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Advisory Opinions in Florida: An Experiment in Intergovernmental Cooperation

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COMMENTARIES

ADVISORY OPINIONS IN FLORIDA: AN EXPERIMENT IN INTERGOVERNMENTAL COOPERATION*

A basic tenet of Anglo-American jurisprudence is reliance on an adversary system to ascertain facts and develop the law.[1] Judicial opinions on abstract questions of law are contrary to this concept[2] and have been severely criticized by legal theorists.[3] Eleven states, however, presently allow their supreme courts to advise designated governmental officials upon request.[4] The Florida constitution vests a limited form of advisory power in the Florida supreme court.[5] This commentary examines advisory opinions in Florida and their utilization as a remedy for the resolution of problems arising among the branches of government.

FLORIDA CONSTITUTIONAL PROVISION

Advisory opinions were first authorized in the Florida Constitution of 1868.[6] The Governor was given authority to request advisory opinions from the Florida supreme court on any point of law.[7] In 1875, however, an amend-

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1. *See* C. AUERBACH, THE LEGAL PROCESS 188-235 (1961).

2. For a brief history of advisory opinions *see* Veeder, *Advisory Opinions of the Judges of England*, 13 HARV. L. REV. 358 (1900). *See also* Note, *The Case for an Advisory Function in the Federal Judiciary*, 50 GEO. L. J. 785, 787 (1962).

3. *See, e.g.*, Frankfurter, *A Note on Advisory Opinions*, 37 HARV. L. REV. 1002 (1937); Sands, *Government by Judiciary — Advisory Opinions in Alabama*, 4 ALA. L. REV. 1 (1951).

4. ALA. CODE tit. 13, §§34-36 (1958); COLO. CONST. art. VI, §3; DEL. CODE ANN. tit. 10, §141 (1953); FLA. CONST. art. IV, §1 (c); ME. CONST. art. VI, §3; MASS. CONST. pt. 2, ch. III, art. 2; N.H. CONST., pt. 2, art. 74; OKLA. STAT. ANN. tit. 22, §§1002-03 (1951); R.I. CONST. amend. XII, §2; S.D. CONST. art. V, §13. Advisory opinions were initiated in North Carolina without statutory or constitutional authority by Waddell v. Berry, 31 N.C. 361 (1849).

5. FLA. CONST. art. IV, §1 (c): "The governor may request in writing the opinion of the justices of the supreme court as to the interpretation of any portion of this constitution upon any question affecting his executive powers and duties. The justices shall, subject to their rules of procedure, permit interested persons to be heard on the questions presented and shall render their written opinion not earlier than ten days from the filing and docketing of the request, unless in their judgment the delay would cause public injury." Not covered in this commentary are related procedures whereby the Florida supreme court answers questions of state law certified to it by federal courts. FLA. STAT. §25.031 (1969). For a comprehensive examination of the certification procedure *see* Note, *Florida's Interjurisdictional Certification: A Reexamination To Promote Expanded National Use*, 22 U. FLA. L. REV. 21 (1969).

6. FLA. CONST. art. V, §16 (1868).

7. The concept of the legislative branch seeking advice as to proposed bills has never been utilized in Florida. For a contrary advisory opinion procedure *see* Sands, *Government by Judiciary — Advisory Opinions in Alabama*, 4 ALA. L. REV. 1 (1951).

ment to the constitution provided that the Governor could request an opinion only as to "the interpretation of any portion of this Constitution upon any question affecting his Executive powers and duties."[8] This provision was transferred verbatim to the constitution of 1885.[9] The Florida constitution adopted in 1968 made only slight changes in the wording of this provision.[10] An additional sentence, however, provided that interested persons could be heard on the question presented.[11]

The supreme court is the only Florida court authorized to exceed the traditional "case or controversy" limitation and render opinions on questions submitted by the Governor.[12] The court has, however, added a further qualification to its advisory power by stressing that advisory opinions are only the opinions of the individual justices.[13] The inquiry is not addressed to the "Court," but to the "Justices."[14] In complying with these requests, "the Justices do not act as a judicial body but as individual judicial officers."[15] Dissenting opinions are merely contrary views, entitled to equal consideration by the Governor.[16] The constitution specifies that the Governor may request an advisory opinion, and the Florida supreme court has refused to entertain requests from any other source.[17]

SUBJECT MATTER

The Governor is constitutionally limited to requesting interpretations of a constitutional provision affecting his executive powers and duties.[18] The justices, in an early opinion, defined "executive" as "a duty appertaining to the execution of the laws as they exist,"[19] and thus distinguished the execu-

8. FLA. CONST. art. XIV (1868), *as amended.*

9. FLA. CONST. art. IV, §13 (1885).

10. FLA. CONST. art. IV, §1 (c). *See* note 5 *supra.*

11. FLA. CONST. art. IV, §1 (c).

12. Although there is no specific constitutional provision regarding cases and controversies, Florida recognizes this limitation on justiciability. Ervin v. Taylor, 66 So. 2d 816 (Fla. 1953). Where no bona fide dispute exists between the litigants, a lower court lacks jurisdiction to render an advisory opinion on the matter. Carter v. Southern Bell, 4 Fla. Supp. 157 (Cir. Ct. 1953). *See also* Ervin v. City of North Miami Beach, 66 So. 2d 235 (Fla. 1953).

13. State v. Lewis, 72 So. 2d 823 (Fla. 1954).

14. *Id.* at 825.

15. *In re* Advisory Opinion to the Governor, 151 Fla. 44, 9 So. 2d 172 (1942) [hereinafter Florida advisory opinions will be cited as Opinion]. As the advisory opinion is merely the individual opinion of the justices the court may not invite lower court judges to participate in the opinions if any supreme court justices are absent. *Cf.* FLA. APP. R. 2.1 (a) (4).

16. Opinion, 150 Fla. 556, 8 So. 2d 26 (1942).

17. State *ex rel.* Ayres v. Gray, 69 So. 2d 187 (Fla. 1953) (private citizen not entitled to advisory opinion); Jones v. Kind, 61 So. 2d 188 (Fla. 1952) (state boards, bureaus, and officers not entitled to advisory opinions). Three other states also limit the availability of advisory opinions solely to the Governor. DEL. CODE ANN. tit. 10, §141 (1953); OKLA. STAT. ANN. tit. 22, §§1002-03 (1951); S.D. CONST. art. V, §13. Other states, however, allow their legislatures to request advisory opinions. *See, e.g.*, ALA. CODE tit. 13, §§34-36 (1958).

