COMMENT

THE NOT-SO HARMLESS ERROR RULE: HOW § 706 OF THE APA COULD BE APPLIED IN A MORE EFFECTIVE MANNER

CANNON JURRENS*

* J.D. Candidate, 2022, Washington College of Law; B.A., Political Science, 2017, Rutgers University. This Comment would not have been possible without the thoughtful guidance and mentorship of Professor Jeffrey Lubbers and the unparalleled editorial assistance of the *Administrative Law Review* staff. I would also like to thank my husband and friends for their unwavering support and positivity throughout this process, without whom I would not be where I am today. Finally, and most importantly, I would like to thank my parents for their unconditional love and encouragement. I am grateful every day to be their daughter.

INTRODUCTION

The late Justice Benjamin Cardozo once noted that "[t]he tendency of a principle [is] to expand itself to the limit of its logic."[1] The modern application of the prejudicial error rule, which allows appellate courts to disregard agency or trial court errors that do not affect the substantial rights of a challenging party, amply demonstrates the truth of Justice Cardozo's observation.[2] In 1919, Congress adopted the prejudicial error rule in response to widespread perception that appellate courts were "impregnable citadels of technicality."[3] The administrative prejudicial error rule, as established in the Administrative Procedure Act (APA),[4] falls into this category. The rule is profoundly important in determining whether an alleged agency misstep violates the APA and ultimately harms a challenging party.[5] However, the rule is arguably inoperative because courts do not apply the rule to agency missteps in a linear way.[6] The lack of linear application leaves challenging parties with no clear path to a successful challenge, and the remedies provided by a court often outweigh the harm caused by the infraction.[7]

In 1946, Congress passed the APA, which controls judicial review of agency action.[8] When an agency violates required procedures, a court may either declare an agency action unlawful or vacate the action.[9] The APA's

---

1. BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 51 (1921).

2. *See generally* Administrative Procedure Act, 5 U.S.C. § 706 ("[T]he court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.").

3. Kotteakos v. United States, 328 U.S. 750, 759 (1946) (quoting Marcus A. Kavanagh, *Improvement of Administration of Criminal Justice by Exercise of Judicial Power*, 11 A.B.A. J. 217, 222 (1925)).

4. 5 U.S.C. §§ 551–559, 561–570a, 701–706.

5. *See* TODD GARVEY, CONG. RSCH. SERV., R41546, A BRIEF OVERVIEW OF RULEMAKING AND JUDICIAL REVIEW 1 (2017) ("The Administrative Procedure Act (APA), which applies to all executive branch and independent agencies, prescribes procedures for agency rulemakings and adjudications, as well as standards for judicial review of final agency actions.").

6. *See infra* text accompanying notes 59–63.

7. We can see one example of the rule's inoperability in two cases that apply two different tests to an error that should invoke the same analysis, culminating in relatively the same outcome. *Compare* Am. Radio Relay League, Inc. v. FCC, 524 F.3d 227, 237 (D.C. Cir. 2008) (applying the record-based test to a procedural error), *with* Friends of Iwo Jima v. Nat'l Cap. Plan. Comm'n, 176 F.3d 768, 774 (4th Cir. 1999) (applying the outcome-based test to a procedural error).

8. *See* 5 U.S.C. § 706 (providing that courts should ask several questions about agency action in their review).

9. *Id.*

author's laid out relevant questions of law that a reviewing court must determine when assessing the meaning or application of an agency action.[10] Section 706(2) provides six relevant legal questions that a court must ask.[11] These questions include: claims of unconstitutionality; *ultra vires* action; violations of procedural requirements; and whether the action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[12] At the end of § 706, the drafters stated "[i]n making the foregoing determinations . . . due account shall be taken of the rule of prejudicial error."[13] This clause is known as the administrative law prejudicial error rule or the harmless error rule.[14]

Administrative law cases need the prejudicial error rule (like in civil and criminal law); agencies and judges are apt to make the occasional mistake. When mistakes arise, it is left to the court to determine whether a mistake is so significant that it amounts to substantial harm.[15] On the other hand, the mistake may be so insignificant as to be considered "harmless," so no action needs to be taken.[16] Deciding when an error is harmless is an important legal issue. The administrative prejudicial error rule is necessary to ensure that agencies and parties are not unduly harmed by an agency action or decision.[17] Yet the rule in its current form does just the opposite; the rule creates an inefficient, unpredictable system, with exponential procedural and financial burdens.[18]

Courts have wrestled with the application of § 706's prejudicial error rule since 1946. The rule's adoption came with little clarity or guidance from

10. *See id.* (providing points for a reviewing court to consider in evaluating agency action); Roni A. Elias, *The Legislative History of the Administrative Procedure Act*, 27 FORDHAM ENV'T L. REV. 207, 208 (2016) (providing a substantial overview of the adoption of the APA).

11. *See* 5 U.S.C. § 706 (listing categories of agency actions that a court would hold unlawful).

12. 5 U.S.C. § 706(2)(A).

13. 5 U.S.C. § 706.

14. *See* Craig Smith, *Taking "Due Account" of the APA's Prejudicial-Error Rule*, 96 VA. L. REV. 1727, 1727, 1730 n.15 (2010) ("A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.") (quoting 5 U.S.C. § 702).

15. *See* Shinseki v. Sanders, 556 U.S. 396, 407–08 (2009) (taking no regard for errors that do not affect the parties' "substantial rights").

16. *Id.* (stating that the court has read the APA as "a [C]ongressional preference for determining 'harmless error' without the use of presumptions").

17. *See* Smith, *supra* note 14, at 1727 ("Despite how often courts review agency action under the APA, the Act's harmless-error rule remains ill-defined . . . a recent Supreme Court opinion indicates that after sixty years of review under the APA, courts have yet to decide just when a complaining party has been injured—and therefore prejudiced—by an agency's error.").

