Fordham Law Review

Volume 44 | Issue 1 Article 3

1975

The State Advisory Opinion in Perspective

Charles M. Carberry

COMMENT

THE STATE ADVISORY OPINION IN PERSPECTIVE

I. INTRODUCTION

A. *Characteristics of an Advisory Opinion*

An advisory opinion is an answer given by the justices of a state's highest court acting in their individual capacities, at the request of a coordinate branch of government, to a legal question regarding a matter pending before the requesting authority.[1] Advisory opinions are meant to function in a prophylactic fashion, on the theory that the requesting branch will not act in a manner inconsistent with the justices' opinion of the legality or constitutionality of the proposed action.[2] Ten states presently have advisory opinion procedures.[3] In seven states, the advisory opinion mechanism may be invoked

1. E.g., A. Ellingwood, Departmental Cooperation in State Government 253 (1918) [hereinafter cited as Ellingwood]; 7 N.Y. State Constitutional Convention Comm., Problems Related to Legislative Organization and Powers 294 (1938); Albertsworth, Advisory Functions in Federal Supreme Court, 23 Geo. L.J. 643, 645 n.10 (1935); Stevens, Advisory Opinions—Present Status and an Evaluation, 34 Wash. L. Rev. 1-3 (1959) [hereinafter cited as Stevens].

2. E.g., 7 N.Y. State Constitutional Convention Comm., Problems Related to Legislative Organization and Powers 297 (1938); Field, The Advisory Opinion—An Analysis, 24 Ind. L.J. 203, 221 (1949) (give advice to public bodies) [hereinafter cited as Advisory Opinion Analysis]; Hagemann, The Advisory Opinion in South Dakota, 16 S.D.L. Rev. 291, 292 (1971) (determine if proposed governmental action is constitutional) [hereinafter cited as Advisory Opinions in South Dakota]; Note, Judicial Determinations in Nonadversary Proceedings, 72 Harv. L. Rev. 723, 731 (1959) (determine validity of governmental course of action before put into operation); Note, Advisory Opinions on the Constitutionality of Statutes, 69 Harv. L. Rev. 1302, 1304 (1956) [hereinafter cited as Advisory Opinions on Statutes]. But see Ala. Code tit. 13, § 35 (1958); In re Opinion of the Justices, 254 Ala. 177, 178, 47 So. 2d 655, 656 (1950) (give protective force and effect to state officials acting under existing law).

3. In seven, express constitutional provisions authorize the justices to give advisory opinions. Colo. Const. art. VI, § 3; Fla. Const. art. 4, § 1(c); Me. Const. art. VI, § 3; Mass. Const. pt. 2, ch. 3, art. II; N.H. Const. pt. 2, art. 74; R.I. Const. amend. 12, § 2; S.D. Const. art. V, § 5. In two states the practice is statutory. Ala. Code tit. 13, § 34 (1958); Del. Code Ann. tit. 10, § 141 (1975). In the tenth state the power of the justices to render such opinions was created by judicial decision. Waddell v. Berry, 31 N.C. 361, 40 N.C. 305 (1849). For an explanation of the initial development of advisory opinion practice in North Carolina, see Edsall, The Advisory Opinion in North Carolina, 27 N.C.L. Rev. 297, 299-302 (1949). Although some commentators have included Oklahoma among states with opinion mechanism, Stevens, supra note 1, at 3 & n.9; Comment, Advisory Opinions in Florida: An Experiment in Intergovernmental Cooperation, 24 U. Fla. L. Rev. 328 & n.4 (1972) [hereinafter cited as Advisory Opinions in Florida]; Note, The Case for an Advisory Function in the Federal Judiciary, 50 Geo. L.J. 785, 788 & n.23 (1962), the Oklahoma provision merely empowers the governor to request the justices' opinion as to whether the legal requirements for imposition of capital punishment have been met if a condemned person has failed to appeal his death sentence. Okla. Stat. Ann. tit. 22, §§ 1002-03 (1958); Clovis & Updegraff, Advisory Opinions, 13 Iowa L. Rev. 188, 193-94 (1928) [hereinafter cited as Clovis]. This unique limitation on the subject matter of the Oklahoma advisory opinion mechanism justifies its exclusion from general analysis. In eight states—Connecticut, Kentucky, Missouri, Nebraska, New Jersey, New York,

by the governor or by either house of the legislature.[4] In the other three, only the governor may request the justices' advice in this manner.[5]

Because an advisory opinion is an expression of the views of the individual justices, it is not considered a holding of the court;[6] rather, it is an extrajudicial function of the justices.[7] Consequently, the theoretical view is that an advisory opinion does not bind the requesting branch to act in accordance with the advice rendered. Neither the justices themselves, nor private parties are bound by the conclusions reached in an advisory opinion when the same subject matter arises in subsequent litigation.[8] Thus, because advisory opinions are non-binding and purely advisory, neither stare decisis nor res judicata applies.[9]

Pennsylvania and Vermont—the advisory opinion procedure has been discontinued. Stevens, supra note 1, at 7 & n.32. For a history of advisory opinions in the United States see Ellingwood, supra note 1, at 30-78.

4. Ala. Code tit. 13, § 34 (1958); Colo. Const. art. VI, § 3; Me. Const. art. VI, § 3; Mass. Const. pt. 2, ch. 3, art. II, § 83; N.H. Const. pt. 2, art. 74; R.I. Const. amend. 12, § 2; see Waddell v. Berry, 31 N.C. 361, 40 N.C. 305 (1849) (legislature); In re Hughes, 61 N.C. 65, 70-71 (1867) (advisory opinion to the governor reported within case). In Massachusetts and Maine, the executive council is also authorized to request advisory opinions. Me. Const. art. VI, § 3; Mass. Const. pt. 2, ch. 2, art. II, § 83.

5. Del. Code Ann. tit. 10, § 141 (1975); Fla. Const. art. 4, § 1(c); S.D. Const. art. V, § 5.

6. E.g., Collins v. Horten, 111 So. 2d 746, 751 (Fla. Dist. Ct. App. 1959); Opinion of the Justices, 281 A.2d 321, 322 (Me. 1971); Opinion to the Governor, 109 R.I. 289, 291, 284 A.2d 295, 296 (1971); Ala. Code tit. 13, § 34 (1958); Del. Code Ann. tit. 10, § 141 (1975); Me. Const. art. VI, § 3; Mass. Const. pt. 2, ch. 3, art. II, § 83; N.H. Const. pt. 2, art. 74; R.I. Const. amend. XII, § 2; Ellingwood, supra note 1, at 221; J. Thayer, Constitutional Law, in Legal Essays 34-35 (1927); Clovis, supra note 3, at 192. Until 1972, Colorado was the only state where advisory opinions were rendered by the court rather than by the justices. Colo. Const. art. VI, § 3. See also Ellingwood, supra note 1, at 221-22. In that year, the words of the South Dakota Constitution were amended to empower the governor to request advisory opinions from the "court." S.D. Const. art. V, § 5, amending id. § 13 (1889). The alteration seems to have been inadvertent, however, resulting from the consolidation of five sections concerning the court's jurisdiction. Id. The historical note to the present section makes no reference to the wording change, perhaps confirming the view that it occurred by accident. Historical Note to S.D. Const. art. V, § 5 (1972). On the other hand, two of the three advisory opinions rendered after the amendment were entitled "Opinion of the Supreme Court." 209 N.W.2d 668 (S.D. 1973); 204 N.W.2d 184 (S.D. 1973). The third, continuing South Dakota's inconsistent prior practice, was entitled "Opinion of the Justices." 203 N.W.2d 526 (S.D. 1973).

7. In re Opinions of the Justices, 209 Ala. 593, 598, 96 So. 487, 491-93 (1923); Laughlin v. City of Portland, 111 Me. 486, 497, 90 A. 318, 322-23 (1914); see In re State Indus. Comm., 224 N.Y. 13, 16-17, 119 N.E. 1027, 1028 (1918); Clovis, supra note 3, at 192; cf. United States v. Ferreira, 54 U.S. (13 How.) 40, 50 (1851). But see In re Opinion of the Justices, 115 Vt. 524, 529-30, 64 A.2d 169, 172 (1949).

8. E.g., Opinion of the Justices, 157 Me. 152, 158, 170 A.2d 652, 655 (1961); Opinion to the Governor, 109 R.I. 289, 291, 284 A.2d 295, 296 (1971); Thayer, John Marshall, in Thayer, Holmes, and Frankfurter on John Marshall 57 (1967); Clovis, supra note 3, at 195; Stevens, supra note 1, at 6 & cases cited in n.28.

9. E.g., Opinion of the Justices, 281 A.2d 321, 322 (Me. 1971); City of New Bedford v. New Bedford S.S. Authority, 336 Mass. 651, 656, 148 N.E.2d 637, 640, appeal dismissed sub nom.

In practice, however, state and federal courts evidently have failed to distinguish the precedential weight of justices' advisory opinions from court holdings.[10] This difference between practice and theory has been one argument against the advisory opinion procedure. Critics have claimed that, notwithstanding theory, such opinions do bind parties in subsequent litigation and thus deprive them of the right to a full and fair hearing.[11] Advocates contend, however, that it is only the intrinsic value—the clarity of reasoning—of some advisory opinions that gives them weight in later litigation.[12]

In Alabama, Delaware and Florida, the justices' power to give advisory opinions is limited to questions of constitutional dimension.[13] On the other hand, in Colorado, Maine, Massachusetts, New Hampshire and South Dakota, constitutional provisions more broadly specify that advisory opinions may be rendered on "important questions of law" and on "solemn occasions."[14] The

---

Boston Five Cents Sav. Bank v. City of New Bedford, 358 U.S. 53 (1958) (per curiam); Goodman, Advisory Opinions, in 1964 Annual Survey of Massachusetts Law 95, 108-09 (R. Huber ed. 1965) [hereinafter cited as Massachusetts Survey]; Hudson, Advisory Opinions of National and International Courts, 37 Harv. L. Rev. 970, 983 (1924); Sands, Government by Judiciary—Advisory Opinions in Alabama, 4 Ala. L. Rev. 1, 24 (1951) [hereinafter cited as Advisory Opinions in Alabama]; Advisory Opinions in Florida, supra note 3, at 332. In Colorado, advisory opinions have been held to be binding precedent because they are rendered by the court. Robinson, Limitations upon Legislative Inquiries under Colorado Advisory Opinion Clause, 4 Rocky Mt. L. Rev. 237, 246-47 (1932) [hereinafter cited as Colorado Advisory Opinion Clause].

10. In the following cases, for example, courts have cited advisory opinions with the same effect as opinions of the court: Fuller v. Oregon, 417 U.S. 40, 42 n.3 (1974) (Supreme Court listed New Hampshire advisory opinion among conflicting views of various courts, citing Opinion of the Justices, 109 N.H. 508, 256 A.2d 500 (1969)); Maher v. New Orleans, 371 F. Supp. 653, 661 (E.D. La. 1974); Kingston v. McLaughlin, 359 F. Supp. 25, 27 (D. Mass. 1972), aff'd, 411 U.S. 923 (1973); Besaw v. Affleck, 333 F. Supp. 775, 780 & n.7 (D.R.I. 1971); Strange v. James, 323 F. Supp. 1230, 1234 & n.8 (D. Kan. 1971), aff'd, 407 U.S. 128 (1972); Allardice v. Adams County, 173 Colo. 133, 138, 476 P.2d 982, 985 (1970); State v. Shepard, 323 A.2d 587, 589 (Me. 1974); Concord Inv. Corp. v. Tax Comm'n, — N.H. —, —, 316 A.2d 192, 194-95 (1974); Bailey v. City of Tulsa, 491 P.2d 316, 319 (Okla. Crim. App. 1971); State ex rel. Widergren v. Charette, 110 R.I. 124, 131, 290 A.2d 858, 862 (1972); Olson v. State, 484 S.W.2d 756, 761 n.8 (Tex. Crim. App. 1969); State v. Wetherell, 82 Wash. 2d 865, 870, 514 P.2d 1069, 1073 (1973); Uhls v. State ex rel. City of Cheyenne, 429 P.2d 74, 87 (Wyo. 1967); Emery, Advisory Opinions from Justices, 2 Me. L. Rev. 1, 2 (1908); Advisory Opinion Analysis, supra note 2, at 216; Advisory Opinions in South Dakota, supra note 2, at 296.

11. Edsall, The Advisory Opinion in North Carolina, 27 N.C.L. Rev. 297, 330-33 (1949); 10 Harv. L. Rev. 50 (1896); see J. Thayer, Advisory Opinions, in Legal Essays 58-59 (1927); Emery, Advisory Opinions from Justices, 2 Me. L. Rev. 1, 2 (1908).

12. Clovis, supra note 3, at 195; Advisory Opinions in South Dakota, supra note 2, at 297. See also D. Pratap, The Advisory Jurisdiction of the International Court 231 (1972).

13. Ala. Code tit. 13, § 34 (1959) ("important constitutional questions"); Del. Code Ann. tit. 10, § 141(a) (1975) (construction of state and Federal Constitutions; constitutionality of laws enacted by the legislature or of constitutional amendments); Fla. Const. art. 4, § 1(c) (interpretation of constitution upon any question affecting governor's duties or powers).