18. FLA. CONST. art. IV, §1 (c).

19. Opinion, 23 Fla. 297, 6 So. 925 (1887).

tive powers of the Governor from his legislative powers.[20] The Governor's constitutional obligations should also be distinguished from his statutory duties.[21] Generally, statutes are not the proper subject matter of advisory opinions,[22] except as they "directly affect the executive powers and duties of the Governor under the Constitution."[23]

Matters on which the supreme court has rendered advice include nearly all of the executive provisions of the constitution. The power of the Governor to appoint and fill vacancies for state and county offices has been the most frequent subject matter.[24] Governors have often tested the qualifications of an individual to fill a position by requesting advice on their constitutional duty to grant commissions.[25] Other executive powers and duties that have been the subject matter of advisory opinions include: the power to suspend officers,[26] the duty to countersign warrants,[27] the duty to see that laws are faithfully executed,[28] and the power to call extra sessions of the legislature.[29] The subject matter limitations on advisory opinions restrict questions to those of a governmental nature, especially problems arising between the Governor and the judicial or legislative branches.

As statutes are not generally the proper subject matter of advisory opinions,[30] they should not be interpreted in advising the Governor, even if they affect the interpretation of a constitutional provision.[31] Where the constitutionality of legislative acts has been questioned, the justices have usually avoided resolving the issue in an advisory opinion.[32] This policy is the product of "the historical recognition of the presumed constitutionality of an act of the Legislature until such presumption is set at rest by a court of competent

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20. *E.g.*, the duty of the Governor to recommend measures in the public interest is a legislative, not executive, duty. FLA. CONST. art. IV, §1 (e). *See* Opinion, 243 So. 2d 573, 579 (Fla. 1971).

21. Opinion, 23 Fla. 297, 6 So. 925 (1887).

22. Opinion, 225 So. 2d 512 (Fla. 1969); Opinion, 39 Fla. 397, 22 So. 681 (1897). *See* text accompanying notes 30-33 *infra*.

23. Opinion, 151 Fla. 44, 47, 9 So. 2d 172, 174 (1942).

24. FLA. CONST. art. IV, §1 (f). *See, e.g.*, Opinion, 88 So. 2d 756 (Fla. 1956). *See also* Opinion, 239 So. 2d 247 (Fla. 1970); Opinion, 72 Fla. 422, 73 So. 742 (1916).

25. FLA. CONST. art. IV, §1 (a). *See, e.g.*, Opinion, 192 So. 2d 757 (Fla. 1966) (advisory opinion requested concerning the qualifications of a judge for his office).

26. FLA. CONST. art. IV, §7. *See, e.g.*, Opinion, 213 So. 2d 716 (Fla. 1968).

27. FLA. CONST. art. IV, §4 (c). *See, e.g.*, Opinion, 62 Fla. 4, 57 So. 345 (1911).

28. FLA. CONST. art. IV, §1 (a). *See, e.g.*, Opinion, 58 So. 2d 319 (Fla. 1952).

29. FLA. CONST. art. III, §3. *See* Opinion, 206 So. 2d 641 (Fla. 1968).

30. Opinion, 225 So. 2d 512 (Fla. 1969); Opinion, 39 Fla. 397, 22 So. 681 (1897).

31. Opinion, 78 Fla. 156, 82 So. 606 (1919); Opinion, 54 Fla. 136, 44 So. 756 (1907). The court has not, however, been consistent. At times it has decided the constitutionality of a statute in the guise of passing on the Governor's constitutional powers and duties. *See, e.g.*, Opinion, 63 So. 2d 321 (Fla. 1953); Opinion, 152 Fla. 547, 12 So. 2d 583 (1943); Opinion, 147 Fla. 148, 2 So. 2d 372 (1941). Recently, the justices have indicated a willingness to enter this area due to the new advisory opinion procedures. *See* text accompanying notes 59-80 *infra*.

32. *E.g.*, Opinion, 82 So. 2d 494 (Fla. 1955); Opinion, 103 Fla. 668, 137 So. 881 (1931); Opinion, 69 Fla. 632, 68 So. 851 (1915). *But see* text accompanying notes 59-80 *infra*.

jurisdiction in a proper adversary proceeding."[33]

The justices early precluded the possibility that many questions would be brought within the ambiguous duty of the Governor to see that laws are faithfully executed.[34] The use of this provision has been limited to questions such as the assignment of judges to insure that judicial overloads do not create improper execution of the laws.[35]

Due to the absence of adversary safeguards,[36] the justices have carefully avoided questions directly affecting individual rights. When the question of suspending specific state officers was presented to the court, it tersely replied: "These individuals are not parties to this non-adversary proceeding. An opinion without their participation would deny to them a traditional aspect of due process – the right to be heard."[37] Of course, an opinion on any constitutional point is certain to affect the rights of some individuals. But where the effect is direct, immediate, and possibly detrimental to a specific individual the use of an advisory opinion to settle the question should be rejected. Where advisory opinions are used to test a state officer's authority to hold office, the central issue has usually been some matter of inter-governmental relations.[38] The court should be careful, however, to protect the officer's right to due process in the proceeding.

PROCEDURES

Before the 1968 constitution, there were no express procedures to be followed in requesting and rendering advisory opinions, thus necessitating informal procedures.[39] Customarily, the Governor's request, in the form of a letter addressed to the chief justice, was reprinted in the opinion and served as a brief in which the surrounding facts were set forth, along with controlling statutes, constitutional provisions, and cases.[40]

In *Petition of Kilgore*[41] the Florida supreme court denied a petition by representatives of the press to treat gubernatorial requests for advisory opinions as public records. The court stated that the request was not subject to public inspection until the reply was delivered to the Governor.[42] One justice noted that there was "an element of protocol" involved in the procedure, because advisory opinions "are much like opinions from lawyer to client and partake of the nature of confidential communications."[43]

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33. Opinion, 113 So. 2d 703, 705 (Fla. 1959).
34. Opinion, 54 Fla. 136, 44 So. 756 (1907).
35. Opinion, 58 So. 2d 319 (Fla. 1952).
36. *See, e.g.*, FLA. CONST. art. I, §16.
37. Opinion, 196 So. 2d 737, 739 (Fla. 1967).
38. *E.g.*, Opinion, 192 So. 2d 757 (Fla. 1966).
39. Petition of Kilgore, 65 So. 2d 30 (Fla. 1953).
40. *See, e.g.*, Opinion, 156 Fla. 48, 22 So. 2d 398 (1945).
41. 65 So. 2d 30 (Fla. 1953).
42. *Id.* The court emphasized the fact that the Governor's request could be withdrawn at any time. *Id.* at 31.
43. *Id.* at 32 (Terrell, J., concurring).

