private.<sup>89</sup> Nor would the acceptance of the captaincy create the forbidden status of double-office holding. Relying on a series of North Carolina cases, the justices declared that "where the second office is temporary, or the appointment thereto

<sup>88</sup> *In re Yelton*: Advisory Opinion, 223 N. C. 845, 28 S. E. 2d 567 (1944); letter of request, *id.* at 846-848, 28 S. E. 2d at 568-569; attorney general's letter, *id.* at 848-849, 28 S. E. 2d at 569; opinion of the justices, *id.* at 849-853, 28 S. E. 2d at 569-572.

<sup>89</sup> *Id.* at 850, 28 S. E. 2d at 570.

does not 'require continuous public service,' no constitutional offence is . . . incurred. \* \* \* Such would seem to be the case here."<sup>90</sup> The temporary character of Yelton's relationship to the Army, the justices stated, saved the case from the rule relative to the incompatibility of offices, which had existed in the *Martin* case, *supra*, and which might have existed here "if the services contemplated were those of the professional, permanent soldier, as distinguished from those of the temporary citizen-soldier."<sup>91</sup>

The justices put much stress on the exception granted militia officers in the constitutional provision quoted above. They admitted that this designation might not apply literally to Yelton, but they deemed it to apply in spirit. "If need be, the letter gives way to promote the equity of the spirit."<sup>92</sup> The aim of the prohibition upon double-office holding was to prevent the simultaneous active performance of, and the simultaneous taking of compensation for, two offices. The facts being as they were, the justices stated, to allow a militia officer and bar a temporary army officer the benefit of the proviso "would be to say that an unwarranted discrimination inheres in the Constitution, whereas the pervading principle of the organic law is equality of treatment."<sup>93</sup> That numerous out-of-state cases could be cited to sustain or to deny their conclusion in Yelton's case, the justices frankly admitted, but, they said, "in its final analysis, we are left to apply our own Constitution to the facts in hand, and to say what it means. The authorities elsewhere, while enlightening, are not controlling."<sup>94</sup> With this opinion at hand, the Governor granted Yelton leave.

The *Yelton* case was settled early in 1944; the war was fought out to complete military victory; the problem of war-crimes trials became a matter of grave concern to the victorious powers. The War Department in recruiting qualified jurists, sought the services of Superior Court Judge F. Donald Phillips of the Thirteenth Judicial District, and Judge Phillips asked a leave of absence for a period not to exceed one year.<sup>95</sup> Attorney General McMullan believed that leave might properly be granted and that Judge Phillips might then accept the tendered judgeship of a United States Zonal Court in Germany without vacating his Superior Court post. Nevertheless the attorney general deemed the question sufficiently open to doubt to make desirable an advisory opinion. "This question is important to Judge Phillips but also important to the

<sup>90</sup> *Id.* at 851, 28 S. E. 2d at 570.

<sup>91</sup> *Id.* at 852, 28 S. E. 2d at 571.

<sup>92</sup> *Id.* at 851, 28 S. E. 2d at 571.

<sup>93</sup> *Id.* at 852, 28 S. E. 2d at 571.

<sup>94</sup> *Id.* at 852-853, 28 S. E. 2d at 571.

<sup>95</sup> Advisory Opinion *in re* F. Donald Phillips, 226 N. C. 772, 39 S. E. 2d 217 (1946); letter of request, *id.* at 772-774, 39 S. E. 2d at 217-9; attorney general's letter, *id.* at 774-775, 39 S. E. 2d at 219; letter of Acting Secretary of War Kenneth Royall, *id.* at 776, 39 S. E. 2d at 220; advisory opinion, *id.* at 776-778, 39 S. E. 2d at 220-221.

public, as it will be necessary to know whether . . . any person . . . appointed to fill the vacancy while he is on leave . . . would in all respects be authorized and empowered to act as the Judge of the Superior Court."<sup>96</sup>

Governor Cherry therefore asked the justices' opinion on a series of questions, only one of which was answered. "The principal inquiry," wrote the members of the Court, "is whether Judge Phillips would vacate his present office, if, during his absence, he should accept" the war-crimes post.<sup>97</sup> After reviewing briefly the Yelton opinion, the justices pointed out that the office offered Judge Phillips "carries with it some of the attributes of sovereignty" and would "invest him with governmental authority."<sup>98</sup> He would therefore hold "an office or place of trust or profit under the United States," or a department thereof.<sup>99</sup> The request for leave, it was true was limited to a year or less, but the court over which Judge Phillips would preside was not so limited. A state officer who assumes a second forbidden or incompatible office vacates the first.<sup>100</sup> All of this would seem to lead to the conclusion that Judge Phillips could not accept a war-crimes judgeship without vacating his North Carolina post, but the advisory opinion avoids saying so point-blank. Instead Governor Cherry was "advised that the pivotal question . . . is regarded as involved in too much doubt to warrant a negative response or one favorable to the purposes indicated and contemplated."<sup>101</sup> The answer was of course interpreted by all concerned as negating the leave plan, and Judge Phillips, after a conference with the Governor, decided to resign.<sup>102</sup>

*Expense allowances for legislators, 1947.*—The members of the Supreme Court, in March 1947, were confronted with the most unpleasant task of denying to members of the General Assembly that measure of financial relief to which a majority of the legislators deemed themselves justly entitled. A salary of \$600 without supplement for expenses has long demanded undue sacrifice of Senators and Representatives, but a constitutional amendment designed to give relief by granting legislators an allowance of \$10 a day for a 60-day period was narrowly defeated at the polls in 1946.<sup>103</sup> The 1947 General Assembly, undiscouraged, proposed a new amendment for action at the general election

<sup>96</sup> *Id.* at 775, 39 S. E. 2d at 219.

<sup>98</sup> *Id.* at 777, 39 S. E. 2d at 220.

<sup>100</sup> *Ibid.*

<sup>97</sup> *Id.* at 776-777, 39 S. E. 2d at 220.

<sup>99</sup> *Ibid.*

<sup>101</sup> *Id.* at 778, 39 S. E. 2d at 221.

<sup>102</sup> Raleigh News and Observer, Sept. 8, 1946. Judge Phillips was "frankly surprised by the Supreme Court's opinion." *Id.* Sept. 18, 1946. W. G. Pittman was appointed to the vacancy created; upon Judge Phillips' return from Germany, Judge Pittman resigned and Judge Phillips replaced him on Nov. 10, 1947, and, on Nov. 2, 1948, was elected to fill out the remaining portion of the term for which he was originally chosen in 1942.