18. *Id.* at 1728–29.

Congress[19] and resulted in unpredictable decisions that adversely affected both agencies and challenging parties.[20] It was left to the courts to apply gloss to the rule for it to be an effective tool for determining whether an agency error was harmful to a challenging party or simply an agency misstep with no undue consequences. Yet despite decades of effort in molding the administrative prejudicial error rule, a concrete doctrine for courts to easily apply in practice remains elusive.[21] The Supreme Court should adopt a standardized test for both procedural and substantive agency errors because such errors invoke the prejudicial error rule frequently. If not, Congress should amend the APA to ensure that the prejudicial error rule is applied consistently to eliminate ambiguity or the appearance of legislating from the bench.

Part I of this Comment explores the history and application of the prejudicial error rule through its creation in civil and criminal contexts, and its application since the APA's establishment. Part II analyzes three possible applications of the rule: (1) the outcome-based test, (2) the record-based test, and (3) a recitation of the language in § 706. Part II builds upon these three avenues as they apply to the most recent court opinions, which attempted to analyze the prejudicial error rule. Finally, Part III recommends a new test for the analysis of prejudicial errors, further advocating that the Supreme Court adopt this new test or that Congress amend the APA to eliminate the current test's ambiguity. If the Supreme Court adopts this new test, it would regularize the prejudicial error rule by providing lower courts with the necessary tools to analyze the doctrine, while still providing parties with meaningful remedies. Alternatively, if Congress amended the APA—an admittedly more difficult task—the prejudicial error rule could be clarified. Moreover, the Administrative Conference of the United States (ACUS) should provide further guidance, as it is the leading expert in this area.

I. HISTORY OF THE PREJUDICIAL ERROR RULE

The prejudicial error rule in administrative law is a relatively new conception compared to the rule that is applied in civil and criminal courts.[22]

19. *Id.* at 1732 (stating "[n]o other provision of the APA defines or refers to Section 706's instruction to consider harmless error").

20. *E.g.*, Nicholas Bagley, *Remedial Restraint in Administrative Law*, 117 COLUM. L. REV. 253, 255 (2017) ("The arguable lack of fit between error and remedy . . . exemplifies administrative law's systematic inattention to remedial questions . . . . Across a range of cases, the remedy appears disproportionate to the underlying infraction.").

21. *See* Smith, *supra* note 14, at 1729 (discussing the ways that various court decisions have failed to follow a consistent mold in applying the prejudicial error rule).

22. *See, e.g.*, Crease v. Barrett, 149 Eng. Rep. 1353, 1359 (Exch. Div. 1835) (providing one of the first applications of the prejudicial error rule).

However, the creation and application of the administrative law rule is grounded in the history of the civil and criminal law rule.[23] For these reasons, it is imperative to understand the rule's full history. The early application of the general prejudicial error rule in the United States was largely derived from the English practice.[24] This early test found a wide variety of errors to be prejudicial, including technical errors.[25] The English influence on U.S. courts led to the same application of the harmless error rule by U.S. judges in civil and criminal cases.[26] By the beginning of the nineteenth century, it was commonplace for judges to automatically reverse civil and criminal cases upon the finding of any error in the lower court, often leading to outlandish decisions.[27]

Congress first addressed the issue of prejudicial error in the 1919 Judicial Code, by establishing a higher threshold for error.[28] The "substantial rights" language in the Code acted as a starting point for future courts to determine prejudicial error as erring parties no longer needed to overcome a presumption of harm.[29] However, while this higher standard assisted in the establishment of prejudicial error for criminal and civil cases, it left much to be desired for administrative cases as the rule is still ill-defined and often misapplied.[30]

The New Deal–era government brought a major shift to the administrative state—creating new agencies and increasing government

---

23. *See id.* (finding that judges have an inability to determine whether an error influenced a jury, so the only way to correct the error was ordering a new trial).

24. Roger A. Fairfax, Jr., *A Fair Trial, Not a Perfect One: The Early Twentieth-Century Campaign for the Harmless Error Rule*, 93 MARQ. L. REV. 433, 435–36 (2009).

25. Daniel J. Meltzer, *Harmless Error and Constitutional Remedies*, 61 U. CHI. L. REV. 1, 1 (1994).

26. Roger A. Fairfax, Jr., *Harmless Constitutional Error and the Institutional Significance of the Jury*, 76 FORDHAM L. REV. 2027, 2033 (2008).

27. *See* Meltzer, *supra* note 25, at 1–2 (showing that a case being overturned for anything less than harmful errors is nonsensical and outlandish, but clearly defining harmful has been difficult for courts); State v. Campbell, 109 S.W. 706, 708–09 (Mo. 1908) (granting convicted murderer new trial due to the misspelling of non-essential words).

28. 28 U.S.C. § 391 (1940) ("[T]he court shall give judgment . . . without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties.").

29. 28 U.S.C. § 391 (1940); *cf.* McDonough Power Equip. v. Greenwood, 464 U.S. 548, 553 (1984) ("The harmless-error rules adopted by this Court and Congress embody the principle that courts should exercise judgment in preference to the automatic reversal for 'error' and ignore errors that do not affect the essential fairness of the trial.").