This, however, only intimated at the actual procedure that the justices and the Governor followed. The Governor would be informed of the justices' decision and given the option of withdrawing his request or having the reply made public.[44] The Governor was thus able to keep private those decisions unfavorable to his position.[45]

In 1968 the court amended its rules to include procedures for requesting, considering, and rendering advisory opinions.[46] This substantially altered prior informal procedures. By permitting interested persons to be heard on the questions presented, advisory opinions are now open to public scrutiny and participation, regardless of the favorability of the advice to the Governor. The availability of briefs and oral arguments from interested parties affords advisory opinions an element of adversariness, because both sides of an issue may now be presented. This procedural change has had an effect on the willingness of the court to answer questions at the periphery of its advisory power.[47]

THE EFFECT OF ADVISORY OPINIONS

Florida courts have repeatedly emphasized that advisory opinions do not carry the weight of stare decisis, because they are only the opinions of the individual justices.[48] Studies in other states have shown, however, that later case decisions place great reliance upon advisory opinions.[49] Obviously, legal opinions from a state's highest court will be looked upon as the final word on a point of law. In two cases the supreme court has noted that advisory opinions are persuasive as judicial precedents and are usually adhered to.[50]

In their practical application advisory opinions in Florida have virtually the same precedential effect as a case. A majority of the 128 advisory opinions studied have been cited in later cases as authority.[51] Not one instance was found in which a Florida court expressly "overruled" an advisory opinion.[52]

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44. Interview with Dr. Stephen C. O'Connell, President of the University of Florida, in Gainesville, Fla., April 13, 1971 [hereinafter cited as O'Connell Interview]. Dr. O'Connell was formerly a justice of the Supreme Court of Florida (1955-1967), serving as Chief Justice in 1967. The reply of the justices was made public by filing the opinion with the clerk of the court. Petition of Kilgore, 65 So. 2d 30 (Fla. 1953).

45. O'Connell Interview, *supra* note 44. Thus, an unknown number of advisory opinion requests and tentative replies exist that were never made public.

46. FLA. APP. R. 2.1(h). When the new procedures were adopted in *In re* Florida Appellate Rules, 216 So. 2d 1 (1968), three justices dissented without opinion.

47. *See* text accompanying notes 59-80 *infra*.

48. *E.g.*, Amos v. Gunn, 84 Fla. 285, 94 So. 615 (1922). *See also* Ervin v. City of North Miami Beach, 66 So. 2d 235 (Fla. 1953).

49. Sands, *supra* note 7, at 24; Edsall, *The Advisory Opinion in North Carolina*, 27 N.C.L. REV. 297 (1949).

50. Lee v. Dowda, 155 Fla. 68, 19 So. 2d 570 (1944); State *ex rel.* Williams v. Lee, 121 Fla. 815, 164 So. 536 (1935).

51. *See* Appendix.

52. *But see* Amos v. Gunn, 84 Fla. 285, 94 So. 615 (1922) (doubt cast on validity of earlier advisory opinion).

A former chief justice once admitted: "These opinions are of considerable importance to the members of the judiciary."[53]

The Governor also considers advisory opinions binding authority. In controversial advisory opinions the Governor has followed the advice given by the justices.[54] Public attitude on advisory opinions indicates that they are considered as official court pronouncements binding on future governmental action.[55]

Since 1943 advisory opinions have usually begun with the term "per curiam."[56] As per curiam opinions are traditionally considered binding precedents in future cases,[57] this is inconsistent with the avowed nonbinding effect of advisory opinions.[58] This practice should therefore be discontinued.

RECENT TRENDS

Although the justices of the supreme court were initially cautious in responding to requests for advice from the Governor,[59] the incidence of requests and opinions has steadily increased.[60] Statutes have been more freely discussed and interpreted.[61] It soon became obvious that the justices, under the subterfuge of passing upon the Governor's constitutional executive powers, were actually ruling on the validity of statutes.[62]

In 1959 the Governor again asked a question that impliedly went to the

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53. Mathews, *Foreword to Summary of Advisory Opinions*, in [1953-1954] FLA. ATT'Y GEN. BIENNIAL REP. 757, 758.

54. For example, after one advisory opinion, Opinion, 206 So. 2d 212 (Fla. 1968), Governor Kirk followed the advice given and limited an extra session of the legislature to ten days. St. Petersburg (Fla.) Times, Jan. 14, 1968, §B at 1, col. 1. In one instance the Governor followed the advice of a concurring justice limiting the time for which an appointment was made. Opinion, 88 So. 2d 756 (Fla. 1956). *See* St. Petersburg (Fla.) Times, June 23, 1956, §B at 12, col. 2.

55. Comments by a representative to the Florida House indicate the finality with which advisory opinions are treated. St. Petersburg (Fla.) Times, July 2, 1970, §B at 3, col. 6 (South Suncoast ed.). In the same article, however, the newspaper showed an awareness to the supposed nonbinding effect of advisory opinions. *Id.*

56. *E.g.*, Opinion, 152 Fla. 547, 12 So. 2d 583 (1943) (the first advisory opinion to do so).

57. Newmons v. Lake Worth Drainage Dist., 87 So. 2d 49 (Fla. 1956). "Such an opinion carries no less weight because of the nomenclature that designates it as such." *Id.* at 50-51. In discussing the various grounds that may prompt a per curiam opinion, the Florida supreme court did not list advisory opinions. *Id.* at 51. "Per curiam" literally means "by the court." BLACK'S LAW DICTIONARY 1293 (4th ed. 1951).

58. *See* text accompanying note 48 *supra*.

59. During a twenty-four year period from 1889 to 1912, fifteen requests were submitted to the justices. Seven were refused consideration. *See* Appendix.

