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Advisory Opinions

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ADVISORY OPINIONS

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Near the end of the summer of 1968 and near the close of the 90th Congress, the U.S. Senate in fulfilling its advise and consent function, engaged in some picayunish tactics behind the facade of protecting the Constitution, and especially the principle of Separation of Powers assumed to be connected with it.

The degradation of an important Senate function took place during the time the Senate was considering the nomination by President Johnson of Justice Abraham Fortas for Chief Justice. The individual objections to the confirmation of Justice Fortas as Chief Justice were based mainly upon petty personal and political attitudes.

Some of the Senators, however, ashamed of these narrow bases for their objections proclaimed the broader grounds of reverence for the Constitution, which they alleged Justice Fortas did not have, in that he had violated one of its fundamental principles, the Separation of Powers, by giving advisory opinions to the President, and by consulting with and advising him on matters to which the President was giving Executive consideration.

Not being able to make any specific charge, the unfriendly Senators put forward the general charge of violating the principle of Separation of Powers. That allegation was also connected with alleged "cronyism" between the President and Justice Fortas, with the implication that a Justice of the Supreme Court was giving advisory opinions to the Chief Executive; an action they considered to be in violation of the principle of Separation of Powers, a constitutional principle upon which the Justice himself was able to rely in refusing to explain to the Senators certain judicial opinions he had given in the Supreme Court.

All of this leads to the justifiable assumption that while all of the men involved believed in the principle of Separation of Powers, they understood it as a principle of belief, but not in the sense of its practical application. It is not unreasonable to liken their concept of Separation of Powers to the statement attributed to a philosopher concerning his concept of

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time. It is alleged that the philosopher said words to this effect: "I understand time and know perfectly well what time is, but when I am asked what *time* is, I know not what it is."

The burden of this article is to explain to a limited degree the meaning of one aspect of the concept as it is applied to the Federal Government of the United States, that aspect being advisory opinions.

Those who believe that the concept of Separation of Powers was brought over by the Founding Fathers as a part of their legacy from the British Constitution should get some enlightenment from the words of Madison in *The Federalist*:

> On the slightest view of the British Constitution we must perceive that the legislative, executive, and judiciary departments are by no means totally separate and distinct from each other. The executive magistrate forms an integral part of the legislative authority. He alone has the prerogative of making treaties with foreign sovereigns, which, when made have, under certain limitations, the force of legislative acts. All of the members of the judiciary department are appointed by him, can be removed by him, on the address of the two houses of Parliament, and form, when he pleases to consult them, one of his constitutional councils. One branch of the legislative department forms also a great constitutional council to the executive chief as, on another hand, it is the sole depository of judicial power in cases of impeachment, and invested with supreme appellate jurisdiction in all other cases. The judges again are so far connected with the legislative department as often to attend and participate in its deliberations, though not admitted to a legislative vote.

Madison goes on to quote Montesquieu as saying, "There can be no liberty where the legislative and executive powers are united in the same person or body of magistrates, or if the power of judging be not separated from the legislative and executive power."

From an examination of the constitutional governments existing at the time, and the political history from which Montesquieu drew his ideas, it is evident that he did not mean the departments of government should have no partial agency in, nor control over, the acts of each other. Montesquieu's insistence was this: "Where the *whole* power of one department is exercised by the same hands which possess the *whole* power of another department, the fundamental principles of a free constitution are subverted."

Supporting his argument by reference to the state constitutions, Madison said:

> Notwithstanding the emphatical and in some instances, the unqualified terms in which the axiom, separation of powers, has been laid down, there is not a single instance in which the several departments of power have been kept absolutely separate and distinct. New Hampshire, whose constitution was last formed, seems to have been fully aware of the impossibility and inexpediency of avoiding any mixture whatever of these departments, and has qualified the doctrine by declaring 'that the legislative, executive, and judicial powers ought to be kept as separate from, and independent of each other as the nature of a free government will admit; or *as is consistent with that chain of connection that binds the whole fabric of the constitution in one indissoluble band of unity and amity.*

Madison goes on to list ten states[1] whose constitutions were written, as he said, "after the principle of separation of powers had become an object of political attention. Yet none of these states was able in spite of expressions of intent to do so, to frame constitutions that accomplished entire separation of executive, legislative and judicial powers."[2]

The Federal Constitution nowhere expressly declares that the branches of the Government must be kept separate and independent. Adherence to the concept of Separation of Powers was best demonstrated by the framers in assigning to separate articles of the Constitution, the creation, functions, and powers of each of the three divisions of the Government. Illustrating this is the established arrangement which follows:

Article I provides for the legislative branch, and begins "all legislative powers herein granted are invested in a Congress . . . ." Article II "The executive power shall be vested in a President of the United States of America." Article III "The judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as Congress may from time to time ordain and establish."