30. The case law surrounding the civil and criminal prejudicial error rule takes note of the "substantial rights" of the parties, whereas the administrative rule uses the "due account" language. *Compare* McCandless v. United States, 298 U.S. 342, 347–48 (1936) (providing that an action impacts substantial rights when the record reflects that it was prejudicial), *with* 5 U.S.C. § 706 (providing that due account is owed to errors by the court in agency decisions to find whether they have been prejudicial to the complaining parties).

regulation.[31] However, Congress was unable to pass the APA until 1946.[32] Despite its imperfections, the APA passed unanimously and has rarely been amended by Congress in its lengthy history.[33] Today, the APA is still the main and comprehensive source for determinations on rulemaking, adjudication, access to information, and judicial review in administrative law.[34]

Shortly after the APA's passage, Congress replaced the 1919 Judicial Code with the 1948 Judicial Act.[35] The newly codified prejudicial error rule clarified its use in civil and criminal appeals, and also aided in administrative cases.[36] In the new test, Congress required the appealing party to separate technical and insubstantial errors from harmful errors.[37] Erring parties no longer needed to overcome a presumption of harm on appeal, and appellants continued to bear the burden of showing that the error was substantial.[38] This burden shifting application provided a framework for the prejudicial error rule to develop in administrative law.[39]

According to the Supreme Court, there is not a relevant distinction in how a reviewing court treats civil and administrative cases.[40] Courts apply the civil and criminal law rule in any case where an alleged error by the lower

---

31. Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 508–09 (1987).

32. MICHAEL ASIMOW & RONALD M. LEVIN, STATE AND FEDERAL ADMINISTRATIVE LAW 4–5 (5th ed. 2020).

33. William H. Allen, *The Durability of the Administrative Procedure Act*, 72 VA. L. REV. 235, 235–37 (1986).

34. ASIMOW & LEVIN, *supra* note 32, at 4–5.

35. 28 U.S.C. § 2111.

36. *See generally* Smith, *supra* note 14, at 1764–65 (stating that the administrative prejudicial error rule may be applied in the same way as the general harmless error doctrine at the time of codification).

37. David A. Shields, Note, *East vs. West—Where Are Errors Harmless? Evaluating the Current Harmless Error Doctrine in the Federal Circuits*, 56 ST. LOUIS UNIV. L. J. 1319, 1324–26 (2012).

38. *See* McDonough Power Equip. v. Greenwood, 464 U.S. 548, 553 (1984) ("The harmless-error rules adopted by this Court and Congress embody the principle that courts should exercise judgment in preference to the automatic reversal for 'error' and ignore errors that do not affect the essential fairness of the trial."); McCandless v. United States, 298 U.S. 342, 347–48 (1936) (concluding that the common law rule remains in place for errors that affect the substantial rights of appellants).

39. *See generally McDonough Power Equip.*, 464 U.S. at 553–54 (outlining the difference between a perfect trial and a fair trial in the context of prejudicial error).

40. *See* Shinseki v. Sanders, 556 U.S. 396, 407 (2009) ("We have no indication of any relevant distinction between the manner in which reviewing courts treat civil and administrative cases. Consequently, we assess the lawfulness of the Federal Circuit's approach in light of our general case law governing application of the harmless-error standard.").

court unduly prejudiced one of the parties.[41] The Supreme Court applies the prejudicial error rule to cases invoking a constitutional question and those without a constitutional question, resulting in a slightly different analysis based on the issue.[42] The Court stated that an appellate court should not reverse the error by the lower court if it is deemed "harmless."[43] Rather, the error must have caused some prejudice to the appealing party, while usually excluding technical errors.[44] Thus, the harmless error rule requires appellate courts to ignore errors that do not affect the parties' "substantial rights."[45] The application of the harmless error rule in civil and criminal contexts may aid in the analysis of the rule in its administrative law application, but is proven to be notoriously unpredictable in the hands of the circuit courts.[46]

In criminal cases, the courts apply the standard found in *Kotteakos v. United States*,[47] which held that if an error "did not influence the jury, or had but a very slight effect" it does not require reversal.[48] Yet, if a court cannot determine whether the error swayed the final judgment, then reversal is required.[49] This standard is generally applied to non-constitutional issues. In this scenario, the burden is on the defendant-appellant to demonstrate the error. The burden then shifts to the government to prove that the error was in fact harmless.

---

41. Wilson v. Mitchell, 498 F.3d 491, 503 (6th Cir. 2007); Virgin Islands v. Martinez, 620 F.3d 321, 337 (3d. Cir. 2010).

42. *Id.*

43. United States v. Olano, 507 U.S. 725, 731 (1993) ("Any error, defect, irregularity[,] or variance which does not affect substantial rights shall be disregarded.").

44. *See* Meltzer, *supra* note 25 (describing technical errors).

45. *Olano*, 507 U.S. at 732 (stating substantial rights as those "seriously affect[ing] the fairness, integrity or public reputation of judicial proceedings."); *see also* HARRY T. EDWARDS & LINDA A. ELLIOTT, FEDERAL STANDARDS OF REVIEW: REVIEW OF DISTRICT COURT DECISIONS AND AGENCY ACTIONS (PRACTITIONER EDITION) 13 (1st ed. 2007); FED. R. CRIM. P. 52(a); FED. R. CIV. P. 61.

46. *Wilson* and *Martinez* both provide examples of the unpredictability of the prejudicial error rule in application. *See Wilson*, 498 F.3d at 503; *Martinez*, 620 F.3d at 337.

47. 328 U.S. 750, 750 (1946).

48. *See, e.g.*, *id.* at 764–65. There are a few technical errors that are believed to cause harm no matter what. *See, e.g.*, Neder v. United States, 527 U.S. 1, 8–9 (1999) (depriving use of counsel as harmful); *see also* Tumey v. Ohio, 273 U.S. 510, 523 (1927) (finding a biased judge results in error); Vasquez v. Hillery, 474 U.S. 254, 255 (1986) (excluding members of defendant's race harmful); McKaskle v. Wiggins, 465 U.S. 168, 182 (1984) (depriving right to self-representation as harmful); Waller v. Georgia, 467 U.S. 39, 46–47 (1984) (denying public trial results in error); Sullivan v. Louisiana, 508 U.S. 275, 278 (1993) (stating a defective reasonable doubt instruction results in error).