60. *See* Appendix. Governors Holland and Collins were the most prolific requesters of advisory opinions. *Id.* The increasing number of advisory opinions prompted the chief justice of the Florida supreme court to enlist the aid of his research assistant in compiling a classification and index of advisory opinions. Kerns, *Summary of Advisory Opinions*, in [1953-1954] FLA. ATT'Y GEN. BIENNIAL REP. 757. The index was discontinued in 1961.

61. *See, e.g.*, Opinion, 63 So.2d 321 (Fla. 1953); Opinion, 147 Fla. 157, 2 So. 2d 378 (1941); Opinion, 94 Fla. 967, 114 So. 850 (1927).

62. *E.g.*, Opinion, 63 So. 2d 321 (Fla. 1953).

constitutionality of a statute.[63] In an attempt to halt increasingly liberal interpretations of the advisory opinion provision, four justices noted:[64]

> The corridor of organic authority for rendering advisory opinions is indeed a narrow one, and although the court has in a few instances rendered such opinions at or beyond the threshold of our constitutional duty, a majority of the court as now constituted feel that the constitutionality of a statute should *only* be passed upon in adversary proceedings.

Subsequently, the number of advisory opinions temporarily decreased.[65]

The 1968 procedural changes, however, guaranteed the future vitality of advisory opinions.[66] Since the effective date of the new constitution, seven advisory opinions have been rendered.[67] The subject matter of these opinions indicates that the justices are expanding their power to render advisory opinions.

In one of the first opinions requested under the new constitution and procedures, the Governor sought advice on his ability to appoint a former legislator as the secretary of administration.[68] In their opinion the justices made it clear that the Governor's specific question dealt with a statutory, not a constitutional, power.[69] An opinion was rendered, however, on the basis that the justices could look behind the form of the question and judicially evaluate the inquiry "in the light of the actual substance of the problem presented."[70]

In the following year the Governor requested an opinion on the constitutionality of the 1970 General Appropriations Bill.[71] Admitting that this question would not have been answered in the past, the justices placed great emphasis on the 1968 procedural changes.[72] An advisory opinion was deemed appropriate because briefs were filed by interested persons presenting both

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63. Opinion, 113 So. 2d 703 (Fla. 1959).

64. *Id.* at 705. Two justices dissented on the grounds that there was abundant authority indicating the justices were authorized to answer the type of question presented. *Id.* at 705-06 (Thomas & Roberts, JJ., dissenting). In discussing these precedents they stated: "As government grows more complex and constantly extends its sphere of influence, we see no reason to recede from [these precedents] . . . ." *Id.* at 706. One justice from the majority, E. Harris Drew, took the opportunity to confess that in rendering advisory opinions in the past, which construed or passed upon the constitutionality of statutes, he had exceeded his authority as a justice of the court. *Id.* at 706.

65. *See* Appendix.

66. FLA. CONST. art. IV, §1 (c).

67. *See* Appendix.

68. Opinion, 225 So. 2d 512 (Fla. 1969).

69. *Id.* at 514.

70. *Id.* at 515. In utilizing the new procedures the justices found it unnecessary to require briefs or oral arguments. They filed their opinion prior to the minimum ten-day period because of the "vital public interest involved and the potentials for public injury inherent in the problem." *Id.* at 516. *See* FLA. CONST. art. IV, §1 (c); note 5 *supra.*

71. Opinion, 239 So. 2d 1 (Fla. 1970).

72. *Id.* at 9.

sides of the issue, and "in view of the great public interest in maintaining the fiscal stability of state government."[73] In recognizing that the advisory opinion went directly to the constitutionality of a statute, the justices receded from the earlier view that such questions were unanswerable in an advisory opinion.[74]

Even this expansion of advisory power was exceeded in 1971 when a gubernatorial election made the possibility of a corporate income tax controversial. In his inaugural address the new Governor announced his intention to ask the Florida supreme court for an advisory opinion on the constitutionality of a statute authorizing such a tax.[75] In his request the Governor made reference to his responsibility for fiscal management and to his constitutional responsibility to recommend measures in the public interest.[76] Upsetting nearly a century of tradition,[77] the justices unanimously agreed to answer the question submitted.[78] The court heard arguments for and against the tax, including business and banking interests strongly opposed to a corporate income tax. In rendering an opinion on the constitutionality of a proposed tax statute, the justices recognized they were passing on a statutory power of the Governor. The availability of briefs and oral arguments and the vital importance of the issue, however, prompted the justices to act.[79]

The availability of briefs and oral arguments has transformed the advisory opinion into a judicial forum resembling an adversary proceeding. This has allowed the court to expand the meaning of the term "constitutional executive powers" to include gubernatorial powers previously untouched.[80] It should be noted, however, that the court has expanded its advisory power principally to reach vital questions of governmental importance.

ARGUMENTS AGAINST THE ADVISORY OPINION

Advisory opinions have been subject to strong and constant criticisms.[81] The major criticism has been that they are destructive of the doctrine of

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73. *Id.*

74. Opinion, 113 So. 2d 703 (Fla. 1959). *See* text accompanying notes 30-33 *supra.*

75. St. Petersburg (Fla.) Times, Jan. 6, 1971, §A at 16, col. 1.

76. Opinion, 243 So. 2d 573, 574 (Fla. 1971).

77. In the first advisory opinion issued under the 1885 constitution, Opinion, 23 Fla. 297, 6 So. 925 (1887), the justices refused to consider a request concerning a proposed statute.

78. Opinion, 243 So. 2d 573, 577 (1971).

79. *Id.* at 576. The justices stated: "There are many decisions of this Court prior to the adoption of the 1968 Constitution that would indicate we should exercise our discretion to refrain from answering the request. However, Section 1 (c), Article IV, Constitution of 1968, enlarged to some extent the power of this Court to be of assistance, and our Rule 2.1 (h) adopted in pursuant [*sic*] of such organic power has enabled us to treat such requests in somewhat the nature of an adversary proceeding by receiving briefs and arguments from interested persons." *Id.* at 575.

80. *E.g.*, the Governor's fiscal responsibility, FLA. CONST. art. IV, §1 (d); the duty to recommend measures in the public interest, FLA. CONST. art. IV, §1 (e).