14. Colo. Const. art. VI, § 3; Me. Const. art. VI, § 3; Mass. Const. pt. 2, ch. 3, art. II; N.H. Const. pt. 2, art. 74; S.D. Const. art. V, § 5; Clovis, supra note 3, at 191. The justices, rather than the requesting authority, determine whether the inquiry falls within the justices' constitutional power to

Rhode Island constitution appears to impose on the justices the broadest duty, requiring opinions on "any question whenever requested."[15] Rhode Island's justices, however, have construed this mandate to require opinions only on constitutional questions.[16] Generally, in all of the states, the justices have interpreted their advisory opinion jurisdiction narrowly.[17]

B. *Focus of the Study*

This Comment was written to examine the role that advisory opinions serve in the ten states in which they presently exist in light of the frequency and subject matter of requests. Requests—the petitions from the requesting authority for consideration of the subject matter contained therein—and their specific questions will be categorized and analyzed to provide the reader with a focal point for an understanding of the advisory opinion mechanism and a possible departure point for further study and analysis.

Among the specific considerations to be examined are: the areas that most frequently are the focus of requests; the branches of state governments that inquire as to the various categories; the trends that are observable in the types of requests submitted; the pressures or concerns that motivate particular requests; the procedural mechanisms that have been erected by the justices to enhance, or possibly retard, the effectiveness of advisory opinions; and finally, the reasons why the mechanism has not developed in other states.

II. Fourteen Years of Advisory Opinion Practice

A. *Methodology*

The following sections of this Comment analyze in quantitative terms the use of the advisory opinion mechanism from 1960 through 1973 in eight states: Alabama, Delaware, Florida, Maine, Massachusetts, New Hampshire, Rhode Island and South Dakota. The data upon which this study is based was derived from examination and classification of all reported advisory opinions for those years.[18] First, requests are examined to provide an

answer. In re Senate Res. No. 2, 94 Colo. 101, 111, 31 P.2d 325, 329 (1933); Opinion of the Justices, 281 A.2d 321, 322-23 (Me. 1971); Advisory Opinions in South Dakota, supra note 2, at 298; Colorado Advisory Opinion Clause, supra note 9, at 249-50.

15. R.I. Const. amend. XII, § 2.

16. Opinion to the Governor, 96 R.I. 358, 364, 191 A.2d 611, 614 (1963).

17. Opinion of the Justices, 291 Ala. 581, 586, 285 So. 2d 87, 91-92 (1973) (Heflin, C.J., Bloodworth & Maddox, JJ., dissenting); Answer of the Justices, — Mass. —, —, 291 N.E.2d 598, 600 (1973); Opinion to the House of Representatives, 99 R.I. 377, 379, 208 A.2d 126, 127-28 (1965); In re Ch. 6, Sess. Laws of 1890, 8 S.D. 74, 66 N.W. 310 (1896); Colorado Advisory Opinion Clause, supra note 9, at 237; Stevens, supra note 1, at 4-5. But see Opinion of the Justices, 57 Del. 495, 496, 202 A.2d 276, 277 (1964) (non-constitutional questions answered to preclude unnecessary litigation and prevent disenfranchisement of eligible voters); Advisory Opinions in Florida, supra note 3, at 334-35.

18. No North Carolina advisory opinions were reported during this period. Since advisory opinions in that state were recorded haphazardly in the past, the absence of reported opinions does not prove conclusively that the mechanism was not used. See Edsall, The Advisory Opinion in North Carolina, 27 N.C.L. Rev. 297, 299-302 (1949).

overview of the frequency with which the procedure has been used. Second, questions—the specific inquiries contained within the requests that set forth the substantive concerns of the requesting authority—are categorized and evaluated to determine the particular topics about which the requesters are most interested. For convenience, summaries are provided in the Appendix showing the number of requests submitted, and the number not entertained by the justices. It also shows the number of questions posed in requests entertained by the justices both in total and by category. Unless otherwise specified, the data discussed in the following sections is taken from the material set forth in that Appendix.[19]

The requesting authorities in Colorado sought advisory opinions from the state supreme court on only eleven occasions between 1960 and 1973. The justices entertained nine of these requests. Due to this infrequency, Colorado has not been included in the general analysis. A summary for that state is found in the Appendix, infra.

19. For the remainder of this Comment, advisory opinions will be cited in an abbreviated form consisting of two letters designating the state and a numeral identifying the particular opinion. The full citation for each opinion is provided below. The requesting authority is as follows: L-legislature; G-governor; C-executive council.

Opinion Number	Requesting Authority	Citation	Opinion Number	Requesting Authority	Citation
		Alabama			
A.1	L	272 Ala. 478, 132 So. 2d 142 (1961)	A.14	L	278 Ala. 298, 178 So. 2d 76 (1965)
A.2	G	272 Ala. 480, 132 So. 2d 381 (1961)	A.15	L	278 Ala. 412, 178 So. 2d 641 (1965)
A.3	L	272 Ala. 512, 132 So. 2d 753 (1961)	A.16	L	278 Ala. 522, 179 So. 2d 155 (1965)
A.4	L	275 Ala. 102, 152 So. 2d 427 (1963)	A.17	G	279 Ala. 38, 181 So. 2d 105 (1965)
A.5	G	275 Ala. 254, 154 So. 2d 12 (1963)	A.18	L	280 Ala. 653, 197 So. 2d 456 (1967)
A.6	L	275 Ala. 372, 155 So. 2d 329 (1963)	A.19	L	280 Ala. 692, 198 So. 2d 269 (1967)
A.7	L	275 Ala. 386, 155 So. 2d 343 (1963)	A.20	L	281 Ala. 20, 198 So. 2d 304 (1967)
A.8	L	275 Ala. 409, 155 So. 2d 513 (1963)	A.21	L	281 Ala. 50, 198 So. 2d 778 (1967)
A.9	L	275 Ala. 465, 156 So. 2d 151 (1963)	A.22	L	281 Ala. 187, 200 So. 2d 486 (1967)
A.10	G	275 Ala. 547, 156 So. 2d 639 (1963)	A.23	L	281 Ala. 231, 201 So. 2d 103 (1967)
A.11	G	276 Ala. 239, 160 So. 2d 648 (1964)	A.24	L	281 Ala. 325, 202 So. 2d 168 (1967)
A.12	L	277 Ala. 630, 173 So. 2d 793 (1965)	A.25	G	283 Ala. 341, 217 So. 2d 53 (1968)
A.13	L	278 Ala. 98, 176 So. 2d 29 (1965)	A.26	L	284 Ala. 129, 222 So. 2d 714 (1969)

Opinion Number	Requesting Authority	Citation
A.27	L	284 Ala. 484, 226 So. 2d 87 (1969)
A.28	G	284 Ala. 626, 227 So. 2d 396 (1969)
A.29	G	286 Ala. 156, 238 So. 2d 326 (1970)
A.30	L	287 Ala. 321, 251 So. 2d 739 (1971)
A.31	L	287 Ala. 325, 251 So. 2d 742 (1971)
A.32	L	287 Ala. 326, 251 So. 2d 744 (1971)
A.33	L	287 Ala. 331, 251 So. 2d 749 (1971)
A.34	L	287 Ala. 334, 251 So. 2d 751 (1971)
A.35	L	287 Ala. 337, 251 So. 2d 755 (1971)
A.36	L	287 Ala. 342, 251 So. 2d 759 (1971)
A.37	L	288 Ala. 89, 257 So. 2d 336 (1972)
A.38	L	291 Ala. 128, 278 So. 2d 711 (1973)
A.39	L	291 Ala. 262, 280 So. 2d 97 (1973)
A.40	L	291 Ala. 301, 280 So. 2d 547 (1973)
A.41	G	291 Ala. 581, 285 So. 2d 87 (1973)

Colorado

C.1	G	142 Colo. 188, 350 P.2d 811 (1960)
C.2	L	154 Colo. 141, 389 P.2d 87 (1964)
C.3	L	157 Colo. 76, 400 P.2d 931 (1965)
C.4	G	162 Colo. 188, 425 P.2d 31 (1967)
C.5	G	163 Colo. 45, 428 P.2d 75 (1967)
C.6	G	163 Colo. 113, 429 P.2d 304 (1967)
C.7	L	168 Colo. 558, 452 P.2d 391 (1969)
C.8	L	168 Colo. 563, 452 P.2d 382 (1969)
C.9	L	171 Colo. 200, 467 P.2d 56 (1970)
C.10	L	177 Colo. 215, 493 P.2d 346 (1972)
C.11	L	178 Colo. 311, 497 P.2d 1024 (1972)

Delaware

D.1	G	54 Del. 164, 174 A.2d 818 (1961)
D.2	G	54 Del. 209, 175 A.2d 405 (1961)
D.3	G	54 Del. 222, 175 A.2d 543 (1961)
D.4	G	54 Del. 366, 177 A.2d 205 (1962)
D.5	G	54 Del. 524, 181 A.2d 215 (1962)
D.6	G	56 Del. 75, 189 A.2d 777 (1963)
D.7	G	56 Del. 118, 190 A.2d 519 (1963)
D.8	G	56 Del. 121, 190 A.2d 521 (1963)
D.9	G	57 Del. 19, 194 A.2d 855 (1963)
D.10	G	57 Del. 202 (1963)
D.11	G	57 Del. 264, 198 A.2d 687 (1964)
D.12	G	57 Del. 388, 200 A.2d 570 (1964)
D.13	G	57 Del. 495, 202 A.2d 276 (1964)
D.14	G	58 Del. 475, 210 A.2d 852 (1965)
D.15	G	59 Del. 196, 216 A.2d 668 (1966)
D.16	G	225 A.2d 481 (1966)
D.17	G	232 A.2d 103 (1967)
D.18	G	233 A.2d 59 (1967)

Opinion Number	Requesting Authority	Citation	Opinion Number	Requesting Authority	Citation
D.19	G	243 A.2d 716 (1968)	D.27	G	276 A.2d 736 (1971)
D.20	G	245 A.2d 172 (1968)	D.28	G	283 A.2d 832 (1971)
D.21	G	246 A.2d 90 (1968)	D.29	G	290 A.2d 645 (1972)
D.22	G	249 A.2d 869 (1968)	D.30	G	295 A.2d 718 (1972)
D.23	G	251 A.2d 827 (1969)	D.31	G	305 A.2d 607 (1973)
D.24	G	252 A.2d 164 (1969)	D.32	G	306 A.2d 720 (1973)
D.25	G	264 A.2d 342 (1970)	D.33	G	314 A.2d 419 (1973)
D.26	G	275 A.2d 558 (1971)	D.34	G	315 A.2d 591 (1973)
		Florida			
F.1	G	131 So. 2d 196 (1961)	F.14	G	213 So. 2d 716 (1968)
F.2	G	132 So. 2d 1 (1961)	F.15	G	214 So. 2d 473 (1968)
F.3	G	132 So. 2d 163 (1961)	F.16	G	217 So. 2d 289 (1968)
F.4	G	150 So. 2d 721 (1963)	F.17	G	223 So. 2d 35 (1969)
F.5	G	154 So. 2d 838 (1963)	F.18	G	225 So. 2d 512 (1969)
F.6	G	156 So. 2d 3 (1963)	F.19	G	229 So. 2d 229 (1969)
F.7	G	171 So. 2d 539 (1965)	F.20	G	239 So. 2d 1 (1970)
F.8	G	192 So. 2d 757 (1966)	F.21	G	239 So. 2d 247 (1970)
F.9	G	196 So. 2d 737 (1967)	F.22	G	243 So. 2d 573 (1971)
F.10	G	200 So. 2d 534 (1967)	F.23	G	247 So. 2d 428 (1971)
F.11	G	201 So. 2d 226 (1967)	F.24	G	271 So. 2d 128 (1972)
F.12	G	206 So. 2d 212 (1968)	F.25	G	276 So. 2d 25 (1973)
F.13	G	206 So. 2d 641 (1968)	F.26	G	281 So. 2d 328 (1973)
		Maine			
Me.1	L	157 Me. 98, 170 A.2d 657 (1961)	Me.13	L	216 A.2d 656 (1966)
			Me.14	L	227 A.2d 303 (1967)
Me.2	L	157 Me. 104, 170 A.2d 647 (1961)	Me.15	L	229 A.2d 829 (1967)
			Me.16	L	230 A.2d 802 (1967)
Me.3	L	157 Me. 152, 170 A.2d 652 (1961)	Me.17	L	230 A.2d 804 (1967)
			Me.18	L	230 A.2d 807 (1967)
Me.4	L	157 Me. 187, 170 A.2d 660 (1961)	Me.19	L	231 A.2d 104 (1967)
			Me.20	L	231 A.2d 431 (1967)
Me.5	G	157 Me. 525, 175 A.2d 728 (1961)	Me.21	L	231 A.2d 617 (1967)
			Me.22	L	237 A.2d 400 (1968)
Me.6	L	159 Me. 77, 190 A.2d 910 (1963)	Me.23	L	253 A.2d 309 (1969)
			Me.24	L	255 A.2d 643 (1969)
Me.7	L	159 Me. 209, 191 A.2d 357 (1963)	Me.25	L	255 A.2d 652 (1969)
			Me.26	L	255 A.2d 655 (1969)
Me.8	L	159 Me. 410, 191 A.2d 637 (1963)	Me.27	L	255 A.2d 886 (1969)
			Me.28	G	260 A.2d 142 (1969)
Me.9	L	159 Me. 420, 191 A.2d 627 (1963)	Me.29	L	261 A.2d 53 (1970)
			Me.30	L	261 A.2d 58 (1970)
Me.10	L	161 Me. 32, 206 A.2d 541 (1965)	Me.31	G	261 A.2d 250 (1970)
			Me.32	L	275 A.2d 800 (1971)
Me.11	L	161 Me. 182, 210 A.2d 683 (1965)	Me.33	G	276 A.2d 441 (1971)
			Me.34	L	278 A.2d 693 (1971)
Me.12	L	216 A.2d 651 (1966)	Me.35	L	281 A.2d 244 (1971)

