Basic Legal Doctrines Frequently Arising In the D.C. Circuit

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The D.C. Circuit's docket is distinctive in that many cases focus on the Administrative Procedure Act, justiciability doctrines, and/or detainee litigation. This article summarizes key legal doctrines relevant to each of these broad categories. More particular doctrines discussed in each Part include: (i) arbitrary-and-capricious review and *Chevron* deference; (ii) constitutional and prudential standing, the voluntary-cessation and capable-of-repetition exceptions to mootness, and the political question doctrine; and (iii) the issues raised in the recent D.C. Circuit decision, *Latif v. Obama*.

I. The Administrative Procedure Act

The D.C. Circuit frequently hears challenges to agency action under the Administrative Procedure Act (APA). Broadly speaking, most APA claims fall into two principal categories: arbitrary-and-capricious review and statutory review.

A. Arbitrary-and-Capricious Review

Perhaps the single largest category of D.C. Circuit cases concerns private-party allegations that an agency has acted in an arbitrary and capricious manner in violation of the APA. *See* 5 U.S.C. § 706(2)(A) ("The reviewing court shall hold unlawful and set aside agency actions, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law[.]"); *City of Kansas City v. Dep't of Hous. & Urban Dev.*, 923 F.2d 188, 189 (D.C. Cir. 1991) (even "assuming[] arguendo" that the agency had ample statutory authority, its action was devoid of "reasoned decision-making," and was therefore arbitrary and capricious).

The Supreme Court has explained that the arbitrary-and-capricious standard "require[s] the reviewing court to engage in a substantial inquiry." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415 (1971). In particular, the reviewing court must determine whether the agency has "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Motor Vehicle Mfr. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (internal quotation marks and citations omitted). "In reviewing that explanation, [the court] must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Id.* (internal quotation marks and citation omitted).

Despite the important role for judicial review, there are important limits on its scope. For example, it is "a simple but fundamental rule of administrative law" that "a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency." *SEC v. Chenery*, 332 U.S. 194, 196 (1947). Moreover, it is well-settled that "the basis for the decision" ultimately reached "must come from the agency" as opposed to the judiciary. JACOB A. STEIN ET AL., 6 ADMINISTRATIVE LAW § 51.03, at 51-915 (2009). The reviewing court may

not "attempt itself to make up for" the agency's "deficiencies," and "may not supply a reasoned basis for the agency's action that the agency itself has not given." *State Farm*, 463 U.S. at 43. "Where the agency has failed to provide a reasoned explanation, or where the record belies the agency's conclusion, [the court] must undo its action." *Petroleum Commc'ns, Inc. v. FCC*, 22 F.3d 1164, 1172 (D.C. Cir. 1994).

The seminal application of arbitrary-and-capricious review is *State Farm*, where the Supreme Court reviewed a regulatory decision by the National Highway Transportation and Safety Administration ("NHTSA"). The agency had rescinded certain seatbelt regulations that would have obligated car companies to install either airbags or automatic seatbelts. *Id.* at 37. The agency had done so because "automobile manufacturers planned to install the automatic seatbelts in approximately 99% of the new cars," and so "the lifesaving potential of airbags" originally envisioned by the regulations "would not be realized." *Id.* at 38. Thus, "the agency concluded that there was no longer a basis for reliably predicting that the [regulations] would lead to any significant increased usage of restraints at all." *Id.* at 39.

The Court rejected the agency's decision, explaining that "NHTSA apparently gave no consideration whatever to modifying the [regulations] to require that airbag technology be utilized." *Id.* The agency "did not even consider [that] possibility" in its decision, but "[a]t the very least[,] this alternative way of achieving the objectives of the [governing statute] should have been addressed and adequate reasons given for its abandonment." *Id.* at 48. There were "no findings and no analysis here to justify the choice made, no indication of the basis on which the agency exercised its expert discretion." *Id.* (internal quotation marks, brackets, and citation omitted). Indeed, NHTSA had not even "offer[ed] a rational connection between the facts found and the choice made." *Id.* at 52 (internal quotation marks and citation omitted). Because "the agency failed to present an adequate basis and explanation for rescinding the passive restraint requirement," its decision was vacated. *Id.* at 34, 57.

