Advisory Opinions and the Problem of Legal Authority

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The prohibition against advisory opinions is fundamental to our understanding of federal judicial power, but we have misunderstood its origins. Discussions of the doctrine begin not with a constitutional text or even a court case, but a letter in which the Jay Court rejected President Washington's request for legal advice. Courts and scholars have offered a variety of explanations for the Jay Court's behavior. But they all depict the earliest Justices as responding to uniquely American concerns about advisory opinions.

This Article offers a different explanation. Drawing on previously untapped archival sources, it shows that judges throughout the anglophone world—not only in the United States but also in England and British India—became opposed to advisory opinions in the second half of the eighteenth century. The death of advisory opinions was a global phenomenon, rooted in a period of anxiety about common-law authority.

Early modern English judges had routinely advised the Crown. This advisory role was politically fraught but doctrinally unproblematic thanks to a jurisprudential orthodoxy that treated judges' opinions as evidence of a preexisting common law. Although this declaratory theory survived into the nineteenth century (and beyond), it began to fragment after 1750, as lawyers began to disagree about the nature of precedent. Those disagreements generated new pressure to clarify the weight of different kinds of legal authority. Most lawyers intuited that advisory opinions were less authoritative than decisions arising from litigation. But because bench and bar lacked a common theory of legal authority, they were unable to articulate a shared understanding of what respect was due to judges' extrajudicial pronouncements. As a result, advisory opinions became dangerous, because the judges who issued them could not

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control how future readers might treat them. In response, judges sought to limit their advisory activity—first in England, then in British-controlled Bengal, and finally in the United States, whose judges inherited Britain's contested and dynamic understanding of the judicial role.

INTRODUCTION

The rule against advisory opinions has been described as "the oldest and most consistent thread in the federal law of justiciability,"[1] but its pedigree is doubtful. Discussions of the doctrine begin not with the Constitution's text or even a landmark case, but a four-sentence letter from 1793 in which the Jay Court rejected the Washington Administration's request for advice on questions of international law.[2]

1. Flast v. Cohen, 392 U.S. 83, 96 (1968) (quoting CHARLES WRIGHT, FEDERAL COURTS 34 (1963)); *accord* RICHARD H. FALLON, JR., JOHN F. MANNING, DANIEL J. MELTZER & DAVID L. SHAPIRO, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 52 (7th ed. 2015); Helen Hershkoff, *State Courts and the "Passive Virtues": Rethinking the Judicial Function*, 114 HARV. L. REV. 1833, 1844 (2001).

2. Letter from U.S. Sup. Ct. JJ. to George Washington (Aug. 8, 1793), *in* 5 THE SELECTED PAPERS OF JOHN JAY 545, 545 (Elizabeth M. Nuxoll ed., 2017) [hereinafter JAY PAPERS].

Courts and commentators have conventionally read that letter as declaring advisory opinions to be unconstitutional,[3] but some scholars have questioned that understanding.[4] The Constitution never mentions advisory opinions, which English judges had routinely issued. Therefore, the revisionists argue, the Jay Court's refusal to provide the requested opinions reflected prudential or political concerns, not constitutional ones.[5]

These accounts offer starkly different interpretations of what has become known as the *Correspondence of the Justices*. But they agree in treating the Jay Court's letter as a uniquely American event that responded to distinctively American concerns. This Article disagrees. Drawing on previously untapped archival sources, it shows that judges throughout the common-law world—not only in the United States but also in Britain and its empire—turned against advisory opinions during the second half of the eighteenth century. The demise of advisory opinions was a global phenomenon that requires a transnational explanation. This Article supplies one.

During the seventeenth and early eighteenth centuries, judges routinely provided legal advice to the Crown. This advisory role was politically fraught but doctrinally unproblematic thanks to a jurisprudential orthodoxy that treated judges' opinions as evidence of a preexisting law.[6] Although this declaratory conception of the law survived into the nineteenth century (and beyond), it began to fragment shortly before the American Revolution, as judges and lawyers started to disagree in subtle ways about the nature of precedent. Those disagreements generated new pressure to clarify the weight of different kinds of legal authority. Lawyers intuited that advisory opinions were less authoritative than opinions accompanying judgments. But because bench and bar lacked a common theory of legal authority, they were unable to articulate a shared understanding of exactly what respect was due to judges' extrajudicial pronouncements. As a result, judges began to worry that readers might invest advisory opinions with the wrong

3. *See, e.g.*, Campbell-Ewald Co. v. Gomez, 577 U.S. 153, 176 (2016) (Roberts, C.J., dissenting); United States v. Windsor, 570 U.S. 744, 781 (2013) (Scalia, J., dissenting); Vieth v. Jubelirer, 541 U.S. 267, 302 (2004); Eisler v. United States, 338 U.S. 189, 191–92 (1949) (Frankfurter, J., dissenting) (per curiam); Nat'l Mut. Ins. Co. of D.C. v. Tidewater Transfer Co., 337 U.S. 582, 647–48 (1949) (Frankfurter, J., dissenting); Muskrat v. United States, 219 U.S. 346, 354 (1911); United States v. Evans, 213 U.S. 297, 301 (1909); *infra* Section III.C.

4. For overviews of the literature, see DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS, 1789-1888, at 12–14 (1985); and FALLON ET AL., *supra* note 1, at 52–53.

5. *See infra* Sections IV.B and IV.C (discussing scholarly views on the rationale for the Jay Court's refusal to provide advisory opinions).

6. *See infra* Part II.

kind of authority. In response, judges sought to limit their advisory activity—first in England, then in British-controlled Bengal, and finally in the United States, whose judges inherited Britain's contested and dynamic understanding of the judiciary.[7]

This Article begins with an overview of current scholarship (Part I). It then gives a narrative history of the advisory role of early modern English judges, during what some scholars have termed the "classical" era of the common law (Part II). Although judges had a duty to provide the Crown with legal advice, they also worried that their role as royal advisors might compromise their duty to declare the law impartially. In response, they developed procedural norms meant to reconcile their judicial and advisory roles.

Part III turns to the second half of the eighteenth century, when judges stopped or tried to stop giving advisory opinions. It begins with *Sackville's Case* (1760), which is generally considered the last advisory opinion given to the Crown by English judges.[8] Although legal historians and constitutional lawyers have long looked to that case to illuminate the American approach to advisory opinions,[9] this Article offers a new interpretation that challenges the prevailing theory of why English judges curtailed their advisory activity. The story then moves to Calcutta, which served as the capital of Britain's emerging empire in South Asia. Starting in 1775, that city was home to a royally chartered Supreme Court of Judicature ("SCJ"). Although the SCJ departed from English practice in many respects, its justices understood their role as analogous to that of English judges.[10] The SCJ's first chief justice, Sir Elijah Impey, had been a respected litigator and municipal judge in England.[11] Sir Robert Chambers, one of the SCJ's first puisne justices, had succeeded Sir William Blackstone as the Vinerian Professor at Oxford.[12] The other two justices had each been a barrister in England for more than a decade.[13] These men expressly tried to emulate English

7. *See infra* Part III.

8. *But cf. infra* Appendix (noting a possible exception).

9. *See, e.g.*, 4 THE FOUNDERS' CONSTITUTION 214 (Philip B. Kurland & Ralph Lerner eds., 1987); *see also* United States *ex rel.* Toth v. Quarles, 350 U.S. 11, 29 n.11 (1955) (Reed, J., dissenting) ("[T]he case could hardly have escaped the notice of the members of the Constitutional Convention.").

10. *See* PAUL D. HALLIDAY, HABEAS CORPUS: FROM ENGLAND TO EMPIRE 281–90 (2010).

11. B.N. PANDEY, THE INTRODUCTION OF ENGLISH LAW INTO INDIA: THE CAREER OF ELIJAH IMPEY IN BENGAL, 1774-1783, at 39–40 (1967); T.H. Bowyer, *Impey, Sir Elijah (1732–1809)*, *in* OXFORD DICTIONARY OF NATIONAL BIOGRAPHY (H.C.G. Matthew & Brian Harrison eds., 2004) [hereinafter DNB].

12. THOMAS M. CURLEY, SIR ROBERT CHAMBERS: LAW, LITERATURE, AND EMPIRE IN THE AGE OF JOHNSON 69 (1998).

13. PANDEY, *supra* note 11, at 38–39.

practice concerning advisory opinions.[14] The value of studying their behavior is not that it directly influenced American views but that it offers a rare opportunity to study eighteenth-century conceptions of judicial power in the context of a newly created court. Part III concludes by briefly retelling the better-known actions of the U.S. Supreme Court in 1793.

Part IV uses this historical narrative to reevaluate existing explanations for the *Correspondence*. Although each of those theories is partly correct, they cannot account for the decline of advisory opinions as a global phenomenon. Part V proposes an explanation that can. It argues that the demise of advisory opinions reflected a crisis of common-law authority. The Part begins by describing that crisis, before using it to explain judges' behavior in England, British-controlled Bengal, and the United States. In all three jurisdictions, judges avoided or tried to avoid giving advisory opinions in response to growing concerns about their being treated as excessively authoritative.

The Conclusion explores some implications of this historical argument. We shouldn't expect federal courts to start issuing advisory opinions any time soon. Although they would have been permitted at the Founding, they were always optional; and courts' consistent practice of rejecting them merits respect.[15] Indeed, one contribution of this Article is not to destabilize current practices but to make sense of doctrines that now seem conceptually incoherent. For example, some scholars have argued that the Supreme Court's justiciability doctrines fit uneasily with its practical focus on expounding the Constitution.[16] Why worry about whether a case is moot, for example, when the case is only a vehicle for declaring constitutional law? But that tension

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14. *See infra* note 180 and accompanying text. For example, Justice Stephen Caesar Lemaistre defended his refusal to give one advisory opinion by citing the conduct of English judges in cases involving general warrants. Letter from J. Stephen Caesar Lemaistre to Warren Hastings (Nov. 22, 1776), Add. Ms. 29137, at 476, 479v–480r (on file with the British Library). He explained that although those judges condemned the practice when its legality was challenged in litigation, they "never wantonly and extrajudicially took up that question of their own accord." *Id.*

15. *Cf.* Richard H. Fallon, Jr., *The Many and Varied Roles of History in Constitutional Adjudication*, 90 NOTRE DAME L. REV. 1753, 1816–17 (2015) (arguing that even if advisory opinions would have been permitted at the Founding, subsequent historical practice has created a constitutional rule against them); John F. Manning, *The Necessary and Proper Clause and Its Legal Antecedents*, 92 B.U. L. REV. 1349, 1376 (2012) (reviewing GARY LAWSON, GEOFFREY P. MILLER, ROBERT G. NATELSON & GUY I. SEIDMAN, THE ORIGINS OF THE NECESSARY AND PROPER CLAUSE (2010)) ("[T]hough it was unobvious at the outset whether Article III courts could properly issue advisory opinions, a practical construction of Article III gave rise to a decisive constitutional prohibition against that practice."); Ernest A. Young, *Our Prescriptive Judicial Power: Constitutive and Entrenchment Effects of Historical Practice in Federal Courts Law*, 58 WM. & MARY L. REV. 535, 554–55 (2016) (describing the prohibition on judicial issuance of advisory opinions as a historical practice that has hardened into a constitutional rule).

16. *See infra* note 344 and accompanying text.

evaporates when one realizes that the Court's avoidance of advisory opinions—the root of all justiciability doctrines—was actually an effort to avoid misleading declarations of law. Justiciability doctrines do not just constrain the Court's law-declaration function; they also protect it.

The Conclusion also highlights a methodological intervention. Historically minded scholars of federal courts have often traced the narrow path running from England to the early United States. Expanding the scope of inquiry to include other common-law jurisdictions, including British India, allows us to consider new evidence that might shed light on otherwise intractable problems.

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Before continuing, it might be helpful to clarify a crucial term. This Article defines *advisory opinion* as a legal opinion delivered by one or more judges in their official capacities but outside of the ordinary process of litigation.[17] Traditionally, advisory opinions were issued by judges, not by courts.[18] (In England, advisory opinions were typically issued by the twelve judges of the superior courts of common law—King's Bench, Common Pleas, and Exchequer.[19]) Accordingly, advisory opinions did not invoke a court's power to issue a binding judgment.[20]

This definition excludes some practices that are sometimes lumped with advisory opinions. First, it excludes advice that judges give in private. That reflects a distinction that judges themselves have historically drawn.[21] Talking about the law behind closed

17. For other possible definitions, see Evan Tsen Lee, *Deconstitutionalizing Justiciability: The Example of Mootness*, 105 HARV. L. REV. 603, 643–51 (1992).

18. Today, three states have provisions that describe courts, rather than their justices, as advice-givers. These provisions were enacted in 1886 (Colorado), 1889 (South Dakota), and 1962 (Michigan). MEL A. TOPF, A DOUBTFUL AND PERILOUS EXPERIMENT: ADVISORY OPINIONS, STATE CONSTITUTIONS, AND JUDICIAL SUPREMACY, at xiv–xv, 21–25 (2011).

19. *See infra* Part II.

20. *See infra* notes 210–211 and accompanying text; *see also* Letter from John Jay, Sup. Ct., C.J., to James Iredell, Sup. Ct., J. (Sept. 15, 1790), *in* 2 LIFE AND CORRESPONDENCE OF JAMES IREDELL 292, 294 (Griffith John McRee ed., New York, D. Appleton & Co. 1857) (draft of letter from U.S. Sup. Ct. JJ. to George Washington, referring to "the distinction between a Court and its Judges").

21. *See* Maeva Marcus, *Separation of Powers in the Early National Period*, 30 WM. & MARY L. REV. 269, 273 (1989) (noting that the Supreme Court has historically distinguished advisory opinions by the Court as an institution from the giving of advice by Justices on an individual basis). For instance, Chief Justice Jay had no objection to offering legal advice in private letters to President Washington, even though he declined to join a public letter in 1793. *See, e.g.*, Letter from John Jay to George Washington (Aug. 28, 1790), *in* 5 JAY PAPERS, *supra* note 2, at 270. Justice Frankfurter, who campaigned against advisory opinions as a professor and as a Justice, see *infra* Part I, nonetheless gave frequent advice to the Roosevelt Administration. William R. Casto, *Advising Presidents: Robert Jackson and the Destroyers-for-Bases Deal*, 52 AM. J. LEGAL HIST. 1, 80 (2012). English judges also observed this distinction. *See, e.g.*, Letter from Henry Dundas, Home

doors might raise ethical issues, but it has not usually raised constitutional concerns.[22]

Second, my definition excludes certified questions—questions of law on which one court seeks guidance from another court or its judges. Again, this distinction reflects historical practice. English judges regularly advised other courts, even after they stopped giving advisory opinions to the Crown.[23] Similarly, the U.S. Supreme Court has been authorized to answer certified questions from circuit courts since 1802, a practice that never seems to have triggered concerns about Article III.[24]

Finally, my definition excludes advisory activity that functioned as appellate review. This includes, for example, advice to the Crown about the legality of court-martial verdicts, which persisted into the nineteenth century.[25] Although those opinions were technically extrajudicial, they effectively served as appeals from judgments that would otherwise have been unreviewable in common-law courts.[26]

Sec'y, to Lord Loughborough, C.J. of Common Pleas (Sept. 12, 1792), GD51/1/20/3, Melville Papers (on file with National Records of Scotland) (describing a request for an opinion as "personally to yourself," when there had been "no formal Reference to the Judges").

22. *See, e.g.*, Ronald J. Krotoszynski, Jr., *Constitutional Flares: On Judges, Legislatures, and Dialogue*, 83 MINN. L. REV. 1, 36 (1998) ("[T]here is no formal constitutional prohibition on federal judges giving advice pertaining to legal matters . . . .").

23. *See, e.g.*, Sutton v. Johnstone (1786) 99 Eng. Rep. 1215; 1 Term. Rep. 493 (reporting advice from the chief justices of Common Pleas and King's Bench to the Lord Chancellor in his capacity as judge of Exchequer Chamber); 3 WILLIAM BLACKSTONE, COMMENTARIES *452–53 (discussing the practice of referring cases from Chancery to judges of King's Bench or Common Pleas to obtain their opinions on questions of law); J.H. Baker, *Ascertainment of Foreign Law: Certification to and by English Courts Prior to 1861*, 28 INT'L & COMPAR. L.Q. 141 (1979); Stewart Jay, *Servants of Monarchs and Lords: The Advisory Role of Early English Judges*, 38 AM. J. LEGAL HIST. 117, 193 (1994) (discussing judges' advice to the House of Lords).

24. Act of Apr. 29, 1802, ch. 31, § 6, 2 Stat. 156, 159; *see, e.g.*, G. Edward White, *The Working Life of the Marshall Court, 1815-1835*, 70 VA. L. REV. 1, 20–22 (1984) (describing the Marshall Court's enthusiasm for certification). The practice quietly died in the twentieth century. *See* Aaron Nielson, *The Death of the Supreme Court's Certified Question Jurisdiction*, 59 CATH. U. L. REV. 483, 484–85 (2010).

25. *See* James Oldham, *Informal Lawmaking in England by the Twelve Judges in the Late Eighteenth and Early Nineteenth Centuries*, 29 LAW & HIST. REV. 181, 189 & n.35 (2011); *see also* JOHN NOORTHOUCK, A NEW HISTORY OF LONDON, INCLUDING WESTMINSTER AND SOUTHWARK 471–74 (London, R. Baldwin 1773) (describing an opinion given in 1769 about the wording of a death warrant); Chantal Stebbings, *The Appeal By Way of Case Stated from the Determinations of General Commissioners of Income Tax: An Historical Perspective*, 1996 BRIT. TAX REV. 611, 612–13 (describing the "case stated" procedure used to review tax-commission decisions).

26. Court-martial sentences had to be approved by the king, who had discretion to abrogate them for any reason. *See* CHARLES JAMES, A COLLECTION OF THE CHARGES, OPINIONS, AND SENTENCES OF GENERAL COURTS MARTIAL, at x & n.* (London, T. Egerton 1820). By the late eighteenth century, he typically followed the advice of his judges or law officers when considering challenges to sentences' legality. *See id.* (describing an instance in which the king abrogated a court-martial sentence based on the advice of the twelve judges). Commentators sometimes described this process as an appeal. *See* JOHN DELAFONS, A TREATISE ON NAVAL COURTS MARTIAL 290 (London, P. Steel 1805). There was even some suggestion that such an appeal was of right in

These exclusions might strike you as gerrymandered, but their coherence will become clear as the Article unfolds. For now, it's enough to note that all three categories dodged the problem that afflicted true advisory opinions: the problem of uncertain legal authority.[27]

I. EXPLAINING THE CORRESPONDENCE

This Article builds on a rich body of scholarship, and it might be helpful to begin by laying out the current state of play. Until now, there have been three main theories about the Jay Court's actions in 1793: that the Constitution forbids advisory opinions; that the *Correspondence* was a prudential effort to advance certain policy aims, such as augmenting the credibility of the United States in foreign affairs; or that the Justices wanted to avoid giving an opinion that would politically hurt the Court or its members.

The orthodox story, reflected in Supreme Court doctrine, is that advisory opinions would violate "the separation of powers prescribed by the Constitution."[28] Many scholars have agreed. Then-professor Felix Frankfurter wrote in 1930 that the Justices must have determined that "the giving of such opinions would not be a proper exercise of the 'judicial power' " conferred by Article III.[29] Later commentators have elaborated on that reading.[30] Extrajudicial advice is, as the name suggests, *extrajudicial*, in the sense of reaching beyond judges' proper role.[31]

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capital cases. *See* John Scott [later Lord Chancellor Eldon], *Opinion of the Solicitor General (Oct. 18, 1792)*, *in* 1 JOHN MCARTHUR, PRINCIPLES AND PRACTICE OF NAVAL AND MILITARY COURTS MARTIAL 434, 435 (London, J. Butterworth 2d ed. 1805) ("I think the prisoner might reasonably be thought entitled to have the opinion of his Majesty's judges . . . . [I]n a case affecting the life of the subject, it is usual to give the subject the protection which he can find only in their wisdom . . . ."). On the obstacles to direct review of court-martial verdicts, see Richard D. Rosen, *Civilian Courts and the Military Justice System: Collateral Review of Courts-Martial*, 108 MIL. L. REV. 5, 14–18 (1985).

27. *See infra* note 311.

28. Flast v. Cohen, 392 U.S. 83, 96 (1968).

29. Felix Frankfurter, *Advisory Opinions, National*, *in* ENCYCLOPEDIA OF THE SOCIAL SCIENCES 475, 476 (Edwin R.A. Seligman ed., 1930); *see also* Maeva Marcus & Robert Teir, *Hayburn's Case: A Misinterpretation of Precedent*, 1988 WIS. L. REV. 527, 543–44 (describing Justice Frankfurter's enthusiasm for the case-or-controversy requirement).

30. *E.g.*, Robert J. Pushaw, Jr., *Why the Supreme Court Never Gets Any "Dear John" Letters: Advisory Opinions in Historical Perspective*, 87 GEO. L.J. 473, 478 (1998) (reviewing STEWART JAY, MOST HUMBLE SERVANTS: THE ADVISORY ROLE OF EARLY JUDGES (1997)); *see also* James E. Pfander, *Judicial Compensation and the Definition of Judicial Power in the Early Republic*, 107 MICH. L. REV. 1, 41 (2008) (accepting the separation-of-powers story, but adding that "workload and compensation concerns may have strengthened the Justices' resolve").

31. *See, e.g.*, Clinton v. Jones, 520 U.S. 681, 700 (1997) ("[T]he judicial power to decide cases and controversies does not include the provision of purely advisory opinions . . . ."); Note, *Advisory Opinions and the Influence of the Supreme Court over American Policymaking*, 124 HARV. L. REV. 2064, 2064 (2011) (summarizing this view).