81. *See, e.g.*, Frankfurter, *A Note on Advisory Opinions*, 37 HARV. L. REV. 1002 (1924); Sands, *Government by Judiciary—Advisory Opinions in Alabama*, 4 ALA. L. REV. 1 (1951).

separation of powers.[82] Advisory opinions, in resolving matters not framed within the adversary mold, are said to be exercises of power not properly judicial.[83] It is also argued that the legislative and executive branches of government should make the initial determination of the constitutionality of proposed action.[84] One commentator concluded: "The advisory opinion goes too far in its emphasis on the wise man technique of government."[85]

The Florida supreme court has evidenced its awareness of these dangers inherent in advisory opinions. In refusing to answer a question concerning the constitutionality of a proposed suspension of state officers, the justices, "out of a profound concern for the preservation of the concept of separation of powers,"[86] noted that it was the initial responsibility of the Governor to act independently in the matter.[87]

The separation of powers objection to advisory opinions assumes the inherent superiority of an adversary system of justice in resolving all legal issues. Analysis of advisory opinions in Florida demonstrates, however, that some legal issues are better resolved in a nonadversary proceeding. Where, for example, legal questions arise involving intergovernmental relations, neither branch of government may actually be at odds with the other, but rather both may be concerned with keeping their actions within constitutional limits.[88] Thus, advisory opinions are at times conducive to the separation of powers. It is also inaccurate to say that advisory opinions are divorced from factual contexts. In many instances the facts set forth in the Governor's request create a context wherein the justices can apply the law.[89]

Anglo-American jurisprudence has devised numerous safeguards to individual rights.[90] Advisory opinions have been criticized as lacking all but a modicum of these protections.[91] Because there are no adverse parties, the court may arguably not be presented with all the information and rational

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82. It was on this ground that statutes authorizing advisory opinions in various states were struck down by the courts as unconstitutional. *See, e.g., In re* Constitutionality of House Bill 88, 115 Vt. 524, 64 A.2d 169 (1949). *In re* Application of the Senate, 10 Minn. 78 (1865).

83. Sands, *supra* note 81, at 37.

84. For this reason statutes carry with them a presumption of constitutionality. City of Fort Lauderdale v. Des Camp, 111 So. 2d 693 (Fla. 1969). The possibility of advisory opinions from the highest court is said to contribute to gubernatorial and legislative laxity in the drafting of statutes. *See* Edsall, *supra* note 49.

85. Sands, *supra* note 81, at 37.

86. Opinion, 196 So. 2d 737, 739 (Fla. 1967).

87. *Id.*

88. *See, e.g.*, Opinion, 206 So. 2d 212 (Fla. 1968) (length of time extraordinary session of the legislature may be held).

89. As to the objection that only one set of facts is being presented, it should be noted that in the vast majority of advisory opinions the facts were undisputed. *See, e.g.*, Opinion 239 So. 2d 247 (Fla. 1970).

90. *See, e.g.*, FLA. CONST. art. I, §§9, 16.

91. Sands, *supra* note 81, at 16, 31. Frankfurter used this approach in his criticism of advisory opinions: "[A]dvisory opinions are bound to move in an unreal atmosphere. The impact of actuality and the intensities of immediacy are wanting." Frankfurter, *supra* note 81, at 1006.

analysis that would be relevant and helpful.[92] On the other hand, the assumption that courts of law operate more effectively in an atmosphere of conflict has been the subject of much criticism.[93]

In Florida this argument is not strictly applicable, because interested parties can submit briefs.[94] Moreover, the issues presented to the supreme court are often of little immediate importance to anyone but the Governor. Therefore, an attempt to force the issue into an adversary mold would serve no useful purpose.[95] Where, however, the subject is of immediate importance to some individual or class of individuals, they will be drawn into the proceedings to present their own version of law and fact.[96] In the past the justices have shown sensitivity to the lack of due process in advisory proceedings.[97] Even with the present availability of briefs and oral arguments, the justices will likely refuse consideration where individual rights are immediately concerned.[98]

A related argument against advisory opinions is the contention that lower court opinions, which are absent in advisory opinion requests, often help the supreme court decide questions of law and policy by providing an initial judicial determination of the issue.[99] It is difficult to measure the importance of this factor. The majority of gubernatorial requests in Florida have involved questions of immediate state-wide governmental impact.[100] Such issues should arguably have as their initial forum the highest state court. At both state and federal levels, instances can be found where the highest court has original jurisdiction over selected matters.[101] The importance of lower court opinions has not been adequately shown.

Another argument opposing advisory opinions is that they treat far-reaching questions of law with only the most superficial research and thought.[102] The average length of time between request and reply in Florida advisory opinions has been 7.5 days.[103] When a request is under consideration,

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92. Sands, *supra* note 81, at 32.

93. M. COHENS, LAW AND THE SOCIAL ORDER 144 (1933); Arnold, *Trial by Combat and the New Deal*, 47 HARV. L. REV. 913 (1934).

94. FLA. CONST. art. IV, §1 (c). *See* note 5 *supra*.

95. *See, e.g.*, Opinion, 112 So. 2d 843 (Fla. 1959) (whether proposed 30-day trip to Russia made the Governor unable to discharge his official duties).

96. Public interest was high during the consideration of the corporate income tax request. Industrial and banker lobbies submitted briefs and oral arguments opposing the proposed statute. St. Petersburg (Fla.) Times, Jan. 15, 1971, §B at 3, col. 8.

97. Opinion, 196 So. 2d 737 (Fla. 1967).

98. The present expansion into new areas has not as yet included a decision directly affecting individual rights, except as to qualifications for office. Opinion, 225 So. 2d 512 (Fla. 1969).

99. Sands, *supra* note 81, at 38.

100. *See, e.g.*, Opinion, 206 So. 2d 641 (Fla. 1968).

101. U.S. CONST. art. III, §2 (setting forth the original jurisdiction of the Supreme Court); FLA. CONST. art. V, §4(2) (setting forth the original jurisdiction of the Florida supreme court).

