Chapter 10: Advisory Opinions

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§10.1. History and background. Massachusetts is one of seven states which provide in their Constitutions for advisory opinions. Article 2 of Chapter 3, Part II of the Massachusetts Constitution, as modified by Amendment 85, adopted in 1964, provides:

Each 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.

The Massachusetts Constitution also contains a classic statement of the principle of the separation of powers. Article 30 of the Declaration of Rights provides:

In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: the executive shall never exercise the legislative and judicial powers, or either of them: the judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men.

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§10.1. Colo. Const., Art. IV, §3; Fla. Const., Art. IV, §13; Me. Const., Art. VI, §3; N.H. Const., Pt. 2, Art. 74; R.I. Const., Amend XII, §2; S.D. Const., Art. V, §13. In Florida and South Dakota, opinions may be requested only by the Governor. In Alabama and Delaware, advisory opinions are provided by statute; in North Carolina they have been given without statutory authority. See Edsall, The Advisory Opinion in North Carolina, 27 N.C.L. Rev. 297 (1949).

2 By Amendment 85, the authority to require an opinion of the Justices, formerly lodged in the Governor and Council, was expanded so that the Governor acting alone or the Council acting alone may now require an advisory opinion.
However, there is no indication that these two provisions created any inconsistency for John Adams, who drafted the Constitution for the Convention of 1780. Perhaps the answer lies in the fact that the provision for advisory opinions "evidently had in view the usage of the English Constitution," and Article 30 is a restatement of Montesquieu, to whom the British Constitution was "the standard, or to use his own expression . . . the mirror of political liberty." It has also been suggested that the provision for advisory opinions was viewed as an interim measure to cope with the initial problems in establishing the government.

An inconsistency between the principle of the separation of powers and the advisory opinion was noted in 1793 by Chief Justice John Jay and the Associate Justices of the Supreme Court of the United States in their refusal to answer a series of questions propounded by George Washington involving our treaties with France and our rights as neutrals. The letter from Thomas Jefferson, Secretary of State, transmitting these questions, stated the desire of President Washington to know "whether the public may, with propriety, be availed of their advice on these questions." The Justices replied to the President:

We have considered the previous question stated in a letter written by your direction . . . [regarding] the lines of separation drawn by the Constitution between the three departments of the government. These 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. . . .

The Bench and Bar in Massachusetts in the early nineteenth century seem to have been troubled by the advisory opinion. Although only eight such opinions are reported up to 1820, the Constitutional Convention of that year recommended that they be eliminated. Delegates to that Convention included Isaac Parker, Chief Justice of the Supreme Judicial Court, Charles Jackson and Samuel S. Wilde, Associate Justices, Lemuel Shaw and Levi Lincoln, who later became Justices, Daniel Webster, and a number of other experienced lawyers.

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3 Opinion of the Justices, 126 Mass. 557, 561 (1878). See Ellingwood, Departmental Cooperation in State Government 31-32 (1919). This is an exhaustive survey of the advisory opinion to 1918.

4 The Federalist, No. 47 (Madison) 313-314 (Modern Library ed.).


Joseph Story, Justice of the Supreme Court of the United States, reported, as chairman for the Committee on the Judiciary, which included Lemuel Shaw and Levi Lincoln, that the provision for advisory opinions "is of very questionable utility and may lead to serious embarrassments." The report also pointed out that "... cases of a more public character may be referred to the judges involving questions of general interest, of political power, and perhaps even of party principles ... and thus the proper responsibility of the public functionaries may be shifted upon judges who are called upon only to decide and not to act." There seems to have been no opposition to the proposal to abolish advisory opinions, and it was agreed to by a large majority. The objections to the advisory opinion are summarized in the address to the people accompanying the proposed amendments to the Constitution:

FIRST. Each department ought to act on its own responsibility. SECOND. Judges may be called on to give opinions on subjects, which may afterwards be drawn into judicial examination before them, by contending parties. THIRD. No opinion ought to be formed and expressed, by any judicial officer, affecting the interest of any citizen, but upon full hearing, according to law. FOURTH. If the question proposed should be of a public nature, it will be likely to partake of a political character; and it highly concerns the people that judicial officers should not be involved in political or party discussions.

The proposed amendment was submitted to the people, linked with another proposal that an address by either House for removal of a judicial officer should require notice to the officer and hearing. This combined proposal was defeated, but there is no indication of the degree to which either proposal was responsible for the defeat. The Constitutional Convention of 1853 also eliminated advisory opinions from the revised constitution which was submitted to the people for ratification. The provision was reported by Marcus Morton, Sr., ex-Governor and Justice of the Supreme Judicial Court, as chairman of the Judiciary Committee, which included Rufus Choate, Simon Greenleaf of the Harvard Law School, and Otis P. Lord, who later became Justice of the Supreme Judicial Court. Marcus Morton urged the elimination of advisory opinions as contrary to the principle of the separation of powers because they were given without argument and because they made it possible for the Court "to be drawn

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8 Journal of the Massachusetts Constitutional Convention, 1820-1821, p. 137.
9 Ibid.
10 Id. at 490.
11 Id. at 629.
12 Documents of the Constitutional Convention of 1853, No. 4, p. 5. Among the delegates to the convention were Richard Henry Dana and Charles Sumner.
13 1 Debates and Proceedings of the Massachusetts Constitutional Convention of 1853 685, 693-694.
into the vortex of politics." He referred to the opinion of the Justices in 1812, which had advised the Governor and Council that the Governor's determination, rather than that of Congress or the President, was controlling as to whether circumstances existed which required calling out the militia. He characterized this as:

a question about which there was more excitement than there ever had been before or will be likely to exist for half a century to come. . . . [The opinion] produced an immense excitement in the community and . . . was arraigned throughout this State and throughout the United States, which opinion was reversed by the whole Court of the United States.  