Although that doctrinal account remains dominant in the courts, recent historiography has been skeptical of it. One alternative explanation has focused on the practical disadvantages of advisory opinions. Here, too, the trail starts with Professor Frankfurter. Although he framed advisory opinions as constitutionally forbidden, he also defended the *Correspondence* as helping to ensure "legislative and popular responsibility" for policymaking.[32] Moreover, he argued, advisory opinions led to worse decisions by forcing judges to consider legislation outside of its real-life context.[33]

Frankfurter did not connect this policy argument to the Justices' concerns in 1793, but more recent scholarship has offered a historically grounded approach that focuses on the specific questions the Washington Administration wanted to ask. The issue in 1793 was not whether the Justices would issue an opinion but whether they would issue an opinion *about the law of nations*. As Professors Golove and Hulsebosch have argued, the young republic was trying to establish its credibility as a "civilized nation" that could be trusted to meet its obligations under international law.[34] To succeed, the United States had to convince foreign audiences that it could faithfully determine what those obligations entailed. Perhaps the Justices believed "that the judiciary could more effectively establish the good faith of the nation in administering the law of nations—and thus boost the credibility of the government—if it drew sharp lines separating itself from the more politically oriented executive branch."[35] In other words, the Jay Court avoided advisory opinions because foreign observers would find them less credible than pronouncements issued in the course of strictly judicial activities.

The foreign affairs context also plays a central role in the third category of explanation, which emphasizes the Justices' domestic political priorities. Professor Casto argues that Chief Justice Jay thought that he was doing the President a favor by rejecting his request. Forcing the executive to rely on its own interpretation of the law of nations would strengthen the President's role in foreign affairs, while also boosting the position of Alexander Hamilton in the cabinet—both of which were congenial to the Federalist politics of the early Justices.[36]

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32. Felix Frankfurter, *A Note on Advisory Opinions*, 37 HARV. L. REV. 1002, 1007 (1924).

33. *Id.* at 1003.

34. David M. Golove & Daniel J. Hulsebosch, *A Civilized Nation: The Early American Constitution, the Law of Nations, and the Pursuit of International Recognition*, 85 N.Y.U. L. REV. 932 (2010).

35. *Id.* at 1027.

36. WILLIAM R. CASTO, FOREIGN AFFAIRS AND THE CONSTITUTION IN THE AGE OF FIGHTING SAIL 117–21 (2006).

Professor Arlyck also focuses on the Justices' desire to shift responsibility to the President. The *Correspondence*, he argues, "was an attempt to define the fraught territory of foreign relations as an area of executive, not judicial, responsibility."[37]

The most sustained argument in this vein has been that of Professor Jay, who argues that the refusal of 1793 "was neither inevitable nor necessary under the contemporary understanding of the constitutional role of judges."[38] Instead, it reflected two contingent political concerns. First, the Washington Administration had asked specifically for an opinion about a treaty; and Chief Justice Jay, a Federalist, was eager to bolster "the President's independence in foreign affairs."[39] Second, the Court had an interest in "avoiding public controversy."[40] The Justices wanted Congress to abolish their onerous circuit-riding duties, and their contentious decision in *Chisolm v. Georgia*[41] had already made them some enemies. Accordingly, the Justices eschewed advisory opinions in favor of other genres—such as "informal advice, grand jury charges, dictum in opinions, and decisions in actual cases"—that let them broadcast their views through less politically charged channels.[42]

Importantly, all these explanations describe the *Correspondence* as a uniquely American event—one that responded to the novel imperatives of Article III or the distinctive political situation of the Founding generation. The one exception is Professor Jay, whose work observes that advisory opinions also happened to disappear in England in the later eighteenth century. Professor Jay attributes this to the goals of Lord Mansfield, the influential Lord Chief Justice at the time of *Sackville's Case*. Jay argues that although Mansfield was happy to advise the Crown, he wanted to be known publicly "as a man outside party politics."[43] Accordingly, he had little to gain from "highly visible" written opinions, when his positions as a member of cabinet and in the House of Lords gave him other means of influence.[44] Ironically, however, Professor Jay's comparative perspective actually reinforces American exceptionalism by depicting the actions of both chief justices as driven by local political concerns. Moreover, none of these explanations account for the fate of advisory opinions in common-law

37. Kevin Arlyck, *The Courts and Foreign Affairs at the Founding*, 2017 BYU L. REV. 1, 23.
38. STEWART JAY, MOST HUMBLE SERVANTS: THE ADVISORY ROLE OF EARLY JUDGES 8 (1997).
39. *Id.* at 159–60.
40. *Id.* at 161.
41. 2 U.S. (2 Dall.) 419 (1793).
42. JAY, *supra* note 38, at 167.
43. *Id.* at 50.
44. *Id.* at 44–45.

colonies outside of the future United States. The next three Parts will consider whether such an approach is tenable.

II. ADVICE-GIVING UNDER THE CLASSICAL COMMON LAW

Until the late eighteenth century, English judges routinely advised the Crown on legal questions. This Part explains the role of advisory opinions under what has been described as the "classical" common law—the jurisprudence that became orthodox during the seventeenth century.[45]

Medieval and early modern judges routinely gave legal advice to monarchs.[46] This reflected a jurisprudential and political framework that imagined judges as both servants of the Crown and oracles of the law.[47] Judges' oaths required that they "lawfully . . . counsel the King in his Business."[48] In other words, advisory opinions were part of a judge's duty.[49] This notion of judicial service was complemented by a conception of judges as oracles.[50] Medieval and early modern judges did not see themselves as making law. Instead, the "law existed before any attempts to express it," and a judge's task "was to find that existing law and make it known."[51] Scholars have offered various theories about the source of that preexisting law, including natural law, communal custom, and the shared understanding of the profession.[52] For now,

45. *See* Gerald J. Postema, *Classical Common Law Jurisprudence (Part I)*, 2 OXFORD U. COMMONWEALTH L.J. 155, 157 (2002) ("Classical common law jurisprudence was articulated by reflective but politically engaged jurists in the 17th century."); *cf.* David J. Ibbetson, *Case-Law and Doctrine: A Historical Perspective on the English Common Law*, *in* RICHTERRECHT UND RECHTSFORTBILDUNG IN DER EUROPÄISCHEN RECHTSGEMEINSCHAFT 27, 29 (Reiner Schulze & Ulrike Seif eds., 2003) (describing an "early modern" common law that existed from the sixteenth through late eighteenth centuries).

46. *See* JAY, *supra* note 38, at 10–50.

47. *See* JOHN P. DAWSON, THE ORACLES OF THE LAW, at xi (1994); Jay, *supra* note 23, at 128–52 (describing judges as "Servants of Monarchs").

48. OATH OF THE JUSTICES (1346), *in* 1 THE STATUTES OF THE REALM 305, 305 (Alexander Luders ed., London, Dawsons of Pall Mall 1963) (1810). The statute prescribing the oath remained in force into the nineteenth century. *See, e.g.*, *In re* Serjeants at Law (1839) 133 Eng. Rep. 74, 76 n.2; 6 Bing. (N.C.) 187, 192 n.2; FIFTH REPORT OF HER MAJESTY'S COMMISSIONERS ON CRIMINAL LAW 21 (London, W. Clowes & Sons 1840) (describing the judge's oath to serve the king as originating during the reign of King Edward III).

49. *See* PHILIP HAMBURGER, LAW AND JUDICIAL DUTY 151–52 (2008).

50. *See, e.g.*, 1 WILLIAM BLACKSTONE, COMMENTARIES *69 (referring to judges as "depositary of the laws; the living oracles").

51. Emily Kadens, *Justice Blackstone's Common Law Orthodoxy*, 103 NW. U. L. REV. 1553, 1557 (2009).

52. *See, e.g.*, William R. Casto, *The Early Supreme Court Justices' Most Significant Opinion*, 29 OHIO N. U. L. REV. 173, 204–05 (2002) ("In administering the common law, a judge's duty was to identify and apply those principles preexisting in nature."); William A. Fletcher, *The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance*, 97 HARV. L. REV. 1513, 1517 (1984) (describing the early nineteenth-century view that the general

what matters is that the declaratory theory made it easy to make sense of what advisory opinions did. They—like opinions given during litigation—served as evidence of a preexisting law.[53]

That was the theory. But by the seventeenth century, contemporaries recognized the possible tension between judges' two roles.[54] As the Stuart monarchs learned, it could be useful for a king to persuade his judges to issue favorable opinions on controversial subjects.[55] This temptation was particularly strong when judges served at the pleasure of the king. But even after the Glorious Revolution, when judges' tenures had become more secure, commentators continued to worry that a tyrannical executive might use extrajudicial opinions to shield corrupt or unconstitutional actions.[56] Even in the 1760s, Sir Michael Foster described "tak[ing] the Opinion of the Judges" as "a Refuge constantly open to a corrupt Administration."[57]

Political pressure was not the only concern. Although judges were oracles of the law, they were accustomed to speaking with the help of their priests—that is, the bar.[58] During the Middle Ages, the common law was thought to reside not in the declarations of judges alone but in the common opinion shared by the legal profession as a whole.[59] By the seventeenth century, this notion of the law as *communis opinio* had started to weaken, but courts continued to rely on barristers as crucial

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common law existed by "common practice and consent among a number of sovereigns"); Caleb Nelson, *A Critical Guide to* Erie Railroad Co. v. Tompkins, 54 WM. & MARY L. REV. 921, 931–35 (2013) (discussing the nature and sources of unwritten law); Stephen E. Sachs, *Finding Law*, 107 CALIF. L. REV. 527, 532–34 (2019) (contrasting the positivist view that judges make law with views of the common law as derived from natural law, social norms, or custom); A.W.B. Simpson, *The Common Law and Legal Theory*, *in* OXFORD ESSAYS IN JURISPRUDENCE (SECOND SERIES) 77, 80 (A.W.B. Simpson ed., 1973) ("[T]he common law is best understood as a system of customary law, that is, as a body of traditional ideas received within a caste of experts.").

53. *See, e.g.*, DAWSON, *supra* note 47, at 60–61.

54. *See, e.g.*, J.R. TANNER, ENGLISH CONSTITUTIONAL CONFLICTS OF THE SEVENTEENTH CENTURY, 1603-1689, at 38–39 (1928).

55. *See id*. at 39–40.

56. *See infra* notes 207–209 and accompanying text (describing the growth of judicial independence in the eighteenth century).

57. MICHAEL FOSTER, A REPORT OF SOME PROCEEDINGS ON THE COMMISSION OF OYER AND TERMINER AND GOAL DELIVERY FOR THE TRIAL OF THE REBELS IN THE YEAR 1746 IN THE COUNTY OF SURRY, AND OF OTHER CROWN CASES TO WHICH ARE ADDED DISCOURSES UPON A FEW BRANCHES OF THE CROWN LAW 394 (Dublin, Sarah Cotter 1767) (1762).

58. Medieval judges had described themselves as the priests. *See* THOMAS J. MCSWEENEY, PRIESTS OF THE LAW: ROMAN LAW AND THE MAKING OF THE COMMON LAW'S FIRST PROFESSIONALS 1 (2019). By the eighteenth century, the term usually applied to lawyers (often pejoratively). *See* DAVID LEMMINGS, PROFESSORS OF THE LAW: BARRISTERS AND ENGLISH LEGAL CULTURE IN THE EIGHTEENTH CENTURY 95, 145 n.178 (2000).

59. J.H. BAKER, THE LAW'S TWO BODIES: SOME EVIDENTIAL PROBLEMS IN ENGLISH LEGAL HISTORY 75 (2001) (explaining that common opinion "was good evidence as to the state of legal doctrine").

collaborators in discovering and declaring the law.[60] Sir Matthew Hale, an eminent seventeenth-century jurist, wrote that the "great Weight and Authority" of judicial decisions derived not only from judges' "greater learning, knowledge, and experience in the laws," but also from their having "the best Helps to inform their Judgments."[61] Adversarial presentation enhanced the accuracy and authority of judicial opinions.[62] Advisory opinions typically lacked that help.

In response to these concerns, judges developed norms to guide their advisory practice. These included group consultation (discussed in Section A), obtaining advice from the bar (Section B), avoiding prejudgment of issues that might arise in subsequent litigation (Section C), and issuing opinions only when they were likely to be followed (Section D). These norms were not universal; indeed, judges sometimes disagreed about whether they existed at all. But they collectively suggest that judges treated advice-giving as a kind of legal procedure—which, like other kinds of procedures, could be done improperly.

A. Group Consultation

Early modern judges typically issued seriatim opinions, rather than a single opinion for the court.[63] In their advisory work, however, judges typically issued joint opinions—primarily, it seems, to insulate themselves from royal pressure. And even when judges did issue separate opinions, they sought to do so only after consulting their colleagues.

This norm began to emerge as early as *Peacham's Case* (1615), which arose when the Privy Council wanted to prosecute a rector for writing a sermon that imagined the King's death, which the King's ministers deemed treason. The problem was that the rector had never

60. *See* Emily Kadens, *The Puzzle of Judicial Education: The Case of Chief Justice William De Grey*, 75 BROOK. L. REV. 143, 150–51 (2009); *see also* Frederick G. Kempin, Jr., *Precedent and Stare Decisis: The Critical Years, 1800 to 1850*, 3 AM. J. LEGAL HIST. 28, 37–38 (1959) (noting that colonial American judges cited the authority of "eminent members of the bar"); Peter M. Tiersma, *The Textualization of Precedent*, 82 NOTRE DAME L. REV. 1187, 1231 (2007) (noting that the barristers who argued a particular case "were normally experts in their field and may well have known more about a specialized subject than the judges"). Even in the 1760s, Blackstone discounted the authority of a reported case because it appeared from the report "that very many Gentlemen of the Law were dissatisfied" with the decision. 2 WILLIAM BLACKSTONE, COMMENTARIES *238–39.

61. MATTHEW HALE, THE HISTORY OF THE COMMON LAW OF ENGLAND 45 (Charles M. Gray ed., 1971) (1739).

62. *See* NEIL DUXBURY, JURISTS AND JUDGES: AN ESSAY ON INFLUENCE 76 (2001); *cf.* Matthew Steilen, *On the Place of Judge-Made Law in a Government of Laws*, 3 CRITICAL ANALYSIS L. 243, 257–58 (2016) (describing this concern in the work of Chancellor James Kent).

63. *See* 1 JOHN BAKER, *The Changing Concept of a Court*, *in* COLLECTED PAPERS ON ENGLISH LEGAL HISTORY 413, 430–31 (2013).

preached or published his "treasonable sermon," which made his prosecution doubtful.[64] As was usual in such cases, the Attorney General—the reliable royal servant Francis Bacon—consulted the judges. But instead of asking their opinion collectively, as had been customary, he tried to consult them separately. Sir Edward Coke, the chief justice of King's Bench, understood the purpose of Bacon's approach. Bacon was worried that Coke might convince his colleagues that a secret writing could not constitute treason.[65] By buttonholing the judges individually, Bacon hoped to build a majority in favor of prosecution before Coke could intervene. The chief justice complained to Bacon that "such particular and . . . *auricular* taking of opinions was not according to the custom of this realm."[66] Although Coke eventually acquiesced—and delivered an opinion hostile to the Crown[67]—his reluctance contributed to an understanding that seriatim advisory opinions were disfavored. The Stuarts continued to seek separate opinions, sometimes successfully.[68] But by the eighteenth century, Coke's view had prevailed, and the judges' advice typically took the form of a jointly signed written opinion.[69] Judges retained the freedom to issue separate opinions, but these were issued only after group consultation.[70]

B. Advising the Advisors

As explained above, judges saw the arguments of counsel as crucial for helping them to declare the law, and a lack of argument was reason to discount the authority of a judicial decision.[71] This remains

64. TANNER, *supra* note 54, at 38–39.

65. *Id.* at 39.

66. Letter from Francis Bacon to James I (Jan. 27, 1614), *in* 5 THE LETTERS AND THE LIFE OF FRANCIS BACON 100, 100 (James Spedding ed., London, Longmans, Green, Reader & Dyer 1869).

67. TANNER, *supra* note 54, at 38–39.

68. *See* JAY, *supra* note 38, at 18 (describing Charles I's successful efforts to obtain separate advisory opinions from judges).

69. *See, e.g.*, OPINION OF THE JUDGES ON THE JURISDICTION OF THE CONVOCATION IN MATTER OF HERESY; GIVEN IN THE YEAR 1711, at 16 (London, John Henry Parker 1850) (reprinting an opinion signed by multiple judges); The Opinion of the Judges of England About Money Bills in Ireland and Poynings Law in Particular 216–17 (1694), SP 63/356 (on file with The National Archives, UK) (same); Opinion of the Judges on Questions Concerning the Next Session of Parliament (July 12, 1707), PC 1/2/72 (on file with The National Archives, UK) (same).

70. *See, e.g.*, Opinion of the Judges About Visiting Foreign Ships in Our Ports (Mar. 1, 1699), *in* 10 CALENDAR OF STATE PAPERS, DOMESTIC SERIES, OF THE REIGN OF WILLIAM III, at 77, 77–78 (Edward Bateson ed., 1937) (reporting the solitary dissent of an admiralty judge); The Grand Opinion for the Prerogative Concerning the Royal Family (1717) 92 Eng. Rep. 909; Fort. 401 (issuing seriatim opinions after conferring as a group).

71. *See* BAKER, *supra* note 63, at 430; Ian Williams, *Early-Modern Judges and the Practice of Precedent*, *in* JUDGES AND JUDGING IN THE HISTORY OF THE COMMON LAW AND CIVIL LAW 51, 63–64 (Paul Brand & Joshua Getzler eds., 2011) ("Coke regarded 'precedents' in the sense of

one of the chief objections to advisory opinions today,[72] and the problem was apparent in the seventeenth century. In 1642, member of Parliament John Pym condemned "extrajudicial Declarations of Judges *without hearing of counsel or argument*" as "a teeming grievance" that produced "many others."[73]

Judges mitigated this problem in three ways. First, they expressly discounted the authority of extrajudicial pronouncements. In 1662, for example, Chief Justice Bridgman distinguished "between cases adjudged upon debate and having counsel on both sides, and resolution upon a case reported or referred to" the judges without argument.[74] Second, the judges sometimes heard counsel before giving their opinion. In at least one case, they heard counsel for one of the parties;[75] more often, they took the advice of the Crown's law officers.[76] Third, the judges sometimes issued their opinion together with prominent members of the bar. In 1702, for example, the judges' opinion about the scope of martial law was joined by "[t]he Queen's Serjeants, Attorney and Solicitor General and all the civilians at Doctors' Commons."[77] Although joint opinions lacked the benefit of adversarial

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arguments from the record based on writs issued as more powerful where the judges have debated them. The notion of debate leading to authority can also be seen with regard to reports of cases."); *see also* Rex v. Corp. of Wigan (1759) 97 Eng. Rep. 560, 561; 2 Burr. 782, 784 (KB) (Mansfield, C.J.) (discounting two precedents that "passed without argument or opposition," while favoring "the two subsequent precedents cited on the other side . . . [that] were debated and fully considered").

72. *See, e.g.*, James E. Pfander & Daniel D. Birk, *Article III Judicial Power, the Adverse-Party Requirement, and Non-Contentious Jurisdiction*, 124 YALE L.J. 1346, 1360 (2015) (explaining that the adverse-party requirement is thought to aid judicial decisionmaking).

73. Speeches Relating to Grievances (Nov. 7, 1640), *in* 2 THE PARLIAMENTARY HISTORY OF ENGLAND, FROM THE EARLIEST PERIOD TO THE YEAR 1803, at 642 (William Cobbett ed., London, T.C. Hansard 1807) [hereinafter PARLIAMENTARY HISTORY] (emphasis added).

74. Beckman v. Maplesden (1662) 124 Eng. Rep. 468, 478; Bridg. O. 60, 78 (CP).

75. In 1717, the judges were asked to resolve a family squabble between George I and his son, the Prince of Wales (and future George II). The Grand Opinion for the Prerogative Concerning the Royal Family (1717) 92 Eng. Rep. 909, 910; Fort. 401, 402. The King claimed a right as sovereign to direct the care and education of the Prince's children. *Id.* But the Prince claimed that his right as a father trumped his father's right as king. *Id.* at 911. After the Lord Chancellor referred the issue to the twelve judges, the Prince requested "that he might be heard by his counsel" before the judges made their decision. *Id.* at 910. The Prince's request highlighted the conflict between judges' duties as servants and as oracles. Although they wanted the assistance of counsel, they unanimously agreed "that in cases wherein our advice is required by His Majesty, we cannot hear counsel without His Majesty's leave." *Id.* The judges then sought the permission of the King, who permitted the judges to hear argument. *Id.* at 911.

76. JAY, *supra* note 38, at 20.

77. Documents Relating to the Disorders at Port St. Mary's: Opinion of the Judges (Nov. 4, 1702), *in* 1 CALENDAR OF STATE PAPERS, DOMESTIC SERIES, OF THE REIGN OF ANNE, PRESERVED IN THE PUBLIC RECORD OFFICE 285, 286 (Robert Pentland Mahaffy ed., 1916). Later judges expressed doubts about the propriety of including the law officers as cosignatories, preferring to hear them as counsel. James Oldham, *The Work of Ryder and Murray as Law Officers of the Crown*, *in* LEGAL RECORD AND HISTORICAL REALITY: PROCEEDINGS OF THE EIGHTH BRITISH LEGAL HISTORY CONFERENCE CARDIFF 1987, at 157, 161–64 (Thomas G. Watkin ed., 1989).

presentation, they could more plausibly claim to represent the common understanding of the profession.

C. Avoiding Prejudgment

Judges also tried to ensure that their advisory activities wouldn't interfere with their freedom to declare the law in other contexts. In some cases, this meant avoiding advisory opinions on issues that might later arise in litigation; at other times, the judges reserved the right to change their minds.[78] Thus, in *Whiston's Case* (1711), the judges concluded by declaring their "entire freedom of altering our opinions in case any records or proceedings which we are now strangers to shall be laid before us, or any new considerations which have not occurred to us to be suggested by the parties or their counsel to convince us of our mistake."[79]

D. Avoiding Unnecessary Opinions

These procedural norms mitigated, but did not eliminate, the dangers of extrajudicial advice. Advisory opinions remained risky, and judges accordingly sought to limit their frequency. That meant withholding opinions that were unlikely to be followed, as a dispute from 1747 reveals. George II had created a commission, composed of the Privy Council and the twelve judges of the common-law courts, to hear appeals in prize cases. Some doubts arose about the legality of the commission, and Lord Chancellor Hardwicke instructed Attorney General Sir Dudley Ryder and Solicitor General William Murray (later Lord Mansfield) to brief the judges.[80] Many of the judges refused even to meet with Ryder and Murray. The judges' objection was not to giving advice or to hearing the presentations of counsel but to the timing of the Crown's request. Although "it might have been proper for them to have met prior to the passing of the Commission in order to consider the legality of it," the judges worried about doing so after the King had

78. *See, e.g.*, JOHN FORTESCUE, REPORTS OF SELECT CASES IN ALL THE COURTS OF WESTMINSTER-HALL 389 (London, Henry Lintot 1748) ("The Judges ought not to deliver their Opinions before Hand in any Criminal Case that may come before them judicially . . . ."). Fortescue noted that this rule was frequently violated. *Id.* at 390.

