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The Advisory Opinion on Separation of Powers: The Uncertain Contours of Advisory Opinion Jurisprudence in Rhode Island

Mel A. Topf*

Those who have given up on ordinary politics and the legislative process will not be unduly distressed if most important controversies are entrusted to the courts for decision.¹

I. THE ADVISORY OPINION ON SEPARATION OF POWERS

During its 1998-1999 term, the Rhode Island Supreme Court had before it one of the most politically contentious issues in the state's modern history: the common and longstanding practice of legislators serving and appointing others to serve on public and quasi-public executive branch boards and commissions,² and the extent to which this practice may violate the state constitution's separation of powers provision.³ The justices' "much anticipated" opinion⁴ came on June 29, 1999. Events leading to the justices' opinion began in October 1995, when the Rhode Island Ethics Commission voted unanimously to issue a draft code of ethics for

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1. Mary Ann Glendon, *Rights Talk: The Impoverishment of Political Discourse* 182 (1991).

2. Hereinafter, these are referred to simply as boards and commissions.

3. See R.I. Const. art. V (stating that "the powers of the government shall be distributed into three departments: the legislative, executive and judicial").

4. Tom Mooney, *Court Close to Ruling on 'Power' Case*, *Prov. J. Bull.*, June 18, 1999, at B1.

public comment.⁵ Among the provisions was a new prohibition against legislators serving on or appointing others to serve on boards and commissions.⁶

Commission members apparently had concerns early on, both about their authority to create the ban and about the constitutionality of the ban itself. In November 1995, at a public hearing on the proposed regulation, they asked the Governor (who was in attendance) to seek an opinion from the justices of the state supreme court. He promised to do so.⁷ In January 1996, the commission agreed to move ahead with the required procedures to create the ban.⁸ This began a public disagreement between the commission and its executive director, who strongly expressed doubts about the constitutionality of the rule. In fact, the executive director stated that adoption of the rule would be "a grave mistake."⁹ Also, curiously, the commission's legal counsel refused to offer his opinion,

5. See Ethics Commission Minutes, Oct. 10, 1995 (on file with author). The draft, entitled Code of Ethics (Proposed), was issued the same date.

6. See Ethics Commission, Code of Ethics (Proposed) 24 (Oct. 10, 1995): No members of the general assembly shall serve as a member or participate in the appointment of any other person to serve as a member of the governing board of a quasi-public board, authority, or corporation while serving in the general assembly, said prohibition as to a member of the general assembly shall continue for a period of one (1) year after he or she leaves legislative office.

7. See Ethics Commission, Proceeding at Hearing *in re* Code of Ethics (Proposed) [transcript], Nov. 16, 1995, at 7 (on file with author) ("Governor Almond: . . . I would say if requested by the commission that I would seek an advisory opinion . . . on the very issue of the power of this commission, and the issue of the separation of powers."). It is difficult to determine when laws and regulations have been drafted in Rhode Island under the condition that an advisory opinion will determine their constitutionality. In general, there has been relatively little study of drafting processes. See, e.g., Jane S. Schacter, *The Confounding Common Law Originalism in Recent Supreme Court Statutory Interpretation: Implications for the Legislative History Debate and Beyond*, 51 Stan. L. Rev. 1, 44 (1998) ("[T]here are surprisingly large gaps in the political science and legal literature relating to the politics and processes of legislative drafting.").

8. See Ethics Commission Minutes, Jan. 31, 1996 (on file with author).

9. Randall Richard, *Ethics Panel Votes to Hire Legal Expert*, Prov. J. Bull., July 27, 1996, at A1:

According to [commission executive director] Healy, it would be a grave mistake for the commission to adopt broad rules that would ban legislators from serving on so-called quasi-public agencies. . . . Not only would the ban be unconstitutional, said Healy, but it would also severely damage the commission's credibility.

but rather suggested that the commission hire a legal expert.¹⁰ He recommended Professor Geoffrey Hazard, a specialist in legal ethics, whom the commission hired.¹¹ Hazard agreed that the proposed ban “exceeded the authority conferred on the commission by the Rhode Island Constitution.”¹² Hazard’s opinions notwithstanding, the commission moved ahead with the adoption of the ban, and on May 5, 1997 unanimously passed Regulation 36-14-5014.¹³

The Governor asked the justices for an opinion in November 1997. His letter inquired both about the commission’s authority to create the rule (Question 1) and about the constitutionality of legislators sitting on executive boards and commissions (Questions 2 and 3). The Governor’s letter did not inquire about the constitutionality of Regulation 5014 itself.¹⁴

10. See Ethics Commission, Public Hearing [transcript], July 26, 1996, at 60 (on file with author). See also Richard, *supra* note 9, at A1 (“[Legal counsel] Gary Yesser . . . demurred when [executive director] Healey suggested it was Yesser’s job to advise the commission on the constitutionality of the proposed ban.”).

11. See Ethics Commission Minutes, July 26, 1996 (on file with author); Public Hearing, *supra* note 10, at 23-27; Richard, *supra* note 9, at A1.

12. Letter from Geoffrey C. Hazard to the Ethics Commission (Aug. 9, 1996), quoted in *In re Advisory Opinion to the Governor*, 732 A.2d 55, 67 (R.I. 1999). See Brief of the Attorney General, at 19 No. 97-572-M.P.; Gerald M. Carbone, *Ethics Commission Prohibits Gifts*, *Prov. J. Bull.*, Aug. 29, 1996, at B8.

13. See Ethics Commission Minutes, May 5, 1997. Regulation 5014 provides:

(1) No member of the General Assembly shall serve as a member of a Public Board. No member of the General Assembly shall participate in the appointment, except through advice and consent as provided by law, of any other person to serve as a member of a Public Board.

(2) For purposes of this regulation, “Public Board” means all public bodies within the executive branch of state government, and all state executive, public and quasi-public boards, authorities, corporations, commissions, councils or agencies; provided, however, that the foregoing definition shall not apply to any such entity which (i) functions solely in an advisory capacity, or (ii) exercises solely legislative functions.

(3) The effective date of this regulation is July 1, 1999.

14. See Letter from the Governor to the Justices of the Supreme Court (Nov. 20, 1997). The questions are:

(1) Does Article III, section 8 of the Rhode Island Constitution, which empowers the Rhode Island Ethics Commission to “adopt a code of ethics, including, but not limited to provisions on conflicts of interest, . . . [and] use of position” provide the Ethics Commission with the power to adopt Regulation 36-14-5014?

(2) Is the principle of separation of powers contained in the Rhode Island Constitution properly interpreted in the same fashion as it has been interpreted in the United States Constitution with respect to appointments,

Soon after the Supreme Court received the Governor's letter, it issued an order inviting briefs.¹⁵ Twelve amici briefs were filed (in addition to those from the Governor and Ethics Commission), reflecting a large degree of public interest. The briefs, over a thousand pages in all, were submitted by, among others, the Rhode Island Senate, the Rhode Island House of Representatives, the current and past Attorneys General, the Rhode Island State Council of Churches, and the American Civil Liberties Union of Rhode Island.¹⁶ Oral arguments before the justices took place on November 10, 1998, and lasted some five hours, with five proponents of the ban and seven opponents presenting arguments.¹⁷ Nearly eight months later, on June 29, 1999, the justices rendered their opinion.¹⁸ This was nearly four years after the commission had first put forth the proposed ban.

During all this time, nearly four years, there was almost no interest expressed in the fact that what the justices were issuing was an advisory opinion. In other words, no concern was expressed regarding the fact that: no litigated case was before the Court and no decision would be issued; the opinion would be rendered not by the Court but by the individual justices; and it would be simply advice, non-binding and without precedential weight.¹⁹ Further, the Governor's request overstepped at least two restrictions the justices had previously imposed on such requests.²⁰ None of this

such that neither legislators, nor their appointees, may serve on any public body within the executive branch of state government, or state executive, public and quasi-public boards, authorities, corporations, commissions, councils or agencies except those which: (i) function solely in an advisory capacity; or (ii) exercise solely legislative functions?

(3) Does the separation of powers principle contained in the Rhode Island Constitution impose any limits whatsoever on legislative appointments to a public board or body (as defined above)? In particular, does the Constitution prohibit legislators and/or their appointees from constituting a majority of the membership of a public board or body? Does the Constitution prohibit appointment of sitting legislators to a public board or body?

15. See Supreme Court Order, Nov. 26, 1997, at 2.

16. A complete listing of briefs is contained in *In re Advisory Opinion*, 732 A.2d at 63.

17. Notes of the author, who attended.

18. Actually there are two opinions, one from Chief Justice Weisberger and Justices Bourcier, Goldberg and Lederberg; the other one is from Justice Flanders.

19. These are general characteristics of advisory authority. See, e.g., *Opinion to the Governor*, 284 A.2d 295, 296 (R.I. 1971).

20. See *infra* Part II.

played any part in the considerable public debate and media coverage.²¹ Two of the briefs submitted raised questions about the propriety of engaging the advisory opinion process to deal with the issues in the Governor's questions.²² The other briefs were silent on this.²³ That it was an advisory opinion that was sought to resolve a major and contentious issue deserves some attention.