102. Sands, *supra* note 81, at 33-34.

103. *See* Appendix.

the justice to whom it is assigned usually devotes his full time to the question.[104] Thus, the Florida justices theoretically have an adequate length of time to explore the questions at issue. In recent years the court has taken progressively longer to answer requests.[105] Under the 1968 procedural changes the Governor's request must remain under consideration at least ten days.[106] Since this provision became effective the average length of time between request and opinion has increased to eighteen days.[107]

Advisory opinions have been criticized as lacking well-reasoned conclusions, due primarily to the lack of briefs and oral arguments.[108] Florida has avoided this criticism to a large extent. Categorical answers have never been given to the Governor's question. The majority of advisory opinions have cited case law and other advisory opinions to support the answer given.[109] These factors indicate that Florida advisory opinions have contained carefully reasoned conclusions.

Arguments for the Advisory Opinion

The continuing vitality of advisory opinions indicates some satisfaction with them in states where they are utilized.[110] The arguments made for advisory opinions have usually been practical arguments, as opposed to the theoretical arguments made against them.[111]

One argument favoring advisory opinions is that they allow a proposed course of action to be judicially examined. The legality of a proposed action can be tested before possible illegal action is taken. The Florida advisory opinion has been limited severely in many respects,[112] but its usefulness in this area is self-evident. Many governmental functions of the Governor are not adequately justiciable in the form of a controversy, but rather call for a legal opinion as to a proposed course of action. The Governor is then supplied with the most authoritative legal opinion available in the state. The corporate income tax opinion[113] is an example of the advantages to be had by the use of advisory opinions. The Governor was able to avoid the waste of time and effort that an unconstitutional statute would have engendered. Rather than wait for the judicial machinery to reach a conclusion declaring such a statute unconstitutional, the Governor was given a prompt answer and

104. O'Connell Interview, *supra* note 44.

105. *See* Appendix.

106. Fla. Const. art. IV, §1 (c) (unless either delay would cause public injury, or briefs and oral arguments are heard). *See* note 5 *supra*.

107. *See* Appendix.

108. Sands, *supra* note 81, at 32-33.

109. *See* Appendix.

110. *But see* Sands, *supra* note 81.

111. *See, e.g.*, Note, *The Case for an Advisory Function in the Federal Judiciary*, 50 Geo. L.J. 785 (1962); Note, *Advisory Opinions on the Constitutionality of Statutes*, 69 Harv. L. Rev. 1302 (1956).

112. *See* text accompanying notes 12-38 *supra*.

113. Opinion, 243 So. 2d 573 (Fla. 1971).

was able to start constitutional amendment procedures.[114]

Advisory opinions, as utilized in Florida, have a flexibility that is useful to the resolution of many problems. These opinions may be seen as an exercise in judicial solutions through an expansion of traditional judicial roles. There is, for example, no other way of testing the constitutionality of a statute in its incipient stages. The court can avoid, however, getting involved in policy determination by exercising its advisory power in strict accordance with the constitutional provision.[115] Also, individuals frequently rely to their detriment on statutes subsequently declared unconstitutional.[116] With advisory opinions, the judiciary need not stand mute in the face of the injustice created by an unconstitutional statute.

Traditional judicial solutions require a great amount of time.[117] Advisory opinions are rendered a short time after a gubernatorial request.[118] The use of advisory opinions as a judicial remedy for limited governmental problems, therefore, provides a forum for their ready determination.

Advisory opinions in Florida have served the useful purpose of an intergovernmental problem solver. They have been considered "a method of promoting governmental efficiency through interdepartmental cooperation."[119] To force such intergovernmental business to assume the character of an adversary proceeding is to do little for cooperation among the branches of government. Advisory opinions in Florida have primarily involved questions dealing with executive relations with the judicial and legislative branches.[120] Calling upon the justices of the supreme court to resolve these problems, especially where they may involve simple interpretations of the words of the constitution, seems to be the most efficient and ready solution to the problems.

CONCLUSION

There can be little doubt that unlimited judicial advisory power would impair the separation of powers and deny due process. Reliance on the judiciary to formulate policy may also lead to executive and legislative laxity.[121] Florida has shown, however, that advisory opinions are capable of appropriate limitation. Within carefully confined corridors of power, advisory opinions may avoid the shortcomings claimed by some jurisprudents.[122] The

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114. St. Petersburg (Fla.) Times, Jan. 23, 1971, §A at 1, col. 3.

115. *See, e.g.*, Opinion, 196 So. 2d 737 (Fla. 1967).

116. For a comprehensive discussion *see* Note, *The Case for an Advisory Function in the Federal Judiciary*, 50 GEO. L. J. 785 (1962).

117. The average length of time between enactment of a statute and a decision thereon has been reported as 7.5 years. Field, *The Advisory Opinion—An Analysis*, 24 IND. L.J. 203, 207 (1949).

118. *See* Appendix.

119. Note, *supra* note 116, at 792.

120. *See, e.g.*, Opinion, 213 So. 2d 716 (Fla. 1968) (relations with judicial branch); Opinion, 206 So. 2d 212 (Fla. 1968) (relations with legislative branch).

121. Sands, *supra* note 81, at 37.

122. *See* note 81 *supra*.

Florida experience indicates that advisory opinions have a useful, valid place in the judicial process and a proven ability to solve pressing and important problems without sacrificing the quality of judicial determination. In the resolution of new and sometimes exasperating intergovernmental problems, advisory opinions allow for flexibility in judicial solution. The procedural safeguards now applicable to Florida advisory opinions insure their keeping within the limits imposed upon all judicial proceedings – above all, the right to be heard. Other states, including those with other advisory opinion procedures, may find it prudent to draw from the Florida experience and adopt similarly limited procedures.[123] Justice Frankfurter termed advisory opinions "ghosts that slay."[124] Florida, however, has proved they can be forward-reaching judicial innovations aiding in the cooperative government of people.

TERRANCE A. SMILJANICH

123. Adoption of an advisory function by the federal government presents a different degree of problem. *See* Note, *supra* note 116.

