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Techniques to Avoid Advisory Opinions

by

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An advisory opinion is one based on a hypothetical set of facts. Since the eighteenth century, the United States Supreme Court has ruled that the U.S. Constitution bars federal courts from issuing advisory opinions. Even when the Constitution would not bar a judgment, prudential considerations often counsel against rendering an advisory opinion.

Our Supreme Court has condemned advisory opinions on at least three grounds. First, parties with an attenuated interest in a controversy may not devote sufficient resources to litigation. Half- hearted litigation of this nature may lead to poorly reasoned decisions. Second, legal disputes are most clear in the context of a concrete factual record. Attempting to resolve a dispute without such a record, once again, may yield poor decisionmaking. Finally, an advisory opinion about the legality of executive or legislative action unnecessarily interferes with those other branches of government. Courts should not interfere with the legislature or executive until a concrete controversy compels them to do so.

The Supreme Court has buttressed this aversion to advisory opinions by developing four doctrines to guard against those opinions: standing, ripeness, mootness, and political question. In addition, the Court usually limits its construction of a statute -- or a decision on a statute's constitutionality -- to the provisions directly before it. This judicial focus, which I call "limited decisionmaking," provides a fifth technique to avoid advisory opinions. In this report, I briefly discuss each of these five techniques.

The federal courts in the United States go to much greater lengths than some state courts toavoid advisory opinions. Some state constitutions, in fact, expressly permit their courts to render advisory opinions on some matters. In discusing techniques to avoid advisory opinions, therefore, I limit most of my remarks to techniques used by the federal courts in the United States. In a few instances, however, I contrast this approach with the more liberal approach followed by some state courts.

I. Standing

The standing doctrine limits judicial action to cases in which the party raising a statutory or constitutional issue has a direct personal interest. The personal interest, moreover, must involve some special injury that distinguishes the complainant from other citizens. Citizens in the United States may not use the courts to complain about governmental action that injures other citizens or that they
perceive as generally unfair.

Suppose, for example, that a city enacts a zoning ordinance barring all "apartment buildings" within its limits. The owner of a two-family house could challenge the ordinance, seeking to determine whether a two-family house is an "apartment building" within the meaning of the ordinance. If a court rules that a two-family house is an "apartment building," then the owner of the two-family house could challenge the constitutionality of the ordinance. The owner of the two-family house has standing to raise both of these issues, because she has a personal interest in the court's decision. The decision will determine whether she can continue to maintain her two-family house or will have to convert it into a single family residence.

Similarly, a current resident of the two-family house would have standing to challenge the ordinance. If the ordinance survives, the resident will have to find other lodgings. The

owner of a vacant lot who had planned to erect an apartment building on his lot would also have standing to challenge the ordinance. Although this second property owner does not yet own an apartment building, the ordinance affects his actions and he has a personal interest in the outcome of the court's decision. If the court construes the ordinance to allow some types of apartment buildings, or holds the ordinance unconstitutional, the owner of the vacant lot will be able to proceed with his plans. If the court rejects these challenges, the owner will have to develop different plans for the vacant lot.

Many other citizens, however, would not have standing to challenge this ordinance. A professor of economics, for example, might feel strongly that the ordinance violated free market principles. She might even have conducted scholarly research on this issue. Neither her strong feelings nor her scholarly research, however, would give her standing to challenge the ordinance. Nor could a town resident who simply disagreed with the ordinance challenge the rule in court. These individuals could complain to the town council or publish newspaper articles criticizing the ordinance, but they would not have standing to bring their challenge to court. A court would rule that they lack the "particularized interest" possessed by an owner of a multi-unit building, an inhabitant of that building, or a property owner planning to build an apartment house.

Between these two extremes -- the current owner of an apartment building and the citizen who simply disagrees with an ordinance -- lie many degrees of interest. Judges could differ over when an interest becomes sufficiently strong or individual to confer standing. The United States Supreme Court has been relatively conservative in drawing that line. This conservative line further reduces the Court's likelihood of issuing an advisory opinion.

In one case, for example, the Court held that low-income residents of a neighboring city could not challenge an ordinance similar to the one I just described. The low-income residents claimed that the ordinance precluded them from moving to the adjacent town. The Court held, however, that the residents had not shown a "substantial probability" that, absent the ordinance, they would have been able to find housing within their budget. The availability of low-income housing depends upon many factors, including the willingness of property owners to build and maintain that housing. Even if a court struck the prohibition of apartment buildings as unconstitutional (or interpreted that ordinance to permit two-family dwellings), the plaintiffs might not have been able to find suitable housing.

