The Advisory Opinion in North Carolina: 1947 to 1991

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COMMENT

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Governmental structure in the United States, at both the state and national levels, is based on the interaction of three independent coordinate branches: the legislative, the executive, and the judicial branches. Each branch has the power and responsibility to preserve the integrity of this tripartite scheme through a system of checks and balances. If one branch oversteps its authority and infringes upon the powers of another, this delicate balance is jeopardized. Judicial advisory opinions present the potential for these threatening abuses of one branch's power.

An advisory opinion is issued by the highest judicial authority in the state in response to a legislative or executive request for guidance concerning the constitutionality of a proposed act. In North Carolina, the need for judicial advisory opinions generally arises after the attorney general has been consulted. The governor, as the state's chief executive, may request an advisory opinion of the attorney general concerning a matter of public importance. In his request, the governor ideally highlights the crucial issues and the conflicting legal principles that are hindering him from interpreting and executing the law. The attorney general, in consultation with her staff in the Department of Justice, then renders an

1. See U.S. Const. arts. I-III (delineating the powers of the three distinct branches of the federal government).
2. See John V. Orth, "Forever Separate and Distinct": Separation of Powers in North Carolina, 62 N.C. L. Rev. 1, 1 (1983) (stating that "[t]he principle of restraining one power with another is known as checks and balances; [along with the principle of the separation of powers] it . . . is one of the fundamental principles of American constitutionalism").
3. See id.
4. See Albert R. Ellingwood, Departmental Cooperation in State Government 253 (1918). Ellingwood was the preeminent authority on the advisory practice. He defined an advisory opinion as an opinion rendered by the highest judicial officers in the state, acting as individuals and not in a judicial capacity, in response to a request for information as to the state of the law or counsel as to the constitutionality of proposed action, coming from the legislative or executive branches of the government.
5. The North Carolina General Statutes provide that one of the duties of the Attorney General is "[t]o give, when required, his opinion upon all questions of law submitted to him by the General Assembly, or by either branch thereof, or by the Governor, Auditor, Treasurer, or any other State officer." N.C. Gen. Stat. § 114-2(5) (1987).
On rare occasions when the attorney general is unable to resolve the governor's legal difficulties, she may suggest that the governor consult the justices of the state supreme court for their individual opinions on the issue. Between 1776 and 1947, the Governor of North Carolina called upon the justices of the North Carolina Supreme Court to render advisory opinions at least sixteen times. The justices, in most instances, willingly complied. Between 1947 and 1985 the justices issued an additional six opinions. Since 1985, however, the justices have refused to issue advisory opinions, claiming that the advisory practice violates the requirement of separation of powers embodied in the state constitution.

This Comment describes the history and function of the advisory opinion in England and the United States. It identifies the basis of a court's authority to render advisory opinions, examines the national trend to limit that authority severely, and discusses the advantages and disadvantages of the practice. The Comment concludes that the era of the advisory opinion will come to a close in North Carolina in the next few years, due to the current North Carolina judiciary's heightened awareness of the separation-of-powers issues raised by the advisory opinion.

7. Id.
8. Id.
10. See Preston W. Edsall, The Advisory Opinion in North Carolina, 27 N.C. L. REV. 297, 301-29 (1949) (discussing the following advisory opinions: Advisory Opinion in re Homesteads and Exemptions [of 1869], 227 N.C. 715, 43 S.E.2d 73 (1947); Advisory Opinion in re House Bill No. 65, 227 N.C. 708, 43 S.E.2d 73 (1947); Advisory Opinion in re Legislative Subsistence and Travel Allowance, 227 N.C. 705, 41 S.E.2d 749 (1947); Advisory Opinion in re F. Donald Phillips, 226 N.C. 772, 39 S.E.2d 217 (1946); Advisory Opinion in re Yelton, 223 N.C. 845, 28 S.E.2d 567 (1944); Advisory Opinion in re Whether the Elections held on Tuesday After the First Monday in November, 1933, was the Next General Election Following the Adjournment of the 1933 Session of the General Assembly, 207 N.C. 879, 181 S.E. 557 (1934); Advisory Opinion in re Resolution of Request and Summary of McLean and Murphy Bills, 204 N.C. 806, 172 S.E. 474 (1933); Advisory Opinion in re Municipal Finance Bill, 227 N.C. 718 (1921); Advisory Opinion in re Omnibus Justice of the Peace Bill, 227 N.C. 717 (1919); Advisory Opinion in re Municipal Annexations, 227 N.C. 716 (1917); Advisory Opinion in re Leasing the North Carolina Railroad, 120 N.C. 623, 28 S.E. 18 (1897); Advisory Opinion in re Judicial Term of Office, 114 N.C. 923 (1894); Advisory Opinion in re Term of Office of the General Assembly That was Elected in April, 1868, 64 N.C. 785 (1870); Advisory Opinion in re William H. Hughes, 61 N.C. 57 (1867); Advisory Opinion in re J.G. Martin, 60 N.C. 153 (1863); and Waddell v. Berry, 31 N.C. (9 Ired.) 518 (1848)).
11. The justices declined to issue an opinion in Advisory Opinion in re Advisory Opinions, 196 N.C. 828, 829 (1929); see infra notes 69-71 and accompanying text.
12. See infra notes 72-184 and accompanying text.
13. See infra notes 185-245 and accompanying text.
I. HISTORY OF THE ADVISORY OPINION

A. In England

The practice of English judges giving "extra-judicial" opinions was pervasive in the twelfth, thirteenth and fourteenth centuries in which there was no separation of powers.\(^\text{15}\) The king, as sovereign of the state, exercised legislative, executive, and judicial functions with the aid of his advisors.\(^\text{16}\) He legislated "with the advice of the Magnum Concilium,"\(^\text{17}\) comprised of "ecclesiastics and tenants in capite,"\(^\text{18}\) and he rendered justice through the curia Regis, which included financial advisors and judges.\(^\text{19}\)

Examples of requests by English kings for the advice of their judges abound. In 1388, Richard II asked the judges to state their opinions regarding "certain acts of the last Parliament, and secured from them sealed statements that his ministers could not be impeached without his consent."\(^\text{20}\) Richard II probably procured these opinions by extortion, but no one questioned his authority to demand them.\(^\text{21}\) In 1717, George I consulted the judges concerning the care, education, and marriages of his grandchildren.\(^\text{22}\) He also requested their opinions regarding the king's authority to pardon all or part of a judgment.\(^\text{23}\)

Occasionally the king tried to procure judicial opinions prior to the time an actual case involving the source of the legal questions came before the court.\(^\text{24}\) In Stafford's Case\(^\text{25}\) in 1485, when the king asked for the judges' opinions on the day before they were to hear the case, the judges objected, insisting that they should wait and adjudicate the matter

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14. See infra notes 335-44 and accompanying text.
15. ELLINGWOOD, supra note 4, at 1.
16. Id.
17. Id. The Magnum Concilium "gathered primarily to pay homage." Id. The judges were members of the Magnum Concilium and served as advisers to the House of Lords. Id. at 2, 25.
18. Under old English law, a tenant in capite was a "tenant in chief; one who held immediatly under the king, in right of his crown and dignity." BLACK'S LAW DICTIONARY 1466 (6th ed. 1990).
19. ELLINGWOOD, supra note 4, at 1-2.
20. Id. at 7.
21. Id. at 8.
22. Id.
23. Id. at 9. The question arose in regard to Sir John Fenwick's Case. Id. 8-9.
24. Id. at 9. The monarch would attempt to procure the judges' opinions on procedural questions, the state of the law, or the "merits of the case." Id.
25. Id.
before issuing an opinion.\textsuperscript{26} Although the king abandoned his request,\textsuperscript{27} the judges clearly had sown a seed by refusing to pass judgment on a case yet to come before them.

In the seventeenth and eighteenth centuries, the judges appeared to question further the wisdom of issuing advisory opinions.\textsuperscript{28} Chief Justice Bridgman, in the 1662 case of \textit{Beckman v. Maplesden},\textsuperscript{29} noted the value of each party's ability to present its side in litigation.\textsuperscript{30} In 1711, in \textit{Whiston's Case},\textsuperscript{31} the judges explicitly reserved the right to make decisions in a manner contrary to the opinions they issued.\textsuperscript{32} In the case of Lord George Sackville\textsuperscript{33} in 1760, Lord Mansfield stressed the judges' "avers[ion] to giving extra-judicial opinions, especially where they affect a particular case" and reminded the king that the judges were not bound by "this answer."\textsuperscript{34}

In 1912, the Judicial Committee of the Privy Council announced that the issuance of advisory opinions was impermissible, unless a statute expressly granted such authority.\textsuperscript{35} In response to the declaration, Parliament passed a number of statutes permitting judicial advisory opinions.\textsuperscript{36} The Judicial Committee Act allowed the king to seek and obtain legal advice "on any point whatsoever."\textsuperscript{37} Likewise, under the Local Government Act of 1888, local executive bodies could refer certain questions to the High Court of Justice for a decision.\textsuperscript{38} The statutes effec-

\begin{itemize}
\item \textsuperscript{26} Id.
\item \textsuperscript{27} Id.
\item \textsuperscript{28} See id. at 9-16.
\item \textsuperscript{29} 124 Eng. Rep. 468 (1662).
\item \textsuperscript{30} Id. at 478. Lord Mansfield observed "a difference between cases adjudged upon debate and having counsel on both sides, and resolution upon a case reported or referred to them." Id.; see infra notes 152-53, 286-87 and accompanying text.
\item \textsuperscript{31} ELLINGWOOD, supra note 4, at 14.
\item \textsuperscript{32} Id. at 14-15.
\item \textsuperscript{33} Lord Sackville's Case, 28 Eng. Rep. 940 (1760).
\item \textsuperscript{34} Id. at 941. Advisory opinions first appeared in the United States in 1760, after \textit{Lord Sackville's Case}. ELLINGWOOD, supra note 4, at 15-16.
\item \textsuperscript{35} ELLINGWOOD, supra note 4, at 16-17.
\item \textsuperscript{36} Id. at 17-18.
\item \textsuperscript{37} Id. at 17.
\item \textsuperscript{38} Id. at 17-18. The Local Government Act of 1888 provided,

"If any question arises, or is about to arise, as to whether any business, power, duty or liability, is or is not transferred to any county council or joint committee under this Act, that question, without prejudice to any other mode of trying it, may, on the application of a chairman of quarter sessions, or of the county council, committee, or other local authority concerned, be submitted for decision to the High Court of Justice in such summary manner as, subject to any rules of Court, may be directed by the Court; and the Court, after hearing such parties and taking such evidence (if any) as it thinks just, shall decide the question."
\end{itemize}
tively nullified the finding that advisory opinions were impermissible. More significantly, the English statutes served as models for permitting the advisory practice in the United States.

B. In the United States

Unlike the English king, the President of the United States may not request advisory opinions of the federal judiciary. In 1793 when war erupted between England and France, President Washington and then Secretary of State Thomas Jefferson put twenty-nine questions to the Justices of the United States Supreme Court, requesting their advice concerning American neutrality. The Justices refused to answer on the basis that such advice to another branch of government would violate the separation of powers. Walled off from the judiciary, President Washington consulted his cabinet instead. This proved to be the first and last time a President of the United States would request that the United States Supreme Court perform a purely advisory function.

Among the states, the status of advisory opinions differs. Eight jurisdictions currently permit their courts to issue advisory opinions. Of the eight, seven explicitly authorize the advisory practice in their state constitutions. Six other states that once permitted advisory opinions

Id. at 17 n.62 (quoting 51 & 52 Vict. ch. 41, § 29 (Eng.)).
39. Id. at 17.
40. Id. at 18.

42. ELLINGWOOD, supra note 4, at 57-58. Jefferson asked the Justices, "May we, within our own ports, sell ships to both parties, prepared merely for merchandise? May they be pierced for guns?" BATOR, supra note 41, at 66.
43. ELLINGWOOD, supra note 4, at 58-59. The Justices wrote that the three departments of the government, "being in certain respects checks upon each other, and our being judges of a court in the last resort, are considerations which afford strong arguments against the propriety of our extrajudicially deciding the questions alluded to." BATOR, supra note 41, at 66.
44. ELLINGWOOD, supra note 4, at 59. The actions taken by President Washington laid the foundation for international law in the United States. Id.
46. Id. The Colorado Constitution provides that "[t]he supreme court shall give its opinion upon important questions upon solemn occasions when required by the governor, the senate, or the house of representatives; and all such opinions shall be published in connection with the reported decision of said court." COLO. CONST. art. VI, § 3.

According to the Florida Constitution,

[t]he governor may request in writing the opinion of the justices of the supreme court
without constitutional authority no longer allow the advisory practice at all.\(^\text{47}\) North Carolina is the only state in the Union today which permits advisory opinions without explicit constitutional authorization.\(^\text{48}\)

II. THE ADVISORY OPINION IN NORTH CAROLINA

Like the framers of the United States Constitution, the members of the North Carolina Constitutional Convention in 1776 carefully delegated specific authority to each of the three branches of government.\(^\text{49}\) The current state constitution retains this original structure, vesting leg-

as to the interpretation of any portion of this constitution upon any question affecting his executive powers and duties. The justices shall, subject to their rules of procedure, permit interested persons to be heard on the questions presented and shall render their written opinion not earlier than ten days from the filing and docketing of the request, unless in their judgment the delay would cause public injury.