Opinion Number	Requesting Authority	Citation
Me.36	L	281 A.2d 321 (1971)
Me.37	G	283 A.2d 234 (1971)
Me.38	L	303 A.2d 452 (1973)
Me.39	L	306 A.2d 18 (1973)
Me.40	L	307 A.2d 198 (1973)
Me.41	L	308 A.2d 253 (1973)
Me.42	G	311 A.2d 103 (1973)

Massachusetts

Opinion Number	Requesting Authority	Citation
Ma.1	L	341 Mass. 738, 167 N.E.2d 745 (1960)
Ma.2	L	341 Mass. 760, 168 N.E.2d 858 (1960)
Ma.3	L	344 Mass. 766, 181 N.E.2d 793 (1962)
Ma.4	L	345 Mass. 780, 189 N.E.2d 849 (1963)
Ma.5	L	346 Mass. 791, 191 N.E.2d 779 (1963)
Ma.6	L	347 Mass. 784, 196 N.E.2d 225 (1964)
Ma.7	L	347 Mass. 789, 196 N.E.2d 912 (1964)
Ma.8	L	347 Mass. 792, 196 N.E.2d 919 (1964)
Ma.9	L	347 Mass. 797, 197 N.E.2d 691 (1964)
Ma.10	L	347 Mass. 804, 199 N.E.2d 179 (1964)
Ma.11	G	348 Mass. 803, 202 N.E.2d 234 (1964)
Ma.12	L	349 Mass. 779, 207 N.E.2d 264 (1965)
Ma.13	L	349 Mass. 786, 208 N.E.2d 240 (1965)
Ma.14	L	349 Mass. 794, 208 N.E.2d 823 (1965)
Ma.15	C	349 Mass. 802, 212 N.E.2d 217 (1965)
Ma.16	L	349 Mass. 804, 212 N.E.2d 562 (1965)
Ma.17	L	351 Mass. 716, 219 N.E.2d 18 (1966)
Ma.18	L	353 Mass. 779, 229 N.E.2d 263 (1967)
Ma.19	G	353 Mass. 785, 229 N.E.2d 715 (1967)
Ma.20	L	353 Mass. 790, 230 N.E.2d 801 (1967)
Ma.21	C	353 Mass. 801, 233 N.E.2d 906 (1968)
Ma.22	L	354 Mass. 779, 236 N.E.2d 523 (1968)
Ma.23	L	354 Mass. 789, 236 N.E.2d 926 (1968)
Ma.24	L	354 Mass. 792, 236 N.E.2d 882 (1968)
Ma.25	L	354 Mass. 799, 238 N.E.2d 855 (1968)
Ma.26	G	354 Mass. 804, 241 N.E.2d 91 (1968)
Ma.27	G	356 Mass. 744, 247 N.E.2d 718 (1969)
Ma.28	L	356 Mass. 747, 249 N.E.2d 23 (1969)
Ma.29	L	356 Mass. 751, 250 N.E.2d 425 (1969)
Ma.30	L	356 Mass. 756, 250 N.E.2d 448 (1969)
Ma.31	L	356 Mass. 761, 250 N.E.2d 428 (1969)
Ma.32	L	356 Mass. 769, 250 N.E.2d 450 (1969)
Ma.33	L	356 Mass. 775, 250 N.E.2d 547 (1969)
Ma.34	G	356 Mass. 814, 254 N.E.2d 258 (1969)
Ma.35	L	357 Mass. 787, 256 N.E.2d 420 (1970)
Ma.36	L	357 Mass. 827, 257 N.E.2d 94 (1970)
Ma.37	L	357 Mass. 831, 258 N.E.2d 731 (1970)
Ma.38	L	357 Mass. 836, 258 N.E.2d 779 (1970)
Ma.39	L	357 Mass. 846, 259 N.E.2d 564 (1970)
Ma.40	L	358 Mass. 827, 260 N.E.2d 740 (1970)
Ma.41	L	358 Mass. 833, 262 N.E.2d 590 (1970)
Ma.42	L	358 Mass. 838, 267 N.E.2d 113 (1971)

Opinion Number	Requesting Authority	Citation
Ma.43	G	359 Mass. 769, 268 N.E.2d 149 (1971)
Ma.44	L	359 Mass. 775, 268 N.E.2d 159 (1971)
Ma.45	G	— Mass. —, 271 N.E.2d 335 (1971)
Ma.46	L	360 Mass. 888, 273 N.E.2d 879 (1971)
Ma.47	G	360 Mass. 894, 274 N.E.2d 336 (1971)
Ma.48	L	360 Mass. 903, 276 N.E.2d 694 (1971)
Ma.49	G	360 Mass. 907, 277 N.E.2d 293 (1971)
Ma.50	G	— Mass. —, 282 N.E.2d 629 (1972)
Ma.51	L	— Mass. —, 284 N.E.2d 908 (1972)
Ma.52	L	— Mass. —, 284 N.E.2d 919 (1972)
Ma.53	G	— Mass. —, 287 N.E.2d 910 (1972)
Ma.54	C	— Mass. —, 291 N.E.2d 598 (1973)
Ma.55	G	— Mass. —, 294 N.E.2d 346 (1973)
Ma.56	L	— Mass. —, 298 N.E.2d 829 (1973)
Ma.57	G	— Mass. —, 298 N.E.2d 840 (1973)
Ma.58	G	— Mass. —, 302 N.E.2d 565 (1973)
Ma.59	L	— Mass. —, 303 N.E.2d 320 (1973)

New Hampshire

N.H.1	G	102 N.H. 565, 163 A.2d 1 (1960)
N.H.2	L	103 N.H. 256, 169 A.2d 279 (1961)
N.H.3	L	103 N.H. 258, 169 A.2d 634 (1961)
N.H.4	L	103 N.H. 262, 169 A.2d 637 (1961)
N.H.5	L	103 N.H. 268, 169 A.2d 762 (1961)
N.H.6	L	103 N.H. 281, 170 A.2d 125 (1961)
N.H.7	L	103 N.H. 325, 171 A.2d 429 (1961)
N.H.8	L	103 N.H. 333, 171 A.2d 923 (1961)
N.H.9	G	103 N.H. 381, 173 A.2d 578 (1961)
N.H.10	G	103 N.H. 402, 174 A.2d 420 (1961)
N.H.11	G	103 N.H. 508, 175 A.2d 396 (1961)
N.H.12	G	104 N.H. 261, 183 A.2d 909 (1962)
N.H.13	G	104 N.H. 342, 186 A.2d 579 (1962)
N.H.14	L	105 N.H. 22, 192 A.2d 22 (1963)
N.H.15	L	105 N.H. 125, 193 A.2d 880 (1963)
N.H.16	L	106 N.H. 180, 207 A.2d 574 (1965)
N.H.17	L	106 N.H. 202, 208 A.2d 458 (1965)
N.H.18	L	106 N.H. 233, 209 A.2d 471 (1965)
N.H.19	L	106 N.H. 237, 209 A.2d 474 (1965)
N.H.20	G	106 N.H. 402, 213 A.2d 415 (1965)
N.H.21	G	106 N.H. 449, 213 A.2d 915 (1965)
N.H.22	G	107 N.H. 325, 221 A.2d 255 (1966)
N.H.23	G	108 N.H. 62, 228 A.2d 165 (1967)
N.H.24	L	108 N.H. 97, 228 A.2d 161 (1967)
N.H.25	L	108 N.H. 103, 229 A.2d 188 (1967)
N.H.26	L	108 N.H. 170, 230 A.2d 221 (1967)
N.H.27	G	108 N.H. 268, 233 A.2d 832 (1967)
N.H.28	G	109 N.H. 36, 241 A.2d 213 (1968)

Opinion Number	Requesting Authority	Citation
N.H.29	G	109 N.H. 191, 246 A.2d 699 (1968)
N.H.30	G	109 N.H. 335, 251 A.2d 330 (1969)
N.H.31	L	109 N.H. 366, 252 A.2d 429 (1969)
N.H.32	L	109 N.H. 367, 253 A.2d 492 (1969)
N.H.33	L	109 N.H. 396, 254 A.2d 273 (1969)
N.H.34	L	109 N.H. 473, 254 A.2d 845 (1969)
N.H.35	G	109 N.H. 508, 256 A.2d 500 (1969)
N.H.36	L	109 N.H. 578, 258 A.2d 343 (1969)
N.H.37	G	110 N.H. 26, 259 A.2d 660 (1970)
N.H.38	G	110 N.H. 117, 262 A.2d 290 (1970)
N.H.39	L	110 N.H. 206, 266 A.2d 111 (1970)
N.H.40	G	110 N.H. 359, 266 A.2d 823 (1970)
N.H.41	L	111 N.H. 129, 276 A.2d 489 (1971)
N.H.42	L	111 N.H. 131, 276 A.2d 817 (1971)
N.H.43	L	111 N.H. 136, 276 A.2d 821 (1971)
N.H.44	L	111 N.H. 144, 276 A.2d 479 (1971)
N.H.45	L	111 N.H. 146, 276 A.2d 825 (1971)
N.H.46	L	111 N.H. 175, 278 A.2d 475 (1971)
N.H.47	L	111 N.H. 197, 279 A.2d 601 (1971)
N.H.48	L	111 N.H. 199, 278 A.2d 357 (1971)
N.H.49	L	111 N.H. 206, 278 A.2d 348 (1971)
N.H.50	L	111 N.H. 210, 279 A.2d 741 (1971)
N.H.51	L	112 N.H. 32, 287 A.2d 756 (1972)
N.H.52	L	112 N.H. 42, 288 A.2d 697 (1972)
N.H.53	L	112 N.H. 166, 290 A.2d 869 (1972)
N.H.54	G	112 N.H. 433, 298 A.2d 118 (1972)
N.H.55	G	113 N.H. 87, 302 A.2d 112 (1973)
N.H.56	G	113 N.H. 141, 303 A.2d 752 (1973)
N.H.57	L	113 N.H. 149, 304 A.2d 86 (1973)
N.H.58	L	113 N.H. 201, 304 A.2d 89 (1973)
N.H.59	L	113 N.H. 205, 304 A.2d 881 (1973)
N.H.60	L	113 N.H. 217, 304 A.2d 872 (1973)
N.H.61	L	113 N.H. 287, 306 A.2d 55 (1973)
N.H.62	L	113 N.H. 297, 307 A.2d 558 (1973)
N.H.63	G	113 N.H. 457, 309 A.2d 215 (1973)
N.H.64	G	113 N.H. 466, 309 A.2d 502 (1973)
N.H.65	G	312 A.2d 702 (1973)

Rhode Island

R.I.1	L	90 R.I. 224, 157 A.2d 113 (1960)
R.I.2	G	91 R.I. 187, 162 A.2d 814 (1960)
R.I.3	G	91 R.I. 346, 162 A.2d 802 (1960)
R.I.4	G	92 R.I. 46, 166 A.2d 224 (1960)
R.I.5	G	92 R.I. 489, 170 A.2d 284 (1961)
R.I.6	G	93 R.I. 28, 170 A.2d 908 (1961)

Opinion Number	Requesting Authority	Citation
R.I.7	G	93 R.I. 211, 172 A.2d 596 (1961)
R.I.8	G	93 R.I. 262, 174 A.2d 553 (1961)
R.I.9	L	93 R.I. 463, 176 A.2d 391 (1962)
R.I.10	L	93 R.I. 465, 176 A.2d 393 (1962)
R.I.11	G	94 R.I. 464, 181 A.2d 618 (1962)
R.I.12	G	95 R.I. 88, 183 A.2d 806 (1962)
R.I.13	G	95 R.I. 109, 185 A.2d 111 (1962)
R.I.14	G	96 R.I. 358, 191 A.2d 611 (1963)
R.I.15	G	97 R.I. 200, 196 A.2d 829 (1964)
R.I.16	L	99 R.I. 151, 206 A.2d 221 (1965)
R.I.17	G	99 R.I. 351, 208 A.2d 105 (1965)
R.I.18	L	99 R.I. 377, 208 A.2d 126 (1965)
R.I.19	L	99 R.I. 382, 208 A.2d 116 (1965)
R.I.20	L	99 R.I. 472, 208 A.2d 522 (1965)
R.I.21	G	100 R.I. 175, 212 A.2d 64 (1965)
R.I.22	L	100 R.I. 194, 212 A.2d 647 (1965)
R.I.23	L	100 R.I. 345, 216 A.2d 124 (1966)
R.I.24	G	101 R.I. 203, 221 A.2d 799 (1966)
R.I.25	G	101 R.I. 329, 223 A.2d 76 (1966)
R.I.26	G	106 R.I. 148, 256 A.2d 194 (1969)
R.I.27	L	107 R.I. 77, 264 A.2d 920 (1970)
R.I.28	G	107 R.I. 651, 270 A.2d 520 (1970)
R.I.29	L	108 R.I. 61, 271 A.2d 810 (1970)
R.I.30	L	108 R.I. 149, 272 A.2d 924 (1971)
R.I.31	L	108 R.I. 151, 272 A.2d 925 (1971)
R.I.32	L	108 R.I. 163, 273 A.2d 485 (1971)
R.I.33	L	108 R.I. 302, 275 A.2d 256 (1971)
R.I.34	L	108 R.I. 551, 277 A.2d 750 (1971)
R.I.35	L	108 R.I. 628, 278 A.2d 852 (1971)
R.I.36	G	109 R.I. 289, 284 A.2d 295 (1971)
R.I.37	G	109 R.I. 474, 287 A.2d 353 (1972)
R.I.38	G	110 R.I. 1, 289 A.2d 430 (1972)
R.I.39	G	— R.I. —, 308 A.2d 802 (1973)
R.I.40	G	— R.I. —, 308 A.2d 809 (1973)