This article reviews Rhode Island's advisory opinion jurisprudence as it relates to the separation of powers advisory opinion, with particular attention devoted to questions of the propriety of invoking the advisory opinion process in this instance. I argue that with the separation of powers advisory opinion the justices are continuing important changes in the legal contours of advisory opinion jurisprudence. The changes began in 1986, after a half-century without significant deviation from the standards by which the justices determined when they would render advice and when they would refuse to do so.

The justices' duty to render advice has been set forth in the Rhode Island Constitution since its creation in 1842: "The judges of the supreme court shall give their written opinion upon any question of law whenever requested by the governor or by either house of the general assembly."²⁴ The clause is mandatory upon the justices and is unusually broad compared to the clauses of the other seven states whose constitutions provide for advisory opinions.²⁵ Perhaps the clause's breadth explains why the Rhode Island jus-

21. See Mel A. Topf, *R.I. Supreme Court: Stay Out This Time*, *Prov. J. Bull.*, Aug. 13, 1998, at B5.

22. See Brief of *Amicus Curiae* the Honorable Paul S. Kelly, Majority Leader, Rhode Island Senate, at 8-18, No. 97-572-M.P. [hereinafter Brief of the Majority Leader]; Brief of *Amicus Curiae* ACLU, Rhode Island Affiliate, at 3-13, No. 97-572-M.P. [hereinafter ACLU Brief]. But see Reply Brief of the Governor Relating to his Request for an Advisory Opinion to the Justices Dated Nov. 20, 1997, at 4-5, No. 97-572-M.P. [hereinafter Governor's Reply Brief].

23. The Court's order inviting briefs was also silent on this. The Governor's Reply Brief seems to express surprise that the issue came up at all in other briefs. See Governor's Reply Brief, *supra* note 22, at 4 ("[T]his Court did not appear to seek briefing on the propriety of the questions.").

24. R.I. Const. art. X, § 3.

25. See Colo. Const. art. VI, § 3; Fla. Const. art. IV, § 1; Me. Const. art VI, § 3; Mass. Const. art II, § 83; Mich. Const. art. III, § 8; N.H. Const. part 2, art. 77; S.D. Const. art. V, § 5. Two other states provide for advisory opinions by statute: Ala. Code § 12-2-10 (1975); Del. Code Ann. tit. 10, § 141(a) (1974). Texts of the provisions are collected in Mel A. Topf, *The Jurisprudence of the Advisory Opinion Process in Rhode Island*, 2 *Roger Williams U. L. Rev.* 207, 254-56 (1997). On the breadth of Rhode Island's clause, see *id.* at 215-16.

tices were the last of the advisory state justices to set forth limits on their duty to advise, beginning in 1937,²⁶ after having given advice virtually without limit since the advisory opinion clause had first appeared. By 1986, the justices had established a set of restrictions broadly similar to those imposed by the justices in the other advisory states.²⁷

The justices' authority to impose restrictions on requests for advice, and to refuse to give advice when requests are deficient (i.e., because the request oversteps one or more restrictions), is grounded in their view that "this peculiar obligation" to render advice is of "obvious repugnance" to the principle of separation of powers.²⁸ The advisory opinion clause was included in the constitution "in order to enable the executive and legislative departments to more effectively discharge particular duties that are textually committed to them by the constitution."²⁹ The effective performance of constitutional duties "requires from time to time assistance from the judges of this court upon questions of law, assistance which the framers of the constitution contemplated as being best provided through the device of the advisory opinion."³⁰ The justices, however, have the duty, "in view of the separation of the executive, legislative, and judicial departments of government," to abstain from answering a request for advice that "does not fall reasonably within the constitutional clause relating thereto."³¹ Hence, the provision that advice be given on any question of law was intended to exclude advice that does not assist the coordinate branches in the discharge of specific constitutional duties.³² The justices' restrictions implement this exclusion.

26. See *To a Certain Member of the House of Reps. in the Gen. Assembly*, 191 A. 269 (R.I. 1937). The only refusals to render advice before 1937 were *Opinions of the Judges of the Supreme Court*, 4 R.I. 585 (1857) and *In re Legislative Adjournment*, 27 A. 324 (R.I. 1893).

27. See Topf, *supra* note 25, at 233-40, for a review of major restrictions on rendering advice.

28. *Opinion to the Governor*, 191 A.2d 611, 614 (R.I. 1963).

29. *Id.* This is presumably an inference by the justices. The author could find no evidence in the documentary record of the 1842 constitutional convention explaining why the convention adopted the advisory opinion provision, and the justices do not identify any.

30. *Id.*

31. *Id.*

32. See *id.*

In 1986, the justices began to reject this position. They began, that is, to waive the restrictions they had developed since 1937, rendering advice notwithstanding violations of their restrictions in requests for advice. They have continued to do so ever since. Their rejection has been, I believe, insufficiently explained or defined and inconsistently applied, so that advisory opinion jurisprudence in Rhode Island has become less coherent, less predictable and extraordinarily broad. In this article I intend to explore the relation of the 1999 separation of powers advisory opinion to the justices' rejection of their prior position. Part II reviews the violations of the justices' restrictions in the governor's request for advice. Part III analyzes the ground the justices put forth for waiving their restrictions: their unprecedented public importance exemption. I argue that the exemption is not applied consistently or clearly and I question whether it should be applied at all. Part IV discusses the effects of the public importance exemption on advisory opinion jurisprudence to show that the exemption tends to aggravate certain weaknesses inherent in the advisory opinion process. Part V discusses another, perhaps the most serious, effect of the expansion of the exemption: a corresponding contraction of public debate and legislative process, a contraction, that is, of the political space in which political issues may be resolved.

II. PROCEDURAL DEFICIENCIES

A. *The Governor's Question 1*

In the Governor's first question, on the Ethics Commission's authority to adopt Regulation 5014,³³ the justices found two defects. First, the justices will not advise the Governor on pending legislation, but will only advise the Governor when the Governor's questions "concern the constitutionality of *existing* statutes which require implementation by the Chief Executive."³⁴ Second, the jus-

33. For text of Question 1, see *supra* note 14. For text of Regulation 5014, see *supra* note 13.

34. *In re Advisory Opinion to the Governor*, 732 A.2d 55, 59 (R.I. 1999). The justices, at least since 1965, have stated that they will advise the Governor only on laws already enacted and the legislature only on pending legislation. See *Opinion to the House of Reps.*, 208 A.2d 126, 128 (R.I. 1965). In a 1959 advisory opinion to the Governor, the justices had not yet clearly distinguished between advising the legislature only on pending legislation and the Governor only on passed legislation. See *Opinion to the Governor*, 153 A.2d 168, 172 (R.I. 1959) (further stating that "the judges of this court are ordinarily reluctant to express an opinion on the

tices will not advise the Governor unless the question propounded has "a bearing upon a present constitutional duty awaiting performance by the Chief Executive," as amplified by the justices' following statement to the Governor: "At the time of your request [November 20, 1997], and indeed at the present time, Regulation 5014 has not become effective and thus does not concern any constitutional duty presently awaiting performance by Your Excellency."³⁵

The Governor's attempts at identifying constitutional duties awaiting performance were perfunctory and vague. His letter to the justices said only that the presence of legislators or their appointees on public boards and commissions exercising executive power "affects the constitutional responsibility of the Executive branch to execute faithfully the law passed by the General Assembly,"³⁶ and that "whether the regulation [5014] is constitutional is a question that directly affects the performance of my duties."³⁷ The only duty the Governor referred to was his duty to make "numerous appointments to boards and commissions exercising executive powers."³⁸ This, however, is not a constitutionally vested duty, as the justices made clear in a 1993 advisory opinion.³⁹ The Governor's brief simply repeated the phrase about the regulation directly affecting performance of his duties again, without identifying any such duty.⁴⁰ The Senate's brief pointed to this deficiency, forcefully arguing that "none of the questions propounded has any relationship to the official duties of the Governor."⁴¹ The Governor, in a reply brief, was indignant but evasive: "It is difficult to take this [the Senate's] position seriously. Never has a question

constitutionality of a statute as distinguished from a proposed act in response to executive or legislative requests").

35. *In re Advisory Opinion to the Governor*, 732 A.2d at 59 (citation omitted). Regulation 5014 was to become effective July 1, 1999; the advisory opinion was issued June 29, 1999. This restriction goes back, at least, to 1971. See *Opinion to the Governor*, 284 A.2d 295, 296 (R.I. 1971) (stating that advisory opinions "in matters unconnected to the official function of the requesting coordinate branch would amount to inexcusable gratuitousness").

36. Letter from the Governor, *supra* note 14, at 1.

37. *Id.* at 2.

38. *Id.* at 1.

39. See *In re Advisory from the Governor*, 633 A.2d 664, 666 (R.I. 1993) (quoting *In re Decision of Justices*, 69 A. 555, 559 (R.I. 1908)).

