THE ADVISORY OPINION—AN ANALYSIS*

OLIVER P. FIELD†

From the beginning of our constitutional history some agency has been exercising the power to tell legislative bodies that they were or were not acting within their power. For a time it was an external agency, the Privy Council. Later the state and national courts took over the task. But even during the period between the break from England and the establishment of the new government under the Constitution of 1787, Massachusetts provided, in its Constitution of 1780, that its highest court could be called upon for its opinion on the validity of proposed legislative action. Precedent for this action was to be found in English history, though English experience was of limited scope.[1] It was not long before the courts were to establish firmly their power to pass upon the constitutionality of legislation, but the Massachusetts practice of having the courts responsible for answering questions concerning validity before the passage of an act has not become general practice in the American system. Other states have adopted the practice of advisory opinions; some of them have retained it; others abandoned it. But the institution still persists in a small group of states, and a few of them have used the practice for so long that it has become an integral part of their governmental system.

This study has been made in an effort to answer the question whether or not the advisory opinion is a procedure which remedies the defects that have appeared in the operation of judicial review of legislation after it has been enacted into law. In order to answer this question it has been

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† A.B. 1919, St. Olaf College; M.A. 1924, University of Minnesota; LL.B. 1927, Indiana University; S.J.D. 1928, Yale University. Professor of Government, Indiana University.

1. This history may be found in the basic work on advisory opinions, ELLINGWOOD, DEPARTMENTAL COOPERATION IN STATE GOVERNMENT 1-30 (1918).

assumed that it is necessary not only to understand the basic legal rules that have been evolved in the application of constitutional provisions authorizing the advisory opinion, but to analyze the *experience* of the advisory opinion as well; that is, how the advisory opinion has worked in practice in the states here studied (Colorado, Maine, Massachusetts, New Hampshire, and South Dakota). There is no dearth of literature on the first point,[2] and no effort will be made here to repeat and recanvass all of the historical and theoretical materials. These have been intensively and competently handled by Albert R. Ellingwood, in his *Departmental Cooperation in State Government*, and by the numerous authors who have relied on his work and who have brought it down to date. No author, however, has analyzed the experience of the advisory opinion, and it is hoped that in this respect the present study will be a contribution.

The legislative branch is the primary interest of this study.[3] But in some states the executive is also authorized

2. The literature on advisory opinions has been summarized and cited by Clovis and Updegraff, *Advisory Opinions*, 13 IOWA L. REV. 188 (1928). See also Goodrich, *The Nature of the Advisory Opinions of the Permanent Court of International Justice*, 32 AM. J. INT'L L. 738 (1938); Davison, *The Constitutionality and Utility of Advisory Opinions*, 2 U. OF TORONTO L. J. (1938); Aumann, *The Supreme Court and the Advisory Opinion*, 4 OHIO ST. L. J. 21 (1937).

3. This article is one of a series of studies by the author on the practice of judicial review of unconstitutional legislation. For preceding studies see Field, *Unconstitutional Legislation by Congress*, 39 AM. POL. SCI. REV. 54 (1945); FIELD, JUDICIAL REVIEW OF LEGISLATION IN TEN SELECTED STATES (Bureau of Government Research, Department of Government, Indiana University, 1943); Field, *Unconstitutional Legislation in Indiana*, 17 IND. L. J. 101 (1941); Field, *Effect of an Unconstitutional Statute*, 1 IND. L. J. 1 (1926).

For purposes of comparison with the material on judicial review of legislation this study has been confined to the same period as the preceding studies, 1781-1937. No attempt has been made to project the study into the more recent period of judicial review in which somewhat different attitudes and factors have characterized the use by courts of their power to declare laws unconstitutional.

The analyses of advisory opinion procedure have been related wherever possible to the same questions or topics that were used in analyzing the experience of selected states in the field of judicial review of legislation, and with some exceptions, the same states were included. The analyses do not include all of the states that have used the advisory opinion practice; one state has been added to the list used in the studies on unconstitutional legislation, namely, Maine.

The procedure followed in gathering the advisory opinions was to leaf through each volume of the reports of the appellate courts of the five states under review here. The list thus com-

to request opinions, and materials relating to executive requests have been included as an integral part of the data on advisory opinions. Following an analysis of the data a brief sketch of the major legal rules that have been applied in administering the advisory opinion will be attempted. In conclusion, some appraisal of the suitability of the advisory opinion as a substitute for judicial review will be made.

THE DATA: THE ADVISORY OPINION IN PRACTICE[4]

Incidence in Time. A chronology of the opinions rendered from the inception of the practice in each of the states studied may be helpful in assisting the reader to obtain an idea of the frequency with which opinions have been requested. This list includes requests by both executive and legislative branches. (Table I, Page 223)

Advisory opinions are given on pending legislation or on contemplated action by the executive, while decisions are on acts passed or actions taken earlier, sometimes much earlier. It is thus not possible to compare the number of decisions in a state holding statutes unconstitutional in a certain decade with the advisory opinions in that state during a similar decade or period. But it is apparent that the advisory opinion, so far as its historical incidence is concerned, has not diminished in use. On the contrary, it was utilized to a greater extent after 1900 than in earlier years. It is of course clear, also, that when controversies arise out of

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piled was checked against the index of each volume and also against annotated constitutions wherever they were available. Over two million pages were examined in the course of the project of which this article is a part. The following search guide was used in analyzing each opinion: (1) Citation (2) Date of request (3) Date of opinion (4) To whom is the request for the opinion addressed? (5) Who makes the request? (6) Who signs the request? (7) How many questions are submitted? (8) What are the questions? (9) Are any facts stated separately? (10) Do the requests raise constitutional questions? (11) Do the requests raise questions of statutory power? (12) What are the answers to the requests? (13) How often does Shepard's Citator say this opinion has been cited? (14) Has the opinion been overruled? (15) Is there any evidence of a formal argument by counsel before the court? (16) Has any statute been enacted in the state like the one involved in the request after the advisory opinion? (17) Are there any dissenting opinions? If so, how many pages long? (18) How many judges dissent? (19) How long is the majority opinion?

4. The purpose of this section is to present the data on the operation of advisory opinions te furnish the basis for later generalization and appraisal.

the social, economic, governmental, or other situations in a state, they tend to elicit increased numbers of requests and opinions, just as they tend to give rise to lawsuits in the courts.