> The doctrine of the separation of governmental powers . . . as a complete denial of the capacity of one department of government to exercise a kind of power assumed to belong peculiarly to one of the others, does not obtain in our public law beyond the confines of the printed page.
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> When we speak of the separation of the three great powers of government, and maintain that the separation is indispensable to public liberty, we are to understand this maxim in a limited sense. It is not meant to affirm that they must be kept wholly and entirely separate and

[1] New Hampshire, Massachusetts, New York, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina, Georgia.

[2] Federalist No. XLVII, ed. Paul L. Ford, pp. 319-26 (1898).

> distinct and have no common link of connection or dependence the one upon the other in the slightest degree. The true meaning is that the *whole* power of one of these departments should not be exercised by the same hands which possess the *whole* power of either of the other departments. . . .[3]

Advisory Opinions

Perhaps one of the most frequent applications of the principle of Separation of Powers in constitutional law has been in relation to advisory opinions.

In 1793 the Supreme Court refused to grant the request of President Washington and Secretary of State Jefferson to construe the treaties and laws of the United States pertaining to questions of international law arising out of the wars of the French Revolution. Secretary Jefferson said, "These treaties and laws were often presented under circumstances which do not give a cognizance of them to the tribunals of the country." After convening the court which considered the request, Chief Justice Jay replied to President Washington concerning the functions of the three departments of government. Chief Justice Jay wrote:

> These being in certain respects checks upon each other and our being judges in a court in the last resort, are considerations which afford strong argument against our extra-judicially deciding the questions alluded to, especially as the power given by the Constitution to the President, of calling on the heads of departments for opinions, seems to have been *purposely* as well as *expressly* united to the Executive Departments.[4]

It might be worthwhile to state what is well known among legal scholars, that the Court itself developed these rules of limitation. Since 1793 the Court has frequently reiterated the early view that the federal courts organized under Article III cannot render advisory opinions, or that the rendition of advisory opinions is not a part of the judicial powers of the United States.

The case best known to law students on advisory opinions, remembered perhaps because of the oddity of the name, is *Muskrat v. United States.*[5] Even in the absence of the early precedent set by Chief Justice Jay, the

[3] Cullen, C. J. in Trustees of the Village of Saratoga Springs v. Saratoga Gas and Electric Light and Power Co., 191 N.Y. 123; 83 N.E. 693 (1908).
[4] Correspondence and Public Papers of John Jay, 486-489.
[5] 219 U.S. 346; 55 L.Ed. 246, 31 S. Ct. 250 (1911).

rule that Constitutional Courts will render no advisory opinions would have logically emerged from the rule subsequently developed, that Constitutional Courts can only decide *cases and controversies* in which an essential element is a binding and final judgment on the parties. As stated by Justice Jackson, when the Court refused to review an order of the Civil Aeronautics Board which in effect was a mere recommendation to the President for his final action:

> To revise or review an administrative decision that has only the force of a recommendation to the President, would be to render an advisory opinion in its most obnoxious form—advice that the President has not asked, tendered at the demand of a private litigant on a subject concededly within the President's exclusive ultimate control. This Court early and wisely determined that it would not give advisory opinions even when asked by the Chief Executive. It has also been the firm and unvarying practice of Constitutional Courts to render no judgment not binding and conclusive on the parties, and none that are subject to later review or alteration by administrative action.[6]

At least one reseacher has maintained that the rule against advisory opinions has not been as iron-clad as the general impression of it seems to be. According to Albertswaith's, "Advisory Functions in Federal Supreme Court":