South Dakota

Opinion Number	Requesting Authority	Citation
S.D.1	G	79 S.D. 585, 116 N.W.2d 233 (1962)
S.D.2	G	80 S.D. 77, 119 N.W.2d 145 (1963)
S.D.3	G	81 S.D. 629, 140 N.W.2d 34 (1966)
S.D.4	G	82 S.D. 500, 149 N.W.2d 326 (1967)
S.D.5	G	83 S.D. 477, 161 N.W.2d 706 (1968)
S.D.6	G	84 S.D. 3, 166 N.W.2d 427 (1969)
S.D.7	G	85 S.D. 390, 182 N.W.2d 849 (1971)
S.D.8	G	— S.D. —, 203 N.W.2d 526 (1973)
S.D.9	G	— S.D. —, 204 N.W.2d 184 (1973)
S.D.10	G	— S.D. —, 209 N.W.2d 668 (1973)

B. *Submission of Requests*

1. Aggregate Use of the Advisory Opinion Mechanism

In the five states in which both the governor and the legislature may request advisory opinions—Alabama, Maine, Massachusetts, New Hampshire and Rhode Island—a total of 244 requests were submitted to the justices.[20] Over the fourteen year period, the overall use of the mechanism increased steadily, reflecting more the practice of the legislature than the executive.[21] Legislative requests outnumbered gubernatorial requests by a ratio of more than two to one.

The increase in legislative use of the advisory opinion procedure can be explained, in part, by several factors, though the prime impetus seems to be the massive growth in the number of bills introduced into state legislatures, an increase of forty-seven percent from 1965 (12,200 bills) to 1971 (17,975 bills).[22]

In the three states in which only the governor may request opinions—Delaware, Florida and South Dakota—seventy requests were submitted over the fourteen years. Over the period, the incidence of requests in these states remained stable,[23] as was the case with gubernatorial requests in the previous group of five states. The Delaware executive, contrary to the trend, steadily decreased its use of the procedure.

2. Requests as a Response of Requesting Authorities to External Stimuli

An analysis of the factors affecting use of the advisory opinion procedure in an important area of state concern—reapportionment—illustrates the effect of extra-state legal pressures in triggering requests. Federal judicial decisions regarding the constitutional requisites for state legislative apportionment resulted in numerous references to the justices for advice on how to implement the new decisions.

In *Baker v. Carr,*[24] the Supreme Court held justiciable claims alleging that gross malapportionment of legislative seats violates the equal protection clause of the Federal Constitution. Following *Baker,* the Rhode Island Supreme Court held that the apportionment of the state's general assembly was unconstitutional. The court observed that its decision was motivated in part

20. Approximately one-half of the total number of requests were submitted in Massachusetts and New Hampshire.

21. The trends were calculated by dividing the twelve years from 1961 through 1972 into three periods (1961-64, 1965-68 & 1969-72), each of which includes the same number of biennial sessions for Maine and New Hampshire and, in the case of Alabama, quadrennial sessions of the state legislature. In this manner, the increase in combined requests in the last period over the first period was found to be 79%; in legislative requests, 100%; and in gubernatorial requests, 23%.

22. Book of the States 1972-73, at 74-75 (R. Weber ed.); Book of the States 1966-67, at 62-63 (F. Smothers ed.).

23. For 23 years prior to the South Dakota governor's request in 1962, S.D.1, that state's advisory opinion mechanism was entirely unused; the last preceding opinion was Opinion of the Judges, 66 S.D. 622, 287 N.W. 581 (1939). See Advisory Opinions in South Dakota, supra note 2, at 306.

24. 369 U.S. 186 (1962).

by the fact that federal courts were in a position to entertain challenges to state constitutional provisions regarding apportionment.[25] This decision generated a request from the Rhode Island governor inquiring into the constitutionality of measures adopted by a legislature that had been elected on the basis of an unconstitutional apportionment scheme.[26] Similarly, in 1962 and 1963, federal district courts in Florida and Delaware voided each state's statutory and constitutional provisions on apportionment;[27] in 1963, the governors of both states sought advice on the matter from the justices.[28]

In 1964, in *Reynolds v. Sims,*[29] the Supreme Court held unconstitutional the Alabama constitutional provisions on apportionment, declaring that representation in state legislatures was to be apportioned on a "one man, one vote" basis. This new rule produced more requests for advisory opinions during the fourteen-year period than any other federal case, provoking a total of at least eleven requests: in Alabama (one), Maine (five), Massachusetts (three) and Rhode Island (two).[30] The last two Maine requests were as recent as 1971.[31]

Other Supreme Court reapportionment decisions gave rise to advisory opinion requests. In *Kirkpatrick v. Preisler,*[32] the Court explicitly left undecided the constitutionality of reapportionment plans based on numbers of legal voters rather than general population.[33] This decision resulted in the submission of "legal voter" plans to the justices in Maine, Massachusetts and New Hampshire.[34] In 1973, Maine's justices entertained a request for their opinion[35] on whether a reapportionment plan met the newly promulgated "as equal as possible" standard set forth by the Court in *Mahan v. Howell.*[36]

These Supreme Court decisions, beginning with *Baker,* mandated a basis for state legislative apportionment that contradicted the historical standards of representation in nearly all the states.[37] Moreover, these decisions effectively deprived the states of authority over a subject that always had been considered an exclusive state concern.[38] As a result, the decisions posed a dilemma for state legislatures and governors. Faced with the extraordinary

25. Sweeney v. Notte, 95 R.I. 68, 75-76, 82-83, 183 A.2d 296, 300, 303-04 (1962).

26. R.I.13.

27. Sincock v. Duffy, 215 F. Supp. 169, 184 (D. Del. 1963) (three judge court), aff'd sub nom. Roman v. Sincock, 377 U.S. 695 (1964); Sobel v. Adams, 208 F. Supp. 316, 317 (S.D. Fla. 1962).

28. D.10; F.4.

29. 377 U.S. 533 (1964).

30. A.15; Me.36; Me.35; Me.19; Me.18; Me.12; Ma.20; Ma.19; Ma.12; R.I.29; R.I.24.

31. Me.36; Me.35.

32. 394 U.S. 526 (1969).

33. Id. at 534.

34. See Me.27; Ma.35; N.H.45.

35. Me.40.

36. 410 U.S. 315, 324-25 (1973), discussed in Note, A Flexible Standard for State Reapportionment Cases, 42 Fordham L. Rev. 641, 641-45 (1974).

37. Reynolds v. Sims, 377 U.S. 533, 610-11 (1964) (Harlan, J., dissenting).

38. P. Kurland, Politics, the Constitution, and the Warren Court 86 (1970).

legal problem of attempting to apportion according to inconsistent, and sometimes antithetical demands of state and federal constitutions, the requesting authorities turned to the justices for advice.[39]

C. *Questions: Subject Matter of the Requests*

1. Requests in General

During the fourteen years studied, requesting authorities in the eight states posed a total of 723 questions in the 278 requests accepted by the justices for consideration.[40] Legislators asked approximately sixty percent of the questions and governors asked the remainder.[41] In the five states in which both the legislature and governor may submit requests, the governors asked over seventy percent. Three states—Maine, Massachusetts, and New Hampshire—accounted for four-fifths of the legislators' questions. Only in Rhode Island did the governor ask more questions and submit more requests than the legislature. Tables I and II present the number and proportions of questions asked by the various requesting authorities.

2. Legislative Inquiries

Seventy-three percent of the legislative questions occurred in three of the six categories developed for observational purposes:[42] individuals' constitutional rights (28%), general governmental mechanics (22%), and state fiscal problems (23%). The predominance of the individuals' constitutional rights category was caused by the fact that over thirty percent of the legislators' questions in Maine, Massachusetts and New Hampshire fell into this classification.[43] By contrast, in the other two states in which the legislature may request advisory opinions—Rhode Island and Alabama—individuals' constitutional rights accounted only for approximately ten and five percent of the legislatures' inquiries respectively. In addition to the questions concerning legislative apportionment discussed previously,[44] most of the legislatures' queries regarding individuals' rights occurred in connection with bills providing aid to sectarian schools and other means of implementing the states' police power. For example, the justices were requested to assess the impact upon

39. See, e.g., A.15; Me.18; Ma.20; Ma.19; R.I.29; cf. C.11.

40. Since refusals are often resubmitted, only those questions posed in accepted requests were analyzed to avoid the creation of false numerical importance through redundancy. Compare Ma.41 with Ma.42, and N.H.34 with N.H.36. Throughout this section "resquests" mean only those requests entertained by the justices. For observational purposes, the questions are grouped into six categories according to the constitutional provisions that were the subject of the requesting authorities' inquiries: individuals' constitutional rights, elections and reapportionment, governmental power, fiscal problems, general governmental mechanics and miscellaneous. These groups are defined in the Appendix.

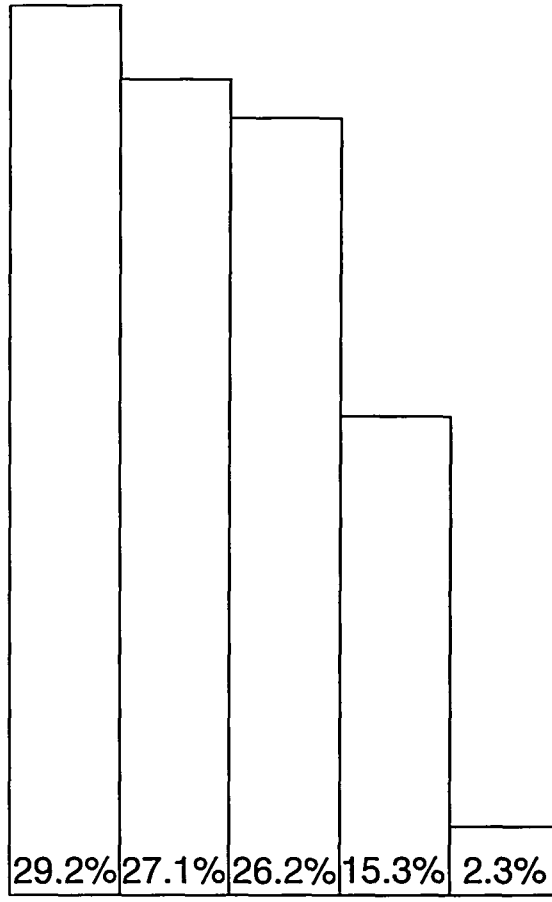
41. The one question asked by the executive council in Massachusetts is not included in this proportion. Ma.21. See note 4 supra and accompanying text.

42. See note 40 supra and accompanying text.

43. Maine asked 37% of its questions in this category, Massachusetts 30.5% and New Hampshire 31.1%.

44. See Pt. II B2 supra.

TABLE I—LEGISLATIVE QUESTIONS



	Mass.	N.H.	Me.	Ala.	R.I.
Number of Questions	128	119	115	67	10
% of all Questions	17.7%	16.5%	15.9%	9.3%	1.4%

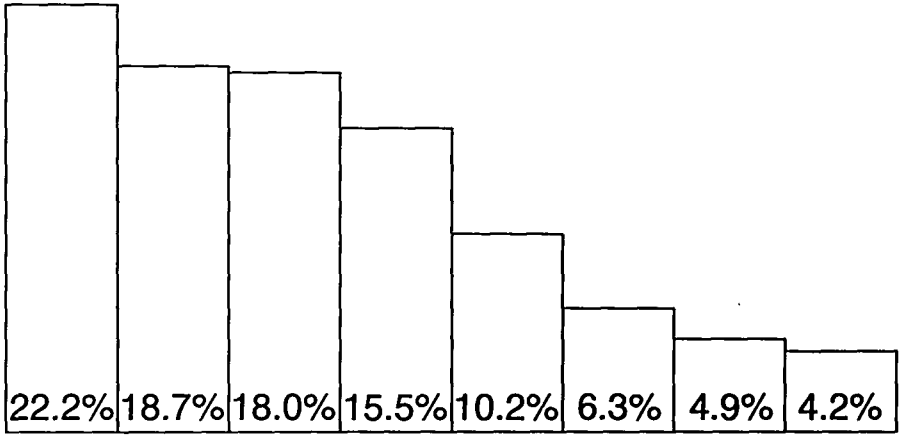
individuals' constitutional rights of proposed measures dealing with regulation of insurance companies,[45] prohibitions against use of photographic efficiency studies by private employers,[46] jury reform and the right to a jury trial,[47] and

45. See A.33; Ma.10; Ma.4; cf. Me.3 (milk dealers); Ma.59 (state employee retirement system); N.H.59 (no-fault insurance bill).