\text{FLA. CONST. art. IV, § 1.}

The Maine Constitution provides that "[t]he Justices of the Supreme Judicial Court shall be obliged to give their opinion upon important questions of law, and upon solemn occasions, when required by the Governor, Senate or House of Representatives." \text{ME. CONST. art. 6, § 3.}

The Massachusetts Constitution provides that "[e]ach branch of the legislature, as well as the governor or the council, shall have authority to require the opinions of the justices of the supreme judicial court, upon important questions of law, and upon solemn occasions." \text{MASS. CONST. art. II, § 8.} The Massachusetts Constitution of 1780 expressly provided for advisory opinions. \text{ELLINGWOOD, supra note 4, at 30.} In 1820 and again in 1853, however, various members of succeeding Massachusetts constitutional conventions proposed amendments repealing the advisory opinion clause. \text{Id. at 35, 37.} The proposals met defeat both times. \text{Id. at 35-38; see infra note 329 and accompanying text.} Despite these results, it is not certain whether the proposed repeals of the clause or other amendments with which they were coupled received the negative votes. \text{ELLINGWOOD, supra note 4, at 36, 38.}

New Hampshire's constitution provides that "[e]ach branch of the legislature as well as the governor and council shall have authority to require the opinions of the justices of the supreme court upon important questions of law and upon solemn occasions." \text{N.H. CONST. pt. 2, art. 74.}

The Rhode Island Constitution provides that "[t]he 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." \text{R.I. CONST. art. X, § 3.}

The South Dakota Constitution provides that "[t]he Governor has authority to require opinions of the Supreme Court upon important questions of law involved in the exercise of his executive power and upon solemn occasions." \text{S.D. CONST. art. V, § 5.}

47. They are Connecticut, Kentucky, Nebraska, New York, Oklahoma, and Pennsylvania. \text{ELLINGWOOD, supra note 4, at 65-78.} The Connecticut judges issued their last advisory opinion in 1867. \text{Id. at 72.} The Kentucky judges issued only one advisory opinion, in 1881. \text{Id. at 73.} The Nebraska judges issued advisory opinions between 1883 and 1894. \text{Id. at 74-76; see Edsall, supra note 10, at 298 n.3.} Unlike these states, North Carolina has issued more than twenty-one advisory opinions since 1848 and currently permits the advisory practice. \text{See supra note 10; infra notes 57-184 and accompanying text.}

48. \text{Edsall, supra note 10, at 299 n.4 and accompanying text.}

49. \text{See N.C. CONST. of 1776, Declaration of Rights, § 4.} For instance, the Mecklenburg County delegates to the North Carolina Provincial Congress were instructed
is legislative power in the general assembly,\textsuperscript{50} executive power in the governor,\textsuperscript{51} and judicial power in a General Court of Justice.\textsuperscript{52} The members of the state convention also specifically addressed the separation-of-powers issue, providing that "[t]he legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other."\textsuperscript{53} This language remains in the state constitution. No such explicit provision appears in the Federal Constitution.\textsuperscript{54}

Despite the constitutional convention's efforts to isolate the three

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That you shall endeavor that the Government shall be so formed that the derived inferior power shall be divided into three branches distinct from each other, viz:

- The power of making laws
- The power of executing laws and
- The power of Judging.


50. See N.C. \textit{Const.} of 1970, art. II, § 1 (providing that "[t]he legislative power of the State shall be vested in the General Assembly, which shall consist of a Senate and a House of Representatives"). Concerning the power of the General Assembly, North Carolina's constitution provides that each house shall be judge of the qualifications and elections of its own members, shall sit upon its own adjournment from day to day, and shall prepare bills to be enacted into laws. The two houses may jointly adjourn to any future day or other place. Either house may, of its own motion, adjourn for a period not in excess of three days.

\textit{Id.} § 20.

51. See \textit{id.} art. III, § 1.

52. See \textit{id.} art. IV, § 1. Extending specific protection to the judiciary, the North Carolina Constitution provides that the judicial power of the State shall, except as provided in Section 3 [concerning the judicial powers of administrative agencies] of this Article, be vested in a Court for the Trial of Impeachments and in a General Court of Justice. The General Assembly shall have no power to deprive the judicial department of any power or jurisdiction that rightfully pertains to it as a co-ordinate department of the government, nor shall it establish or authorize any courts other than as permitted by this Article.

\textit{Id.}

53. \textit{Id.} art. I, § 6. For a discussion of the history of the principle of the separation of powers under the state and federal constitutions, see Orth, \textit{supra} note 2, at 3-6.

54. See \textit{supra} notes 1 and 53 and accompanying text. Professor Orth points out that the separation of powers is not absolute under either the state or Federal Constitution. Orth, \textit{supra} note 2, at 1-17. He notes that although the North Carolina Constitution of 1776 contained an explicit separation-of-powers provision, it also provided that the general assembly could elect the "Governor, the members of the Council of State, the Attorney General, the State Treasurer, the State Secretary, and all the judges." \textit{Id.} at 5-6. These provisions remained in effect for over 100 years, until the revision of the constitution in 1868. \textit{Id.} at 6. Orth points out that the Supreme Court has declared that the separation of powers, implicit in the federal constitution, is not "'airtight.'" \textit{Id.} at 16 (quoting Nixon v. Adviser of Gen. Services, 433 U.S. 425, 443 (1976)). In \textit{Nixon v. Administrator of General Services}, the Court held that the legislature could infringe upon the executive branch if the "impact is justified by an overriding need to promote objectives within the constitutional authority of Congress." 433 U.S. at 443.
branches of government from one another, North Carolina's judiciary throughout history has rendered advisory opinions at the request of the executive branch. The North Carolina Supreme Court has grounded its authority to render the opinions in the state constitutional provision granting it "jurisdiction to review upon appeal any decision of the courts below, upon any matter of law or legal inference." The court's advisory practice has not gone undisputed, however; legislators and judges alike have contested the constitutionality of this practice ever since its inception in 1848. In order to illuminate the controversy surrounding the granting of advisory opinions in North Carolina, a brief overview of the earlier advisory opinions follows along with an in-depth review of the more recent advisory opinions and requests for advisory opinions.

A. Before 1947

Preston W. Edsall's 1949 article, *The Advisory Opinion in North Carolina,* serves as the authoritative commentary on advisory opinions issued by the North Carolina Supreme Court prior to 1947. Edsall noted that the common thread running through the early advisory opinions was the justices' concern with defining the parameters of their authority to issue such opinions. In its first advisory opinion, *Waddell v. Berry,* the court set forth the rules it would follow in issuing advisory opinions. The *Waddell* court noted that in rendering an advisory opinion the judges must act individually, not as a body; they must act voluntarily, not in response to a legal obligation; and they may act only if the "nature of the question" deems it appropriate. Subsequent advisory opinions

55. N.C. CONST. of 1970, art. IV, § 12. The state constitution further provides that [t]he jurisdiction of the Supreme Court over "issues of fact" and "questions of fact" shall be the same exercised by it prior to the adoption of this Article, and the Court may issue any remedial writs necessary to give it general supervision and control over the proceedings of the other courts.

56. See Edsall, supra note 10, at 327-43.
57. Id.
58. See id. at 299; see infra notes 235-45 and accompanying text (discussing the rules currently followed in issuing advisory opinions).
59. 31 N.C. (9 Ired.) 518 (1848).
60. Id. at 518.
61. In *Waddell,* Chief Justice Thomas Ruffin explained the judges' view of their role in advising the legislature:

Although not strictly an act of official obligation, which could not be declined, yet from the nature of the questions and the purposes to which the answers are to be applied—being somewhat of a judicial character—the Judges have deemed it a duty of courtesy and respect to the Senate to consider the points submitted to them and to give their opinions thereon.
employed these basic guidelines. According to Advisory Opinion in re Homesteads and Exemptions in 1869, the justices could not "prejudge questions of law" or give advice regarding questions that might come before them. 62 The judges could answer only questions of "manifest necessity." 63 Although they could not answer political questions, the judges were permitted to answer legal questions. 64 Finally, no judge could render an opinion regarding an issue with which he was personally involved. 65 Thus, before 1947, the substance of advisory opinions in North Carolina dealt largely with defining the scope of the judiciary's authority to render such opinions.

Various members of the legislature and courts challenged the advisory practice in the first fifty years of its existence in North Carolina. In 1897, when the North Carolina House of Representatives sought the opinions of the North Carolina Supreme Court justices concerning the validity of a railroad lease, one representative protested that the justices lacked authority to give such advice. 66 He asserted that "the [s]upreme [c]ourt had no business in this matter, save to construe a law after its enactment; that there are three coordinate branches of the government, each in its own place." 67 Unmoved by the objection, the justices readily answered the legislature's question. 68 In 1929, however, while retaining the advisory practice, the supreme court modified the manner in which advisory opinions could be issued. 69 Refusing to render an advisory opinion as a court, the court stated that a question could be addressed to the justices individually. 70 Having thus changed the form of the advisory practice, the judges continued to render advisory opinions during the first half of the twentieth century. 71

62. Advisory Opinion in re Homesteads and Exemptions, 227 N.C. 715, 715-16 (1869). Although issued in 1869, the Homesteads opinion was not published until 1947.
63. Edsall, supra note 10, at 305 (quoting Associate Justice Rodman in Advisory Opinion in re Term of Office of the General Assembly that was Elected in April, 1868, 64 N.C. 785, 794 (1870)); see infra note 88 and accompanying text.
64. Edsall, supra note 10, at 305 (quoting Associate Justice Rodman in Term of Office, 64 N.C. at 794).
65. Id. at 311-12; see Advisory Opinion in re Judicial Term of Office, 114 N.C. 923, 924 (1894) (Chief Justice Shepherd and Associate Justices Avery and Burwell, abstaining).
66. See Edsall, supra note 10, at 313. The opinion was Advisory Opinion in re Leasing the North Carolina Railroad, 120 N.C. 623, 28 S.E. 18 (1897).
68. See Leasing the North Carolina Railroad, 120 N.C. at 623-24; Edsall, supra note 10, at 314.
69. See Advisory Opinion in re Advisory Opinions, 196 N.C. 828, 829 (1929).
70. Id.
71. See Edsall, supra note 10, at 319-29.
B. After 1947

The justices of the North Carolina Supreme Court have issued six advisory opinions since 1947, concerning a number of procedural and political issues that have yielded a variety of responses from the justices. The arbitrariness of these responses explains the justices' recent reluctance to issue advisory opinions.\(^7\)

Filling a vacancy in 1950. Upon the death of Associate Justice Seawell on October 14, 1950, Governor W. Kerr Scott was responsible for appointing a new justice to fill the vacant seat on the North Carolina Supreme Court.\(^7\) Governor Scott was uncertain how long the new justice would be able to serve before he would be forced to seek election to the supreme court.\(^7\) The answer to this question was important, for if an election were needed in the next month, the Governor had to inform the State Board of Elections so it could prepare for the election by printing and distributing ballots.\(^7\) The Governor also had to inform the major political parties so that they could nominate candidates for the position.\(^7\) Under these pressures, the Governor wrote the Attorney General for advice concerning the course of action he should take.\(^7\)

Attorney General Harry McMullan wrote Governor Scott that after considering the state constitution,\(^7\) the North Carolina General Stat-

\(^7\). See infra notes 275-88 and accompanying text.

\(^7\). Advisory Opinion in re Time of Election to Fill Vacancy in Office of Associate Justice of the Supreme Court of North Carolina, 232 N.C. 737, 737, 61 S.E.2d 529, 531 (1950).

\(^7\). Id. Specifically, the Governor did not know whether the appointee would hold the position until the next general election, to be held in less than a month, or whether the appointee would hold the judgeship until the succeeding general election in 1952. Id.

\(^7\). Id.

\(^7\). Id. at 737-38, 61 S.E.2d at 531.

\(^7\). Id. at 738, 61 S.E.2d at 531.

\(^7\). Id. Article IV, Section 25 of the North Carolina Constitution provided that

\[\text{[a]ll vacancies occurring in the offices provided for by this Article of the Constitution shall be filled by the appointments of the Governor, unless otherwise provided for, and the appointees shall hold their places until the next regular election for members of the General Assembly, when elections shall be held to fill such offices. If any person, elected or appointed to any of said offices, shall neglect or [sic] fail to qualify, such office shall be appointed to, held and filled as provided in case of vacancies occurring therein. All incumbents of said offices shall hold until their successors are qualified.}\]

N.C. CONST. of 1868, art. IV, § 25 (1875), quoted in Time of Election to Fill Vacancy, 232 N.C. at 739, 61 S.E.2d at 529.

Attorney General McMullan noted that in 1875 the state constitutional convention had added the phrase "for members of the General Assembly" to prevent the result reached in Cloud v. Wilson, 72 N.C. 155 (1875). Time of Election to Fill Vacancy, 232 N.C. at 739-40, 61 S.E.2d at 530. Under the result in Cloud, a supreme court appointee potentially could hold
utes,79 and applicable case law in North Carolina,80 "I am unable to furnish you with any opinion upon which you could safely rely."81 He then suggested that the Governor request an advisory opinion from the jus-

office for as long as eight years before being faced with an election. See id. at 740, 61 S.E.2d at 530.

In addition to § 25 of Article IV, Attorney General McMullan quoted Article III, § 13 of the North Carolina Constitution, which provided that

[1]he respective duties of the Secretary of State, Auditor, Treasurer, Superintendent of Public Instruction and Attorney-General shall be prescribed by law. If the office of any of said officers shall be vacated by death, resignation or otherwise, it shall be the duty of the Governor to appoint another until the disability be removed or his successor be elected and qualified. Every such vacancy shall be filled by election at the first general election that occurs more than thirty days after the vacancy has taken place, and the person chosen shall hold the office for the remainder of the unexpired term fixed in the first section of this Article.

N.C. CONST. of 1868, art. III, § 13 (1873); see Time of Election to Fill Vacancy, 232 N.C. at 739, 61 S.E.2d at 529-30. The Attorney General apparently referred to this constitutional provision by analogy; it involves the Governor's power to make appointments to fill vacancies in certain offices and the length of the term the appointee may serve, although it does not involve the office of associate justice of the North Carolina Supreme Court.

79. The Attorney General quoted Section 163-7 of the North Carolina General Statutes, see Time of Election to Fill Vacancy, 232 N.C. at 740, 61 S.E.2d at 530, which in 1950 provided in part that

[w]henever any vacancies shall exist by reason of death, resignation, or otherwise, in any of the following offices, . . . justices of the supreme court, . . . the same shall be filled by elections, to be held in the manner and places and under the same regulations and rules as prescribed for general elections, at the next regular election for members of the general assembly which shall occur more than thirty days after such vacancy, except as otherwise provided for in the constitution.

N.C. GEN. STAT. § 163-7 (1943) (repealed 1967).

Attorney General McMullan also referred to § 7-48 of the North Carolina General Statutes, which, at the time of the opinion, provided that

[all] vacancies occurring by death, resignation or otherwise in the offices of justice of the supreme or judge of the superior court of the state shall be filled for the unexpired term at the next general election for members of the general assembly held after such vacancy is created. The persons elected at such election shall be commissioned by the governor immediately after the ascertainment of the result in the manner provided by law, and shall qualify and enter upon the discharge of the duties of the office within ten days after receiving such commission.