This advisory opinion was the legal basis upon which the Governor refused to cooperate with the Federal Government in the War of 1812.

The revised constitution was submitted as a whole and was rejected, but this particular change probably was of no consequence in the result.

While no specific issue was made of advisory opinions in the Constitutional Convention of 1917-1918, the judiciary was under severe attack. A proposal to limit the authority of the Supreme Judicial Court to declare statutes unconstitutional was extensively debated, and Professor Albert Bushnell Hart of Harvard University asserted that there was "a widespread distrust of the judicial system." In the preceding quarter of a century the Justices had advised that the General Court could not empower cities and towns to sell coal and wood to their inhabitants; that trading stamps could not be prohibited; that rent and sell homes to wage-earners was not a public purpose; that it was unconstitutional to exempt trade unions from liability for torts of their members; that it was unconstitutional to require prison-made goods to be so labelled; and that it was unconstitutional to require a railroad to give an employee the opportunity to rebut information of misconduct before he could be discharged.

14 Id. at 228-229.
15 8 Mass. 549 (1812).
17 4 Channing, History of the United States 472 (1909-1921).
18 Ellingwood, op. cit. supra note 5, 57-58.
19 1 Debates of the Massachusetts Constitutional Convention, 1917-1918 p. 500.
One delegate to the Convention, not a lawyer, criticized an 1894 opinion of the Justices\(^{26}\) that it was unconstitutional to condition legislation on a referendum, but he did not note that this was an advisory opinion. Indeed, he referred to it as a matter “decided” by the Massachusetts Supreme Judicial Court.\(^{27}\) This is illustrative of the failure of the public generally to differentiate between opinions of the Justices and decisions of the Court. Both the *Boston Herald* and the *Boston Globe* of October 29, 1964, reported as a ruling of the Court the opinion of the Justices that the incumbent Registrar of Motor Vehicles could not legally hold that office. The *Boston Traveler* headline on October 28, 1964, was “Court Ousts Registrar.”\(^{28}\)

The present lack of concern with advisory opinions as such is reflected in the 1964 enactment of Amendment 85 to the Constitution, which extends the authority to require opinions of the Justices from the Governor and Council to the Governor or Council. This occasioned practically no discussion by either the bar or the public generally. The amendment was originally introduced into the Legislature in 1961, after the Council had refused to acquiesce in Governor Volpe’s proposal to obtain an opinion of the Justices whether the Commonwealth could build a freeway between Weston and the proposed Inner Belt in Boston. The Attorney General had ruled that the Massachusetts Turnpike Authority had the exclusive right to build such an expressway, but Governor Volpe had received advice from other counsel to the contrary. The proposed amendment was approved on July 18, 1962, at a joint session of the Legislature by a vote of 220 to 24 and again on May 8, 1963, by a vote of 258 to 1. The Special Commission on Revision of the Constitution, by a vote of 9 to 3, 4 members not voting, recommended approval of the proposal.\(^{29}\) The amendment was passed by a vote of 1,474,803 in favor and 232,701 against. The vote probably indicated a desire to give the Governor a freer hand vis-à-vis the Council, rather than any conviction regarding advisory opinions. At the same election the people approved a constitutional amendment giving the Governor and other constitutional officers a four-year term and an initiative petition stripping the Council of its statutory powers. There was apparently no concern, or little awareness, that Amendment Article 85, for the first time in Massachusetts history, gave the Council constitutional power to act independently of the Governor. Under the circumstances, this would seem to suggest public confidence that the Justices can cope with possible abuses by the Council of its new authority.

§10.2. Limitations on jurisdiction: Requests from the Legislature. The earlier opinions of the Justices give some indication of the misgivings expressed in the Constitutional Conventions of 1820 and 1853.

\(^{26}\) 160 Mass. 586, 36 N.E. 488 (1894).

\(^{27}\) 1 Debates of the Constitutional Convention, 1917-1918, p. 517.


\(^{29}\) The writer was one of the three opposed.
The first of these opinions was given in 1781,\(^1\) pursuant to an order passed by both Houses of the Legislature which "directed" the Justices of the Supreme Judicial Court within two days "to deliver in writing to each House of the Legislature . . . their respective opinions" on a question regarding the prerogative of the House of Representatives as the originator of money bills. Three of the four Justices who appeared in the Senate Chamber to reply noted the very short time allowed for forming their opinions. Justice Sargeant said "Perhaps if I had heard all the arguments that have been made use of I might be of a different opinion."