46. Ma.40 (due process; equal protection); Ma.30 (due process; equal protection).

47. Me.34 (sixth amendment); Ma.45 (same); N.H.59 (right to jury in state constitution); R.I. 35 (sixth and seventh amendments); cf. N.H.35 (right to counsel).

TABLE II—GUBERNATORIAL QUESTIONS



63	53	51	44	29	18	14	12
8.7%	7.3%	7.1%	6.1%	4.0%	2.5%	1.9%	1.7%

use of blood tests to determine drunken driving.[48] Moreover, Supreme Court decisions restricting the states' use of the police power to impose voting and welfare residency requirements[49] prompted additional requests for opinions containing questions in this category.[50]

48. Me.24 (fourth, fifth and fourteenth amendments; due process).

49. Dunn v. Blumstein, 405 U.S. 330 (1972) (voter residency requirement held violative of equal protection clause of Federal Constitution); Shapiro v. Thompson, 394 U.S. 618 (1969) (same for welfare residency requirement).

50. Me.38 (voting); Ma.46 (welfare); Ma.36 (same); cf. Me.25 (residency requirement to possess firearms).

State fiscal problems constituted the second largest category of legislative questions.[51] In Massachusetts and New Hampshire, more than one-quarter of the legislatures' questions concerned this area whereas in Alabama and Maine the percentage was smaller, yet still significant. The questions in this category primarily concerned the state debt and legislative taxing and spending powers. For example, the justices were requested to advise on whether bond issues would violate state debt provisions,[52] on the legislature's ability to withdraw unexpended funds from state departments prior to the end of the fiscal year,[53] on tax exemptions for certain organizations,[54] and on public financing of political campaigns.[55]

The third largest classification of legislative questions dealt with "general governmental mechanics."[56] These questions most frequently arose when the normal course of legislative proceedings was interrupted by an unusual factual situation presenting an unfamiliar legal problem. For example, in one case, the justices were asked to advise on the validity of a bill that had not been signed by the presiding officers of both houses of the legislature.[57] In other cases, the legislature inquired as to the size of the legislative vote required to set a date for submission of a constitutional amendment to the electorate[58] and the effect of a purported gubernatorial veto after the time for acting on a bill had lapsed.[59]

The categories of fiscal problems and general governmental mechanics are similar in that both deal with procedural and practical aspects of operating the governmental machinery—*i.e.*, passage of legislation and funding of programs. Because these problems are common to all states, it is not surprising to find substantial numbers of questions in both categories.

3. Gubernatorial Inquiries

Eighty-two percent of gubernatorial questions occurred in three categories: general governmental mechanics (36%), governmental power (27%) and fiscal problems (19%). Two of these categories also were among the three most active areas of legislative inquiry.[60] Gubernatorial questions in the gov-

51. See Appendix infra. This category constituted 16% in Alabama (11 questions); 14% in Maine (16 questions); 27% in Massachusetts (34 questions); 27% in New Hampshire (32 questions); 40% in Rhode Island (4 questions).

52. A.14; cf. R.I.32 (borrowing on anticipated tax receipts and other sources). See also Me.7 (method of issuing bonds).

53. R.I.33; cf. Me.2 (private damage payment made from highway fund).

54. Ma.23; cf. Me.11; Ma.3; Ma.2. These requests also contained questions as to whether the classification violated the equal protection clause.

55. Ma.24; Ma.9; Ma.7.

56. See Appendix infra. This category amounted to 36% in Alabama (24 questions); 19% in Maine (22 questions); 23% in Massachusetts (30 questions); 17% in New Hampshire (20 questions); 40% in Rhode Island (4 questions).

57. A.3.

58. N.H.47; cf. Me.15 (size of vote needed to override veto); Me.16 (size of vote needed to pass emergency legislation).

59. Ma.16; cf. Me.29 (validity of veto of resolution for constitutional amendment); Me.21 (validity of veto of bill with a referendum clause).

60. See Pt. II C2 supra.

ernmental mechanics category[61] paralleled those of the legislatures. Ordinarily, these questions arose when the executive, in the exercise of his duties, was confronted with extraordinary legal or factual circumstances, often involving the interrelationship between the executive and the legislature.[62] Some questions concerned the procedure for calling special legislative sessions[63] and the effect of bills that, through accident or clerical mistake, were missing necessary legislative signatures.[64] Others concerned the effective dates of statutes or constitutional amendments,[65] the voting privileges of the president pro tempore of the state senate[66] and the percentage legislative majority needed to amend the state's general corporation law.[67]

The second largest category of gubernatorial questions was governmental powers.[68] In these questions, governors sought advice as to the power of the various branches of government to take certain action. The inquiries usually concerned aspects of the executive appointment power—*e.g.*, length and termination of appointees' terms[69] and eligibility of particular candidates for appointment.[70] In addition, governors posed questions in this category as to their power to close schools disturbed by racial violence,[71] to pardon criminals,[72] and to accept testamentary gifts to the state.[73]

Fiscal problems comprised the third largest category of gubernatorial questions. This resulted from the fact that almost one-half of all the Rhode Island governors' inquiries were within this classification; in the other states, the category formed only a small proportion of gubernatorial questions.[74]

61. See Appendix infra. This category was 11% of the gubernatorial questions in Alabama (2 questions); 63% in Delaware (32 questions); 36% in Florida (16 questions); 14% in Maine (2 questions); 31% in Massachusetts (9 questions); 41% in New Hampshire (26 questions); 19% in Rhode Island (10 questions); 50% in South Dakota (6 questions).

62. For example questions with respect to exercise of the gubernatorial power. D.32; D.14; F.1; Ma.19.

63. F.12; Ma.27.

64. F.5 (death of required signatory prevented compliance); S.D.6 (unsigned by presiding officer of house); cf. N.H.20 (bill not engrossed).

65. E.g., D.9 (constitutional amendment); D.7 (act amending state constitution); Ma.53 (amendment); cf. Me.5 (amendment submitted to electorate on wrong date).

66. D.16; cf. D.23 (basis for finding quorum).

67. D.17.

68. See Appendix infra. This category comprised 50% of the gubernatorial questions in Alabama (9 questions); 10% in Delaware (5 questions); 50% in Florida (22 questions); 43% in Maine (6 questions); 28% in Massachusetts (8 questions); 32% in New Hampshire (20 questions); 8% in Rhode Island (4 questions); 33% in South Dakota (4 questions).

69. D.6; Me.28; Ma.34; N.H.54. See also Me.42 (conflicting statutes on governor's appointment power).

70. A.17; Ma.11 (appointment of judge to different position with a higher salary); S.D.1 (eligibility of governor or lieutenant governor for interim appointment as a United States Senator).

71. A.10.

72. S.D.5.

73. N.H.30; cf. F.10 (privately donated funds for law enforcement). See also N.H.28 (governor's power to grant emergency funds to school district).

74. This category encompassed 6% of the gubernatorial questions in Alabama (1 question); 8%

Frequently, executives' queries in this area concerned the issuance of bonds by public authorities.[75]

Governors asked only eighteen questions involving individuals' constitutional rights. Ten of these were asked by the governors of Massachusetts and New Hampshire, two of the three states in which the legislators asked a significant number of such questions.[76]

The subject matter of the questions asked by the governors in the five states in which both the executive and the legislature may request advisory opinions did not vary significantly in subject matter from those posed by the governors in the three states in which only the executive may solicit the justices' advice. One category in which there was some difference, however, was general governmental mechanics: governors in the three states seem to have inquired into some matters with which the legislatures in the other five states, rather than the governors, were concerned.[77] This may indicate that parallel situations arise, generating questions as to general governmental mechanics and creating similar problems for governors and legislators into which the legislatures of the three states would have inquired if they had the power to request advisory opinions.

D. *The Justices' Treatment of Requests and Questions*

1. Jurisdiction

Prior to 1972, statutory or constitutional provisions in seven of the eight states included in this study appeared to require that the justices answer all requests that satisfied constitutional or statutory requirements.[78] In addition, the language of the Alabama statute seemed to impose a duty upon the justices to answer requests conforming to the statutory standards.[79] That state's justices, however, have interpreted the statute to grant the power, but not to impose the duty, to render advisory opinions.[80] Commentators have maintained that, irrespective of firm statutory or constitutional dictate, the justices in all states have defined their advisory function so as to create a

in Delaware (4 questions); 14% in Florida (6 questions); 21% in Maine (3 questions); 10% in Massachusetts (3 questions); 14% in New Hampshire (9 questions); 49% in Rhode Island (26 questions). South Dakota had one such question.

75. R.I.40 (Housing and Mortgage Finance Corp.); R.I.39 (Public Buildings Authority); R.I.38 (Land Development Corp.); R.I.28 (Water Resources Board); R.I.25 (Recreational Building Authority); R.I. 17 (Turnpike and Bridge Authority); cf. R.I.21 (guarantee of mortgage loans by Industrial Building Authority).

76. See note 43 supra and accompanying text.

77. Compare D.23, D.16, F.5, and S.D.6, with A.3, Me.16, Me.15 and N.H.47.

78. Del. Code Ann. tit. 10, § 141 (1953), as amended, Del. Code Ann. tit. 10, § 141 (1975) ("shall give"); Fla. Const. art. IV, § 1(c) ("shall render"); Me. Const. art. VI, § 3 ("shall be obliged"); Mass. Const. pt. 2, ch. 3, art. 2, § 83 ("require"); N.H. Const. pt. 2, art. 74 ("required"); R.I. Const. amend. XII, § 2 ("shall . . . give whenever requested"); S.D. Const. art. V, § 5 ("required").

79. Ala. Code tit. 13, § 34 (1959) (governor or legislature "may obtain written opinion of the justices"); Advisory Opinions in Alabama, supra note 9, at 8.

80. Opinion of the Justices, 266 Ala. 370, 96 So. 2d 752, 753 (1957); Advisory Opinions in Alabama, supra note 9, at 5.

power to refuse to answer otherwise proper requests under a variety of circumstances.[81] Delaware appears to have codified this alleged prior practice in a 1972 amendment to its enabling statute. The amendment rephrased the previously mandatory language[82] so as to expressly give the justices full discretion to refuse to render advice even in the case of questions that meet the statutory criteria.[83]

2. Restrictions Imposed by the Justices on the Advisory Mechanism

It is clear that the justices have developed methods to avoid giving advisory opinions. In refusing to entertain requests, or to answer specific questions within requests, the justices have developed three broad rules or categories of objections: the issue presented is hypothetical or abstract; it would be judicially uneconomical to render an answer; or an answer would affect private interests.

Requests submitted to the justices are deemed hypothetical when the subject matter of a request is not pending before the requesting authority.[84] Such inquiries are unrelated to any presently proposed course of governmental action; consequently an advisory opinion would be purely academic.[85] This rationale for declining to entertain requests has been the primary reason for the rejection of legislative requests concerning already-enacted statutes.[86] In related circumstances, the justices have labelled moot those requests respecting subject matter pending before the requesting authority at the time of the request but not at the time of the justices' deliberations.[87] This occurs most frequently when the legislature adjourns sine die after submission of the request to, but before its consideration by, the justices.[88] Similarly, the justices have refused to answer questions in a request that they deem have been rendered moot by a response to another question in the same request.[89]

The second principal reason that justices have given for refusing to answer requests is that the burden on the justices would be greater than the benefit conferred on the requesting authority. This "judicial economy" rationale has been advanced primarily in refusals to answer "broad and indefinite questions."[90] That is, when a question is phrased too broadly, the justices may have to assume an unacceptably heavy burden in answering it completely.[91]

81. Colorado Advisory Opinion Clause, supra note 9, at 250; Comment, The Advisory Opinion and the United States Supreme Court, 5 Fordham L. Rev. 94, 100-01 (1936); see Note, The Case for an Advisory Function in the Federal Judiciary, 50 Geo. L.J. 785, 811 (1962); Massachusetts Survey, supra note 9, at 99-108; Stevens, supra note 1, at 4-5.

82. See note 78 supra and accompanying text.

83. Codified at Del. Code Ann. tit. 10, § 141 (1975).

84. A.31; Massachusetts Survey, supra note 9, at 104-05; Advisory Opinions in Alabama, supra note 9, at 18.

85. A.31; A.29. This objection is closely related to the judicial economy rationale. See notes 90-91 infra and accompanying text.