79. OPINION OF THE JUDGES ON THE JURISDICTION OF THE CONVOCATION IN MATTER OF HERESY; GIVEN IN THE YEAR 1711, *supra* note 69, at 16. To some extent, this reflected judges' more general willingness to change their minds when confronted with new evidence of the law, even in the context of adjudication. *See* Williams, *supra* note 71, at 53–54. But even after judges became more reluctant to abandon *judicial* precedents, they continued to insist on the provisional character of their *extrajudicial* declarations.

80. Oldham, *supra* note 77, at 162.

already "done what he thought fit."[81] Eventually, they agreed to hear the law officers and to consider the matter.[82] But although the judges exchanged opinions with each other,[83] they never produced a written report for the King. (They also agreed that they "would give no opinion in [the] presence" of the Attorney and Solicitor General.[84]) Instead, they merely reported to Hardwicke that they were divided.[85] But that collective declaration of ambivalence was enough. In 1749, the cabinet drafted, and Parliament enacted, a statute that obviated any doubts about the prize commission's lawfulness.[86] The judges had fulfilled their advisory function without giving any advice at all.

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In 1775, the barrister and antiquarian Francis Hargrave used a footnote in his new edition of *Coke Upon Littleton* to criticize advisory opinions. "[I]t must be admitted," Hargrave conceded, that such opinions had a long history.[87] "But however numerous and strong the precedents may be," he continued, "it is a right to be understood with many exceptions, and such as ought to be exercised with great reserve."[88] Most importantly, judges ought "rigid[ly]" to avoid giving "opinions on causes *actually depending*."[89] He alluded to other norms that limited the Crown's right to advice, but he declined "to be more particular on a subject of so much delicacy, by attempting to mark the bounds to a right, the extent of which we do not find clearly ascertained by precedent or authority."[90]

This Part has tried to make those norms more explicit. Like Hargrave, eighteenth-century judges did not always explain their

81. Hargrave Ms. 431, at 6 (Nov. 30, 1748) (on file with the British Library).

82. Notes of Sir William Lee (Dec. 1748), OSB MSS 52/11/1–8 (on file with the Beinecke Rare Book & Manuscript Library, Yale University).

83. Hargrave Ms. 431, *supra* note 81, at 18 (reporting that the judges came to Chief Justice Lee's chambers on December 6 and 9, 1748, and "delivered their opinions on the Commission"). Justice Burnet "sent his opinion by writing." *Id.*

84. Hargrave Ms. 431, *supra* note 81, at 6.

85. Oldham, *supra* note 77, at 163–64.

86. Prize Causes Act 1748, 22 Geo. 2 c. 3. The cabinet was a small group of high-ranking ministers and royal advisers. *See* Ian R. Christie, *The Cabinet During the Grenville Administration, 1763-1765*, 73 ENG. HIST. REV. 86–87 (1958); Philip Lawson, *Further Reflections on the Cabinet in the Early Years of George III's Reign*, 57 HIST. RSCH. 237, 237–38 (1984).

87. EDWARD COKE, THE FIRST PART OF THE INSTITUTES OF THE LAWS OF ENGLAND; OR, A COMMENTARY UPON LITTLETON § 168, n.5 (Francis Hargrave ed., London, G. Kearsly & G. Robinson 1775).

88. *Id.*

89. *Id.*

90. *Id.*

advisory practice, perhaps because its vagueness was a useful tool for dodging the Crown's demands.[91] The numbers bear this out: although we lack an official register of advisory opinions, no monarch after 1660 seems to have obtained more than a handful.[92] They remained an accepted but carefully circumscribed part of the duty of English judges.

III. THE DEMISE OF ADVISORY OPINIONS

The classical common law provided a framework that accommodated advisory opinions while seeking to mitigate their risks. In the second half of the eighteenth century, however, that framework broke down, and judges throughout the common-law world tried harder to escape their roles as advisors.

This Part describes this development through three case studies. Section A offers a new view of *Sackville's Case*, the last written advisory opinion given to the British Crown.[93] The judges in that case granted the request for advice, but their evident reluctance to do so contributed to a new norm against the Crown soliciting formal legal advice at all. Section B takes the story to British-controlled Bengal, where judges on the Supreme Court of Judicature similarly sought to limit their advisory role, in ways that went beyond what the classical model required. Section C retells the more familiar story of the Jay Court's refusal in 1793.

A. England

Sackville's Case began with a disgraced cavalry officer's attempt to salvage his reputation. At the Battle of Minden in 1759, Lord George Sackville received ambiguous orders to pursue retreating French troops. Sackville failed to advance, and his superior, Prince Ferdinand of Brunswick-Wolfenbüttel, blamed him for allowing France to escape a decisive defeat.[94] Sackville resigned his commission and returned to

91. For the idea that early modern judges saw vagueness as a bulwark against tyranny, see Christian R. Burset, *Redefining the Rule of Law: An Eighteenth-Century Case Study*, AM. J. COMPAR. L. (forthcoming 2022).

92. *See Book Review: The Judges of England, with Sketches of Their Lives, and Miscellaneous Notices Connected with the Courts at Westminster, from the Time of the Conquest, by Edward Foss*, L. MAG. & L. REV. OR Q.J. JURIS., Nov. 1858-Feb. 1859, at 31, 39 (counting advisory opinions). That list is imperfect—for example, it seems to count an opinion given to George II as given to George III—but it indicates a general downward trend after the Restoration. *Id.*

93. *But cf. infra* Appendix (discussing a possible exception).

94. ANDREW JACKSON O'SHAUGHNESSY, THE MEN WHO LOST AMERICA: BRITISH LEADERSHIP, THE AMERICAN REVOLUTION, AND THE FATE OF THE EMPIRE 168–69 (2013).

London, where the press condemned his alleged cowardice.[95] Sackville maintained that he had acted properly, and he decided that the only way to restore his good name was to have a court-martial judge his actions.[96]

As soon as the court-martial commenced, however, its members expressed doubts about two important issues. First, Sackville was no longer in the army; could he still be tried under military law? Second, was the court-martial authorized to impose a capital sentence?[97] The court-martial's members were army officers without legal training, and they asked the King "to direct the Judges of the Land to give their opinion."[98] George II agreed to do so.[99]

The judges eventually issued an opinion, but only on the first question, and only after initially refusing to say anything at all. Why? The prevailing explanation is that Lord Mansfield, arguably the most influential judge in England at the time, took the lead in resisting the King's request.[100] This Mansfield-centered story has an important implication: it suggests that the demise of advisory opinions in England was largely the product of his own idiosyncratic priorities.[101] This interpretation is plausible—George II himself blamed Mansfield for the judges' obstinacy[102]—but a careful review of the evidence suggests something different. As it turns out, the judges were all reluctant to decide *Sackville's Case*; and to the extent that Mansfield's views stood out, it was because he was *more* willing to accommodate the Crown, not less.[103] As a result, we need to explain the decline of advisory opinions by looking beyond Mansfield's personal preferences.

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95. PIERS MACKESY, THE COWARD OF MINDEN: THE AFFAIR OF LORD GEORGE SACKVILLE 158–61 (1979).

96. *Id.* at 161–64. This was a risky maneuver. Two years earlier, Britain had executed Admiral John Byng after a court-martial found that he had failed "to do his utmost" to engage the French navy. N.A.M. RODGER, THE COMMAND OF THE OCEAN: A NAVAL HISTORY OF BRITAIN 1649-1815, at 267 (2004). The government also had much to lose. An acquittal would antagonize Britain's popular ally Prince Ferdinand, see FRED ANDERSON, CRUCIBLE OF WAR: THE SEVEN YEARS' WAR AND THE FATE OF EMPIRE IN BRITISH NORTH AMERICA, 1754-1766, at 300 (2001), while a conviction would rekindle the political controversy over Byng's execution, see SARAH KINKEL, DISCIPLINING THE EMPIRE: POLITICS, GOVERNANCE, AND THE RISE OF THE BRITISH NAVY 130–38 (2018).

97. At a General Court Martial 2 (Feb. 29, 1760) WO 71/134 (on file with The National Archives, UK).

98. *Id.*

99. *See* Certificate of the Judges Respecting the Court-Martial Proposed to Be Held upon Lord George Sackville (1760) 28 Eng. Rep. 940, 940; 2 Eden 371, 371.

100. JAY, *supra* note 38, at 44–45; Pushaw, *supra* note 30, at 475–76.

101. *See* JAY, *supra* note 38, at 44–45 (describing Mansfield's desire to avoid political damage that could result from issuing an advisory opinion in *Sackville's Case*).

102. *See* MACKESY, *supra* note 95, at 181–82 (describing the King's anger with Mansfield).

103. *See id.* There are other signs that Mansfield was comparatively unconcerned about advisory activity. In *Perrin v. Blake*, Mansfield was part of the Privy Council committee that heard

First, though, it's important to set out what happened.[104] The court-martial asked for guidance on February 29, 1760. The cabinet met that night to consider the issue, as the Duke of Newcastle later reported to William Pitt.[105] (Newcastle and Pitt were effectively co-prime ministers. Newcastle had been present at the cabinet meeting, but Pitt had been too ill to attend.) The cabinet agreed nearly unanimously that the first question, concerning the court-martial's jurisdiction, should be referred to the judges.[106] Newcastle made a point of noting that the lawyers present had shared this consensus. Lord Hardwicke, the respected former Lord Chancellor, had "thought the reference extremely proper in a case of this nature, relating to the jurisdiction of an inferior court."[107] Mansfield also "concurred," although he asked

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an appeal from Jamaica about the construction of wills. JOSEPH HENRY SMITH, APPEALS TO THE PRIVY COUNCIL FROM THE AMERICAN PLANTATIONS 325 (1950). The question presented was both important and difficult, and Mansfield thought the Privy Council wasn't up to answering it. *See id.* Although the Privy Council was the court of last resort for colonial appeals, it consisted mostly of nonlawyers, and it had a poor reputation for legal analysis. P.A. HOWELL, THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL 1833-1876: ITS ORIGINS, STRUCTURE AND DEVELOPMENT 8–9 (1979). Accordingly, Mansfield proposed to refer the case to King's Bench (of which he was chief justice), so that the Privy Council would render judgment based on that court's advice. *See* SMITH, *supra*, at 325 & n.338. This would not have been an advisory opinion strictly speaking, because the reference would have come from the King "in his judicial capacity." Hodgson v. Ambrose (1780) 99 Eng. Rep. 216, 220 n.3; 1 Dougl. 337, 344 n.3. Nonetheless, Mansfield's fellow judges refused to accept the reference, and they insisted on *Perrin* being brought in King's Bench as a feigned action. SMITH, *supra*, at 326. Another example came a few years later, during a debate in the House of Lords about a controversial colonial statute. Mansfield, eager for political reasons to have the statute declared void, "demanded that the opinions of the judges might be taken." Letter from Horace Walpole to Horace Mann (May 24, 1767), *in* 22 THE YALE EDITION OF HORACE WALPOLE'S CORRESPONDENCE 519, 520 (W.S. Lewis ed., 1960). The Lords rejected Mansfield's demand, and one observer thought the other "judges would not have given their opinions if asked." *Id.*; *see also* SMITH, *supra*, at 631–35 (discussing this incident).

104. The story has been well told by JAY, *supra* note 38, at 31–34, but this Article departs from his account in one crucial way. Although Professor Jay consulted a broad combination of primary and secondary sources, the structure of his narrative relied on work by Dr. Piers Mackesy, a respected military historian. *Id.* at 214 n.81. Dr. Mackesy's account indicated that Mansfield refused to issue an opinion until he attended a cabinet meeting at which the Duke of Newcastle convinced him to change his mind. MACKESY, *supra* note 95, at 181–82. Professor Jay quite reasonably adopted this sequence of events. But the relevant letters indicate that the cabinet meeting happened first. In other words, Mansfield was initially willing to give an opinion, but his meeting with the other judges discouraged him from doing so. *See infra* notes 105–120 and accompanying text.

105. Letter from the Duke of Newcastle to William Pitt (Mar. 1, 1760), *in* 2 CORRESPONDENCE OF WILLIAM PITT, EARL OF CHATHAM 23, 23–24 (William Stanhope Taylor & John Henry Pringle eds., London, John Murray 1838).

106. There was a heated dissent from Lord Granville, who insisted "with great vehemence" that Sackville "was not triable by a court-martial; that the Judges had nothing to do with it; and that it was wronger still to refer it to them." *Id.* It is not clear why he objected or why he thought the issue so obvious. A few weeks earlier, the Attorney and Solicitor General had given their opinion that Sackville was indeed triable by a court-martial. Letter from Charles Pratt & Charles Yorke to Lord Holdernesse (Jan. 12, 1760), State Papers 41/23, at 311r, 312r (on file with The National Archives, UK).

107. Letter from the Duke of Newcastle to William Pitt (Mar. 1, 1760), *supra* note 105, at 24.

that, "being a judge," his name be omitted from the record.[108] On the second question, concerning Sackville's possible punishment, "it was unanimously agreed, that it would be highly improper to refer *that* to the Judges."[109] The reason, Newcastle explained, was that the question "was indeed desiring to know of them what the court was to do, which depended upon themselves."[110] In other words, Sackville, if convicted, might appeal to those same judges, and it would have been improper to demand a preview of their answer. Pitt replied to Newcastle that this was "perfectly right."[111]

So far, so good. But there was a logistical hurdle. The court-martial needed "a speedy answer."[112] Britain was still at war, and many of the court's members and witnesses were active-duty officers.[113] But the judges were about to ride their semiannual circuit around England, and at least one judge had already departed. Somebody (perhaps Mansfield) indicated that those who remained might not answer the question presented until they had all returned to London.[114] The judges' attitude might simply have reflected the long-standing norm of group consultation.[115] But whatever the cause, the delay exposed Mansfield to acute political danger.[116] A rumor was spreading that Mansfield had encouraged the judges to stall: Mansfield and Sackville, it was said, were friends, and Mansfield wasn't eager to see Sackville put on trial for his life.[117] Newcastle urged Mansfield, his friend and former protégé, to get the judges to cooperate as quickly as possible—or to find someone else to blame for their delay. "I know there are those in the highest stations of the Law who say it may be done," Newcastle wrote; "at least let it appear that if it is not done *it is not your fault* . . . . For God's sake

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108. *Id.*

109. *Id.*

110. *Id.* at 24–25.

111. Letter from William Pitt to the Duke of Newcastle (Mar. 1, 1760), Add. Ms. 32903, at 17 (on file with the British Library).

112. Letter from the Duke of Newcastle to William Pitt, *supra* note 105, at 25.

113. Sackville himself had declined to call certain witnesses out of fear that doing so would compromise military operations. 1 HIST. MANUSCRIPTS COMM'N, REPORT ON THE MANUSCRIPTS OF MRS. STOPFORD-SACKVILLE, OF DRAYTON HOUSE, NORTHAMPTONSHIRE 318 (1904).

114. Letter from the Duke of Newcastle to William Pitt (Mar. 1, 1760), *supra* note 105, at 25 & n.1.

115. *Supra* Section II.A.

116. *See* Letter from the Duke of Newcastle to [Andrew] Stone (Mar. 1, 1760), Add. Ms. 32903, at 10, 10 (on file with the British Library); Letter from the Duke of Newcastle to Lord Mansfield (Mar. 1, 1760), Add. Ms. 32903, at 6 (on file with the British Library).

117. *See, e.g.*, Letter from the Duke of Newcastle to [Andrew] Stone, *supra* note 116, at 11 ("The King is extremely hurt with Lord Mansfield. . . . He takes it to be *Friendship* to Lord George."); *see also* 3 HORACE WALPOLE, MEMOIRS OF THE REIGN OF KING GEORGE THE SECOND 252–55 (Lord Holland ed., 2d ed. rev., London, Henry Colburn 1846) (describing Mansfield's supposed friendship with Sackville).

consider whether it may not be proper for the remaining Judges to give an answer."[118] Mansfield, however, insisted that he couldn't help. He had already explained to Newcastle he had no objection to advising the King on this issue, even publicly.[119] But Newcastle would "have no opinion from the Judges"[120]—not because Mansfield himself was unwilling, but because his colleagues could "not be induced to give a separate Opinion."[121]

Two days later, the judges changed their minds, for unclear reasons. The eleven who remained in London issued a short, jointly signed statement that they saw "no ground to doubt of the legality of the jurisdiction of a Court-Martial in the case put by the above question."[122] Their opinion included a conventional caveat:

> But as the matter may several ways be brought, in due course of law, judicially before some of us . . . we shall be ready, without difficulty, to change our opinion, if we see cause, upon objections that may be then laid before us, though none have occurred to us at present which we think sufficient.[123]

So far, the judges' actions reflected the classical norms described in Part II, particularly the emphasis on group consultation. But when Mansfield transmitted the opinion to the Crown, his cover letter added a new wrinkle. The judges, he reported,

> are exceedingly thankful to his Majesty for his tenderness in not sending any question to them till the necessity of such reference became manifest and urgent. . . . *In general, they are very averse to giving extra-judicial opinions*, especially where they affect a particular case; but the circumstances of the trial now depending ease us of difficulties upon this occasion, and we have laid in our claim not to be bound by this answer.[124]

Mansfield's letter indicated a deeper opposition to advisory opinions than the classical common law would have suggested.

Sackville's Case only became a landmark in retrospect. At least into the 1780s, observers continued to assume that advisory opinions were permissible.[125] Nonetheless, it appears to have been the last

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118. Letter from the Duke of Newcastle to Lord Mansfield, *supra* note 116.

119. Letter from the Duke of Newcastle to [Andrew] Stone, *supra* note 116, at 11.

120. Letter from Lord Mansfield to the Duke of Newcastle (Mar. 1, 1760), Add. Ms. 32903, at 8 (on file with the British Library).

121. Letter from Lord Barrington to the Duke of Newcastle (Mar. 1, 1760), Add. Ms. 32903, at 12 (on file with the British Library).

122. Certificate of the Judges Respecting the Court-Martial Proposed To Be Held upon Lord George Sackville (1760) 28 Eng. Rep. 940, 940–41; 2 Eden. 371, 371.

123. *Id.*

124. Letter of Lord Mansfield to the Lord Keeper, Enclosing the Above Certificate (1760) 28 Eng. Rep. 941, 941; 2 Eden 373, 373 (emphasis added).

125. In 1772, Benjamin Franklin presented the colonial secretary, Lord Dartmouth, with a controversial petition from Massachusetts. Letter from Benjamin Franklin to Thomas Cushing (Dec. 2, 1772), *in* 19 THE PAPERS OF BENJAMIN FRANKLIN 399, 409 (William B. Willcox ed., 1959). Dartmouth counseled against forwarding it to George III. *Id.* at 409. The King, Dartmouth warned, might "require the Opinion of the Judges or Government Lawyers, which would surely be against"

formal advisory opinion that English judges gave to the executive.[126] Some observers might have missed it, but the Crown's relations with the judiciary had changed.[127]

B. Bengal

In 1765, the British East India Company became the de facto ruler of Bengal. Under a grant from the Mughal Emperor, the Company gained the right to collect taxes from, and the responsibility to administer justice for, the region's more than twenty million inhabitants.[128] Eight years later, in response to the perceived failures of Company rule, Parliament passed the Regulating Act, which created a new governance structure for British India. The statute placed executive and legislative authority in the hands of a governor-general and four-member council, who were accountable to the Company but effectively appointed by government ministers. (The act itself named the first four councilors.)[129] It also authorized the Crown to charter a new Supreme Court of Judicature, to be staffed by royally appointed judges.[130]

From the beginning, the SCJ and the Council disagreed about their relationship. In particular, three views emerged about the SCJ's duty to render advisory opinions. The first view belonged to Governor-General Warren Hastings, who enthusiastically sought the judges' advice. The Regulating Act had empowered the Council to legislate with the "consent and approbation" of the SCJ.[131] Hastings argued that the judges should therefore participate in the legislative process, and he proposed giving the chief justice "a fixed or occasional seat at the

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the petition. *Id.* Neither Franklin nor Dartmouth was a lawyer, and Franklin's account of the meeting might not have been accurate. *See id.* n.4. Nonetheless, Franklin's comment indicates that advisory opinions were not obviously out of bounds. For an example from the 1780s, see *infra* Appendix.

126. *But cf. infra* Appendix (discussing a possible exception).

127. By the way, Sackville landed on his feet. The court-martial declared him "unfit to serve his Majesty in any military capacity whatever"—a verdict humiliating enough to appease George II but too trifling to justify a capital sentence or even to permanently damage his political career. O'SHAUGHNESSY, *supra* note 94, at 169. George II died six months later, which cleared the way for Sackville's rehabilitation. He resumed his work as a member of Parliament, and in 1775 he became secretary of state for the American colonies, in which capacity he served as primary architect of the failed war against their independence. *See id.* at 165–206.

128. P.J. MARSHALL, THE MAKING AND UNMAKING OF EMPIRES: BRITAIN, INDIA, AND AMERICA C.1750-1783, at 207 (2005).

129. *Id.* at 213.

130. Charter of Justice, Dated 26th March 1774, *in* THE RULES AND ORDERS OF THE SUPREME COURT OF JUDICATURE AT FORT WILLIAM IN BENGAL 135, 135 (Longueville Clarke ed., Calcutta, Samuel Smith & Co. 1829).