In 1825\(^2\) the Justices gave an opinion to the House of Representatives on the effect of certain legislation concerning a specific charitable trust upon the obligation of tenants of the trustees to pay rent. The Attorney General submitted to the Justices an opinion that contrary to the contention of the tenants, the Commonwealth had not assumed the obligation to make these rent payments nor absolved the tenants from making them. Those interested adversely to the Commonwealth were invited to be heard and submitted an argument. Nevertheless, the Justices gave an opinion "with some reluctance . . . since an opinion given in this form without the usual hearing is liable to incorrectness." The Justices went on to say, "but it appearing to us to be a question on which according to the Constitution either branch of the Legislature has a right to our opinion we have performed our duty."\(^3\) The same reluctant compliance with a request of the Legislature when private rights were involved was evidenced in 1844,\(^4\) when the Justices gave an opinion to the House of Representatives on the rights and obligations of the Western Railroad Corporation under a special act to aid in the construction of the railroad, and again in 1852\(^5\) when they were called on to interpret the investment powers of the Provident Institution for Savings under its legislative charter.

It appears in these early opinions that the Justices felt they were bound to answer the questions asked. Justice Story expressed the same conviction in the Constitutional Convention of 1820. In the course of an argument for the elimination of advisory opinions, he said: "As the constitution now stands, the judges are bound to give their opinions if insisted upon, even in a case where private rights are involved, and without the advantage of an argument."\(^6\)

It was not until 1877\(^7\) that the Justices for the first time\(^8\) refused to

\(^1\) 126 Mass. 547 (1781). This opinion was found in the archives when the Justices in 1878 asked for material on a similar question.
\(^2\) 7 Pick. 125 (Mass. 1825), in a footnote to Adams v. Bucklin, 7 Pick. 121 (Mass. 1828), which decided the same issue in a case between the trustees and tenants.
\(^3\) 7 Pick. at 129.
\(^4\) 5 Metc. 596 (Mass. 1844).
\(^5\) 9 Cush. 604 (Mass. 1852).
\(^6\) Journal of Massachusetts Constitutional Convention, 1820-1821, p. 490.
\(^7\) 122 Mass. 600 (1877).
\(^8\) In 1876 the Justices had refused to answer one of two questions relating to the weight to be given by the Governor and Council, in exercising their commutation
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honor an order of a branch of the Legislature requesting their opinion. They refused to answer because the question posed by the House of Representatives related to the tenure of a special justice, whether a special justice who became a member of the House thereby vacated his judicial position. This, the Justices said, could not be affected by legislative action but could be determined only in the course of judicial proceedings. Any attempt by the Legislature to deal with the tenure of this judicial officer would have been an interference with the judiciary and inconsistent with the separation of powers. The question was thus irrelevant to any exercise of legislative power.

The Justices "pray[ed] to be excused from further consideration of the subject until it shall have been presented and argued by counsel in the ordinary course of the administration of justice," and a footnote in the report of the answer says that the House of Representatives took no further action. However, the answer itself does not seem to claim that the Justices can refuse their opinion as a matter of right.

The next two refusals, in 1889 and 1890, explicitly asserted the right and duty of the Justices to refuse to answer the questions asked by the House of Representatives and invoked the separation of powers as a restraint on the Justices which "prohibits" them from giving their opinion except in a situation which presents an important question of law and a solemn occasion within the constitutional provision.

Both requests were for interpretations of existing statutes. The Justices refused to answer, because any interpretation they might give the statutes could not affect the power of the Legislature to clarify them, or amend them, or give them whatever meaning the Legislature desired. The questions thus did not require determination to enable the Legislature to act, and therefore a solemn occasion did not exist.

The 1889 request for an opinion asked for an interpretation of the then-existing compulsory education statutes as they related to private schools. It is a fair conjecture that the questions were controversial, and an interpretation by the Justices would, in the public mind, have placed on them rather than on the Legislature the responsibility for the scope of the statutes. The House of Representatives did not take kindly to the refusal of the Justices to answer, and it passed a resolve affirming its authority to require an answer to these questions.

power, to a recommendation by a jury that the death sentence should not be imposed. They said that this posed a "pure question of fact." 120 Mass. 600 (1876). See Commonwealth v. Smith, 9 Mass. 531 (1813), in which an opinion was refused to the Attorney General.

9 Cf. 237 Mass. 613, 131 N.E. 81 (1921), in which the Justices refused to deal with bills relating to the administration of named charitable trusts.


12 Id. at 627, 21 N.E. at 440; 150 Mass. 598, 601, 24 N.E. 1086, 1088 (1890). See also 126 Mass. 557 (1875).

The refusal of the Justices to answer the following year elaborated and justified their position in the 1889 refusal. They said:

While it is our duty to render opinions in all those cases in which either branch of the Legislature or the Governor and Council may properly require them, it is not the less our duty, in view of the careful separation of the executive, legislative, and judicial departments of the government, to abstain from doing so in any case which does not fall within the constitutional clause relating thereto.14

Confronted with Article 30 and the advisory opinion provision, the Justices asserted their right to make the ultimate accommodation between these two clauses. They said:

We shall always pay great respect to its judgment that a proper occasion has arisen for the exercise of its power in this regard. . . . On the other hand, we cannot surrender our own judgment to that of the House, or of the other bodies entitled to require our answer to questions proposed by them, but must for ourselves finally decide whether the occasion contemplated by the Constitution in which our opinion may properly be required has arisen.15