The Supreme Court has also refused to grant taxpayers standing to challenge most types of governmental action. In the case I just described, for example, town taxpayers might argue that their tax dollars are being used to enforce an unconstitutional housing ordinance. One could argue that these taxpayers have a personal stake in the outcome of their constitutional challenge; if they succeed, their tax money will be used for other purposes. The Supreme Court, however, has refused to recognize this type of taxpayer standing, fearing that it would allow almost any citizen to challenge any disputed governmental action. The Court prefers aggrieved citizens to bring these complaints directly to the legislature, rather than to the courts.

State courts have not interpreted the standing doctrine this rigorously. Most states, for example, grant standing to taxpayers. Some follow other liberal standing doctrines. The U.S. Supreme Court's more rigorous interpretation of standing may reflect, in part, a desire to limit the power of federal courts within a federal-state system. In addition, the doctrine reflects that

Court's strong opposition to advisory opinions.

II. Ripeness

A second doctrine for avoiding advisory opinions is the rule that a court will not consider a case until it is "ripe" for review. Federal courts in the United States will not act until harm to the complaining party is relatively imminent. Once again, this doctrine insures that the factual record behind any dispute is complete and that the court withholds its judicial power until resolution of the controversy is necessary.

If applied rigorously, the ripeness doctrine would bar a large number of lawsuits. One could argue, for example, that challenges to the housing ordinance I described above are not ripe until the town fines a property owner for violating the ordinance. Similarly, one could argue that the complaint of the vacant lot owner is not ripe until he erects an apartment building on the land and the town prevents him from renting the apartments.

The U.S. courts, however, have not interpreted the ripeness doctrine this strictly. They have recognized the unfairness of requiring a party to suffer criminal prosecution -- or to invest substantial money in a project -- before obtaining a definitive ruling about the scope or constitutionality of a statute. As long as a complaining party has standing, the courts have been relatively generous in finding that cases are ripe for decision.

Even when a criminal statute has fallen into disuse, modern Supreme Court opinions allow challenges brought by individuals who claim that the possibility of prosecution hinders their activities. In one case, for example, a teacher challenged the constitutionality of a statute forbidding the teaching of evolution. Even though no prosecutions had been brought under the statute, and the Court characterized the statute as "more of a curiosity than a vital fact of life," the Court held that the statute's chilling effect was sufficient to render the challenge ripe.

The ripeness doctrine, however, would preclude a party from challenging a statute before the legislature enacted the statute. Thus, at least in the federal courts, parties cannot obtain advisory opinions on the constitutionality of proposed legislation. In addition, courts sometimes hold that a challenge to a statute must wait until another branch of government construes the statute. Especially if an administrative agency is charged with implementing the statute, a court may wait until the agency issues regulations interpreting the statute before either determining the scope of the statutory language or judging the statute's constitutionality.

III. Mootness

While the ripeness doctrine prevents controversies from coming to court before they are sufficiently developed, the mootness doctrine prevents those controversies from remaining in court after the underlying dispute is over. Once again, the doctrine helps courts avoid rendering decisions in hypothetical cases.

To return once again to my example of a zoning ordinance prohibiting "apartment buildings," suppose that our vacant lot owner challenges the ordinance as interfering with his plans to build an apartment building on the lot. At the time the property owner institutes the lawsuit, he plans to build a multi-unit dwelling on the lot. While the lawsuit is pending,

however, the owner decides that he could make more money by building a shopping center on the lot -- and the ordinance does not prohibit shopping centers.

At this point, the controversy has become moot. The property owner no longer has a personal interest in the outcome of the case; the court's decision will not affect his actions in any way. The United States Supreme Court would dismiss this controversy as moot. The Court would not waste its judicial resources on this controversy; nor would it want to risk an erroneous decision in this hypothetical case.

Notice that the controversy is moot even if other property owners retain a live interest in constructing apartment buildings. If those property owners want to challenge the ordinance, they must file their own lawsuits doing so. At least one party in the case pending before the court must retain a live interest in the controversy to avoid application of the mootness doctrine.

Courts have recognized two major exceptions to this doctrine. First, filing a class action may avoid the mootness doctrine. If the vacant lot owner in my hypothetical had challenged the zoning ordinance on behalf of himself and all other property owners planning to construct apartment buildings, and if the court had recognized this class, the class action would survive the named plaintiff's change of plans. As long as at least one member of the class still planned to construct an apartment building, the controversy would retain life and avoid dismissal as moot.

Second, courts have recognized that the judicial process lasts longer than some conditions raising legal issues. Strict application of the mootness doctrine would prevent judicial review of these legal challenges. In 1970, for example, a pregnant woman challenged the constitutionality of a law preventing her from obtaining an abortion. The United States Supreme Court did not decide her case until three years later -- when the time for obtaining an abortion was long since past. The Court, however, ruled that the plaintiff's case was not moot. Instead, her complaint was "capable of repetition, yet evading review." The plaintiff might well become pregnant again, and challenge the same abortion statute, but the slowness of judicial review would prevent her case from reaching the Supreme Court in time to obtain an abortion. Under circumstances like these, the Court has relaxed the mootness doctrine.