Taking the gross number of requests and opinions before and after 1900, slightly more than half came before that year. (Table II, Page 224) Colorado presents a somewhat different picture than these figures indicate, with 80 per cent of its cases prior to 1900. This is of interest because it began its use of the practice much later than the other states studied. Although one of the five states, South Dakota, permits only the executive to make the request, the tables show that the legislature requested more opinions than the executive. Legislatures requested 65.4 per cent, while the executive requested 34.6 per cent of the total.[5] (Table II, Page 224)

The chronological distribution of judicial decisions in a study of ten selected states indicates that 43 per cent came before 1900, and 57 per cent after that year.[6] The study of unconstitutional federal legislation indicates that 44 per cent of those cases came before and 56 per cent after 1900.[7] No attempt is made to generalize from the slight difference between the advisory opinion and the judicial decision experience.

Time Elapsing Between Request and Opinion. One of the most glaring defects in the operation of judicial review of legislation has been the length of time elapsing between the enactment of a statute and the judicial determination of its validity. In some instances many years, even scores of years, have passed before a statute has been involved in litigation, and, therefore, has been the subject of controversy suitable to judicial settlement under our procedural system. One of the greatest apparent advantages of advisory opinion practice has always been thought to be the speed with which it could operate.

How long a time elapses between request and opinion?[8]

5. The literature suggests that many persons have probably been unaware of the fact that the executive makes as much use of the advisory opinion as this set of figures indicates. See note 2 *supra.*
6. FIELD, JUDICIAL REVIEW OF LEGISLATION IN TEN SELECTED STATES 13 (1943).
7. Field, *Unconstitutional Legislation by Congress*, 39 AM. POL. SCI. REV. 54, 56 (1945).
8. Colorado records published in the regular reports do not show

South Dakota had an average period elapsing between request and opinion of 7.4 days, which is unusually short. The South Dakota figures are for the executive alone, of course, because of the restricted practice of that state. The highest average of time elapsing is 45.4 days, for legislative requests in New Hampshire.[9]

The average elapsed time for all states included in this study is 29.8 days. When this is compared with the experience in judicial review of legislation by regular procedures, the contrast is most striking. In ten selected states the average period elapsing between the time that statutes were enacted and the time when the decisions were handed down was seven years and six months.[10] Congressional statutes had been on the books, on an average, ten years before they were declared invalid.[11]

The length of time between the commencement of litigation by parties and the termination of litigation on appeal to the highest court of a jurisdiction has not been the subject of statistical analysis, because the data are not readily available in the printed records. For those cases in which data were available, a conclusion is justified that a much longer period elapsed between commencement and termination of regular judicially settled controversies than elapsed in the case of the advisory opinions in the states included here. In fact, an advisory opinion is obtained in less time than most cases are settled by the court of first instance. When to this is added the months, and sometimes years, involved in appeal to intermediate and ultimate appellate courts, the difference in time consumed is very great. There can be no question that the advisory opinion has a great advantage over regular judicial procedure so far as time is concerned.[12]

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dates, and it was not believed worthwhile to go to the expense of gathering this material, in view of the fact that sufficient other data were available to furnish a sound basis for judgment on this question.

9. It might be observed that the New Hampshire court is not in session at the capital at all times even during the winter. Rarely is the docket sufficiently crowded to justify continuous session. Some of the judges maintain their residences in their former homes outside the capital, coming to the capital only during the term of court. Thus a longer time might be expected to elapse between request and opinion in that state than in some others.
10. FIELD, *op. cit. supra* note 6, at 45.
11. Field, *supra* note 7, at 58.
12. This problem of time consumed in litigation must be related to the problem of the adequacy of briefs and argument in the two

Parties to the Requests for Opinions. The parties to constitutional litigation are a source of never ending interest to students of law and politics. The parties involved in advisory opinion procedure are, of course, in many instances, in reality the same as those in private litigation. But instead of there being counsel representing a municipality, or a private corporation, or a group of sportsmen interested in conservation of fish and game, or former servicemen interested in governmental subsidies, these interests are represented by members of the lower house, or of the senate. These representatives, in turn, influence committees or the houses to make formal requests. But on the record the requesting party is always formal, and must be the party authorized by the constitutional provision on advisory opinions to make requests for opinions. Similarly, the requests must be to the agency specified.

In states in which the governor, or the governor and council, is authorized to make requests, the governor himself usually signs the requests. But, in some instances, as in Maine, the printed request does not bear the governor's signature. It is often true in New Hampshire that the secretary of state signs with the governor.

With respect to requests from the houses of the legislative body, there is no indication as to who makes the request for the New Hampshire house. In Colorado, requests are signed by the secretary of state, or the secretary of the senate, or the president of the senate. In Maine, they have been signed by the speaker of the house, clerk of the house, secretary of the house, president pro tem of the senate, chairman (apparently referring to a request originated by a committee of the house or senate) and "President of the Senate, Acting as Governor." Massachusetts requests have been signed by the president of the senate and by the speaker of the house.

Body to Whom Requests are Addressed. Requests should, of course, be addressed to the body specified in the constitution as a suitable body to receive them. This would seem to be a simple requirement, but in practice it has given rise to both practical and theoretical difficulties. In Colo-

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types of procedures, but consideration of this point will be deferred until a general appraisal of merits and demerits of the advisory opinion is attempted.

rado, for example, requests have been addressed to the "Honorable Judges of the Supreme Court," if the governor made the request, but to the "Supreme Court," if the legislative body made the request. Both the institutional and personal addresses have been used by the governor of Maine in making his requests. The chief executive in Maine has also addressed some requests to "The Chief Justice of the Supreme Judicial Court," apparently intending this as a designation of the officer who is to transmit the request to the members of the court itself. Legislative requests in Maine have been addressed to "Justices of the Supreme Court," and "Justices of the Supreme Judicial Court."[13]

Executive requests in Massachusetts have been addressed to the "Honorable Justices of the Supreme Judicial Court," while legislative requests have been addressed to "Justices of the Supreme Court," or "Justices of the Supreme Judicial Court," as the case may be. In Massachusetts it is the "justices" who are to be addressed, under the constitutional provision. In New Hampshire most requests have been addressed to the "justices" as the constitution specifies, but a few have been addressed to the "Supreme Court," which is a deviation from the constitutional requirement. South Dakota practice is uniform, and all requests have been addressed to the "Honorable Judges of the Supreme Court," as the constitution recites.