49. *Kotteakos*, 328 U.S. at 763.

In cases where the defendant presents a constitutional violation, the Supreme Court made clear in *Chapman v. California*[50] that the government must prove harmless error beyond a reasonable doubt.[51] This heightened standard ensures that criminal defendants receive their constitutional guarantee of due process of law.[52] Subsequently, appellate courts created numerous ways to apply this standard.[53] For example, the majority rule looks at the effect of the alleged prejudicial error on the jury itself.[54] If the court finds any indication that the jury may have relied on the error, the decision will be reversed regardless of whether the evidence shows overwhelming guilt.[55] On the other hand, the minority rule will find an error to be harmless if the evidence of guilt is overwhelming.[56]

In civil cases, the harmless error rule was adjusted but still relies heavily on the *Kotteakos* standard that is used in criminal cases.[57] The main difference is that in a civil appeal, the burden to prove the harmless error is on the party who claims the error.[58] This burden shifting conceptually aligns with the criminal standard, but it recognizes that there are two private parties, rather than one party versus the government.

II. MODERN APPLICATION OF THE ADMINISTRATIVE PREJUDICIAL ERROR RULE

The APA's language implies the drafters' recognition of a predetermined rule for analyzing prejudicial error.[59] However, the APA was the first time where the phrases "due account" and "rule of prejudicial error" appeared together in a statute.[60] Yet the statute does not define either of these

50. 386 U.S. 18, 24 (1967).

51. *Id.* at 24.

52. U.S. CONST. amend. V.

53. Shields, *supra* note 37, at 1322.

54. *Id.* at 1320.

55. *See* Gregory Mitchell, *Against "Overwhelming" Appellate Activism: Constraining Harmless Error Review*, 82 CAL. L. REV. 1335, 1358 (1994) (examining "whether the error in question possibly affected the decision of 'at least one member of the jury'").

56. *See, e.g.*, Virgin Islands v. Martinez, 620 F.3d 321, 337 (3d. Cir. 2010); Wilson v. Mitchell 498 F.3d 491, 503 (6th Cir. 2007); United States v. Boling, 648 F.3d 474, 481 (7th Cir. 2011); Wilson v. Sirmons, 536 F.3d 1064, 1121 (10th Cir. 2008); United States v. Malol, 476 F.3d 1283, 1292 n.7 (11th Cir. 2007) (exemplifying the minority rule by reviewing whether the evidence presented proves overwhelming guilt).

57. Kotteakos v. United States, 328 U.S. 750, 762–66 (1946).

58. EDWARDS & ELLIOTT, *supra* note 45, at 13–14.

59. 5 U.S.C. § 706.

60. According to the legislative history of the APA the prejudicial error rule could have

phrases.[61] This ambiguity left the window open for judges to construe the statute according to statutory interpretation rules. Despite numerous attempts to decipher the doctrine, the phrases "due account" and "rule of prejudicial error" still lack clear definitions.[62] No court has definitively determined an accurate test for proving prejudicial error in administrative law cases.[63]

When analyzing the prejudicial error rule, it is important to note the innate difficulties surrounding an agency's attempt to argue that an error was harmless.[64] Often it is more expeditious for an agency to argue a case on the merits rather than point out to a judge that its error had no bearing on the ultimate agency action.[65] Emphasizing the triviality of an error emphasizes how easy it is to address the error in the first place, which suggests that the agency action was arbitrary.[66] This argument may alienate some judges who believe that agencies should strictly adhere to the procedures provided in the APA.[67]

Notwithstanding the difficulties of an agency arguing harmless error, most courts jump directly into an analysis on which party holds the burden of proving prejudicial error.[68] Fortunately, there is some congruence in this aspect of the law. In *Air Canada v. Department of Transportation*,[69] the D.C. Circuit held that "[a]s incorporated into the APA, the harmless error rule requires the party asserting error to demonstrate prejudice from the error."[70] While the

---

applied to much fewer cases. *See* Raoul Berger, *Do Regulations Really Bind Regulators?*, 62 NW. UNIV. L. REV. 137, 160–62 (1967). Beginning drafts of the APA had the rule condensed into one of the Act's six standards of review, now listed as § 706(2)(d). Further along in the legislative process, the prejudicial error rule was moved to the bottom of § 706 where it now resides. *Id.*

61. 5 U.S.C. § 706.

62. Many scholars, including Justice Scalia, have devoted substantial thought to statutory interpretation and how we define words within statutes. *See generally* Jonathan R. Siegel, *The Legacy of Justice Scalia and His Textualist Ideal*, 85 GEO. WASH. L. REV. 857, 858 (2017); Maxine D. Goodman, *Reconstructing the Plain Language Rule of Statutory Construction: How and Why*, 65 MONT. L. REV. 229, 229–31 (2004); Abbe R. Gluck, *Justice Scalia's Unfinished Business in Statutory Interpretation: Where Textualism's Formalism Gave Up*, 92 NOTRE DAME L. REV. 2053, 2054 (2017).

63. *See* Smith, *supra* note 14, at 1764 (noting harmless error "appears to be an afterthought in many opinions").

64. *See* Bagley, *supra* note 20, at 262 (stating that it is often risky for an agency to argue for remedial restraint); Kristina Daugirdas, Note, *Evaluating Remand Without Vacatur: A New Judicial Remedy for Defective Agency Rulemakings*, 80 N.Y.U. L. REV. 278, 310 (2005) (noting that agencies may undercut their own arguments by relying on both the merits and the remedy simultaneously).

65. Bagley, *supra* note 20, at 262.

66. *Id.*

67. *Id.*

68. Air Canada v. Dep't of Transp., 148 F.3d 1142, 1445, 1156 (D.C. Cir. 1998).

69. 148 F.3d 1142 (D.C. Cir. 1998).