<sup>103</sup> The vote was 143,021 *for* to 143,918 *against* the amendment. N. C. MANUAL 230-232 (1947).

of 1948 and, being reluctant to await the outcome thereof, was on the verge of voting itself the same subsistence and travel allowances paid state officials and employees when away from home on official business.<sup>104</sup> Serious constitutional doubts existed, however, concerning the General Assembly's authority so to act, and, consequently, after Attorney General McMullan declined to give a positive answer, the constitutional question was referred by joint resolution to the justices.<sup>105</sup>

In a unanimous advisory opinion, the legislature was informed that it "would seem to be without authority" to grant itself the proposed allowances.<sup>106</sup> Casting a glance back toward the 1946 action of the voters, the justices declared "the voice of the people" to be "the voice of finality." The people, the justices pointed out, had authorized the legislature to set the compensation of other state employees but had reserved to themselves the right to set the compensation of legislators. This they did, said the opinion, in order to relieve law-makers of "the necessity of passing upon a matter in which they have a direct pecuniary interest." Upon the receipt of this opinion, the General Assembly abandoned the pending legislation and the hope of relief was deferred until the 1948 election.<sup>106a</sup>

*The missing enacting clause opinion, 1947.*—More important to North Carolinians than its predecessor was the advisory opinion pronouncing void the comprehensive revision of the state's adoption laws made by the 1947 General Assembly. The purported legislation, introduced as House Bill No. 65, was revised in various particulars in Judiciary Committee No. 2, and a substitute bill was reported favorably by that committee. This substitute passed all remaining stages in the House, all stages in the Senate, was enrolled, and was ratified. At no point during this process was it discovered that the substitute contained no enacting clause. The magic words "The General Assembly of North Carolina do enact" were missing from the bill.<sup>107</sup>

<sup>104</sup> \$6 a day. Raleigh News and Observer, March 26, 1947.

<sup>105</sup> Attorney General McMullan, by statute made legal adviser to the General Assembly, *post.* p. 336, suggested that the matter be referred to the justices. "If I could furnish a definite opinion," the attorney general wrote, "I would not hesitate to do so, but as this question and no question very similar to it has ever been presented to our Supreme Court, it would be impossible for me to forecast with certainty what the decision would be if the question were presented." The attorney general added that, while he was not in a position to give an opinion, he believed the expense allowance proposed to be unconstitutional. Raleigh News and Observer, March 26, 1947.

<sup>106</sup> Matter of Legislative Subsistence and Travel Allowance, 227 N. C. 705 (1947). Resolution of request, *id.* at 705-706 (also N. C. Laws 1947, p. 1684); opinion, *id.* at 706-707.

<sup>106a</sup> The proposed amendment increasing the pay of legislators to \$1,200 met defeat at the general election held on November 2, 1948, the vote being 235,535 for ratification to 248,786 against.

<sup>107</sup> N. C. CONST., Art. II, §21. An Act to Rewrite Chapter 48 of the General Statutes Relating to Adoptions, N. C. Laws 1947, c. 885. See 227 N. C. 708 (1947) *et seq.* for the history of this attempted legislation.



Could the measure be law without these words? The Department of Welfare and the Department of Justice, not to speak of numerous other offices and officers, were deeply concerned over the matter. Commissioner Winston reported that many adoption proceedings had been held in abeyance pending the effective date of the liberalized law and that "the legal status and welfare of many children are at stake."<sup>108</sup> She therefore turned to Attorney General McMullan for advice, and he, in a letter to Governor Cherry,<sup>109</sup> pointed out that it was the duty of his office to incorporate the public laws in the General Statutes. He was, however, "unable to determine whether . . . the Committee Substitute . . . should be included as a part of the codification of the laws of North Carolina." After a detailed examination of the legislative history of the bill, the attorney general raised the question whether the enacting clause must be set forth *in ipsissimis verbis*, cited *State v. Patterson* as the leading North Carolina precedent, and noted language in the act indicative of intent to legislate. In recommending that the Governor ask an advisory opinion, he pointed out that such an opinion would allay doubts about the validity of adoption proceedings which would otherwise certainly arise. "Any opinion expressed by me would be inconclusive," concluded the attorney general, "and not in anywise binding upon the Courts."<sup>110</sup> The governor in his letter requesting an advisory opinion pointed out "that no case could arise" in the normal course of litigation and reach the Supreme Court in time to avoid the unfortunate results that would follow from reliance upon the questioned statute should it later be held invalid.<sup>111</sup>

Impressed by the serious bearing of the problem upon "human and property rights" and upon the administrative responsibilities of the executive departments involved, the justices responded promptly and unanimously. The provision of the Constitution setting forth the enacting clause "must be treated as a command. Its observance is essential to the effectiveness of the act. To interpret the Constitution otherwise would permit it to be ignored by the General Assembly, its creature." The enacting clause must be regarded as of the substance of a law.<sup>112</sup> But could there not be a substitute for the precise words? Both Commissioner Winston and Attorney General McMullan had called attention to the opinion in *State v. Patterson*,<sup>113</sup> wherein the Court, in holding an act void for want of an enacting clause, had observed that "nothing

<sup>108</sup> Commissioner Winston to Attorney General McMullan, June 4, 1947. In this letter Dr. Winston says, "We are requesting an advisory opinion by the Supreme Court."

<sup>109</sup> Advisory Opinion *in re* House Bill No. 65, 227 N. C. 708 (1947); letter of request, June 5, 1947, *id.* at 708-709; attorney general's letter, June 4, 1947, *id.* at 709-712; opinion, June 9, 1947, *id.* at 712-714.

<sup>110</sup> *Id.* at 712.

<sup>112</sup> *Id.* at 713.

<sup>111</sup> *Id.* at 709.

<sup>113</sup> 98 N. C. 660 (1887).

appears as a substitute" for the clause. The attorney general had set forth various expressions in the questioned legislation that might be looked upon as a substitute.<sup>114</sup> These suggested substitutes, designed to show purpose to legislate, the justices rejected. "Moreover," they wrote, "it may be doubted whether any substitute for this form should be deemed a compliance with the unequivocal requirement of the Constitution."<sup>115</sup> And they concluded by informing the governor that the adoption bill "was not enacted in conformity with the Constitution, and must be regarded as inoperative and void."<sup>116</sup>

The justices were undoubtedly correct in their conclusion. It is certainly not the business of courts to write into legislation vital passages omitted by a careless legislature. But it may be asked properly whether the dictum italicized above has any bearing on the use of joint resolutions for legislative purposes. The Constitution plainly recognizes that law may be made by resolution.<sup>117</sup> The use of the joint resolution for this purpose is as yet limited, but suppose it should be extended to cover matters heretofore handled by act: Could such an extension be challenged as unconstitutional and the lack of the prescribed enacting clause *in ipsissimis verbis* be made one ground for such challenge? Would the Court in such an instance recognize in the resolving clause a proper substitute? And again, on grounds parallel to those given in the 1947 advisory opinion, would the Court hold void a joint resolution having a legislative purpose if the resolving clause were missing?<sup>118</sup> Or would it accept the kind of evidence of intent to legislate by resolution that it rejected in the adoption law case and justify its action on the ground that no specific resolving clause is required by the Constitution? Sooner or later these questions may have to be answered.