80. The Attorney General found no precedent to aid him. The closest case was that of Rodwell v. Rowland, 137 N.C. 617, 50 S.E. 319 (1905); see also Time of Election to Fill Vacancy, 232 N.C. at 741, 61 S.E.2d at 531 (citing Rodwell but finding it inapplicable in the case involving the election on educational amendments). In Rodwell, the court addressed the issue of filling a vacancy in the office of the Clerk of the Superior Court. Rodwell, 137 N.C. at 619, 50 S.E. at 320. The court held that an appointee to a vacancy does not hold office for a full term if a regular election intervenes between the occurrence of the vacancy and the expiration of the term, unless the appointee is duly elected. Id. at 635-36, 50 S.E. at 322-23.

81. Time of Election to Fill Vacancy, 232 N.C. at 739, 61 S.E.2d at 529.
Taking Attorney General McMullan's advice, Governor Scott wrote the justices, posing his question about the proper construction of Section 25 of Article IV of the North Carolina Constitution. The justices replied that the answer to the Governor's question was "clear and unambiguous": an election should be held on November 7, 1950. Writing separately, Associate Justice Barnhill reminded the Governor and the court that the practice of issuing advisory opinions should be sparing, "interpose[d] . . . only in the event of an emergency gravely affecting the public interest." No such emergency, he argued, was present in construing the constitutional provision. Because the Attorney General was "reluctant to give . . . an unqualified answer, but, instead, advise[d the governor] to seek an opinion from [the supreme court]," and because the Governor had to act expediently and needed "competent legal advice" to do so, however, Justice Barnhill felt "constrained to join [his] associates in complying with [the] request."

**Holding an election to consider educational amendments.** In April 1956, the Advisory Committee on Education drafted several proposed amendments to the North Carolina Constitution addressing the problem of education in the state. The advisory committee requested that Governor Luther H. Hodges call a special session of the General Assembly to

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82. Id. at 741-42, 61 S.E.2d at 531.
83. Id. at 737-38, 61 S.E.2d at 531-32.
84. Id. at 742, 61 S.E.2d at 532.
85. Id. Associate Justices Devin, Winborne, Denny, and Ervin signed an opinion written by Chief Justice Stacy. Id.
86. Justice Barnhill noted that "[f]rom a legal standpoint the question . . . pose[d] presents no difficulty," and "[t]he language of [N.C. CONST. art. IV, § 25] is so clear and unambiguous it does not require interpretation." Id. at 743, 61 S.E.2d at 532-33 (Barnhill, J).
87. Id. at 743, 61 S.E.2d at 532 (Barnhill, J).
88. Id. (Barnhill, J); see infra note 243 and accompanying text.
89. Time of Election to Fill Vacancy, 232 N.C. at 743, 61 S.E.2d at 532 (Barnhill, J).
90. Id. (Barnhill, J).
91. Id. (Barnhill, J).
92. Id. (Barnhill, J).
93. The Advisory Committee on Education was created by legislative resolution to examine race relations in the North Carolina public school system, particularly the "problems growing out of the segregation decisions of the United States Supreme Court." NORTH CAROLINA ADVISORY COMMITTEE ON EDUCATION, JULY 23RD REPORT TO THE GOVERNOR AND GENERAL ASSEMBLY 2 (1956); see also NORTH CAROLINA ADVISORY COMMITTEE ON EDUCATION, APRIL 5TH REPORT TO THE GOVERNOR, GENERAL ASSEMBLY, ET AL. 3 (1956) (stating that the obligation of the Advisory Committee on Education was to study "the educational problem as affected by race").
94. Advisory Opinion in re General Election, 244 N.C. 748, 748, 93 S.E.2d 853, 853 (1956).
authorize an election to ratify the proposed amendments.\textsuperscript{95} Because the Governor did not want the educational amendments to be involved "in any manner" in "partisan politics,"\textsuperscript{96} he recommended that the election occur at a time when no constitutional officers were up for election, so that the people would be voting only on the proposed amendments.\textsuperscript{97}

In making his recommendation, Governor Hodges recognized that the North Carolina Constitution requires the general assembly to submit any amendments "at the next general election."\textsuperscript{98} He also realized that a "general election" as commonly understood occurs each November.\textsuperscript{99} Because the state constitution did not define "general election," however, the Governor wrote Attorney General William B. Rodman, Jr., for advice as to whether the special election, held prior to November, would constitute a general election within the meaning of the state constitution.\textsuperscript{100}

Attorney General Rodman replied that he considered the special election to be a "general election."\textsuperscript{101} Apparently unconvinced, the Governor then consulted the justices of the North Carolina Supreme Court.\textsuperscript{102} The justices, each signing the advisory opinion, agreed with

\textsuperscript{95} Id.
\textsuperscript{96} Id.
\textsuperscript{97} Id.
\textsuperscript{98} Id.; see N.C. CONST. of 1868, art. XIII (1875) (revised in N.C. CONST. of 1970, art. XIII). Article XIII consisted of two sections at the time of the 1956 advisory opinion. Section 1 provided that

\begin{quote}
[n]o convention of the people of this State shall ever be called by the General Assembly unless by the concurrence of two-thirds of all the members of each house of the General Assembly, and except the proposition, convention or no convention, be first submitted to the qualified voters of the whole State, at the next general election, in a manner to be prescribed by law. And should a majority of the votes cast be in favor of said convention, it shall assemble on such day as may be prescribed by the General Assembly.
\end{quote}

\textit{Id.} § 1. Section 2 provided that

\begin{quote}
[n]o part of the Constitution of this State shall be altered unless a bill to alter the same shall have been agreed to by three-fifths of each house of the General Assembly. And the amendment or amendments so agreed to shall be submitted at the next general election to the qualified voters of the whole State, in such manner as may be prescribed by law. And in the event of their adoption by a majority of the votes cast, such amendment or amendments shall become a part of the Constitution of this State.
\end{quote}

\textit{Id.} § 2.

\textsuperscript{99} General Election, 244 N.C. at 748, 93 S.E.2d at 854.
\textsuperscript{100} Id. Appointed by Governor Hodges in 1955, Attorney General Rodman served in that office until August 1956, when he was appointed to the North Carolina Supreme Court. \textbf{RUFUS L. EDMISTEN, SECRETARY OF STATE, NORTH CAROLINA MANUAL 1989-1990} (Jon L. Cheney, Jr. ed.).
\textsuperscript{101} General Election, 244 N.C. at 748, 93 S.E.2d at 854.
\textsuperscript{102} Id. at 748-49, 93 S.E.2d at 854. Governor Hodges posed the following question:
the Attorney General: the special election would constitute a general election, if it complied with the "general election laws." The justices cited two previous advisory opinions as authority for their opinion.

**Holding a bond election in 1961.** In 1961, the North Carolina General Assembly ratified the “Capital Improvement Bond Election Bill.” The bill provided that qualified voters of North Carolina were to vote on whether the state should issue a certain bond, and the Governor was to set a date for the election. If any other bonds were up for election at the same time as the Capital Improvement Bond, the governor was to schedule the election involving all the bonds on the same day. Finally, the bill provided that the election would be conducted according to the general laws of North Carolina with the exception that no absentee ballots would be permitted.

At the same time it ratified the “Capital Improvement Board Election Bill,” the General Assembly ratified six other acts. Under the terms of the acts, the people of North Carolina were to consider six amendments “at the next general election.” After Governor Terry Sanford slated the bond election for November 1961, a question arose as to whether the bond election was to be treated as a general election. If it were a general election, the elections involving the six acts and the

May the General Assembly, at its special session to be held in July, provide for the holding, prior to November, of a Statewide election, so as to meet the constitutional requirements of a general election, when the only questions which may be submitted to the electorate on the day designated for the election are the ratification or rejection of:

(a) Constitutional amendments proposed by Chapters 1169, 1245, and 1253 of the 1955 Session of the General Assembly, and
(b) Such constitutional amendment or amendments as may be duly proposed at the special session of the General Assembly.

Id. at 749, 93 S.E.2d at 854.

103. Id. at 749-50, 93 S.E.2d at 854. The justices who participated in the opinion were Chief Justice Barnhill and Associate Justices Winborne, Denny, Johnson, Parker, Bobbitt, and Higgins. Id. at 750, 93 S.E.2d at 854.

104. Id.; see also Advisory Opinion in re Opinions of the Justices, 207 N.C. 879, 880, 181 S.E. 557, 557 (1934) (addressing “whether the election held on Tuesday after the first Monday in November, 1933,. . . [was] the ‘next general election’ following the adjournment of the 1933 session of the General Assembly”); Advisory Opinion in re Opinions of the Justices, 204 N.C. 806, 808-09, 172 S.E. 474, 476 (1933) (regarding calling a convention to vote on a proposed amendment).


106. Id.

107. Id. at 747, 127 S.E.2d at 1-2.

108. Id. at 747, 127 S.E.2d at 2.

109. Id. at 747-48, 127 S.E.2d at 2.

110. Id. at 748, 127 S.E.2d at 2.

111. Id.
Capital Improvement Bond would be held on the same day, at the next general election in November 1962. The Governor thus would not be able to hold the special bond election in 1961.

Unable to resolve the dispute regarding the dates, Governor Sanford requested advice from Attorney General Wade Bruton, who replied that he did not think that the bond election was a general election. Reporting that the attorney general "ha[d] advised [him] that the question is not altogether free from doubt," Governor Sanford wrote to the justices of the state supreme court, asking for their opinions regarding the matter.

Examining the language of the bill and acts, the justices found that the Governor properly could call the bond election for November 1961. The justices noted that, under the terms of the acts, the six amendments were to be submitted "at the next general election to the qualified voters . . . under the same rules and regulations governing general elections in this State." The rules governing elections in North Carolina permit the use of absentee ballots, but the terms of the bond bill explicitly prohibited their use. The justices concluded that the drafters did not intend for the vote on the bond issue to occur at a general election. Thus, the two elections could not be held on the same day.

Prisoners on Work Release. In 1966, Attorney General Wade Bruton issued an opinion in which he asserted that no difference existed between "farming out" prisoners for hire and permitting prisoners to participate in a "work release" program. Both practices, he found,

112. *Id.* at 749, 127 S.E.2d at 2.
113. *Id.* at 748, 127 S.E.2d at 2.
114. *Id.*
115. Governor Sanford posed his question as follows:
   Would a bond election called pursuant to Chapter 1037 of the 1961 Session Laws meet the constitutional requirements of a general election, so as to require the constitutional amendments proposed by Chapter[s] 313, 459, 466, 591, 840 and 1169 of the 1961 Session Laws [to] be submitted to the qualified voters of the State?
*Id.*
116. *Id.* at 750, 127 S.E.2d at 3. The following Associate Justices joined Chief Justice Winborne in the advisory opinion: Denny, Parker, Bobbitt, Higgins, Rodman, and Moore. *Id.*
117. *Id.*
118. *Id.*; see N.C. GEN. STAT. §§ 163-53 to -69 (1952) (current version at N.C. GEN. STAT. §§ 163-226 to -239 (1991)).
120. *Id.*
121. *See id.*
were illegal if they involved prisoners who had been sentenced on a
"charge of Murder, Manslaughter, Rape, Attempt to Commit Rape, or
Arson." As a result of the Attorney General's opinion, the North
Carolina Board of Paroles withdrew the work release privileges of 136
prisoners who did not qualify for "farming out" under the state consti-
tution, but who had previously qualified for the work release program
under a state statute.

Governor Dan K. Moore recognized the multiple advantages of the
work release program, noting society's strong interest in rehabilitating
prisoners who had been charged with the offenses which disqualified
them from being "farmed out." Seeking to find a way to continue the
program, he requested a judicial advisory opinion concerning the Attor-
ney General's interpretation of the statute. The Governor pointed out
to the justices that neither the Attorney General's opinion nor the Board
of Paroles' letter withdrawing the prisoners' privileges mentioned the
amendment to the state constitution that authorized the general assembly

123. Id. at 727, 152 S.E.2d at 225; see N.C. CONST. art. XI, § 1 (1875); N.C. GEN. STAT.

based his opinion on a provision of the North Carolina Constitution, which permitted the state
prison department to "farm out" all prisoners except those who have been sentenced on a
"charge of murder, manslaughter, rape, attempt to commit rape, or arson." N.C. CONST. art.
XI, § 1 (1875). As originally intended, the purpose of the "farming out" provision was to
provide industry with cheap labor and save taxpayers the cost of boarding prisoners who did
not pose a threat to life. See Work Release Statute, 268 N.C. at 727-28, 152 S.E.2d at 225. In
light of the state constitutional provision, the Attorney General advised the chairman of the
Board of Paroles that § 148-33.1 of the North Carolina General Statutes likewise prohibited
the Board of Paroles from granting work release privileges to prisoners charged with the same
life-threatening offenses. Id.; see N.C. GEN. STAT. § 148-33.1 (1963) and infra note 131.

125. The work release program enabled prisoners to "work at regular jobs, receive wages
comparable to those received by free men performing similar work, pay taxes on their earn-
ings, pay the cost of their prison keep, contribute to the support of their dependents, and
accumulate savings to be paid to them upon their discharge." N.C. GEN. STAT. § 148-33.1(f)
(1963); see Work Release Statute, 268 N.C. at 730-31, 152 S.E.2d at 227. The court noted that
one effect of withdrawing the work release privileges was to put these prisoners "back behind
bars" and make them a "burden" on North Carolina taxpayers. Work Release Statute, 268
N.C. at 727-28, 152 S.E.2d at 225. Further, withdrawing the privileges denied employers a
"highly-valued" labor force. Id. at 728, 152 S.E.2d at 225. Finally, it handicapped the prison-
ers, since they could not reap the benefits of being slowly incorporated back into society. Id.
Released suddenly, the prisoners had little opportunity for rehabilitation. Id.


127. Id. Governor Moore posed his question to the court as follows:

Does the provision of Article XI, Section 1, of the Constitution of North Carolina,
prohibiting the farming out of prisoners sentenced on charges of Murder, Man-
slaughter, Rape, Attempt to Commit Rape, or Arson, prohibit such prisoners from
participation in the Work Release Program authorized by G.S. 148-33.1?

Id.
to create the Board of Paroles and to prescribe rules for the Board.\textsuperscript{128} The Governor felt that the amendment empowered the general assembly to enact the statute which permitted prisoners convicted of the life-threatening charges to participate in the work release program.\textsuperscript{129}

Six of seven justices agreed with Governor Moore, finding that the prisoners could participate in the work release program despite the prohibition against their being “farmed out.”\textsuperscript{130} Reviewing the history and purpose of both programs, the justices found, on the one hand, that the purpose of “farthing out” prisoners was to provide industry with cheap labor and to save taxpayers the cost of boarding prisoners who did not pose a threat to life.\textsuperscript{131} The primary aim of the work release program, on

\textsuperscript{128} Id.; see N.C. CONST. art. III, § 6 (amended 1953).