40. See *Governor's Reply*, Brief *supra* note 22.

41. Brief of the Majority Leader, *supra* note 22 at 11. See *ACLU Brief*, *supra* note 22, at 6-7.

been more relevant to the official constitutional duty of the Governor of the State of Rhode Island than the separation of powers question presently before this Court."⁴² During oral argument, the Governor's counsel was silent on this point until the Chief Justice asked, "Should the court answer the questions? . . . Does the Governor have an imminent duty?"⁴³ The Governor's counsel replied that, yes, the Governor does, and without identifying any such duty left the subject and moved on.⁴⁴

In light of these defects, the justices usually refuse to advise, stating: "[C]onsistent with the long established precedent of this Court, we would ordinarily refrain from responding to Your Excellency's request."⁴⁵ The justices, however, proceeded to answer Question 1. Despite the acknowledged defects, the justices stated that the question "is a significant constitutional issue of great public interest sufficient to transcend these infirmities. Therefore, in deference to Your Excellency's concern, we proceed to respond to your inquiry notwithstanding the significant procedural deficiencies."⁴⁶

B. *The Governor's Questions 2 and 3*

The justices turned to Questions 2 and 3 regarding whether legislators sitting on public boards and commissions offend separation of powers doctrine. They found a deficiency in these questions

42. Governor's Reply Brief, *supra* note 22, at 4-5.

43. Supreme Court Oral Arguments, Nov. 10, 1998. From notes of the author who attended.

44. *See id.* A further aspect of this deficiency was one the justices did not mention: the Governor was seeking advice for a third party, the commission. *See* Letter from the Governor, *supra* note 14, at 2 ("By letter, the Commission has requested that I seek the advice of the Justices of the Supreme Court"). The justices have long looked askance at this. *See* Opinion to the Governor, 284 A.2d 295 (R.I. 1971) (Justices refusing advice since Governor sought it for East Providence City Council, whose members have no standing to seek advice through Governor, when advice has no relation to Governor's duties.). The ACLU's brief emphasized this defect, noting that the "mere fact that the request is on the Governor's stationery does not change the underlying reality that the request has, in essence, emanated from the Ethics Commission." ACLU Brief, *supra* note 22 at 7-8.

45. *In re* Advisory Opinion to the Governor, 732 A.2d 55, 59 (R.I. 1999).

46. *Id.* The justices' answer to Question 1 is that "the ethics commission lacks the power to enact Regulation 5014, which fundamentally alters the constitutional structure of the state. . . . The ethics commission is not a constitutional convention." *Id.* at 71-72.

as well.⁴⁷ The deficiency is that answering the questions would require fact-finding: “[T]his Court will not issue advisory opinions which require a direct or indirect exercise of our fact-finding power.”⁴⁸ The grounds are that the justices render advisory opinions “as individuals and not as the judicial department of state government.”⁴⁹ Fact-finding power inheres in the court as the judicial branch of the state government. The judges in their individual capacities “therefore lack the power to issue advisory opinions which implicate fact-finding.”⁵⁰

The fact-finding that would be required to answer Questions 2 and 3, the justices stated, is to determine which of the public boards and commissions were executive in nature: the “classification of boards as executive or otherwise requires fact-intensive investigation of the nature, purpose, membership, and operation of each board and commission.”⁵¹ Further, “even determining the number of boards to which our advisory opinion would apply would require the exercise of fact-finding powers.”⁵² The justices therefore declined to answer Questions 2 and 3.

The justices’ explanation seems unlikely. Why is it necessary to identify all the boards that are executive, in order to respond to the general question of whether legislators sitting on executive boards offends the state constitution’s separation of powers provision? The justices did not explain. They said only that some boards are executive, some not, some combine executive with legislative or judicial functions and some combine all three.⁵³ Neither did they explain the necessity of ascertaining how many there were. Questions 2 and 3 would seem to apply whether legislators serve on 75, 140 or just one board. Also, Justice Flanders, in his separate opinion, noted the inconsistency of the majority’s dire (and factual) prediction of the many “legal deaths” of executive

47. See *id.* at 72-73. For text of Questions 2 and 3, see *supra* note 14.

48. *Id.* at 72. The justices have applied this restriction at least since 1963. See *Opinion to the Governor*, 191 A.2d 611, 614 (R.I. 1963).

49. *In re Advisory Opinion to the Governor*, 732 A.2d at 72 (quoting *Opinion to the Governor*, 191 A.2d at 614).

50. *Id.*

51. *Id.* at 73.

52. *Id.* The justices noted the varying numbers of boards and commissions in the brief submitted, which they say ranges from 75 to 140. See *id.* at 73. But see *id.* at 73 (According to Senate brief, its members serve on 140 boards and commissions but appoint others to 166.).

53. See *id.* at 73.

boards and commissions with sitting legislators or their appointees should Regulation 5014 go into effect.⁵⁴

Having established that Questions 2 and 3 were defective since they require fact-finding, the justices refused to answer.⁵⁵ Why did they not waive the defects on public importance grounds, as they waived the present-duty restriction in answering Question 1?⁵⁶ They did not say. They simply waived the one and not the others without explanation or comment.

Did the justices refrain from answering Questions 2 and 3? They said they “must respectfully decline to address Your Excellency’s questions [2 and 3].”⁵⁷ But earlier in the advisory opinion they offered, at some length, their opinion on the subject of the constitutionality of legislators sitting and appointing others to sit on boards and commissions. They looked to the history of Rhode Island’s fundamental law and found no limits, by separation of powers principles or otherwise, on the legislature’s power of appointments.⁵⁸ The Royal Charter of 1663 “delegated virtually unlimited power to govern to the General Assembly,” including the power “to appoint persons, including from its own membership” to bodies addressing colonial, administrative and governmental needs, including legislative and judicial bodies.⁵⁹ For 170 years, “the General Assembly exercised legislative power, judicial power, and unlimited power of appointment.”⁶⁰ The Governor, a member of the legislature, had limited executive capacity.⁶¹ The Rhode Island Constitution made little change in this power structure. The

54. See *In re Advisory Opinion to the Governor*, 732 A.2d at 78 (Flanders, J. dissenting). Earlier in his opinion Justice Flanders was emphatic about the advisory opinion provision being mandatory upon the justices: “[T]his constitutional command is unequivocal, peremptory, and without qualification.” He did not reconcile this with his agreement that advisory opinion requests requiring fact-finding may be refused. *Id.* at 74. *But see id.* at 62 (indicating “Regulation 5014, if authorized by our Constitution, would invalidate scores of other boards and commissions that currently exist and perform a number of important and sometimes vital functions”).

55. See *id.* at 72.

56. See *In re Advisory Opinion*, 732 A.2d at 72. The justices did not address the question of whether the Governor has a present constitutional duty requiring performance for which answers to Questions 2 and 3 are needed.

57. *Id.*

58. See *id.* at 63-65.

59. *Id.* at 63.

60. *Id.*

61. See *id.*

1842 constitution that replaced the Charter specifically provided that the now constitution-based General Assembly retained all powers it exercised to that point, unless otherwise prohibited by the constitution.⁶² The 1986 constitution retained the reserved powers of the General Assembly.⁶³ An amendment was proposed at the 1986 constitutional convention to curb the appointive powers of the General Assembly, but it failed to pass.⁶⁴ The justices further noted the major differences between treatment of executive power in the United States Constitution and the Rhode Island Constitution. The framers of the latter included no specific appointments clause and they “deliberately fragmented and distributed the executive power among four elected general officers.”⁶⁵ Regarding separation of powers, “it is the Rhode Island Constitution that we are expounding, not the Constitution of the United States or the constitutions of our sister states which may vary widely from our own.”⁶⁶ This point apparently was intended to counter arguments by the Governor that the United States and most state constitutions prohibit legislators and their appointees on executive boards and commissions as violations of separation of powers.⁶⁷ Further, the justices asserted that the “sole and proper procedure” for banning legislators from serving on or appointing others to executive boards and commissions was by constitutional amendment.⁶⁸ This is consistent with the view that present practice, whereby legislators freely sit and appoint others to sit on boards and commissions, is constitutionally sound, requiring an amendment to change the practice.

The justices also appear to have answered a question not asked. The Governor’s letter does not specifically inquire about the constitutionality of Regulation 5014. They nonetheless identified one constitutional defect, though the defect is related neither to the commission’s authority nor to separation of powers. The justices found that the regulation has a “self-executing presumption of universal conflict of interest and conclusive guilt based on status as a

62. See R.I. Const. of 1842, art. IV, § 10; *In re Advisory Opinion*, 732 A.2d at 63-64.

63. See R.I. Const. art. VI, § 10; *In re Advisory Opinion*, 732 A.2d at 63-64.

64. See *In re Advisory Opinion*, 732 A.2d at 65.

65. *Id.*

66. *Id.* at 73.

67. See, e.g., Governor’s Reply Brief, *supra* note 22, at 14-29.

68. *In re Advisory Opinion*, 732 A.2d at 72.

legislator,"⁶⁹ in violation of "the ancient and venerable principle of justice that is firmly embedded in our state's jurisprudence," that a person is presumed innocent until proven otherwise.⁷⁰

III. THE PUBLIC IMPORTANCE EXEMPTION

In the separation of powers advisory opinion, the justices invoked the public importance exemption to answer one defective question. They ignored the exemption when they declined to answer the other two questions. This has been fairly typical of the invocations of the public importance exemption, which have been without sufficient clarity, definition or predictability.