131. Regulating Act 1773, 13 Geo. 3 c. 63, § 36.

Council Board."[132] His attitude reflected his long-standing friendship with Sir Elijah Impey, the first chief justice, whom he hoped to gain as an ally in the Council's political struggles.[133]

Hastings's opponents on the council—John Clavering, George Monson, and Philip Francis—developed a second view, which was more circumspect about judicial advice.[134] To some extent, they were suspicious of Impey's friendship with Hastings; but their attitude also reflected their belief that the SCJ and the Council ought to be mutually independent. For example, they argued that the SCJ was meant to review the Council's regulations "in the nature of an appeal, the Benefit of which would be lost, if there were any previous Communication and agreement between the Legislative and Judicial Powers."[135] As a result, it would be improper not only for the judges to attend Council meetings, but even for them to offer "an extrajudicial opinion" about proposed legislation.[136] If the Council needed advice, it ought to get its own lawyer.[137]

Francis, the faction's leader, was especially sensitive to separation-of-powers concerns. When a dispute arose about Hastings's authority to dissolve the Council, some of his colleagues suggested that the matter be settled by obtaining an opinion of counsel. Francis rejected that idea. Although individual councilors could seek advice as they saw fit, he "disapprove[d] of submitting the internal Rights and powers of the Supreme Council" to the judgment of private attorneys.[138] "I am of the same opinion with respect to the Judges," he continued.[139] The matter could "never come regularly before them" as a court; and it would be improper for them to furnish "an extrajudicial opinion."[140]

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132. Letter from Warren Hastings to Lord North (Apr. 2, 1775), *in* 1 MEMOIRS OF THE LIFE OF THE RIGHT HON. WARREN HASTINGS, FIRST GOVERNOR-GENERAL OF BENGAL 534, 542 (G.R. Gleig ed., London, Richard Bentley 1841) [hereinafter HASTINGS MEMOIRS].

133. *See* LAUREN BENTON, LAW AND COLONIAL CULTURES: LEGAL REGIMES IN WORLD HISTORY, 1400-1900, at 136 n.14 (2002) (discussing Hastings's friendship with Impey); ROBERT TRAVERS, IDEOLOGY AND EMPIRE IN EIGHTEENTH-CENTURY INDIA: THE BRITISH IN BENGAL 186–87 (2007) (indicating that Hastings used the court to pursue political goals).

134. For the factions on the council, see TRAVERS, *supra* note 133, at 145–46.

135. Memorandum from John Clavering, George Monson & Phillip Francis (Apr. 12, 1774), Add. Ms. 29207, at 52 (on file with the British Library).

136. *Id.*

137. *Id.*

138. Letter from Philip Francis to John Clavering (Mar. 19, 1775), Mss. Eur. E15, at 87 (on file with the British Library). The issue was eventually submitted to several eminent attorneys in England, who generally concluded that Hastings had the power to dissolve the Council. JAMES FITZJAMES STEPHEN, SELECTED WRITINGS OF JAMES FITZJAMES STEPHEN: THE STORY OF NUNCOMAR AND THE IMPEACHMENT OF SIR ELIJAH IMPEY 46 n.§ (Lisa Rodensky ed., 2013).

139. Letter from Philip Francis to John Clavering, *supra* note 138, at 87.

140. *Id.* at 87–88; *see also id.* (arguing that any opinion from the judges would not "carry any other Authority, than that of eminent Lawyers, by which we might or might not be directed").

Instead of seeking external advice, the councilors themselves should trust their own ability "to understand the Law, under which [they] act."[141] Excessive deferral to the judges, he warned, would elevate the court into "the first power of the State."[142]

The third and most restrictive view of advisory opinions came from the judges themselves. Their position became clear following the arrest of a senior Indian official named Nandakumar, who had been accused of forgery.[143] Nandakumar complained to the Council that the conditions of his confinement were inconsistent with his religious practices.[144] The Council asked Impey to investigate. He did so and reported back in a letter that assured the Council of his desire to accommodate prisoners' beliefs while also warning against "suffer[ing] the pretence of Religion to be set up to elude the ordinary course of Justice."[145] But Impey was less concerned about the merits of Nandakumar's petition than the Council's willingness to receive it. In the future, the chief justice insisted, prisoners should apply directly to the court. Otherwise, the Council's intervention in high-profile cases might undermine the court's appearance of impartiality.[146]

The Council—more precisely, the majority composed of Francis, Clavering, and Monson[147]—construed Impey's letter as an attack on their authority.[148] Impey then tried to backtrack. He professed "infinite concern that any thing in my former letter could by any strained construction be interpreted to question the authority of the Board."[149] He would never have suggested anything of the sort, he explained, because "[t]he bounds between the Authority of the Supreme Court and

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141. *Id.* at 88.

142. *Id.*

143. He was eventually executed for that crime. *See, e.g.*, P.J. MARSHALL, THE IMPEACHMENT OF WARREN HASTINGS 135–36 (1965). His trial occasioned immediate and enduring debate about whether Hastings had rigged the proceedings to silence his political enemy and the extent to which English criminal law should be administered in India. *See, e.g.*, MARSHALL, *supra*, at 141; STEPHEN, *supra* note 138, at xv.

144. Nandakumar alleged that he was unable to perform religious ceremonies in prison or to eat in any "room where Christians or Mussulmen had been." Letter from Elijah Impey to the Governor-Gen. & Council (May 9, 1775), Add. Ms. 16265, at 23r (on file with the British Library).

145. *Id.* at 24r.

146. *Id.* at 24v.

147. Although the letters in this series were signed from the "governor-general and council," at least some appear to have been sent over Hastings's objection. *See* Letter from Warren Hastings to Graham & Macleane (May 20, 1775), Add. Ms. 29127, at 202v, 203r (on file with the British Library) ("The majority have commenced a war with the Chief Justice & the Judges, & in a Spirit peculiar to themselves.").

148. *See* Letter from John Clavering, George Monson & Phillip Francis to Lord Rochford (May 16, 1775), Mss. Eur. E13, at 389 (on file with the British Library).

149. Letter from Elijah Impey to the Governor-Gen. & Council (May 15, 1775), Add. Ms. 16265, at 26r (on file with the British Library).

the Council are of too delicate a nature to be discussed" unless absolutely necessary.[150] But that annoyed the Council even more. "We do not agree" that the boundary between the court's and the Council's authority is "too delicate" to be discussed, they replied; "we think that the lawful powers of every branch of government should be fixed and declared, and particularly that the limits of the Jurisdiction of the Supreme Court should be ascertained."[151] In other words, the Council wanted Impey to spell out the SCJ's jurisdiction.

This time, the Council drew a response from the full court. The letter reiterated the chief justice's warning that it was dangerous to chat about "delicate" jurisdictional matters and insisted that the judges "have no authority to make, extrajudicially, a more particular declaration, or description of the powers of the Court."[152] The judges, in other words, said they could not render an advisory opinion about their own jurisdiction.

This created a problem. Bengal had a tangle of competing courts—some controlled by the Company, others by the Crown—and it was important to specify the lines of authority.[153] The Council, concerned about the consequences of unresolvable jurisdictional conflicts, took the extraordinary step of suspending an important civil court, the *sadr diwani adalat*, pending the SCJ's opinion.[154] Impey had no interest in being blamed for the court's closure, and he complained that the Council was acting as if the judges had said "it was improper that it should be defined and known over whom the Court hath or hath not Jurisdiction."[155] But they had only refused to address two subjects: the Council's power to review judges' decisions (such as their imprisonment of Nandakumar) and the Council's "Right to communicate Petitions to the Judges."[156]

Now, with Bengal's judiciary descending into chaos, the judges felt compelled to explain themselves. With respect to the first point,

150. *Id.*

151. Letter from the Governor-Gen. & Council to Elijah Impey (May 16, 1775), Add. Ms. 16265, at 27r–27v (on file with the British Library).

152. Letter from the Sup. Ct. of Judicature to the Governor-Gen. & Council (May 20, 1775), *in* 2 SELECTIONS FROM THE LETTERS, DESPATCHES, AND OTHER STATE PAPERS PRESERVED IN THE FOREIGN DEPARTMENT OF THE GOVERNMENT OF INDIA, 1772-1785, at 378, 378 (George W. Forrest ed., Calcutta, Superintendent of Gov't Printing 1890).

153. *See* HALLIDAY, *supra* note 10, at 281–89.

154. Letter from the Governor-Gen. & Council to Sup. Ct. of Judicature (May 23, 1775), *in* 5 REPORTS FROM COMMITTEES OF THE HOUSE OF COMMONS: EAST INDIES—1781, 1782, at 441, 441 (London, reprinted by Ord. of the House 1804) [hereinafter REPORTS]; *Extract of Bengal Revenue Consultations (May 23, 1775)*, *in* REPORTS, *supra*, at 440.

155. Letter from Elijah Impey to the Governor-Gen. & Council (May 25, 1775), Add. Ms. 16265, at 29v (on file with the British Library).

156. *Id.* at 30r.

Impey considered it his "Duty on the part of the Judges to assert, 'That there doth not reside in the Governor General and Council any legal authority what so ever to review and control any Judicial acts of the Judges done either in or out of Court, be those acts ever so erroneous.' "[157] This short statement, issued jointly on behalf of all the judges, reads like a classic advisory opinion. But then, turning to the second question, Impey seemed to say that advisory opinions were impermissible: "[N]o Board even of the highest authority in England can refer any matter either to a Court of Justice or any Judge thereof, otherwise than by suit legally instituted."[158] Taken together, these two statements indicated that the judges might occasionally be willing to give advice, but that the Council had no right to seek it.

This was not because the judges wanted to keep their powers vague. As Impey emphasized, they had promulgated rules of procedure meant to clarify their jurisdiction, and his first charge to the grand jury had covered the same topic. "[T]o give sanction to it," Impey continued, "I asked [the other judges] publickly [sic] whether they concurred with me, & had the satisfaction of their full concurrence."[159] Moreover, Impey had been willing to "converse" with councilors privately—and even "to give answers in writing"—"but always with this reserve that my Judgment should not be considered bound by any extrajudicial opinion."[160] The only thing that Impey shouldn't do, he concluded, was "authoritatively ascertain" questions of law outside of ordinary litigation.[161]

This response failed to satisfy the Council, and the *sadr diwani adalat* remained closed. A few days later, the justices relented and rendered the opinion that the Council had demanded.[162] In doing so, they took the same approach as the English justices in 1760: issuing an advisory opinion while warning against asking for more. Their short letter clarified the SCJ's jurisdiction, and particularly its relationship to Company-run courts. The letter also offered several qualifications. Like the judges in *Sackville's Case*, Impey and his colleagues thanked the Council for its "Caution . . . in submitting Questions to us."[163] (One

157. *Id.*

158. *Id.*

159. *Id.* at 30r–30v.

160. *Id.* at 30v.

161. *Id.*

162. Letter from Elijah Impey, Stephen Caesar LeMaistre & John Hyde to the Governor-Gen. & Council (May 28, 1775), *in* REPORTS, *supra* note 154, at 441. Justice Chambers was out of town, but his colleagues asserted that he would have agreed with their opinion. *Id.*

163. *Id.*

detects a hint of sarcasm.) Advisory opinions were to be rarely sought and rarely given.

The letter then explained why the present situation merited an exception:

> Though we are not in general justifiable [i.e., subject to your jurisdiction], and therefore ought to be reserved in delivering extra-judicial Opinions; we are at all times desirous of affording you every Assistance and Information that is compatible with our Duty. As the Questions now proposed will, as we apprehend, never come judicially before us, and as we shall thereby prevent the Suspension of Justice, we are much pleased to feel ourselves at liberty to give you direct and full Answers.[164]

This passage made several arguments. First, the justices reminded the Council of their independence ("not in general justifiable"). Unlike English judges, the SCJ's justices had no duty to advise. Second, maintaining that independence required that advice be given sparingly ("we . . . therefore ought to be reserved in delivering extrajudicial opinions"). Indeed, the justices hinted that only an exceptional circumstance—in this case, the "suspension" of Company-controlled courts—justified their cooperation. Third, extrajudicial opinions were only appropriate on matters that would never arise "judicially," that is, in the course of litigation. (They did not say whether this was because this eliminated the risk of prejudging a future case or because there would otherwise be no way for the judges to address the issue.) Only when these conditions were satisfied, the justices concluded, would they be "at liberty" to answer extrajudicial inquiries; and even then, they need not do so.[165]

The Council got the letter but not the message. It continued to demand advisory opinions, which the judges repeatedly refused to give. In July 1775, they expressed their "deepest concern" that "the Council still persist[ed], notwithstanding the frequent declarations and unanimous opinion of the Court," to demand advice.[166] One especially obnoxious request asked the judges to decide whether the Crown or the Company was the sovereign of Bengal—one of the most contentious questions in British law and politics.[167] Impey, on behalf of the judges, replied that the SCJ would decide the question "if it became absolutely necessary"—such as during litigation—but the justices "would avoid it

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164. *Id.* For *justifiable*, see the second definition of that word in OXFORD ENGLISH DICTIONARY (3d ed. 2013), https://oed.com/view/Entry/102219 [https://perma.cc/7GNE-YAE6].

165. Letter from Elijah Impey, Stephen Caesar LeMaistre & John Hyde to the Governor-Gen. & Council (May 28, 1775), *supra* note 162, at 441.

166. Opinion of the JJ. of the Sup. Ct. of Judicature (July 6, 1775), *in* 20 A COMPLETE COLLECTION OF STATE TRIALS, 1771–1777, at 1135, 1136 (T.B. Howell ed., 1814) (Impey, C.J.).

167. *See, e.g.*, Spencer A. Leonard, *'The Capital Object of the Public': The 1766–7 Parliamentary Inquiry into the East India Company*, 132 ENG. HIST. REV. 1110, 1143 (2017).

if [they] could."[168] In any event, he continued, "we would not give [an opinion] until we had heard every thing that could be said on either side, nor until we had obtained all the lights and information that could be obtained on the subject."[169] Although Impey professed his willingness to provide "every right and every assistance, judicially or extra-judicially, which I think I legally may," he reiterated his opposition to advisory opinions.[170]

Impey and Hyde found themselves compelled to make a similar argument a few months later. "We . . . must decline to make a Precedent of submitting to answer Questions . . . which you have neither grounds nor right to put to us," they scolded the Council.[171] As in England, the justices were willing to offer advice in their private capacities.[172] But they continued to resist the Council's calls for official legal advice.

The judges made some exceptions. In 1777, the government fell into disarray when its members disagreed about who was actually governor-general. Clavering and Francis claimed that Hastings had resigned and that Clavering had succeeded to his position. Awkwardly for them, Hastings insisted that he remained in office.[173] The two sides agreed to submit their dispute to the judges, who returned a unanimous opinion a few hours later, declaring that Hastings was governor-general.[174] Even in the midst of that crisis, however, the judges sought to limit their advisory role. Although the contending councilors had appealed to the judges' "judgment and authority" to settle the dispute,[175] the judges emphasized their wish "to deliver such an opinion as from the reasoning of it, *not from its authority*, might" resolve the matter.[176] They added that only "the fatal consequences of a divided Government" could have persuaded them "to deliver any opinion at

168. Opinion of the JJ. of the Sup. Ct. of Judicature (July 6, 1775), *supra* note 166, at 1141.

169. *Id.*

170. *Id.* at 1137.

171. Letter from Elijah Impey & John Hyde to the Governor-Gen. & Council (Sept. 9, 1775), Add. Ms. 16265, at 55r (on file with the British Library).

172. *See, e.g.*, Letter from Elijah Impey to Warren Hastings (Jan. 11, 1776), Add. Ms. 29137, at 9 (on file with the British Library); Opinion of Sir R. Chambers on a Question Referred to Him, ([after 1774]), Taussig Collection, box 48, folder 355, at 139 (on file with the Beinecke Rare Book & Manuscript Library, Yale University).

173. SOPHIA WEITZMAN, WARREN HASTINGS AND PHILIP FRANCIS 103–04 (1929).

174. Letter from the JJ. of the Sup. Ct. of Judicature to John Clavering & Philip Francis (June 20, 1777) [hereinafter SCJ Letter], *in* 12 BENGAL: PAST & PRESENT 11, 15 (W.K. Firminger ed., 1916).

175. Address from John Clavering & Philip Francis to the JJ. of the Sup. Ct. of Judicature (June 20, 1777), *in* 12 BENGAL: PAST & PRESENT, *supra* note 174, at 8, 10.

176. SCJ Letter, *supra* note 174, at 15 (emphasis added).

all."[177] This was meant, in other words, to be a rare exception—one in which the judges spoke as counselors and arbitrators, not judges.

The tension over advisory opinions lasted even as personnel changed. In 1788, a different set of judges—Chambers, Hyde, and Sir William Jones—again had occasion to reject a request for advice.[178] "Extrajudicial opinions are never given by English Judges but with caution, and on such extraordinary emergencies as are out of the common course of Law," they explained.[179] Although they acknowledged that the members of the SCJ had "thought themselves obliged to give such opinions more frequently than is expected from Judges in England," they had nonetheless done so only where the alternative would have been to await instructions from England and "where danger or great inconvenience to the Public must have ensued from such delay."[180] Otherwise, such advice would be improper.

The members of the SCJ didn't manage to eliminate advisory opinions. Although they were formally independent of the governor-general and Council, they had a limited appetite for confrontation. Nonetheless, their reluctance to advise went beyond what the classical common law would have indicated. When the justices wrote in 1788 that they gave opinions more frequently than their English counterparts, they were measuring themselves against the standard that had emerged after *Sackville's Case*—one that had effectively eliminated judges' advisory duties in England.

C. United States

The Jay Court's refusal to issue an advisory opinion in 1793 is well known,[181] and this Section will retell that story only briefly. Colonial Americans had inherited the classical understanding of extrajudicial advice.[182] They recognized its dangers while also accepting

177. *Id.*

178. Impey had left India but had not officially resigned, so that Chambers was acting chief justice. Bowyer, *supra* note 11. Justice Lemaistre had died in 1777. PANDEY, *supra* note 11, at 41. Jones, the newest addition to the court, was a Welsh barrister and polymath with an international reputation as an orientalist. Michael J. Franklin, *Jones, Sir William*, *in* DNB, *supra* note 11, https://doi.org/10.1093/ref:odnb/15105 [https://perma.cc/VU3Q-ZWJE].

179. Letter from the JJ. of the Sup. Ct. of Judicature to the Governor-Gen. in Council (Sept. 11, 1788), *in* 2 THE LETTERS OF SIR WILLIAM JONES 809, 810 (Garland Cannon ed., 1970).

180. *Id.*

181. *See, e.g.*, CASTO, *supra* note 36, at 113–21; JAY, *supra* note 38, at 134–38; Arlyck, *supra* note 37, at 19–23.

182. *See* JAY, *supra* note 38, at 51–56 (discussing examples of colonial governments seeking advisory opinions from judges).

its legitimacy and utility.[183] This traditional attitude persisted into the Constitutional Convention, where some delegates assumed that federal judges would continue the English tradition of advising the executive.[184]

By 1793, however, many politicians and lawyers had developed a sense that advisory opinions might be objectionable. When legal questions emerged during the Neutrality Crisis, President Washington and his cabinet agreed that it would be proper to ask the Supreme Court for advice. But they doubted whether the Justices would acquiesce. The President initially asked only for a meeting, not a written opinion.[185] Before transmitting the questions themselves, Secretary of State Thomas Jefferson first asked the Justices "Whether the public may, with propriety, be availed of their advice?"[186] There is no evidence that Jefferson ever sent substantive questions to the Justices; the actual correspondence seems to have focused solely on whether it would be appropriate to do so.[187]

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183. John Adams, for example, saw both sides. On one hand, he quoted Justice Foster's warning about the dangers of advisory opinions. John Adams, *Letter to the Boston Gazette* (Feb. 8, 1773), *in* 1 PAPERS OF JOHN ADAMS: SEPTEMBER 1755 – OCTOBER 1773, at 287, 290 (Robert J. Taylor ed., 1977) (quoting FOSTER, *supra* note 57). On the other hand, he urged colonists to seek the "Extrajudicial Opinion" of Massachusetts judges during the Stamp Act crisis. John Adams, *Entry of Dec. 23, 1765*, *in* 1 DIARY AND AUTOBIOGRAPHY OF JOHN ADAMS: 1755–1770, at 270, 271 (L.H. Butterfield ed., 1961); *see also* John Adams, *Entry of Dec. 21, 1765*, *in* 1 DIARY AND AUTOBIOGRAPHY OF JOHN ADAMS: 1755–1770, *supra*, at 270 (outlining his proposed strategy). Shortly afterwards, James Otis mocked those judges for being "so squeamish" about delivering "extrajudicial opinions." [James Otis], *John Hampden to Wm. Pym*, BOS. GAZETTE & COUNTRY J., Jan. 6, 1766, at 1. (For Otis's authorship, see 1 DIARY AND AUTOBIOGRAPHY OF JOHN ADAMS, *supra*, at 287 n.2.) For more on Adams's strategy, see EDMUND S. MORGAN & HELEN M. MORGAN, THE STAMP ACT CRISIS: PROLOGUE TO REVOLUTION 146–49 (3d ed. 1995) (discussing the colonists' reaction to the closing of the courts during the Stamp Act crisis); JOSIAH QUINCY, JR., REPORTS OF CASES ARGUED AND ADJUDGED IN THE SUPERIOR COURT OF JUDICATURE OF THE PROVINCE OF MASSACHUSETTS BAY, BETWEEN 1761 AND 1772, at 206 (Samuel M. Quincy ed., Boston, Little, Brown, & Co. 1865) (discussing reactions to Adams's argument for a judicial opinion on the validity of the Stamp Act); Letter from Francis Bernard to the Bd. of Trade (Mar. 10, 1766), *in* 3 PAPERS OF FRANCIS BERNARD 111, 112 (Colin Nicolson ed., 2013) (describing the opinion of the judges on whether to proceed with the opening of the courts in Massachusetts).

184. JAY, *supra* note 38, at 75; Russell Wheeler, *Extrajudicial Activities of the Early Supreme Court*, 1973 SUP. CT. REV. 123, 128–30, 145 n.101.