\textsuperscript{129} Work Release Statute, 268 N.C. at 728, 152 S.E.2d at 226.

\textsuperscript{130} Id. at 731, 152 S.E.2d at 228. The six justices were Chief Justice Parker and Associate Justices Bobbitt, Higgins, Sharp, Pless, and Branch. Id. The seventh justice, who did not agree with the Governor, was Associate Justice Lake. Id. at 735, 152 S.E.2d at 229. For a discussion of Justice Lake’s separate opinion, see infra notes 134-37 and accompanying text.

\textsuperscript{131} Work Release Statute, 268 N.C. at 730, 152 S.E.2d at 227. The six justices noted that, under Article XI, Section I of the North Carolina Constitution of 1868, prisoners were subject to “imprisonment with or without hard labor.” Id. at 729, 152 S.E.2d at 227 (quoting N.C. CONST. of 1868, art. XI, § 1). They noted that the General Assembly in 1872 passed legislation permitting the “farthing out” of convicts to railroads and other public corporations. Id. at 729, 152 S.E.2d at 226. This legislation provided that, in exchange for supplying the prisoners with food and clothes, the railroad or corporation could utilize the prisoners if it implemented certain safeguards. Id. at 729, 152 S.E. 2d at 226-27. In particular, the hiring party had to “provide a good and sufficient guard to prevent the escape of such convicts, . . . give bond for their safe keeping and proper treatment, . . . and return [them] to the penitentiary on the termination of the contract.” Id. (quoting Public Laws 1871-72 CCII). The prisoners received no pay. Id. at 730, 152 S.E.2d at 227. Finally, the legislation excluded from its coverage prisoners who had been sentenced on a “charge of murder, manslaughter, rape, attempt to commit rape, or arson.” Id.

In 1875, the members of the North Carolina Constitutional Convention incorporated the “farthing out” legislation into the state constitution. See N.C. CONST. art. XI, § 1 (amended 1875), cited in Work Release Statute, 268 N.C. at 729-30, 152 S.E.2d at 227. By adding this provision, the state constitutionalized its relinquishment of control over the convicts involved in the “farthing out” program. Work Release Statute, 268 N.C. at 730, 152 S.E.2d at 227. The state also confirmed its decision not to rehabilitate the convicts. Id.

In 1957, the General Assembly authorized the Board of Paroles to permit prisoners to participate in a work release program. See N.C. GEN. STAT. § 148-33.1 (1963). Unlike the farming-out procedure, the work release program left the state in strict control of the prisoners. Work Release Statute, 268 N.C. at 730-31, 152 S.E.2d at 227-28. The convicts worked alongside people who were free, see N.C. GEN. STAT. § 148-33.1(f) (1963), but they had to “return to quarters designated by the prison authorities” upon completing the day’s assigned work. Id. § 148-33.1(d) (1963). They had to pay taxes to the government as well as rent and the costs of their upkeep. Id. § 148-33.1(f). Often the convicts had to forward the money they earned to their families, whom they supported. Id.; see Work Release Statute, 268 N.C. at 730, 152 S.E.2d at 227. In contrast to the “farthing out” program, the work release program’s primary aim was to “prepare” the prisoners to “return” to freedom. Id. at 731, 152 S.E.2d at 227-28.
the other hand, was to rehabilitate the prisoners for re-entry into society. In light of the "fundamental[ly] differen[t]" goals of the two programs, one to benefit society, the other to benefit the prisoners, the six justices concluded that the General Assembly could enact the statute permitting convicts who could not be "farmed out" to participate in the work release program.

Associate Justice Lake disagreed with the other six justices. Writing separately, Justice Lake emphasized that the justices were to evaluate the work release program in light of the state constitution, not social policy. They were only to give their opinions as to the "meaning of the provision, not its wisdom." Considering the original language and intent of the 1868 North Carolina Constitution, Justice Lake agreed with Attorney General Bruton that the Governor should deny work release privileges to prisoners sentenced on a charge of murder, manslaughter, rape, attempt to commit rape, or arson.

In response to Justice Lake's objection, the six other justices carefully noted that their opinion addressed only the "constitutional question" before them and not "[p]olicy considerations." The justices realized that they would exceed the bounds of their judicial power and infringe upon the legislative branch if they evaluated the legislative policy itself. The seven justices all disagreed about how to define the boundaries of judicial authority, a dispute they would have to resolve in future opinions.

The Sales-Tax Election of 1969. In 1969, the General Assembly passed an act authorizing each county in North Carolina to hold special elections to consider whether to impose a one percent sales-and-use tax on certain transactions. The General Assembly also enacted other

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132. Work Release Statute, 268 N.C. at 731, 152 S.E.2d at 227-28; see supra note 131.

133. Work Release Statute, 268 N.C. at 731, 152 S.E.2d at 228.

134. Id. at 731-33, 152 S.E.2d at 228-29 (Lake, J.).

135. Id. at 732, 152 S.E.2d at 228 (Lake, J.).

136. Id. at 732, 152 S.E.2d at 229 (Lake, J.).

137. Id. at 732, 152 S.E.2d at 228 (Lake, J.). Justice Lake stated that the purpose behind the provision prohibiting the "farming out" of convicts who have been sentenced for certain crimes was to protect the public, since such convicts could escape. Id. (Lake, J.) Justice Lake pointed out that the "possibility of escape" was no less in the work release program than it was in the farming out program. Id. (Lake, J.) Indeed, in both programs the prisoner, "during working hours, is outside the confines of the prison and is not under prison guard." Id. (Lake, J.) Thus, the principal concern in evaluating either program should lie in protecting the public. Id. (Lake, J.)

138. Id. at 731, 152 S.E.2d at 228.

139. Id.

measures permitting North Carolina voters to vote upon several constitutional amendments at the next general election.\textsuperscript{141} The question Governor Robert W. Scott confronted as a result of the passage of these measures was whether the sales tax election constituted a general election or a special election.\textsuperscript{142} If it were a general election, the people would vote on the sales tax along with the six constitutional amendments at the next general election, to be held in November 1970.\textsuperscript{143} If it were a special election, the people would vote only on the sales tax at a special election on November 4, 1969.\textsuperscript{144}

Unable to determine from the state constitution which was the proper date for the election, Governor Scott consulted Attorney General Robert Morgan.\textsuperscript{145} Reviewing the sales and use statute and each of the six amendments, Morgan concluded that the sales tax election was not a general election.\textsuperscript{146} He expressed "some doubt about the matter," however, and suggested that the Governor write the supreme court justices for an advisory opinion, noting that "ample legal precedent" existed for such consultations.\textsuperscript{147}

Governor Scott did make the request;\textsuperscript{148} five of seven justices re-


\begin{quote}
The amendment set out in Section 1 of this Act (or Sections 1 and 2 of this Act, as the case may be) shall be submitted to the qualified voters of the State at the next general election. That election shall be conducted under the laws then governing elections in this State.
\end{quote}

\textit{Id.} at 686, 169 S.E.2d at 699.

\textsuperscript{142} \textit{Sales-Tax Election of 1969}, 275 N.C at 684, 169 S.E.2d at 697-98.

\textsuperscript{143} \textit{Id.}

\textsuperscript{144} \textit{Id.}

\textsuperscript{145} \textit{Id.} at 683-84, 169 S.E.2d at 697-98; see N.C. CONST. of 1868, art. XIII, § 2 (1875); supra note 98.


\textsuperscript{147} \textit{Id.} at 687, 169 S.E.2d at 699.

\textsuperscript{148} Governor Scott posed the question as follows:

Is the sales tax election to be held in each county on November 1969, under the
sponded that it was not a general election. In a brief paragraph the five justices stated only that "after careful consideration and study," they had concluded, "each for himself and herself," that the sales-tax election was not a general election.

Associate Justices Higgins and Lake refused to answer Governor Scott's question. They claimed that they could not express an opinion prior to litigation without prejudice to the parties:

It is our opinion that we, as Associate Justices of the Supreme Court of North Carolina, should not express our views concerning the law of the State governing any specific issue until that issue is presented to the Court for decision in an appropriate judicial proceeding between adversary parties to a justiciable controversy. Otherwise, as justices, when subsequently called upon to determine the same issue in such a proceeding, we may find ourselves embarrassed by an advisory opinion given without the benefit of argument and briefs. In that event, the litigant who takes a contrary view of the law might feel his case has been prejudged, thus denying him the benefit of his day in court.

Justices Higgins and Lake emphasized that their "failure to join" the other justices in responding to the Governor's question in no way reflected their "agreement or disagreement" with the five justices' opinion.

Concerning the Separation of Powers. In 1981, the North Carolina General Assembly passed two statutes severely limiting executive control over the state budget and greatly enlarging the legislature's power over fiscal operations. Questioning the constitutionality of the two amend-
ments, Governor James Hunt, Jr., along with Lieutenant Governor James Green and Liston Ramsey, Speaker of the North Carolina House of Representatives, asked Attorney General Rufus Edmisten for his opinion on the matter. Based on Edmisten’s response, the Governor concluded that the statutes were “probably unconstitutional.” At the Attorney General’s suggestion, however, the three officials made a joint request to the North Carolina Supreme Court justices for an advisory opinion.

The first of the two amendments at issue involved executive and legislative control over state budget transfers. Drastically curtailing the governor’s authority, the amendment required the governor to obtain the permission of a specific committee of legislators before making certain “[t]ransfers or changes as between objects and items” in an agency’s budget.

Under the 1981 amendment, an agency head could not submit a request to the governor if the request involved more than a certain amount of money, unless the “Joint Legislative Commission on Governmental Operations had given its prior approval for that transfer.” The amendment appeared to violate the constitutional assembly enacted amendments to §§ 143-23 and 143-16.1 of the North Carolina General Statutes. Advisory Opinion in re Separation of Powers, 305 N.C. 767, 768-69, 295 S.E.2d 589, 589-90 (1982).


158. In their request, the three officials wrote, “the Attorney General has informed the Governor that there is no North Carolina precedent on these precise points and, therefore, has advised that this request be made for your advisory opinion.” Id.; see infra note 281 and accompanying text.

159. See Separation of Powers, 305 N.C. at 768-69, 295 S.E.2d at 590.

160. N.C. GEN. STAT. § 143-23 (1981), quoted in Separation of Powers, 305 N.C. at 768, 295 S.E.2d at 590. Prior to the amendment, the head of a state agency in need of more money had been permitted to submit a request for money to the governor. Separation of Powers, 305 N.C. at 768, 295 S.E.2d at 590. The governor, as director of the budget, would forward the request to the general assembly, which would then allocate money to the agency. Id.

161. Act of Oct. 10, 1981, ch. 1127, § 82, 1981 N.C. Sess. Laws ch. 1127, § 82, amending N.C. GEN. STAT. § 143-23, quoted in Separation of Powers, 305 N.C. at 768-69, 295 S.E.2d at 590. The amendment limited the amount of money the governor could transfer within an institution or agency to “ten percent (10%) of the amount appropriated for that program line item for that fiscal year.” Id. If the governor wanted to transfer more funds, he first had to obtain the approval of the Joint Legislative Commission on Governmental Operations. Separation of Powers, 305 N.C. at 769, 295 S.E.2d at 590. The amendment further provided that the ten-percent limit applied to all departments, except to “[s]tate departments with a total General Fund appropriation’ of less than ‘fifty million dollars ($50,000,000).’” 1981 N.C. Sess. Laws ch. 1127, § 82, amending N.C. GEN. STAT. § 143-23, quoted in Separation of Powers, 305 N.C. at 769, 295 S.E.2d at 590. Moreover, the governor could make only transfers or
requirement of separation of powers between the legislative and executive branches of the state government by enabling a legislative body to "control major budget transfers proposed . . . by the Governor in his constitutional role as administrator of the budget." 162

The second amendment involved executive and legislative control over federal block grant funds. 163 Prior to the amendment, the governor and Advisory Budget Commission had the responsibility of recommending the use of federal funds to the general assembly. 164 The general assembly then would appropriate the funds. 165 In 1981, Congress made money available to the states in the form of block grants. 166 In response, the North Carolina General Assembly enacted a provision requiring that all federal block grants pass directly through the general assembly. 167 A new committee composed entirely of members of the general assembly would make recommendations concerning the legislature's use of the block grants. 168 The statute further provided that, after the federal funds were accepted, the governor could make proposals concerning the funds, but his proposals were subject to the committee's approval prior to implementation. 169 A separation of powers issue arose because the provision authorized a committee of legislators to override the governor's changes from salary monies with the Commission's approval. Id. Finally, the amendment did not apply to transfers or changes within the Medicaid program. Separation of Powers, 305 N.C. at 769, 295 S.E.2d at 590.

162. Separation of Powers, at 776, 295 S.E.2d at 594.

163. See infra notes 166-70 and accompanying text.

164. Separation of Powers, 305 N.C. at 769, 295 S.E.2d at 590. The Advisory Budget Commission consists of persons appointed by the President of the Senate, the Speaker of the House, and the Governor. N.C. GEN. STAT. § 143-4 (1981). It assists the Governor in handling federal funds under § 143-16.1 of the North Carolina General Statutes, which provides that "[a]ll federal funds shall be expended and reported in accordance with provisions of the Executive Budget Act. Proposed budgets recommended to the General Assembly by the Governor and Advisory Budget Commission shall include all appropriate information concerning the federal expenditures in State agencies, departments and institutions." Id. § 143-16.1 (1978).

165. Separation of Powers, 305 N.C. at 779, 295 S.E.2d at 595.


168. Under § 120-80 of the proposed statute, the committee was to be called the Joint Legislative Committee to Review Federal Block Grant Funds. Id. at 770, 295 S.E.2d at 591. It was to have thirteen members, twelve of whom were to be legislators. Id. at 776, 295 S.E.2d at 594. The committee was to follow the "organizational rules" of § 120-82 and "make recommendations" under § 120-83 of the new statute. Id. at 770, 295 S.E.2d at 591.

proposals regarding the use of federal block grant funds. Thus, the governor, the lieutenant governor in his capacity as President of the North Carolina Senate, and the Speaker of the North Carolina House of Representatives requested that the justices of the North Carolina Supreme Court issue an advisory opinion concerning the constitutionality of the statutory amendment.