86. R.I.34; R.I.27; R.I.23; R.I.22; Massachusetts Survey, supra note 9, at 103.

87. A.24; R.I.31; R.I.30; R.I.29.

88. R.I.31; R.I.30; R.I.29; R.I.16; see Advisory Opinions on Statutes, supra note 2, at 1308.

89. See, e.g., A.9; D.14; F.22; Me.17; Ma.47; N.H.11; R.I.2; S.D.6.

90. A.38; R.I.34; R.I.18.

91. R.I.18.

Under the third type of objection, the justices will not render opinions if it appears that an answer would affect private interests.[92] Pursuant to this rule, the justices will not answer questions concurrently at issue in litigation.[93] Nor will the justices, in the context of an advisory opinion, perform such "judicial" functions as making findings of fact or "overruling" prior court decisions.[94] Since the opinion would be highly persuasive it might foreclose issues on which interested parties in future litigation would not have had full opportunity to be heard. Florida's justices explained the rationale for this rule:

> An answer [would] affect directly the rights of individuals against whom it is contemplated the [executive] power will be exercised. . . . These individuals are not parties to this nonadversary proceeding. An opinion without their participation would deny to them a traditional aspect of due process—the right to be heard.[95]

One commentator has questioned the soundness of such a rule, noting that every governmental action affects some private rights and, if the rule were followed strictly, no advisory opinion ever could issue.[96] In fact, it appears that the rule actually is aimed at those situations in which the governmental action in question will have an intense and direct effect upon a small group of people.[97]

3. Application of the Justices' Objections

During the fourteen year period studied, the justices in the eight states under analysis refused to entertain thirty-six of the 314 requests submitted.[98] Ten were refusals of gubernatorial requests. Notably, refusals of seven Alabama and ten Rhode Island legislative requests accounted for almost half of all refusals. Of the total, sixteen were due to the hypothetical question rule—seven of these were by Rhode Island's justices.[99] Five refusals, each from a different state, fell within the "affecting private interests" category.[100] Application of the judicial economy rationale resulted in eight refusals: six in Alabama and two in Rhode Island.[101]

92. Ma.55; S.D.7; Clovis, supra note 3, at 191; Advisory Opinions in Alabama, supra note 9, at 20; Stevens, supra note 1, at 5; Advisory Opinions in Florida, supra note 3, at 331.

93. N.H.13; Advisory Opinions in South Dakota, supra note 2, at 297; Stevens, supra note 1, at 1-3 & n.7; see A.2.

94. Me.3; R.I.14; Advisory Opinions in South Dakota, supra note 2, at 297; Stevens, supra note 1, at 5; see F.9; Advisory Opinions in Florida, supra note 3, at 331.

95. F.9 at 739.

96. Advisory Opinions in Alabama, supra note 9, at 22.

97. Advisory Opinions in Florida, supra note 3, at 331.

98. The total number of refusals does not include requests made by the executive council in Massachusetts that the justices declined to entertain. Ma.15; Ma.54. See note 4 supra. The gubernatorial refusal rates were Alabama 33% (3 refusals); Delaware 3% (1 refusal); Massachusetts 7% (1 refusal); New Hampshire 4% (1 refusal); Rhode Island 9% (2 refusals); South Dakota 20% (2 refusals); see Appendix, infra. There were no refusals of gubernatorial requests in Florida and Maine. The legislative refusal rates were 22% in Alabama (7 refusals); 11% in Maine (4 refusals); 7% in Massachusetts (3 refusals); 5% in New Hampshire (2 refusals); 59% in Rhode Island (10 refusals). Id.

99. A.24; Me.36; Me.35; Me.15; Ma.58; Ma.48; Ma.41; N.H.34; R.I.31; R.I.30; R.I.29; R.I.27; R.I.23; R.I.22; R.I.16; S.D.10; cf. N.H.31 (withdrawn request not answered); see notes 84-89 supra and accompanying text.

100. A.2; Me.3; N.H.13; R.I.14; S.D.7; see notes 92-97 supra and accompanying text.

101. A.38; A.36; A.31; A.27; A.23; A.22; R.I.34; R.I.18.

Four of these Alabama refusals arose from a policy of the justices of that state to decline to entertain requests concerning the constitutionality of local laws,[102] "in order that the members of [the] [c]ourt can devote themselves to the preparation of opinions in the large number of cases which come [to the court] by appeal and to answering requests for advisory opinions concerning proposed legislation of statewide application."[103] The other four refusals were based on judicial economy being characterized by the justices as too "broad and indefinite."[104] What is broad and indefinite seems to vary from state to state. At one extreme, Alabama and Rhode Island insist that the requesting authority identify the particular constitutional provision with which the proposal may be in conflict.[105] At the other, New Hampshire's justices frequently answer questions that merely ask whether the proposal is constitutional.[106]

Of the six refusals of requests that did not fit within the three broad categories of objections, five were rejected for being clearly outside the justices' advisory opinion jurisdiction. In three of these, the requesting branch improperly sought the justices' advice on behalf of an unauthorized party;[107] in the other two, refusal resulted from the submission of requests not dealing with a constitutional question[108]—a statutory requirement for the exercise of the justices' jurisdiction in Alabama and Delaware.[109] The sixth unclassified refusal was a common-sense denial by the Rhode Island justices of a request for advice on proposed legislation when, apparently inadvertently, only the title of the bill was submitted for consideration.[110]

The justices answered 84 percent of the 723 separate questions asked in accepted requests. Of the 116 questions not answered, 83 were due to the justices' determination that a response to a different question contained in the same request had rendered the unanswered question moot. In addition, the justices refused to answer twenty-nine questions for the same three broad objections that motivated the overwhelming majority of their refusals to entertain requests.[111]

The justices declined to answer the remaining four questions for reasons that are less clear than those discussed above. In Massachusetts, two questions that presented "constitutional issues of great difficulty" were not answered because the justices were reluctant to respond "without full deliberation or without receiving briefs from interested persons."[112] In addition, the

102. A.36; A.27; A.23; A.22. The justices will, however, answer questions as to whether a particular bill is a local law. See Appendix infra.

103. A.23 at 104.

104. A.38; A.31; R.I.34; R.I.18.

105. A.31; R.I.18. But see R.I.35 (question phrased broadly but since constitutional sections involved were clearly implied justices answered).

106. E.g., N.H.48; N.H.42; N.H.33; see N.H.36 (question number 5). Such questions comprised 16% of the questions in New Hampshire-accepted legislative requests.

107. A.29; Ma.32; R.I.36.

108. A.11; D.33.

109. See note 13 supra and accompanying text.

110. R.I.10.

111. See notes 99-106 supra and accompanying text.

112. Ma.19 at 716.

Maine and Massachusetts justices each refused to answer a question on a federal constitutional issue about which the law was entirely unresolved. The justices reasoned that their advice would be of minimal utility to the requesting authority, since it would not be based on any authoritative Supreme Court decisions but rather on the justices' intuition and prognostication regarding future resolution of the issue by the Supreme Court.[113]

Occasionally, the justices went beyond the questions addressed in order to point out potential conflicts between proposed legislation and constitutional provisions about which no inquiry was made.[114] Moreover, the justices have suggested to the legislature how to redraft a submitted proposal to meet their criticisms.[115] It has been warned, however, that in going beyond their advisory function, "the justices should be careful not to assume the legislative function of selecting an appropriate method for achieving the legislative goal."[116] Although the justices' suggestions for redrafting bills may result in sounder statutes, the danger exists that judicial involvement in the formulation of legislation, removed as it is from the legislative fact-finding task, will result in a loss of governmental flexibility in dealing with the social problems at which statutes are aimed.[117]

4. Observations

The rationales that the justices have constructed for refusing requests and questions are grounded in sound policy. Perhaps with the exception of those requests that were refused due to their effect on private rights, every declination could have been foreseen by the requesting authority. The explanation for the high refusal rates in Alabama (24%) and Rhode Island (30%) apparently lies in the inability or unwillingness of those in the state legislature who frame the requests to understand the rather mechanical limitations that the justices have placed on use of the advisory opinion mechanism.

There is no reason why judicial resources should be expended in refusing improperly submitted requests. Since it is clear that such requests regarding enacted statutes or local laws will be refused, legislative advisory opinion procedures should be tightened to filter out those requests doomed to failure from inception.

III. CONCLUSION

Advisory opinions are primarily concerned with the internal operations of government. While legislative requests significantly outnumbered gubernato-

113. Me.27; Ma.13.

114. E.g., A.40; A.15; Ma.12; R.I.37. But see Ma.38 (justices noted additional constitutional problems but refused to discuss them; limited answer to specific inquiry).

115. Opinion of the Justices, 313 N.E.2d 561, 571 (Mass. 1974); Ma. 56; N.H.24. For a discussion of courts' use of dictum in ordinary litigation for the same purpose see Albertsworth, Advisory Functions in Federal Supreme Court, 23 Geo. L.J. 643, 650-56 (1935). See also Kauper, The Supreme Court: Hybrid Organ of State, 21 Sw. L.J. 573, 584-85 (1967) (informal constitutional revision by interpretation and construction by Supreme Court).

116. Advisory Opinions on Statutes, supra note 2, at 1310.

117. Massachusetts Survey, supra note 9, at 112-13.

rial requests, the questions of both branches of government were predominantly concerned with internal governmental mechanics and fiscal responsibilities.[118] The only material difference in their respective requests was that governors had a significant number of requests concerning governmental power and a rather insignificant number of requests in regard to individuals' constitutional rights, while the converse was true of legislative inquiries.

While advisory opinions have been primarily concerned with the internal workings of state government, they have not been unaffected by extra-state legal pressure as evidenced by the apportionment cases discussed above. It should also be noted, however, that such extra-state pressure may actually result in a reluctance of state justices to render advisory opinions on such matters, especially where the federal law is unclear and its ultimate direction is still developing.[119]

Procedural reform of the mechanism, particularly the greater involvement of counsel in presenting the issues to the justices, occurred throughout the period studied. In at least five states, submission of briefs by interested parties has been provided for by statute or has become standard procedure.[120] In at

118. This finding answers to a limited degree a theoretical argument offered by opponents of the advisory opinion mechanism. These commentators have argued that the availability of the mechanism may encourage the legislature to avoid its obligation to determine independently the compatibility of a proposed measure with constitutional provisions. Advisory Opinions in Alabama, supra note 9, at 38; see Frankfurter, A Note on Advisory Opinions, 37 Harv. L. Rev. 1002, 1007 (1924) [hereinafter cited as A Note on Advisory Opinions]. This duty is similar to that imposed by the U.S. Const. art. VI, on federal officers. See, e.g., Ala. Const. art. XVI, § 279; Colo. Const. art. XII, §§ 7, 8; Del. Const. art. XIV, § 1; Fla. Const. art. 2, § 5(b); Me. Const. art. IX, § 1; Mass. Const. pt. 2, ch. 6, art. I; N.H. Const. pt. 2, art. 84; S.D. Const. art. XXI, § 3. Consequently the justices must decide whether a proposed act is constitutional without the implied decision to that effect that accompanies enacted legislation. The finding that well over two-thirds of the requests for advisory opinions contain no questions as to constitutionality of a proposed action, but rather seek advice regarding procedural workings of state government, effectively limits the effectiveness of such an argument.

119. See note 113 supra and accompanying text.

120. An Alabama statute empowers the justices to request amicus briefs from interested parties. Ala. Code tit. 13, § 36 (1958). This authority seldom has been used. Advisory Opinions in Alabama, supra note 9, at 32-33. In 1972, Delaware amended its statute to give the justices discretion to appoint members of the Delaware bar "for the purpose of briefing or arguing the legal issues submitted . . . ." Codified as Del. Code Ann. tit. 10, § 141(b) (1975). Rules promulgated by the Florida Supreme Court allow the justices to permit "interested persons to be heard on the questions presented through briefs or oral argument or both." Fla. App. Ct. R. 2.1h(2)(b) (1975). In New Hampshire, the justices appear to have adopted the solicitation of briefs from interested parties as a standard practice. See, e.g., Opinion of the Justices, 114 N.H. 165, 316 A.2d 174 (1974); Opinion of the Justices, 109 N.H. 366, 252 A.2d 429 (1969). The justices in New Hampshire occasionally hear oral arguments in advisory opinion proceedings. Opinion of the Justices, 113 N.H. 205, 304 A.2d 881 (1973); Opinion of the Justices, 102 N.H. 565, 163 A.2d 1, 2 (1960); Note, The Case for an Advisory Function in the Federal Judiciary, 50 Geo. L.J. 785, 792 (1962). On at least one occasion, New Hampshire's justices have refused to answer a request until interested parties had an opportunity to submit their views. Opinion of the Justices, 109 N.H. 473, 475, 254 A.2d 845, 846 (1969). And in Massachusetts, the use of briefs by the justices has become a common practice since 1967, when the justices abandoned historical practice by requesting the submission of briefs to aid in the preparation of their response to a complex

least one other state, submission of briefs has been used on occasion.[121] Although this practice[122] probably has resulted in sounder opinions in some instances, it also may have produced some unexpected consequences. First, submission of briefs and presence of counsel have lent an increasingly judicial flavor to the advisory opinion procedure, further blurring the already imprecise distinction between decisions of the court and opinions of the justices. Absence of briefs and counsel has been a primary reason for the justices' self-imposed refusal to deal with requests that would affect private rights. It is apparent, however, that employment of these aids to decision-making may result in the elimination of the refusal to deal with such requests. It is clear that submission of briefs by some interested parties cannot ensure that all relevant views will be represented. A reform aimed at correcting a weakness in the advisory opinion procedure may therefore result incidentally in expansion of the justices' advisory jurisdiction. For example, Massachusetts' governor requested the justices' advice on the state's obligation to pay rent to private landlords under a lease executed by the state university.[123] The justices answered although it was a situation in which a response obviously would affect the private interest of the landlords. Acknowledging their departure from the traditional rule, the justices explained:

> Where private rights are involved, such as the rights of [these] landlords . . . , it would normally be inappropriate for us to give an opinion on a matter of statutory construction which could be brought to the court by the usual litigation process, initiated by the parties in interest. . . . Here, however, the answers we give are not adverse to any landlord and are directed solely to questions of law of continuing importance, which have been fully argued to us in carefully considered briefs.[124]

Despite their caveat that this case should not be viewed as establishing a precedent, it seems clear that the justices effectually expanded their advisory jurisdiction due to the presence of legal briefs, but without the other benefits

---

reapportionment question. Opinion of the Justices, 353 Mass. 790, 793, 230 N.E.2d 801, 803 (1967); see, e.g., Opinion of the Justices, — Mass. ——, ——, 311 N.E.2d 44, 45 (1974); Opinion of the Justices, —— Mass. ——, ——, 303 N.E.2d 320, 327 n.13 (1973).