> The Court rendered an advisory opinion to President Monroe in response to a request for legal advice on the power of the Government to appropriate federal funds for public improvements by responding that Congress might do so under the War and Postal Powers. The inhibitions of the Court against advisory opinions do not prevent the individual Justices from giving advice or aiding the political departments in their private capacities. [Those who criticized Justice Fortas along this line were evidently not aware of this exception to the general rule.] Ever since Chief Justice Jay went on a mission to England to negotiate a treaty, the members of the Court have performed various non-judicial functions. John Marshall served simultaneously as Secretary of State and Chief Justice [sic] and later Justice Robert Jackson served as War Crimes Prosecutor.[7]

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[6] C and S Airlines v. Waterman Corp., 333 U.S. 103, 113 (1948) citing the following cases: Hayburn's Case, 2 Dall. 409 (1792); United States v. Fevreira, 13 How. 40 (1852); Gordon v. United States, 117 U.S. 697 (1864); In Re Sanborn, 148 U.S. 222 (1893); Interstate Commerce Commission v. Brimson, 154 U.S. 447 (1894); La Abra Silver Mining Co. v. United States, 175 U.S. 423 (1899); Muskrat v. United States, 219 U.S. 346 (1911); United States v. Jefferson Electric Co., 291 U.S. 386 (1934).

[7] 23 GEO. L.J. 643 (1935).

Cases and Controversies

The Court's rule against advisory opinions is based upon the broader rule that only *cases or controversies* can come before the court. Justice Field in the cases of *In re Pacific Ry. Com'n*,[8] and in *Smith v. Adams*[9] said:

> Controversies to the extent that they differ from cases include only suits of a civil nature. By cases and controversies are intended the claims of litigants brought before the courts for determination by such regular proceedings as are established by law or custom for the protection of or enforcement of rights, or the prevention, redress, or punishment of wrongs.
>
> Whenever the claim of a party under the Constitution, laws, or treaties of the United States takes such a form that the judicial power is capable of acting upon it, then it has become a case. The term implies the existence of present or possible adverse parties whose contentions are submitted to the Court for adjudication.

This definition was reënforced in the Muskrat case[10] in which the court held that the exercise of judicial power is limited to *cases and controversies* and emphasized "adverse litigants," "adverse interests," and "actual controversy," and conclusiveness, or finality of judgment as essential elements of a case.

A more recent pronouncement on the subject was given by Justice Frankfurter in a concurring opinion in *Anti-Fascist Committee v. McGrath*,[11] he wrote:

> A court will not decide a question unless the nature of the action challenged, the kind of injury inflicted, and the relationship between the parties are such that judicial determination is consonant with what was, generally speaking, the business of the colonial courts and the Courts of Westminster when the Constitution was framed. The jurisdiction of the federal courts can be invoked only under circumstances which to the expert feel of lawyers constitute a "case or controversy."

Three professors at the University of Minnesota Law School[12] have prepared a valuable tool for the teaching of Constitutional Law.[13] In

[8] 32 F. 241 (1887).
[9] 130 U.S. 167 (1889).
[10] 219 U.S. 346 (1911).
[11] 341 U.S. 123 (1951).
[12] Professor and Dean, William B. Lockart, Professor Yale Kamison, and Professor Jessie H. Choper.
[13] "Constitutional Law—Cases—Comments—Questions," West Publishing Company (1964).

their "notes and questions" that follow leading cases, they have made extensive use of the works of outstanding authorities on Constitutional Law, by drawing heavily upon their books, and published articles and by the use of pertinent extractions.

Following the section of this book devoted to "Cases and Controversies" with the subheading "Advisory Opinions,"[14] they have set forth the *pro's and con's of advisory opinions* reënforced with references to leading authorities.[15] This passage is so thought-provoking and such a good guide to the interested reader, that the writer of this article sets forth the passage in some detail.