Agreeing to issue an advisory opinion, the justices focused on the state constitution and North Carolina case law construing it. They quoted the North Carolina Constitution's separation-of-powers provision, which states that "[t]he legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other." The justices then referred to the case of State ex rel. Wallace v. Bone to demonstrate the drafters' commitment to the separation-of-powers principle. In Wallace, the North Carolina Supreme Court declared unconstitutional a law that permitted the general assembly to appoint four of its own members to a committee performing an executive function. The justices thus prefaced their advice concerning the constitutionality of the statutes with a reference to recent case law.

170. Separation of Powers, 305 N.C. at 778, 295 S.E.2d at 595.
171. Id. at 772-73, 295 S.E.2d at 592. In their joint letter to the justices, the three officials requested that the justices address the following two questions:

1. Is G.S. 143-23(b), as enacted by Section 82 of Chapter 1127 of the 1981 Session Laws, consistent with, or contrary to, in whole or in part, the pertinent provisions of the N.C. Constitution?

2. Is G.S. 120-84, as enacted by Section 63 of Chapter 1127 of the 1981 Session Laws, consistent with, or contrary to, in whole or in part, the pertinent provisions of the N.C. Constitution?

Id. at 772, 295 S.E.2d at 592.

172. Chief Justice Branch and Associate Justices Copeland, Exum, Britt, Carlton, Meyer, and Mitchell issued the advisory opinion. Id. at 781, 295 S.E.2d at 596.

173. Id. at 773, 295 S.E.2d at 592; see supra note 53 and accompanying text.


175. Id. at 774-75, 295 S.E.2d at 593. In Wallace, the justices found that the Environmental Management Commission (EMC) served an executive function, not a legislative function. Wallace, 304 N.C. 591, 608, 286 S.E.2d 79, 88 (1982). By permitting the general assembly to appoint four of its own members to the executive commission, the law violated the separation-of-powers provision of the state constitution. Id.; see Separation of Powers, 305 N.C. at 773, 295 S.E.2d at 592 (quoting N.C. CONST. art. I, § 6). Professor Orth maintains that "the proper issue in Wallace was not separation of powers per se, but the separation of personnel," which the court failed to address. Orth, supra note 2, at 24.

176. Professor Orth contends that the court wrongly relied on Wallace in reaching its conclusion in Separation of Powers. See Orth, supra note 2, at 27-28. Orth asserts that Separation of Powers involved retention of control by one branch over another branch, while Wallace involved delegation of authority within a branch. Id. at 19-23. Only in the former instance did a separation-of-powers issue arise, according to Orth, since the separation-of-powers principle involves delegation among coordinate branches of government. Id. at 22-23.
Turning their attention to the state budget transfers amendment, the justices noted that the North Carolina Constitution provides for a “three-step [budget-setting] process”: the Governor proposes the budget, the legislature enacts it, and the Governor administers it.\(^{177}\) According to the justices, the budget transfers amendment violated the first step in the process by permitting a committee of legislators to restrict the Governor’s authority to make proposals concerning the budget.\(^{178}\) They thus concluded that the amendment violated the separation-of-powers provision of the state constitution.\(^{179}\)

With respect to the amendment involving federal block grant funds, the justices noted two problems, only one of which the three officials had asked them to address.\(^{180}\) The first problem concerned whether the General Assembly had the power to accept federal grants on behalf of the state and its agencies, and if so, whether it could determine the use of the funds.\(^{181}\) Based on an assumption that the General Assembly did have such authority, the second issue involved whether the legislature could delegate it to a committee of its members.\(^{182}\) Citing the state constitution, the justices found that such a delegation would violate the separation-of-powers provision of the state constitution.\(^{183}\) The *In re Separation of Powers* opinion represented the most complex and lengthy advisory opinion that the justices of the North Carolina Supreme Court had rendered since 1947.\(^{184}\)

**Constitutionality of Administrative Rules Review Commission.** In 1985, the General Assembly considered legislation that would create an Administrative Rules Review Commission.\(^{185}\) The effectiveness of several sections of the proposed statute depended entirely on the North Car-

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177. *Separation of Powers*, 305 N.C. at 776, 295 S.E.2d at 594; see N.C. CONST. arts. II & III.


179. Id. at 777, 295 S.E.2d at 594; see *supra* notes 173-76.


181. Id. The justices stated that, since the officials did not request their opinions about this aspect of the General Assembly’s power, they would offer no advice on the matter. See infra notes 244-45 and accompanying text.


183. Id. at 780-81, 295 S.E.2d at 596. Professor Orth maintains that the justices had no reason to address the separation-of-powers issue at all, since the state constitution “specifically charges the Governor with the duty of administering the ‘budget as enacted by the General Assembly.’” Orth, *supra* note 2, at 23 (citing N.C. CONST. art. III, § 59(3)).

184. The opinion was fifteen pages in length. The other five opinions ranged from three to seven pages in length.

olina Supreme Court's issuing an advisory opinion finding the statute constitutional. 186 Section 19 provided that sections 5 and 6, establishing the new Commission, were to become effective thirty days from the date the supreme court issued a not unfavorable advisory opinion. 187 A subsection of the statute giving the chief justice the power to appoint the Director of the Office of Administrative Hearings was also made conditionally effective. 188 The proposal provided, however, that, in the event the justices concluded that the chief justice could not constitutionally exercise the appointment power, an alternative amendment giving the Attorney General the appointment power would become effective. 189 The justices' advisory opinion would, in essence, either trigger or nullify certain provisions of the statute. 190 In an unprecedented move, the North Carolina General Assembly wrote the justices of the supreme court, requesting that they issue an advisory opinion approving the constitutionality of the proposed legislation. 191

The justices noted that section 19 of the proposed statute gave their advisory opinion the "force of law." 192 A favorable advisory opinion would establish an Administrative Rules Review Commission; an unfavorable one would render the Commission ineffective. 193 Further, a favorable advisory opinion would enable the chief justice to appoint the Director of the Office of Administrative Hearings; an unfavorable opinion would vest the appointment power in the Attorney General. 194 The justices stated that such extensive power should rest in the legislature and not in the court, for it is the General Assembly's "prerogative to first address and determine the constitutionality of its legislation." 195 They therefore "respectfully decline[d]" to offer their advice. 196 This was the

186. Advisory Opinion, 335 S.E.2d at 891.
190. Id.
191. The justices who received the request were Chief Justice Branch and Associate Justices Exum, Meyer, Mitchell, Martin, Frye, and Billings. Id. at 892. The question posed was "whether Sections 5 and 6 and subsection 7A-752 of Section 2, all being contained in Chapter 746 of the 1985 session laws, are consistent with the North Carolina Constitution." Id. at 890.
192. Id. at 891.
193. Id.; see supra note 187 and accompanying text.
194. Advisory Opinion, 335 S.E.2d at 890-91; see supra notes 188-89 and accompanying text.
195. Advisory Opinion, 335 S.E.2d at 892.
196. Id.
Regarding judicial districts, elections, and terms of office for superior court judgeships. In 1987, the General Assembly enacted several measures affecting judicial districts, elections, and the terms of office for various regular superior court judgeships. Doubting the constitutionality of the legislation, Governor James G. Martin wrote to the justices for an advisory opinion, stating that "there [was] not enough time for the normal judicial processes to work" before he had to execute the new laws. The Governor felt pressed for an expedited response, for if the laws were constitutional, he had to notify the North Carolina State Board of Elections so that it could properly prepare for the 1988 judicial elections.

The first question posed was whether the General Assembly could create superior court judicial districts made up of portions of two or more counties. If so, the Governor questioned whether the legislature could assign previously elected superior court judges to those new districts without holding an election. Governor Martin then inquired whether the General Assembly could enlarge the term of an elected regular superior court judge beyond eight years; whether it could require a candidate for a superior court judgeship to reside in the judicial district for which he sought election; and finally, whether the legislature could enlarge the terms of designated special superior court judges and appoint special judges for the enlarged terms.

To each of his questions the Governor proposed answers. No previous governor requesting an advisory opinion had ever given his own conclusions in the correspondence requesting the advisory opinion. Addressing his first question, Governor Martin pointed out that historically, several superior court judicial districts had included more than one county but no county had ever been divided into several judicial districts;

197. In 1929, the court had refused to issue an opinion as a court, but claimed that the individual justices could render their opinions on issues put before them. See supra notes 69-71 and accompanying text.

198. Letter from Governor James G. Martin to the chief justice and associate justices of the North Carolina Supreme Court 1-6 (July 9, 1987) (on file with author) [hereinafter July 9, 1987 Letter].

199. Id. at 2.

200. See id. at 4-8, 10-12.

201. Id. at 2.

202. Id. at 5.

203. Id. at 6. Article IV, § 16 of the state constitution calls for eight year terms. See N.C. CONST. art. IV, § 16.


205. Id. at 10.
the General Assembly thus lacked authority to implement a new rule.\textsuperscript{206} In response to his other questions, the Governor maintained that the state constitution provides for the election, not assignment, of regular superior court judges to newly created judicial districts;\textsuperscript{207} that regular superior court judges could not serve beyond eight-year terms;\textsuperscript{208} and that the General Assembly could not appoint the special superior court judges or enlarge the judges' terms.\textsuperscript{209} Finally, Governor Martin asserted that the legislature could not impose a residency requirement on candidates for superior court judgeships.\textsuperscript{210} In his letter requesting the advisory opinions of the justices, the Governor concluded that the General Assembly had overstepped its bounds in enacting the legislation.

In a one-page response, Chief Justice James G. Exum, Jr., emphasized the "disfavor" with which American and English courts traditionally have viewed advisory opinions.\textsuperscript{211} The chief justice reminded the Governor that advisory opinions are not "legally binding," being merely opinions.\textsuperscript{212} Noting that the Governor's questions were "serious" and difficult to answer, he concluded that the Governor could ascertain the answers most effectively through the "use of traditional legal procedures."\textsuperscript{213} Recognizing the Governor's need to act quickly,\textsuperscript{214} the chief justice reassured the Governor that he was "prepared, in the event an appropriate action is instituted, to assign especially a superior court judge, unaffected by the challenged statute, to hear the matter in the first instance on an expedited basis."\textsuperscript{215} For the second time in two years, the justices declined to render an advisory opinion at the request of a gover-

\textsuperscript{206} Id. at 3-4.

\textsuperscript{207} Id. at 5. The Governor relied on §§ 1, 9(1) and 16 of article IV of the state constitution in reaching his conclusions. See N.C. CONST. art. IV, §§ 1, 9(1), & 16.

\textsuperscript{208} July 9, 1987 Letter, supra note 198, at 7. Governor Martin cited § 16 of article IV of the state constitution. See N.C. CONST. art. IV, § 16.

\textsuperscript{209} July 9, 1987 Letter, supra note 198, at 11. Based on the appointment power in § 5(8) of article III of the state constitution, the Governor claimed that he, and not the General Assembly, had the right to fill any vacancies in the superior court judgeships. Id.; see N.C. CONST. art. III, § 5(8); id. art. IV, § 19.

\textsuperscript{210} July 9, 1987 Letter, supra note 198, at 9-10. In his analysis, the Governor relied on § 6 of article VI of the state constitution. See N.C. CONST. art. VI, § 6.

\textsuperscript{211} Letter from Chief Justice James G. Exum, Jr. to Governor James G. Martin 1 (July 20, 1987) (on file with author) (declining the Governor's request for advisory opinions concerning superior court judgeships) [hereinafter July 20, 1987 Letter].

\textsuperscript{212} Id.

\textsuperscript{213} Id.

\textsuperscript{214} See supra text accompanying notes 199-200.

\textsuperscript{215} July 20, 1987 Letter, supra note 211, at 1. The chief justice also stated that should the trial court's decision be appealed, the supreme court would act quickly to resolve the issues. Id.
Their refusal served as a prelude to their most recent refusal to issue an advisory opinion in 1991.

Regarding the term of judicial office. In the general elections of 1988 and 1990, the citizens of North Carolina elected three judges to the North Carolina Court of Appeals and two to the North Carolina Superior Court. Prior to the elections, each superior court judge notified the state Board of Elections of the district for which he desired to be elected and each court of appeals judge indicated the "vacated seat" or "unexpired term" of office he intended to fill. No judge specified to the Board the term of office for which he was running.

At the general elections, without any notice to the candidates, the North Carolina Board of Elections designated the terms of the offices on the ballots. The Board provided that four of the five judges’ terms would end on December 31, 1992; the fifth judge’s term would expire on December 31, 1994. Upon election, the judges began serving their terms. In 1991, with the expiration dates as listed on the ballots approaching, the judges brought an action at law, claiming that the Board had erred when it listed the expiration dates on the ballots in the previous


Upon receipt of the justices’ response, Governor Martin brought suit. The trial court found that each of the measures was constitutional except for the provision enlarging the terms of the elected regular superior court judges beyond eight year terms. See State ex rel. Martin v. Preston, 325 N.C. 438, 447, 385 S.E.2d 473, 477 (1989). On appeal, the supreme court found that this measure was also valid. Id. at 456, 385 S.E.2d at 483. Thus, the judiciary resolved the governor’s questions in a manner contrary to the determinations he had expressed in his request for the advisory opinion.

217. Judges John B. Lewis and Robert F. Orr were elected to the North Carolina Court of Appeals in the general election held in November of 1988. Letter from Governor James G. Martin to the Chief Justice and Associate Justices of the North Carolina Supreme Court 8-9 (June 28, 1991) (on file with author) [hereinafter June 28, 1991 Letter]. Judge James A. Wynn was elected judge of the court of appeals and Judges W. Russell Duke, Jr. and Quentin T. Sumner were elected judges of the superior court in the general election held in November of 1990. Id. at 9.

218. In his notice, Judge Lewis stated that he sought the position of "Judge of the North Carolina Court of Appeals[,] the John C. Martin seat." Id. at 10. Judge Orr indicated that he sought the position of "Associate Judge, North Carolina Court of Appeals for the unexpired term of John Webb to succeed myself." Id. Judge Wynn sought the "Court of Appeals seat vacated by Charles Becton." Id. Judge Duke sought the position of "Superior Court Judge, District 3-A." Id. Finally, Judge Sumner stated that he was running for the position of "Superior Court Judge, Superior Court District 7-A." Id.

219. Id.

220. Id. at 13. The Board listed the expiration dates in keeping with the amended version of § 163-9 of the North Carolina General Statutes. Id. at 15.