121. E.g., R.I.37.

122. This practice effectively disposes of a theoretical argument against advisory opinions. Opponents of the mechanism argue that the absence of litigating attorneys may leave unconsidered by the justices issues and points of law that would have been brought to their attention in an adversarial setting. United States v. Fruehauf, 365 U.S. 146, 157 (1961); C. Wright, Federal Courts 37 (2d ed. 1970); Emery, Advisory Opinions from Justices, 2 Me. L. Rev. 1, 2-3 (1908); see Advisory Opinions in Alabama, supra note 9, at 21. See generally Neef & Nagel, The Adversary Nature of the American Legal System from a Historical Perspective, 20 N.Y.L.F. 123 (1974). Opponents further maintain that the concomitant absence of legal briefs increases the burdens on the justices by requiring them to do their own research. Aumann, The Supreme Court and the Advisory Opinion, 4 Ohio St. L.J. 21, 47-48 (1937); Emery, Advisory Opinions from Justices, 2 Me. L. Rev. 1, 4 (1908); Advisory Opinions in Alabama, supra note 9, at 33. The practice in several states has blunted or mooted both of these contentions. See note 120 supra.

123. Ma.55.

124. Id. at 351-52.

of the litigation process that frequently have been extolled in the context of the "case or controversy" limitation on federal court jurisdiction.[125]

The benefits and liabilities of the advisory opinion mechanism become readily apparent if the subject matter of advisory opinions is divided into three groups: internal governmental affairs; facial constitutionality of legislation; and legislation the constitutionality of which can be determined only on its application to particular facts. In the first group would fall three of the categories developed for observational purposes—general governmental mechanics, fiscal problems and governmental powers[126]—containing the vast majority of questions asked in advisory opinion requests.[127] It is in dealing with problems of internal governmental affairs that the mechanism seems to be of greatest assistance to the requesting authority. These questions frequently concern problems of governmental structure or procedural difficulties between the executive and legislative branches, such as the governor's veto power.[128] Often what is important is not the substance of the justices' answer but the fact that there is an answer that the contending parties can accept as conclusive. It is also important that an answer be provided quickly to limit the adverse ramifications on governmental order caused by the presence of the problem and resultant indecision. There seem to be no valid objections to advisory opinions of this nature.[129]

The second group, facial constitutionality of legislation, includes issues that do not require fully developed factual settings for resolution: for example, whether a reapportionment plan violates the equal protection clause or whether the reduction in size of a criminal jury violates the sixth amendment. If counsel is allowed to represent interested parties, the only valid objection to the use of advisory opinions for such matters is the possibility that the justices would have too little time for deliberation, particularly in the case of a legislative request submitted near the end of a session.[130] One must assume, however, that the justices will not venture an answer on important issues unless they have taken sufficient time to fully consider their response.

---

125. See, e.g., Flast v. Cohen, 392 U.S. 83, 96-97 (1968); United States v. Fruehauf, 365 U.S. 146, 157 (1961). At the same time, the justices seem to have adopted impliedly the position that they would abandon the "affects private interests" limitation on their advisory opinion jurisdiction only when their advice would affect private persons in a favorable manner. Ma.55 at 351-52. This is appropriate because, if the private persons brought suit subsequent to an adverse advisory determination on the same subject matter, the advisory opinion would stand as strong persuasive authority against their contentions, in effect foreclosing their opportunity to be heard in court. Conversely, although an opinion adverse to the government would not prevent the requesting authority from bringing a suit in court on the same matter, see notes 6-9 supra and accompanying text, the requesting authority at least had the election of asking the justices' advice or testing the issue in court and, having chosen the former, should have been prepared for adverse consequences.

126. See Appendix infra.

127. See Pt. II C2 & 3 supra.

128. See note 59 supra and accompanying text.

129. But see A Note on Advisory Opinions, supra note 118, at 1008 n.18.

130. See notes 133-38 infra and accompanying text.

In the last group—legislative measures, the application of which would be unconstitutional in a particular factual situation—advisory opinions are of limited value and, possibly, may be harmful.[131] The justices cannot be expected to imagine all possible applications of the proposed act for purposes of determining its constitutionality in each situation which might ultimately arise under it. All they can reasonably be expected to do is to judge the bill's facial constitutionality, leaving for future litigation the constitutionality of the act as applied.[132]

The effectiveness of advisory opinions in the first two areas is further enhanced by the rapidity with which advisory opinions can be obtained from the justices.[133] A 1949 study found that the average time between request and answer in Colorado, Maine, Massachusetts, New Hampshire and South Dakota was less than a month, far shorter than litigation on similar points.[134] A more recent study in Florida demonstrated the elapsed time to be seven and one-half days.[135] Opponents of the procedure cite these figures to support the proposition that the justices do not spend enough time for careful deliberation.[136] It appears, however, that when there has been insufficient time for a thorough analysis, the justices simply have refused to answer.[137] Perhaps in order to insure that enough time will be available to consider requests, Florida's court rules now provide that an answer shall not be returned until ten days after the request is filed and docketed unless "such delay would cause public injury."[138]

Apart from the fundamental political arguments that traditionally have been advanced against the advisory opinion mechanism,[139] there seem to be two principal reasons why the number of states utilizing the practice is not

131. See Massachusetts Survey, supra note 9, at 114.

132. See Ma.10; R.I.24; cf. Monaghan, Constitutional Adjudication: The Who and When, 82 Yale L.J. 1363, 1373 (1973).

133. Advisory Opinion Analysis, supra note 2, at 221; Stevens, supra note 1, at 13.

134. Advisory Opinion Analysis, supra note 2, at 207.

135. Id. at 337.

136. Aumann, The Supreme Court and the Advisory Opinion, 4 Ohio St. L.J. 21, 47 (1937); Advisory Opinions in Alabama, supra note 9, at 33-35. See generally Reisman, Accelerating Advisory Opinions: Critique and Proposal, 68 Am. J. Int'l L. 648, 662 (1974).

137. E.g., In re House Bill No. 1503, 163 Colo. 45, 47, 428 P.2d 75, 77 (1967); Opinion of the Justices, 114 N.H. 174, 178, 317 A.2d 568, 572 (1974); Ellingwood, supra note 1, at 219-21.

138. Fla. App. Ct. R. 2.1h(3) (1975).

139. In addition to the arguments discussed in note 122, as well as note 11 and the accompanying text, there are other theoretical or political arguments advanced against advisory opinions. While these objections are beyond the scope of this Comment, they do deserve mention at this point. The principal objection to advisory opinions is that they infringe upon the separation of powers doctrine. See Stevens, supra note 1, at 9-10 and cases cited in n.51. See generally A. Vanderbilt, The Doctrine of Separation of Powers and Its Present Day Significance 1-51 (1963). Another theoretical objection is that advisory opinions do not permit legislation to first be tested in actual practice. A Note on Advisory Opinions, supra note 118; see Davison, The Constitutionality and Utility of Advisory Opinions, 2 U. Toronto L.J. 254, 263 (1938). A final theoretical objection is the difficulty of determining the application of constitutional classifications in the absence of a factual background. Ma.10; Ma.4; Massachusetts Survey, supra note 9, at 110-11.

likely to increase. First, the mechanism has not been the focus of public attention, in large part because the subject matter of requests overwhelmingly has dealt with the internal workings of state government.[140] Unlike other procedural devices, such as class actions that may involve major segments of the private economy, the substance of the justices' advice has made no such dramatic impact on public consciousness. Furthermore, the jurisdictions that currently have an advisory opinion procedure are predominantly rural and sparsely populated.[141] Since they do not face the massive social and legal problems confronted by the industrial states, their experiences have been unpersuasive in encouraging greater acceptance of the device.

A second reason why more states have not adopted an advisory opinion mechanism is the decline in importance of state government,[142] with a corresponding expansion of federal law into areas that previously had been areas solely of state concern.[143] Recognizing this, the justices sometimes have refused to answer inquiries within their advisory jurisdiction because the issues dealt with unclear areas of federal law on which they reasoned that their advice would be of little value.[144] This expansion of the federal role coupled with the relatively narrow scope of the procedure makes it unlikely that other states will adopt the advisory opinion mechanism in the future.

Charles M. Carberry

APPENDIX I: SUMMARIES OF ADVISORY OPINIONS BY STATE—REQUESTS, DENIALS AND QUESTIONS

This Appendix summarizes the number of requests for advisory opinions, the number of times the justices refused to entertain requests and the number of questions in requests entertained by the justices in each state and in each year during the period 1960-73. Each column is subdivided to show requests and questions from the legislature (L) and the governor (G) and the total (T). For observational purposes, the questions have been classified in six broad categories:

CATEGORY I: *Individuals' Constitutional Rights.*—conflicts between proposed measures and guarantees contained in the Bill of Rights, the fourteenth amendment and the contract clause of the Federal Constitution and in analogous provisions of state constitutions. (18.8% of all questions.)

CATEGORY II: *Elections and Reapportionment.*—state legislative apportionment and election procedure. Of the sixty-six questions in this category, twenty-two were contained in two lengthy requests from the Maine legislature concerning the technical issue of the validity of election ballots marked in a particular way. Me.14; Me.10. (9.7% of all questions.)

CATEGORY III: *Governmental Powers.*—authority to implement a specific course of

140. See notes 126-27 supra and accompanying text.

141. The states rendering advisory opinions, ranked by population are: Ala. (21st); Del. (46th); Fla. (9th); Me. (38th); Mass. (10th); N.H. (41st); R.I. (39th); S.D. (44th). See The Book of the States 1974-75, at 538, 545, 546, 556, 558, 566, 576, 578 (P. Albright ed. 1974).

142. See Keefe, The Functions and Powers of the State Legislature, in State Legislatures in American Politics 37 (A. Heard ed. 1966).

143. See P. Kurland, Politics, the Constitution, and the Warren Court 59-97 (1970).

144. See Me.27; Ma.13.

action: principally, delegation of legislative power and the exercise of gubernatorial appointment power. (15.0% of all questions.)

CATEGORY IV: *Fiscal Problems.*—expenditures, taxing power, governmental financing and state debt. (20.1% of all questions.)

CATEGORY V: *General Governmental Mechanics.*—technical governmental operations, including home rule provisions, separation of powers of state governmental branches, legislative quorum and voting requirements, etc. In addition, this category includes those questions in which the justices were requested to interpret specific words of state constitutions and statutes, such as the meaning of the word "mileage" for purposes of reimbursement of state officers' driving expenses. E.g., C.7; cf. A.25 (meaning of "office for profit"); N.H.32 (meaning of word "town"). (29.4% of all questions.)

CATEGORY VI: *Miscellaneous.*—in addition to a minute number of questions that did not fit within the preceding five categories, two states had peculiarly local advisory opinion questions that are listed here. 28.2 percent of the questions in Alabama were miscellaneous, nearly all of which dealt with Ala. Const. art. 4, §§ 45, 104-11, which require that bills be limited to a single subject and that local laws meet certain special requirements. See A.18; A.14; A.13; A.5. In New Hampshire, twelve percent of all questions were within the miscellaneous category, almost all of which concerned the facial constitutionality of proposed measures, a type of question not acceptable in the other states. See note 130 supra. (Including these Alabama and New Hampshire questions, this category accounted for seven percent of all questions; without these questions, less than two percent of all questions were miscellaneous.)

It should also be noted that in those instances in which judgment required a determination as to which category a particular question belonged when there were several alternatives, the question was placed according to what appeared to be the primary thrust of the inquiry.