Drafting the Requests. The preparation of requests for advisory opinions is not always handled by the same officers as those who make the requests. In Massachusetts, for instance, each house has a regular officer whose duty it is to prepare these requests, in addition to assisting committees and officers on legal problems involving technical refinements.[14] It is clear to any close observer that the role of this officer in the process of legislation in the General Court of Massachusetts is a very important one, and much credit for the excellent form in which requests are prepared in Massachusetts should go to this officer. He is not only effective in assisting the members in confining their requests

13. For discussion of the implications of these provisions see page — *infra.*

14. The phrase "Legislative Counsel" has several different meanings in state government, generally, but in Massachusetts it refers to the technical legal adviser to the House of Representatives. The Senate similarly has an officer of this type, but with a different title.

to questions that are susceptible of intelligent and definitive answers, but also in restricting the inquiry to matters that are within the purview of pending legislation. Where individual members of committees draft the requests, of course, varying degrees of skill are brought to the task.

Not infrequently, the attorney general is asked to give technical assistance in drafting requests. Sometimes these requests are prepared with skill and consideration. However, in many instances some minor employee in his office may actually perform the task of drafting.

Subjects of Requests. On what subjects do executives and legislators ask for advice from the justices of the highest court?[15] The statutes concerning which advisory opinions have been requested are not identical with those of statutes which have been involved in litigation, and which have been declared invalid,[16] and for this reason a true comparison of the two cannot be made. The categories which best seemed to fit the subjects of advisory opinion requests are as follows: (1) taxation and governmental finance; (2) governmental structure; (3) regulation of business; (4) voting and elections; (5) police power regulations; (6) highways; (7) local government and schools; (8) legislative procedure and statutory construction; (9) social security and compensation payments; (10) property rights and interests —eminent domain. (The materials on this phase of the analysis are presented in Table III, Page 225)

Thus the advisory opinions in the states included in this study dealt with questions of inter-governmental relations,

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15. Requests vary in their complexity. While some may pose a single question, other requests are very complicated, and deal with many related aspects of a central issue. Still others are diffuse in that they ask for opinions on unrelated subjects, all of which are pending before the house, or before a committee. In this section, each question on each subject has been considered as a separate question, or request, so far as the classification of subjects is concerned. The average number of questions asked in each request was:

	By Governor	By Legislature
Colorado	2.54	1.65
Maine	3.19	3.61
Massachusetts	3.14	3.14
New Hampshire	2.16	2.10
South Dakota	1.86	(Legislature makes no requests)

16. The subject matter categories used in the study of those statutes were: (1) government (2) courts (3) taxes (4) business (5) property (6) labor. See FIELD, *op. cit. supra* note 6, at 19.

structure of government, taxation and finance, and other phases of public policy, rather than with questions or issues directly related to police, property rights, or personal liberties. These are the subjects which were also found to be involved in controversy in litigation resulting in declarations of unconstitutionality.[17] But in the advisory opinions questions dealing with the structure of government were proportionately greater than in the statutes involved in constitutional litigation in the courts. This, of course, is what one might expect. It is somewhat interesting, nevertheless, to find such a preponderance of the topics presented by these requests being so remotely related to private and personal rights. It should be noted, of course, that many legislative proposals in the field of governmental structure do affect in an indirect manner the rights of individuals. Advisory opinions, then, are not to be justified or condemned on the ground that they protect or fail to protect individual rights, as that term is used in ordinary language. The procedure must be justified primarily from the point of view of its effectiveness in dealing with proposals which affect governmental policies in their broader signification.

Length of Opinions. The average length of the advisory opinion is four pages. The opinions to the Colorado legislature average two pages in length, while Maine replies to the legislature, the longest, average five pages in length.[18] Five pages was the lowest median length of judicial opinions for any state included in the study of ten selected states,[19] while United States Supreme Court opinions in cases involving unconstitutional legislation average thirteen and one-half pages in length.[20]

Frequency with which Opinions Sustain or Deny Power. The advisory opinion procedure is used to test both the

17. *Ibid.*

18. Average number of pages of majority opinions:

	Requests by Governor	Requests by Legislature
Colorado	4.34	2.08
Maine	4.43	5.08
Massachusetts	3.47	4.88
New Hampshire	3.12	4.59
South Dakota	4.32	(Legislature makes no requests)

19. FIELD, *op. cit. supra* note 6, at 70.

20. Field, *supra* note 7, at 60.

statutory and the constitutional power of the requesting party. Data are presented concerning executive requests relating to statutory power and executive and legislative requests relating to constitutional power. Further data reveal that courts rendering advisory opinions are more likely than in regular litigation to hold that governmental agencies do not have the constitutional power to take proposed action.

In sixteen requests from the governor of Maine, six replies held that he had the power to act under the statute in question, and ten opinions held that he was without power. Three opinions by the Massachusetts justices gave the governor power, while in five they said that he had not been granted power. Six New Hampshire opinions denied the governor the power to act under statutes, and one advised him that he could proceed under existing statutory provisions.

With respect to requests for interpretation of constitutional provisions restricting legislative power or capacity to enact legislation, the Massachusetts justices replied in forty-nine opinions that no power existed, while in forty-eight opinions the legislature was said to possess the capacity to act in the manner proposed. Almost as equally divided were the opinions to the governor, four saying that the governor had constitutional power, while six said that he had no power to act. In Maine, twenty-one legislative requests brought replies advising that power existed, and seventeen said that no power existed. Fourteen executive requests resulted in judicial advice sustaining proposed executive power, and fifteen denied the executive power. New Hampshire opinions gave twenty-one approvals and twenty-five disapprovals of proposed constitutional action by the legislative agencies. All three opinions to the executive denied him constitutional authority in the situations therein described. The South Dakota executive sometimes asks for advice on whether or not the legislature has constitutional power to act, and thirteen opinions said that it had power, while three said that it did not have power. Two opinions gave the governor constitutional authority to act. Colorado experience shows thirty-four opinions favored power, while twenty-four denied power to the legislature. In two instances the governor received opinions advising that he had constitutional authority.