The D.C. Circuit applies *State Farm*'s arbitrary-and-capricious inquiry in myriad cases every year. For example, in *Allied-Signal, Inc. v. United States Nuclear Regulatory Commission*, 988 F.2d 146 (D.C. Cir. 1993), the D.C. Circuit reviewed an action by the Nuclear Regulatory Commission ("NRC") to apportion costs among various regulated parties. *Id.* at 148. NRC's governing statute directed it "to recover 100% of its costs from those who receive[d] its regulatory services and to allocate the costs fairly and equitably among those recipients." *Id.* (internal quotation marks omitted). NRC's proposed regulation would have recovered costs from each regulated class in proportion to the level of waste produced by the class's overall membership. *Id.* at 152. But NRC still placed a uniform charge on each waste producer, without regard to that individual producer's waste output. *Id.*

Because the NRC justified its action based on a "conclusory statement" that the charges "should be the same for all large fuel facility licensees," *id.*, the D.C. Circuit invalidated NCR's determination as arbitrary and capricious, *id.* at 152-53. The court further explained that "no rationale [was] readily apparent" for the agency's decision, and the court "g[a]ve little weight to the possibility that the [agency] could pull a reasonable explanation out of the hat" based on the administrative record. *Id.* at 152.

B. Statutory Review

Under the APA, the Court must set aside agency action that is "not in accordance with law," or that is "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2)(A), (C). "[T]he judiciary, not the agency, is the final authority on issues of statutory construction," and must therefore set aside "any administrative constructions" of the statute that violate "clear congressional intent." *Massachusetts v. Dep't of Transp.*, 93 F.3d 890, 893 (D.C. Cir. 1996) (internal quotation marks citation omitted). Where "the text and reasonable inferences from it give a clear answer" about Congress's intention, that "is the end of the matter," and the agency's decision must be vacated. *Brown v. Gardner*, 513 U.S. 115, 120 (1994) (internal quotation marks and citation omitted); *see also Davis Cnty. Solid Waste Mgmt. v. Envtl. Protection Agency*, 101 F.3d 1395, 1402 (D.C. Cir. 1996) (setting aside agency regulations that "conflict[ed] with the plain meaning of" the relevant statute).

Thus, in *Brown v. Gardner*, the Supreme Court addressed a statute that directed the Department of Veterans Affairs ("the VA") to compensate for injuries occurring "as the result of hospitalization" or other medical treatment, "so long as the injury was not the result of such veteran's own willful misconduct." 513 U.S. at 116 (internal quotation marks and citation omitted). The VA adopted measures that required veterans seeking compensation "to prove that [their] disability resulted from negligent treatment by the VA[,] or an accident occurring during treatment." *Id.* The Court held that the VA violated the statute, which contained not "so much as a word about fault on the part of the VA." *Id.* at 117. The agency could not "impos[e] a burden" that the statute did not contain. *Id.* at 120. Based on this "clear textually grounded conclusion," the Court set aside the agency's decision. *Id.*

Similarly, in *Davis County Solid Waste*, the D.C. Circuit considered Clean Air Act provisions directing the Environmental Protection Agency ("the EPA") to promulgate emissions standards regarding "solid waste incineration units." 101 F.3d at 1402. The EPA implemented this mandate by limiting municipal solid waste ("MSW") combustion based "on the aggregate MSW capacity of the *plant* at which [a waste combustor] unit was located," rather than for the individual combustor unit itself. *Id.* at 1397 (emphasis added). The D.C. Circuit set aside these standards, *id.* at 1411-12, holding that they "violate[d] the plain meaning" of the governing statute, which required the EPA to set standards by reference to waste combustion "units," rather than "aggregate plant capacity," as the EPA suggested. *Id.* at 1409-10. The court vacated the EPA's restrictions in part and remanded for the agency to "reissue those standards" consistent with the statute. *Id.* at 1411.