124. Frankfurter, *supra* note 81, at 1008.

APPENDIX

Opinion Number	Citation	Governor Who Requested	Questions Answered?	Dissents?	Days Between Request and Opinion	Cases Cited in Opinion	Opinion Subsequently Cited in Cases (No. of Times)
1	25 Fla. 426, 5 So. 613 (1889)	Fleming	Yes	No	4	Yes	7
2	23 Fla. 297, 6 So. 925 (1887)	Perry	No	No	1	No	5
3	31 Fla. 1, 12 So. 114 (1893)	Mitchell	Yes	No	3	No	4
4	34 Fla. 500, 16 So. 410 (1895)	Mitchell	Yes	No	4	No	4
5	39 Fla. 397, 22 So. 681 (1897)	Bloxham	No	No	8	No	0
6	43 Fla. 305, 31 So. 348 (1901)	Jennings	Yes	No	4	Yes	3
7	45 Fla. 154, 34 So. 571 (1903)	Jennings	Yes	No	3	Yes	5
8	49 Fla. 269, 39 So. 63 (1905)	Broward	Yes	No	19	Yes	5
9	50 Fla. 169, 39 So. 187 (1905)	Broward	No	No	3	No	0
10	54 Fla. 136, 44 So. 756 (1907)	Broward	No	No	2	No	0
11	61 Fla. 1, 55 So. 460 (1911)	Gilchrist	No	No	1	No	0
12	62 Fla. 7, 55 So. 865 (1911)	Gilchrist	Yes	Yes	1	No	1
13	62 Fla. 4, 57 So. 345 (1911)	Gilchrist	No	No	77	No	0
14	62 Fla. 1, 57 So. 351 (1911)	Gilchrist	Yes	No	0	Yes	0
15	64 Fla. 1, 59 So. 778 (1912)	Gilchrist	No	No	5	No	0
16	64 Fla. 16, 59 So. 782 (1912)	Gilchrist	Yes	No	1	No	4
17	64 Fla. 21, 59 So. 786 (1912)	Gilchrist	Yes	No	1	No	0
18	64 Fla. 168, 60 So. 337 (1912)	Gilchrist	Yes	No	1	No	2
19	65 Fla. 434, 62 So. 363 (1913)	Trammell	Yes	No	2	No	6
20	67 Fla. 423, 65 So. 4 (1914)	Trammell	Yes	No	2	No	0
21	67 Fla. 489, 65 So. 224 (1914)	Trammell	Yes	No	2	No	0
22	68 Fla. 560, 66 So. 1003 (1914)	Trammell	Yes	No	3	Yes	2
23	69 Fla. 508, 68 So. 450 (1915)	Trammell	Yes	No	1	No	8
24	69 Fla. 653, 68 So. 849 (1915)	Trammell	Yes	No	2	No	1
25	69 Fla. 632, 68 So. 851 (1915)	Trammell	No	Yes	3	No	0
26	72 Fla. 422, 73 So. 742 (1916)	Trammell	Yes	No	2	No	1
27	74 Fla. 250, 77 So. 102 (1917)	Catts	Yes	No	1	No	5

Opinion Number	Citation	Governor Who Requested	Questions Answered?	Dissents?	Days Between Request and Opinion	Cases Cited in Opinion	Opinion Subsequently Cited in Cases (No. of Times)
28	75 Fla. 674, 78 So. 673 (1918)	Catts	Yes	No	1	No	3
29	76 Fla. 417, 79 So. 874 (1918)	Catts	Yes	No	1	No	0
30	76 Fla. 500, 80 So. 17 (1918)	Catts	Yes	No	1	No	5
31	76 Fla. 649, 80 So. 519 (1919)	Catts	Yes	No	0	No	3
32	78 Fla. 156, 82 So. 606 (1919)	Catts	No	No	4	No	0
33	78 Fla. 5, 82 So. 612 (1919)	Catts	Yes	No	0	No	3
34	79 Fla. 137, 83 So. 672 (1920)	Catts	Yes	No	10	No	0
35	85 Fla. 505, 97 So. 127 (1923)	Hardee	Yes	No	1	No	1
36	90 Fla. 708, 107 So. 366 (1925)	Martin	Yes	No	1	Yes	0
37	92 Fla. 989, 111 So. 252 (1926)	Martin	Yes	No	11	No	2
38	93 Fla. 948, 113 So. 113 (1927)	Martin	Yes	No	0	No	1
39	93 Fla. 1024, 113 So. 115 (1927)	Martin	Yes	No	3	No	4
40	94 Fla. 620, 113 So. 913 (1927)	Martin	Yes	No	3	No	4
41	94 Fla. 967, 114 So. 850 (1927)	Martin	Yes	No	19	Yes	3
42	94 Fla. 986, 114 So. 889 (1927)	Martin	Yes	No	2	No	2
43	97 Fla. 705, 122 So. 7 (1929)	Carlton	Yes	Yes	5	No	1
44	98 Fla. 843, 124 So. 728 (1929)	Carlton	Yes	No	13	No	2
45	101 Fla. 1510, 136 So. 623 (1931)	Carlton	Yes	No	0	Yes	1
46	103 Fla. 668, 137 So. 881 (1931)	Carlton	No	No	12	No	0
47	114 Fla. 520, 154 So. 154 (1934)	Sholtz	Yes	No	0	No	8
48	117 Fla. 773, 158 So. 441 (1934)	Sholtz	Yes	No	2	Yes	3
49	120 Fla. 142, 162 So. 346 (1935)	Sholtz	Yes	No	8	Yes	2
50	120 Fla. 729, 163 So. 76 (1935)	Sholtz	Yes	No	12	Yes	4
51	120 Fla. 734, 163 So. 78 (1935)	Sholtz	Yes	No	11	No	0
52	121 Fla. 157, 163 So. 410 (1935)	Sholtz	Yes	No	9	Yes	1
53	128 Fla. 334, 174 So. 740 (1937)	Cone	Yes	No	2	Yes	0
54	137 Fla. 298, 188 So. 218 (1939)	Cone	Yes	No	2	Yes	1
55	145 Fla. 375, 199 So. 350 (1940)	Cone	Yes	No	7	No	1