These figures show a striking contrast between the operation of judicial review in its normal procedures, and

the operation of the advisory opinion. Not more than one in six or seven cases coming before the courts which challenge the constitutionality of legislation actually results in a declaration of invalidity.[21] In advisory opinions a much greater proportion than this is held to be invalid. There can be little room for argument on this point. The advisory opinion restricts the legislature more than the regular operation of judicial review does. But, to counterbalance this factor, it should be pointed out that in some instances the advisory opinion warns the legislature that a proposed action will be invalid, and as a result, other valid action can be taken. A bill will be altered, sometimes in such a manner that its effectiveness is not impaired, and rendered valid.[22] Even when allowance is made for this situation, it must be clear that the experience represented by this body of advisory opinions clearly shows that advisory opinions are not to be adopted as a technique for hastening radical reform. The conservative effects of the advisory opinion are only what one might expect. Private individuals are not usually directly affected in any adverse manner by the declaration. The entire proceeding is such that no real hesitancy need be felt in expressing doubt as to the existence of power. Nor does it mean that no action can be taken; but even if action cannot be taken, the alternative of constitutional amendment exists in most instances.

Advisory Nature of Opinions. One of the points constantly stressed in discussions of the advisory opinion is that the opinion is by justices, not by courts. Several state constitutions specifically mention "justices," but the Colorado provision mentions "Supreme Court." These provisions

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21. FIELD, *op. cit. supra* note 6, at 12.

22. However, justices rarely give any advice to legislatures on how to proceed to correct proposed bills to make them consistent with the constitution. The justices restrict themselves to the questions asked of them, and offer no "free" advice. They usually answer requests, but eighteen instances were found in which the requests were not answered by opinions, the justices expressly declining to give opinions. An examination of subjects dealt with in these opinions is of little assistance in determining hidden motives on the part of the justices. Sometimes the justices feel that the request is so vague that they cannot adequately formulate a reply. In other instances, they seem to feel that the request is primarily a political or partisan request. On other occasions, the court has declined because it would not attempt the settlement of private rights except in regular litigation. It may be that the court feels, also, that the legislation is not really "pending legislation."

are a clue to the nature of the advisory opinion. It is an opinion by the judges, given for the purpose of advising, not for the purpose of determining. For this reason, a legislator may be quite within his province when he votes for a bill that has been advised against by the justices on constitutional grounds. The legislator is entitled to regard constitutionality on a par with other factors going to the merits of the bill, as he sees them. His function is not primarily to be a judge, but to be a formulator of policy. He may be quite within the proper sphere of his function if he assumes that either the rules have not been firmly settled, or that the conditions have changed so much that the judges will, when confronted with a regular judicial proceeding, change their minds and adopt a different line of reasoning based on a different set of assumptions. If the advisory opinion were rendered by a court, as an institution, distinguishable from the persons who compose it, as are cases in a judicial proceeding, then it could be argued that the legislator would be bound on the constitutional point.

This reasoning applies with equal force to the governor. In some instances the chief executive may find it necessary to use his own judgment, particularly when one of the justices has disagreed with his brethren. The usual situation, of course, is that governors and senates and houses of representatives give serious weight to opinions, and customarily follow them in their subsequent work on the problems dealt with in the requests and opinions.

Role of Counsel in Advisory Opinion Procedure. One of the most severe criticisms of the advisory opinion practice has always been that in contrast to regular judicial cases, no argument of counsel is provided for, and that the courts, therefore, are without benefit of argument of opposing counsel. This has been alleged to be serious, not only because it deprives the court of the benefit of counsel, but also because it deprives the parties, or interested groups, of adequate presentation of the different phases of the argument in support of their contentions or views. The experience on this point is quite at variance with popular, or even expert, opinion. Argument has taken place by brief in twenty-one instances in Colorado, two in Massachusetts, and in thirteen instances in New Hampshire. However, no evidence has been found of oral argument. There is nothing in the constitutions of the states involved to prevent the courts, or the

justices, from serving notice to interested groups in the legislature that they may file briefs if they wish to do so. The time permitted for the preparation of briefs may be relatively short. However, this need not be an insuperable handicap, because in most of these instances the interested parties have already done much of the basic research required.

Dissents. The distinction between justices and the court of which they are members has given rise to some thorny problems in advisory opinion practice. Do judges dissent from the "majority" of the court in advisory opinions? They should be free to dissent from the views of their brethren, but not from a "majority" opinion. Opinions have been written by the individual members only on rare occasions.[23] More often, the chief justice, or some other designated justice, has prepared the opinion after the usual consultation or conference of all the members of the court. If one or two members dissent they may merely note the fact or choose to write a dissenting opinion, as is customary in judicial opinion writing. The tendency to handle advisory opinion requests in the same manner as regular cases, so far as internal court procedure is concerned, is natural, and does not conclusively show whether in essence the work is judicial or advisory. But it does show that as a matter of practical routine the judges think of it as relatively normal judicial work. On the other hand, their repeated assertions that the opinions are individual, not institutional, should be taken at face value. There is a distinction, and this distinction has important practical results in restricting the use of the opinion as a procedure for handling constitutional questions.

Comparing dissents in regular judicial work with dissents in advisory opinion work, the figures show that 8 per cent of the advisory opinions contained dissents, while 16 per cent of judicial decisions contained dissents.[24] Approximately 50 per cent of United States Supreme Court decisions dealing with unconstitutional congressional acts were divided.[25] Bare majority opinions are not usual, only 1.6 per

23. Maine opinions contain fifteen dissents; ten dissents were found in Massachusetts opinions; Colorado replies contain six dissents; New Hampshire opinions contain four dissents; and in South Dakota no dissents were found.

24. FIELD, *op. cit. supra* note 6, at 59 *et seq.*

25. Field, *supra* note 7, at 59 *et seq.*

cent of all advisory opinions dividing in this way. State supreme court decisions were agreed to by a bare majority in 5.5 per cent of the cases, while in Supreme Court decisions concerning invalid congressional statutes, 13 per cent were agreed to by a bare majority.[26]

It is not surprising that there are more dissents in regular judicial than in advisory work. The lack of oral argument, and in most instances, of any argument, by counsel, the absence of private parties to be directly affected, and the lack of responsibility of establishing precedent, all combine to make dissent less likely in advisory opinions than in regular decisions. Also, cases of personal liberty are absent from normal advisory opinion work, and this partly explains the divergency.

The subjects involved in opinions in which there were differences of views expressed by the justices shed little light on the causes for these differences. The distribution of the subjects in divided advisory opinions seems to be about the same as in decisions, and much the same as in opinions in which there was unanimous agreement.