Since developing their restrictions beginning in 1937,⁷¹ the justices adhered to them with few exceptions until 1986. In the near half-century from 1937 through 1985 the justices received ninety-nine advisory opinion requests. They refused, in all or in part, thirty requests for advice, nearly all for failing to comply with one or more restrictions. During these years, the justices waived their restrictions only twice.⁷² This changed dramatically in 1986. In the fourteen years from 1986 through 1999, the justices waived their restrictions for six advisory opinion requests, out of a total of nineteen requests.⁷³ During this time, before their refusal to answer the Governor's Questions 2 and 3, they refused to advise only once.⁷⁴

69. *Id.* at 66.

70. *Id.*

71. *See supra* notes 26-27 and accompanying text.

72. *See* Opinion to the Governor, 170 A.2d 908 (R.I. 1961) (waiving restriction against rendering advice when request does not specify particular provision of the constitution implicated); *In re* Opinion to the House of Reps., 5 A.2d 455 (R.I. 1939) (waiving restriction against rendering advice in case pending in court). In 1970, the justices said they would have rendered advice to the Senate despite restriction against doing so, when requesting house had adjourned *sine die*, except that the question propounded would have been moot by the time the justices could have answered it. *See* Opinion to the Senate, 271 A.2d 810 (R.I. 1970).

73. *See In re* Advisory Opinion to the Governor, 732 A.2d 55 (R.I. 1999); *In re* Advisory Opinion to the Governor, 666 A.2d 813 (R.I. 1995); *In re* Advisory from the Governor, 633 A.2d 664 (R.I. 1993); *In re* Advisory Opinion to the House of Reps., 576 A.2d 1371 (R.I. 1990); *In re* Advisory Opinion, 507 A.2d 1316 (R.I. 1986); *In re* Advisory Opinion to the Governor, 504 A.2d 456 (R.I. 1986).

74. *See* To the Honorable Senate, 610 A.2d 131 (R.I. 1992).

The rationale for all six waivers made since 1986 is the same, and it is unprecedented: public importance.⁷⁵ In the first of the six waivers the justices advised on whether the conflict of interest statute required a state-appointed official, who was a member of a state agency, to resign from the agency, when a business in which the official had an interest came before the agency, or whether the official need only recuse himself. The same issue was being litigated before the Rhode Island Conflict of Interest Commission. One of the justices' restrictions is refusal to advise if the question is involved in pending litigation, either judicially or administratively.⁷⁶ The issue, however, pointed to a threat to the Governor's ability to persuade qualified people to assume public office. Hence, "[t]he public interest," the justices stated, "requires us to respond."⁷⁷

In this and the next two advisory opinions applying the public importance exemption, the justices seem to have suggested that it was to be invoked only with deliberateness and in exceptional circumstances. In the first opinion applying the exemption, the justices referred to the "extreme conditions" that would justify such an exemption from their restrictions.⁷⁸ The second opinion applying the exemption responded to a question concerning the removal of the Chief Justice, jointly propounded by the Governor and both

75. The justices applied a somewhat similar rationale once before 1986. See *In re Legislative Adjournment*, 27 A. 324, 325-26 (R.I. 1893) (Justices need not "take notice" of a House resolution in which the House propounded a question, since the House was not in session, the Governor having prorogued the General Assembly. Justices nevertheless render advice owing to "[t]he gravity of the situation" and "the importance of the principles and rights involved," which "are a sufficient warrant."). In *Opinion to the Senate*, 271 A.2d 810 (R.I. 1970), the justices mentioned the rationale but did not apply it. See *id.* (noting that the Justices would be willing to advise, owing to "the importance of the issues raised," despite Senate having adjourned *sine die*, except that the question would be moot by the time the justices answered it).

76. See, e.g., *Opinion to the House of Reps.*, 43 A.2d 944 (R.I. 1984) (refusing advice, owing to pending litigation in Superior Court); *In re Advisory Opinion to the Governor*, 492 A.2d 134 (R.I. 1985) (refusing to advise owing to pending litigation in administrative proceeding).

77. *In re Advisory Opinion to the Governor*, 504 A.2d 456, 459 (R.I. 1986) (advising that recusal is sufficient) (footnote omitted).

78. *Id.* at 458-59 (citing *Opinion to the House of Reps.*, 149 A.2d 343, 345 (R.I. 1959) (Justices refuse to advise owing to pending litigation "in the absence of more extreme conditions than now appear to require the justices to give an advisory opinion on a question of law which is involved materially in a pending . . . case.")).

houses of the General Assembly.⁷⁹ The justices stated that the request for advice violated the justices' restrictions against joint requests, against requests where the Governor lacks a present constitutional duty awaiting performance and against requests made absent a formal resolution in either house requesting the advice.⁸⁰ Nevertheless, the justices issued the opinion, citing "the profoundly important substantive issues."⁸¹ They stressed, however, that they "shall not consider this action as a precedent indicating that in the future we shall render an advisory opinion when the requesting petition is improperly before this court."⁸²

In the third advisory opinion applying the exemption, the justices waived their pending litigation restriction, citing the "public importance of the question currently propounded."⁸³ They cited the first opinion in which they applied the exemption, "where this court noted that, despite our established practice of refraining from rendering advisory opinions when the questions propounded are involved in litigation, there are extreme circumstances involving the public interest in which we shall respond."⁸⁴

Despite the careful assertions about extreme conditions and not creating precedent in these three earlier advisory opinions, the justices left the exemption open-ended, if not arbitrary. They did not address what defined extreme conditions. They did not address at all when the exemption may be applied and when it may not. They set no standards for what constitutes public importance sufficient to warrant application of the exemption. They did not explain why they set aside an earlier standard that specifically rejected a public importance exemption, at least for questions that might reach the Supreme Court through certification by the Attorney General. In a 1959 advisory opinion to the Governor, the justices refused to advise owing to pending litigation. They asserted that if the Governor deems his questions to be "of such pressing

79. See *In re Advisory Opinion*, 507 A.2d 1316 (R.I. 1986).

80. See *id.* at 1318-19.

81. *Id.* at 1319.

82. *Id.*

83. *In re Advisory Opinion to the House of Reps.*, 576 A.2d 1371, 1372 (R.I. 1990) (This case addressed the issue of whether the Governor could unilaterally withhold from distribution funds which the legislature designated as state aid to cities and towns. The justices answered in the negative.).

84. *Id.* (citing *In re Advisory Opinion to the Governor*, 504 A.2d 456, 458 (R.I. 1986)).

public interest and importance that they should be decided without the necessity of awaiting the outcome of the . . . litigation," then he could ask the Attorney General to certify the question to the justices.⁸⁵

The imprecisely defined expansion of the public importance exemption was reflected in one justice's "dissent"⁸⁶ in the third advisory opinion applying the exemption. The justice noted that the question from the House "[had] nothing to do with . . . pending legislation," but was actually about the duty of the Governor under passed legislation, and the Governor not only had sought no advice but had objected to the House's request.⁸⁷ In addition, he questioned the propriety of the issuance of an advisory opinion while a similar question was involved in pending litigation.⁸⁸ The justice emphasized that in the second exempted opinion the justices made clear that the exemption should not be construed as precedent.⁸⁹ The dissent simply pointed out deficiencies in the request for advice and expressed concern about the waiver. It identified no standard or definitions by which his view should prevail over that of the majority.

In the three later exempting advisory opinions, the justices' attitude toward the exemption became less restrained and more expansive. In the first of these three (the fourth exempted opinion), the justices applied the exemption, but this time stated no warnings about precedents,⁹⁰ in contrast to the second exempted opinion. In the fourth opinion, the justices rendered advice to the Governor despite finding that the Governor had no present constitutional duty awaiting performance for which the advice was needed.⁹¹ The justices applied the public importance exemption to this defect using language nearly identical to that in the second exempted opinion: "In spite of the procedural deficiency ingrained in this request, we shall exercise our discretion and waive the de-

85. Opinion to the Governor, 149 A.2d 341 (R.I. 1959) (citing R.I. Gen. Laws § 9-24-27 (1956)).

86. Topf, *supra* note 25, at 248. Strictly speaking there can be no dissents to advisory opinions which represent only the opinions of individual justices and not of the court. "Dissent" is a misnomer for an opinion of a justice whose opinion differs from an opinion adopted by the majority.

87. *Opinion to the House of Reps.*, 576 A.2d at 1376.

88. *See id.*

89. *See id.* (citing *In re Advisory Opinion*, 507 A.2d 1316, 1319 (R.I. 1986)).

90. *See In re Advisory from the Governor*, 633 A.2d 664 (R.I. 1993).

91. *See id.* at 667.

fect . . . because this is an instance in which the public and constitutional importance is paramount."⁹² This time, however, the justices were silent, as they would remain thereafter, about whether or not they should be interpreted as establishing precedent.

This advisory opinion was one of several affecting the Rhode Island Ethics Commission.⁹³ The Governor's request for advice challenged the commission's new "revolving door" regulations.⁹⁴ The challenge was unsuccessful. The justices upheld the authority of the commission to make the regulations.⁹⁵ The Governor based his request on his need for advice pursuant to his duty to appoint

92. *Id.* (citation omitted). See also *In re Advisory Opinion*, 507 A.2d at 1319-20 (R.I. 1986) (indicating that "[i]n spite of procedural deficiencies inherent within the petition before us . . . we shall exercise our discretion and waive the defects").