As an assertion of the principle of judicial review by a court, this statement seems unexceptionable. However, it is not quite so obvious if — as the Justices have asserted and the Court has held — the Justices in performing their advisory function are not acting as a court but as individual "constitutional advisors of the other departments of Government."16 It is one thing for a court, when a case comes before it, to review the action of the Legislature in the exercise of its own powers as a body coordinate with the Legislature. It may be something else for a "constitutional advisor" to refuse to give advice to those whom the Constitution has made his clients. However, both the Legislature and the Governor and Council have, except in the 1889 instance, acquiesced without question in what may now be regarded as settled doctrine — that the Justices may refuse to, and indeed "have no right to,"17 answer questions unless they satisfy themselves that an important question of law and a solemn occasion exist. "The 'Justices are forbidden to go beyond the requirement of the Constitution. The Constitution not only limits their duty but bounds their right to express opinions.' "18

15 Ibid.
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Since whatever the Justices are not “require[d]” to answer by the advisory opinion clause they are forbidden to answer by Article 30, they must in every instance in which their opinion is asked make a threshold inquiry as to their “jurisdiction.” The limitation imposed by Article 30 would thus seem to preclude an opinion such as the Justices gave in 1924, in which they answered the question asked and specifically refrained from resolving the jurisdictional issue whether a question received from the House of Representatives too late for answer before the Legislature prorogued could be answered for the succeeding House. Indeed, in 1934 the Justices refused to give an opinion on just those grounds. The Justices said that since there was no longer any “necessity, opportunity or power for consideration by that legislative body . . . the solemn occasion which gave rise to the order had ceased to exist.” They noted however, that “whether public emergencies may require an exception to this practice need not be considered.” This recognizes that practical considerations may enter into a determination whether an important question of law and a solemn occasion exist, but the determination itself cannot be avoided.

The Justices have adhered to the conditions developed in the answers of 1877, 1889, and 1890 and have continued to refuse to interpret existing statutes for the Legislature on the ground that their opinion would have no “bearing . . . upon the power and authority of the legislature.” Similarly, they have refused to discuss “abstract legal propositions” and have generally confined their answers to the specific bills submitted to them and the specific constitutional question raised.

The Justices have considered that the principle applicable to their refusal to interpret existing statutes is also applicable to questions concerning the constitutionality of existing statutes. In 1919 they referred to the “well settled rule, from which we do not here depart, that we are not required to express to the General Court or either branch thereof opinions as to the constitutionality or construction of statutes already enacted.” In that instance, however, the Justices were “constrained” to consider the constitutionality of the statute because pending

22 Id. at 603-604, 195 N.E. at 358.
23 Ibid.
amendments before the Senate were so interwoven with the statute that both the statute and the amendments had to be considered together.

The 1919 opinion referred to a request in 1911,²⁹ when the Justices had refused to answer a question posed by the House of Representatives whether the civil service statute had been constitutionally passed over the Governor's veto. There the Legislature had it within its power to repeal the statute or change it regardless of its constitutionality. An opinion that the statute was constitutional obviously would not have affected the Legislature's power over it. An opinion that the statute was unconstitutional would not have imposed a duty on the Legislature to repeal it and would not have curtailed its power to change it.

However, a determination of the constitutionality of an existing statute may have relevance to the power of the Legislature to appropriate funds in connection with that statute, and, indeed, in 1885³⁰ the Justices answered questions as to the constitutionality of the civil service law passed the previous year, asked by the House of Representatives, which had pending before it an appropriation bill for the administration of that law. This opinion, however, cannot provide real guidance, because it was given before the 1889 and 1890 opinions asserting the right and duty of the Justices to refuse to answer in appropriate circumstances, and this point was not discussed.

A basic objection to opinions regarding the constitutionality of existing statutes in any situation would seem to be the presumption of constitutionality which attaches to existing law. As "constitutional advisors" to the Legislature, the Justices are functioning as part of the legislative branch. As such, they would seem to be bound by existing legislation until the presumption in its favor has been dispelled by the Court in a factual context after argument. Perhaps the Justices recognized this when in 1857 the Senate asked for an opinion on the constitutionality of the insolvency law.³¹ They withheld the opinion for over a month and released it simultaneously with the decision of the Court in Dearborn v. Ames,³² upholding the law.

§10.3. Limitations on jurisdiction: Requests of Governor and Council. In general the Justices have used the same criteria in answering questions propounded by the Governor and Council. They have refused to answer abstract questions when it did not appear that the questions involved "pending matters in order that assistance may be gained in the performance of a present duty,"³³ and they have noted that it has been customary "for the specific pending matter to be . . .

²⁹ 208 Mass. 614, 95 N.E. 927 (1911).
³⁰ 138 Mass. 601 (1889).
³¹ 8 Gray 20 (Mass. 1857).
³² 8 Gray 1 (Mass. 1857).
referred to in the inquiry to the end that a more intelligent and helpful answer be given." However, when the question is asked by the Governor and Council, rather than by a branch of the legislature, it is obvious that nothing so specific as a pending bill can be required as a basis for the question. The Justices have, therefore, often been willing to answer a question put by the Governor and Council on the assumption that the question had important ramifications in which the questioners were bound to become involved. This was the basis for their answer to questions concerning the effect of a United States Supreme Court decision on a large number of excise taxes, the validity of the Massachusetts Turnpike Authority, and whether the governor could accept an appointment on the Federal Civil Defense Advisory Council without ipso facto vacating the governorship. In the first two of these opinions, the Justices said that in answering they had cast aside serious doubts as to the right of the Governor and Council to ask such questions and that this was not to be taken as an indication of an intent to depart from the practice of requiring a "present duty." Since the Governor and Council must, under the Constitution, approve warrants for all state expenditures, it is not difficult in most cases to find a present duty or at least an imminent duty. But this should not conclude the question whether there is an important question of law or a solemn occasion. This is perhaps intimated in the opinion of the Justices of October 27, 1964, advising that the Registrar of Motor Vehicles had been illegally appointed. The Justices not only noted that the question involved the function of the Governor and Council in approving warrants for state expenditures but also emphasized the importance that the executive know whether there is a legally appointed Registrar.

