to the identity of the "established" government of a foreign country.\textsuperscript{13}

\textbf{CORRESPONDENCE OF THE JUSTICES (1793)\textsuperscript{1}}

Letter from Thomas Jefferson, Secretary of State, to Chief Justice Jay and Associate Justices:

Philadelphia, July 18, 1793.

Gentlemen:

The war which has taken place among the powers of Europe produces frequent transactions within our ports and limits, on which questions arise of considerable difficulty, and of greater importance to the peace of the United States. These questions depend for their solution on the construction of our treaties, on the laws of nature and nations, and on the laws of the land, and are often presented under circumstances which do not give a cognizance of them to the tribunals of the country. Yet their decision is so little analogous to the ordinary functions of the executive, as to occasion much embarrassment and difficulty to them. The President therefore would be much relieved if he found himself free to refer questions of this description to the opinions of the judges of the Supreme Court of the United States, whose knowledge of the subject would secure us against errors dangerous to the peace of the United States, and their authority insure the respect of all parties. He has therefore asked the attendance of such of the judges as could be collected in time for the occasion, to know, in the first place, their opinion, whether the public may, with propriety, be availed of their advice on these questions? And if they may, to present, for their advice, the abstract questions which have already occurred, or may soon occur, from which they will themselves strike out such as any circumstances might, in their opinion, forbid them to pronounce on. I have the honour to be with sentiments of the most perfect respect, gentlemen,

Your most obedient and humble servant,


The following are some of the questions submitted by the President to the Justices:

1. Do the treaties between the United States and France give to France or her citizens a right, when at war with a power with whom the United States are at peace, to fit out originally in and from the ports of the United States vessels armed for war, with or without commission?

2. If they give such a right, does it extend to all manner of armed vessels, or to particular kinds only? If the latter, to what kinds does it extend?


1. The letters are respectively taken from 3 Correspondence and Public Papers of John Jay 486-89 (Johnston ed. 1891) and 15 The Papers of Alexander Hamilton 111 n.1 (H. Syrett ed. 1969), and the questions from 10 Sparks, Writings of Washington 542-45 (1836).
3. Do they give to France or her citizens, in the case supposed, a right to refit or arm anew vessels, which, before their coming within any port of the United States, were armed for war, with or without commission?

4. If they give such a right, does it extend to all manner of armed vessels, or to particular kinds only? If the latter, to what kinds does it extend? Does it include an augmentation of force, or does it only extend to replacing the vessel in statu quo?

17. Do the laws of neutrality, considered as aforesaid, authorize the United States to permit France, her subjects, or citizens, the sale within their ports of prizes made of the subjects or property of a power at war with France, before they have been carried into some port of France and there condemned, refusing the like privilege to her enemy?

18. Do those laws authorize the United States to permit to France the erection of courts within their territory and jurisdiction for the trial and condemnation of prizes, refusing that privilege to a power at war with France?

20. To what distance, by the laws and usages of nations, may the United States exercise the right of prohibiting the hostilities of foreign powers at war with each other within rivers, bays, and arms of the sea, and upon the sea along the coasts of the United States?

22. What are the articles, by name, to be prohibited to both or either party?

25. May we, within our own ports, sell ships to both parties, prepared merely for merchandise? May they be pierced for guns?

29. May an armed vessel belonging to any of the belligerent powers follow immediately merchant vessels, enemies, departing from our ports, for the purpose of making prizes of them? If not, how long ought the former to remain, after the latter have sailed? And what shall be considered as the place of departure from which the time is to be counted? And how are the facts to be ascertained?

On July 20, 1793, Chief Justice Jay and the Associate Justices wrote to President Washington expressing their wish to postpone the answer to Jefferson's letter until the sitting of the Court. On August 8, 1793, they wrote to the President as follows:

Sir:

We have considered the previous question stated in a letter written to us by your direction by the Secretary of State on the 18th of last month. The lines of separation drawn by the Constitution between the three departments of the government—their being in certain respects checks upon 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 the executive departments.

NOTE ON ADVISORY OPINIONS

(1) Consistent Practice. The prohibition against advisory opinions has been termed "the oldest and most consistent thread in the federal law of justiciabili-
ty." Wright, Law of Federal Courts 65 (5th ed.1994). But what makes a judicial opinion "advisory" in the constitutional sense? Would it be fair to describe the parts of Marbury v. Madison dealing with Marbury’s right to the commission and the propriety of the remedy of mandamus as advisory?

(2) Foundations. To what extent was the Justices’ decision controlled by the language and history of the Constitution? According to Wright, supra, at 65, “the power of English judges to give advisory opinions was well recognized” by 1770. Apparently for this reason, Felix Frankfurter concluded that the prohibition against advisory opinions must rest on policies implicit in Article III, rather than on historical pedigree. Frankfurter, Advisory Opinions, 1 Encyc. of the Social Sciences 475, 476 (1937). What are the policies to which Frankfurter referred? Are they the policies underlying the private rights or dispute resolution model of adjudication sketched on pp. 77-78, supra? Those associated with the “functional requisites” of effective adjudication acknowledged by the competing “public rights” model on pp. 79-81, supra?

To what extent would the objections to advisory opinions be lessened if the Court restricted itself to giving advisory rulings on definite states of fact, real or assumed? Consider the practices of administrative agencies in meeting demand for advance information of the agencies’ policies and legal position. See generally Schwartz, Administrative Law 149-59 (3d ed. 1991).

If the Justices had answered the questions presented to them, would their answers have been treated as authoritative in subsequent litigation?

If the Justices had answered the questions presented, how might the Supreme Court’s role have been altered? Would the Court’s prestige, and the acceptability of its decisions, have been enhanced or diminished? Is there value in having courts function exclusively as organs of sober second thought, appraising action already taken, rather than as advisers at the stage of initial decision?

1. Note that Jefferson’s questions to the Justices all sought clarification of existing law. Compare the proposal of Senator Schwellenbach in 1937 that the Supreme Court be requested to amend its rules so as to enable the Congress, on majority vote of both houses, to request and receive “advisory opinions as to the constitutionality of legislation pending before, and being considered by, the Congress of the United States.” S.Res. 103, 75th Cong., 1st Sess., 81 Cong.Rec. 2804 (1937).


Formal opinions of the Attorney General have been published since 1841, but their number has declined consistently in recent years. Between 1977 and 1992, the Office of Legal Counsel, which is authorized to release certain opinions of the Attorney General, published only 22 of these opinions.

5. According to Wheeler, note 2, supra, “the 1793 incident was * * * part of a broader attempt by the early Supreme Court to deemphasize the obligatory extrajudicial service concept, so widely held in the early period” (p. 158).