#### CRITIQUE OF THE ADVISORY FUNCTION

It now becomes important to summarize the rules governing the exercise of the advisory function in North Carolina and to analyze the authority of the advice given. The first and oldest doctrine is that advice is given as a matter of courtesy to coordinate departments of government. No advisory function is conferred by the Constitution or statutes of North Carolina and no effort has ever been made by the Court to find any basis for it in the early legal history of colony or state.

Second, the rule has finally emerged that advice will be given to the legislature only when that body has determined to take action to the execution of which its legal doubts constitute the only barrier. While

<sup>114</sup> 227 N. C. 710-711 (1947).

<sup>115</sup> *Id.* at 714. Italics mine.

<sup>116</sup> *Ibid.* This statement, to say the least, does not sound like advice.

<sup>117</sup> N. C. Consr., Art. II, §23, reads: "All bills and resolutions of a legislative nature shall be read three times in each House before they pass into laws. . . ."

<sup>118</sup> No form of resolving clause is prescribed by the Constitution.

the justices are unwilling to advise where action is a mere possibility, they have not insisted that the legislature shall have settled upon one course of action. They have instead allowed alternative courses to be submitted provided the General Assembly has decided to choose between them.

Third, the justices are reluctant to give advice upon questions certain to arise in litigation unless some broad public purpose is to be served thereby. This is particularly true where private property rights are involved and is exemplified by the refusal in the Homestead case and by the cautious procedure years later in Judicial Tenure cases.

Finally, except for the deviations noted in the years 1917, 1919, and 1921, the doctrine has been maintained officially that advisory opinions are opinions of the individual justices and not of the Supreme Court in its corporate capacity. In this attitude toward advisory opinions, North Carolina is in agreement with all states except Colorado. Officially, then, these opinions in all states save one are "purely advisory, and binding neither as decisions nor as precedents."<sup>119</sup> The doctrines of *stare decisis* and *res judicata* do not apply to them.<sup>120</sup> They bind neither the giver nor the recipient.

But, if this is really fact and not merely theory, why did Professor Thayer, writing more than a half century ago about advisory opinions, warn that "it is of grave importance that the notion of their binding quality should be dispelled?"<sup>121</sup> Exactly what is the status and force of an advisory opinion in America generally and in North Carolina particularly? In Massachusetts, where the advisory function is more active than in any other state, the justices "are bound most sedulously to guard against any influence flowing from their previous consideration if a [litigated] question later arises for decision."<sup>122</sup> One finds, however, that even in Massachusetts advisory opinions are freely cited, and this is true also in other states. In North Carolina instances of citation are numerous and any deviation from their doctrines has been deemed to require judicial rationalization.<sup>123</sup> One advisory opinion furnished

<sup>119</sup> 10 HARV. L. REV. 50 (1896). This point is emphasized by all authorities. On the practice in Colorado see ELLINGWOOD, *op. cit. supra* note 2, at 48-53, 259, and the articles listed in the bibliographical note following the text of this article.

<sup>120</sup> ELLINGWOOD, *op. cit. supra* note 2, at 223-237. See also Hudson, *Advisory Opinions*, 37 HARV. L. REV. 983 (1924); Clovis & Updegraff, *Advisory Opinions*, 13 IA. L. REV. 195 (1928).

<sup>121</sup> THAYER, LEGAL ESSAYS 59 (1908).

<sup>122</sup> HUDSON, *op. cit. supra* note 120, at 983.

<sup>123</sup> The Court, speaking through Justice Rodman, refused to accept the definition of the term "freehold" set forth in *Waddell v. Berry*, 31 N. C. 518, 519 (1848), saying: "We do not feel ourselves bound by the opinion in that case, because it was not a judicial opinion, that is, [it was] not given in any case which the court had jurisdiction to decide, and the reasoning is almost altogether technical." *State v. Ragland*, 75 N. C. 12, 13 (1876).

the precedent upon which the Court based its jurisdiction over a litigated case.<sup>124</sup>

The first contention made by the friends of advisory opinions when the question of authority is raised is that, as Judge Hudson put it, "binding quality is a matter of degree, . . . and while a matter handled in an advisory opinion may not thereby become *res judicata*, still the views given on solemn consideration by learned judges, acting in their official capacity, would seem to call for serious consideration. *Stare decisis* is inapplicable, but short of that there is room for giving advisory opinions great weight."<sup>125</sup> And such weight they have always received.

It is unquestionably true that advisory opinions should, as Jameson put it, be accorded "no greater weight" than they deserve on account of their "intrinsic merit."<sup>126</sup> Realists know, however, that there is strong compulsion in these opinions regardless of their intrinsic merit. At least in North Carolina, the requestor-recipient has in every case followed the advice given irrespective of its merit and in every case save one there has been no subsequent governmental action contrary to that advice.<sup>127</sup> Governors and legislatures do not approach the judges unless they intend to abide the result. To enact a measure after the justices have called it unconstitutional, or to act administratively in the face of an unfavorable opinion, would appear rash indeed in a land where the judicial veto is universal. And private citizens would likewise gamble against odds should they seek to compel administrators to act contrary to the advice of the judges. To encourage clients to adopt such a course, counsel would indeed have to be confident of their ground. Where careful consideration has been given to formulating advice for the coordinate branches of the government, there is strong presumption that

<sup>124</sup> *Farthing v. Carrington*, 116 N. C. 315, 320, 22 S. E. 9, 11 (1895). In the opinion of the Court, Justice Montgomery said: "And while ordinarily we might dismiss the proceeding because the case is not full enough as to its statement of the facts, yet where the matter involves great public interest, as does this matter, we have decided to follow a late *precedent of this Court*—'Treat the case as in the nature of a submission of the controversy without legal action.'" (Italics mine.) The so-called precedent is the Judicial Tenure opinion, 114 N. C. 923 (1894). Justices Clark and Avery were severely critical of this use of the 1894 opinion. 116 N. C. 326, 330-322. Chief Justice Furches wrote an elaborate though not convincing justification. His remarks are enlightening on the subject of the Judicial Tenure case. *Id.* at 333-334. Smith, *Advisory Opinions*, 7 N. C. L. REV. 452, writing before the passage of the Declaratory Judgment Act of 1931 (N. C. Pub. Laws, 1931, c. 102, p. 133; N. C. GEN. STAT. §§1-253 to 267 (1943)) says that *Farthing v. Carrington* was the only declaratory judgment rendered by the Supreme Court.

<sup>125</sup> 37 HARV. L. REV. 983 (1924).

<sup>126</sup> Jameson, *THE CONSTITUTIONAL CONVENTION; ITS HISTORY, POWERS, AND MODE OF PROCEEDING*, 364, §393 (3d ed. 1873).

<sup>127</sup> The single exception occurred in 1871 when the legislature legislated regarding a constitutional convention in spite of the advisory opinion furnished to Governor Caldwell. *Supra* p. 308.

the advice is correct. Even if the advice were incorrect, rumor has it that judges of high courts are slower to see error in their own work than in that of others.