93. The Ethics Commission has been the object of unusual attention in advisory opinions. Indeed, since the commission's creation in 1986, the advisory opinion process has been the chief means of interpreting its powers. Two of the six opinions applying the public interest exemption involved commission powers, the fourth on revolving door rules and the sixth on separation of powers. (Another exempting opinion, the first one issued, came out of a challenge to a ruling by the Ethics Commission's predecessor, the Conflict of Interest Commission.) Another advisory opinion on the Ethics Commission (not involving a public interest exemption) found that the constitution gave the commission power to enact ethics laws. See *In re Advisory Opinion to the Governor*, 612 A.2d 1 (R.I. 1992). Here the Governor's request for advice seems defective in several respects, but the justices are silent on this and proceed to advise without comment on the request's propriety. The Governor sought the advice so that he could "(1) promote, oversee and participate in an orderly system of ethics reform; (2) fulfill my responsibilities to appoint qualified public officials with the knowledge and ability to inform them of the ethical rules to which they will be bound; and (3) discharge my duty under Article IX, § 3 of the Rhode Island Constitution to see that the laws are faithfully executed." See Letter from Governor Bruce Sundlun to the Justices of the Rhode Island Supreme Court 2 (Nov. 5, 1991). Ethics reform is not an enumerated executive power; the Governor specifies no law awaiting execution; and appointment powers are not constitutionally vested, the justices have ruled. See *In re Advisory Opinion to the Governor*, 504 A.2d 456 (R.I. 1986).

94. See R.I. Gen. Laws § 36-14-5(n), (o) (1956) (Reenactment 1997). See also R.I. Ethics Commission Advisory No. 13, *The Code of Ethics as it Affects Legislators and Their Related Financial Interests* (1992) (publicizing the Commission's views and interpretations of the Code of Ethics regarding propriety of legislators in outside ventures); R.I. Ethics Commission Advisory Opinion No. 92-30 (1992) (determining whether a legislator's employment is restrictive on her ability to participate and to vote on certain items coming before the general assembly). See generally Katherine Gregg, *Sundlun Takes Aim at Parts of Ethics Law*, *Prov. J. Bull.*, Apr. 17, 1993, at A1 (interviewing the Governor and other officials involved with the ethics opinion challenge).

95. See *In re Advisory from the Governor*, 633 A.2d 664, 678 (R.I. 1993).

qualified people to certain government positions, but the justices found that "no power of appointment [was] vested in the governor, save to fill vacancies temporarily existing. . . . [O]ur own constitution [did] not make appointment to office an executive function."⁹⁶ Hence, "it [was] evident that the Governor [had] no present constitutional duty awaiting performance."⁹⁷ The brief of the Ethics Commission, besides noting this defect, pointed to two others. One was that advising in this case required fact-finding by the justices; specifically, they would need to make "an ad hoc evaluation of each and every appointment . . . and each determination would involve various findings of fact."⁹⁸ The other was that the question was "vague in form."⁹⁹ The justices applied the public importance exemption in this way: by ignoring the arguments on fact-finding and vagueness altogether. As to the Governor's duty, they made clear there was none: "the Governor has no present constitutional duty awaiting performance."¹⁰⁰ Then, the justices immediately proceeded to waive the defect. The only elucidation of the exemption was a citation without comment to the second exempted opinion.¹⁰¹ The justices did not note that this opinion stressed that their exemption was not to be construed as a precedent, "indicating that in the future we shall render an advisory opinion when the requesting petition is improperly before this court or procedurally defective."¹⁰²

The fifth exempting advisory opinion increased the ambiguity about application of the exemption. The Governor sought an opinion on whether the state was constitutionally required to provide free counsel to indigent defendants even when the trial judge determined that no incarceration would be imposed.¹⁰³ The Gover-

96. *Id.* at 666 (citations omitted) (quoting *In re* Decision of Justices, 69 A. 555, 559 (R.I. 1908)). See also R.I. Const. art IV, § 4; R.I. Const. art IX, § 5 (each dictating that the authority to fill vacancies of government offices generally lies within the power of the general assembly).

97. *In re Advisory from the Governor*, 633 A.2d at 667.

98. Brief and Appendix of Amicus Curiae: R.I. Ethics Commission, at 12 No. 97-572-M.P.; *In re Advisory from the Governor*, 633 A.2d 664 (R.I. 1993).

99. *Id.* The justices have said they will decline to respond to questions insufficiently specific or clear as to the thrust of the inquiry. See *Advisory Opinion to the Governor*, 289 A.2d 430 (R.I. 1972).

100. *In re Advisory Opinion from the Governor*, 633 A.2d at 667.

101. See *id.* at 667 (citing *In re Advisory Opinion*, 507 A.2d 1316, 1319-20 (R.I. 1986)).

102. *In re Advisory Opinion*, 507 A.2d at 1319-20.

103. See *In re Advisory Opinion to the Governor*, 666 A.2d 813 (R.I. 1995).

nor claimed he needed the opinion in order to provide for sufficient funding in the budget which he was constitutionally obliged to prepare and send to the General Assembly.¹⁰⁴ The question propounded, however, was not actually about the Governor's budgetary duties. One justice in a separate opinion made the point: "The Governor's argument [on his need for advice] . . . is unconvincing. The question propounded is simply whether the state has an obligation to provide legal representation to indigent misdemeanor defendants. The question, therefore, does not bear upon the Governor's duty to present a balanced budget to the General Assembly."¹⁰⁵ Hence, "this case is a definitive textbook instance in which the Governor's question is not properly the subject of an advisory opinion."¹⁰⁶ The majority's opinion did state that the justices "will generally refrain from advising the Governor on issues" not bearing on a present constitutional duty awaiting performance.¹⁰⁷ But then they seemed to have presented it both ways. Does the Governor have such a duty? Their opinion was simply that "Your Excellency has presented legitimate concerns that impede your ability to prepare a budget absent clarification of the requirements imposed by article I, section 10."¹⁰⁸ Since article I, section 10 specified no duty of the Governor, the justices would seem to have opened up the advisory process to virtually every item in the state budget for both the Governor and the legislature. The justices quickly attempted to close it again: "Although we are responding to your request for advice in this instance, we would not consider that every issue affecting the state budgetary duties of the Governor or of the General Assembly would be a proper subject for such an opinion."¹⁰⁹ The justices did not specify how the Governor and legislature were to know which issues would be proper and which would not. Then, without explanation, they referred to the public interest exemption, curiously relegating it to a footnote: "This Court has exercised its discretion to issue advisory opinions

104. *See id.* at 815. *See also* R.I. Const. art. IX, § 15 (articulating that it is the governor's duty to submit a budget).

105. *In re Advisory Opinion*, 666 A.2d at 819 (Murray, J., dissenting).

106. *Id.* at 818 (Murray, J., dissenting).

107. *Id.* at 814-15.

108. *Id.* at 815. *See also* R.I. Const. art. I, § 10 (providing for the rights of the accused, which include the right "to have the assistance of counsel in their defense").

109. *In re Advisory Opinion*, 666 A.2d at 815.

even on questions arguably improperly before the court, but of great public importance."¹¹⁰ Its relevance to the propriety of the request for advice is not specified or clear. Perhaps it is the standard by which the justices will decide when budget-related questions will be answered and when not. The justices do not say.

With the fifth exempting advisory opinion, the public importance exemption has evolved in two ways. It now trumps the justices' restrictions developed since 1937. And it has become somewhat free-wheeling and expansive, with little definition or clarity as to what constitutes public importance or what warrants applying the exemption to one defective request for advice but not to another. There is a diminished likelihood that anyone can reasonably predict what a proper request for advice is, or determine why some questions failing to fall within the justices' restrictions are rejected for that reason and why some are not. In short, the public interest exemption has made it increasingly difficult to determine the scope of the justices' advisory jurisdiction.

The exemption's effects are intensified by the striking frequency with which it has been applied. Compare its use in the other advisory states. During this period, 1986-1999, the justices in each of the other nine advisory opinion states applied a public importance exemption to defective requests for advice either rarely or not at all. Justices in seven of these states applied no such exemption during this time. Justices in two states did.¹¹¹ The Alabama justices applied the exemption three times, while refusing advice twelve times out of a total of thirty-nine requests for advice in this period.¹¹² The Massachusetts justices applied the exemption once, while refusing to advise eight times out of a total of

110. *Id.* at 815 n.1. In their footnote, the Justices cite the first, second and fourth of the exempted opinions, though not the third.

111. It is possible that advisory justices may ignore defects in the requests for advice and answer deficient questions on public importance grounds, without calling attention to their doing so. My concern here, however, is with the explicit application of the public importance exemption.

112. See Opinion of the Justices, 624 So. 2d 107, 109 (Ala. 1993) (Despite pending litigation, question propounded "is one of great public interest."); Opinion of the Justices, 599 So. 2d 1166, 1167 (Ala. 1992) (Despite legislature not in session and no pending legislation, "matters of great public concern are involved requiring immediate resolution."); Opinion of the Justices, 558 So. 2d 390, 391 (Ala. 1989) (Despite pending litigation, Governor's request "involves questions vitally important to the people of the State of Alabama.").

twenty-nine requests for advice.¹¹³ From 1986 through 1999, the justices of the nine advisory opinion states, other than Rhode Island, responded to a total of 134 advisory opinion requests and applied a public importance exemption a total of four times.¹¹⁴ The justices in Rhode Island, responding to nineteen requests, applied the exemption six times.