Use as Precedent. Advisory opinions are used as precedents by the bar, by the courts, and by the public. They are cited in briefs, in opinions by the courts, and despite the fact that they are sometimes carefully distinguished from judicial decisions, they are relied on as fully as decisions are, so far as precedent is concerned.[27] For instance, Massachusetts advisory opinions to the legislature have each been cited on an average of fourteen times by the courts. According to Shepard's Citator, the advisory opinions from the five states here studied have been cited on an average of six times each.

JUDICIAL DECISIONS INTERPRETING ADVISORY OPINION PROVISIONS

Part of the experience with advisory opinion practice is doctrinal in character. Judicial decisions construe the sections of a constitution authorizing the justices or the court

26. See notes 24, 25 *supra*.

27. In conversations with lawyers and judges this author found that they professionally made use of advisory opinions and decisions indiscriminately, and only as an afterthought would they add: "Of course, they are not like decisions."

to give advice on request. Rules and principles are generalized from, as well as assumed prior to, opinions in particular instances. These rules or principles are data despite the fact that they are doctrinal. It is important to learn what rules the courts have formulated as they have worked with the practice of giving advice in the form of opinions.

Professor Ellingwood has summarized the major rules and principles that have been evolved by the courts in their work with advisory opinions.[28]

Not all of the thirteen rules stated by Professor Ellingwood are of equal interest to one who is attempting to appraise the advisory opinion in terms of its possible utility as a procedure for supplementing existing methods of judicial review, or as a substitute for regular judicial review of executive or legislative action. Of particular interest here are certain of his generalizations:

> 2. Advisory opinions will not be rendered when the question submitted deals with private rights involved in a case actually before the courts. . . .
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> 3. The possibility that the question submitted may at some time come before the courts in a litigated case is not a sufficient excuse for refusing to give an advisory opinion thereon. . . .
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> (a) Ex parte advisory opinions upon questions of private right should not be given;
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> (b) Questions of private right should only be adjudicated in regular proceedings in court;
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> (c) No advisory opinions should be given in advance of possible cases dealing with the questions referred;
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> (d) Existing statutes should not be construed in advisory opinions;
>
> (e) Questions referred by the legislatures for advisory opinions must be *publici juris*.

Probably the most important single rule listed by Professor Ellingwood is 3(a), which is that the advisory opinion will not be given in a situation which involves private rights. Presumably, private rights are involved within the meaning of the rule only when such rights are readily ascertainable, and the parties to be affected can be easily identified. In operation the rule restricts the use of advisory opinion to

28. ELLINGWOOD, DEPARTMENTAL COOPERATION IN STATE GOVERNMENT 178-237 (1918). His summary still accurately describes the legal situation and should be studied with care by anyone who is interested in advisory opinions.

matters of general concern, such as problems of governmental power, or capacity, to lay down general standards or rules, and with general problems of interpretation. At first thought this might seem to unduly restrict the operation of the advisory opinion, but it may be that this is a sound rule, when all phases of the problem are considered.

It has often been argued that it is a weakness of the advisory opinion that it is not used as, or suitable for use as, a device for settling the application of statutes to specific situations and to particular parties.[29] The question of legislative power should probably not be conceived of in the latter terms. It is a fair question whether or not a court should pass upon constitutionality of statutes in terms of their specific application in the process of administration. It may well be that questions of legislative power ought to be separated from questions of direct private injury in the application of the law. Legislative capacity to enact a statute, that is, to formulate a standard or rule, is one problem; the question whether or not in the application of the standard some individual has been injured may be another. Obviously, of course, a general statute which specifically authorized bills of attainder would be invalid, but it would be invalid because it violated a prohibition in the constitution, and this prohibition forbids the formulation of rules authorizing this procedure. A lack of legislative capacity is involved, and this lack of power is not to be tested in terms of whether *X* or *Y* or anyone else is being proceeded against. Not all instances are as clear as this, but in the opinion of this writer the principle that questions of legislative power to formulate general rules should not be tested by the manner in which the rules are enforced against individuals remains valid. The claim that the particular facts of a particular case and that the specific provision of a statute is applicable to the party under these circumstances is a question of the administration of justice, and should present a legal, but not a constitutional problem. This is true, even where the guarantee of personal

29. See FRANKFURTER, LAW AND POLITICS 24 (1939); Frankfurter, *A Note on Advisory Opinions*. 37 HARV. L. REV. 1002 (1924). Brandeis, J., in Ashwander v. Tennessee Valley Authority, 297 U. S. 288, 346 n.4 (1936), has collected a number of cases in which the Supreme Court of the United States has reiterated the long established principle that the federal courts do not have the power to give advisory opinions, since it is not considered an incident of the judicial function to which Article III limits them.

liberty is expressly recited in the constitution itself. There should be some method of testing the question of power, irrespective of particular individuals or circumstances. It is true that the Anglo-American legal mind instinctively resents this mode of legal reasoning, but that is no reason why our conceptions cannot change, if the change will improve our legal procedures.

Subdivision (d) of number 3 of Professor Ellingwood's rules, to the effect that courts will refuse to pass on or interpret the provisions of existing statutes that have already been enacted by the legislature, is a serious limitation on the scope of the advisory opinion. This leaves the advisory opinion restricted to the field of pending legislation, or in the case of the executive, to proposed action. There is no sound reason why justices cannot interpret a statute in an advisory opinion as well as they can interpret it in a declaratory judgment, except that the concept of the advisory opinion is that it is for purposes of advising branches of the government in the performance of their functions, not for the direct benefit of private individuals in the state. The declaratory judgment, however, is thought of as a procedure for the benefit of private individuals primarily, probably because private parties are represented as such, and because regular judicial procedures, including the use of counsel, are followed. But just as the declaratory judgment can be used to advise an officer of his powers, so the advisory opinion could similarly be used whenever the legislature or governor required this knowledge before taking some contemplated action. The courts have ruled otherwise.

It is true that if the distinction between an opinion by the justices and an opinion by the court be observed, the refusal to interpret a statute might be justified on the ground that the advice is for purposes of a limited and specified character, and that the justices are not to take over the advisory functions of the attorney general. This accounts for the fact that in Colorado, where the court, not the justices, is specified as giving the opinion, the rule that advisory opinions relating to existing legislation will not be rendered is not wholly applicable.[30]

Professor Ellingwood's second rule, that advisory opin-

30. For confused state of the law of Colorado on the point see ELLINGWOOD, *op. cit. supra* note 28, at 197 *et seq.*

ions will not be rendered where private rights involved are already before a court for adjudication, is obviously sound. But this is true, not primarily because it relates to private rights, but because it relates to judicial administration and the relation of higher to lower courts. It is advisable to permit a court that is proceeding with a case to complete it unless there is some overwhelming reason for doing otherwise.