Although at least two opinions have been given in situations in which the only relevant duty of the Governor and Council was the approval of a warrant, the Justices have also indicated that there may be a class of cases presenting questions of law which are not so important as to require the Justices to give opinions. In 1912 the Justices noted "the requirement for such opinions is to be sparingly exercised. . . . It is not as to any question of law that the requisition may be made but only important questions of law." The Justices went on to say that: "The Legislature has made ample provision for the

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2 Ibid.
6 Here also it is questionable whether the Justices may in this way avoid making a threshold determination of jurisdiction.
8 See 304 Mass. 681, 682, 23 N.E.2d 415, 416 (1939), in which the Governor and Council in asking for an opinion listed a number of reasons for the request, among which the need to approve warrants was listed last.
advice by the Attorney General as to usual legal difficulties presenting themselves either to the House of Representatives or to the Senate or to the Governor and Council."10 Thus, for example, it would seem that despite a present duty of the Governor and Council to pass on warrants for the payroll, the Justices might well refuse to answer questions proposed by the Governor or the Council involving the minutiae of the civil service law — the validity of appointments to and separation from the service, the right to pay increases, etc. — which the Court frequently deals with in its decisions.11 If Amendment 85, which gives the Governor or the Council, each unrestrained by the other, the right to ask for opinions, should result in a large number of such questions, the Justices may be compelled to draw a sharper line between those questions better left to the Attorney General and matters such as those involving the status of a Registrar of Motor Vehicles or of the Governor himself.

A question which may be reopened by Amendment 85 concerns the right of the Governor to obtain an opinion of the Justices in connection with the exercise of his veto power. It may be significant that the 1913 refusal12 to give the Governor an opinion on the constitutionality of a bill before him for approval was not based solely on the use of the phrase "governor and council" in the Constitution prior to Amendment 85. The Justices noted that the circumstances in 1780 when the Constitution was adopted — the dispersal of the Justices (two of whom usually lived in Maine) and the difficulty of transportation — indicated that it was not the intent of the Constitution to require an opinion on a question which, then as now, would have to be answered within five days. Furthermore, the history of Amendment 85 indicates that its immediate purpose was to permit the Governor to make requests for opinions without obtaining the previously required concurrence of the Council. There is no indication that Amendment 85 was intended to broaden the category of questions that could be asked.

Since executive action is primarily within a statutory framework, the reasons for the Justices' refusal to answer questions involving the interpretation of existing statutes put by the House or Senate cannot apply to similar questions asked by the Governor or Council. The Justices have thus interpreted statutes for the Governor and Council when answers were required in aid of the exercise of their statutory powers to make appointments,13 approve rules and regulations under


11 But see the opinion in 154 Mass. 603, 31 N.E. 634 (1891), concerning the validity of the appointment of a commissioner of pilots, although this may have been an important post in 1891.


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statutory rule-making powers,14 issue bonds, or perform other functions.15

Similarly, the Justices have been willing to answer questions proposed by the Governor and Council involving the constitutionality of existing statutes, and such an opinion was given as recently as 1958, when the Justices advised that the statute establishing the Massachusetts Turnpike Authority was constitutional.16 Such opinions, however, are also open to the objection that the Justices — acting as constitutional advisors to the executive, not as the Court — cannot rebut the presumption of constitutionality. Indeed, the Florida Justices have consistently refused to give the Governor opinions on the constitutionality of statutes under a constitutional provision permitting the Governor to "require the opinion . . . as to the interpretation of any portion of the Constitution, upon any question affecting his executive powers and duties" — a provision far less restrictive than the Massachusetts provision. In a 1915 opinion the Florida Justices said that "an advisory opinion of the Justices, while not binding on the court and open to reconsideration and revision . . . would create a doubt as to the effect of such a statute which the Justices on ex parte consideration of the subject should not bring about."17

Opinions as to the constitutionality of statutes when sought by the Governor or Council raise other and more difficult questions than those that arise when such opinions are sought by a branch of the Legislature. Since the Justices do not answer abstract questions irrelevant to action, these opinions are given to the Governor or Council with the implicit recognition that they may refuse to execute a law which they are advised is unconstitutional. Otherwise, of course, such an opinion would be pointless. Since the opinion is merely that of constitutional advisors, not of the Court, any action taken by the executive on the basis of the opinion is on his own responsibility rather than on the responsibility of a Court. But if the executive has the right to refuse to execute a law on his own responsibility, he in effect becomes a law maker. Justice Black's opinion in the Steel Seizure Case concerning presidential power is relevant:18

The Constitution limits his functions in the law-making process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad. And the Constitution is neither silent nor equivocal about who shall make laws which the President is to execute.19