221. The terms of Judges Lewis, Orr, Wynn, and Duke were to end on December 31, 1992. Id. Judge Sumner's term was to expire on December 31, 1994. Id.
The judges then wrote to the Governor, demanding a clarification of the terms of their offices. Specifically, the judges asked Governor Martin to issue them constitutional commissions providing that they were to serve for eight year terms.

Upon receipt of the judges' demands, Governor Martin requested an advisory opinion from the supreme court justices concerning the issuance of the commissions to the judges. Governor Martin posed several questions, to which he gave tentative answers. The questions asked were whether the issuance of the commissions to the judges was an executive or ministerial act; whether the commissions should recite the terms of office for which the commissions had been issued; and whether the commissions issued to the particular judges should be for eight-year terms. Governor Martin indicated that, in his opinion, the issuance of the commissions was an executive act; that the commissions should state the terms of office; and that the terms should be for eight years.

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222. See infra note 229 and accompanying text.
224. All grants and commissions made by the Governor must bear the seal of the state in order to be effective, as provided in section 10 of article III of the state constitution:

There shall be a seal of the State, which shall be kept by the Governor .... All grants and commissions shall be issued in the name and by the authority of the State of North Carolina, sealed with "The Great Seal of the State of North Carolina," and signed by the Governor.

N.C. CONST. art. III, § 10.
226. Id. at 3. Governor Martin did not consult Attorney General Lacy H. Thornburg for an opinion prior to writing the justices of the North Carolina Supreme Court. The judges whose terms were in dispute also "joined in [the Governor's] request for advice." See Letter from Chief Justice James G. Exum, Jr., and the Associate Justices of the North Carolina Supreme Court to Governor James G. Martin I (Aug. 20, 1991) (on file with author) (responding to Governor James G. Martin's request for an advisory opinion concerning the constitutional commissions of the judges) [hereinafter August 20, 1991 Letter].
227. June 28, 1991 Letter, supra note 217, at 3; see supra notes 206-10 and accompanying text (discussing Governor Martin's July 9, 1987 request for an advisory opinion).
229. Id. Governor Martin made clear his support for the position of the petitioning judges, and delineated the constitutional bases for his belief. First, he noted that Article IV, § 14 of the North Carolina Constitution "provides (i) that judges of the Court of Appeals and the Superior Court shall be elected to office and (ii) that the terms for which they shall be elected shall be for eight years." Id. at 14. He then referred to article IV, § 19 and its 1868 constitutional "counterpart" regarding the filling of vacancies. Id. Both sections provide that appointees should fill vacancies for "terms only until the next election for members of the General Assembly held more than 60 days after the vacancy occurs." Id.

Governor Martin then pointed out that, until 1967, the North Carolina General Statutes followed the language of article IV, § 19 and the 1868 state constitution. In 1967, however, the General Assembly amended the North Carolina General Statutes to provide that the term of office of "Judges of the Court of Appeals and Regular Judges of the Superior Court elected to office following a vacancy" would be "for the unexpired term of the vacating judge." Id. at
ertheless, he requested an advisory opinion from the North Carolina Supreme Court justices because he did not feel the "normal legal procedures" would enable him to respond adequately to the judges' demands.\(^2\)

In a brief letter to Governor Martin, Chief Justice Exum noted that the Governor appeared to have answered the questions himself, rendering the advice of the justices unnecessary.\(^3\) The Chief Justice pointed out that a case involving the same issue currently was pending in the superior court.\(^2\) Finally, he reminded the Governor that the justices viewed the advisory practice with "disfavor."\(^2\) The justices thus re-


In conclusion, Governor Martin stated that under the North Carolina Constitution, "[t]erms of office belong to judges, not judgeships," and that such terms of office are for eight years from the date of election, "irrespective of whether the election was held following the expiration of a term or at the end of an appointive term following a vacancy." \(\text{Id. at 14.}\) He stated that, had the voters written in the expiration dates beside the candidates' names, he would have given the dates more "weight." \(\text{Id. at 17.}\) He found, however, that, "[u]nder the circumstances . . . I do not give much weight to the ballot notation. It was a mistake, albeit an honest mistake, made by the State Board of Elections." \(\text{Id.}\)

230. Governor Martin recognized that the justices "generally . . . prefer not to give advisory opinions" but hoped that the justices would "consider giving [him an opinion since] the use of normal legal procedures [would] not meet the need at hand." June 28, 1991 Letter, supra note 217, at 1. The Governor did not specify why following "normal legal procedures" would not suffice. \(\text{Id.}\) Usually, a governor asks the attorney general for an advisory opinion and consults the justices only upon the attorney general's suggestion. See supra notes 5-9 and accompanying text.


232. See August 20, 1991 Letter, supra note 226, at 1. The case was Martin v. North Carolina, 330 N.C. 412, 410 S.E.2d 474 (1991), which was pending in the Wake County Superior Court when Governor Martin submitted his request to the justices. In Martin, the supreme court upheld the constitutionality of a state statute that requires the justices and judges in the appellate division to retire from office upon reaching the age of seventy-two, even if the terms for which they have been elected have not yet expired. \(\text{Id. at 414-15, 410 S.E.2d at 475-76.}\) Associate Justice Martin of the state supreme court and Judge Phillips of the court of appeals had argued that the statute violated § 16 of Article IV of the North Carolina Constitution, which provides that the judges and justices of the appellate division "shall hold office for terms of eight years." \(\text{Id. (citing N.C. CONST. art. IV, § 8).}\)

233. August 20, 1991 Letter, supra note 226, at 2. The justices wrote, As we have previously communicated to you, we generally disfavor the issuance of advisory opinions. Such questions as you have submitted are better answered in the context of adversarial proceedings, in which the Court can have the benefit of the research of counsel, full briefing and argument on all aspects of the questions presented.

\(\text{Id.}\)
fused to proffer the requested opinion.234

III. CRITIQUE OF THE ADVISORY FUNCTION

A. The Rules

Judicial responses to executive requests for advisory opinions in the twentieth century reveal several fundamental characteristics of the advisory practice in North Carolina. First, the justices of the North Carolina Supreme Court will issue advisory opinions only as individuals, not as a court.235 Thus, in his request for an advisory opinion, the governor must address the justices individually.236 Having considered the matter as individuals, the justices may or may not sign the collective opinion. They may write separate opinions if they so choose.237 Second, the justices render advisory opinions only as a matter of respect or courtesy to the executive branch.238 They are free to decline the request, for no statutory or constitutional provision compels them to issue the opinions.239 Third, the justices will issue advisory opinions only if a justiciable controversy exists and the relevant facts are presented to them in the request;240 they

234. Id. The Justices who participated in the response were Chief Justice Exum and Associate Justices Meyer, Mitchell, Frye, Webb, and Whichard. Associate Justice Martin recused himself presumably because he was a party to the lawsuit that ultimately reached the supreme court on this question.

Just as the Governor's questions in the 1987 request were resolved through legal action, supra note 216, the questions the Governor addressed to the justices in 1991 are currently being decided through the legal system.

235. Advisory Opinion in re Advisory Opinion, 335 S.E.2d 890, 891 (1985); see Advisory Opinion in re Advisory Opinions, 196 N.C. 828, 829 (1929); Edsall, supra note 10, at 318.

236. Advisory Opinion, 335 S.E.2d at 891. The governor generally lists each justice's name at the top of the letter requesting the opinion. He then begins the letter with "My Dear Sirs" or "Gentlemen." In one letter, however, the governor addressed the justices as a group, beginning the letter in the following manner: "TO: THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF NORTH CAROLINA." Advisory Opinion in re Sales-Tax Election of 1969, 275 N.C. 683, 683, 169 S.E.2d 697, 697 (1969). This format arguably undermines the purpose of seeking an advisory opinion, which is to obtain the opinions of the justices as individuals, not as a court. See supra note 4 and accompanying text.

237. See supra notes 86-91, 134-37, 151-54 and accompanying text.

238. Advisory Opinion, 335 S.E.2d at 891; see Advisory Opinions, 196 N.C. at 829.

239. See Advisory Opinion, 335 S.E.2d at 891; Sales-Tax Election of 1969, 275 N.C. at 688, 169 S.E.2d at 700; August 20, 1991 Letter, supra note 226, at 2; see also State v. Scoggins, 236 N.C. 1, 7, 72 S.E.2d 97, 101 (1952) (stating that "[n]one of the parties are entitled to an advisory opinion from this Court").

240. See City of Henderson v. County of Vance, 260 N.C. 529, 532-533, 133 S.E.2d 201, 203-204 (1963) (stating that "it would be unwise for this Court to render an advisory opinion on the questions posed, before all the pertinent facts have been found or agreed upon"); Wilson v. City of High Point, 238 N.C. 14, 24, 76 S.E.2d 546, 553 (1953) ("We have decided this case upon the agreed facts presented to us. To discuss other questions argued in the defendant appellees' brief would be to render an advisory opinion, which we do not do.").
will not issue advisory opinions regarding "hypothetical situations."241 Fourth, the justices will not issue advisory opinions to private litigants.242 The matter at issue must involve the public and be "an emergency gravely affecting the public interest."243 Fifth, the justices will not give "unnecessary advisory opinions" on questions the parties have not put before them.244 Finally, the matter in question must relate to statutory construction or constitutional issues, not policy considerations.245 Thus, in rendering advisory opinions the justices of the North Carolina Supreme Court follow self-imposed guidelines.

B. The Practice

Between 1947 and 1985 the justices attempted to adhere to the first rule: that they render advisory opinions only as individuals.246 In three of the six advisory opinions, a governor prefaced his written request with each justice's name but then stated in the letter that he was "seeking an opinion of the Supreme Court."247 In each instance, the justices ignored the request directed at the court and responded that they signed the opin-

241. First Citizens Bank & Trust Co. v. Barnes, 257 N.C. 274, 276, 125 S.E.2d 437, 439 (1962) (refusing to "advise the trustee how it should act" in the absence of "necessary" facts because courts do not provide mere advisory opinions with respect to hypothetical situations"); see also Kirkman v. Wilson, 328 N.C. 309, 312, 401 S.E.2d 359, 361 (1991) (declining to address "abstract" questions in an advisory opinion); Little v. Wachovia Bank & Trust Co., 252 N.C. 229, 243, 113 S.E.2d 689, 700 (1960) (declining to construe plaintiff's interests in the trust estate on the grounds that "[t]he courts have no jurisdiction to determine matters purely speculative, enter anticipatory judgments, declare social status, deal with theoretical problems, give advisory opinions, answer moot questions, adjudicate academic matters, provide for contingencies which may hereafter arise, or give abstract opinions"); Boswell v. Boswell, 241 N.C. 515, 519, 85 S.E.2d 899, 902 (1955) (stating that "the Court will not give advisory opinions or decide abstract questions"); Bragg Dev. Co. v. Braxton, 239 N.C. 427, 429, 79 S.E.2d 918, 920 (1954) ("The controversy . . . created presents a purely abstract question. Any judgment putting it to rest would be wholly advisory in nature.").


243. See supra notes 87-88 and accompanying text.

244. State v. Cofield, 320 N.C. 297, 311, 357 S.E.2d 622, 630-31 (1987) (Mitchell, J., concurring in result) (noting that "the Court is most unwise . . . to address" any other questions because "[t]o do so amounts to rendering an entirely unnecessary advisory opinion on questions which need not and should not be reached or decided"); see supra notes 231-32 and accompanying text; see infra notes 271-73 and accompanying text.

245. See supra notes 138-39 and accompanying text.

246. See supra note 235-36 and accompanying text.

247. In three opinions, the governor framed his request by saying, "The question is, however, of such great importance that I feel justified in seeking an opinion of the Supreme Court." See Advisory Opinion in re Sales-Tax Election of 1969, 275 N.C. 683, 684, 169 S.E.2d 697, 698 (1969); Advisory Opinion in re General Elections, 255 N.C. 747, 748, 127 S.E.2d 1, 2 (1961); Advisory Opinion in re General Election, 244 N.C. 748, 749, 93 S.E.2d 853, 854 (1956).
itions, "each for himself." In 1985, however, the justices declined the request, pointing out that "[t]he North Carolina Constitution does not authorize the Supreme Court as a Court to issue advisory opinions," a proposition which their predecessors first stated in 1929. They further proclaimed that neither the court nor the members of the court had the power to issue the opinion the legislature requested. Thus, the justices acted to curb a practice in which they had indulged for more than two centuries.

The second rule—that the justices render the opinions as a favor and not as a matter of judicial duty—has prevailed by and large, but in some cases it has been weakened by the forceful tone of the requests. In most of the letters requesting the justices’ advice, governors have recognized the justices’ “discretion” in issuing the opinions. The governors have requested that the justices respond only “if in keeping with the proprieties and functions of the Court” and have expressed their appreciation when the justices have responded. In some instances, however, the governors appear to have pressured the justices. One governor concluded his letter to the justices by saying, “I respectfully request the members of the Court to furnish this advisory opinion at the earliest possible time on account of the urgency of the matter . . . .” In a later request, another governor wrote, “Your opinion on this question will be highly appreciated and will guide the State officers on this highly important question . . . . I shall await your response.” Finally, in 1982, Governor Hunt and leaders of the legislature reminded the justices that

248. In Sales-Tax Election of 1969, the justices signed the opinion “each for himself or herself.” 275 N.C. at 687, 169 S.E.2d at 699; see General Elections, 255 N.C. at 750, 127 S.E.2d at 3; General Election, 244 N.C. at 749-50, 93 S.E.2d at 854.

249. Advisory Opinion in re Advisory Opinion, 335 S.E.2d 890, 892 (1983). It is notable that the legislature made the request.