The most famous doctrine of APA statutory review is the so-called "*Chevron* doctrine," named after the Supreme Court's seminal decision in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The *Chevron* doctrine evaluates agency action that plausibly may be within the scope of regulation delegated by Congress to the agency and proceeds in two stages. The first is often called "*Chevron* step one." The reviewing court at step-one asks "whether Congress has directly spoken to the . . . issue." *Id.* at 842. Many *Chevron* cases do not proceed past this first step. As the Supreme Court explained, if "the statute "is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43.

However, the statutory text may not be clear on its face, and the reviewing court may determine that "Congress has not directly addressed the precise question at issue." *Id.* at 843. In that event, the reviewing court proceeds to what is often called "*Chevron* step two." During this second phase, "the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843. To survive step-two review, the agency's interpretation may be no more than one among many permissible readings of the statutory text. Furthermore, the agency is free to adopt permissible readings different from constructions previously adopted by the agency or viewed as permissible by courts. *Id.*

II. Justiciability

The D.C. Circuit's extensive administrative-law docket ensures a steady stream of justiciability issues, often raised by government defendants to defeat challenges to agency action. Three types of justiciability issues are discussed below: standing (both constitutional and statutory), mootness (the voluntary-cessation and capable-of-repetition exceptions), and the political question doctrine.

A. Standing

Litigation in the D.C. Circuit often raises issues regarding two types of standing: constitutional and prudential.

Constitutional standing is based on the Article III of the Constitution, which affords federal courts jurisdiction over certain "Cases" and "Controversies." The Supreme Court has emphasized that Article III standing preserves "the traditional role of the Anglo-American courts." *Summers v. Earth Island Institute*, 129 S. Ct. 1142, 1148 (2009). The "irreducible constitutional minimum" necessary to establish constitutional standing includes three ingredients. First, the plaintiff "must have suffered an 'injury in fact'" that is "concrete," "particularized," and either "actual" or "imminent." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Second, "there must be a causal connection between the injury and the conduct complained of." *Id.* And, third, "it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" *Id.* Constitutional standing issues often arise in connection with regulatory disputes in which interest groups attempt to challenge agency action or inaction. *See, e.g., Coalition for Mercury-Free Drugs v. Sebelius*, No. 11-5035 (March 13, 2012) (holding that the petitioner lacked constitutional standing to challenge an FDA decision regarding a mercury-based preservative).

Prudential standing, also called statutory standing, arises most commonly in administrative-law cases. *See Bennett v. Spear*, 520 U.S. 154, 162 (1997) (discussing "prudential limitations" on standing). This doctrine requires "that a plaintiff's grievance must arguably fall within the zone of interests protected or regulated by the statutory provision." *Id.* In applying this requirement, the D.C. Circuit has emphasized that "[t]he zone of interest test . . . is intended to 'exclude only those whose interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit.'" *National Ass'n of Home v. US Army Corps*, 417 F.3d 1272, 1287

(2005) (citation omitted). Further, the D.C. Circuit has found prudential or statutory standing requirements satisfied where a party has both statutory interests and self-interests at stake. For example, in the context of environmental litigation under the National Environmental Protection Act (NEPA), the D.C. Circuit has held that "a party is not precluded from asserting cognizable injury to environmental values because his 'real' or 'obvious' interest may be viewed as monetary or 'disqualified' from asserting a legal claim under NEPA because the 'impetus' behind the NEPA claim may be economic." *Id.*

B. Mootness

In administrative-law cases, mootness issues often arise because the agency has voluntarily abandoned or modified the policy under review. While mootness may result in such situations, the Supreme Court has been clear that a party faces a "heavy burden" when asserting that the "case has been mooted by the defendant's voluntary conduct." *Friends of the Earth, Inc. v. Laidlaw Envt'l Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000). In particular, the government must carry the "formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur," *id.*, and that it has "completely and irrevocably eradicated the effects of the alleged violation." *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979). This "stringent" requirement, *id.*, "protect[s] plaintiffs from defendants who seek to evade sanction by predictable protestations of repentance and reform." *Gwaltney of Smithfield v. Chesapeake Bay Fdn.*, 489 U.S. 49, 66-67 (1987) (internal quotation marks and citation omitted).