70. *Id.* at 1156; *see also* Friends of Iwo Jima v. Nat'l Cap. Plan. Comm'n, 176 F.3d 768,

burden occasionally shifts to an agency to show that no harm resulted, traditionally challengers must demonstrate how the agency harmed them.[71]

Apart from which party bears the burden of demonstrating prejudicial error, there is no clear agreement on how to apply the prejudicial error rule.[72] Several courts have interpreted the rule differently. In *Small Refiner Lead Phase-Down Task Force v. USEPA*,[73] the court stated that "the APA's 'prejudicial error' rule . . . requires only a *possibility* that the error would have resulted in *some* change in the final rule."[74] In contrast, the court in *Weyerhaeuser Co. v. Costle*[75] stated that an error is harmless only if the court is "*sure* that under the correct procedure the agency would have reached the same conclusion."[76] Even though these two statements seem to be analogous, the latter relies on the court being "sure" about the existence of an error, and the former allows for the mere "possibility" that an error occurred.[77] This discrepancy alone creates enough ambiguity in the rule that it is often misapplied, leading to costly and unpredictable outcomes.

It is also necessary to determine whether an agency error is substantive or procedural. This distinction is imperative when making a final determination on prejudicial error.[78] Under administrative law, to determine whether a substantive error occurred, reviewing courts look at the action an agency may or may not be allowed to take.[79] In an alleged substantive error action, the reviewing court must determine if the agency

---

774 (4th Cir. 1999); Chamber of Com. of the U.S. v. SEC, 443 F.3d 890 (D.C. Cir. 2006) (quoting the same language for determining burden as in *Air Canada*).

71. United States v. River Rouge Improvement, 269 U.S. 411, 421 (1926); *see also* Kotteakos v. United States, 328 U.S. 750, 760–62 (1946) (demonstrating which party bears the burden of proving prejudicial error).

72. *See, e.g.*, *Friends of Iwo Jima*, 176 F.3d at 774 (using the outcome-based test); Am. Radio Relay League, Inc. v. FCC, 524 F.3d 227, 237 (D.C. Cir. 2008) (using the record-based test).

73. 705 F.2d 506 (D.C. Cir. 1983).

74. *E.g.*, *Small Refiner Lead Phase-Down Task Force*, 705 F.2d at 521 (emphasis in original).

75. 590 F.2d 1011 (D.C. Cir. 1978).

76. *Weyerhaeuser Co.*, 590 F.2d at 1031 n.27 (emphasis added).

77. *Compare Small Refiner Lead Phase-Down Task Force*, 705 F.2d at 521 (requiring the existence of an error), *with Weyerhaeuser Co.*, 590 F.2d at 1031 (noting that there only needs to be a possibility of an error).

78. If procedural verses substantive errors are not determined properly from the outset of an analysis the final remedy will not correspond to the initial harm. *Compare* Am. Radio Relay League, Inc. v. FCC, 524 F.3d 227, 237 (D.C. Cir. 2008) (applying the record-based test to a procedural error), *with* Friends of Iwo Jima v. Nat'l Cap. Plan. Comm'n, 176 F.3d 768, 774 (4th Cir. 1999) (applying the outcome-based test to a procedural error).

79. *See generally* Croplife Am. v. EPA, 329 F.3d 876, 881 (D.C. Cir. 2003) (providing an example of a substantive issue).

either incorrectly interpreted the governing statute or if the agency's decision is arbitrary and capricious.[80] Procedural errors do not concern themselves with this analysis, as a reviewing court only has to review whether an agency violated a required procedural step.[81]

Currently, there are three avenues a judge may choose when deciding on the issue of prejudicial error in an administrative case. The first is a direct analysis of the outcome of the agency's decision and whether or not a challenger can prove that an error changed the agency's ultimate action. This test is primarily used for substantive errors, but it has also occasionally been applied to procedural errors.[82] The second avenue is an analysis of the record, asking whether a mistake made by the agency changed the record and ultimately harmed the challenging party. This test is traditionally applied to procedural issues, rather than substantive errors, making it an often-used tool since many challenges to agency actions are procedural in nature.[83] Finally, the third option is a simple restatement of § 706 with a context-specific analysis of the issue.[84] These differing approaches are evidenced in two recent cases—one from the D.C. Circuit, and the other from the Supreme Court—which follow the reasoning laid out in option three. Neither case provides a true analysis of the rule; rather, each simply cites the language of § 706 while engaging in fact-specific reasoning.[85]

A. Outcome-Based Test

Judges often use the outcome-based test to decide prejudicial error issues because it is seemingly the most straightforward test.[86] The outcome-based test can be easily applied to substantive agency errors.[87] To determine if a substantive agency action amounts to prejudicial error under this test, the court asks if the agency would have come to a different conclusion that would

80. 5 U.S.C. § 706.

81. *See Am. Radio Relay League, Inc.*, 524 F.3d at 237–38 (applying the record-based test to a procedural error).

82. *See* Kurzon v. U.S. Postal Serv., 539 F.2d 788, 794–97 (1st Cir. 1976) (applying the analysis to a procedural error).

83. *See* Gerber v. Norton, 294 F.3d 173 (D.C. Cir. 2002) (applying the record-based analysis to a procedural issue).

84. *See, e.g.*, Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania, 140 S. Ct. 2367, 2385 (2020); *see also* Nat. Res. Def. Council v. Wheeler, 955 F.3d 68 (D.C. Cir. 2020) (engaging in only a recitation of § 706 and a fact-based analysis).

85. *Little Sisters of the Poor Saints Peter & Paul Home*, 140 S. Ct. at 2385; *Nat. Res. Def. Council*, 955 F.3d at 94–95.

86. *See, e.g.*, *Kurzon*, 539 F.2d at 796–97 (applying the outcome-based test).