IV. THE PUBLIC IMPORTANCE EXEMPTION: JURISPRUDENTIAL ISSUES

The uncertainty that the public importance exemption has lent to advisory opinion jurisprudence in Rhode Island raises several problems in areas that themselves have long troubled the advisory opinion process: separation of powers, problematic effects on private rights and the purportedly non-precedential nature of advisory opinions.

A. *Separation of Powers*

The justices' observation about the "repugnance" of the advisory opinion process to the principle of separation of powers¹¹⁵ points to what is perhaps the most significant problem of expanding the public interest exemption, effectively expanding occasions for issuing advisory opinions. This is the most formidable challenge to advisory opinions, one that has shadowed them from the start: separation of powers doctrine. The United States Supreme Court's rejection of advisory opinions in 1793 was grounded then and is still mainly grounded in that doctrine.¹¹⁶

113. See *Opinion of the Justices to the Senate*, 493 N.E.2d 859, 863 (Mass. 1986) (Despite question being on constitutionality of existing statutes, advice was necessary to avoid needlessly expending considerable time, effort and public funds should statutes be found unconstitutional later.).

114. In a recent advisory opinion the Massachusetts justices seemed to have expressed skepticism about a public importance exemption. See *Answer of the Justices to the Acting Governor*, 686 N.E.2d 444, 446 (Mass. 1997) ("If there is no present duty, no solemn occasion exists and the Justices are constitutionally constrained from rendering an advisory opinion regardless of the importance of the particular question.") (citing *Answer of the Justices*, 547 N.E.2d 17 (Mass. 1989)).

115. *Opinion to the Governor*, 191 A.2d 611, 614 (R.I. 1963); see *supra* note 28 and accompanying text.

116. See, e.g., Stewart Jay, *Most Humble Servants: The Advisory Role of Early Judges* 113-48 (1997) (discussing the United States Supreme Court's 1793 rejection of President Washington's request for advice); see also, e.g., *Flast v. Cohen*, 392 U.S. 83, 96 (1968) ("[T]he rule against advisory opinions implements the separation of powers prescribed by the Constitution.") (citations omitted).

Exemplifying many state supreme courts' strong views on this was the Ohio Supreme Court's overturning of an advisory opinion statute in 1882, ruling that for the court to advise the legislature would "be an unwarranted interference . . . dangerous in its tendency."¹¹⁷ In those states where advisory authority is provided by the constitution, the justices still must develop standards to balance advisory duties with separation of powers, as did the Rhode Island justices.¹¹⁸ An aggravating problem here is the tendency of one political branch to use the advisory process against the other, or at least to use the supreme court to supervise a coordinate branch.¹¹⁹ The 1999 separation of powers advisory opinion may plausibly be viewed as an attempt by the Governor to limit the constitutional plenary powers of the legislature. The point here is that advisory opinion processes, which trouble separation of powers doctrine under any circumstances, trouble it all the more with a public interest exemption that, by trumping virtually any restriction ever placed on advisory opinion requests, permits the justices to broaden the scope of the advisory process without limits.

B. *Problematic Effects on Private Rights*

The public importance exemption similarly aggravates a long-noted problem with the advisory process: no one "can tell, when a question is proposed, how far the decision may affect private rights."¹²⁰ Further, "[the justices] may give such an opinion as they may be called upon to revise in their judicial capacity on a question of private rights."¹²¹ In addition, though advisory justices have in more recent years allowed briefs and arguments, there is

117. *State v. Baughman*, 38 Ohio St. 455, 459 (1882). For a review of rulings overturning advisory opinion statutes, see Topf, *supra* note 25, at 230 & n.149.

118. *See, e.g.*, *Answer of the Justices to the Council*, 291 N.E.2d 598, 600, (Mass. 1973) (The Massachusetts advisory opinion provision "must be strictly observed in order to preserve the fundamental principle of the separation of the judicial from the executive and the legislative branches of government.") (citation omitted).

119. *See* Robert H. Kennedy, *Advisory Opinions: Cautions About Non-Judicial Undertakings*, 23 U. Rich. L. Rev. 173, 182 (1989).

120. Official Report of the Debates and Proceedings in the State Convention 688 (Mass. 1853). The Massachusetts Convention of 1853 debated a proposal to remove the advisory opinion provision, which carried at the convention, but failed at the ballot. *See* Albert R. Ellingwood, *Departmental Cooperation in State Government* 36-39 (1918).

121. Official Report, *supra* note 120, at 688.

no sure way to identify in advance those who may be affected by an opinion. At any rate, decisions as to who may submit briefs, and whether briefs may be submitted at all, remains at the discretion of the justices.¹²² Another problem here is that, without private parties with a direct stake in the outcome, the justices may be imperfectly briefed and given "but an imperfect knowledge of the facts."¹²³ It may be difficult "to find advocates with sufficient stake in the matter to effectively represent opposing points of view," especially when the justices, apprehensive about due process, attempt to restrict opinions to general public issues.¹²⁴ If there are no briefs or arguments, the justices "can arrive at a conclusion only by consulting among themselves and comparing their several views on the matter."¹²⁵

Further, since advisory proceedings are prospective, they "might foreclose issues on which interested parties in future litigation would not have had full opportunity to be heard."¹²⁶ There is also the risk of the justices being "insensibly biased" in later litigated proceedings by their earlier advisory opinions, simply owing to pride of first conviction and the additional need to change al-

122. See Pascal F. Calogero, Jr., *Advisory Opinions: A Wise Change for Louisiana and Its Judiciary?*, 38 Loy. L. Rev. 329, 349 (1992), and Kennedy, *supra* note 119, at 192, for a discussion on problems of identifying and notifying parties who may have an interest in an advisory opinion proceeding.

123. Recent Cases, 26 Harv. L. Rev. 650, 655 (1913).

124. Calogero, *supra* note 122, at 349. In a letter, Massachusetts Chief Justice Paul J. Liacos stated, "When we receive a request we publish an announcement and solicit briefs from interested parties. The briefing sometimes is not so effective or as well-focused as that which follows thorough examination of the issues through the trial processes." Letter from Paul J. Liacos, Massachusetts Chief Justice, to Pascal F. Calogero, Jr., Louisiana Chief Justice (May 17, 1991) (on file with author).

125. F.R. Aumann, *The Supreme Court and the Advisory Opinion*, 4 Ohio St. L. Rev. 21, 47 (1937) (arguing that "[t]his does not seem to be a very satisfactory arrangement").

126. Charles M. Carberry, Comment, *The State Advisory Opinion in Perspective*, 44 Fordham L. Rev. 81, 101 (1975). These are the oldest and most persistent objections to rendering advisory opinions by the advisory justices themselves. See, e.g., Opinion of the Court, 62 N.H. 704 (1816) (refusing to advise as question may affect private rights in litigation). This is, so far as I can determine, the earliest reported instance of advisory justices refusing to render advice. See also Massachusetts Constitutional Convention of 1820, Report of the Judiciary Committee 72 (arguing for proposal to remove advisory opinion provision: "The question proposed by the legislature or by the Governor and Council to the Judges may deeply affect private rights and interests.").

ready defined and published views.¹²⁷ The Rhode Island justices themselves expressed this concern to members of the Rhode Island Constitutional Convention of 1986: "Once an advisory opinion is issued, it becomes very difficult to reconsider an issue and decide it differently, in light of an actual factual situation."¹²⁸

C. *Advisory Opinions as Purportedly Non-Binding*

These problems would seem to be effectively neutralized by another characteristic of advisory opinions. They are purportedly just advice, non-binding and without precedential weight. As Justice Flanders put it in his minority opinion on the separation of powers questions, "advisory opinions have no precedential value in the sense of *stare decisis*; that is, they lack the potentially controlling impact that decisions in previously litigated cases and controversies have upon later decided cases involving the same or similar factual situations."¹²⁹ The Rhode Island justices have emphatically put forth their advisory opinions as products of non-judicial action by judges sitting in a non-judicial capacity, and as such their advice is neither binding nor precedential. The justices' earliest general statement about advisory opinions was that their advice "is not a *decision* of this court; and . . . can have no weight as a precedent."¹³⁰ A century later, in 1959, the justices repeated

127. See Ellingwood, *supra* note 120, at 254-55. See also Preston W. Edsall, *The Advisory Opinion in North Carolina*, 27 N.C. L. Rev. 297, 333 (1949) (quoting from the Notes section of the Harvard Law Review, which stated:

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.

Notes, 10 Harv. L. Rev. 49, 50 (1897)); C. Dallas Sands, *Government by Judiciary—Advisory Opinions in Alabama*, 4 Ala. L. Rev. 1, 26 (1951):

It would seem natural to anticipate that because of the operation of psychological factors, advisory opinions would possess a high normative quality. From the standpoint of the justices themselves, it is normal for a person to cling to an opinion once reached until a strong showing against it is made.

128. Rhode Island Constitutional Convention of 1986, Report of the Judicial Selection and Discipline Committee Minutes, May 21, 1986.

129. *In re* Advisory Opinion to the Governor, 732 A.2d 55, 86 n.17 (R.I. 1999) (citations omitted).