250. Id. at 891; see supra note 197 and accompanying text.

251. Advisory Opinion, 335 S.E.2d at 891.

252. Id. at 891-92.

253. See supra notes 238-39 and accompanying text.

254. See Advisory Opinion in re Work Release Statute, 268 N.C. 727, 728, 152 S.E.2d 225, 226 (1966) (Governor Moore stated to the justices: “it is this question which I submit to you for an advisory opinion, if, in your discretion, you are disposed to render one to me.”).


their request for advice was "[i]n accordance with established practice." 258

The justices generally have followed the third rule, considering only questions based on fact. 259 For instance, in 1950, the justices advised the governor regarding the proper construction of the state constitution with respect to filling the vacancy caused by the death of supreme court Associate Justice Seawell. 260 In 1956, 1961, and 1969, governors asked the justices to address questions involving particular elections to be held on specific dates. 261 In 1966, 1982, 1985, and 1987, the justices were asked to address questions involving the constitutionality of certain provisions of the North Carolina General Statutes. 262 In 1991, the justices were asked to advise the governor regarding the constitutional commissions of five named state judges. 263

The fourth rule—that the justices only issue advisory opinions with regard to emergencies gravely affecting the public interest—has been

258. Advisory Opinion in re Separation of Powers, 305 N.C. 767, 767, 295 S.E.2d 589, 589 (1982); see also Sales-Tax Election of 1969, 275 N.C at 687, 169 S.E.2d at 699 (Attorney General Robert Morgan suggesting that Governor Scott ask for an advisory opinion of the supreme court because, "[a]s you know, there is ample legal precedent for the Governor of North Carolina to request the Supreme Court for an advisory opinion on pressing matters of this nature").

259. See supra notes 240-41 and accompanying text.

260. See supra notes 83-85 and accompanying text.

261. The 1956 opinion considered whether a special election for educational amendments would be a general election if it were held before November. Advisory Opinion in re General Election, 244 N.C. 748, 749, 93 S.E.2d 853, 854 (1956), discussed supra notes 93-104 and accompanying text. In the 1961 opinion, the justices considered the proper construction of article XIII of the state constitution with regard to a bond election. Advisory Opinion in re General Elections, 255 N.C. 747, 748, 127 S.E.2d 1, 2 (1961), discussed supra notes 105-21 and accompanying text. The 1969 opinion considered whether a sales-tax election constituted a general election. Sales-Tax Election of 1969, 275 N.C. at 684, 169 S.E.2d at 697-98, discussed supra notes 140-54 and accompanying text.

262. The 1966 opinion involved the construction of article XI, section 1, of the state constitution in relation to the work release program authorized under North Carolina General Statutes § 148-33.1. Advisory Opinion in re Work Release Statute, 268 N.C. 727, 727-28, 152 S.E.2d 225, 225-26 (1966), discussed supra notes 122-39 and accompanying text. The 1982 opinion involved the question of whether specific provisions of the general statutes violated select provisions of the state constitution. Separation of Powers, 305 N.C. at 772, 295 S.E.2d at 392, discussed supra notes 155-84 and accompanying text. In the 1985 request, the governor asked the justices to consider whether §§ 5 and 6 and subsection 7A-752 of § 2 of chapter 746 of the 1985 session laws would violate the North Carolina Constitution. Advisory Opinion in re Advisory Opinion, 335 S.E.2d 890, 890 (1985), discussed supra notes 185-97 and accompanying text. In the 1987 request, the justices were asked to decide upon the constitutionality of a ratified bill. See July 9, 1987 Letter, supra note 198, discussed supra notes 198-216 and accompanying text.

263. See June 28, 1991 Letter, supra note 217, discussed supra notes 217-34 and accompanying text.
more difficult for the members of the court to apply. The justices generally have regarded anything that affects the voting public as an emergency, sufficient to warrant the issuance of an advisory opinion. In some instances, however, the justices have differed in defining an "emergency." In 1950, six of the seven justices felt that filling a vacancy on the North Carolina Supreme Court constituted an emergency sufficient to warrant an advisory opinion. One justice, however, wrote that no emergency existed; the emergency arose only because the Attorney General refused to advise the Governor and the Governor "should not be required to [act] without competent legal advice." Likewise, in 1966 the justices again differed in defining an emergency, this time with regard to the prison work release program. Six of seven justices claimed an emergency existed due to the harmful effects of putting work release prisoners "back behind bars." One justice found that the emergency resulted not from incarcerating the prisoners but from permitting the prisoners to go free. Thus, although the justices generally have adhered to the rule that they issue advisory opinions only with regard to an emergency, they on occasion have differed in defining what constitutes an emergency.

The justices have stood steadfastly by the fifth rule that they not render unnecessary advisory opinions. For instance, in 1966, the justices stressed that the advisory opinion involving the work release statute "relates solely to the constitutional question submitted to us." The opinion did not address policy considerations. Similarly, in 1982, the justices refused to answer a collateral question that was not before them. The justices stated that they would not "engage now in the lengthy research that would be necessary to answer it," but added that, "[i]f our opinion on this question is deemed urgently needed, we will consider a further request, provided it is accompanied by in-depth infor-

264. See supra notes 87-89 and accompanying text.
265. See supra note 261.
266. See supra notes 83-85 and accompanying text.
267. Advisory Opinion in re Time of Election to Fill Vacancy in Office of Associate Justice of the Supreme Court of North Carolina, 232 N.C. 737, 743, 61 S.E.2d 529, 532 (1950) (Barnhill, J); see supra notes 86-92 and accompanying text.
269. See supra notes 134-37 and accompanying text.
270. See supra note 244 and accompanying text.
271. Work Release Statute, 268 N.C. at 731, 152 S.E.2d at 228; see supra notes 138-39 and accompanying text.
272. See supra notes 138-39 and accompanying text.
273. See supra note 181 and accompanying text.
mation and briefs with respect to the grants being considered." 274

In a marked change of position in regard to the advisory, the justices in 1985 declined to issue an advisory opinion concerning the constitutionality of proposed legislation. 275 In 1987, they again refused to advise the Governor concerning the constitutionality of a ratified bill, stating that they only would hear the matter should the Governor bring a legal action and appeal the trial court's decision. 276 Finally, in 1991, the justices declined to issue an advisory opinion regarding the constitutional commissions of five judges, stating that the issue was being litigated in a pending case, making an advisory opinion inappropriate and unnecessary. 277

The basic premise underlying all of the judicial rules involving the issuance of advisory opinions is that such opinions are only opinions; they cannot and do not have the force of law. 278 Prior to 1985, however, advisory opinions in North Carolina held a law-like status. The very language of the requests indicated that the justices' advice would influence greatly, if not dictate, the actions of the inquirer. For instance, in 1950 Governor Scott wrote that the justices' answer would "enable" the Attorney General to advise him so that he could act. 279 In 1956, 1961, and 1969, governors stated that the justices' advice would "guide" them in resolving the issues before them. 280 Arguably, had the governors not intended to follow the "guidance," however, they would not have bothered to make the initial request. Likewise, in 1982, the Governor asked the justices to create precedent for him to follow, stating that "no North

275. See supra notes 195-97 and accompanying text.
276. See supra notes 215-16 and accompanying text.
277. See supra notes 231-34 and accompanying text.
278. See infra note 282.
280. Advisory Opinion in re Sales-Tax Election of 1969, 275 N.C. 683, 684-85, 169 S.E.2d 697, 698 (1969) (Governor Scott stating that "[y]our opinion on this question will be highly appreciated and will guide the State officers on this highly important question as to when these proposed amendments to the Constitution of this State should be submitted"); Advisory Opinion in re General Elections, 255 N.C. 747, 748, 127 S.E.2d 1, 2 (1961) (Governor Sanford stating that "[y]our opinion on the question presented will be appreciated and will guide me in the fixing of a date to submit these important issues to the people"); Advisory Opinion in re General Election, 244 N.C. 748, 749, 93 S.E.2d 853, 854 (1956) (Governor Hodges stating that "[y]our opinion on the question presented will be appreciated and will guide me in the recommendations which I shall make to the special session of the General Assembly as to appropriate means to be taken looking to the solution of our educational problem").
Carolina precedent on these precise points" at issue existed. Until 1985 the inquirer thus asked for an opinion which he intended to follow as if it were the law.

In 1985, in In re Advisory Opinion, the justices reasserted the proposition firmly announced by their predecessors in 1929 that advisory opinions are only opinions. The justices found that, because the opinion which the legislature requested would have the force of law, they could not acquiesce and give it. The justices insisted that they could not interject themselves into the "stream of the legislative process" in this way. Thus, in 1987, when Governor James G. Martin questioned the justices regarding the constitutionality of legislation involving certain superior court judgeships and indicated that the justices' response would influence his course of action, the justices refused to issue an advisory opinion. The justices found that, in addition to interfering with the legislative process, the issuance of the advisory opinion would interfere with the adversarial process that is the hallmark of the United States' system of justice. Only through the use of briefs and argument could the justices give the questions the "deliberative and reflective" treatment which they required. Similarly, when Governor Martin asked several questions concerning state judges' constitutional commissions and stated that the justices' "answers... will determine the responses that I should make," the justices again declined the request. Thus, the justices recently have refused to render advisory opinions, apparently believing that the adversarial process is the best judge of the issue in question.

282. In response to the legislature's request, the justices briefly reviewed the bases of the advisory practice in North Carolina. Advisory Opinion in re Advisory Opinion, 335 S.E.2d 890, 890-91 (1985). They found no constitutional authorization for the practice and noted that the justices had rendered advisory opinions in the past, "as a matter of courtesy, and out of respect to a coordinate branch of the government," but not as a matter of judicial duty. Id. (quoting Advisory Opinion in re Advisory Opinions, 196 N.C. 828 (1929)). The justices further reminded the legislature that advisory opinions are only opinions; "they have not and could not have had the force of law." Id. Although the opinions may be "persuasive," they are "not binding." Id.
283. See supra notes 192-96 and accompanying text.
284. Advisory Opinion, 335 S.E.2d. at 892.
286. See July 20, 1987 Letter, supra note 211.
287. Id.
The advisory practice has several notable advantages. Permitting the executive or legislative branches to submit an issue to the justices in order to ascertain their positions prior to litigation saves the government, potential parties, and the taxpayers money. If the justices find a proposed statute to be unconstitutional, future parties, the government, and the justices may avoid the expense in time and money of bringing suit.\textsuperscript{289} In addition, the government may refrain from implementing a law that will later be held unconstitutional.\textsuperscript{290} Permitting the practice also simplifies the law-making process.\textsuperscript{291} As one justice stated, a question involving "a dry matter of constitutional law" is often easier to deal with "than it might be hereafter, when complicated with collateral considerations,"\textsuperscript{292} such as the factual intricacies of an actual case.\textsuperscript{293} Moreover, the advisory practice enables officials with less expertise in the law to consult with those who deal with it daily, creating a more effective and efficient system of state government.\textsuperscript{294} For example, a finding by the justices that a proposed statute violates the state constitution might enable the branch making the proposal to modify it and more speedily present it to citizens or legislators for a vote, hastening its implementation.\textsuperscript{295}

\textsuperscript{289} See ELLINGWOOD, \textit{supra} note 4, at 195-96, 251. Ellingwood argued that permitting the justices to render advisory opinions "will reduce such probability [of future cases] to a minimum, thus saving a great deal of litigation." \textit{Id.} at 195-96. If the case does come to trial, then the judges are "free to change their minds upon further argument." \textit{Id.} at 196. He further reflected:

As a matter of policy, if the justices can eliminate a great deal of litigation in advance, by indicating their expert views on legislative acts, why should they not do so? Why should it be necessary for the people to run the risk of error in matters that often are not settled for years after a statute is passed?

\textit{Id.} at 201. After making this statement, Ellingwood quickly caught himself, noting that advisory opinions are not binding anyway. \textit{Id.} at 201-02.

Despite Ellingwood's argument for the efficiency of the advisory opinion, it should be remembered that the issuance of an advisory opinion itself takes time.

\textsuperscript{290} See \textit{id.} at 251.

\textsuperscript{291} \textit{Id.} at 253-54.

\textsuperscript{292} \textit{Id.} at 254 (quoting \textit{Advisory Opinion In re The Term of Office of the General Assembly that was Elected in April, 1868}, 64 N.C. 785, 786 (1870)).

\textsuperscript{293} See \textit{id.}

\textsuperscript{294} \textit{Id.} at 164. Ellingwood explained:

the purpose of the advisory opinion scheme was to secure to officials whose connection with the government is merely temporary, whose qualifications for dealing with the difficult problems of political science are often meager and whose ordinary sources of information are sometimes prejudiced or inadequate, the expert advice of other officials upon questions with which they are especially competent to deal thoroughly and without prejudice.

\textit{Id.}

\textsuperscript{295} \textit{Id.} at 253.
Thus, the advisory practice may be a "useful instrument of government" which helps eliminate waste.\footnote{296}

D. The Disadvantages of the Advisory Opinion

The principal argument against permitting extra-judicial opinions\footnote{297} is that the practice violates the separation of powers as mandated by the Constitution of North Carolina.\footnote{298} One of the reasons the drafters included the separation-of-powers provision in the state constitution was to "preserve and protect the independence of the judiciary."\footnote{299} Indeed, the instructions to one of the delegations charged with drafting the constitution required the drafters to observe "[t]hat the judging power shall be entirely distinct from and independent of the law making and executive powers."\footnote{300} In order to preserve the system of checks and balances in the government, the instructions also required the drafters to be mindful that a person in one branch could not exercise authority in another branch.\footnote{301} In State ex rel. Wallace v. Bone,\footnote{302} the North Carolina Supreme Court noted that North Carolina is "one of the few states, if not the only state," that does not allow its governor to veto legislative enactments.\footnote{303} The court stated that "[t]he clear implication [of disallowing the executive veto] is that our people do not want the chief executive to have any direct control over our legislative branch."\footnote{304} Arguably the

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\item \footnote{296} Id. at 251, 257. Concluding his book, Ellingwood asserted that "[t]he greatest problem before political scientists today is to reconcile democracy and efficiency." Id. at 252.
\item \footnote{297} While advisory opinions are theoretically "extra-judicial," it is reasonable to ask whether any question addressed to all the justices and answered by them jointly can ever be "extra-judicial."
\item \footnote{298} See N.C. CONST. art. I, § 6; Edsall, supra note 10, at 335 & n.144; supra notes 50-53, 173 and accompanying text.
\item \footnote{299} State ex rel. Martin v. Melott, 320 N.C. 518, 532, 359 S.E.2d 783, 791 (1987) (Martin, J., dissenting).
\item \footnote{300} State ex rel. Wallace v. Bone, 304 N.C. 591, 597, 286 S.E.2d 79, 83 (1982) (quoting 10 COLONIAL RECORDS OF NORTH CAROLINA 870a, 870b, 870g, 870h (W. Saunders ed., Raleigh, N.C., J. Daniels, 1890)). The instructions were given to the delegation of drafters from Orange County. Id. at 597, 286 S.E.2d at 82; see also supra note 49 and accompanying text (describing instructions to the Mecklenburg County delegates regarding the separation of powers).
\item \footnote{301} The instructions to the delegation of drafters provided
\[ [t]hat no person shall be capable of acting in the exercise of any more than one of these branches at the same time lest they should fail of being the proper checks on each other and by their united influence become dangerous to any individual who might oppose the ambitious designs of the persons who might be employed in such power.\]
\item \footnote{Wallace, 304 N.C. at 597-98, 286 S.E.2d at 83; see Orth, supra note 2, at 3-6.}
\item \footnote{302} 304 N.C. 591, 286 S.E.2d 79 (1982).
\item \footnote{303} Id. at 599, 286 S.E.2d at 83.
\item \footnote{304} Id.
people of North Carolina likewise do not want the judiciary to have any direct control over the executive branch. In keeping with Wallace, extra-judicial advisory opinions addressing the constitutionality of legislative enactments in response to executive requests potentially violate the separation-of-powers provision of the North Carolina Constitution.