87. *See, e.g.*, *id.* (applying the outcome-based test to a substantive error).

have been more favorable to the challenging party had the error not occurred.[88] However, judges do not always signal use of this test, and often confuse which party holds the burden of proving the error.[89] For example, in an alleged procedural error action, it is often hard to prove if changing the agency procedure would have ultimately led to a different outcome.[90] This is because agencies are not required to strictly follow the suggestions posed during the notice-and-comment period.[91] Under this test, few agencies are held accountable for their procedural errors, and the challenging parties are unable to prove how the error led to an ultimate and identifiable harm.[92] For these reasons, the outcome-based test is more helpful to identify harm in cases where an agency committed a substantive error.[93]

Under the outcome-based test, the challenger bears the burden of demonstrating harm from a substantive error.[94] However, courts employ various tools to come to their conclusions. Some implement a fact-specific analysis that asks whether an error led an agency to a different conclusion or action,[95] while others create verbal formulations to gauge whether an agency would reach the same result if it had not erred.[96] An example verbal formulation is highlighted in a Tenth Circuit opinion that states evidence erroneously admitted to an adjudication is prejudicial only "if it can be reasonably concluded that with . . . such evidence, there would have been a

88. Shinseki v. Sanders, 556 U.S. 396, 410 (2009) ("Often the circumstances of the case will make clear to the appellate judge that the ruling, if erroneous, was harmful and nothing further need be said.").

89. *See id.* (discussing the complexities of the burden shifting framework).

90. *See e.g.*, Delta Air Lines, Inc. v. Civ. Aeronautics Bd., 564 F.2d 592, 598 (D.C. Cir. 1977) ("The court should affirm if it appears all the important basic findings made by the Board are supported by substantial evidence."); Allison v. Dep't of Transp., 908 F.2d 1024, 1029 (D.C. Cir. 1990) (using the phrase "substantial evidence").

91. *Infra* note 107.

92. *See* Gunderson v. U.S. Dep't of Labor, 601 F.3d 1013, 1021 (10th Cir. 2010) (explaining prejudicial error).

93. *See id.* (explaining that "[a]n error is prejudicial only 'if it can be reasonably concluded that with . . . such evidence, there would have been a contrary result.'").

94. Air Canada v. Dep't of Transp., 148 F.3d 1142, 1156 (D.C. Cir. 1998).

95. *See* Nat'l Ass'n of Home Builders v. Defs. of Wildlife, 551 U.S. 644, 659 (2007) (finding alleged erroneous statement had no bearing on the final agency action that respondents challenged); Shinseki v. Sanders, 556 U.S. 396, 410 (2009) ("Often the circumstances of the case will make clear to the appellate judge that the ruling, if erroneous, was harmful and nothing further need be said.").

96. Smith, *supra* note 14, at 1740–41.

contrary result."[97] One of the D.C. Circuit's favorite tactics is to analyze the agency action's outcome by asking if there was "substantial evidence" to support the agency decision when disregarding the alleged error.[98] While both a fact-specific analysis and a verbal formulation may be useful in determining prejudicial error, it is difficult for a challenging party or an agency to determine which standard the court will use to successfully bring a challenge or a defense to the claim of prejudicial error.[99] Reaching a consensus on how to employ the outcome-based test would benefit both the challenging party and the agency because both parties would understand the parameters for mounting a successful argument.

A prominent case in which the Supreme Court used the outcome-based test is *Shinseki v. Sanders*.[100] When the Supreme Court granted certiorari for this case, prominent administrative law scholars and agencies were hopeful that the Court would finally determine a test for analyzing prejudicial error as specified by the APA.[101] The case involved a veterans law statute that contained the same language of taking "due account of the rule of prejudicial error" as seen in the APA.[102] However, Justice Breyer simply restated a widely known opinion confirming that the burden of demonstrating harm is borne by the party challenging the agencies' decisions.[103]

Applying the outcome-based test primarily to substantive errors aligns with an effort to use agency resources efficiently. If a court determines that an agency action does amount to prejudicial error, the agency must go through the entire process again.[104] This requirement can be quite time-

97. Gunderson v. U.S. Dep't of Labor, 601 F.3d 1013, 1021 (10th Cir. 2010) (quoting Sanjuan v. IBP, Inc., 160 F.3d 1291, 1296 (10th Cir. 1998)).

98. Allison v. Dep't of Transp., 908 F.2d 1024, 1029 (D.C. Cir. 1990) (using the phrase "substantial evidence"); Delta Air Lines, Inc. v. Civ. Aeronautics Bd., 564 F.2d 592, 598 (D.C. Cir. 1977) ("The court should affirm if it appears all the important basic findings made by the Board are supported by substantial evidence.").

99. *See* United States v. Utesch, 596 F.3d 302, 312 (6th Cir. 2010) ("[A] reviewing court must focus not merely on the ultimate rule but on the process of an administrative rulemaking; otherwise, an agency could always violate the APA's procedural requirements based on the representation that it would have adopted the same rule had the proper process been followed.").

100. 556 U.S. 396 (2009).

101. *Id.* at 406–07.

102. *Id.* at 406.

103. *Id.* at 410.