In evaluating mootness in administrative-law cases, it is particularly important to distinguish potentially ongoing agency policies from discrete agency actions. As the D.C. Circuit has explained, "It is well-established that if a plaintiff challenges both a specific agency action and the *policy* that underlies the action, the challenge to the policy is not necessarily mooted merely because the challenge to the particular agency action is moot." *City of Houston v. Dep't of Hous. & Urban Dev.*, 24 F.3d 1421, 1428 (D.C. Cir. 1994) (citation omitted). The D.C. Circuit's decision in *Worth v. Jackson*, 451 F.3d 854 (D.C. Cir. 2006), illustrates what is required to show that a challenge to an agency policy has become moot. In that case, the plaintiff had challenged an expired regulation of the Department of Housing and Urban Development ("HUD"). HUD filed an affidavit explaining that it had no plan to revive the expired regulation. Citing the affidavit, the D.C. Circuit held that the case was moot. The court explained that "[t]o be sure, the Supreme Court has occasionally addressed challenges to laws no longer in force, but it has done so only when the statute or ordinance in question has been replaced by a substantially similar enactment, . . . or where the governing body expressed an intent to re-enact the allegedly defective law." *Id.* at 861 (citations omitted).

Under a separate exception to mootness, courts will hear lapsed controversies that are capable of repetition yet evading review. This doctrine provides that a given claim is not moot where "(1) the challenged action is in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there [is] a reasonable expectation that the same complaining party would be subjected to the same action again." *Del Monte Fresh Produce Co. v. United States*, 570 F.3d 316, 322 (D.C. Cir. 2009). "Agency actions of less than two years' duration cannot be 'fully litigated' prior to cessation or expiration, so long as the short duration is typical

of the challenged action." *Id.* (quoting *Pub. Utils. Comm'n v. FERC*, 236 F.3d 708, 714 (D.C. Cir. 2001)). To invoke this exception to mootness, a plaintiff or petitioner need not demonstrate that the challenged agency will certainly reinstitute its prior policy; instead, "what matters is whether it is reasonably likely" that the plaintiff "will suffer the same type of legal wrong . . . in the future." *Id.* at 324.

B. The Political Question Doctrine

Until this Term, the leading political question case was *Baker v. Carr*, where the Supreme Court identified six categories of nonjusticiable political questions variously based on:

> [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

369 U.S. 186, 217 (1962). The Supreme Court has emphasized that political questions arise in connection with "policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch," *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986), as well as in areas where "the Constitution has given one of the political branches final responsibility," *Nixon v. United States*, 506 U.S. 224, 240 (1993) (White, J. concurring). In two recent decisions, the D.C. Circuit has applied the political question doctrine to bar civil suits.

In the first of these recent cases, *El-Shifa Pharmaceutical Industries Co. v. United States*, 607 F. 3d 836 (D.C. Cir. 2010) (en banc), "[t]he owners of a Sudanese pharmaceutical plant sued the United States for unjustifiably destroying the plant, failing to compensate them for its destruction, and defaming them by asserting they had ties to Osama bin Laden." *Id.* at 8137. The en banc D.C. Circuit held that this suit should be dismissed based on the political question doctrine. The court explained "that courts are not a forum for reconsidering the wisdom of discretionary decisions made by the political branches in the realm of foreign policy or national security." *Id.* at 842. "If the political question doctrine means anything in the arena of national security and foreign relations," the en banc D.C. Circuit reasoned, "it means the courts cannot assess the merits of the President's decision to launch an attack on a foreign target, and the plaintiffs ask us to do just that." *Id.* at 844.