AN APPRAISAL OF THE ADVISORY OPINION

Some basic changes would be required in the advisory opinion practice if it were to be made a substitute for judicial review even in the cases in which regular judicial procedures assist the executive and legislative branches in the exercise of their functions. The advisory opinion is not without merit, and within the sphere of its advantages it is helpful as an instrument for facilitating the work of the legislature and the executive in their respective roles in the lawmaking process.

It is not true that the advisory opinion is unsuited to serve as an adequate substitute for judicial review merely because argument and representation of affected parties has not been fully utilized in advisory opinion procedure. Oral as well as written argument could be used. Nor would it be impossible to have counsel represent affected—prospectively affected—groups, because notice could be given effectively to such groups, and representation before the court could be arranged. If advisory opinion procedure is unsuited for judicial work it is not for these reasons. The determining factor is that the advisory opinion is conceived to be advisory in the process of making statutes rather than as a device adaptable to the settlement of rights affected by enacted statutes. It is this, no doubt, that explains the unwillingness of courts to give advisory opinions of a declarative nature after a statute has been enacted, when private parties may be involved.

The advisory opinion is useful to show what improvements might be made in the regular procedures of judicial review of legislation, or executive action. For example, it is striking that advisory opinions are so much shorter than opinions in controverted cases. They are shorter, not because they do not involve private rights, because sometimes

they do, nor because there is no argument, because sometimes there is. They are shorter because the judges do their own work, and when expressing their conclusions have the requests and issues more or less outlined for them by the requesting agency. They are also under less temptation to copy long extracts from briefs of counsel often containing much irrelevant materials, and have every reason for expressing themselves pointedly and clearly within a brief space and within a reasonable period of time. This may also account for the infrequency with which advisory opinions are overruled.[31]

For many years it has been a widespread complaint that an unnecessarily long time is consumed in litigating a constitutional point. Another serious problem in this field is the time that elapses between enactment of a statute and the initiation of the lawsuit designed to test its validity. Not only is the regular procedure that is suited to common law trial unsuited to constitutional litigation in many instances, but the long delays in appellate procedure are also serious obstacles to a smooth functioning of judicial review. The object of judicial review should be to determine effectively the questions of power or of rights for all concerned (and that includes the entire public) as soon as possible, consistent with adequate safeguards.

The advisory opinion has a great advantage over judicial review with respect to the time element, for the advisory opinion procedure operates when a device for testing the validity of statutes is needed. Judicial review often operates long after it is needed, and for practical purposes, sometimes not at all. Dependent as judicial review is upon private initiative in testing validity, and on common law tests of adequate interest, the ordinary process of judicial review is seriously inadequate to serve the real needs of the public. It is with respect to the needs of governmental bodies that the advisory opinion has its use.

Despite this advantage on the part of the advisory opin-

31. One significance of the length of opinions is that long opinions almost invariably inject a factor of uncertainty into the law. Anything that makes the work of determining the present state of the law more uncertain with respect to any constitutional point is to be deplored. Constitutional law is destined to be sufficiently blessed with uncertainty for a long time to come, without having unnecessary doubts thrust upon it by rambling opinions.

ion, it must be concluded that the advisory opinion practice, even at its best, is a supplement to, not a substitute for, judicial review. The advisory opinion is not available to private or corporate or group parties generally. It is restricted, usually to the two houses of the legislature and the executive (or the executive and a council if there is one). Private parties injured may not initiate a request under existing constitutional provisions. Nor are advisory opinions binding upon private parties. They are not for the purpose of determining rights affecting persons, but rather, they are primarily for the purpose of giving advice to public bodies. The advisory opinion is designed for use during the process of legislation, or in the process of executive action.

In the light of these factors the question arises whether the advisory opinion procedure should be recommended to states not now using it, or to the national government. The answer must depend in part on what is to be done to judicial review itself. If judicial review is to be improved and made more effective, the answer might well be in the negative, although the question would be debatable. If, on the other hand, judicial review is to continue to operate with its present and past procedural limitations, the answer might well be that more jurisdictions ought to use the advisory practice.

There can be little doubt that the advisory opinion has worked with a reasonable degree of effectiveness in the states in which it has been used. Just as a good common law lawyer is always a little disturbed by the procedures for "quieting title," bar and bench are, as a matter of form, theoretically disquieted by the advisory opinion practice because of the common law assumptions requiring adversary parties. Both legislators and lawyers seem agreed that the advisory opinion is useful in the process of government. If it is to be adopted by other states, the adoption should be accompanied by some of the same institutional arrangements used in a state like Massachusetts. For instance, a state would be well advised to introduce a legislative counsel along with the practice of advisory opinions.

States using the advisory opinion are conservative about urging it on others. Their general attitude seems to be that it is satisfactory for them, but as to others—well, they must decide for themselves as to whether or not they can use it

to advantage. It may well be that the practice would be unsuited to a community in which less social stability exists, in which legal procedures are regarded as of little more importance than the rules of a political party committee, and slight distinction is made between legislative and judicial work.

The advisory opinion may be a useful instrument of government as things now stand, but it would have a lesser role to play if judicial review were improved to the point where it could effectively operate as a public, as well as a private, function in the legal order.

APPENDIX

TABLE I

CHRONOLOGICAL DISTRIBUTION OF ADVISORY OPINIONS—BY DECADES*

	Colorado	Massachusetts	Maine	New Hampshire	South Dakota	Total
1780-89		3				3
1790-99		1				1
1800-09		1				1
1810-19		3		1		4
1820-29		2	1	1		4
1830-39		6	6	2		14
1840-49		8	3			11
1850-59		8	4	2		14
1860-69		3	6	7		16
1870-79		10	13	6		29
1880-89	33	8	5	5		51
1890-99	51	11	2	3	10	77
1900-09	4	11	6	10		31
1910-19	9	33	6	12	2	62
1920-29	1	27	9	7	6	50
1930-39	7	17	14	18	4	60
TOTAL	105	152	75	74	22	428

* The data in this study have been carried only through 1937.