185. Letter from Thomas Jefferson to John Jay (July 12, 1793), *in* 6 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789–1800, app. at 744 (Maeva Marcus ed., 1998) [hereinafter DHSC]; *see also* Letter from George Washington to Thomas Jefferson (July 18, 1793), *in* DHSC, *supra*, app. at 745 ("[Q]uere, would a verbal communication, & explanation of the wishes of Government made to them by you be better than by letter?").

186. Letter from Thomas Jefferson to U.S. Sup. Ct. JJ. (July 18, 1793), *in* DHSC, *supra* note 185, app. at 747.

187. Questions to Be Posed to the U.S. Sup. Ct. C.J. & JJ. (July 18, 1793), DHSC, *supra* note 185, app. at 747, 751 n.8.

In short, Washington and his cabinet seem to have considered the propriety of advisory opinions an open question.[188] The response of the Justices reinforces this impression. Rather than immediately refusing to give advice, four of them—Chief Justice Jay and Justices Wilson, Iredell, and Patterson—described the issue as one "of much Difficulty as well as Importance."[189] They declined to answer without consulting the other two members of the Court, Justices Cushing and Blair, who were out of town.[190] That meant a three-week delay until August, when the Court next met. Although Cushing was still absent at that meeting, the other five Justices determined that they were unable to oblige the Washington Administration, and they sent their famous letter of refusal on August 8. This is its key sentence:

> The Lines of Separation drawn by the Constitution between the three Departments of Government—their being in certain Respects checks on each other—and our being Judges of a court in the last Resort—are Considerations which afford strong arguments against the Propriety of our extrajudicially deciding the questions alluded to; especially as the Power given by the Constitution to the President of calling on the Heads of Departments for opinions, seems to have been *purposely* as well as expressly limited to *executive* Departments.[191]

The next two Parts will consider the meaning of that consequential passage.

IV. RECONSIDERING EXISTING EXPLANATIONS

Between 1760 and 1793, judges on three continents expressed new opposition to advisory opinions. Although no one declared them to be categorically forbidden, judges in England and the United States effectively ended the practice, and judges in Bengal came close. The next two Parts explain why. This Part begins that work by reconsidering existing explanations for what happened in the United States, as well as their potential application to events in the British Empire.

A. Constitutional

The orthodox view of the *Correspondence* focuses on two constitutional concerns: that advisory opinions violate the separation of

188. *See* Amanda L. Tyler, *Assessing the Role of History in the Federal Courts Canon: A Word of Caution*, 90 NOTRE DAME L. REV. 1739, 1747 (2015) (emphasizing the unsettled nature of the issue at the Founding).

189. Letter from John Jay, James Wilson, James Iredell & William Paterson, JJ., U.S. Sup. Ct., to George Washington (July 20, 1793), *in* 6 DHSC, *supra* note 185, app. at 752.

190. *Id.* app. at 753 n.2.

191. Letter from U.S. Sup. Ct. JJ. to George Washington (Aug. 8, 1793), *supra* note 2, at 545.

powers and that they are not a proper exercise of the judicial power conferred by Article III. Obviously, the U.S. Constitution can't explain earlier developments in the British Empire. But one might try to salvage this argument by recasting it in more general terms.

First, let's consider whether an intensified commitment to the separation of powers—a commitment reflected in, but not caused by, Article III—led judges in Westminster, Calcutta, and Philadelphia to reject an advisory role. Even this more general approach turns out to be a bad fit. No constitutional revolution preceded the demise of advisory opinions in England.[192] Well into the nineteenth century, judges continued to swear an oath to advise the king.[193] Meanwhile, they continued to engage in activities that would strike us as inconsistent with a strong view of separation of powers. For example, they continued to draft legislation and to serve in the House of Lords, Privy Council, and cabinet.[194]

There was a similar pattern in Bengal. Although the judges there resisted advisory opinions, they regularly collaborated with the governor-general and Council in other respects, such as by helping to draft legislation.[195] Chief Justice Impey even argued "that a Member of the Court [should] always be a Member of the Council."[196]

The separation-of-powers approach doesn't even fit the American story. As is well known, some of the first Justices served simultaneously in the executive branch.[197] It is hard to see why an advisory opinion would have offended the separation of powers while serving as an ambassador or secretary of state did not.[198] Even more striking is evidence from the Massachusetts Constitution of 1780, which

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192. *See* JAY, *supra* note 38, at 6.

193. *See supra* note 48.

194. *See* LEMMINGS, *supra* note 58, at 289–91; Kadens, *supra* note 60, at 156.

195. *See, e.g.*, Memorandum from Robert Chambers, S.C. Lemaistre & John Hyde (Mar. 30, 1776), IOR H/124, at 427 (on file with the British Library); Letter from Elijah Impey to Edward Thurlow (Mar. 3, 1776), Add. Ms. 16259, at 26 (on file with the British Library).

196. Letter from Elijah Impey to Lord North (Oct. 19, 1776), Add. Ms. 16266, at 31v (on file with the British Library); *see also* CURLEY, *supra* note 12, at 262 (describing Chambers's ambition to get a council seat).

197. *See, e.g.*, GORDON S. WOOD, EMPIRE OF LIBERTY: A HISTORY OF THE EARLY REPUBLIC, 1789-1815, at 413–14 (2009); Wheeler, *supra* note 184.

198. *See infra* notes 213–214 and accompanying text. In 1803, St. George Tucker complained that the Chief Justices' simultaneous employment as foreign envoys was "in manifest violation of every constitutional principle." 1 ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES WITH NOTES OF REFERENCE, TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND THE COMMONWEALTH OF VIRGINIA, app. at 356 n.* (Lawbook Exch. 1996) (1803). Interestingly, he also thought that federal judges had been *less* scrupulous about the separation of powers than their English counterparts in this respect. In his view, the Constitution protected judges' independence, but it made no significant innovation in separating judges from the executive. *Id.* app. at 356–57.

has been said to exemplify Founding-era ideas about the separation of powers.[199] That document *required* judges to give advisory opinions.[200]

There is one piece of evidence that has made "separation of powers" seem plausible: the Justices' invocation of the "Lines of Separation drawn by the Constitution between the three Departments of Government."[201] But, as others have observed, that statement merely indicated the Justices' power to say no—not their inability to say yes.[202] Their reference to the Opinion Clause served a similar purpose.[203] The Constitution's text and structure, the Justices were saying, had created a judiciary that was independent of the president.[204] But "independent" does not entail "unable to help."

Shifting the focus from separation of powers to judicial independence also helps to make sense of events in England and India. The SCJ, which had been chartered by the Crown, was meant to be independent of the Company-controlled Council. Its justices understood that, and they expressly grounded their refusal to advise in their not being subject to its jurisdiction.[205] English judges lacked that degree of formal autonomy, but they arguably enjoyed an even greater degree of functional independence. Starting with the Glorious Revolution in 1688, judges had acquired increasingly strong protections against removal.[206] In 1761, Parliament closed a loophole that had allowed judges to be replaced upon the death of the monarch.[207] Importantly, George III had recommended that change shortly after his accession, offering a strong signal that the Crown itself supported the independence of judges.[208] Additionally, the judges of Westminster Hall,

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199. *See, e.g.*, GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787, at 434 (2d ed. 1998); Barbara Aronstein Black, *Who Judges? Who Cares? History Now and Then*, 36 OHIO N. U. L. REV. 749, 795 (2010).

200. MASS. CONST. of 1780, ch. 3, art. 2, *amended by* MASS. CONST. art. 75; *see infra* Appendix (describing requirements for advisory opinions).

201. Letter from U.S. Sup. Ct. JJ. to George Washington (Aug. 8, 1793), *supra* note 2, at 545.

202. CASTO, *supra* note 36, at 113.

203. *See* Akhil Reed Amar, *Some Opinions on the Opinion Clause*, 82 VA. L. REV. 647, 656–57 (1996).

204. Frankfurter, *supra* note 29, at 479, 483. This is not to say that the Justices' understanding was identical to modern theories of judicial independence. *Cf.* Tara Leigh Grove, *The Origins (and Fragility) of Judicial Independence*, 71 VAND. L. REV. 465, 467–71 (2018) (showing the historical contingency of several rules we associate today with judicial independence).

205. *See supra* note 164 and accompanying text.

206. JOHN H. LANGBEIN, RENEE LETTOW LERNER & BRUCE P. SMITH, HISTORY OF THE COMMON LAW: THE DEVELOPMENT OF ANGLO-AMERICAN LEGAL INSTITUTIONS 656 (2009); Daniel M. Klerman & Paul G. Mahoney, *The Value of Judicial Independence: Evidence from Eighteenth Century England*, 7 AM. L. & ECON. REV. 1, 3, 6 (2005).

207. Commissions and Salaries of Judges Act 1760, 1 Geo. 3, c. 23, s. I.

208. Contemporaries disagreed about the practical importance of the Act. *Compare* 1 HORACE WALPOLE, MEMOIRS OF THE REIGN OF KING GEORGE THE THIRD 35 (Denis Le Marchant ed., Philadelphia, Lea & Blanchard 1845) (describing the statute as a "trifling addition" to judges'

unlike their counterparts in Bengal, could rely on the close supervision by Parliament and the press to support their claims to autonomy.[209] Judicial independence was a necessary precondition for the decline of advisory opinions. But the ability to say no is not the same as a duty to do so.

That leaves the second constitutional objection: that extrajudicial opinions are, as the term suggests, not an exercise of the *judicial power* granted by Article III. The statement is true but tautological. As William Baude and others have explained, the judicial power is a court's "power to issue binding judgments."[210] By definition, extrajudicial opinions didn't invoke that power. Indeed, they weren't issued by a court at all, but by the subscribing judges.[211] The question, then, is not whether advisory opinions abuse the Article III power but whether the Constitution prohibits judges from engaging in additional activities. But as we've just seen, common-law judges sustained various extrajudicial activities after advisory opinions ceased.

B. Prudential

Sensing the weakness of the constitutional case, some scholars have described the *Correspondence* as a prudential response to the practical disadvantages of advisory opinions. In particular, Professors Golove and Hulsebosch have argued that the Justices sought to enhance their international credibility by emphasizing their separation from the executive branch.

This argument rightly focuses on the potential audience of advisory opinions.[212] And it seems clear that the Justices often acted

already-secure tenure), *with* 1 JAMES BOSWELL, BOSWELL'S LIFE OF JOHNSON 587 (H. Milford ed., Oxford University Press 1924) (reporting Johnson's criticism of the Act as overly protective of judges). *See also* EVAN HAYNES, THE SELECTION AND TENURE OF JUDGES 79 (1944) (arguing for the importance of the Act).

209. David Lemmings has argued that judicial independence remained imperfect in the eighteenth century. Judicial salaries were often in arrears, which gave the Treasury some leverage over them; post-retirement pensions remained discretionary until 1799; and the executive could offer peerages and other douceurs to judges and their families. Moreover, between 1714 and 1760, Britain effectively had one-party rule, and the appointment process tended to produce judges who were sympathetic to the dominant Whig regime. LEMMINGS, *supra* note 58, at 271–74. But the intensification of partisan conflict after 1760 would have mitigated these concerns: any effort to compromise judges' independence would have provoked an immediate backlash from the opposition. *Id.* at 282–86.

210. William Baude, *The Judgment Power*, 96 GEO. L.J. 1807, 1809 (2007); *accord* Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 219 (1995).

211. *See* TOPF, *supra* note 18, at xiv–xv (distinguishing between requests made to a state supreme court and those made to the Justices of the Court); JAMES BRADLEY THAYER, *Advisory Opinions*, *in* LEGAL ESSAYS 42, 49 (Ezra Ripley Thayer ed.,1908) (noting that advisory opinions in Massachusetts were not binding).

212. *See infra* Section V.B (discussing potential misuses of advisory opinions).

with an eye toward foreign observers. But there are at least two reasons to doubt that the *Correspondence* was primarily aimed abroad. First, this theory hits the same stumbling block as the traditional separation-of-powers approach: the repeated tendency of Chief Justices to serve in the executive branch—and, specifically, to serve as diplomats. Most strikingly, Chief Justice Jay accepted an appointment as envoy to Great Britain less than a year after he signed the *Correspondence*.[213] His two immediate successors also took significant public roles in foreign affairs.[214] If refusing to issue an advisory opinion was a way to tell the world that the judiciary and the executive were unconnected, the Chief Justice and his successors muddled the message.

Second, it's not clear that foreign observers would have cared.[215] Consider Britain's own experience with a neutrality dispute—the so-called Silesian loan affair, which involved its seizure of neutral Prussian ships during the War of the Austrian Succession.[216] During that crisis, the British government had its law officers prepare a report on Britain's view of applicable international law.[217] The report—which had been commissioned to fortify Britain's credibility among European diplomats[218]—"acquired a great reputation and is looked upon as one of the most important international documents of the 18th century."[219] Its

213. *John Jay: Appointment as Chief Justice in 1789*, *in* 1 DHSC, *supra* note 185, at 3, 7; Golove & Hulsebosch, *supra* note 34, at 1042. He had also continued as Secretary for Foreign Affairs for his first six months on the bench. *John Jay: Appointment as Chief Justice in 1789*, *supra*, at 3, 6.

214. Chief Justice Rutledge was a recess appointee who was denied Senate confirmation after he publicly denounced the Jay Treaty. WILLIAM R. CASTO, THE SUPREME COURT IN THE EARLY REPUBLIC: THE CHIEF JUSTICESHIPS OF JOHN JAY AND OLIVER ELLSWORTH 90–95 (1995). Rutledge's replacement, Oliver Ellsworth, served overseas as a diplomat while Chief Justice. Thomas H. Lee, *The Law of Nations and the Judicial Branch*, 106 GEO. L.J. 1707, 1741 (2018); Neal Kumar Katyal, *Judges as Advicegivers*, 50 STAN. L. REV. 1709, 1745 & n.174 (1998).

215. When Jefferson told the French minister, Edmond Charles Genet, that federal courts would need to adjudicate certain matters in dispute between the two countries, he replied that he was "ignorant . . . of the constitutional judges" to whom Jefferson referred. Letter from Edmond Charles Genet, Minister Plenipotentiary of the Republic of France, to Thomas Jefferson, Sec'y of State (June 22, 1793), *in* 1 AMERICAN STATE PAPERS 155, 156 (Walter Lowrie & Matthew St. Clair Clarke eds., Washington, D.C., Gales & Seaton 1833); *cf.* JOANNE B. FREEMAN, AFFAIRS OF HONOR: NATIONAL POLITICS IN THE NEW REPUBLIC 97 (2001) (describing Genet as "confused" by U.S. constitutional law).

216. *See* SHAVANA MUSA, VICTIM REPARATION UNDER THE IUS POST BELLUM: AN HISTORICAL AND NORMATIVE PERSPECTIVE 74–85 (2018).

217. GEORGE LEE, G. PAUL, DUDLEY RYDER & WILLIAM MURPHY, REPORT OF THE LAW OFFICERS OF THE CROWN (Jan. 18, 1753), *reprinted in* ERNEST SATOW, THE SILESIAN LOAN AND FREDERICK THE GREAT 77, 77–100 (1915).

218. *See* J. LL. J. EDWARDS, THE LAW OFFICERS OF THE CROWN 134 (1964) (noting that the opinion was "communicated . . . to the British Ministers in the leading European capitals for presentation to the courts in which they were accredited"); SATOW, *supra* note 217, at 73.

219. Arnold D. McNair, *The Debt of International Law in Britain to the Civil Law and the Civilians*, 39 TRANSACTIONS GROTIUS SOC'Y 183, 195 (1953).

admirers included Vattel, Montesquieu, Alexander Hamilton, and Edmund Randolph.[220] Nobody seems to have cared that most of its authors were executive officers.[221] In fact, as Golove and Hulsebosch observe elsewhere, a close association between the Justices and the executive branch might actually have enhanced the Court's credibility. In 1790, when a senator wanted to reassure a British diplomat that Chief Justice Jay would treat foreign litigants fairly, he elided the distinction between Jay's political and judicial roles: "[I]s it possible to suppose, that what he openly acknowledged in his political character, will not equally affect his decisions on the Bench?"[222]

C. Political

This leaves explanations that emphasize the Justices' domestic political priorities. Professors Arlyck, Casto, and Jay, for example, all see the Justices as trying to steer clear of the contentious field of foreign relations—whether to save themselves political trouble, to boost the presidency as an institution, or to encourage the President's Federalist policies.

As with the other two explanations, this one hits on an important truth. Eighteenth-century judges worried that executive officials might use advisory opinions to dodge political accountability. Impey justified the judges' refusal to answer one inquiry by explaining that an advisory opinion would "in some measure remove the responsibility . . . to ourselves."[223] Chancellor Robert Livingston of New York used more colorful language in 1801. Advisory opinions, he warned, would "convert [judges] into mantelets to receive the shot,

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220. *See, e.g.*, HENRY J. BOURGUIGNON, THE FIRST FEDERAL COURT: THE FEDERAL APPELLATE PRIZE COURT OF THE AMERICAN REVOLUTION, 1775-1787, at 181–82 (1977); EMER DE VATTEL, THE LAW OF NATIONS 304 n.* (Béla Kapossy & Richard Whatmore eds., Liberty Fund 2008) (1758); Alexander Hamilton, *To Defence No. XX [New York, Oct. 23 and 24, 1795]*, *in* 19 THE PAPERS OF ALEXANDER HAMILTON, JULY 1795–DECEMBER 1975, at 329, 342–43 (Harold C. Syrett ed., 1973); Letter from Edmund Randolph to Thomas Jefferson (Apr. 12, 1793), *in* 25 THE PAPERS OF THOMAS JEFFERSON 537, 538 (John Catanzariti ed., 1992).

221. The authors were Sir George Lee, the Dean of the Arches; George Paul, the King's Advocate; Attorney General Dudley Ryder; and Solicitor General William Murray. Of these, only Lee was a judge. (He presided over the ecclesiastical court of the Archbishop of Canterbury.)

222. Golove & Hulsebosch, *supra* note 34, at 1015 (quoting Letter from Lord Dorchester to Mr. Grenville (May 27, 1790)). One might also cite the example of prize cases, "which were among the most numerous and important types of cases raising questions under the law of nations at the time." *Id.* at 1003. In Britain, prize appeals were decided by the Lords Commissioners for Prize Appeals, a majority of whom had to be members of the Privy Council—a fundamentally executive body. *See* BOURGUIGNON, *supra* note 220, at 18, 161–77; *supra* notes 80–86 and accompanying text.

223. Letter from Elijah Impey to Lord Bathurst (Oct. 19, 1776), Add. Ms. 16266, at 32v (on file with the British Library).

while the leaders of parties fought securely under their protection."[224] This concern became more salient in the later eighteenth century. The three places where we've seen judges resist advisory opinions—England in the 1760s, Bengal in the 1770s, and the United States in the 1790s—were all sites of intense partisan conflict, where judges would have been especially attuned to questions of political responsibility.

Where these accounts fall short, however, is in not accounting for the risks of *refusing* to advise.[225] In the late eighteenth century, extrajudicial silence wasn't always the safer course. George II became enraged when he thought Mansfield was trying to dodge his advisory duties in *Sackville's Case*.[226] Indeed, the Duke of Newcastle was convinced that the incident would lead to his friend's downfall.[227] Throughout his career, Mansfield was criticized because of his supposed proclivity for saying in private what he refused to say in public.[228] In contrast, the unanimous opinion in *Sackville's Case* proved uncontroversial, as did most advisory opinions. If a judge's goal was to stay out of trouble, joining a unanimous opinion was the surer path.[229]

Impey got even more grief for his reluctance. In 1786, he faced impeachment on various charges of misconduct as chief justice. The third article cited his refusal to give an advisory opinion on "the Limits of the Jurisdiction of the Supreme Court."[230] Impey, the article charged, not only "did decline giving any satisfactory Answer," but "did persuade the other Judges to declare, in Conjunction with himself, that they had no Authority to make, extrajudicially, any particular Description of the Powers of the Court, other than is given in the Charter of their Establishment."[231] This charge was quickly dropped (and Impey was eventually acquitted on all counts), but its inclusion suggests that his extrajudicial silence had been costly. Impey himself seems to have anticipated this. A decade earlier, he had responded to the SCJ's critics

224. Letter from Robert R. Livingston to John Jay, Governor of New York (Mar. 21, 1801), *in* 2 STATE OF NEW YORK: MESSAGES FROM THE GOVERNORS 481, 482 (Charles Z. Lincoln ed., 1909).

225. For additional critiques, see Golove & Hulsebosch, *supra* note 34, at 1027 n.360.

226. *See supra* notes 102, 116–118 and accompanying text.

227. Letter from the Duke of Newcastle to [Andrew] Stone, *supra* note 116, at 10 ("I see a Run coming on upon [Mansfield] for preventing (as they think) the asking the opinion of the Judges, some time ago . . . . I foresee such a storm as no man can stand.").

228. *See, e.g.*, Letter from "Junius" to Lord Mansfield (Nov. 14, 1770), *in* THE LETTERS OF JUNIUS 206, 215 (John Cannon ed., 1978) [hereinafter JUNIUS]. Interestingly, the "Junius" letters were likely written by Philip Francis. *See* John Cannon, *Appendix Eight: A Note on Authorship*, *in* JUNIUS, *supra*, at 539.

229. The opinion in *Sackville's Case* repeated a conclusion already reached by the Attorney and Solicitor General. *See supra* note 106.

230. ARTICLES OF CHARGE OF HIGH CRIMES AND MISDEMEANORS, AGAINST SIR ELIJAH IMPEY 108 (Dublin, John Stockdale 1788).

231. *Id.*

by emphasizing that its justices "have given extrajudicial opinions at the desire of the Governor and Council."[232] His defenders likewise praised his willingness to write advisory opinions.[233] They did not mention that he had rendered those opinions infrequently and under protest.

The *Correspondence* was far less controversial, but that might not have been clear in advance. Some contemporaries thought that the president was "authorized to require in writing" "the opinion of the judges," including on questions about "the laws of nations."[234] As Professor Jay observes, the early Supreme Court was not universally loved, and it would have been plausible for its critics to attack it for failing to assist President Washington.