Perhaps the commonly held doctrine that an advisory opinion is an opinion of individual justices rather than of the court on which they serve has some value in that—at least in the eyes of the judges—such an opinion lacks the authority of an opinion rendered in a litigated case. Advice may lack the sanctity of reasoning in a real controversy 'twixt me and thee. The seekers after advice, the press, and the public, however, are scarcely aware of the difference. In North Carolina, as has been shown, a very substantial fraction of the requests for advice have asked for the Court's opinion, and the justices, in replying, have not always made it clear that they were speaking only as individual justices; indeed they have in a few instances replied as the Supreme Court. But whatever the form of words in advisory opinions, the opinions are talked of by recipients and by the press as official action. Ample evidence of this is given in a footnote and in view of this evidence it is hard to avoid Justice Reade's statement that questions come "to us as Justices, as the Supreme Court. \* \* \* And in whatever form we might answer, the Legislature and the public will understand it to be the opinion of the Supreme Court."<sup>128</sup>

It is the juncture in the same body of men of the *right to interpret* and *the power to decide* that makes the advice of this body so much sought-after. Theoretically the advice of the judges is no more official or binding on legislatures and executives than the advice of the attorney general. Actually, however, executives have been known to turn for advice from the attorney general to the judges and have done so on recommendation of that official.<sup>129</sup> Attorney General McMullan, for example, in the *Adoption Bill* case, said: "The numerous adoption proceedings . . . now pending . . . may be seriously imperiled and [their] validity brought into question unless the answer to this problem is given by such authority as may be provided in an advisory opinion of the *Chief Justice* and the *Associate Justices* of the Supreme Court. Any opinion expressed by me would be inconclusive and not in anywise binding upon the Courts."<sup>130</sup> The obvious implication of this language is that advisory opinions do tend to bind the judges and that they do so

<sup>128</sup> Legislative Tenure Opinion, 64 N. C. 793 (1870). Almost every reference to an advisory opinion cited from the News and Observer speaks of advisory opinions either as opinions or decisions of the Court. The members of the General Assembly in debate consistently do so. The Supreme Court did so in *Farthing v. Carrington*, *supra*, note 124. As has previously been shown the advisory opinions of 1917 and 1919 were rendered as opinions of the Court so far as language may be taken as a guide. 227 N. C. 716, 717 (1947).

<sup>129</sup> Judicial Tenure Case, 114 N. C. 923 (1894).

<sup>130</sup> 227 N. C. 712 (1947).

is nowhere better illustrated than in Justice Clarkson's surrender in the *Constitutional Referendum* case.<sup>131</sup> In the evolution of binding potentialities in advisory opinions lurks some risk to all concerned. A writer of a half century ago did not overstate the case when he said: "Admitting that it [an advisory opinion] is purely advisory, it is an official act, and can hardly fail to be prejudicial to parties adversely interested, and to influence the officials of lower tribunals, as well as to bias the subsequent opinions of the judges themselves if the question comes up for actual decision."<sup>132</sup>

One of the most serious charges against advisory opinions is that they are often more important in politics than in law. Under the guise of answering legal and constitutional questions, the judges often play a decisive role in settling political questions. When *Waddell v. Berry* came before the judges, the Senate was equally balanced between Whigs and Democrats (Loco-focos), and the effect of the advice rendered was to maintain that balance and, simultaneously, to deny the right to vote to many previously enfranchised North Carolinians.<sup>133</sup> In the *Martin* case during the Civil War, the legislative effort to unseat the adjutant general was allegedly directed by Daniel Fowle. When the justices advised Governor Vance that the adjutant general's office was indeed vacant, the governor proceeded to make Fowle its new occupant. The proceedings leading to this outcome were described by a contemporary critic as the device of an "Astute Lawyer" (Fowle) by which the head "of a most important office is turned out, and the son-in-law of the Chief Justice of the Supreme Court . . . put in his place."<sup>134</sup>

Again the element of politics entered into the 1870 *Legislative Tenure* case. There seems to be little doubt that the members of the General Assembly who desired to stretch their tenure from two years to four

<sup>131</sup> 207 N. C. 880 (1935); *supra* p. 322.    <sup>132</sup> 10 HARV. L. REV. 50 (1897).

<sup>133</sup> Men having mere equitable claims to land, many of whom had previously enjoyed the franchise, were not "freeholders" within the meaning of the suffrage provisions of the old constitution. 31 N. C. 516 at 527 (1848). "The points made in the case doubtless had effect in creating a sentiment favorable to abolishing the freehold qualification in electing Senators." 2 ASHE, HISTORY OF NORTH CAROLINA, 472 (1925).

<sup>134</sup> Letter signed "Compatible," March 27, 1863, in the Raleigh Register, April 1, 1863. The Raleigh Standard, W. W. Holden's paper, on March 18, 1863, contained the following editorial: "The result of this vexed question fully vindicates the propriety and wisdom of the course adopted by Gov. Vance. Gen. Martin has no ground for complaint, for he has had time to obtain legal advice as to his supposed rights, and the case has been dispassionately tried by a tribunal of his own selection; while Gov. Vance, by resorting to the Court for its decision, has most probably avoided an unpleasant conflict with a subordinate, and at the same time obtained for the Legislature, in declaring the office vacant, and for his own action in appointing a new Adjutant General, the sanction of *law*, as expounded by the highest judicial tribunal in the state."

That Daniel Fowle's first wife was Chief Justice Pearson's daughter is a well-known fact. See BROOKS & LEFLER, THE PAPERS OF WALTER CLARK, 1857-1901, 556.

believed Chief Justice Pearson "favorable to the four-year term, and it was probably thought that he would carry the court with him."<sup>135</sup> Justice Rodman, it will be recalled, deemed "the question . . . an exclusively political one," which, so far as he could see, could "never . . . be made a legal question or a subject of judicial determination," and Justice Reade, whose opinion has received ample attention above, frankly looked on the whole manner as meddling in politics.<sup>136</sup> Governor Holden, writing his memoirs years later, gave clear evidence that he had been approached on the tenure question by the Chief Justice himself.<sup>137</sup> That Governor Caldwell used the Supreme Court to make possible an administrative veto where no executive veto existed is too evident to require argument.<sup>138</sup> It is equally obvious that, in the *Judicial Tenure* case, Governor Carr's request for an advisory opinion was designed to solve a serious political question in time for party nominating machinery to operate.<sup>139</sup> The *Railroad Lease* opinion was the product of a skillful political strategem as is evident from the debates in the General Assembly. Josephus Daniels saw it clearly in this light when he declared the Senate substituted "a 'trick' bill" and added that the "decision of the Supreme Court lifted out the snake that was devilishly coiled in it to strike the people's interest at the proper stealthy moment. \* \* \* The railroad did not expect the people to seek light from the court. That was a species of shrewd flank movement of which the railroad did not think the stupid people capable."<sup>140</sup> And, again, in its 1934 opinion fixing November 1933 as the time of the next general election after the 1933 General Assembly, the justices performed yeoman service in saving the proposed constitution and its supporters from almost certain defeat.<sup>141</sup> The author has no disposition to say the judges erred in any

<sup>135</sup> HAMILTON, RECONSTRUCTION IN NORTH CAROLINA, 408.