104. *See* Stephanie J. Tatham, Admin. Conf. of the U.S., *The Unusual Remedy of Remand Without Vacatur* 50–51 (2014), http://www.acus.gov/sites/default/files/documents/Remand%20Without%20Vacatur%20Final%20Report.pdf (identifying two opportunities to remand without vacatur).

consuming, especially if the action involves rulemaking.[105] This wastes the limited time and resources that an agency has and should not be required when an error is found to be harmless to the ultimate agency action.[106] The downside to the outcome-based test is that it creates insufficient deterrence for agency failures to adhere to the requirements of the APA. As long as the agency can prove that the outcome of its decision was not affected by the error, its action will not be overturned.[107] Depending on the substantive issue, this type of test could unfairly burden the challenging party by forcing them to prove that an agency would have come to a different conclusion if the error had not occurred.[108]

B. Record-Based Test

The record-based test for determining prejudicial error, like the outcome-based test, is straightforward in theory but difficult to apply successfully in practice. It requires a challenger to show that a procedural error prevented the agency from considering certain arguments or duly recorded them in the administrative record.[109] In applying the record-based test, courts tend to get caught up in issues of burden-shifting and focus too heavily on the ultimate outcome of the agency action.[110] This muddles the line between the outcome-based and record-based tests and renders the record-based test ineffective under normal circumstances.[111]

---

105. *See generally* Bagley, *supra* note 20 (highlighting the fact that the underlying infraction is often disproportionate to the remedy).

106. *Id.*

107. U.S. Dep't of Just., Att'y Gen.'s Manual on the Administrative Procedure Act 110 (1947) ("[E]rrors which have no substantial bearing on the ultimate rights of the parties will be disregarded.").

108. *See* Riverbend Farms, Inc. v. Madigan, 958 F.2d 1479, 1487 (9th Cir. 1992) ("An agency is not required to adopt a rule that conforms in any way to the comments presented to it. So long as it explains its reasons, it may adopt a rule that all commentators think is stupid or unnecessary.").

109. *E.g.*, Util. Solid Waste Activities Grp. v. EPA, 236 F.3d 749, 755 (D.C. Cir. 2001) (stating that the Petitioners presented enough evidence to show that they can mount a credible challenge to the EPA's rule); Omnipoint Corp. v. FCC, 78 F.3d 620, 630 (D.C. Cir. 1996) (finding the abbreviated comment period not prejudicial because the challenging party "failed to identify any substantive challenges it would have made had it been given additional time").

110. *See*, *e.g.*, Am. Radio Relay League, Inc. v. FCC, 524 F.3d 227, 237 (D.C. Cir. 2008) (stating that the agency should have disclosed studies which they relied upon in order to inform interested parties); Friends of Iwo Jima v. Nat'l Capital Plan. Comm'n, 176 F.3d 768, 774 (4th Cir. 1999) (reviewing the adequacy of the agency's notice).

111. *Am. Radio Relay League, Inc.*, 524 F.3d at 237; *Friends of Iwo Jima*, 176 F.3d at 774.

One case that successfully applied the record-based standard is *Gerber v. Norton*.[112] In this case, the U.S. Fish & Wildlife Service (FWS) issued a permit allowing real estate development on a piece of land habituated by an endangered species.[113] The FWS required a permit application to be published in the Federal Register to provide notice and garner comments on the proposed permit.[114] The FWS followed this procedure, but not entirely.[115] Upon publication, the permit application did not contain a map of the proposed real estate development area.[116] Shortly after realizing its mistake, the Service published a map.[117] However, there was not enough time for a conservation group to make comments on the proposed permit application after the map was published.[118] The D.C. Circuit determined that the Endangered Species Act required the publication of a map in conjunction with the permit application in the Federal Register.[119] Thus, the FWS's actions were deemed harmful, resulting in prejudicial error.

Gerber highlights the difference between the outcome-based test and the record-based test.[120] Under the former, a court could determine that the agency's action was not ultimately changed due to the error because the challenging party may not have been able to effectively assert that the agency would have reached a different conclusion if they were given the opportunity to comment. However, under the record-based test, the final outcome was irrelevant because the record required the publication of the map with time for interested parties to comment.[121] A court applying the outcome-based test would likely find FWS's error harmless, while a court applying the record-based test would likely find in favor of the conservation group. The possibility of differing outcomes, depending on which test is employed, exemplifies why the administrative prejudicial error rule needs more effective application.

---

112. 294 F.3d 173 (D.C. Cir. 2002).

113. *Id.* at 175.

114. *Id.* at 176.

115. *Id.* at 177.

116. *Id.*

117. *Id.*

118. *Id.* at 178.

119. *Id.* at 179.

120. *Id.*

121. *See also* Riverbend Farms, Inc. v. Madigan, 958 F.2d 1479, 1487 (9th Cir. 1992) ("An agency is not required to adopt a rule that conforms in any way to the comments presented to it. So long as it explains its reasons, it may adopt a rule that all commentators think is stupid or unnecessary.").

C. Recitation of § 706

Unlike the approaches laid out above, the most prominent analysis of prejudicial error does not involve a meaningful test that can be logically deduced and applied across a range of cases.[122] From 2010 to present, the most common way that courts determine prejudicial error in administrative law is through a simple recitation of the language in § 706 of the APA, stating, "In making the foregoing determinations, the court shall review the whole record . . . and due account shall be taken of the rule of prejudicial error."[123] This is usually implemented in conjunction with a fact-specific analysis which bears no resemblance to the outcome-based or record-based tests, while duly applying the language from previous fact-specific case analyses as precedent.[124]

Adherence to precedential case law in determining prejudicial error often leads a judge in the right direction. However, it is not uncommon for one case to be taken out of context and applied to several cases following it. One example comes from the D.C. Circuit in *Braniff Airways v. Civil Aeronautics Board*.[125] An often-quoted passage in this case states that under the APA's harmless error doctrine, an error is deemed not prejudicial to the challenging party if it "clearly had no bearing on the procedure used or the substance of decision reached."[126] This quote seemingly provides a straightforward means of analyzing prejudicial error, but it is unfortunately taken out of context for several reasons. First, the original language came from a non-administrative law case, suggesting that analyzing the rule in civil contexts is identical to the rule in administrative law.[127] Second, the D.C. Circuit in *Braniff* simply stated that the Supreme Court explained its disfavor towards vacating an agency action over minor errors.[128] These two facts have not stopped multiple courts from applying or misapplying the language in administrative law cases, disregarding the substantial impact of agency decisions compared to that of private parties in civil cases.[129] This is problematic: a single D.C. Circuit case

---

122. *Cf.* Shinseki v. Sanders, 556 U.S. 396, 406–07 (2009) (stating that a fact-based analysis may always be required).