14 324 Mass. 736, 742-743, 85 N.E.2d 238, 244 (1949).
16 330 Mass. 713, 113 N.E.2d 452 (1953). The opinion in 334 Mass. 765, 138 N.E.2d 212 (1956), does not involve the constitutionality of a statute duly passed by the legislature, but rather whether a statute was properly passed — whether a statute existed at all.
17 69 Fla. 632, 639-640, 68 So. 851, 853 (1915).
19 Cf. Mass. Const., Part II, c. 1, §1, Art. IV.
Historically, Jefferson's position that the executive as well as the courts may decide questions of constitutionality has not prevailed.\textsuperscript{20} As early as 1868, Benjamin R. Curtis, a former Justice of the United States Supreme Court, in his defense of Andrew Johnson, conceded as settled that, except in the case of a direct interference with executive power, the President's duty was to execute the laws whether or not he believed them constitutional; his function was not to "erect himself into a judicial court and decide that the law is unconstitutional."\textsuperscript{21}

The 1927 edition of Cooley's \textit{Constitutional Limitations} states without discussion: "The right to declare an act unconstitutional is purely a judicial power and cannot be exercised by the officers of the executive department under the guise of the observance of their oath of office to support the constitution."\textsuperscript{22} Thus, President Franklin D. Roosevelt complied with a rider\textsuperscript{23} directed against Robert M. Lovett and others, which was attached to the Urgent Deficiency Appropriation Act of 1943, although he believed it unconstitutional, leaving them to the courts for remedy.\textsuperscript{24}

It may be significant that only one opinion has been found in which the Governor and Council were advised that an existing statute was unconstitutional.\textsuperscript{25} It related to a grant of bounties to Civil War veterans by the Commonwealth, and the Justices noted that the unconstitutionality of such a grant had been decided in \textit{Mead v. Acton}, "a case which arose in regular judicial proceedings and was argued by counsel."\textsuperscript{26} In that instance the Justices had before them not only a statute presumably valid in the absence of hearing and argument, but also a decision of the Court, also presumptively effective, which had decided the very question asked and by which the Justices, acting as part of the executive branch, were bound.

\textbf{\textsection 10.4. Effect of opinions.} The Justices have been concerned to differentiate between their judicial functions and their advisory functions. When the Governor's message in 1960 in connection with the Prudential Center stated that an opinion of the Justices would assure its constitutionality, the Justices said:\textsuperscript{1}


\textsuperscript{21} Proceedings in Congressional Globe (Supp.), 40th Congress, 2d Sess., 126, 127 (1868), reprinted in Freund et al., id. at 18.

\textsuperscript{22} Cooley, \textit{Constitutional Limitations} 105 n.3 (8th ed. 1927), citing State ex rel. Atlantic Coastline R.R. v. State Board of Equalizers, 84 Fla. 592, 94 So. 681 (1922).

\textsuperscript{23} 57 Stat. 431, 450, \textsection 304.

\textsuperscript{24} See United States v. Lovett, 328 U.S. 303, 66 Sup. Ct. 1073, 90 L. Ed. 1252 (1946).

\textsuperscript{25} 186 Mass. 605, 72 N.E. 95 (1904).

\textsuperscript{26} 199 Mass. 441, 1 N.E. 413 (1885).

In this connection we quote from Commonwealth v. Welosky, 276 Mass. 398, 400, where Chief Justice Rugg said for the court, "It has been uniformly and many times held that such opinions, although necessarily the result of judicial examination and deliberation, are advisory in nature, given by the justices as individuals in their capacity as constitutional advisors of the other departments of government and without the aid of arguments, are not adjudications by the court, and do not fall within the doctrine of stare decisis." If the same question arises in the course of litigation, it is the duty of the court to consider it anew, unaffected by the advisory opinion.2

However, the Justices themselves have recognized that this does not end the matter. "Opinions are accorded weight by the public and the profession as indicating what the law is."3 Although an opinion does not have the force of an adjudication, "yet it is in a sense a prejudgment of the question proposed and would usually be followed by the subordinate judicial officers of the Commonwealth."4

The distinction between the Justices as advisors and the Justices as members of the Court becomes particularly thin if we view their statements of what the law is as "the prophecies of what the court will do in fact."5 On that view of the law, the Justices — when advising on state rather than federal constitutional law — are predicting what they themselves will do as members of the Court. It is small wonder that no case has been found deciding an issue contrary to an opinion given on that issue.

Whatever the practical effect the distinction between Justices as constitutional advisors and as members of the Court may have on the use of opinions by the Court, the distinction does have implications for the treatment of Court decisions in an opinion. Thus, in an opinion holding that taxation of partnerships was unconstitutional on the basis of Gleason v. McKay,6 the Justices said:

It hardly needs to be added that adjudicated cases decided by the court after a hearing and arguments by counsel cannot be overruled by opinions rendered by the Justices under c. 3, art. 2 of the Constitution, when not acting as a court but as the constitutional advisors of the other departments of government, although such opinions necessarily presuppose judicial examination and consideration.7

5 Holmes, The Path of the Law, in Collected Legal Papers 175 (1920).
6 134 Mass. 419 (1888).
This has obvious force, but there may be a point at which a decision has been so eroded that it is fair to predict even without argument that it will be overruled. One wonders whether this was not the situation in 1917 when the Justices held the prohibition of trading stamps unconstitutional. The Justices relied upon inferences from various old cases and opinions, which they refused to reappraise in the light of subsequent United States Supreme Court cases holding such a statute constitutional.

If the advisory opinion is not to be a roadblock to new legislation, the Justices will have to continue the approach used in the opinion on the validity of the historic districts in Nantucket. There the Justices did examine the development of the law to indicate that the old opinions limiting the purposes for which zoning and similar controls could be imposed would not be followed.