TABLE II

NUMBER OF OPINIONS REQUESTED, BEFORE AND AFTER 1900

	Governor				Legislature			
	Before 1900		After 1900		Before 1900		After 1900	
	Number Requested	Percentage	Number Requested	Percentage	Number Requested	Percentage	Number Requested	Percentage
Colorado	21	72.4	8	27.5	63	82.9	13	17.1
Massachusetts	23	63.8	13	36.1	41	35.3	75	64.6
New Hampshire	10	40.	15	60.	17	34.7	32	65.3
Maine	22	61.1	14	38.8	18	46.1	21	53.8
South Dakota	10	45.5	12	54.5	—	—	—	—
Total	86	58.1	62	41.9	139	49.6	141	50.4

TOTALS

	Requested Before 1900		Requested After 1900	
	Number	Percentage	Number	Percentage
Colorado	84	80.	21	20.
Massachusetts	64	42.1	88	57.9
New Hampshire	27	36.5	47	63.5
Maine	40	53.3	35	46.7
South Dakota	10	45.5	12	54.5
Total	225	52.6	203	47.4

TABLE III

SUBJECTS OF THE OPINIONS REQUESTED BY THE LEGISLATURES

	Colorado	Maine	Massachusetts	New Hampshire	South Dakota	Total	Percentage
1. Taxation and governmental finance	17	9	28	34	No opinions from the legislature	88	26.3
2. Governmental structure	24		32	9		65	19.4
3. Regulation of business	8		25	6		39	11.6
4. Voting and Elections		9	14	5		28	8.4
5. Police power	2	1	12	2		17	5.0
6. Highways			3	1		4	1.2
7. Local government and Schools	7		12	1		20	5.9
8. Legislative procedure and Statutory construction	9	20	17	5		51	15.2
9. Social security and compensation payments	2		3	4		9	2.7
10. Property rights and interests (Eminent domain)	3		8	3		14	4.2
Total	72	39	154	70		335	

SUBJECTS OF THE OPINIONS REQUESTED BY THE GOVERNORS

	Colorado	Maine	Massachusetts	New Hampshire	South Dakota	Total	Percentage	Combined Total	Combined Percentage
1. Taxation and governmental finance	14	3	2	2	12	33	20.6	121	24.4
2. Governmental structure	9	6	27	13	6	61	38.1	126	25.4
3. Regulation of business	4	1	2	5	1	13	8.1	52	10.5
4. Voting and Elections	—	16	4		1	21	13.1	49	9.9
5. Police power		1	3		1	5	3.1	22	4.4
6. Highways				1		1	.6	5	1.0
7. Local government and Schools	1					1	.6	21	4.2
8. Legislative procedure and Statutory construction	2	9	5	3	2	21	13.1	72	14.5
9. Social security and compensation payments	1		1			2	1.3	11	2.2
10. Property rights and interests (Eminent domain)				2		2	1.3	16	3.3
Total	31	36	44	26	23	160		495	

LIST OF ADVISORY OPINIONS

Colorado

Vol.	Reporter	Page	Year
9	Colo.	620	(1886)
9		622	
9		623	
9		623	
9		624	
9		625	
9		626	
9		628	
9		629	
9		630	
9		631	
9		631	
9		632	
9		635	
9		639	
9		641	
9		642	
11		373	(1888)
12		186	(1888)
12		187	
12		188	
12		285	
12		287	
12		289	
12		290	
12		337	
12		339	
12		340	
12		359	
12		395	
12		399	
12		466	(1889)
13		316	(1889)
15		421	(1890)
15		520	
15		578	
15		593	
15		595	
15		598	
15		600	
15		601	
15		602	
16		539	(1891)
18		192	(1893)
18	Colo.	195	(1893)
18		220	
18		234	
18		272	
18		273	
18		288	
18		291	
18		317	
18		359	
18		398	
18		566	
19		58	(1893)
19		63	(1893)
19		333	(1894)
19		357	
19		409	
19		482	
21		14	(1895)
21		27	
21		29	
21		32	
21		38	
21		46	
21		62	
21		69	
21		399	
21		403	
23		492	(1897)
23		499	
23		504	
23		508	
24		247	(1897)
24		446	
25		136	(1899)
25		296	(1898)
26		140	(1899)
26		167	
26		182	
26		234	
27		99	(1899)
28		359	(1901)
29		350	(1902)
33		307	(1905)
45		394	(1909)

Vol.	Reporter	Page	Year
50	Colo.	71	(1911)
50		84	
54		166	(1913)
54		262	
54		429	
55		17	(1912)
55		105	(1913)
62		188	(1917)
66		319	(1919)
71	Colo.	331	(1922)
88		569	(1931)
94		101	(1933)
94		215	(1934)
97		528	(1935)
97		587	(1935)
99		591	(1937)
100		342	(1937)

Maine

Vol.	Reporter	Page	Year
6	Maine	486	(1826)
6		506	(1830)
6		514	(1830)
7		483	(1830)
7		492	(1830)
7		497	(1831)
7		502	(1831)
16		479	(not given, but approx. 1840)
18		458	(approx. 1842)
25		567	(approx. 1845)
33		587	(approx. 1851)
35		563	(1854)
38		597	(approx. 1855)
44		505	(approx. 1857)
46		561	(1861)
50		607	(1863)
52		595	(1863)
53		587	(1867)
53		594	(1867)
54		602	(1867)
58		564	(1870)
58		590	(1871)
61		601	(1872)
62		596	(1874)
64		588	(1871)
64		596	(1875)
68		582	(1876)
68		587	(1877)
68		589	(1878)
68		593	(1878)
68		594	(1878)
69		585	(1878)
69		596	(1879)
70		560	(1880)
70		570	(1880)
70		600	(1880)
72		542	(1881)
81	Maine	602	(1889)
85		545	(1891)
85		547	(1892)
95		564	(1901)
97		590	(1903)
97		595	(1903)
99		515	(1905)
102		527	(1907)
103		506	(1908)
108		545	(1911)
114		557	(approx. 1915)
116		557	(approx. 1917)
118		503	(approx. 1919)
118		544	(1919)
118		552	(1919)
119		603	(1921)
114	Atl.	865	(1921)
123	Maine	593	(1923)
124		453	(1924)
124		501	(1925)
124		512	(1925)
125		529	(1926)
137	Atl.	50	(1927)
137		53	(1927)
131	Maine	503	(1932)
131		506	(1932)
132		491	(1933)
132		502	(1933)
132		507	(1933)
132		509	(1933)
132		512	(1933)
132		519	(1933)
132		523	(1934)
133		521	(1935)
133		525	(1935)
133		532	(1935)
133		537	(1935)
134		507	(1935)