In addition to the dispute involving the constitutionality of advisory opinions, the advisory practice has faced other challenges. Opponents of the advisory practice argue that permitting the justices to express their views on an issue prior to litigation denies a litigant his day in court. Further, because the justices offer the advice "without the benefit of argument and briefs," the advice itself is thought to be dangerously un-sound. The nonbinding force of the opinions does not sap their power, for the justices presumably would be reluctant to "overrule" their earlier advisory opinions. On the other hand, if advisory opinions are not the work of the court in its official capacity, future justices might be more willing to "overrule" a previous advisory opinion.

E. Approaches to Advisory Opinions in Other Jurisdictions

For many of the reasons stated above, the United States Supreme Court has refused to issue advisory opinions since President Washington's first request for advice in 1793. The Supreme Court has limited itself to deciding actual disputes, maintaining that to advise coordinate branches of government concerning issues which may or may not come to pass would be a waste of judicial resources and time. Further, the Supreme Court has asserted that the Justices' issuing advisory opinions directed to coordinate branches of government would violate the separation-of-powers principle implicit in the federal constitution. In Flast v. Cohen, the Court stated that "the implicit policies embodied in Article III, and not history alone, impose the rule against advisory opinions on federal courts." The rule "implements the separation of powers" and

305. See supra notes 152-53, 233 and accompanying text.
306. Advisory Opinion in re Sales Tax Election of 1969, 275 N.C. 683, 688, 169 S.E.2d 697, 700 (1969); see supra notes 153, 233 and accompanying text; see also July 20, 1987 Letter, supra note 211 (stating that "use of traditional legal procedures would allow the courts to consider them benefitted by briefs and arguments").
307. See supra note 153 and accompanying text; see infra note 328 and accompanying text. But see supra note 289 (stating that Justices are free to overrule advisory opinions).
308. See supra notes 42-44 and accompanying text.
310. CHEMERINSKY, supra note 309, § 2.2 at 43.
312. Id. at 96.
"also recognizes that such suits often 'are not pressed before the Court with that clear concreteness provided when a question emerges precisely framed and necessary for decision from a clash of adversary argument exploring every aspect of a multifaceted situation embracing conflicting and demanding interests.'"

The Court, therefore, has had to differentiate between justiciable controversies, which it may address in regular court opinions, and nonjusticiable matters that would require advisory opinions which it has found to be impermissible.

In order to distinguish a controversy subject to judicial decision from a controversy that would give rise to advice in the form of an advisory opinion, the Supreme Court has followed several guidelines. First, the Court will not offer an opinion if the disputed issue may come before it in litigation. Second, the Court will not render an opinion if the opinion, however favorable, would influence the resolution of the issue in dispute. In *Chicago & Southern Air Lines v. Waterman Steamship Corp.*, the board of a congressionally authorized agency passed an order that was subject to the President's approval. The President stated that he would approve the order only with modifications; the board complied and altered the order, then requested that the Court review the order. The Supreme Court declined. The Justices reasoned that, since the President had the ultimate say on the matter and since he had approved the order as amended, their opinion was of no consequence.

The Court wrote that,

To revise or review an administrative decision which has only the force of a recommendation to the President would be to render an advisory opinion in its most obnoxious form . . . . 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 judgments not binding and conclusive on the parties . . . .

The Court derives its power and preserves its prestige through the issuance of well-reasoned, logical opinions. Were the Court to haphazardly

313. *Id.* at 96-97 (1968) (quoting United States v. Fruehauf, 356 U.S. 146, 157 (1961)).
314. *Id.*
315. CHEMERINSKY, supra note 309, § 2.2 at 44.
316. *Id.* § 2.2, at 45.
317. 333 U.S. 103 (1948).
318. *Id.* at 104-05; see CHEMERINSKY, supra note 309, § 2.2, at 46.
320. *Id.* at 113-14.
321. *Id.*
322. *Id.*
render non-binding judgments, it would sacrifice its credibility and lose its authority within the tripartite structure.\(^{323}\)

Nine of the ten states that once permitted the advisory practice without constitutional or statutory authority now prohibit it, for many of the reasons the United States Supreme Court has articulated in the federal realm. For example, nearly twenty years after the North Carolina Supreme Court issued its first advisory opinion in 1848,\(^{324}\) the Supreme Court of Errors in Connecticut banned advisory opinions.\(^{325}\) The Connecticut court criticized the non-binding character of advisory opinions and claimed that the advisory practice conflicts with the principle of the separation of powers.\(^{326}\) Characterizing advisory opinions as "mere[] advice, . . . of no more authority than the opinion of any other five judicious lawyers,"\(^{327}\) the judges emphasized that, without the benefit of "arguments of counsel" and without a "searching investigation of the principles involved," a Connecticut court would deprive future parties of their "right to our unbiased judgment."\(^{328}\) The judges noted that other states

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323. The Supreme Court also emphasized that the judiciary was not equipped to address political issues. The Court wrote that

\[\text{Id. at 111; see supra notes 138-39, 271-72 and accompanying text. Although the "decision" in Chicago & Southern Air Lines involved foreign policy (the regulation of foreign carriers present in the waters and territories of the United States), it is arguable that the Court's statement would apply to its role with regard to questions of domestic policy as well.}\]

324. \textit{See supra} note 56 and accompanying text.

325. \textit{Reply of the Judges of the Supreme Court to the General Assembly, 33 Conn. 586} (1867).

326. \textit{Id. at 586-87; see Edsall, }\textit{supra} note 10, at 335 n.144.

327. \textit{Reply of the Judges, 33 Conn. at 586. The judges of the Connecticut Supreme Court of Errors refused to give advisory opinions because}

\[\text{Such action on our part would be clearly extra-judicial. It would be a case purely of advice and not of judgment. There are no parties before us, and nothing for us to adjudicate in any sense of the term. Our action being extra-judicial, and really rather our individual than official action, it can not be of any binding character whatever. No Judge of the Supreme or Superior Court, in any case hereafter before him, would be bound by our opinion. We ourselves should not be bound by it. Being merely advice, it would be in contemplation of law, and probably in fact, of no more authority than the opinion of any other five judicious lawyers, except perhaps as we ourselves, if sitting upon any such case, might be inclined to adhere to an opinion which we had expressed.}\]

\[\text{Id. at 586-87.}\]

328. \textit{Id. at 587. Commenting on the potential bias to the parties, the justices of the Connecticut Supreme Court noted that}
permit the advisory practice by statute, but questioned the constitutional-
ity of such statutory authorization. 329 In conclusion, the Connecticut
judges insisted that, although they had issued advisory opinions in prior
instances, they could have declined the requests just as easily. 330 Unlike
the North Carolina Supreme Court, the Connecticut Court recognized in
due course the separation-of-powers problem inherent in issuing advisory
opinions and consequently forbade the advisory practice before it became
tradition.

In a more recent decision, Cuomo v. Long Island Lighting Co., the
New York Court of Appeals reviewed the reasons the New York courts
and most other state courts no longer render advisory opinions. 331 The
Court of Appeals first noted that “the role of the judiciary is to ‘give the
rule or sentence,’ and thus the courts may not issue judicial decisions

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So far as our opinion would be regarded as having authority, and so far as we
ourselves would be influenced by it in any future case before us, there are the more
serious objections to our giving such an opinion upon a purely ex parte hearing, with
no arguments of counsel, no searching investigation of the principles involved, and
only the conclusion that we can best arrive at upon a comparison of our several
impressions on the subject in a consultation among ourselves.

Id. The judges concluded that “it is very clear any expression of opinion on our part becomes
a pre-judgment of a question that may come before us or other judges of our courts for adjudication.” Id.

329. Id.; see supra notes 45-46 and accompanying text.

Until 1682, the magistrates in Massachusetts asked the clergy for advice concerning ques-
tions of law. ELLINGWOOD, supra note 4, at 31. In 1780, John Adams reportedly drafted the
Massachusetts Constitution, explicitly providing for the advisory practice in the state constitu-
tion. Id. at 32-33. The Massachusetts Supreme Judicial Court rendered its first advisory opin-
ion in 1781. Id. at 33.

The years 1820 and 1854 brought proposals for the repeal of the advisory opinion clause
in the Massachusetts Constitution, supra note 46, but both proposals met defeat. ELLING-
WOOD, supra note 4, at 35, 37.

Diverse views of the value of advisory opinions found voice in Massachusetts. Those
against the practice claimed that it violated the separation-of-powers principle and that it
tossed the court into the “vortex of politics.” Id. at 37. They further asserted that allowing
the judiciary to issue advisory opinions invited the legislature and executive departments to
shirk their responsibilities. Id.

Those in favor of the advisory practice found it beneficial and efficient. They claimed
that it worked well in practice, that no evil had resulted, that it secured a desirable
uniformity of action in questions under the constitution and that the supreme court
of the State can render no better service to the Commonwealth than in answering
such questions as may be propounded to them by the legislature.

Id.

To this day the Massachusetts Constitution continues to authorize the advisory practice.
Since 1877, however, the justices have “asserted a claim to considerable discretion in refusing
their advice.” Id. at 38.


that 'can have no immediate effect and may never resolve anything.' "332 The court then noted that "an action 'may not be maintained if the issue presented for adjudication involves a future event beyond control of the parties which may never occur.'"333 The court further found that the ban against the advisory practice upholds the integrity of the judicial system. It "not only prevents dissipation of judicial resources, but, more importantly, prevents devaluation of the force of judicial decrees which decide concrete disputes."334 Based on these reasons, most of the states which once permitted the advisory practice now disallow it.

E. Should the Advisory Practice Continue in North Carolina?

North Carolina is the only state in the Union that permits the justices of its highest court to issue advisory opinions without explicit constitutional or statutory authorization.335 Ironically, North Carolina is also one of the few states that explicitly provides for the separation of powers in its state constitution.336 In recent years, various persons, the justices of the North Carolina Supreme Court in particular, have challenged the constitutionality of the advisory practice.337 Some critics claim that the advisory practice violates the explicit state constitutional provision requiring the separation of powers in state government. They maintain that, although superficially voluntary and advisory, an advisory opinion is, in effect, binding upon the branch seeking the opinion, since it has been sought for the express purpose of obtaining specific guidance.338 In addition, those who oppose the practice assert that permitting the judges to rule on proposed legislation unconstitutionally interjects the judiciary into the legislative process.339 In response to the contention that advisory opinions save money and time, opponents of the practice


334. Id.

335. See supra notes 45-48 and accompanying text.

336. See supra notes 50-54 and accompanying text; see Orth, supra note 2, at 11-17 (comparing the North Carolina Constitution's separation-of-powers provision with the similar provisions found in the state constitutions of South Carolina, Indiana, West Virginia, Georgia, and Colorado).

337. See Advisory Opinion in re Advisory Opinion, 335 S.E.2d 890, 891 (1985); supra notes 195-97, 250-52 and accompanying text; July 20, 1987 Letter, supra note 211; supra notes 211-13 and accompanying text; August 20, 1991 Letter, supra note 226; supra notes 231-34 and accompanying text.

338. See supra note 307 and accompanying text.

339. See supra notes 286, 301-04 and accompanying text.
argue that achieving efficiency in government never has trumped a constitutional right. Finally, the critics state that, if the federal courts can hold the advisory practice unconstitutional based on an implied separation-of-powers provision in the United States Constitution, the North Carolina Supreme Court has even more reason to hold advisory opinions unconstitutional since the state constitution contains an express separation-of-powers provision. As a result of these criticisms and an increasing consciousness that the advisory practice violates the separation-of-powers provision in the state constitution, the advisory opinion cannot survive in North Carolina.

F. Implications of the Demise of the Advisory Practice

A finding that the North Carolina Constitution prohibits the justices of the North Carolina Supreme Court from issuing advisory opinions would force the legislative, executive, and judicial branches of government to shoulder their constitutionally delegated responsibilities with greater deliberation. The legislature would propose and enact legislation; the governor would execute the law; and the judiciary would determine the constitutionality of the law and adjudicate disputes based on that law.\(^{340}\) The governor could not consult the judiciary about the constitutionality of an act prior to its execution. The legislature could not make an enactment contingent upon an opinion of the justices. The legislature would make its own proposals regarding the law and the executive would make its own decisions in executing the law. Each branch would function separately, and yet each would serve as a check on the other branches. The three branches of government would fulfill their constitutionally mandated duties\(^{341}\) without resorting to measures of self-imposed restraint which the practice of rendering advisory opinions requires.

It has been asserted that the "separation of powers should be an instrument both of democracy and efficiency."\(^{342}\) Ellingwood claimed that permitting the judges to render advisory opinions is one solution to the "problem" of "reconcil[ing] democracy with efficiency."\(^{343}\) Yet a state constitution like that in North Carolina, which explicitly provides for the separation of powers, does not contemplate the type of "reconciliation" Ellingwood envisions. In such a state, the legislative, executive, and judicial branches should check—not advise—one another. This is

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340. See supra notes 49-52 and accompanying text.
341. See supra notes 49-52 and accompanying text.
342. See ELLINGWOOD, supra note 4, at 251.
343. Id. at 252, 257.
because, although the doctrine of stare decisis does not apply to advisory opinions, a type of "stare opinionibus" exists. Judicial advice in the form of advisory opinions quickly assumes the status of legal precedent, encroaching upon the exercise of legislative, executive, and judicial authority. Because the drafters of the North Carolina Constitution expressly provided for the separation of powers of government, and because the advisory practice crosses those boundaries, the justices of the North Carolina Supreme Court should lay to rest the advisory practice in North Carolina.

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344. Id. at 236.