130. *G. & D. Taylor & Co. v. R.G. & J.T. Place*, 4 R.I. 324, 362 (1856).

this,¹³¹ stating that “[w]e are aware of no instance in which this court has ever adopted a contrary view.”¹³² Another 1959 advisory opinion developed the rationale:

It may be helpful to point out that the constitution by its express language imposes a mandatory duty on the *judges* of the supreme court to answer such questions. Section 2 [the advisory opinion clause] does not impose that duty on the supreme court as a judicial department of the state government. Opinions of the justices . . . are merely advisory.¹³³

This means, as the justices stated elsewhere, that an advisory opinion

is in no sense a decision of the supreme court. . . . [T]he judges do not speak *ex cathedra*, from the chair of judgment, but only as consulters. . . . However sound the opinion may be, it carries no mandate. For this reason it is not an exercise of our judicial power.¹³⁴

This would seem to mitigate the effects of an expanding use of the public interest exemption and consequent expansion of advisory opinions, since it apparently neutralizes problems relating to separation of powers and private rights.

However, almost no one believes it. Few besides advisory justices make claims that advisory opinions are non-binding. Advisory opinions in Rhode Island, and elsewhere, have always been treated as precedential by nearly everyone else. Requesting authorities rarely fail to act as if bound by the advice. One observer commented that it would be “absurdly naïve” to believe that the advice should be taken as anything but a reliable prediction of how the court will hold if the same question came before it later in litigation.¹³⁵ The Delaware justices are straightforward about it. They say their advisory opinions are “binding on no one,” but are still “what one would expect the Justices to say if the issue had been presented to them in litigation.”¹³⁶

131. See *Opinion to the Governor*, 149 A.2d 341, 342 (R.I. 1959) (“[A]n advisory opinion would not constitute a decision of this court, . . . and would have no binding effect.”).

132. *Id.*

133. *Opinion to the Governor*, 153 A.2d 168, 170-71 (R.I. 1959).

134. *Opinion to the Governor*, 174 A.2d 553, 554 (R.I. 1961).

135. Sands, *supra* note 127, at 25.

136. *Opinion of the Justices*, 413 A.2d 1245, 1248 (Del. 1980).

It is likely that it was always like this. Maine's Chief Justice noted in 1908 that advisory opinions are "often cited as judicial authority and the people are prone to regard them as adjudications to be adhered to despite all arguments to the contrary."¹³⁷ The media tend not to make the distinction, regularly referring to an advisory opinion proceeding as a "case" which the "supreme court" will "decide."¹³⁸ The justices themselves rely on advisory opinions in litigated cases, often extensively, in a manner indistinguishable from their reliance on litigated cases.¹³⁹

This may put a lower court in an awkward position if a proceeding is begun there while the justices are preparing an advisory opinion on an issue that may bear on the proceeding. Shortly before the justices issued the 1999 separation of powers advisory opinion, a superior court judge granted the Governor a preliminary injunction blocking the Rhode Island Lottery Commission's approval to increase the number of video slot machines at a dog racing track and a jai alai fronton, both private commercial enterprises. The Governor argued that the Lottery Commission violated the state constitution's separation of powers provision in that it was an executive body with legislators not only sitting on it, but also comprising six of its nine members. At that point in time the justices were preparing the separation of powers advisory opinion, involving issues being argued in the litigated case and affecting rights of private parties. In an instance of the tail wagging the dog, the judge in the litigated case decided to hold off proceedings until the purportedly non-binding advisory opinion was issued. One reason the judge issued the preliminary injunction is that he wanted to "hold matters approximately in the status quo" in light

137. Lucilius A. Emery, *Advisory Opinions from Justices*, 2 Me. L. Rev. 1, 2 (1908).

138. See, e.g., Tom Mooney, *Justices Refuse to Ban Legislators from State Boards*, Prov. J. Bull., June 30, 1999, at A1 (referring to the separation of powers advisory opinion as a "decision"); Tom Mooney, *Court Close to Ruling on 'Power' Case*, Prov. J. Bull., June 18, 1999, at B1.

139. See, e.g., *Davis v. Hawksley*, 379 A.2d 922, 923 (R.I. 1977) (citing *In re Opinion to the Governor*, 116 A.2d 474, 475 (R.I. 1955), as sole support of court's interpretation of R.I. Const. art. IX, § 6); *State v. Garnetto*, 63 A.2d 777, 779 (R.I. 1949) (citing *Opinion of the Justices*, 3 R.I. 299 (1853), to support that it is "unquestionably . . . the established law . . . that the [legislature] cannot under our constitution rightfully exercise judicial power"). See also Terrance A. Smiljanich, Comment, *Advisory Opinions in Florida: An Experiment in Intergovernmental Cooperation*, 24 U. Fla. L. Rev. 328, 332 (1972) (studying all Florida advisory opinions to 1971 and finding that the majority were cited in later cases as authority).

of the “pendency of the request by the Governor for an advisory opinion.”¹⁴⁰ The judge was “looking to the Supreme Court for ultimate guidance,” so he ordered a status conference “on the day following the issuance by the Supreme Court of an advisory opinion . . . for the purpose, basically in seeing what the advisory opinion . . . has said and what steps, if any, should be taken as a result thereof.”¹⁴¹ The Lottery Commission, however, appealed the judge’s preliminary injunction to the Supreme Court and the Supreme Court scheduled arguments on it.¹⁴² The Supreme Court hearing was held on June 30, the day after the justices had issued the separation of powers advisory opinion. The inevitable awkwardness and complications were apparent. The attorney representing the Lottery Commission said that the superior court judge constantly referred to the expected advisory opinion.¹⁴³ When the Chief Justice said that the justices did not answer the Governor’s Questions 2 and 3, the attorney replied that the justices in fact did use “strong language” regarding the constitutionality of legislators serving on and appointing others to executive boards and commissions.¹⁴⁴ When the judge later ruled that the ban be lifted, he said he had “read and reread” the advisory opinion, and he “inescapably” concluded that “it would be intellectually and legally wrong” to keep the ban in force since the justices “inferentially” answered Question 2.¹⁴⁵ The judge issued a final decision in October 1999, ruling that the statute in question was unconstitutional.¹⁴⁶ Since the separation of powers advisory opinion declined, at least for-

140. Transcript of Hearing before Hon. Michael A. Silverstein, June 9, 1999, at 18-19. Background on the Lottery Commission case is taken from this transcript and from Tom Mooney, *Court Blocks Expansion of Video Slots*, *Prov. J. Bull.*, June 10, 1999, at A1 and Tom Mooney, *Ruling on Slots Heads to Top Court*, *Prov. J. Bull.*, June 11, 1999, at A1.

141. Hearing, *supra* note 140, at 19.

142. See *Almond v. Rhode Island Lottery Comm’n*, No. PC 99-2323, at 1 (June 17, 1999).

143. From notes of the author, who attended the R.I. Supreme Court Hearing on June 30, 1999.

144. *Id.* On the extent to which the justices may in fact have answered Questions 2 and 3, see *supra* Part II.B.

145. *Almond v. Rhode Island Lottery Comm’n*, No. PC 99-2323, at 3-4 (July 27, 1999).

146. See *Almond v. Rhode Island Lottery Comm’n*, No. PC 99-2323, at 14-15 (Oct. 27, 1999) (holding statute “unconstitutional to the extent that it requires appointments by the House Speaker and Senate Majority Leader of members of the General Assembly to sit on and comprise a majority of the Lottery Commission membership”).

mally, to advise on the constitutionality of legislators sitting on boards and commissions, the extent to which this decision dances around the advisory opinion is impressive. Over half of the decision's section on the "[H]istory of This Case" is devoted to the advisory opinion¹⁴⁷ and the decision makes considerable efforts to juggle relevant statements in the advisory opinion with their being purportedly non-binding: "[T]he Court is aware that Advisory Opinions issued by our Supreme Court . . . 'are of limited precedential effect.'"¹⁴⁸ "Be that as it may," the decision continues, "the Majority Advisory Opinion . . . represents the view of four of the five justices presently sitting on our Supreme Court and is highly persuasive, if not binding, upon this Court."¹⁴⁹ The fence-sitting treatment of the advisory opinion continued as the Lottery Commission decision noted that the majority justices "declined to respond to certain questions propounded to them."¹⁵⁰ "However, while not directly answering the question[s]," the justices "did make particular reference" to the extensive history of the practice of legislators serving on and appointing others to serve on boards and commissions, and to "the sole and proper procedure" for changing this practice being a constitutional convention.¹⁵¹ The decision then noted that none of this is dispositive for the Lottery Commission case, and it went on to decide the case on other grounds. However, the justices then ordered a stay of the judgment until July 1, 2000 to allow for "appeals and cross appeals, which inevitably will flow" from the decision.¹⁵²

In short, the ill-defined, complicated and strained relation of the separation of powers advisory opinion to the litigated Lottery Commission case points to the ambiguities, if not confusions, which may arise from advisory opinions which are non-binding in theory but simply impossible to disregard in practice. Whatever the theory about advisory opinions as non-binding, the likelihood

147. *Id.* at 2-5.