<sup>136</sup> *Supra* p. 306.

<sup>137</sup> Writing thirty years after the event, Ex-Governor Holden said: "One morning, during the spring of 1870, Chief Justice Pearson called . . . at my house. Among other things, he said, 'The Senate of this State had been chosen for four years.' He said . . . he could prove it beyond question. He said he hoped I would confer with him, and that I would aid him in a case to be made up by the Supreme Court. I was surprised at the suggestion. \* \* \* I said to him: 'Judge, the people in voting for the Constitution no doubt believed they were voting for two years for the Senate, and not four years. And besides it is written the different departments of government shall be kept always separate and distinct. According to this rule I could not beforehand confer with the court.' He seemed to be, as he no doubt was, profoundly in earnest. The Senate at that time was by two-thirds Republican. It was the first Senate under the new Constitution. I did not think of the matter any more until I was impeached." MEMOIRS OF W. W. HOLDEN, 159. W. K. Boyd, editor of Holden's memoirs, thinks this conversation took place in the spring of 1869, and it may have, but it might have taken place at any time between that date and the submission of the legislative tenure question by the General Assembly in December 1869. *Ibid.* note 1.

<sup>138</sup> *Supra* p. 308.

<sup>139</sup> Superior Court Judge George A. Shuford to the Asheville Citizen, May 1894. Governors' Papers, Elias Carr, May-Aug., 1894.

<sup>140</sup> Raleigh News and Observer, March 9, 1897.

<sup>141</sup> *Supra* p. 319.

of the advisory opinions except those of 1933 and 1934; all he affirms is that in the instances cited the judges were used, and can hardly have avoided knowing the fact, for purposes in a large measure political.

*Future of the Advisory Function.*—Every indication for the future points to more rather than less frequent calls for advisory opinions. What is to be the attitude of the justices toward such a growing demand? Three general courses are open to them: They may let matters rest as they are and treat each request on its own merit without any comprehensive plan to improve the practice; they may take steps to improve advisory procedures and to safeguard themselves against an over-expansion of the function; or they may decline longer to serve the executive and legislative branches in an advisory capacity.

If there are present defects and prospective risks in the performance of advisory work, as it is believed that there are, the first course does not commend itself. The choice lies, therefore, between a planned improvement and outright abandonment of the advisory function.

Ample precedent exists for abandonment. Of seven states where advisory opinions were once given without constitutional or statutory authorization, North Carolina alone still makes them available.<sup>142</sup> Two other states have been denied such advantages as may come from advisory opinions although in one of them there was an advisory-opinion statute on the books.<sup>143</sup> The reasons given by the judges for abandoning or rejecting the advisory function have been numerous, but they have all tended to center on the concept of the separation of powers and have revealed the strong predilection of American jurists for the litigated case.<sup>144</sup> For North Carolinians, these reasons were effectively

<sup>142</sup> Conn., Ky., Neb., N. Y., Okla., Pa.

<sup>143</sup> In *State v. Baughman*, 38 Ohio 455 (1882), the judges refused to assume the advisory function. In Minnesota an act providing that the governor, the legislature, or "either house may, by resolution, request the opinion of the Supreme Court, or any one or more of the Judges thereof, upon a given subject, and it shall be the duty of such Court or Judges, when so requested, respectfully, to give such opinion in writing" (MINN. COMP. STAT., Ch. 4, sec. 15, quoted in opinion and by ELLINGWOOD, *op. cit. supra* note 2, at 70, n. 293) was declared unconstitutional as violating the constitutionally imposed doctrine of the separation of powers. In *re* Application of the Senate, 10 Minn. 78 (1865).

<sup>144</sup> *Supra* note 143. In 1867, the Judges of the Connecticut Supreme Court of Errors, after having given advice on two previous instances. (Opinion . . . *de* Soldiers' Voting Act, 30 Conn. 591 (1863), and Opinion . . . *de* Negro Citizenship, 32 Conn. 565 (1865) declined further to do so on the following grounds: The practice was extra-judicial since no parties were before the Court and there was nothing to adjudicate; the opinions being merely advisory, would bind no one, "except perhaps as we ourselves, if sitting upon" an actual case "might be inclined to adhere to an opinion which we had expressed"—an opinion "purely *ex parte*" formed without assistance of counsel and reached in consultation "upon a comparison of our several impressions"; and, finally, advisory action would "conflict with our judicial duties and . . . with the legislative duties" of the General Assembly by leading to a pre-judgment of questions likely to come before the courts and by causing improper judicial interference "with your separate and



stated in 1870 by Justice Reade and, to a lesser degree, by Justice Rodman.<sup>145</sup> The collective views of the numerous judges who have condemned advisory opinions here and in other states would furnish a strong case should the present members of the Supreme Court wish to use it.

It cannot be argued that were the North Carolina justices to refuse to give further advice, their action would deny the executive and legislative branches the competent legal counsel to which they are entitled. For 80 years the law has imposed upon the attorney general the obligation "to give, when required, his opinion upon all questions of law submitted to him by the general assembly, or either branch thereof, or by the governor, auditor, treasurer, or any other state officer."<sup>146</sup> The existence of a similar provision in the law of Nebraska was one ground for abandoning the advisory opinion there.<sup>147</sup> Furthermore, the General Assembly of North Carolina, in adopting the above quoted words at the very session when the Homestead advisory opinion was rendered, plainly indicated that they meant the attorney general to become their regular counsellor.

It would therefore have been easy to have justified the abandonment of the custom in 1870 and even easier after the 1871 joint resolution

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independent rights and duties of legislation." Reply of the Judges, 33 Conn. 586-588 (1867).

A number of advisory opinions were rendered in Nebraska, the last being *In re* Board of Public Lands and Buildings, 37 Neb. 425 (1867). In dissenting from his fellows in this case, Justice Noval held that courts "should refrain from construing a statute or passing upon its constitutionality in advance of actual litigation. . . \* \* \* We are aware that this court has, in some instances, assumed to answer questions submitted by the other branches of the state government." He had assented reluctantly on two occasions, but "it is time for the court to call a halt, and entertain jurisdiction solely in causes where the same is conferred by the constitution." *Id.* at 432 ff. Justice Noval's point of view, rejected at the moment by his brethren, was adopted six months later when the Supreme Court determined that, in the future, "only questions involved in matters of actual litigation before the court will be entertained or judicially determined, and no opinion will be filed in answer to any merely hypothetical question." 37 Neb. xiii, Rule 23, Jan. 4, 1894.

A refusal to give advice came from the pen of the late Benjamin N. Cardozo, while serving as a judge of the New York Court of Appeals: "The function of the courts [of New York] is to determine controversies between litigants. \* \* \* They do not give advisory opinions. The giving of such opinions is not the exercise of the judicial function. \* \* \* In this state the legislature is without power to charge the courts with the performance of non-judicial duties. \* \* \* We are asked by an omnibus answer to an omnibus question to adjudge the rights of all. That is not the way in which a system of case law develops. We deal with the particular instance; and we wait until it arises." *Matter of State Industrial Commission*, 224 N. Y. 13 at 16, 17-18 (1918).