> Question:—"(a) Do you agree with the well established principle that bars the court from advising the Congress on the constitutionality of legislation? Consider note, "Advisory Opinions on the Constitutionality of Statutes," 69 HARV. L. REV. 1302, 1305 (1956). Before it is successfully challenged, an unconstitutional statute may discourage legitimate activity, or conversely, it may encourage reliance which, when the statute is invalidated, will prove to have been ill-founded, thus causing injury to those who have based action upon it. Further . . . there is frequently an unnecessary expenditure of time and money when the state enacts a statute, invalidates it in lengthy judicial proceedings, and subsequently must enact new legislation; this waste would seem particularly great when the government sets up elaborate machinery to implement a statute held unconstitutional.
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> Question: Is this sort of advisory opinion any different than [sic] carefully considered dicta in a real case or controversy? Consider Note, "The Case for an Advisory Function in the Federal Judiciary," 50 Geo. L.J. 785, 799 (1962). [P]ast legislative programs frustrated by an adverse opinion have often been salvaged once the constitutional pitfalls were mapped by the court. The court itself has recognized these facts and often furnished explicit advice for the anticipated second attempt.[16] Thus an established advisory practice . . . already exists . . . direct advice in the form of judicial dicta. The price paid for even the indirect advice was, however, an unconstitutional statute. Is this contention simply answered by the fact that political action is often taken on the basis of weighty dicta, and its dislocation by later decisions erasing the dicta adds needlessly to the functions of government? Frankfurter and Hart, "The Business of the Supreme Court at October Term," 1934, 49 HARV. L. REV. 68, 105 (1935), or is the final objection removed by giving advisory opinions the force of precedent?

[14] *Id.*, pp. 47-51.
[15] *Id.*, p. 51.
[16] See Nixon v. Condon, 286 U.S. 73; 52 S. Ct. 484; 76 L.Ed. 984; 88 A.L.R. 458 (1932).

(b) Consider Comment, *The Advisory Opinion and the United States Supreme Court,* 5 FORD L. REV. 94, 108 (1936). The advisory opinion it is said [by Frankfurter, "A Note on Advisory Opinions," 37 HARV. L. REV. 1002 (1924)] would distort the entire focus of the judicial function, in that it would require the Court to express its judgment on abortive issues without the benefit of all the relevant facts which, in crucial constitutional questions, are the very heart of the case. In addition, the operation of the device would debilitate the creative responsibility of the legislature, in that it would tend to induce reliance upon the judiciary, depriving the former of submitting its convictions to the test of trial and error and of accumulating new facts for the vindication of its judgment which, *a priori* may run counter to settled legal principles.

(i) As to the "facts" argument, might this be cured by having Congress present the court a specific set of facts, real or assumed? Or by having the court confine its attention to the statute's application to what it considers to be the most common set of facts intended to be covered? May these practices be truly analogous to presenting the court with a regularly litigated fact situation? Consider Frankfurter and Hart note 1(a) *supra* at 96: "The Court's sense of its position and function as an appellate tribunal leads it to emphasize . . . data already explored by trial and intermediate tribunals. This insistence rests . . . upon awareness of adjudication as a process . . . in which the deliberations of successive tribunals serve to illumine final judgment and in which particularly 'the special knowledge of local conditions' possessed by local tribunals may be indispensable." In how many constitutional cases are the litigated facts crucial?

(ii) As to the 'responsibility of the legislature' argument, might this be cured by limiting the advisory opinion to statutes fully considered and already passed by Congress? Is there *any* answer to the point that the cumulative experience of a statute's operation may shed great light on its constitutionality? If not, is the point sufficient to sustain present practice regarding advisory opinions?

(c) Is the opposition to advisory opinions justified by the fact that "only when [the experienced judge] has had the benefit of intelligent and vigorous advocacy on both sides can he feel fully confident of his decision"? "Professional Responsibility," 44 A.B.A.J. 1159, 1161 (1958). Could the court before rendering an advisory opinion, invite the submission of briefs and presentation of arguments by interested parties on both sides of the question? Consider Note, 69 HARV. L. REV. 1302, 1309-10 (1956): "Argument in advisory proceedings might in some situations provide more assistance to the court than would argument in a normal adversary proceeding. Representation of diversified interests might provide the Justices with a more realistic perspective on the statute than representation of only two parties; and unlike

ordinary litigation where the prosecutor or plaintiff . . . may be able to select an opponent with little interest in the proceeding or one who is peculiarly culpable, the parties seeking to appear will generally be strong antagonists." See also Arnold, "Trial by Combat and the New Deal," 47 HARV. L. REV. 913 (1934).