Thus, "political" explanations of the *Correspondence* are right to focus on questions of accountability. Advisory opinions were indeed risky, and they could be used to shift responsibility from policymakers to judges. But silence wasn't safe, either. Something beyond risk aversion must have pushed judges to end their advisory practice.

V. COMPLETING THE STORY

The last Part showed that existing accounts can't fully explain the *Correspondence* or the decline of advisory opinions more generally. This Part develops a new explanation, which focuses on changes within the common law.

The classical attitude toward advisory opinions had depended on a jurisprudence that treated all legal opinions as probative, but none as decisive, in determining the law's meaning.[235] Starting in the 1750s, that view of legal authority came under pressure. The declaratory

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232. Letter from Elijah Impey to Lord Weymouth (Jan. 20, 1776), Add. Ms. 38398, at 220, 240v (on file with the British Library).

233. *See, e.g.*, Letter from Warren Hastings to Lord North (Jan. 20, 1776), *in* 2 HASTINGS MEMOIRS, *supra* note 132, at 14; Considerations on East India Affairs, ([after 1774]), Add. Ms. 38398, at 107, 113 (on file with the British Library):

> The Establishment of the Court of Judicature in Bengal has done some good, & some mischief. The good it has done in some particular Instances makes me think it should be continued; . . . It has in two Instances wisely upon application interposed with its advice, & thereby prevented great confusion in two of the Settlements.

234. "A Native American," *Letter to the Editor*, CITY GAZETTE & DAILY ADVERTISER (Charleston, S.C.), Sept. 16, 1793, at 2; *see also* 11 THE DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES, MARCH 4, 1789–MARCH 3, 1791, at 927, 931 (June 17, 1789) (statement of Rep. Gerry) ("There is a clause in this system of government . . . which authorises the president to obtain the opinions of the heads of departments in writing; so the president and senate may require the opinion of the judges respecting this power if they have any doubts concerning it."). These arguments seem absurd today—they cite the Opinion Clause in *support* of advisory opinions—but that doesn't mean that they might not have caused trouble.

235. *See supra* Section II.A.

theory remained orthodox, but it began to fragment. Some judges, most prominently Blackstone, began to elevate the authority of individual cases into a newly powerful theory of stare decisis; others, most notably Mansfield, tended to emphasize cases' underlying principles. Those subtle differences in emphasis created new anxiety about the nature of legal authority. As judges and lawyers realized their disagreement, they tried to develop clearer rules about what counted as evidence of the law.

Advisory opinions were a casualty of this process. There was little doubt that a judge's extrajudicial writings ought to carry less weight than the opinion accompanying a judgment. But it was difficult to say *how* much less when the profession couldn't agree about how to treat judgments themselves. Judges began to worry that their advisory pronouncements would be misused in ways that might harm both the development of the law and their own reputations. In response to these concerns, judges intensified their long-standing caution about issuing advisory opinions, until the practice died out entirely.

A. The Problem of Legal Authority

The common law experienced a crisis in the middle of the eighteenth century.[236] Britain's rapid economic growth led many observers to conclude that English law was unfit for a modern commercial society,[237] a suspicion reinforced by litigants' flight from the courts.[238] Judges and lay observers lamented the law's uncertainty, while a surge of parliamentary activity raised new questions about the roles of courts and legislators in reforming the law.[239] Meanwhile, Britain's imperial expansion created new stages on which to display the inadequacies of English law.[240]

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236. LEMMINGS, *supra* note 58, at 144.

237. *See, e.g.*, David Lieberman, *Property, Commerce, and the Common Law: Attitudes to Legal Change in the Eighteenth Century*, *in* EARLY MODERN CONCEPTIONS OF PROPERTY 144 (John Brewer & Susan Staves eds., 1995); David Lieberman, *The Legal Needs of a Commercial Society: The Jurisprudence of Lord Kames*, *in* WEALTH AND VIRTUE: THE SHAPING OF POLITICAL ECONOMY IN THE SCOTTISH ENLIGHTENMENT 203, 205–06 (Istvan Hont & Michael Ignatieff eds., 1986).

238. *See* C.W. Brooks, *Interpersonal Conflict and Social Tension: Civil Litigation in England, 1640–1830*, *in* THE FIRST MODERN SOCIETY: ESSAYS IN ENGLISH HISTORY IN HONOUR OF LAWRENCE STONE 357, 359 (A.L. Beier, David Cannadine & James M. Rosenheim eds., 2005); Christian R. Burset, *Arbitrating the England Problem: Litigation, Private Ordering, and the Rise of the Modern Economy*, 36 OHIO ST. J. ON DISP. RESOL. (forthcoming 2021), https://ssrn.com/abstract=3561136 [https://perma.cc/6JRF-V6AN].

239. DAVID LIEBERMAN, THE PROVINCE OF LEGISLATION DETERMINED: LEGAL THEORY IN EIGHTEENTH-CENTURY BRITAIN 11–30 (1989).

240. *See, e.g.*, JEREMY BENTHAM, *Place and Time [1782]*, *in* SELECTED WRITINGS 152 (Stephen G. Engelmann ed., 2011).

One response to this crisis was increased attention to the nature of legal authority. Perhaps the most prominent examples of this were found in the competing approaches of Blackstone and Mansfield. Blackstone argued for "a relatively new and stronger understanding of the binding nature of precedent."[241] In his account of the common law, judges swore oaths to decide cases according to law, not their own discretion. Because that law was knowable through precedents, they bound judges in later cases. Mansfield, in contrast, took a more relaxed approach to case law. Precedents, in his view, were authoritative not because they provided specific rules that judges must follow, but because they revealed the law's underlying principles. A judge's job was to conform his decision to those principles—not the specific rules of particular cases. Therefore, a judge could overrule cases that had been decided wrongly or had aged poorly.[242]

The difference between these two approaches was subtle. Occasionally, the jurisprudential gap between Blackstone and Mansfield erupted conspicuously.[243] Usually, though, it lurked below the surface. Both judges embraced a variant of the declaratory theory, and it wasn't obvious whose approach best represented contemporary orthodoxy.[244] The result was a legal system in which the participants disagreed about the nature of precedent but were not always able to articulate how or why.[245]

This sometimes-silent disagreement about case law had collateral consequences for other kinds of legal authority. Blackstone had identified as evidence of the common law not only prior cases but also "the authoritative writings of the venerable sages of the law," which have "intrinsic authority in the courts of justice."[246] But how were such writings to be weighed against judicial decisions, or against each other? Jeremy Bentham, writing in the 1770s, mocked the absence of any "common scale": "Every man, pleader or judge, makes up for himself fragments of such a scale, *pro re nata*, as it happens: and whether in

241. Kadens, *supra* note 51, at 1558.

242. *See* LIEBERMAN, *supra* note 239, at 86–87.

243. *See* Burset, *supra* note 91 (discussing the controversy surrounding *Perrin v. Blake*).

244. *See, e.g.*, LIEBERMAN, *supra* note 239, at 3; MICHAEL LOBBAN, THE COMMON LAW AND ENGLISH JURISPRUDENCE 1760-1850, at 98–114 (1991); Kadens, *supra* note 51, at 1556 & n.12.

245. *Cf.* Wendy Collins Perdue, *Personal Jurisdiction and the Beetle in the Box*, 32 B.C. L. REV. 529, 530–31 (1991) (describing a similar phenomenon in twentieth-century doctrines of personal jurisdiction).

246. 1 WILLIAM BLACKSTONE, COMMENTARIES *72–73.

any case that of the pleader shall happen to be the same with that of the Judge is a matter of [chance]."[247]

Bentham wasn't alone in recognizing this problem. Some judges responded to it by developing a norm (frequently but erroneously attributed to the nineteenth century[248]) against citing living authors. Bentham himself suggested that such a convention was emerging in his own day.[249] Mansfield had invoked it a few years earlier, when he blocked a barrister from citing Blackstone's *Commentaries* because their author lived.[250] Blackstone himself drew the line not between living and dead but between ancient and modern.[251] But these guidelines remained flexible and contested;[252] it is revealing not only that Mansfield refused to hear the *Commentaries* cited but also that a barrister had considered them citable.[253] (The barrister, incidentally, was Elijah Impey.[254])

Judges also tried to develop a scale for weighing opinions of counsel. Traditionally, the opinions of eminent lawyers had enjoyed

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247. JEREMY BENTHAM, *A Comment on the Commentaries*, *in* THE COLLECTED WORKS OF JEREMY BENTHAM: A COMMENT ON THE COMMENTARIES AND A FRAGMENT ON GOVERNMENT 1, 210 (J.H. Burns & H.L.A. Hart eds., 1977).

248. *See* Alexandra Braun, *Burying the Living? The Citation of Legal Writings in English Courts*, 58 AM. J. COMPAR. L. 27, 33 (2010) (arguing that the rule emerged at least by the early nineteenth century); Lord Neuberger of Abbotsbury, *Judges and Professors—Ships Passing in the Night?*, 77 RABEL J. COMPAR. & INT'L PRIV. L. 233, 235 (2013). This rule is sometimes referred to as "better read when dead." DUXBURY, *supra* note 62, at 78. (A warning, perhaps, to professors who thirst to be cited.)

249. BENTHAM, *supra* note 247, at 211.

250. *Postscript*, LONDON EVENING POST, May 15–17, 1770, at 4 (reporting Mansfield's statement that "he would suffer no such references in that Court; for though the work alluded to was of much utility to the public, and would be remembered and applied to, when the author was no more, yet, while living, he thought it unnecessary, as well as improper"). Awkwardly, Blackstone was on the bench at the time. *Id.*

251. *See* BENTHAM, *supra* note 247, at 209–10; *see also* JOHN DALRYMPLE, AN ESSAY TOWARDS A GENERAL HISTORY OF FEUDAL PROPERTY IN GREAT BRITAIN, at xi (London, A. Millar 4th ed. 1759) (explaining why he quoted "some modern writers . . . who may perhaps not be quoted as authorities in courts of law"). Mansfield also seems to have been skeptical of the newly departed. In 1774, when a barrister cited Vattel (d. 1767), Mansfield asked, "Does he quote any authorities?"—suggesting that while the Swiss jurist was citable, he was not an "authority" himself. Campbell v. Hall (1774) 98 Eng. Rep. 848, 879; Lofft. 655, 710 (K.B.).

252. James Ram's influential treatise found it "difficult, in some cases, to draw the line of partition between books that are, and books that are not, authority." Ram thought the key question was whether the author was a judge. JAMES RAM, THE SCIENCE OF LEGAL JUDGMENT 92–93 (London, A. Maxwell 1834).

253. *See, e.g.*, Kadens, *supra* note 60, at 164–65 (describing citations of modern authors at oral argument and in jury instructions); *cf.* DAWSON, *supra* note 47, at 97 (describing the rule against citing living authors as "only a rule of etiquette"). Francis Hargrave suggested that he cited Blackstone's *Commentaries* to Mansfield in *Somerset's Case* (1772), but he also admits that the printed report of his argument was "entirely a written composition" created for publication, so its accuracy is questionable. *The Case of James Sommersett*, *in* 20 A COMPLETE COLLECTION OF STATE TRIALS, 1771–1777, *supra* note 166, at 1, 23 n.*, 28.

254. *Postscript*, *supra* note 250, at 4.

significant authority, but only as evidence of what the profession thought.[255] Over the course of the eighteenth century, however, judges and lawyers increasingly cited individual opinions as authoritative in themselves.[256] In 1749, for example, Lord Chancellor Hardwicke described an opinion that he had coauthored while attorney general (known as the Yorke-Talbot opinion) as having settled certain questions about the legal status of slavery.[257] Hardwicke's self-citation reflected a growing tendency to treat the opinions of eminent lawyers as potentially decisive.[258] But, as with treatises, the weight of such opinions was contested.[259] When counsel cited the Yorke-Talbot opinion to Mansfield in 1772, he discounted its authority because it had been given "in Lincoln's Inn Hall after dinner."[260] Maybe Yorke and Talbot had too much to drink when they declared slavery compatible with English law.[261]

Two years later, Mansfield offered a more systematic treatment of lawyers' opinions in *Campbell v. Hall*.[262] At argument, Francis Hargrave cited an opinion given in 1689 by Sir John Somers and Sir George Treby. Mansfield asked whether the case had been referred to them in their official capacities as attorney and solicitor general—implying that an official opinion might carry more weight.[263] But his opinion ultimately declined to pursue that distinction. Instead, he stated that "opinions of counsel, *whether acting officially in a public charge or in private*, are not properly authority to found a decision," but merely evidence of what lawyers at the time had thought.[264] But not

255. *See* BAKER, *supra* note 59, at 87–89.

256. Sir John Baker has observed that in the eighteenth century, it "became a common practice for opinions [of counsel] to be transcribed into volumes for future reference," although historians have yet to explain why. *Id.* at 88.

257. Pearne v. Lisle (1749) 27 Eng. Rep. 47, 48; Amb. 75, 76–77.

258. American land speculators famously cited a "garbled version" of another opinion to justify land purchases from "Indians," even though a royal proclamation had barred such transactions. (The opinion's authors had been writing about South Asians, not Native Americans.) STUART BANNER, HOW THE INDIANS LOST THEIR LAND 101–03 (2005); JACK M. SOSIN, WHITEHALL AND THE WILDERNESS: THE MIDDLE WEST IN BRITISH COLONIAL POLICY, 1760–1775, at 230–34, 259–67 (1961).

259. *See, e.g.*, RAM, *supra* note 252, at 93–94 (quoting with approval Justice Buller's declaration that "opinions given by eminent men at the bar . . . have no weight in the scale of justice," but noting instances in which judges cited or relied on such opinions).

260. Somerset v. Stewart (1772) 98 Eng. Rep. 499, 503; Lofft. 1, 8.

261. *Cf.* 2 FRANCIS MASERES, THE CANADIAN FREEHOLDER 297–99 (London, B. White 1779) (critiquing another opinion by Yorke as "given very hastily and with very little attention").

262. *Campbell v. Hall* (1774), *in* 20 A COMPLETE COLLECTION OF STATE TRIALS, 1771–1777, *supra* note 166, at 239.

263. *Id.* at 300 ("Is it referred to them as officers of the crown?").

264. *Id.* at 326 (emphasis added). Later, Mansfield hinted that judicial dicta might outweigh opinions of counsel. *See id.* at 344 ("[N]o book, no saying of a judge, no not even an opinion of any counsel public or private, has been cited . . . .").

everyone agreed. Several decades later, the lawyer and imperial bureaucrat George Chalmers described the opinions of the Crown's law officers as "of little less authority, than decided law."[265]

One reason that treatises and opinions of counsel were so attractive to cite was their textual reliability. Eighteenth-century law reporting was messy. Judges did not send their opinions to the printer. Instead, they pronounced their decisions from the bench; what made it into print depended on what reporters happened to write down.[266] The quality of those reports varied widely.[267] "At present, I am always uncertain whether what is printed be a faithful report or not," one pamphleteer complained; "it comes with no authority, but from some private hand."[268] In response, Mansfield tapped James Burrow as the first authorized reporter of King's Bench decisions. But even Burrow provided only paraphrases of what judges said.[269] As a result, lawyers remained hungry for judges' actual words, even if they came from questionable sources. One prominent law reporter noted that "Mr. Baron Maseres has told me" that Justice Willes had disagreed with Mansfield's opinion in *Campbell*.[270] The dissent wasn't noted in other reports, and this game of telephone was the only indication in print that the decision hadn't been unanimous.[271]

Unlike judicial decisions, treatises and opinions of counsel came straight from their authors' pens. John Reeves, a barrister and colonial judge, acknowledged that the "opinions of law-officers" lacked the

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265. GEORGE CHALMERS, OPINIONS OF EMINENT LAWYERS, ON VARIOUS POINTS OF ENGLISH JURISPRUDENCE, at xxi–xxii (London, Reed & Hunter 1814); *see also* Alexander Du Toit, *Chalmers, George*, *in* DNB, *supra* note 11, https://doi.org/10.1093/ref:odnb/5028 [https://perma.cc/V5AP-WJNJ] (outlining Chalmers's life as a lawyer and English bureaucrat).

266. Tiersma, *supra* note 60, at 1200–01; *see also* Maeva Marcus, *Wilson as a Justice*, 17 GEO. J.L. & PUB. POL'Y 147, 158 (2019) (noting that federal courts were not required to issue written opinions in the 1790s).

267. *See* T.T. Arvind & Christian R. Burset, *A New Report of* Entick v. Carrington *(1765)*, 110 KY. L.J. (forthcoming 2022) (manuscript at 18–28), https://ssrn.com/abstract=3529420 [https://perma.cc/SBZ3-CUJQ] (discussing differences between the various reports of an eighteenth-century case).

268. ANOTHER LETTER TO MR. ALMON, IN MATTER OF LIBEL 147 (London, J. Almon 2d ed. 1771); *see also* Francis Hargrave, *Preface*, *in* 1 COLLECTANEA JURIDICA: CONSISTING OF TRACTS RELATIVE TO THE LAW AND CONSTITUTION OF ENGLAND, at A2 (Francis Hargrave ed., London, E. & R. Brooke 1791) ("[I]t must necessarily happen under the present want of regulation for an authentic and a continued publication of the Adjudications of our Courts of Law, that many important authorities will be left to float on the uncertain surface of tradition . . . .").

269. DAWSON, *supra* note 47, at 79. Unlike some reporters at the time, Burrow didn't know shorthand. *Id.* And even eighteenth-century shorthand systems "did not allow reporters to capture verbatim text." *See* MARY SARAH BILDER, MADISON'S HAND: REVISING THE CONSTITUTIONAL CONVENTION 23–24 (2015).

270. *Addenda—The Case of the Island of Grenada (Campbell v. Hall)*, *in* 20 A COMPLETE COLLECTION OF STATE TRIALS, 1771–1777, *supra* note 166, at 1387, 1389.

271. *See* Campbell v. Hall (1774) 98 Eng. Rep. 1045; 1 Cowp. 204 (containing no mention of any dissenting opinions).

"juridical authority" of "opinions delivered by judges upon the bench."[272] Nonetheless, he chose to rely on them in his well-regarded treatise on navigation laws. "[T]he opinions of lawyers have an advantage which [judicial opinions] have not," he explained; "they come down to us in the writing of the author . . . the opinions of courts, on the other hand, are usually conveyed by standers-by."[273] Advisory opinions had the same advantage—with the added benefit of having been given by the very "oracles which speak in our courts."[274]

There was another reason that advisory opinions were so alluring. Unlike ordinary cases, which were heard by the four members of a single court, advisory opinions were generally signed by all twelve common-law judges, which made the final product look enticingly authoritative. We can appreciate the effect of all those signatures by considering the phenomenon of twelve-judge decisions—an informal process of appellate review in which the judges of King's Bench, Common Pleas, and Exchequer consulted on difficult cases. Technically, twelve-judge deliberations were extrajudicial, and they served merely to advise the judge or judges who were actually hearing the case. Nonetheless, as James Oldham has shown, the resulting opinions "were *at times* considered to be weightier than decisions by only one of the common law courts."[275] At times. *Foster v. Thackary* (1781) provides an extreme example of the uncertainty this might cause. That case "was never finally decided and was never made public," but counsel later cited it as precedent.[276] Justice Buller also cited it as "a case of considerable authority"; but he wrote in dissent, so his colleagues presumably disagreed.[277]

In short, conditions were ideal for advisory opinions to be used in ways that their authors did not intend. Inadequate law reporting encouraged lawyers to seize on authentic texts, even if they had less authority than judicial opinions. The fragmentation of the declaratory theory meant that practitioners and judges disagreed about how much weight to give those second-tier texts. Bentham's sneering description of "the whole affair of authority" as plunged into "glorious uncertainty"

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272. JOHN REEVES, A HISTORY OF THE LAW OF SHIPPING AND NAVIGATION 9 (London, E. & R. Brooke 1792).

273. *Id.* at 9–10.

274. *See id.* at 9.

275. Oldham, *supra* note 25, at 193–94 (emphasis added).

276. *Id.* at 196.

277. Good v. Elliott (1790) 100 Eng. Rep. 808, 812; 3 T.R. 693, 702 (Buller, J., dissenting). These considerations also explain why dicta survived even as advisory opinions declined. First, everyone understood that dicta in a law report weren't the judge's actual words; they were, in a very real sense, the words of a reporter. *See* Tiersma, *supra* note 60, at 1208. Second, dicta were usually attributed to a single judge.

was unusually caustic but not inaccurate.[278] The situation would have been even more confusing for lay readers, who often failed to appreciate the nuances of contemporary jurisprudence.[279] Judges responded to this environment by trying to curtail their advisory activities.

B. Rethinking the Refusals

Advisory opinions had worked when everyone agreed what they signified. By the 1760s, however, a judge who signed onto such an opinion had to worry that readers might put it to very different uses from what had been intended. And the stakes of misuse were growing. Although Britain had experienced political conflict throughout the eighteenth century, partisan divisions reached a new pitch in the 1760s.[280] During that time, judging came to be viewed not merely as political but as partisan,[281] and writers more frequently attributed jurisprudential disagreements to judges' bad faith.[282] In that context, judges had less reason to believe that their advisory opinions would be given the provisional meaning that the classical common law had accorded them. In response, judges intensified their long-standing reluctance to give formal extrajudicial advice.

There were two concerns. The first was that a judge's adversaries might use an old opinion to embarrass him. Classical advisory opinions had insisted on judges' right to change their minds. In *Sackville's Case,* for example, the judges concluded by laying "in our claim not to be bound by this answer."[283] But judges had reason to doubt that readers would honor that claim. In 1767, for example, the Duke of

278. BENTHAM, *supra* note 247, at 211. Incidentally, the ironical phrase "the glorious uncertainty of the law" appears to have been coined in 1756. *Glorious*, OXFORD ENGLISH DICTIONARY (2d ed. 1989).

279. *Cf.* HUGH HENRY BRACKENRIDGE, LAW MISCELLANIES 53 (Philadelphia, P. Byrne 1814) ("The public opinion is that the courts are governed by decisions as if these made the law. . . . It ought not to be so . . . and it is a great matter that it be understood by the people . . . .").