<sup>145</sup> *Supra* p. 304.

<sup>146</sup> N. C. Pub. Laws, 1868-69, c. 270, sec. 82, par. 6, p. 634; N. C. GEN. STAT. §114-2, par. 5 (1943).

<sup>147</sup> Justice Noval, in his dissent *In re* the Boards, 37 Neb. 425 (1893) at 435, said: "In Nebraska the attorney general, not the supreme court, is the legal adviser of the executive and legislative departments."

condemning the advisory opinion of that year as "subversive of the fundamental principles of the constitution."<sup>148</sup> Lapse of time might also have encouraged forthright renunciation in 1894 or in 1917. Today such a course would be much more difficult to adopt and to justify on convincing grounds, in spite of logic and out-of-state precedent that could be brought to support it. Indeed a decision of the justices to limit themselves to litigation, even if based on the strongest constitutional grounds, might produce a reaction ending in an advisory opinion statute or in a constitutional amendment imposing the function upon the Court or its members. The Court might, of course, pronounce the statute void, but it could limit the amendment only by interpretation. It can scarcely be denied that the present situation in which usage furnishes the foundation leaves the justices broader discretion than they would have were advisory duties imposed upon them by positive law.

Furthermore, with the exception of the 1933 and 1934 instances, the actual use of the advisory opinion has been wholesome. The 1870 legislature needed badly the legal and moral guidance furnished respectively by Chief Justice Pearson and Associate Justice Rodman; the state was saved an embarrassing and perhaps paralyzing conflict over control of the military in the midst of the Civil War by the opinion in Martin's case; the confusion over judicial tenures might have had serious repercussions in 1894 had not the justices answered Governor Carr as they did; and any effort to enforce the recent defective Adoption Bill could well have produced many legal tangles of pitiable character.

Again, it should be remembered that the General Assembly of North Carolina alone among American legislatures is unchecked by executive veto. In other states governors are in a position to restrain legislative bodies by threatening to veto objectionable bills, but in North Carolina the only veto is judicial and the only admitted ground for the exercise of this veto is the unconstitutionality of legislation. If there is anything in the argument that advisory opinions save the legislature from enacting measures only to have them subsequently outlawed, then this argument would seem to apply in North Carolina with even greater force than in the forty-seven states where the governor can stand between the fundamental law and a self-willed legislature.

The inevitable conclusion, based in part upon the peculiar state of affairs in North Carolina, is that abandonment of the advisory function is impracticable. A well-planned improvement of the advisory technique and an amplification of existing safeguards are, on the contrary, thoroughly practicable and highly desirable. It is suggested that the improvement include the following seven points:

1. That greater emphasis be placed upon the extraordinary char-

<sup>148</sup> *Supra* note 30.

acter of the advisory function. The judges should insist that they will advise the coordinate branches of the government only upon questions so important and on occasions so solemn that no other course of action seems appropriate. For all normal circumstances legislatures and executives should be left to their own resources. The lawfully designated adviser of the executive and the legislature is the attorney-general and neither they nor he should be encouraged at any time to transfer this responsibility to the judges.

2. That the justices refuse to give advice hurriedly. The judges should make it a fixed rule never to act in haste. The advisory function, realistically viewed, carries tremendous power and commensurate responsibility. Hence not much need be said about haste—a self-confessed fault in some states. The judges in North Carolina have several times supplied advice within twenty-four hours of the request and on one occasion have responded on the evening of the same day. Unless they were forewarned of these requests—as well they may have been—they must have acted hurriedly; either that, or the questions put to them were of such simplicity as scarcely to have merited reference in the first place. Sometimes a legislature hurrying toward final adjournment will be tempted, as was the House of Representatives of 1897, to seek advice on Friday and “respectfully” allow the judges until Saturday to furnish it.<sup>149</sup> To accede to such a request obviously lays judges open to the charge of giving “horse-back opinions.” Surely a semblance of deliberation is essential to the judicial process.

3. That briefs be taken and oral argument be heard. All risk of haste would disappear if the justices were to take adequate precautions against unadvised action. Litigated cases, when they reach the Supreme Court, have been battled out in lower courts by professional adversaries before qualified judges operating under well-defined rules. Upon appeal to the Supreme Court, briefs are filed and oral argument takes place. The possibilities and implications of a case are, or at least may be, explored thoroughly. How different is the situation when the justices are performing their advisory function! According to present practice, there are neither counsel nor briefs nor oral arguments. Some writers and some courts have assumed this to be a necessary situation.<sup>150</sup> But

<sup>149</sup> 120 N. C. 433 (1897).

<sup>150</sup> See note on advisory opinions, 10 HARV. L. REV. 50 (1897). Hudson, 37 *id.* 983 says: “It seems to have been assumed by the Missouri judges that counsel could not be heard. The Massachusetts justices have complained on more than one occasion that they were compelled to act without sufficient assistance from counsel, and in one instance [190 Mass. 611, 77 N. E. 820 (1906)] they have referred to advisory opinions as ‘necessarily given without the aid of arguments of counsel.’ It is difficult to see why this should be true. The court could easily call in *amici curiae*, and the Massachusetts court did once hear argument [Adams v. Bucklin, 7 Pick. 121, 125 (1828)], and occasionally now receives briefs.”

it is not necessary; neither is it the unbroken practice in a number of states, including North Carolina. In *Waddell v. Berry*, the first of the advisory opinions, Chief Justice Ruffin said:<sup>151</sup>

"The Judges would have been gratified to have heard, before forming their opinion, an argument on the part of the gentlemen concerned on opposite sides; and, if the matter of law, involved in the questions of the Senate, were deemed by them doubtful, they would have been obliged to defer their answer until the parties or their counsel could submit their views."

Obviously, Ruffin and his colleagues believed that a formal presentation of the issues involved would normally be as essential in advisory matters as in litigated cases. When the *Martin* case was considered in 1863, not only was an agreed statement of facts submitted to the judges but the judges heard argument from two of the ablest members of the bar.<sup>152</sup> Again in the *Judicial Tenure* case, the judges had the benefit of a "well-considered and strong argument" submitted by Attorney General Osborne and also, on the opposite side, of "powerful presentations" of "some others of the ablest and most learned members of the legal profession."<sup>153</sup> More recently conferences with legislative committees responsible for requests and various documents submitted with the requests—for example, statements prepared by the attorney general—have aided the members of the Court.<sup>154</sup> Sufficient precedent clearly exists in the practice of North Carolina to justify the judges in insisting upon an adequate formal presentation of the problems upon which their advice is asked.