IV. Political Questions

The political question doctrine serves many purposes. Indeed, the primary purpose of the doctrine is to prevent the federal courts from invading areas better left to the legislative or executive departments. In some cases, however, the political question doctrine also prevents the courts from issuing an advisory opinon. For that reason, I discuss the doctrine briefly here.

The Supreme Court has held that political questions may arise in six types of situations:

(1) When the Constitution textually commits a decision to a branch other than the judiciary.
(2) Whenthe courts lack judicially manageable standards for resolving a dispute.
(3) When the issue requires a policy determination that clearly depends upon nonjudicial discretion.
(4) When the courts cannot resolve the issue without expressing a lack of respect for

the other branches of government.

(5) When there is an unusual need for unquestioning adherence to a decision already made by another governmental branch.

(6) When conflicting pronouncements from different branches of government would cause significant embarrassment.

Read broadly, these guidelines would preclude many types of judicial action. Whenever a court declares a statute unconstitutional, for example, the legislature could claim that the court has expressed a lack of respect or engaged in a policy decision. Federal courts in the United States, however, have construed the political question doctrine relatively narrowly. They have relied upon the doctrine largely to limit judicial action in some matters of foreign affairs where the Constitution grants special powers to the President or Congress and where the nation's need to speak with one voice is strongest.

By applying the political question doctrine in these limited cases, the courts maintain important separation-of-powers principles. They also give the executive and legislative branches significant freedom of action in these limited fields. The doctrine, however, also restrains the courts from issuing advisory opinions on matters subject to the political question doctrine. This is true even if the executive or legislature would like to have the courts' advisory input. Once the court has ruled that an issue raises a political question, the executive and legislative branches must resolve that issue on their own.

Indeed, the political question doctrine differs from the other techniques discussed here because it raises a permanent bar to judicial action. If one citizen lacks standing to challenge a statute, another citizen with different interests may be able to assert that standing. If one lawsuit fails on ripeness or mootness grounds, a later suit may succeed. Once the Supreme Court labels an issue a political question, however, no court may resolve that issue. Perhaps for this reason, the courts have been more reluctant to invoke the political question doctrine than the other techniques discussed here.

V. Limited Decisionmaking

In addition to the four doctrines related to standing, ripeness, mootness, and political questions, courts use a technique I call "limited decisionmaking" to avoid advisory opinions. Under this technique, courts decide only the specific issues raised by the controversy before them. They avoid deciding related issues that another party might raise in a future case.

In part, this technique involves application of the standing, ripeness, mootness, and political question doctrines to each issue in a case rather than simply to the case as a whole. Suppose, for example, that a statute bars both "manufacturing" and "selling" liquor. A social club that serves liquor to its members might challenge the meaning of "selling." Does serving liquor to a club's guests constitute "selling" liquor if the guests pay for their memberships? If this is a sale, is the statute constitutional? The club has standing to raise both of these issues. Unless the club makes its own liquor, however, it lacks standing to raise any questions related to the ban on "manufacturing" liquor.

Similarly, if an administrative agency has issued regulations defining the "sale" of liquor under this statute, but has not yet issued regulations defining the "manufacture" of liquor,

challenges to the regulation of sales may be ripe while those related to manufacture are not yet ripe.

In addition to this careful application of the standing, mootness, ripeness, and political question doctrines, U.S. courts usually limit their rulings as narrowly as possible to the facts before them. Suppose, for example, that the social club I described does not charge its members any fee to belong to the club. The club relies upon the endowment of a wealthy benefactor to provide benefits to its members. A court considering the statute I just described might decide that this club is not "selling" liquor when it provides free drinks to members. The court would leave for another day, however, the question whether a club that charged a membership fee was "selling" liquor to members. Answering the latter question in the first case would constitute an advisory opinion.

Conclusion

Federal courts in the United States have developed several doctrines to avoid renderingadvisory opinions. As I mentioned at the start, avoidance of advisory opinions serves at least three important purposes. Resisting advisory opinions promotes careful decisionmaking by insuring that

(1) only litigants with a substantial stake in the outcome of the case present arguments to the court;
(2) the court has a full factual record to inform its decision; and
(3) the court defers interference with legislative or executive action until that interference is unavoidable.

It is worth noting in conclusion that these doctrines also complement the principle of stare decisis. Under stare decisis, one court's decision binds a later or inferior court's decision on the same issue. Techniques developed to avoid advisory opinions, however, insure that courts set precedents only in cases with fully developed records. Those precedents, moreover, control only the narrowest range of future cases. Judges deciding subsequent cases may more readily distinguish the earlier decision. The doctrine of stare decisis and techniques for avoiding advisory opinions thus work together to promote the orderly development of legal principles.