IN THE COURTS

Advisory Opinions: The "Ghosts That Slay"

by Katherine White

Should the Supreme Court of North Carolina serve as a sort of hybrid policy advisor to the legislative and executive branches of government? That's the central question surrounding the practice of granting advisory opinions—a practice that's not widely understood.

The North Carolina Constitution authorizes state courts to hear two kinds of cases: civil actions between opposing parties, and criminal cases where the state prosecutes those charged with crimes.[1]

But since 1849, the N.C. Supreme Court—the final arbiter of what the state Constitution and state law say—has responded to at least 28 requests from the governor or the legislature for advisory opinions. These opinions have no force of law but indicate the Court's views on an issue. The Court has issued only four such opinions in the last quarter-century—in 1961, 1966, 1969 and 1982. But in the past three years, the governor and the General Assembly have sought the Court's advice on many occasions.

The Court has issued those opinions despite the fact that it has no guidelines on when it should issue advisory opinions—or any other rules regarding advisory opinions, for that matter. Chief Justice Joseph Branch, like some of his predecessors, questions whether such opinions should be issued. He fears, in part, that the Court could be swamped with requests for such opinions in the future.

Legislatures and governors alike have sought advisory opinions because it would help determine the constitutionality of a bill or resolve an issue. It would also help speed the resolution of issues. But there haven't been all that many advisory opinions granted—on the average about one every seven years since the Court first convened in 1789. The use of such opinions has hardly burdened the court.

"You're faced with the fact that over many, many years you've had the court issuing them," Branch said in an interview. "It's custom .... Whether there's any constitutional authority for it I don't know. Up to now no one's challenged giving the opinions—probably because (the opinions) are not binding."

In theory, the opinions are not binding on the Court because they are the individual views of the justices and not of the Court as an institution. But in practice, the opinions often are cited in later developments to support one position or another.

Branch himself acknowledges that the opinions carry weight. "When you get into giving advisory opinions it's a pretty strong indication of what you might do if you get a lawsuit," said Branch.

The latest request, submitted by Democratic Lt. Gov. Robert Jordan and House Speaker Liston Ramsey (D-Madison) in July, sought the justices' opinion on whether two sections of the new Administrative Procedure Act (APA) meet state constitutional requirements.[2] The new APA established an independent system of hearing officers under the chief justice of the Supreme Court and also established a commission—called the Administrative Rules Review Commission—composed of legislative appointees to review the rules executive branch agencies make.

In its deliberations, the Democratic-controlled House wanted to keep Republican Gov. James G. Martin from appointing the chief hearing officer and give the appointment instead to the General Assembly. The House also wanted to ensure control over the executive branch's rules and sought a legislative veto over those rules. The Senate membership expressed concern that the House position encroached on the constitutional provision of separation of powers, which requires that the three branches of government remain separate and distinct.

The two houses compromised on July 12—with no legislative veto of rules and with the chief justice appointing the chief hearing officer. But the compromise carried with it a condition: The two houses of the legislature would request an advisory opinion on the two contested issues from the Supreme Court—and one section of the bill would not take effect unless the Court

Katherine White, a lawyer, is a Raleigh reporter for The Charlotte Observer *who covers state and federal courts.*

okayed it in an advisory opinion. In other words, the Supreme Court would have what the governor never had—an outright veto.

The N.C. Supreme Court rejected that request for an advisory opinion in a letter written on October 28, 1985, and filed on October 31—in effect probably killing the proposed Administrative Rules Review Commission. The Court's letter, addressed to Lt. Gov. Robert Jordan and House Speaker Liston Ramsey, noted: "To grant your request the members of the Supreme Court would have to place themselves directly in the stream of the legislative process. This kind of legislative power, we believe, should not be construed upon or accepted by this Court...."

The request for an advisory opinion, founded in politics, placed the justices in a position of answering a legal question that the state Constitution does not *expressly* empower the Court to answer, because its stated powers are limited to review of civil litigation and criminal cases. It also places one branch of government in the position of advising another branch, blurring the separateness of the judiciary and legislative branches.

That blur between the two branches is the reason that the U.S. Supreme Court has never given advisory opinions. The justices in 1793 told President Washington that the federal separation of powers doctrine in which they were "judges of a court in the last resort" meant they could not give advisory opinions.[3] By establishing this doctrine requiring a "case or controversy," the U.S. Supreme Court in effect said it would decide only real fights between real antagonists, not serve as an ultimate legal advisor.

The N.C. Supreme Court's first advisory opinion—issued in 1849—was granted in almost a casual way, with no consideration of the separation of powers doctrine. There, the court settled a political dispute over which votes should be