280. *See, e.g.*, JOHN BREWER, PARTY IDEOLOGY AND POPULAR POLITICS AT THE ACCESSION OF GEORGE III, at 9 (1976); JUSTIN DU RIVAGE, REVOLUTION AGAINST EMPIRE: TAXES, POLITICS, AND THE ORIGINS OF AMERICAN INDEPENDENCE 180 (2017) (describing the polarization of North American political culture in the 1760s); JAMES M. VAUGHN, THE POLITICS OF EMPIRE AT THE ACCESSION OF GEORGE III: THE EAST INDIA COMPANY AND THE CRISIS AND TRANSFORMATION OF BRITAIN'S IMPERIAL STATE 71–72 (2019) (describing the rise of the radical Whig party in the 1760s).

281. During the reign of George II, judicial appointments had been controlled by a Whig oligarchy. After the accession of George III in 1760, the instability of party politics led to greater political diversity among judicial appointees—and a heightened potential for political conflict among them. *See* LEMMINGS, *supra* note 58, at 285–88.

282. *See, e.g.*, John Brewer, *The Wilkites and the Law, 1763-74: A Study of Radical Notions of Governance*, *in* AN UNGOVERNABLE PEOPLE: THE ENGLISH AND THEIR LAW IN THE SEVENTEENTH AND EIGHTEENTH CENTURIES 128 (John Brewer & John Styles eds., 1980).

283. *Supra* note 124 and accompanying text.

Newcastle plotted to publicize an eight-year-old opinion that his political rival, Lord Camden, had given when he was attorney general. The old opinion contradicted the position Camden now sought to advance in Parliament, and Newcastle assumed that Camden would "have a Difficulty" opposing "a Point, which he has himself, in a formal Report, declared."[284] Newcastle bragged about this tactic to his friend Mansfield, who perhaps wondered whether he had any inconvenient past opinions of his own.[285] Newcastle should have understood that law officers sometimes wrote things in their official capacities that might not fully comport with their private views.[286] But if politicians refused to acknowledge that, how could judges trust them to recognize the subtle difference between judicial and advisory opinions? Mansfield himself got a taste of this in 1772, when the lawyer Charles Fearne accused him of giving an opinion when he was solicitor general that contradicted his later opinion on the bench.[287] This did not bode well for any judge who hoped to rethink an advisory opinion.

The second concern was that readers might distort the law by imputing excessive authority to advisory opinions. During Impey's impeachment, a dispute arose about the admissibility of evidence. Sir Lloyd Kenyon, the Master of the Rolls, told the House of Commons that "the Judges were ready to give their opinion" as needed: "Upon all disputed points the law would be pronounced from the Woolsack" (the Lord Chancellor's seat), "and what was so pronounced must be considered as law."[288] Edmund Burke balked at that description of judicial authority, and he warned that Kenyon "held too high an opinion of the determination of the Judges."[289] Burke told the chamber that he "had contended, and with success, against the unanimous opinion of the

284. Letter from the Duke of Newcastle to the Duke of Bedford (May 23, 1767), Add. Ms. 32982, at 99–100 (on file with the British Library).

285. Letter from the Duke of Newcastle to Lord Mansfield (May 24, 1767), Add. Ms. 32982, at 111 (on file with the British Library).

286. *See, e.g.*, *Debate in the Commons on the Resolutions for Restraining the East India Company's Dividends: Statement of Speaker Fletcher Norton (Mar. 23, 1773)*, *in* 17 PARLIAMENTARY HISTORY, *supra* note 73, at 813, 824 ("Respecting the opinion I formerly gave upon the subject, being not then in office, it may be supposed a transcript of my real sentiments.").

287. Mary Sarah Bilder, *The Relevance of Colonial Appeals to the Privy Council*, *in* TEXTS AND CONTEXTS IN LEGAL HISTORY: ESSAYS IN HONOR OF CHARLES DONAHUE 413, 425 (John Witte, Jr., Sara McDougall & Anna Di Robilant eds., 2016). The allegation was serious enough that Mansfield felt compelled to deny it from the bench. *See* Hodgson v. Ambrose (1780) 99 Eng. Rep. 216, 220; 1 Dougl. 337, 343–44. The incident remained fodder for lawyerly gossip more than seventy years later. JAMES OLDHAM, ENGLISH COMMON LAW IN THE AGE OF MANSFIELD 356 (2004).

288. *Proceedings on the Impeachment of Sir Elijah Impey: Statement of Sir Lloyd Kenyon, Master of the Rolls (Feb. 7, 1788)*, *in* 26 PARLIAMENTARY HISTORY, *supra* note 73, at 1340, 1424.

289. *Proceedings on the Impeachment of Sir Elijah Impey: Statement of Edmund Burke (Feb. 7, 1788)*, *in* 26 PARLIAMENTARY HISTORY, *supra* note 73, at 1340, 1424.

Judges," which was worthy of respect but not infallible.[290] Although Kenyon was the front-runner to succeed Mansfield as Lord Chief Justice, Burke hoped that he might wait "some time longer" before getting promoted—"as it were, performing quarantine," so that he would not infect the bench with his diseased notions of judicial supremacy.[291]

The exchange illustrated the ambiguities of contemporary jurisprudence. Neither Kenyon nor Burke believed that judges could make new law, particularly through extrajudicial declarations.[292] But they nonetheless disagreed about the evidentiary value of judges' opinions. As a result, judges could not be sure whether their extrajudicial pronouncements would be "considered as law," as Kenyon put it, or as contestable evidence of the law.[293] This exchange wasn't an isolated occurrence. In *Entick v. Carrington* (1765), Lord Camden had felt compelled to remind his listeners that "the Opinion of all the 12 Judges of England" could not "extrajudicially make a Law to bind the Kingdom."[294]

Impey himself had articulated this concern while he was still in India. Although he resisted giving advisory opinions to executive officials in Bengal, he and his colleagues were more willing to advise courts from other British settlements in India, which were not within the SCJ's appellate jurisdiction. When giving that advice, Impey warned that his "opinion must be understood as not carrying any Authority with it from my station nor have any greater weight given to it than that of a Counsel in England on a Cause laid before him. . . . [A]ny advice we give must be understood private & not ex Officio."[295] Impey and his colleagues soon decided that those warnings were insufficient, and a short time later, they declined to speak even in their private capacities. "[I]f more weight were given to [our letter] than a private Opinion deserves," the judges explained, "it might create Mischiefs that we forsee [sic] and many that can not possibly be

290. *Id.*

291. *Id.* Kenyon became Lord Chief Justice a few months later.

292. *See, e.g.*, Good v. Elliott (1790) 100 Eng. Rep. 808, 815; 3 Term. Rep. 693, 706 (Kenyon, C.J.).

293. *Proceedings on the Impeachment of Sir Elijah Impey: Statement of Edmund Burke (Feb. 7, 1788)*, in 26 PARLIAMENTARY HISTORY, *supra* note 73, at 1424.

294. Arvind & Burset, *supra* note 267, at 62 (quoting a manuscript report of the case).

295. Letter from Elijah Impey to John Turing (Oct. 4, 1776), Add. Ms. 16265, at 129v–131v (on file with the British Library); *see also* Letter from Elijah Impey to Andrew Ross (Oct. 11, 1776), Add. Ms. 16266, at 26v (on file with the British Library) (asking that his opinion "be only considered as the private opinion of a private Barrister").

foreseen."[296] In the increasingly vitriolic politics of British India, no caveat could be strong enough to prevent misuse.

Later events justified that caution. Recall the judges' opinion about whether Warren Hastings had resigned.[297] Although the judges expressly denied that it had any intrinsic authority, Clavering and Francis nonetheless called it a "judgment," binding on them as parties even though they disputed its reasoning.[298] When the judges sent the Council another letter a few days later to clarify their original opinion,[299] the councilors replied that they "regard[ed] it as legal authority."[300] Richard Barwell later testified to a parliamentary committee "that it would have been his duty" to follow the opinions of the judges, even if he had disagreed with their advice.[301] In other words, he, too, treated it as a judgment, despite the judges' insistence that it was no such thing. But Barwell wasn't even consistent in overvaluing advisory opinions. He told the same committee that he *also* felt bound to follow the advice of a Company-appointed lawyer, even when it conflicted with the judges' determinations.[302] More than four years after the fact, he still could not articulate a coherent theory of how seriously he ought to have taken the judges' words.

American judges shared these concerns. Anxiety about the nature of legal authority was part of the new republic's inheritance.[303] As a result, American judges also inherited the growing discomfort with extrajudicial opinions. In 1787, for example, a Connecticut court warned justices of the peace "to be cautious in declaring extra-judicial

296. Letter from the JJ. of the Sup. Ct. of Judicature to the Governor-Gen. & Council (Oct. 19, 1776), Add. Ms. 16266, at 31r–31v (on file with the British Library). The justices later resumed their private advice-giving, once colonial politics cooled down and it seemed that their letters would "not be productive of mischief." JJ. of the Sup. Ct. of Judicature to the Governor-Gen. & Council, Copy of Parts of a Letter from the Judges to the Governour General and Council of Fort William Containing Their Answers to the Questions Proposed by the President and Council of Fort St. George (Oct. 30, 1777), Add. Ms. 38400, at 117r (on file with the British Library).

297. *Supra* notes 173–177 and accompanying text.

298. Minute from John Clavering & Philip Francis (June 23, 1777), *in* 12 BENGAL: PAST & PRESENT, *supra* note 174, at 18, 18.

299. Letter from the JJ. of the Sup. Ct. of Judicature to the Governor-Gen. & Council (June 24, 1777), *in* 12 BENGAL: PAST & PRESENT, *supra* note 174, at 26, 26.

300. Letter from Warren Hastings & Richard Barwell to the JJ. of the Sup. Ct. of Judicature (June 24, 1777), *in* 12 BENGAL: PAST & PRESENT, *supra* note 174, at 27, 27.

301. REPORT FROM THE COMMITTEE ON PETITIONS RELATIVE TO THE ADMINISTRATION OF JUSTICE IN INDIA (May 8, 1781), *reprinted in* REPORTS, *supra* note 154, at 1, 28.

302. *Id.* at 28–29.

303. *See, e.g.*, Kempin, *supra* note 60, at 37–38; Robert J. Pushaw Jr., *Article III's Case/Controversy Distinction and the Dual Functions of Federal Courts*, 69 NOTRE DAME L. REV. 447, 476 & n.145 (1994) (arguing that stare decisis might not have been established in the United States until the nineteenth century).

opinions, lest an undue use should be made of them."[304] The judges of most other states seem to have shared this concern.[305]

American judges also feared their old opinions might be used to embarrass them. Consider the events leading up to *Hayburn's Case*.[306] In 1792, the judges of three circuit courts wrote to President Washington about legislation that instructed them to review veterans' pension claims. In one such letter, Justice Iredell and Judge John Sitgreaves emphasized "the necessity of judges being in general extremely cautious in not intimating an opinion in any case extra-judicially."[307] In part, they were worried that doing so might bias them in future litigation. But they also feared embarrassment if they changed their minds.[308] "[I]f we can be convinced this opinion is a wrong one, we shall not hesitate to act accordingly," they insisted; "being as far from the weakness of supposing that there is any reproach in having committed an error, to which the greatest and best men are sometimes liable."[309] This was a preemptive defense against the criticism they might receive for appearing to flip-flop. In the politically charged landscape of the 1790s—a time when the structure and role of the federal judiciary were deeply contested[310]—judges simply lacked confidence that their extrajudicial writings would be read in the proper spirit.[311]

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304. Wilson v. Hinkley, 1 Kirby 199, 201 (Conn. Super. Ct. 1787) (per curiam).

305. *See* Letter from Robert R. Livingston to John Jay, Governor, New York (Mar. 21, 1801), *supra* note 224, at 482 (noting Chancellor Livingston's position). There were limited exceptions in Massachusetts, New Hampshire, and Pennsylvania. *See infra* Appendix.

306. 2 U.S. (2 Dall.) 409 (1792).

307. Letter from James Iredell & John Sitgreaves to George Washington (June 8, 1792), *reprinted in* Hayburn's Case, 2 U.S. (2 Dall.) at 413 n.*.

308. Later judges were sometimes more explicit about their fear of humiliation. *See, e.g.*, *In re* Advisory Opinion, 169 S.E.2d 697, 700 (N.C. 1969) ("Otherwise, as justices . . . we may find ourselves embarrassed by an advisory opinion given without the benefit of argument and briefs."); *In re* Requests to Judges in Chancery for Advisory Opinions, 137 A. 151, 151 (N.J. Ch. 1927) (warning that an advisory opinion "may embarrass [a judge] immensely when the matter comes before him officially").

309. Letter from James Iredell & John Sitgreaves to George Washington (June 8, 1792), *supra* note 307.

310. *See* ALISON L. LACROIX, THE IDEOLOGICAL ORIGINS OF AMERICAN FEDERALISM 186 (2010) (discussing reservations about the Judiciary Act of 1789).

311. Focusing on the potential misuse of advisory opinions also explains why some kinds of extrajudicial activity disappeared while others survived. *See supra* notes 21–27 and accompanying text. For example, because private advice was unlikely to circulate widely, it had less risk of being misinterpreted by the public. Advice that judges gave to another court or in a quasi-appellate capacity was also less likely to be misinterpreted, because in both situations, the advice would eventually be linked to a judgment. *Cf.* A[rchibald] Macdonald, Opinion of the Attorney General (Oct. 22, 1792), *in* 1 MCARTHUR, *supra* note 26, at 430, 432 (describing the capacity of judges to "solemnly settle[ ]" the legality of court-martial verdicts).

It's unsurprising that the Justices didn't mention these concerns in the *Correspondence* itself. Their letter instead emphasized their right to say no,[312] while also invoking the classical concern with prejudging cases.[313] This was sufficient to justify their refusal, so there was no need to add the more insulting argument that the president or the American people could not be trusted to read an advisory opinion correctly. Besides, if the Justices' fundamental fear was that their writings might be misread, they had every reason to keep their letter as short as possible.

C. How the Correspondence Was Canonized

The Justices of 1793 meant to discourage the Washington Administration from seeking advisory opinions, but they did not declare them unconstitutional. How, then, was the *Correspondence* transformed into a constitutional landmark?

First, let's consider why the executive branch didn't keep asking for the Justices' advice. The main reason was logistical: the early Justices were in the capital for only a few weeks each year.[314] The Justices had made it clear that, like English judges, they wouldn't give opinions without an opportunity for in-person discussion.[315] Furthermore, to the extent that the Administration hoped to use opinions for political cover, their value would have been diminished without a full set of signatures. As a result, judicial advice would usually have taken weeks to obtain—even if the Justices had wanted to give it.

The practical difficulties increased in 1794, when the President sent the Chief Justice to London to negotiate what became known as the Jay Treaty. By the time he returned to the United States in 1795, he had been elected Governor of New York. Jay's successor, John Rutledge, denounced the Jay Treaty shortly after his nomination; his ill-advised speech led the Senate to reject his nomination and some observers to question his sanity.[316] This was not someone whose opinion President Washington was likely to solicit. The next Chief Justice, Oliver Ellsworth, was more sound; but in 1799, he left on a mission to

312. *See supra* notes 201–209 and accompanying text.

313. This is what the judges seem to have meant when they said they were judges of a "court in the last resort." *See* Wheeler, *supra* note 184, at 152. Professor Casto suggests that this phrase was meant to reinforce the Justices' right to refuse by drawing an analogy to the House of Lords, which did not issue advisory opinions. Casto, *supra* note 52, at 188–89.

314. *See* JAY, *supra* note 38, at 98–99; White, *supra* note 24, at 6–7.

315. *See supra* note 190 and accompanying text.

316. *See supra* note 214.

France.[317] Chief Justice Marshall, appointed in 1801, had the virtue of remaining in the country; but his advice would have been uncongenial to President Jefferson, his longtime antagonist, or to President Madison, who thought that the Marshall Court already had too many chances to say what the law is.[318] President Monroe, elected in 1816, was more interested in the Court's views.[319] But by then, the presidency had functioned for nearly three decades without advisory opinions.

This was possible thanks to the advice-giving role of the attorney general. As the Justices emphasized, the Constitution authorized the president to require opinions from the heads of executive departments; and the Judiciary Act of 1789 directed the attorney general "to give his advice and opinion upon questions of law when required by the President of the United States, or when requested by the heads of any of the departments."[320] The first attorneys general had little prestige and no supervisory authority—not even over U.S. Attorneys[321]—and early occupants of the office seem to have viewed opinion-giving as a rare chance to be useful.[322] Like their English counterparts, American attorneys general believed that their oaths obliged them to faithfully expound the law—just like judges.[323] Indeed, Attorney General William Wirt described himself "as a judge, called to decide a question of law

317. *See supra* note 214.

318. *See* R. KENT NEWMYER, THE TREASON TRIAL OF AARON BURR: LAW, POLITICS, AND THE CHARACTER WARS OF THE NEW NATION 46–47 (2012) (discussing Jefferson and Marshall's "intense dislike and distrust of one another"); Letter from James Madison to Spencer Roane (Sept. 2, 1819), *in* 1 THE PAPERS OF JAMES MADISON 500–04 (David B. Mattern, J.C.A. Stagg, Mary Parke Johnson & Anne Mandeville Colony eds., 2009) (Madison discussing his displeasure with the Court's "latitudinary mode of expounding the Constitution" in *Marbury v. Madison*).

319. David S. Schwartz, *Misreading* McCulloch v. Maryland, 18 U. PA. J. CONST. L. 1, 85–88 (2015). In 1822, President Monroe sent the Justices a pamphlet he had written about internal improvements. *Id.* at 85. Three Justices replied; but although two of the letters offered some legal commentary, the Court as a whole did not offer an advisory opinion. *Id.* at 85–88. Justice Johnson's letter purported to speak for the full Court; but, as Professor Schwartz shows, that wasn't accurate. *Id.* at 85–86. Justice Story expressly declined "to express any opinion." *Id.* at 85. Accordingly, the Justices' replies were in the nature of private advice, not advisory opinions.

320. Judiciary Act of 1789, ch. 20, § 35, 1 Stat. 73, 93.

321. Edmund Randolph was paid less than the other members of the Cabinet; he didn't have his own office; and he couldn't persuade Congress to pay for a single clerk. Jed Handelsman Shugerman, *The Creation of the Department of Justice: Professionalization Without Civil Rights or Civil Service*, 66 STAN. L. REV. 121, 131 (2014).

322. When Jefferson learned of the Justices' refusal, he asked Randolph "if we could not prepare a bill for Congress to appoint a board or some other body of advice for the Executive on such questions." Letter from Thomas Jefferson to James Madison (Aug. 11, 1793), *in* 26 THE PAPERS OF THOMAS JEFFERSON, *supra* note 220, at 651, 653. Randolph replied that "he should propose to annex it to his office." *Id.*

323. HAMBURGER, *supra* note 49, at 320–21; Trevor W. Morrison, *Stare Decisis in the Office of Legal Counsel*, 110 COLUM. L. REV. 1448, 1471 (2010).

with the impartiality and integrity which characterizes the judician."[324] Such a perspective allowed holders of that office to become increasingly effective substitutes for judicial advisors.[325] Analogous developments facilitated the demise of advisory opinions in England[326] and Bengal.[327]

Meanwhile, the prevailing understanding of the Justices' actions in 1793 had evolved. Initially, observers did not see the *Correspondence* as announcing a constitutional principle. On receiving the Justices' letter, Jefferson observed only that "they declined being consulted," and that English admiralty judges showed no such reluctance.[328] A decade later, however, Chief Justice Marshall offered a different gloss. In his biography of George Washington, he described the *Correspondence* as reflecting the Justices' view that the Court was only "a legal tribunal for the decision of controversies brought before them in legal form," and that it would be "improper to enter the field of politics, by declaring their opinions on questions not growing out of the case before them."[329] Marshall apparently hadn't seen the Justices' letter,[330] and it's not clear how he arrived at his interpretation.[331] But it quickly became canonical. Thomas Sergeant, a former justice of the Pennsylvania Supreme Court, adopted Marshall's explanation nearly verbatim in his treatise on

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324. Shugerman, *supra* note 321, at 133 (quoting Letter from William Wirt to John C. Calhoun (Feb. 3, 1820)).

325. *See* DAVID R. DEENER, THE UNITED STATES ATTORNEYS GENERAL AND INTERNATIONAL LAW 22–24 (1957).

326. The attorney and solicitor general gradually gained prestige during the eighteenth century. EDWARDS, *supra* note 218, at 279–80. By the end of the century, they remained servants of the Crown, but they were no longer seen as totally subservient. *See* Oldham, *supra* note 77, at 172–73*; see also* GORDON H. WARREN, FOUNTAIN OF DISCONTENT: THE *TRENT* AFFAIR AND FREEDOM OF THE SEAS 99 (1981) (suggesting that the prime minister rightly relied "on the written opinion of the law officers," rather than the oral advice of the Lord Chancellor and an admiralty judge, concerning a question of international law during the 1860s).

327. In 1776, the East India Company appointed Sir John Day as the first advocate general of Bengal. J. Duncan M. Derrett, *Justice, Equity, and Good Conscience*, *in* CHANGING LAW IN DEVELOPING COUNTRIES 114, 134 (J.N.D. Anderson ed., 1963). Although he had been appointed partly to represent the Council before the SCJ, his practice consisted mostly of rendering legal opinions. JOHN DAY, STATE OF SIR JOHN DAY'S CLAIM UPON THE EAST-INDIA COMPANY 2 (London, 1787).

328. Letter from Thomas Jefferson to James Madison (Aug. 11, 1793), *supra* note 322.

329. 5 JOHN MARSHALL, THE LIFE OF GEORGE WASHINGTON 441 (Philadelphia, C.P. Wayne 1804).

330. He didn't quote the *Correspondence*, and he seemed to be guessing about its date. Specifically, he was unsure whether it had been received when the Cabinet met on August 3. *Id.* at 441–42. (The letter is dated August 8.) The *Correspondence* was only printed in 1891. Wheeler, *supra* note 184, at 145 n.98.