148. *Id.* at 9 (quoting from *In re Advisory to the Governor*, 732 A.2d 55, 73 (R.I. 1999)). (The justices "realize that [advisory opinions] are of limited precedential effect.") This is weaker than previous categorical statements on this, e.g., advisory opinions "can have *no* weight as a precedent." *Taylor & Co. v. Place*, 4 R.I. 324, 362 (1856) (emphasis added).

149. *Almond*, *supra* note 146, at 9.

150. *Id.* at 10.

151. *Id.* at 10-11.

152. *Id.* at 16.

that the Ethics Commission would ignore the justices' opinion on separation of powers and move to enforce Regulation 5014 is non-existent. Prudence dictates that when the justices of the state's high court offer advice on a matter of law, it is an offer that cannot be refused. The effects of an expanding public importance exemption find no mitigation in claims that advisory opinions are non-binding.

V. THE PUBLIC IMPORTANCE EXEMPTION AND THE POLITICAL PROCESS

The justices' expansion of the public importance exemption, and their consequent weakening of their restrictions on advisory opinion requests, intensifies the advisory opinion's effects on the political process. "Under the guise of answering legal and constitutional questions, the judges often play a decisive role in settling political questions."¹⁵³ Advisory opinions are addressed to public issues, which tend toward the political. "The characteristic agenda of an advisory opinion . . . is political rather than adjudicatory."¹⁵⁴ Reinforcing this concept is the fact that the source of advisory opinions is always one of the political branches, providing two questionable opportunities. One is the ability of the Governor to use the judiciary to supervise the legislature.¹⁵⁵ This was likely the case with the separation of powers advisory opinion, which the media accurately, if dramatically, identified as "a tug-of-war for power between the executive and legislative branches."¹⁵⁶ The judiciary is

153. Edsall, *supra* note 127, at 333. See also, e.g., Massachusetts Constitutional Convention, Journal of Debates and Proceedings in the Convention of Delegates 220 (Dec. 30, 1820) (It would be an "extreme danger" if judges "would be required to give opinions in cases which should be exclusively of a political character."); Calogero, *supra* note 122, at 367 (The advisory opinion process "involves, or appears to involve, the judiciary directly in politics."); John F. Hagemann, *The Advisory Opinion in South Dakota*, 16 S.D. L. Rev. 291, 295 (1971).

154. Kennedy, *supra* note 119, at 179. See also Massachusetts Constitutional Convention, Journal of Debates and Proceedings in the Convention of Delegates 284 (Jan. 9, 1821) ("If the question proposed, should be of a public nature, it will be likely to partake of a *political character*; and it highly concerns the people that Judicial Officers should not be involved in political or party discussions.").

155. See, e.g., Kennedy, *supra* note 119, at 195 ("When an advisory court provides an executive with unlimited standing to obtain constitutional assessment of new legislation, the executive branch may employ the judiciary to supervise the legislative process.").

156. Tom Mooney, *Justices Refuse to Ban Legislators from State Boards*, *Prov. J. Bull.*, June 30, 1999, at A1.

placed in a position of significant control, or at least influence, over a political branch through rendering preemptive and non-adjudicatory advice.¹⁵⁷ An offshoot of this is the occasional instance when the justices go beyond the questions propounded to point to problems about which no specific inquiry was made.¹⁵⁸

A second opportunity afforded the political branches is to shift political responsibility to the justices. The advisory opinion process "permits the legislative or executive department to put, in many important instances, the whole responsibility of their action upon the judicial department."¹⁵⁹ The very fact that the process is available may encourage the political branches "to avoid their obligation to assess the constitutionality of what they do or to act according to those assessments It is not unknown for legislators to abdicate their duty to act constitutionally in reliance upon eventual judicial review. Advisory opinions facilitate the abdication."¹⁶⁰

The public importance exemption increases these two opportunities since it, in effect, waives whatever restrictions might limit the rendering of an advisory opinion, precisely because of the public—that is, likely, political—importance. The more significant or intense a political issue purportedly is, the greater the chance of

157. See Kennedy, *supra* note 119, at 194-95; see also 2 Official Report of the Debates and Proceedings in the [Massachusetts] State Convention 687 (July 11, 1853) (stating that "[Advisory opinions] have this further objection—that it is very little different from permitting the judiciary to control the legislative and executive powers.").

158. See Carberry, *supra* note 126, at 103. In the separation of powers opinion the justices may have done this when they opined on the constitutionality of Regulation 5014 itself, about which the Governor did not ask.

159. 2 Official Report, *supra* note 157, at 687.

160. Kennedy, *supra* note 119, at 103. This appears to be the case with the Ethics Commission, which declined to act in accordance with the assessments of its expert consultant and others about the constitutionality of Regulation 5014; instead they asked the Governor to seek an advisory opinion. The pressure to shift legislative responsibility to supreme courts occurs generally on the federal as well as state level. See, e.g., Abner J. Mikva, *How Well Does Congress Support and Defend the Constitution?*, 61 N.C. L. Rev. 587, 610 (1983):

In addition to the institutional pressures on the Congress to pass the constitutional problems to the courts, the political incentives to do so are great. The very knowledge that the courts are there, as the ultimate nay-sayers, increases the tendency to pass the issue on, particularly if it is politically controversial. Such behavior by Congress is both an abdication of its role as a constitutional guardian and an abnegation of its duty of responsible lawmaking.

the justices applying an exemption. Legislators serving on or appointing others to serve on public boards and commissions is such an issue, and, as the justices note, the way to restrict this is through constitutional amendment.¹⁶¹ The amending process is political, involving debate, negotiation, compromise, lobbying, editorializing and other risky and frustrating activities that are inescapable in the political process. All this is substantially marginalized if not altogether bypassed when questions of public importance are withdrawn from the uncertain and contentious political realm to the non-political realm of the justices.¹⁶² For Justice Frankfurter, “perhaps the most costly price of advisory opinions is the weakening of legislative and popular responsibility.”¹⁶³ The converse is true as well: as the availability of advisory opinions weakens such responsibility, so weak legislative and popular responsibility encourages advisory opinions. Those who disdain the political “will not be unduly distressed if most important controversies are entrusted to the courts for decision.”¹⁶⁴

The expanded public interest exemption encourages this, and this encouragement is perhaps the most serious civic consequence of the expansion. The result is not only an evasion of what Brandeis called the duty of public discussion,¹⁶⁵ but also the attenuation of the force and effect of whatever public discussion there is.

161. See *In re Advisory Opinion to the Governor*, 732 A.2d at 72.

162. See Christopher Rowland, *Senate Asks for Review of Court Ruling*, *Prov. J. Bull.*, Apr. 8, 1997, at B1. In 1997, panelists on a local televised panel show discussed what was called a “power struggle” between the Governor and legislature over appointment power to fill a vacancy in the position of Lieutenant Governor. During the program, the chair of the Senate Judiciary Committee perfectly depicted the relation between the popular disdain for political controversy and the desire to shift political issues to the justices for resolution through the advisory opinion process. She stated:

My inclination would be for us [the Senate] to seek an advisory. . . . We need to be sensitive to public opinion. . . . People feel . . . all we’re doing is fighting. . . . My personal inclination would be to receive some direction from the Supreme Court, *a non-controversial manner*, as to whether or not the legislation I’ve introduced [on appointment of Lieutenant Governor] is in fact—would be valid.

Lively Experiment (video recording of broadcast, Jan. 30, 1997) (emphasis added).

163. Felix Frankfurter, *A Note on Advisory Opinions*, 37 *Harv. L. Rev.* 1002, 1007 (1924). Frankfurter takes *In re The Constitutional Convention*, 14 R.I. 649 (1883), as an example of an “ill-considered advisory opinion[.]”

164. Glendon, *supra* note 1, at 182.

165. See *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

From the time the Ethics Commission first promulgated a draft of what would be Regulation 5014 in October 1995 until the justices issued their advisory opinion in June 1999, there was considerable public discussion on the issues involved. But, of course, it did not matter, formally speaking, because the questions went before the justices, who should not have been influenced by the public discussion and presumably were not. The effective discussion was in the briefs and arguments of some fourteen attorneys, all addressed to the five attorneys who sat as the justices, who in turn deliberated among themselves. Nineteen attorneys were the effective participants in discussion of the issues that led to the advisory opinion on one of the century's major political controversies in Rhode Island.

VI. CONCLUSION

The public importance exemption, then, strengthens the capacity of the advisory opinion process to contract, even impoverish, public discourse even as it has skewed advisory opinion jurisprudence. The justices asserted in 1993 that they avoid issuing advisory opinions in circumstances not constitutionally mandated.¹⁶⁶ A former Rhode Island chief justice, corresponding with a chief justice in another state in 1991, was clear on this. The Rhode Island justices, he said, "only answer requests for advice if they meet the criteria set forth in our cases."¹⁶⁷ But in fact these statements have not been true since 1986. Since then the justices have waived their criteria in six out of eight advisory opinion requests that were deficient with respect to the criteria, all on public importance grounds. The result is an advisory opinion jurisprudence whose contours are elusive, ambiguous and unpredictable, and whose effect on the political process is questionable.

166. See *In re Advisory from Governor*, 633 A.2d 664, 666 (R.I. 1993).

167. See Letter from Thomas F. Fay, Rhode Island Chief Justice, to Pascal F. Calogero, Jr., Louisiana Chief Justice (May 29, 1991) (on file with author).