Summary No. 1: Alabama

	Requests			Denials of Requests			Questions Posed			Categories of Questions												
										I			II			III			IV			V			VI		
Year	L	G	T	L	G	T	L	G	T	L	G	T	L	G	T	L	G	T	L	G	T	L	G	T	L	G	T
1961	2	1	3	0	1	1	2	0	2	0	0	0	0	0	0	0	0	0	0	0	0	1	0	1	1	0	1
1963	4	2	6	0	0	0	10	6	16	0	0	0	1	0	1	1	2	3	4	1	5	0	0	0	4	3	7
1964	0	1	1	0	1	1	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
1965	5	1	6	0	0	0	18	3	21	1	0	1	2	0	2	0	3	3	6	0	6	4	0	4	5	0	5
1967	7	0	7	3	0	3	17	0	17	0	0	0	0	0	0	0	0	0	1	0	1	10	0	10	6	0	6
1968	0	1	1	0	0	0	0	2	2	0	0	0	0	0	0	0	0	0	0	0	0	0	2	2	0	0	0
1969	2	1	3	1	0	1	1	3	4	0	0	0	0	0	0	0	0	0	0	0	0	1	0	1	0	3	3
1970	0	1	1	0	1	1	2	0	2	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
1971	7	0	7	2	0	2	8	0	8	1	0	1	0	0	0	6	0	6	0	0	0	2	0	2	1	0	1
1972	1	0	1	0	0	0	5	0	5	0	0	0	0	0	0	0	0	0	0	0	0	5	0	5	0	0	0
1973	4	1	5	1	0	1	4	4	8	1	0	1	0	0	0	1	4	5	0	0	0	1	0	1	1	0	1
Totals	32	9	41	7	3	10	67	18	85	3	0	3	3	0	3	8	9	17	11	1	12	24	2	26	18	6	24

No Requests in 1960, 1962, 1964, and 1966

Summary No. 2: Colorado

	Requests			Denials of Requests			Questions Posed			Categories of Questions												
										I			II			III			IV			V			VI		
Year	L	G	T	L	G	T	L	G	T	L	G	T	L	G	T	L	G	T	L	G	T	L	G	T	L	G	T
1960	0	1	1	0	1	1	0	0	0				0	0	0							0	0	0			
1964	1	0	1	0	0	0	1	0	1				0	0	0							1	0	1			
1965	1	0	1	0	0	0	3	0	3				0	0	0							3	0	3			
1967	0	3	3	0	1	1	0	7	7				0	0	0							0	7	7			
1969	2	0	2	0	0	0	4	0	4				0	0	0							4	0	4			
1970	1	0	1	0	0	0	3	0	3				2	0	2							1	0	1			
1972	2	0	2	0	0	0	4	0	4				4	0	4							0	0	0			
Totals	7	4	11	0	2	2	15	7	22				6	0	6							9	7	16			

No Requests in 1961, 1962, 1963, 1966, 1968, 1971 and 1973

Summary No. 3: Delaware

	Requests			Denials of Requests			Questions Posed			Categories of Questions												
										I			II			III			IV			V			VI		
Year	L	G	T	L	G	T	L	G	T	L	G	T	L	G	T	L	G	T	L	G	T	L	G	T	L	G	T
1961	3			0			6			0			0			0			0			6			0		
1962	2			0			2			0			0			0			1			1			0		
1963	5			0			7			0			2			1			0			4			0		
1964	3			0			7			0			1			2			0			4			0		
1965	1			0			2			0			0			0			0			2			0		
1966	2			0			3			1			0			0			0			2			0		
1967	2			0			2			0			0			0			0			2			0		
1968	4			0			8			1			0			1			3			2			1		
1969	2			0			2			0			0			0			0			2			0		
1970	1			0			1			0			0			0			0			1			0		
1971	3			0			3			1			0			0			0			2			0		
1972	2			0			4			1			2			0			0			1			0		
1973	4			1			4			0			0			1			0			3			0		
Totals	34			1			51			4			5			5			4			32			1		

No Requests in 1960

Summary No. 4: Florida

	Requests	Denials of Requests*	Questions Posed	Categories of Questions I	II	III	IV	V	VI
Year	L G T	L G T	L G T	L G T	L G T	L G T	L G T	L G T	L G T
1961	3	0	3			1	0	2	
1963	3	0	3			2	0	1	
1965	1	0	3			2	0	1	
1966	1	0	1			1	0	0	
1967	3	0	4			3	0	1	
1968	5	0	5			4	0	1	
1969	3	0	6			3	0	3	
1970	2	0	5			2	3	0	
1971	2	0	7			2	3	2	
1972	1	0	2			1	0	1	
1973	2	0	5			1	0	4	
Totals	26	0	44			22	6	16	

No Requests in 1960, 1962 and 1964

*Prior to 1969, refusals of requests were not recorded in Florida. See Advisory Opinions in Florida, supra note 3, at 332.

Summary No. 5: Maine

	Requests	Denials of Requests	Questions Posed	Categories of Questions I	II	III	IV	V	VI
Year	L G T	L G T	L G T	L G T	L G T	L G T	L G T	L G T	L G T
1961	4 1 5	1 0 1	9 2 11	5 0 5	2 0 2	0 0 0	2 0 2	0 2 2	0 0 0
1963	4 0 4	0 0 0	11 0 11	2 0 2	0 0 0	0 0 0	2 0 2	0 2 2	0 0 0
1965	2 0 2	0 0 0	12 0 12	0 0 0	8 0 8	0 0 0	3 0 3	1 0 1	0 0 0
1966	2 0 2	0 0 0	4 0 4	1 0 1	0 0 0	0 0 0	0 0 0	0 0 0	3 0 3
1967	8 0 8	1 0 1	26 0 26	1 0 1	16 0 16	0 0 0	4 0 4	5 0 5	0 0 0
1968	1 0 1	0 0 0	1 0 1	0 0 0	0 0 0	0 0 0	0 0 0	1 0 1	0 0 0
1969	5 1 6	0 0 0	17 4 21	9 0 9	0 1 1	2 3 5	1 0 1	5 0 5	0 0 0
1970	2 1 3	0 0 0	6 1 7	2 0 2	0 0 0	1 0 1	0 1 1	2 0 2	1 0 1
1971	4 2 6	2 0 2	4 4 8	2 0 2	2 2 4	0 0 0	0 2 2	0 0 0	0 0 0
1973	4 1 5	0 0 0	25 3 28	20 0 20	0 0 0	0 3 3	0 0 0	5 0 5	0 0 0
Totals	36 6 42	4 0 4	115 14 129	42 0 42	28 3 31	3 6 9	12 3 15	19 4 23	4 0 4

No Requests in 1960, 1962, 1964 and 1972

Summary No. 6: Massachusetts*

	Requests			Denials of Requests			Questions Posed			Categories of Questions I			II			III			IV			V			VI		
Year	L	G	T	L	G	T	L	G	T	L	G	T	L	G	T	L	G	T	L	G	T	L	G	T	L	G	T
1960	2	0	2	0	0	0	21	0	21	3	0	3	0	0	0	3	0	3	9	0	9	6	0	6			
1962	1	0	1	0	0	0	2	0	2	0	0	0	0	0	0	0	0	0	2	0	2	0	0	0			
1963	2	0	2	0	0	0	2	0	2	1	0	1	1	0	1	0	0	0	0	0	0	0	0	0			
1964	5	1	6	0	0	0	8	1	9	1	0	1	1	0	1	1	0	1	3	0	3	3	0	3			
1965	4	0	4	0	0	0	12	0	12	2	0	2	3	0	3	1	0	1	3	0	3	3	0	3			
1966	1	0	1	0	0	0	8	0	8	1	0	1	0	0	0	3	0	3	4	0	4	0	0	0			
1967	2	1	3	0	0	0	4	5	9	3	1	4	1	2	3	0	0	0	0	0	0	0	2	2			
1968	4	1	5	0	0	0	10	1	11	4	0	4	0	0	0	0	0	0	6	0	6	0	1	1			
1969	6	2	8	1	0	1	28	5	33	6	0	6	0	0	0	8	5	13	7	0	7	7	0	7			
1970	7	0	7	1	0	1	17	0	17	9	0	9	1	0	1	0	0	0	0	0	0	7	0	7			
1971	4	4	8	1	0	1	5	10	15	2	1	3	1	0	1	0	2	2	0	2	2	2	5	7			
1972	2	2	4	0	0	0	4	2	6	2	0	2	0	1	1	0	0	0	0	0	0	2	1	3			
1973	2	3	5	0	1	1	7	5	12	5	3	8	1	0	1	2	1	3	0	1	1	0	0	0			
Totals	42	14	56	3	1	4	128	29	157	39	5	44	9	3	12	18	8	26	34	3	37	30	9	39			

No Requests in 1961

*Requests by the Council not included; only three requests were made by the Council during the period studied. Ma.54; Ma.21; Ma.15.

Summary No. 7: New Hampshire

	Requests			Denials of Requests			Questions Posed			Categories of Questions I			II			III			IV			V			VI		
Year	L	G	T	L	G	T	L	G	T	L	G	T	L	G	T	L	G	T	L	G	T	L	G	T	L	G	T
1960	0	1	1	0	0	0	0	2	2	0	0	0	0	0	0	0	0	0	0	2	2	0	0	0	0	0	0
1961	7	3	10	0	0	0	17	7	24	1	0	1	0	0	0	0	3	3	8	0	8	3	4	7	5	0	5
1962	0	2	2	0	1	1	0	3	3	0	0	0	0	0	0	0	1	1	0	0	0	0	2	2	0	0	0
1963	2	0	2	0	0	0	6	0	6	0	0	0	3	0	3	0	0	0	3	0	3	0	0	0	0	0	0
1965	4	2	6	0	0	0	13	8	21	1	0	1	2	0	2	1	0	1	6	0	6	1	8	9	2	0	2
1966	0	1	1	0	0	0	0	2	2	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	2	2
1967	3	2	5	0	0	0	16	9	25	10	3	13	0	0	0	0	0	0	1	0	1	0	5	5	5	1	6
1968	0	2	2	0	0	0	0	4	4	0	0	0	0	0	0	0	3	3	0	1	1	0	0	0	0	0	0
1969	5	2	7	2	0	2	23	3	26	10	1	11	0	0	0	4	1	5	2	0	2	3	1	4	4	0	4
1970	1	3	4	0	0	0	1	7	8	1	0	1	0	0	0	0	3	3	0	2	2	0	2	2	0	0	0
1971	10	0	10	0	0	0	23	0	23	8	0	8	0	0	0	0	0	0	4	0	4	9	0	9	2	0	2
1972	3	1	4	0	0	0	10	2	12	0	0	0	0	0	0	0	2	2	7	0	7	2	0	2	1	0	1
1973	6	5	11	0	0	0	10	16	26	6	1	7	1	0	1	0	7	7	1	4	5	2	4	6	0	0	0
Totals	41	24	65	2	1	3	119	63	182	37	5	42	6	0	6	5	20	25	32	9	41	20	26	46	19	3	22

No Requests in 1964

Summary No. 8: Rhode Island

	Requests			Denials of Requests			Questions Posed			Categories of Questions																	
										I			II			III			IV			V			VI		
Year	L	G	T	L	G	T	L	G	T	L	G	T	L	G	T	L	G	T	L	G	T	L	G	T	L	G	T
1960	1	3	4	0	0	0	1	7	8	0	0	0	0	0	0	0	1	1	0	0	0	1	6	7	0	0	0
1961	0	4	4	0	0	0	0	7	7	0	0	0	0	2	2	0	0	0	0	3	3	0	2	2	0	0	0
1962	2	3	5	1	0	1	1	9	10	0	1	1	0	5	5	0	0	0	0	3	3	0	0	0	1	0	1
1963	0	1	1	0	1	1	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
1964	0	1	1	0	0	0	0	5	5	0	0	0	0	0	0	0	1	1	0	4	4	0	0	0	0	0	0
1965	5	2	7	3	0	3	3	6	9	0	0	0	0	0	0	0	0	0	0	6	6	3	0	3	0	0	0
1966	1	2	3	1	0	1	0	6	6	0	2	2	0	3	3	0	0	0	0	1	1	0	0	0	0	0	0
1969	0	1	1	0	0	0	0	2	2	0	0	0	0	0	0	0	0	0	0	2	2	0	0	0	0	0	0
1970	2	1	3	2	0	2	0	1	1	0	0	0	0	0	0	0	0	0	0	1	1	0	0	0	0	0	0
1971	6	1	7	3	1	4	5	0	5	1	0	1	0	0	0	0	0	0	4	0	4	0	0	0	0	0	0
1972	0	2	2	0	0	0	0	4	4	0	0	0	0	0	0	0	0	0	0	2	2	0	2	2	0	0	0
1973	0	2	2	0	0	0	0	6	6	0	0	0	0	0	0	0	2	2	0	4	4	0	0	0	0	0	0
Totals	17	23	40	10	2	12	10	53	63	1	3	4	0	10	10	0	4	4	4	26	30	4	10	14	1	0	1

No Requests in 1967 and 1968

Summary 9: South Dakota

	Requests			Denials of Requests			Questions Posed			Categories of Questions																	
										I			II			III			IV			V			VI		
Year	L	G	T	L	G	T	L	G	T	L	G	T	L	G	T	L	G	T	L	G	T	L	G	T	L	G	T
1962		1			0			1			0						1			0			0				
1963		1			0			1			0						0			0			1				
1966		1			0			1			1						0			0			0				
1967		1			0			1			0						0			1			0				
1968		1			0			1			0						1			0			0				
1969		1			0			2			0						0			0			2				
1971		1			1			0			0						0			0			0				
1973		3			1			5			0						2			0			3				
Totals		10			2			12			1						4			1			6				

No Requests in 1960, 1961, 1964, 1965, 1970 and 1972