This local precedent is strengthened by wholesome experience in a number of other states. Thirty years ago in Delaware, in response to a gubernatorial request for advice, the judges wrote: "We think our opinion should not be based upon a hasty and imperfect consideration of the matter. . . . To that end we have concluded that at least a week's time is essential, and that an opportunity should be given to any attorneys who may desire to argue before us either side of the question. We \* \* \* will be pleased to hear and consider any arguments that may be sub-

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ELLINGWOOD, *op. cit. supra* note 2, at 80, 81, 190, 206-207, gives evidence concerning the extensive use of *amici curiae* in Canada and some states. CLOVIS AND UPDEGRAFF, *supra* note 120, at 195, believe it would be desirable to require the attorney general of a state "in all cases involving advisory opinions, to furnish briefs both *pro* and *contra*." See also *In re* the Constitutional Convention, 55 R. I. 68 (1935).

<sup>151</sup> 31 N. C. 519 (1849), 40 N. C., appendix, p. 306.

<sup>152</sup> B. F. Moore appeared for the attorney general; Thomas Bragg for General Martin. 60 N. C. 156 (1863). Moore's argument appears in the Raleigh Standard, March 18, 1863.

<sup>153</sup> 114 N. C. 925-926 (1894).

<sup>154</sup> See Chief Justice Clark, Municipal Finance Bill opinion, 227 N. C. 719; Raleigh News and Observer, Feb. 7, 1925; and the Yelton, Phillips, and Adoption Bill opinions, 223 N. C. 848, 226 N. C. 774, 227 N. C. 709.

mitted either orally or in writing."<sup>155</sup> As a result of this invitation the attorney general and eight other lawyers argued the question. Even more striking was an action taken in 1935 by Rhode Island judges.<sup>156</sup> For fifty-two years an advisory opinion virtually outlawing constitutional conventions in the state had excited the ire of authorities.<sup>157</sup> In language unusually frank for judges criticizing the work of their predecessors, the 1935 justices set forth fully the haste under which the 1883 opinion had been given and added that their predecessors had "evidently . . . had no assistance from counsel."<sup>158</sup> Faced with a new opportunity to advise on the legality of constitutional conventions in Rhode Island, the 1935 justices "deemed it of utmost importance . . . to exhaust every avenue of information that would assist us in giving our opinion. Accordingly, we have largely laid aside other duties pressing upon us and have devoted ourselves to a thorough, painstaking examination of the authorities and a careful review of the legislative precedents and practice of Rhode Island. . . . In this we have been ably assisted by outstanding leaders of our bar, including the attorney general of the state, who at our invitation appeared before us and argued these intricate constitutional questions. In addition we have had also the benefit of their well-prepared and exhaustive briefs."<sup>159</sup> The result was a reversal of the "ill considered and hastily prepared" opinion of a half-century's standing as "entitled to little or no weight, in spite of the ability and character of the men who joined in it."<sup>160</sup>

What the judges of Delaware and Rhode Island have taken liberty to do on their own initiative, the judges of Alabama have been empowered to do by statute. Section 3 of the Alabama Advisory Opinion Act of 1923 states that the justices "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."<sup>161</sup> In view of these several actions, the recommendations of numerous careful students—Hudson, Frankfurter, Clovis, Updegraff, and Elling-

<sup>155</sup> *In re* School Code of 1919, 30 Del. 406, 409, 108 Atl. 39, 40 (1919). On this instance see HUDSON, *op. cit. supra* note 120, at 983-984.

<sup>156</sup> *In re* the Constitutional Convention, 55 R. I. 56 (1935).

<sup>157</sup> *In re* the Constitutional Convention, 14 R. I. 649 (1883). Frankfurter, *Note on Advisory Opinions*, 37 HARV. L. REV. 1008 n. 18 (1924), points to this case as striking evidence of the potential shortcomings of the advisory opinion even where problems of the organization of government are concerned. "Even on technical questions concerning merely the internal structure of government," he says, "ill-considered advisory opinions before the event may become mill-stones around the necks of succeeding generations."

<sup>158</sup> 55 R. I. 69 (1935).

<sup>159</sup> *Id.* at 60.

<sup>160</sup> *Id.* at 69.

<sup>161</sup> An Act to Provide for Obtaining the Opinion of the Justices of the Supreme Court, or a Majority Thereof, by the Governor or Either House of the Legislature Upon Important Constitutional Questions. Ala. General Acts, 1923, pp. 25-26; Ala. Code 1940, Title 13, §36.

wood<sup>162</sup>—and of the favorable background in this state, it is difficult to see any substantial reason why the practice of brief-taking and argument should not be adopted regularly in North Carolina.

4. That a rule of unanimity be established. It is doubtful that advice should be given when the judges are unable to reach a genuinely unanimous conclusion. Divided opinions are often unavoidable in litigated cases where fully developed problems of law in their relationship to facts are at issue, but advisory opinions, especially when concerned with legislative proposals, are too often arrived at in an atmosphere of unreality divorced from fact—a condition intensified when the proceedings are purely *ex parte*. Divided opinions under such circumstances ought not to be offered, for they only drag the personal views of the judges into the vortex of legislative and political struggle.

5. That the grounds upon which advice is based always be stated. Implicit in the preceding paragraph is the assumption that advisory opinions should be opinions in the true sense of the word. To state mere conclusions unsupported by reasons is not a sound practice. The unreasoned conclusion can be used by judges to cloak insufficient consideration; it must be baffling to those on the opposite side of a question; it reduces the opportunity of legislators to recast condemned proposals. It smacks rather of “will and power” than of that light of reason which supposedly guides the judicial process.

6. That advisory opinions never be given on proposed economic and social legislation. Reference has already been made to the unrealistic atmosphere likely to surround the judges when rendering advisory opinions on constitutional questions. In no area is this factor more disturbing than in that of economic and social legislation. If it is true, as John Marshall once said it was, that the preeminent duty of the judges is to say what the law *is*,<sup>163</sup> it is equally true that the preeminent duty of the legislature is to say what the law shall be. This duty the legislature ought not to shift to others—be they executives or judges. Whenever the legislature attempts to adopt a fresh approach to the economic and social problems that confront our civilization, opponents have one last resort, one Cato-like cry: “Furthermore the bill is unconstitutional.” In such cases it is all-too-easy for legislators to turn to judges and to offer up their convictions upon the altar of their doubts. This is not as it should be, for “constitutionality,” as Felix Frankfurter long ago said, “is not a fixed quality; in crucial cases it resolves itself into a judgment upon facts. \* \* \* [And] the history of modern legislation amply proves that facts may often be established in support of measures after enact-

<sup>162</sup> *Post.*, bibliographical note.

<sup>163</sup> *Marbury v. Madison*, 1 Cr. 137 at 178 (1803).

ment although not in existence previously."<sup>164</sup> Judges, in the opinion of the present writer, ought not to interfere with prospective legislation in our industrialized age, by taking sides as to its constitutionality. The published reports of litigated cases contain quite as much judicial guidance as any sitting legislature is entitled to have. Students of the United States Supreme Court know how difficult it often is for the members of that Court to avoid substituting their own economic and social predilections for those of the Congress.<sup>165</sup> How much harder would it be were that exalted tribunal to engage directly in the legislative process *via* the advisory opinion!