§10.5. Factual bases for opinions: General welfare legislation. The endeavor to give "abstractly correct answers . . . without the full presentation of all the facts which could be brought before the legislature and its committees" is most critical when the Justices are called upon by the Legislature to advise on pending legislation involving classifications which may be discriminatory, the police power generally, and whether proposed expenditures are for a public purpose.

Two recent opinions — one in 1963 and one in 1964 — point up the dilemma before the Justices when called upon to pass on potentially discriminatory distinctions. In 1963 they were asked whether savings banks could be prohibited from denying savings bank life insurance to blind persons. They said:

Not enough appears in the order to reveal any ground why the bill should apply only to savings bank life insurance. Surely there are no facts in the realm of general knowledge upon which we may draw as an aid . . . . [T]t is unsatisfactory to try to answer a question of this sort without adequate factual background.

They noted the history of this type of life insurance and its distinctive treatment by the Legislature, but this did not elicit any demonstrable justification for this particular difference in treatment. While they could perceive no reason for "imposing any such disadvantage exclusively upon the 'wage earners' life insurance,'" they said, "[O]n our present inadequate information, that is a matter of policy for the Legislature."

8 226 Mass. 613, 115 N.E. 978 (1917).  

5 Id. at 785, 189 N.E.2d at 852.
The 1964 opinion dealt with the question whether the Legislature could provide that Blue Cross and Blue Shield must insure subscribers who retired at sixty-five at the rates applicable to group plans. Again the Justices said:

There is no source upon which we may properly draw for information which would assist us in attempting to make answer. The missing facts surely are not matters of common knowledge. . . . Upon such slight information as we have, we are unable to point to anything which renders the bill repugnant to . . . art. 10 of the Declaration of Rights.6

This seems a quite different approach from that taken in opinions involving the police power generally. Thus, in an opinion in 1948 in which the Justices held that it would be unconstitutional to prohibit cemeteries from selling monuments, the Justices said: "We do not see what evil arises."8 The possibility that cemeteries could put undue pressure on a bereaved family was dismissed as "fanciful rather than real."9

Thus, too, in an opinion in 1962 that a $5000 real estate exemption for home owners was unconstitutional, the Justices said: "We can see no justification for the proposed exemption . . . there is no presumption of constitutionality."11 The view that pending legislation has no presumption of constitutionality, first explicitly enunciated in 1958,12 would seem to mean in these cases that the function of the Justices as constitutional advisors is not that of counsel trying to predict what the Court will do when the statute comes to it clothed with a presumption of constitutionality, but is, rather, that of a legislator. "What is asked for is the judge's own opinion."13

However, the Justices do not always confine themselves to an abstract answer. When a bill is accompanied by legislative findings, the Justices have said that these were "entitled to weight."14 They have also utilized judicial notice and commission reports, "making reasonable intendments in favor of the results of investigations by special

8 322 Mass. at 760, 79 N.E.2d at 887.
9 Id. at 761, 79 N.E.2d at 887. See 337 Mass. 796, 151 N.E.2d 681 (1958), and 300 Mass. 615, 14 N.E.2d 955 (1938) (unconstitutional to establish hours for barber shops); 305 Mass. 631, 22 N.E.2d 49 (1939) (unconstitutional to exclude married women from public employment); 300 Mass. 591, 14 N.E.2d 392 (1938) (unconstitutional to require electric light companies to furnish free bulbs).
11 Id. at 769, 181 N.E.2d at 795.
commissions.\textsuperscript{15} Where, as in the opinion that the bill establishing the Historic Beacon Hill District was constitutional,\textsuperscript{16} the Justices through judicial notice were satisfied with the justification, they have been willing to give their opinion as to how a court confronted with this factual situation would deal with an existing statute carrying a presumption of constitutionality. In that opinion the Justices said:

The announced purpose of the act is to preserve this historic section for the educational, cultural, and economic advantage of the public. If the General Court believes that this object would be attained by the restrictions which the act would place upon the introduction into the district of inappropriate forms of construction that would destroy its unique value and associations, a court can hardly take the view that such legislative determination is so arbitrary or unreasonable that it cannot be comprehended within the public welfare.\textsuperscript{17}

This was also the attitude of the Justices in a 1958 opinion\textsuperscript{18} restricting dower and curtesy. The Justices reviewed the report of the Judicial Council and the experience in other states indicating the minimal importance of dower and curtesy. They concluded that the Legislature "may make an evaluation in the public interest, and determine that any slight advantage in their retention in a relatively few cases is outweighed by the far greater benefit to the general good accruing from their restriction."\textsuperscript{19} Here, too, the Justices were not attempting themselves to assess abstractly the importance of dower and curtesy. In effect they attributed a presumption to the evaluation of the Legislature which they predicted would prevail if the matter came before them sitting as the Court.\textsuperscript{20}

Facts become particularly crucial when the Justices are called upon to assess whether a project involving both governmental and private participation serves a public purpose.\textsuperscript{21} Such projects as the Prudential Center raise in the first instance a question whether the recitals are sufficient to indicate a public purpose. Thus in the first Prudential Center opinion in 1960,\textsuperscript{22} the Justices noted that the bill did not explicitly rely upon urban renewal and the development of open blighted areas, which they had declared public purposes in 1956,\textsuperscript{23} and indeed they suggested the possibility of such reliance.\textsuperscript{24} They did not consider that a proposed garage — undoubtedly for a public