The question quoted above as to whether an advisory opinion is really any different from carefully considered dicta in a real case or controversy, can support an elaborate answer. Several cases come to mind in which the court provided advice on what would be a constitutional course of legislation and action in matters or on questions that have affected and shaped the political, social, and economic course of American society.

One of these cases is *Dred Scott v. Sanford*[17] in which the court went out of its way to declare by dicta the unconstitutionality of the Missouri Compromise (which restricted slavery to certain geographical limits), to reassert the status of a slave as property whose owner was free to take anywhere in the United States without his status as slave property being changed. The court could have rested its decision with the finding that Scott had no standing to sue under the diversity of citizenship provision of the Constitution because as plaintiff he had not established citizenship in a state different from that of the defendant's residence. However, Chief Justice Taney went on to say that not only was Scott, the plaintiff, not a citizen, but that no Negro was or could be a citizen of the United States, and that at the time the Declaration of Independence and the Constitution were being formulated, a Negro had no rights that a white man was bound to respect. This last statement produced great political and moral exacerbation on the part of many people, white and black, by their mis-reading or by their mistaken belief that the Chief Justice said that as of the time of the case or the writing of his opinion, a Negro had no rights that a white man was bound to respect. The dicta of this opinion was intended, so it appears, to be advisory to the North and the South on the question of slavery. It gave encouragement to the pro-slavery advocates and consternation to the anti-slavery forces. Some historians list it as one of the causes of the Civil War.

Another such case was that of *Plessy v. Ferguson.*[18] This case probably did more to plant the seeds of racism in American society than any other occurrence since the Civil War, seeds whose bitter harvest we are now reaping.

[17] 19 How. 393; 15 L.Ed 691 (1857).
[18] 163 U.S. 537; 16 S. Ct. 1138; 41 L.Ed 256 (1896).

The case turned upon the constitutionality of an act of the General Assembly of the State of Louisiana, providing for separate railway carriages for the white and colored races. The act also empowered the officers (conductors) on the trains to separate the passengers by race, and provided a fine and imprisonment for anyone violating the act. This legislation was in answer to a statute having the opposite effect passed by the Reconstruction Legislature of Louisiana forbidding the separation of the races in public transportation, etc. This act had been struck down by the Supreme Court in the case of *Hall v. DeCuir*[19] on the grounds that it was state interference with interstate commerce. In the Plessy case, the court upheld the Act of the Louisiana Legislature, thus setting the standard of "separate but equal," which legalized and ushered in the era of legalized segregation and discrimination throughout the South, practices and policies from which race relations in this country have suffered so much.

Justice Brown in his opinion went on by way of dicta to advise the white race that its policy of racial superiority could be justified; he said:

> We consider the underlying fallacy of the plaintiff's (the case was brought on a petition for a writ of prohibition) argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put this construction upon it. The argument necessarily assumes that if, as has been more than once the case, and is not unlikely to be so again, the colored race should become the dominant power in the state legislature and should enact a law in precisely similar terms, it would relegate the white race to an inferior position. We imagine that the white race, at least, would not acquiesce in this assumption . . . .

The most pernicious result, however, flowing from this case was Justice Brown's covert advice to the states that they could establish separate schools for the two races. He did this by basing his opinion on the case of *Roberts v. City of Boston*[20] in which the Supreme Court of Massachusetts had upheld the power of Boston to provide separate schools for Negro children. He carefully failed to mention that the City of Boston had abandoned and abolished the separate school plan long before the time his opinion was written.

[19] 95 U.S. 485 (1875).
[20] 5 Cush. 198 (1849).

As was stated above, this case, with its not so covert advice to the Southern States, did more to plant and nourish the seeds of racism than any other occurrence since the Civil War. Justice Harlan's dissent in this case turned out to be quite prophetic. Justice Harlan wrote in *Plessy*:

> The present decision, it may well be apprehended, will not only stimulate aggressions, more or less brutal and irritating, upon admitted rights of colored citizens, but will encourage the belief that it is possible, by means of state enactments, to defeat the beneficient purposes which the people of the United States had in view when they adopted the recent amendments of the Constitution, by one of which the blacks of this country were made citizens of the United States and of the states in which they respectively reside, and whose privileges and immunities, as citizens, the states are forbidden to abridge. Sixty millions of whites are in no danger here from the presence of eight millions of blacks. The destinies of the two races, in this country, are indissolubly linked together, and the interests of both require that the common government of all shall not permit the seeds of race hate to be planted under the sanction of law. What can more certainly arouse race hate, what more certainly create and perpetuate a feeling of distrust between the races, than state enactments, which in fact, proceed on the ground that colored citizens are so inferior and degraded that they cannot be allowed to sit in public coaches occupied by white citizens? That, as all will admit, is the real meaning of all such legislation as was enacted in Louisiana.
>
> The sure guarantee of the peace and security of each race is the clear, distinct, unconditonal recognition by our governments, national and state, of every right that inheres in civil freedom, and of the equality before the law of all citizens of the United States, without regard to race. State enactments regulating the enjoyment of civil rights upon the basis of race, and cunningly devised to defeat legitimate results of the war, under the pretense of recognizing equality of rights, can have no other result than to render permanent peace impossible, and to keep alive a conflict of races, the continuance of which must do harm to all concerned. . . .

All persons familiar with the current plight of race relations in this country know that Justice Harlan was a good prophet, and his prediction has just about come true. On the other hand, Justice Brown's advisory dicta set forth the very damaging concept which persists until today, that social equality cannot exist between the white and black races in this country. His opinion did more than anything else to lay the foundation for racism according to the definition of it found in Webster's Dictionary:

"Racism—assumption of inherent racial superiority or the purity and superiority of certain races, and consequent discrimination against other races; also any doctrine or program of racial domination and discrimination based on such an assumption. . . ."

The Southern States took the advice of this opinion literally and all of them passed legislative enactments providing for the separation and segregation of the two races (the notorious Jim Crow laws). Many of the people of the other states accepted the spirit of the opinion and set up many of the same patterns of separation and segregation without the help of state laws.

It is interesting to contemplate what American society would be like today if the Harlan opinion, and not that of Justice Brown, had been the majority opinion in *Plessy v. Ferguson.*

Perhaps the most direct advice given in a "case or controversy" situation was that relating to the exclusion of Negroes from the Democratic primary in the South, at a time when in most of the Southern States the primary election was the only meaningful election, and when nomination by the Democratic primary was tantamount to election to the office sought.

In *Nixon v. Herndon,*[21] a Texas statute forbidding Negroes to participate in Democratic primaries was held violative of the Fourteenth Amendment; following that decision, the statute was repealed and a law was enacted authorizing the Executive Committee of a political party to prescribe who might vote in its primaries. Under this statute, the Democratic Executive Committee adopted a resolution, limiting participation in the Democratic primary to white persons. The exclusion of Negroes from voting pursuant to this resolution was held violative of the Fourteenth Amendment in *Nixon v. Condon*;[22] the court pointed out that it was still state action and consequently contrary to the Fourteenth Amendment.

The court, however, went on to advise that if the Texas State Democratic Party in convention assembled would pass this restrictive regulation, only it would not be tainted with state action, and therefore, would not be violative of the Fourteenth Amendment. Of course, a State Democratic convention was immediately called and such action as was suggested by the court was taken. The exclusion of a Negro from voting in the Democratic primary of Texas pursuant to this action by the State con-

[21] 273 U.S. 536; 47 S. Ct. 446; 71 L.Ed. 759 (1926).
[22] 286 U.S. 73; 52 S. Ct. 484, 487; 76 L.Ed. 984; 88 A.L.R. 458 (1932).

vention was held not violative of his constitutional right in *Grovey v. Townsend.*[23]

The suggestion made by the court in *Nixon v. Condon* was certainly advisory, and the State of Texas accepted it as such. The only difference between the results of this disguised form of advisory opinion and one that might be given without a "case or controversy" to support it is, perhaps, a difference in the time the advice can be put into effect.

When the results on American life and society, flowing from the cases cited above, are considered, it appears that the objections to the *pro forma* type of advisory opinion, without "a case or controversy" is a legal exercise of straining at a gnat and swallowing a camel.

[23] 295 U.S. 45; 55 S. Ct. 622; 79 L.Ed. 1292; 97 A.L.R. 680 (1935). This case and holding were expressly overruled in *United States v. Classic,* 313 U.S. 299; 61 S. Ct. 1031; 85 L.Ed. 1368 (1941).