Fortunately in North Carolina, advisory opinions upon the constitutionality of proposed social and economic legislation have not as yet been asked of the judges. But such requests are almost certain to be made as urbanization and industrialization go forward and the inevitable social and economic issues demand settlement. When the requests do come, a sound and sufficient reply would be that, until legislation has been through the empiricism of administration, the judges will reserve judgment upon questions of constitutionality. So placed on notice, no timid General Assembly will be able to hide behind the robes of the judges.

7. That the authority of advisory opinions be defined. As these opinions grow in number and importance of subject matter, they will necessarily attract more and more attention. If they are reached after receiving briefs and hearing argument and if they are well and carefully reasoned, the natural inclination of lawyers to utilize them in the presentation of regular litigation will increase, as will also the references to them in the opinions of judges. There is a degree of danger in this and

<sup>164</sup> Frankfurter, *Advisory Opinions: National*, 1 ENCYCLOPAEDIA OF THE SOCIAL SCIENCES 478.

<sup>165</sup> A few examples of economic and social predilections of the justices will suffice. In his concurring opinion condemning the income tax law of 1894, Justice Field said: "The present assault upon capital is but the beginning. It will be the stepping-stone to others, larger and more sweeping, till our present contests will become a war of the poor against the rich; a war constantly growing in intensity and bitterness." *Pollock v. Farmer's Loan & Trust Co.*, 157 U. S. 429 at 607 (1895). In *Lochner v. New York*, 198 U. S. 45 at 57 (1905), Justice Peckham for the Court declared that there was "no reasonable ground for interfering with the liberty of person or the right of free contract, by determining the hours of labor in the occupation of a baker"; and added, *id.* at 61, that "we do not believe in the soundness of the views which uphold this law." Justice Holmes countered, in what is perhaps his most famous dissent, that "this case is decided upon an economic theory which a large part of the country does not entertain. \* \* \* The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics. \* \* \* But a constitution is not intended to embody a particular economic theory, whether of paternalism . . . or of *laissez faire*." *Id.* at 75. It is not always the judge with out-moded economic and social ideas who is influenced by his predilections. Brandeis, we are told, was not "governed by facts alone. Both as a lawyer and a judge, the decisive factors were 'partly legal, partly sentimental and partly a recognition of economic rights and a sound social policy.' Certain prejudices and certain preferences formed a picture of an ideal society and predetermined his stand." MASON, *BRANDEIS: A FREE MAN'S LIFE*, 578 (1946); and see *id.* at 620.

it should be offset by a careful insistence that, in all citations to, and quotations from, advisory opinions their character be clearly stated and that all possible effort be made not to enshroud them in a cloak of authority which characterizes opinions in litigated cases. The judges might well declare at some appropriate moment, as did the legislature of Alabama in 1923, that advisory opinions "shall not be binding upon the State or any department thereof, nor even upon the departments requesting it, or the justices giving the opinions; but such opinions shall be advisory merely."<sup>166</sup> Nevertheless, advisory opinions are certainly entitled to such weight as their intrinsic merit warrants, and executives and administrators acting in accordance with them should be entitled at least to the same measure of protection that accrues when they follow the formal advice of an attorney general. Alabama, in repealing the language quoted above, found it desirable to give judicial advice equal footing with the attorney general's advice where no conflict between the views of the advisers existed, and to give judicial advice statutory priority when conflict did exist.<sup>167</sup> There is, however, no need for such a formal rule in North Carolina because the whole advisory practice is in the keeping of the chief justice and associate justices of the Supreme Court.

Thus limited and regulated the advisory function in North Carolina need never again appear as a "ghost that slays" but can instead truly be "a useful instrument of government."

**BIBLIOGRAPHICAL NOTE AND ACKNOWLEDGMENTS.**—The only previous study of the advisory opinion function in North Carolina is Allen R. Smith's Note, *Advisory Opinions in North Carolina*, 7 N. C. L. REV. 449-452 (1949). Albert R. Ellingwood's *DEPARTMENTAL COOPERATION IN STATE GOVERNMENT* (1918) is the only American book exclusively devoted to the study of the function generally, and the first leading quotation given above is drawn from this work, pp. 253, 257. Among significant general articles and notes on the subject are the following: Hugo Dubuque, *The Duty of Judges as Constitutional Advisers*, 24 AM. L. REV. 369-398 (1890); *Extra-Judicial Opinions*, an unsigned Note, 10 HARV. L. REV. 50-55 (1896); James B. Thayer, *Advisory Opinions*, LEGAL ESSAYS 42-59 (1908); Manley O. Hudson, *Advisory Opinions of National and International Courts*, 37 HARV. L. REV. 970-1001 (1924); Felix Frankfurter, *Note on Advisory Opinions*, 37 HARV. L. REV. 1002-1009 (1924), from which the concluding sentence has been drawn for use as the second leading quotation in this article, and *Advisory Opinions: National* in 1 *ENCYCLOPEDIA OF THE SOCIAL SCIENCES* 475-478 (1929); Paul C. Clovis & Clarence M. Updegraff, *Advisory Opinions*, 13 IA. L. REV. 188-198 (1928); E. F. Albertsworth, *Advisory Functions in the Federal Supreme Court*, 23 GEORGETOWN L. J. 643-670 (1935); F. R. Aumann, *The Supreme Court and the Advisory Opinion*, 4 OHIO ST. L. J. 21-55 (1937); and NEW YORK STATE CONSTITUTIONAL CONVENTION COMMITTEE, *Advisory Opinions on the Constitutionality of Proposed Legislation in PROBLEMS RELATED TO LEGISLATIVE ORGANIZATION AND POWERS* 294-299 (1938). On the advisory opinion practice in Massachusetts

<sup>166</sup> Ala. General Acts, 1923, p. 25.

<sup>167</sup> *Id.*, 1927, p. 103; Ala. Code 1940, Title 13, §36.



see Frank W. Grinnell, *Duty of the Court to Give Advisory Opinions*, which is Ch. 11 of *The Constitutional History of the Supreme Judicial Court of Massachusetts from the Revolution to 1813*, 2 MASS. L. Q. 542-552 (1917). Most of the articles listed above throw light on the advisory opinion practice in Massachusetts and that of Dubuque is largely devoted to it.

The Governors' Papers and the Governors' Letterbooks to which occasional reference is made in the footnotes above are in manuscript and will be found in the State Department of Archives and History, where, as always, I received courteous and efficient attention. I am also indebted to Mr. Dillard S. Gardner, Librarian and Marshal of the Supreme Court, to Mr. Adrian J. Newton, the Clerk of the Supreme Court, to Miss Carrie L. Broughton, the State Librarian, and to the members of their respective staffs for many helpful courtesies. My secretary, Mrs. Frances M. Green, typed the manuscript and performed efficiently various other tasks in connection with the preparation of this article.