\textsuperscript{15} 337 Mass. 800, 805, 152 N.E.2d 90, 93 (1958); 270 Mass. 593, 601, 170 N.E. 800, 803 (1930).
\textsuperscript{17} Id. at 787, 128 N.E.2d at 566-567.
\textsuperscript{18} 337 Mass. 786, 151 N.E.2d 475 (1958).
\textsuperscript{19} Id. at 795, 151 N.E.2d at 480.
\textsuperscript{20} But see the caveat in 332 Mass. 769, 780, 126 N.E.2d 795, 801 (1955).
\textsuperscript{22} 341 Mass. 738, 167 N.E.2d 745 (1960).
\textsuperscript{23} 334 Mass. 760, 135 N.E.2d 665 (1956).
\textsuperscript{24} 341 Mass. 738, 757, 167 N.E.2d 745, 756 (1960).
§10.6 — was itself sufficient to justify the entire Prudential project and held the bill establishing the Prudential Center unconstitutional. When the bill was modified to make explicit that the purpose of the Prudential Center was to develop an open blighted area — a fact of which the Justices could take judicial notice — the Justices accepted the detailed legislative findings in the bill as demonstrating a public purpose.

However, the Justices were not content to rest an opinion of constitutionality on the existence of a public purpose generally. They required that the bill contain "adequate public regulation." This involved the Justices in the detailed administrative controls over the project. Indeed the Justices in the first 1960 opinion virtually suggested that provisions be made for reviewing the earnings of the project, and for insurance, tort liability, etc. A reading of these opinions suggests that the Justices were indirectly almost participating in the drafting of the legislation. This type of involvement in the legislative process by the Justices may have worked out well in this case, but in other situations it may result in a loss of administrative flexibility which may be detrimental to a project.

§10.6. Conclusion. It is not easy to judge whether advisory opinions have performed a useful function in preventing "the enactment of many measures of doubtful constitutionality which, nevertheless had they been enacted, might ... have become imbedded in our statutory law" or whether that itself confirms Justice Frankfurter's thesis that advisory opinions are "ghosts that slay." Any such evaluation would have to take into consideration the more liberal criteria for standing provided by the taxpayers' suit and the mandamus action to enforce a public right. These in any event bring judicial review very much closer to the point at which the advisory opinion operates than the "case or controversy" requirement of the United States Constitution. The factual context of Allydon Realty Corp. v. Holyoke

27 Id. at 765, 168 N.E.2d at 862.
28 Id. at 778-779, 168 N.E.2d at 869-870. Perhaps the lack of adequate administrative controls explains the opinion of the Justices in 1964 that it would be unconstitutional to provide state funds to political parties for campaign expenses. To relieve office seekers and office holders from the pressures of private contributors seems a manifest public purpose, but the bill was devoid of any administrative devices to see that the money was properly spent — though any such interference with the political process has obvious dangers. 1964 Mass. Adv. Sh. 605, 197 N.E.2d 691.

§10.6. 1 Address of Bentley W. Warren, Esquire, 302 Mass. 625, 638 (1939).
2 Frankfurter, A Note on Advisory Opinions, 37 Harv. L. Rev. 1002 (1924).
3 G.L., c. 29, §63; cf. c. 40, §53.
Housing Authority\(^5\) (a taxpayers' suit) was not far different from that of an advisory opinion, and the contexts of \(Loring v. Young\)^6 (a mandamus action) and \(Dodge v. The Prudential Insurance Co.\)^7 (a declaratory judgment action) were hardly more concrete than that of the opinions of the Justices which had decided the same issues.\(^8\)

The advisory opinion may be useful in dealing with the complexities of the apportionment or initiative provisions of the Constitution\(^9\) or with other technical questions concerning the internal structure of government.\(^10\) Indeed it can obviate such a situation as occurred in Washington, where the State had erected government buildings in Seattle only to be told by the court that government buildings could constitutionally be erected only in Olympia.\(^11\) However, when economic and social legislation involving factual questions is at issue, the desirability of such opinions is more doubtful. Indeed, it has been suggested that opinions should not be given in this area.\(^12\) Borchard has favored advisory powers for the judiciary on the condition that:

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\ldots \text{the court would or should have complete power to refuse an opinion where it felt that experience of the practical operation of a statute, such as police power legislation, or a concrete factual situation was a necessary condition of reaching a conclusion.} \ldots \]

The advisory opinion is a facet of the recurring discussion relating to the criteria for standing when public issues are involved.\(^14\) Ultimately, the degree to which seven men, appointed for life, chosen exclusively from one profession,\(^15\) and deliberating in secret,\(^16\) should participate in the legislative process is as much a political question as a legal question and depends in part upon the confidence felt in the judiciary and the make-up of the Legislature. In the long run the viability of the advisory opinion will depend upon the limitations set by the

\(^6\) 239 Mass. 949, 132 N.E. 65 (1921).
\(^7\) 343 Mass. 375, 179 N.E.2d 234 (1961).
\(^8\) 233 Mass. 605, 125 N.E. 849 (1920); 341 Mass. 760, 168 N.E.2d 858 (1960).
\(^13\) Borchard, Declaratory Judgments 75 (2d ed. 1941).
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Justices on the questions they will answer and — as important, though often overlooked — on the responsibility and restraint which the executive and legislative departments exercise in submitting questions to the Justices.