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—compiled by Lacy Maddox

1. *Waddell v. Berry,* 31 N.C. 516 and 40 N.C. 440 (1849)
2. *In re Martin,* 60 N.C. 153 (1863)
3. *In the Matter of Hughes,* 61 N.C. 64 (1867) (also cited as *In re Extradition*)
4. *In re Homestead and Exemptions,* Opinion handed down in 1869; reported at 227 N.C. 715 (1947)
5. *In re Legislative Term of Office,* 64 N.C. 785 (1870)
6. *In re A Convention of the People,* Opinion handed down in 1871; reported at 230 N.C. 760 (1949)
7. *In re Power of Supreme Court to Declare Act of General Assembly Unconstitutional,* 66 N.C. 652 (1872)
8. *In re Term of Office of Judges and Justices,* 114 N.C. 923 (1894)
9. *In re Leasing of the North Carolina Railroad,* 120 N.C. 623 (1897)
10. *In re Municipal Annexations,* Opinion handed down in 1917; reported at 227 N.C. 716 (1947)
11. *In re Omnibus Justice of the Peace Bill,* Opinion handed down in 1919; reported at 227 N.C. 717 (1947)
12. *In re Municipal Finance Bill,* Opinion handed down in 1921; reported at 227 N.C. 718 (1947)
13. *In re Emergency Judges,* Opinion handed down in 1925; reported at 227 N.C. 720 (1947)
14. *In re Proposed Changes in Judicial System,* No formal response, as the Resolution of the General Assembly requesting advice was later withdrawn. Resolution adopted in 1925; reported at 227 N.C. 721
15. *In re Advisory Opinion,* 196 N.C. 828 (1929)
16. *In re Proposed Constitutional Convention,* 204 N.C. 806 (1933)
17. *In re General Election,* 207 N.C. 879 (1934)
18. *In re Yelton,* 223 N.C. 845 (1944)
19. *In re Phillips,* 226 N.C. 772 (1946)
20. *In re Terms of the Supreme Court,* Opinion handed down in 1923; reported at 227 N.C. 723 (1947)
21. *In re Subsistence and Travel Allowance for Members of the General Assembly,* 227 N.C. 705 (1947)
22. *In re House Bill No. 65,* 227 N.C. 708 (1947)
23. *In re Advisory Opinion in re Time of Election to Fill Vacancy in Office of Associate Justice of the Supreme Court of North Carolina,* 232 N.C. 737 (1950)
24. *Advisory Opinion in re General Election,* 224 N.C. 748 (1956)
25. *Advisory Opinion in re General Election,* 255 N.C. 747 (1961)
26. *Advisory Opinion in re Work Release Statute,* 268 N.C. 727 (1966)
27. *Advisory Opinion in re Sales Tax Election of 1969,* 275 N.C. 683 (1969)
28. *Advisory Opinion in re Separation of Powers,* 305 N.C. 767 (Appendix, 1982)

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counted in a close state Senate race. Chief Justice Thomas Ruffin wrote that the justices responded because they "deemed it a duty of courtesy and respect to the Senate." Few other state supreme courts extend that courtesy to the executive or legislative branches of government, and most of those states have a specific constitutional provision for advisory opinions.

Still, the N.C. Court hasn't always been courteous.

In 1869, for example, the N.C. Supreme Court refused to advise the General Assembly on how the 1868 Constitution affected certain classes of debt that were incurred before the new Constitution's adoption. Then, wrote Chief Justice Richmond Pearson, "The functions of this court are restricted to cases constituted before it. We are not at liberty to prejudge questions of law."

And in 1984, the justices did not respond to a request from Gov. James B. Hunt, Jr. on the constitutionality of sections of the Safe Roads Act of 1983. Their denial is not part of any written record. They simply didn't answer it, said Branch. The reason? People accused of drunk driving already were being prosecuted under the new law. Thus, any defendant's lawyer could raise the constitutional question. "With a pending criminal case, it's questionable whether we could give one (an advisory opinion). It would be bad on the man who was about to be tried," explained Branch.

Over the years, in other states, debate has centered on the appropriateness of the advisory opinion. U.S. Supreme Court Associate Justice Felix Frankfurter called them "ghosts that slay," meaning that they can come back to haunt a court that acted hastily in issuing an advisory opinion.

That can happen because requests for the opinion don't present a sharply defined controversy between opposing sides. The N.C. Supreme Court doesn't want to receive written briefs on the issues or to be presented oral arguments from people interested in the matter. Requiring briefs and hearing arguments "really gives it the stature of an opinion, it seems to me," Branch said.

North Carolina's expert on advisory opinions, the late professor Preston Edsall, explored these problems and recommended the the court take steps to avoid the pitfalls of advisory opinions. Based on the infrequency of such opinions in recent years, the practice has not been abused. Perhaps that has worked in the North Carolina Supreme Court's own best interest—as a sort of legal talisman to ward off those "ghosts that slay."[5] □

FOOTNOTES

[1]N.C. Constitution, Article 3, Section 1.

[2]See "Assessing the Administrative Procedure Act," N.C. Center for Public Policy Research, May 1985.

[3]Warren, The Supreme Court in United States History, 108-111 (1922).

[4]Felix Frankfurter, Note on Advisory Opinions, 37 Harvard Law Review 1002, at 1008 (1924).

[5]Preston Edsall, The Advisory Opinion in North Carolina, 27 N.C.L.R. 297 (1949).

IN THE LEGISLATURE

The measures trimmed about a month off the 1985 session when compared to 1983. Even more internal reforms are on the way, according to House Speaker Liston Ramsey and Lt. Gov. Robert Jordan, the Senate president. The two have discussed convening the session even later, perhaps in mid-February. "There is a lot of wasted time at the beginning of a session," Ramsey said. They have also discussed new internal deadlines: moving the deadline for public bills back to May 1, and requiring all bills to clear the chamber of their introduction by June 1 or else die. "My position has been let's take this logically and move one step at a time," Jordan says.

A major overhaul of the committee system is an idea whose time has not yet come. Ramsey, for one, is adamantly opposed to year-round meetings of standing committees, although he is considering naming members to fewer committees. Jordan would like to have not more than eight or 10 Senate committees instead of the current 29. However, he notes that fighting tradition isn't always so easy as it sounds. Majority-party Democrats with seniority are used to touting their chairmanships back home. Fewer committees mean fewer chairmanships and some disgruntled ex-chairmen. Jordan frames the committee dilemma as a question that could well apply to the broader issue of how to make sure the Martin Lancasters don't quit the General Assembly before their time—and whether the increasing demand for new laws can be balanced with the desire for a citizen legislature.

"How do you get from where we are to there?" Jordan asks. "That'll be difficult." □