A number of D.C. Circuit judges dissented from the decision in *El-Shifa*. The principal dissent, written by Judge Kavanaugh, argued that "[t]he Supreme Court has never applied the political question doctrine in cases involving statutory claims of this kind." *Id.* at 855. Expressly drawing on prior opinions by Senior Judge Edwards, Judge Kavanaugh reasoned that

"the proper separation of powers question in this sort of statutory case is whether the statute as applied infringes on the President's exclusive, preclusive authority under Article II of the Constitution." *Id.* (citing *Zivotofsky v. Sec'y of State*, 571 F.3d 1227, 1240-45 (D.C. Cir. 2009) (Edwards, J., concurring)).

The second recent decision, *Zivotofsky v. Clinton*, paralleled the *El-Shifa* majority in finding a political question, but was vacated and remanded by the Supreme Court. 132 S. Ct. 1421 (2012). The suit in *Zivotofsky* requested enforcement of a statute allowing Americans born in Jerusalem to have "Israel" listed on their passports as their place of birth. The D.C. Circuit had held that this measure presented a political question, but the Supreme Court disagreed. Instead of quoting all six *Baker* factors, the Court discussed two areas where it had previously found political questions – namely, cases involving "a textually demonstrable constitutional commitment of the issue to a coordinate political department," and cases involving "a lack of judicially discoverable and manageable standards." *Baker*, 369 U.S. at 217. The Supreme Court explained that the first circumstance did not obtain because "there is, of course, no exclusive commitment to the Executive of the power to determine the constitutionality of a statute." 132 S. Ct. at 1428. The second circumstance did not apply either, since courts are well-equipped to engage in a "careful examination of the textual, structural, and historical evidence put forward by the parties regarding the nature of the statute and of the passport and recognition powers." *Id.* at 1429. "This is what courts do." *Id.* The Court accordingly remanded for a judgment on the merits. The Supreme Court's disagreement with the D.C. Circuit suggests that the political question doctrine may be in a state of flux in the years to come.

III. Detainee Litigation

In recent years, the D.C. Circuit's docket has included a type of case heard nowhere else in the United States: habeas corpus cases raised by detainees at Guantanamo Bay pursuant to the Supreme Court's decision in *Boumediene v. Bush*, 553 U.S. 723 (2008). Though significantly redacted, the recent 2011 D.C. Circuit decision in *Latif v. Obama*, 666 F.3d 746 (D.C. Cir. 2011), provides a useful example of current D.C. Circuit habeas corpus case law. The government had agreed that its argument in support of detention significantly depended on a single document, and the District Court had found that document to be unreliable. The D.C. Circuit vacated and remanded. *Latif* reasoned in part that the District Court had failed to apply a "presumption of regularity" to "an official government record." *Id.* at 748-55. Latif emphasized that this presumption pertained only to the regularity of the government's record and "does not compel a determination that the record establishes what it is offered to prove." *Id.* at 750. *Latif* also reasoned in part that the District Court had failed to assess the reliability of the document in question based on all the evidence. After stating that "*Boumediene*'s air suppositions have caused great difficulty for the Executive and the courts," *id.*, at 764, *Latif* vacated and remanded to the District Court to apply the newly clarified legal framework. Judge Henderson concurred in the judgment, in part to explain her preference for reversal as opposed to remand. *Id.* at 764 (Henderson, J., concurring in the judgment). Writing in dissent, Judge Tatel argued in part that the majority was wrong to apply its "presumption of regularity" and that the District Court's factual findings contained no "clear error." *Id.* at 770-71 (Tatel, J., dissenting). Judge Tatel would therefore have sustained the District Court's factual findings, as well as the District Court's decision to issue the writ of habeas corpus.