56	146 Fla. 622, 1 So. 2d 636 (1941)	Holland	Yes	No	4	Yes	3
57	147 Fla. 148, 2 So. 2d 372 (1941)	Holland	Yes	No	3	Yes	0
58	147 Fla. 157, 2 So. 2d 378 (1941)	Holland	Yes	No	1	Yes	2
59	150 Fla. 556, 8 So. 2d 26 (1942)	Holland	Yes	Yes	10	Yes	0
60	151 Fla. 44, 9 So. 2d 172 (1942)	Holland	Yes	Yes	19	No	0
61	152 Fla. 119, 10 So. 2d 926 (1942)	Holland	Yes	No	6	No	1
62	152 Fla. 356, 11 So. 2d 580 (1943)	Holland	Yes	No	9	No	1
63	152 Fla. 547, 12 So. 2d 583 (1943)	Holland	Yes	No	5	No	0
64	152 Fla. 683, 12 So. 2d 876 (1943)	Holland	Yes	No	2	Yes	2
65	152 Fla. 674, 12 So. 2d 879 (1943)	Holland	Yes	No	2	No	0
66	153 Fla. 344, 14 So. 2d 663 (1943)	Holland	Yes	No	0	No	0
67	153 Fla. 581, 15 So. 2d 291 (1943)	Holland	Yes	No	4	No	0
68	153 Fla. 650, 15 So. 2d 765 (1943)	Holland	Yes	No	6	Yes	0
69	154 Fla. 822, 19 So. 2d 198 (1944)	Holland	Yes	No	17	No	1
70	154 Fla. 866, 19 So. 2d 370 (1944)	Holland	Yes	Yes	1	Yes	0
71	156 Fla. 45, 22 So. 2d 397 (1945)	Caldwell	Yes	No	1	No	1
72	156 Fla. 48, 22 So. 2d 398 (1945)	Caldwell	Yes	Yes	2	Yes	2
73	156 Fla. 55, 22 So. 2d 458 (1945)	Caldwell	Yes	No	0	No	1
74	156 Fla. 166, 23 So. 2d 158 (1945)	Caldwell	Yes	No	14	Yes	1
75	156 Fla. 507, 23 So. 2d 619 (1945)	Caldwell	Yes	No	11	Yes	0
76	157 Fla. 885, 27 So. 2d 409 (1946)	Caldwell	Yes	No	0	No	0
77	158 Fla. 872, 30 So. 2d 377 (1947)	Caldwell	Yes	No	2	No	0
78	159 Fla. 464, 31 So. 2d 854 (1947)	Caldwell	Yes	No	2	No	0
79	42 So. 2d 170 (1949)	Warren	Yes	No	NA	No	1
80	46 So. 2d 21 (1950)	Warren	Yes	No	21	No	0
81	52 So. 2d 646 (1951)	Warren	Yes	No	1	No	0
82	55 So. 2d 99 (1951)	Warren	Yes	No	21	No	0
83	58 So. 2d 319 (1952)	Warren	Yes	No	43	No	1
84	60 So. 2d 285 (1952)	Warren	Yes	No	0	Yes	6
85	60 So. 2d 321 (1952)	Warren	Yes	No	1	Yes	2
86	63 So. 2d 274 (1953)	McCarty	Yes	No	9	No	0
87	63 So. 2d 321 (1953)	McCarty	Yes	No	4	Yes	3
88	67 So. 2d 413 (1953)	Johns	Yes	No	0	No	2
89	81 So. 2d 778 (1955)	Collins	Yes	Yes	7	Yes	0

Opinion Number	Citation	Governor Who Requested	Questions Answered?	Dissents?	Days Between Request and Opinion	Cases Cited in Opinion	Opinion Subsequently Cited in Cases (No. of Times)
90	81 So. 2d 782 (1955)	Collins	Yes	No	1	Yes	1
91	82 So. 2d 494 (1955)	Collins	Yes	No	63	Yes	1
92	86 So. 2d 158 (1956)	Collins	Yes	No	6	No	0
93	88 So. 2d 131 (1956)	Collins	Yes	No	1	Yes	0
94	88 So. 2d 756 (1956)	Collins	Yes	Yes	27	Yes	0
95	91 So. 2d 204 (1956)	Collins	Yes	No	2	No	0
96	92 So. 2d 513 (1956)	Collins	Yes	No	5	Yes	0
97	95 So. 2d 603 (1957)	Collins	Yes	No	1	No	0
98	96 So. 2d 413 (1957)	Collins	Yes	No	5	No	0
99	96 So. 2d 541 (1957)	Collins	Yes	No	12	Yes	1
100	96 So. 2d 546 (1957)	Collins	Yes	No	12	No	0
101	96 So. 2d 900 (1957)	Collins	No	No	12	No	0
102	96 So. 2d 904 (1957)	Collins	Yes	No	6	No	1
103	112 So. 2d 843 (1959)	Collins	Yes	No	2	Yes	1
104	113 So. 2d 703 (1959)	Collins	No	Yes	1	No	1
105	116 So. 2d 425 (1959)	Collins	Yes	No	14	Yes	2
106	131 So. 2d 196 (1961)	Bryant	Yes	No	0	Yes	0
107	132 So. 2d 1 (1961)	Bryant	Yes	No	6	Yes	0
108	132 So. 2d 163 (1961)	Bryant	Yes	No	3	Yes	1
109	150 So. 2d 721 (1963)	Bryant	Yes	No	1	Yes	5
110	154 So. 2d 838 (1963)	Bryant	Yes	No	5	Yes	0
111	156 So. 2d 3 (1963)	Bryant	Yes	No	2	No	0
112	171 So. 2d 539 (1965)	Burns	Yes	No	15	Yes	2
113	192 So. 2d 757 (1966)	Burns	Yes	No	5	No	0
114	196 So. 2d 737 (1967)	Kirk	No	Yes	7	Yes	0
115	200 So. 2d 534 (1967)	Kirk	Yes	No	10	No	1
116	201 So. 2d 226 (1967)	Kirk	Yes	No	22	No	0
117	206 So. 2d 212 (1968)	Kirk	Yes	Yes	3	Yes	0

118	206 So. 2d 641 (1968)	Kirk	Yes	Yes	1	No	0
119	213 So. 2d 716 (1968)	Kirk	Yes	No	15	Yes	2
120	214 So. 2d 473 (1968)	Kirk	Yes	No	47	Yes	0
121	217 So. 2d 289 (1968)	Kirk	Yes	No	12	Yes	2
122	223 So. 2d 35 (1969)	Kirk	Yes	No	20	Yes	2
123	225 So. 2d 512 (1969)	Kirk	Yes	No	9	No	0
124	229 So. 2d 229 (1969)	Kirk	Yes	No	31	Yes	0
125	239 So. 2d 1 (1970)	Kirk	Yes	Yes	16	No	0
126	239 So. 2d 247 (1970)	Kirk	Yes	No	NA	Yes	0
127	243 So. 2d 573 (1971)	Askew	Yes	Yes	16	Yes	0
128	247 So. 2d 428 (1971)	Askew	Yes	No	11	Yes	0