331. Professor Steilen has argued that a new understanding of judging emerged in the 1790s, which emphasized courts' unique authority to expound laws through the nonpolitical process of litigation. Matthew Steilen, *Judicial Review and Non-Enforcement at the Founding*, 17 U. PA. J. CONST. L. 479, 561–67 (2014). Under this paradigm, various kinds of extrajudicial commentary, including politicized grand jury charges and advisory opinions, came to seem at odds with judicial office. *Id.* Marshall's retelling of the *Correspondence* sounded similar themes.

constitutional law.[332] Justice Story, in turn, relied on Sergeant's treatise, in addition to Marshall's biography, when making his own pronouncement in 1833 that federal judges "cannot . . . be called upon to advise the president in any executive measures; or to give extrajudicial interpretations of law."[333] Marshall's account, amplified by Story's treatise, became the basis of the standard view of federal judicial power in the early twentieth century.[334] Reformers continued occasionally to call for a revival of advisory opinions, but at that point, they were arguing for a practice that had been disfavored for more than a century.[335]

CONCLUSION

The Jay Court's famous refusal of 1793 was a pragmatic response to growing anxiety about the nature of legal authority, not a declaration that the Constitution barred advisory opinions. This historical discovery has far-reaching implications. As Dean Erwin Chemerinsky has observed, "justiciability doctrines exist largely to ensure that federal courts will not issue advisory opinions."[336] One might ask whether those doctrines need a new purpose.

Answering that question is work for another day, but it might be helpful to suggest some points of departure. As an initial matter, this Article does not argue that federal courts should get into the advice business. Federal judges never had a duty to give advisory opinions; and their long practice to the contrary has created a strong norm—and perhaps even a constitutional rule—against starting now.[337] Moreover,

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332. THOMAS SERGEANT, CONSTITUTIONAL LAW: BEING A VIEW OF THE PRACTICE AND JURISDICTION OF THE COURTS OF THE UNITED STATES, AND OF CONSTITUTIONAL POINTS DECIDED 375 (Philadelphia, P.H. Nicklin & T. Johnson 2d ed. 1830) (1822).

333. 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 651 (Boston, Hilliard, Gray & Co. 1833). Story's constitutional interpretation aligned with his broader views about the proper role of the judiciary: in 1820, he led an effort to amend the Massachusetts Constitution so as to eliminate its provision authorizing advisory opinions. JOURNAL OF DEBATES AND PROCEEDINGS IN THE CONVENTION OF DELEGATES CHOSEN TO REVISE THE CONSTITUTION OF MASSACHUSETTS 72 (Boston, The Daily Advertiser 1821); TOPF, *supra* note 18, at 35–36.

334. *See* United States v. Evans, 213 U.S. 297, 301 (1909) (quoting Marshall and citing Story); *see also* Wheeler, *supra* note 184, at 145 (describing the adoption of Story's account). Alexis de Tocqueville further amplified Story's perspective when he used the *Commentaries* as one of the principal sources for his account of the American judiciary. *See* ANDRÉ JARDIN, TOCQUEVILLE: A BIOGRAPHY 201–03 (Lydia Davis & Robert Hemenway trans., 1989) (describing Tocqueville's reliance on Story); 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 169–75 (Eduardo Nolla ed., James T. Schleifer trans., Liberty Fund 2012) (1840). The first Supreme Court opinion to rely directly on the *Correspondence* was *Muskrat v. United States*, 219 U.S. 346 (1911).

335. *See infra* Appendix.

336. ERWIN CHEMERINSKY, FEDERAL JURISDICTION 54 (7th ed. 2016).

337. *See supra* note 15.

the practical concerns that motivated the Jay Court persist. One might think, in our more positivist legal culture, that it would be simple enough for a court (or legislature) to make advisory opinions safe by declaring them nonbinding. But the effort would almost certainly fail.[338] Consider, for example, the debate about the precedential authority of unpublished opinions.[339] Indeed, we still can't agree about the binding scope of judicial decisions.[340] Anxiety about legal authority still lurks, even if it's sometimes out of sight.[341]

To some extent, then, the status quo should persist, but on a new conceptual footing. In fact, one advantage of this Article's historical argument is that we can make sense of practices that now seem doctrinally dubious but practically irradicable. Consider the perennial debate about whether federal courts ought to focus primarily on "law declaration" or "dispute resolution."[342] In practice, of course, they do both; but the Supreme Court has tended in recent years to privilege the former.[343] Regardless of whether that's desirable, it creates a conceptual problem. As several scholars have argued, a focus on law declaration fits uneasily with the justiciability doctrines of standing, ripeness, and mootness, which "rest on a dispute resolution model of adjudication."[344] But this apparent tension is less troubling once we recover the Court's historical reasons for avoiding extrajudicial advice. Their refusal to give an advisory opinion—the decision that was the mother of all justiciability doctrines—was itself a product of their desire to declare

338. *See* CARISSIMA MATHEN, COURTS WITHOUT CASES: THE LAW AND POLITICS OF ADVISORY OPINIONS 213–21 (2019) (describing Canadian courts' failure to distinguish between references and ordinary cases); THAYER, *supra* note 211, at 58–59 (lamenting "a popular impression that [advisory opinions in Massachusetts] are on the same footing as decisions in litigated cases").

339. *See, e.g.*, Daniel Epps & William Ortman, *The Lottery Docket*, 116 MICH. L. REV. 705, 723 (2018); Andrea Pin & Francesca M. Genova, *The Duty to Disclose Adverse Precedents: The Spirit of the Common Law and Its Enemies*, 44 YALE J. INT'L L. 239, 261 & n.141 (2019); Norman R. Williams, *The Failings of Originalism: The Federal Courts and the Power of Precedent*, 37 U.C. DAVIS L. REV. 761, 776–77 (2004).

340. *See, e.g.*, RANDY J. KOZEL, SETTLED VERSUS RIGHT: A THEORY OF PRECEDENT 70–91 (2017); Adam N. Steinman, *Case Law*, 97 B.U. L. REV. 1947 (2017); Charles W. Tyler, *The Adjudicative Model of Precedent*, 87 U. CHI. L. REV. 1551 (2020); Nina Varsava, *Precedent on Precedent*, 169 U. PA. L. REV. ONLINE 118 (2020).

341. *Cf.* Simpson, *supra* note 52, at 87 ("[W]hat is the authoritarian pecking order between a decision of the American Supreme Court, dicta by the late Scrutton L.J., and an article by Pollock? There are no rules to deal with conundrums of this sort."); Robert C. Berring, *Legal Information and the Search for Cognitive Authority*, 88 CALIF. L. REV. 1673, 1688–91 (2000) (arguing that the fragmentation of legal authority in the late twentieth century contributed to the growing number of split Supreme Court decisions).

342. *See, e.g.*, Henry Paul Monaghan, *On Avoiding Avoidance, Agenda Control, and Related Matters*, 112 COLUM. L. REV. 665 (2012).

343. *Id.*

344. Pushaw, *supra* note 303, at 453; *accord* Gary Lawson, *Stipulating the Law*, 109 MICH. L. REV. 1191, 1222 (2011).

the law more effectively. From that perspective, it becomes clear that justiciability is about protecting law declaration, not just ensuring that courts remain focused on resolving concrete disputes.

In one sense, the connection between justiciability and law declaration is well known. Indeed, the Supreme Court has described the utility of adversarial presentation as one of the chief arguments against advisory opinions today.[345] But that wasn't what motivated the Jay Court. As Part II showed, classical common-law judges had also emphasized the benefits of adversarialism, and yet they continued to give advisory opinions without it. What really pushed the Justices into silence was their desire to avoid statements that might later distort the law. That decision depended not on their perception of limited power under Article III but on a prudential judgment about what their judicial duty required. If that's right, then it might be productive to revisit older notions of justiciability, which saw the doctrine as a prudential tool rather than an inexorable constitutional command.[346]

In some cases, such an approach might actually lead judges to speak less—for example, by forgoing dicta that readers might be tempted to take too seriously.[347] The law now treats dicta as a kind of loophole to the rule against advisory opinions; a more historically grounded approach would allow us to think more forthrightly about the similar kinds of problems they raise.[348] At the same time, a more historically sensitive approach might sometimes free judges from the contortions required by an artificial avoidance of advisory opinions.[349]

This Article also makes a methodological intervention. Inquiries into the original meaning of the Constitution, whether by self-described originalists or otherwise, tend to draw a straight line from England to

345. *See* Pfander & Birk, *supra* note 72, at 1360 ("[T]he Supreme Court has treated decisions rendered without full adversarial briefing as entitled to less precedential weight than decisions rendered on fully developed records.").

346. *See* Heather Elliott, *The Functions of Standing*, 61 STAN. L. REV. 459, 471–72 (2008) (describing this older notion of standing).

347. *Cf.* Pierre N. Leval, *Judging Under the Constitution: Dicta About Dicta*, 81 N.Y.U. L. REV. 1249 (2006) (worrying that judges and lawyers too readily treat dicta as binding law).

348. *See, e.g.*, Michael C. Dorf, *Dicta and Article III*, 142 U. PA. L. REV. 1997, 2006 (1994); Lee, *supra* note 17, at 648–49; Frederick Schauer, *Giving Reasons*, 47 STAN. L. REV. 633, 654–56 (1995).

349. I tentatively suggest two possible applications. First, some scholars have suggested that the doctrine of constitutional avoidance has been distorted by the perceived need to prevent courts from issuing advisory opinions. *See, e.g.*, Eric S. Fish, *Constitutional Avoidance as Interpretation and as Remedy*, 114 MICH. L. REV. 1275, 1283–85 (2016); William K. Kelley, *Avoiding Constitutional Questions as a Three-Branch Problem*, 86 CORNELL L. REV. 831, 840–81 (2001). Second, this Article suggests that courts in qualified-immunity cases need not worry that decisions on the constitutional merits are prohibited by Article III. *See* Aaron L. Nielson & Christopher J. Walker, *The New Qualified Immunity*, 89 S. CAL. L. REV. 1, 13–14 (2015) (discussing this concern). Of course, constitutionality is not the only concern, and prudential considerations might lead courts to maintain their current practice.

the early republic.[350] To capture the Founders' legal worldview, courts and commentators typically look to canonical English texts like Blackstone's *Commentaries* or the practice of the Westminster courts, and perhaps adding evidence from early American treatises or case reports. This move is sometimes justifiable. For instance, the early Supreme Court deliberately modeled its procedures on "the practice of the courts of King's Bench and Chancery in England."[351] It makes sense, then, to examine those English courts to illuminate some aspects of early federal procedure.[352]

In general, however, American lawyers saw themselves as inheriting not the practice of specific courts but the common law itself—a law that wasn't tied to any particular jurisdiction.[353] If what we're after is the eighteenth-century common law, then we should seek it wherever it was administered, including British colonies that did not become part of the United States. Of course, English materials will often be the easiest ones to access; and there might be doctrinal reasons to prefer the products of Westminster courts. But for some topics—such as the behavior of a newly created supreme court—the study of colonial legal materials offers an incomparable opportunity to understand the nature of judging in the eighteenth century.

APPENDIX: EXTRAJUDICIAL STRAGGLERS

This Article has followed conventional wisdom in assuming that English judges gave their last advisory opinion to the Crown in 1760.[354]

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350. *See* James E. Pfander & Daniel D. Birk, *Article III and the Scottish Judiciary*, 124 HARV. L. REV. 1613, 1614 (2011) (summarizing and critiquing this view). Professors Pfander and Birk have sought to broaden our perspective in a different way by emphasizing Scottish influences on the Founders' conception of judicial power. For other discussions of the importance of Scots law and legal theory, see LACROIX, *supra* note 310, at 24–29, 87–88, 120–24; William Ewald, *James Wilson and the Scottish Enlightenment*, 12 U. PA. J. CONST. L. 1053, 1097–98 (2010); and James E. Pfander, *Standing To Sue: Lessons from Scotland's Actio Popularis*, 66 DUKE L.J. 1493 (2017).

351. Hayburn's Case, 2 U.S. (2 Dall.) 408, 410 (1792).

352. *See, e.g.*, Pushaw, *supra* note 303, at 473 (examining English practice to consider the definition of a "case"). Even early federal practice, however, sometimes looked not to specific English courts but to broader concepts, such as "the principles, rules and usages which belong to courts of equity and to courts of admiralty." Anthony J. Bellia, Jr. & Bradford R. Clark, *The Original Source of the Cause of Action in Federal Courts: The Example of the Alien Tort Statute*, 101 VA. L. REV. 609, 653 (2015) (quoting Act of May 8, 1792, ch. 36, § 2, 1 Stat. 275, 276 (repealed 1872)).

353. *See, e.g.*, Nelson, *supra* note 52, at 937 & n.49 ("As Chancellor Taylor observed, . . . 'it was the common law we adopted, and not English decisions.' "); Stephen E. Sachs, *Pennoyer Was Right*, 95 TEX. L. REV. 1249, 1262–63 (2017).

354. The reporter of *Sackville's Case*, a lawyer and member of Parliament named Robert Henley Eden, described it in 1818 as "the last time that the crown has taken the opinion of the judges extrajudicially." Sackville's Case (1760) 28 Eng. Rep. 940, 941; 2 Eden 371, 372 n. Later

But reporting was irregular, and it's possible that later specimens exist.[355] If one is found, what would that mean for this Article?

Not much. Its claim is merely that English judges tried to end their advisory practice after 1760. That historians have assumed for more than two centuries that advisory opinions ceased after that date is good evidence that the practice at least became less frequent. But it wouldn't be surprising if judges continued to issue stray advisory opinions in later years. Well into the nineteenth century, judges continued to swear an oath to advise the king.[356] If the Crown really wanted an advisory opinion, it could get one.[357]

For the sake of building a complete historical record, this Appendix considers an extrajudicial opinion that English judges gave in 1785, which has so far escaped the attention of legal historians. The matter began when Major General Charles Ross wrote a letter to a London newspaper in which he attacked his former commander.[358] George III and his cabinet agreed that Ross ought to be court-martialed "for his having published a letter so derogatory to the honour of a superior officer."[359] A court-martial duly assembled on March 3, at which point its members raised doubts about their jurisdiction. Ross was on "half-pay"—basically, in semiretirement—and it was unclear whether half-pay officers were subject to military law.[360] Accordingly, the court-martial adjourned to get the judges' opinion.[361] The judges were away on circuit; but on April 26, after they had returned, they stated that neither Ross's warrant as a general officer nor his half-pay pension subjected him to military law.[362] The court-martial accordingly dissolved.

So far, this looks a lot like *Sackville's Case*: an opinion from the twelve judges about the jurisdiction of a court-martial, rendered at the

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scholars have accepted this statement. *See, e.g.*, HAMBURGER, *supra* note 49, at 508 n.2; Thayer, *supra* note 211, at 46.

355. *See* JAY, *supra* note 38, at 149 n.120.

356. *See* OATH OF THE JUSTICES (1346), *supra* note 48.

357. *See, e.g.*, Letter from Henry Dundas, Home Sec'y, to Lord Loughborough, C.J. of Common Pleas (Sept. 12, 1792), *supra* note 21 (suggesting that the Crown had a "right to call for your sentiments" upon a "formal Reference to the Judges").

358. Charles Ross, *For the Morning Herald*, MORNING HERALD, Feb. 1, 1785, at 4, Gale, Doc. No. GALEIZ2000919121.

359. Letter from George III to Lord Sydney (Feb. 2, 1760), *in* 1 THE LATER CORRESPONDENCE OF GEORGE III 130 (A. Aspinall ed., 1962).

360. *England*, 47 SCOTS MAG., June 1785, at 303, 303. Some sources give the date as March 6. *E.g.*, *Historical Chronicle for March*, UNIVERSAL MAG. KNOWLEDGE & PLEASURE, March 1785, at 161, 162.

361. *Court Martial*, WHITEHALL EVENING POST, Mar. 5, 1785, at 3, Gale, Doc. No. GALEIZ200169985.

362. *Monthly Chronology*, 4 LONDON MAG., May 1785, at 386, 386.

outset of the proceeding. That's mostly how it was reported in the contemporary press,[363] in parliamentary debates,[364] and in nineteenth-century treatises.[365] But there are two reasons to hesitate before revising the death-date of advisory opinions. First, it's unclear what the judges said. Their opinion was never printed, and at least one contemporary—Prime Minister William Pitt—disagreed with those other accounts. During a parliamentary debate, he invoked a reference made to three judges (not twelve), who disagreed about the court-martial's jurisdiction (rather than agreeing unanimously).[366] It's possible that he had in mind a different opinion, or that he was simply mistaken. In any event, the ambiguity suggests that the opinion was not widely available—and, perhaps, that it hadn't been written down at all. In other words, it's possible that the judges only gave an oral opinion.

Second, unlike in *Sackville's Case*, members of Ross's court-martial seem to have contacted the judges directly, rather than going through the King.[367] Accordingly, the judges might have viewed the request as coming from another court. As the Introduction explained, judges treated those sorts of certified questions differently from advice to the Crown.[368] Accordingly, we can't say definitively that English judges gave an advisory opinion to the Crown after 1760—although it wouldn't be very surprising if they had done so.

It's similarly unsurprising that advisory opinions survived in a few states in the late eighteenth century.[369] In Massachusetts, the constitution adopted in 1780 authorized the legislative and executive branches "to require the opinions of the justices of the supreme judicial court upon important questions of law, and upon solemn occasions."[370] Surviving sources shed little light on why the provision was included.[371]

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363. *See, e.g.*, *Chronicle*, *in* ANNUAL REGISTER, OR A VIEW OF THE HISTORY, POLITICS, AND LITERATURE, FOR THE YEARS 1784 AND 1785, at 222, 230–31 (J. Dodsley ed., 1786).

364. *See, e.g.*, 20 PARLIAMENTARY REGISTER 18 (Mar. 21, 1786) (statement of Viscount Stormont). Some commentators didn't specify the number of judges but stated that their opinion was unanimous. *See, e.g.*, *id.* at 20 (statement of Lord Loughborough). Loughborough, the chief justice of Common Pleas, had been one of the judges to join the opinion.

365. *See, e.g.*, DELAFONS, *supra* note 26, at 63; 1 MCARTHUR, *supra* note 26, at 195–96; *see also A Case of Hardship*, 77 LANCET 617, 618 (1861) (referring to "the decision of the twelve judges in the case of General Ross").

366. 19 PARLIAMENTARY REGISTER 381 (Mar. 16, 1786) (statement of William Pitt).

367. *See Principal Occurrences*, *in* The NEW ANNUAL REGISTER, OR GENERAL REPOSITORY OF HISTORY, POLITICS, AND LITERATURE, FOR THE YEAR 1785, at 3, 20 (London, G.G.J. & J. Robinson 1786) (reporting correspondence between the members of the court-martial and the Chief Baron of the Exchequer).

368. *See supra* notes 23–24 and accompanying text.

369. *See* JAY, *supra* note 38, at 54–56.

370. MASS. CONST. of 1780, ch. 3, art. 2, *amended by* MASS. CONST. art. 75.

371. TOPF, *supra* note 18, at 8–12.

It's possible that its author, John Adams,[372] had in mind his own experience during the Stamp Act crisis, when he found it politically useful to pressure colonial judges for an opinion.[373] New Hampshire copied the Massachusetts provision in 1784.[374] These provisions were rarely used.[375] The Supreme Court of Pennsylvania was more active in giving advisory opinions during the 1780s, but the practice there seems to have depended largely on the leadership of Chief Justice Thomas McKean, and it died out after the state adopted a new constitution in 1790.[376]

Attitudes toward advisory opinions continued to change during the nineteenth and twentieth centuries; the 1820s and 1920s seem to have been times of especially vigorous debate. On the one hand, there were efforts to revive or expand the practice in various British and American jurisdictions.[377] On the other hand, critics of advisory opinions developed new arguments against them.[378] Those developments lie beyond the scope of this Article, but they merit investigation in future work.

372. *The Report of a Constitution or Form of Government for the Commonwealth of Massachusetts, Boston, 1779*, 8 PAPERS OF JOHN ADAMS: MARCH 1779 – FEBRUARY 1780, *supra* note 183, at 232, 257 n.124.

373. *See supra* note 183.

374. TOPF, *supra* note 18, at 17–18.

375. *Id.* at 29.

376. JOHN M. COLEMAN, THOMAS MCKEAN: FORGOTTEN LEADER OF THE REVOLUTION 224–26 (1975); ALBERT RUSSELL ELLINGWOOD, DEPARTMENTAL COÖPERATION IN STATE GOVERNMENT 64–65 (1918); John M. Coleman, *Thomas McKean and the Origin of an Independent Judiciary*, 34 PA. HIST. 111, 125 (1967). In 1807, when McKean was governor, the legislature directed the justices to prepare a report about "which of the English statutes are in force in this Commonwealth, and which of those statutes in their opinion ought to be incorporated into" Pennsylvania statutory law. An Act Enjoining Certain Duties on the Judges of the Supreme Court, 3 Binney 594 (1807). The judges complied; but their work product looks more like a research report than an advisory opinion. *See* REPORT OF THE JUDGES, *in* 3 REPORTS OF CASES ADJUDGED IN THE SUPREME COURT OF PENNSYLVANIA 595, 595–98 (Horace Binney ed., 1808).

377. *See, e.g.*, D.B. Swinfen, *Politics and the Privy Council: Special Reference to the Judicial Committee*, 23 JURID. REV. (N.S.) 126 (1978).

378. *See, e.g.*, TOPF, *supra* note 18, at 29–39 (highlighting arguments that advisory opinions encourage political abuse); Note, *The Advisory Opinion and the United States Supreme Court*, 5 FORDHAM L. REV. 94, 94–95 (1936) (discussing a proposed amendment to the Constitution that would have allowed for advisory opinions); *supra* note 333 and accompanying text (highlighting Joseph Story's opinion that it is improper for the judicial branch to act as an advisor to another branch of government). *Compare* Manley O. Hudson, *Advisory Opinions of National and International Courts*, 37 HARV. L. REV. 970 (1924) (arguing for the utility of advisory opinions), *with* Frankfurter, *supra* note 32, at 1008 (critiquing Hudson and describing advisory opinions as "ghosts that slay").