Massachusetts

Volume	Page	Year
3 Mass.	567	(1791)
3	568	(1807)
7	523	(1811)
8	548	(1812)
14	470	(1784)
14	472	(1787)
15	536	(1815)
3 Pick.	517	(1826)
7 Pick.	126n, 24	
Mass.	125	(1825)
11 Pick.	537	(1832)
22 Pick.	571	(1838)
23 Pick.	547	(1840)
1 Metc.	572	(1841)
1 Metc.	580	(1841)
5 Metc.	587	(1843)
5 Metc.	591	(1844)
5 Metc.	596	(1844)
3 Cush.	584	(1840)
3 Cush.	586	(1849)
6 Cush.	573	(1833)
6 Cush.	575	(1839)
6 Cush.	578	(1851)
9 Cush.	604	(1852)
11 Cush.	604	(1853)
18 Cush.	575	(1836)
3 Gray	601	(1855)
8 Gray	20	(1857)
10 Gray	613	(1858)
13 Gray	618	(1859)
14 Gray	614	(1859)
1 Allen	197n	(1837)
9 Allen	585	(1864)
13 Allen	593	(1867)
99 Mass.	636	(1868)
107 Mass.	604	(1871)
115	602	(1874)
117	599	(1875)
117	603	(1875)
120	600	(1876)
122	594	(1877)
122	600	(1877)
124	596	(1878)
126	547	(1781)
126	557	(1878)
126	603	(1879)
132	600	(1882)
135	594	(1883)
136	578	(1883)
136	583	(1883)
138 Mass.	601	(1885)
142	601	(1886)
145	587	(1887)
148	623	(1889)
150	586	(1890)
150	592	(1890)
150	598	(1890)
154	603	(1891)
155	598	(1892)
157	595	(1893)
160	586	(1894)
163	589	(1895)
165	599	(1896)
166	589	(1896)
167	599	(1897)
175	599	(1900)
178	605	(1901)
182	608	(1903)
186	603	(1904)
190	605	(1906)
190	611	(1906)
190	616	(1906)
193	608	(1907)
195	607	(1908)
196	603	(1908)
201	609	(1909)
204	607	(1910)
204	616	(1910)
207	601	(1911)
207	606	(1911)
208	603	(1911)
208	607	(1911)
208	610	(1911)
208	614	(1911)
208	616	(1911)
208	619	(1911)
208	625	(1911)
209	607	(1911)
210	609	(1912)
211	605	(1912)
211	608	(1912)
211	618	(1912)
211	620	(1912)
211	624	(1912)
211	630	(1912)
211	632	(1912)
214	599	(1913)
214	602	(1913)
216	605	(1914)
217	607	(1914)

220 Mass.	609	(1915)
220	613	(1915)
220	627	(1915)
226	607	(1917)
226	613	(1917)
229	601	(1918)
231	603	(1919)
232	601	(1919)
232	605	(1919)
233	603	(1920)
234	597	(1920)
234	612	(1920)
237	589	(1921)
237	591	(1921)
237	598	(1921)
237	613	(1921)
237	619	(1921)
239	603	(1921)
239	606	(1921)
240	601	(1922)
240	611	(1922)
240	616	(1922)
243	605	(1923)
247	583	(1924)
247	589	(1924)
250	591	(1925)
251	569	(1925)
251 Mass.	617	(1925)
254	617	(1926)
261	523	(1927)
261	556	(1927)
262	603	(1928)
266	583	(1929)
266	590	(1929)
267	607	(1929)
269	611	(1929)
270	593	(1930)
271	575	(1930)
271	582	(1930)
271	598	(1930)
275	575	(1931)
275	580	(1931)
276	617	(1931)
278	607	(1932)
278	613	(1932)
279	607	(1932)
282	619	(1933)
286	611	(1934)
289	607	(1935)
290	601	(1935)
291	567	(1935)
291	572	(1935)
291	578	(1935)

New Hampshire

4 N. H.	565	(1827)
7	599	(1835)
8	573	(1835)
25	537	(1852)
35	579	(1858)
41	550	(1860)
41	553	(1861)
44	633	(1863)
45	590	(1864)
45	593	(1864)
45	595	(1864 approx. date)
45	607	(1864)
52	622	(1873)
53	634	(1866)
53	640	(1873)
56	570	(1875)
56	574	(1875)
58	621	(1877)
58	623	(1879)
60	585	(1881)
62 N. H.	704	(approx. 1816)
62	706	(1877)
62	706	(1883)
63	625	(1885)
65	673	(approx. 1889)
66	629	(1891)
67	600	(approx. 1892)
70	638	(1899)
70	640	(1901)
70	642	(1901)
71	621	(1902)
72	601	(1903)
72	605	(1903)
73	618	(1905)
73	621	(1906)
73	625	(1906)
74	606	(1907)
75	613	(1909)
75	622	(1910)
75	624	(1910)

76 N. H.	586	(1911)	84 N. H.	559	(1930)
76	588	(1911)	84	584	(1930)
76	597	(1911)	85	562	(1931)
76	601	(1911)	85	570	(1931)
76	609	(1913)	85	572	(1931)
76	612	(1889)	86	597	(1933)
77	606	(1914)	86	603	(1933)
77	611	(1915)	86	604	(1934)
78	617	(1917)	87	489	(1935)
78	621	(1917)	87	490	(1935)
79	535	(1919)	87	492	(1935)
80	595	(1921)	87	496	(1935)
81	552	(1923)	88	484	(1937)
81	563	(1925)	88	494	(1937)
81	566	(1925)	88	495	(1937)
81	573	(1925)	88	497	(1937)
82	561		88	500	(1937)
83	589	(1927)	88	511	(1937)
84	557	(1930)			

South Dakota

2 S. D.	58	(1891)	38 S. D.	635	(1917)
2	71	(1891)	43	635	(1920)
3	456	(1893)	43	645	(1920)
3	548	(1893)	43	648	(1920)
4	532	(1894)	48	253	(1925)
6	518	(1895)	48	375	(1925)
6	540	(1895)	50	324	(1926)
7	42	(1895)	58	72	(1931)
8	274	(1896)	59	469	(1932)
10	249	(1897)	61	107	(1933)
34	650	(1914)	61	162	(1933)