123. 5 U.S.C. § 706.

124. *E.g.*, *Sanders*, 556 U.S. at 406.

125. 379 F.2d 453 (D.C. Cir. 1967).

126. *Id.* at 466 (quoting Mass. Trs. of E. Gas & Fuel Assocs. v. United States, 377 U.S. 235, 248 (1964)) (not an administrative law case).

127. *Id.*

128. *Id.*

129. *See, e.g.*, U.S. Steel Corp. v. EPA, 595 F.2d 207, 215 (5th Cir. 1979) ("Agency's error plainly affected"); Buschmann v. Schweiker, 676 F.2d 352, 358 (9th Cir. 1982) ("regulation . . . was invalid"); Silverton Snowmobile Club v. U.S. Forest Serv., 433 F.3d 772,

repeatedly taken out of context established a line of case law presenting a false test for administrative prejudicial error.[130]

D. 2020 Opinions on Administrative Prejudicial Error

1. Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania

A 2020 Supreme Court case and a 2020 D.C. Circuit opinion provide two examples of a § 706 recitation and a fact-based analysis. The first and most recent case comes from the Supreme Court in *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*.[131] In this case, Pennsylvania and other states brought an action for relief against the President of the United States and the Secretaries of Health and Human Services, Treasury, and Labor.[132] The challenging party asserted substantive and procedural challenges under the APA to the agencies' joint issuance of interim-final rules exempting employers with religious or moral objections from a mandate to provide no-cost contraceptive coverage under the Patient Protection and Affordable Care Act.[133] The 2018 final rules were preceded by a document entitled "Interim Final Rules with Request for Comments," rather than the required "General Notice of Proposed Rulemaking."[134] At the heart of the case, respondents claimed that the proposed document "was insufficient to satisfy § 553(b)'s [procedural] requirement," thereby causing the final rules to be "procedurally invalid."[135]

Writing for a five-justice majority, Justice Thomas found that the agencies' document entitled "Interim Final Rules with Request for Comments" was sufficient to satisfy the procedural requirements of § 553.[136] In his analysis of prejudicial error, Justice Thomas simply provided a citation to § 706 and a quote from another administrative law case, stating that the prejudicial error

786 (10th Cir. 2006) (concluding "that no NFMA error occurred"); United States v. Dean, 604 F.3d 1275, 1288 (11th Cir. 2010) ("harmless . . . lack of pre-enactment notice").

130. *U.S. Steel Corp.*, 595 F.2d at 215 (quoting *Braniff*, 379 F.2d at 453); Berryhill v. Shalala, No. 92-5876, 1993 WL 361792, at *7 (6th. Cir. 1993) (citing to both *U.S. Steel Co.* and *Braniff*); *Buschmann*, 676 F.2d at 358 (looking to both *U.S. Steel Co.* and *Braniff* for guidance on prejudicial error); *Silverton Snowmobile Club*, 433 F.3d at 786 (applying the *Braniff* reasoning without citing to it) ; *Dean*, 604 F.3d at 1288 (referencing the *Braniff* language in the concurrence).

131. 140 S. Ct. 2367 (2020).

132. *Id.* at 2372–73.

133. *Id.*

134. *Id.* at 2384.

135. *Id.*

136. *Id.*

rule is treated as an "administrative law . . . harmless error rule."[137] In conclusion, Justice Thomas maintained that the respondents could not prove that they were harmed because the interim document contained all of the elements of a notice of proposed rulemaking as required by the APA.[138] His lack of analysis skimmed over the issue by simply providing authoritative statements and concluding, "[The] [r]espondents . . . do not come close to demonstrating that they experienced any harm from the title of the document, let alone that they have satisfied this harmless error rule."[139]

In this opinion, Justice Thomas conducted a fact-based analysis of prejudicial error.[140] However, underlying his fact-based analysis, he conducted a separate outcome-based assessment relying heavily on respondents' inability to prove they were ultimately harmed by the agency's misnamed document.[141] This is the focal question to ask when making an outcome-based determination.[142] A challenging party's ability to prove they were harmed by the agency action is imperative under the outcome-based test.[143]

It is interesting that Justice Thomas conducted a fact-based and outcome-based analysis when this case presented a defined procedural error. Traditionally, when an agency violates a procedural rule, the record-based test is more helpful in determining prejudicial error because it is inherently difficult to prove harm in a procedural violation.[144] Akin to the discussion of *Gerber* above, the implementation of the outcome-based test versus the record-based test would generate a substantially different outcome.[145] Under the record-based test, the Court could have determined that the respondents were discouraged from commenting on the Interim Final Rules, as opposed to a document entitled Notice of Proposed Rulemaking, because the purpose of the document was unclear. Thus, commentors may have been harmed because they presumed that the agency had already made up its mind on the issue without giving them an opportunity to comment.

---

137. *See id.* at 2385 (quoting Nat'l Ass'n of Home Builders v. Defs. of Wildlife, 551 U.S. 644, 659–60 (2007).

138. *Id.* at 2384–85 (stating the requirements for a notice of proposed rulemaking under the APA and explaining why the interim final rules met these requirements).

139. *See id.* at 2385.

140. *See id.* at 2385–86.

141. *See id.* at 2385 (stating that the intent of a notice of proposed rulemaking is to provide fair notice and that the interim final rule provided the respondents with that fair notice).

142. *See* Robert M. Gross & David R. Maass, *Harmless Error in Civil Appeals*, FLA. BAR J., Nov. 2015, at 14.

143. *Id.*

144. *See supra* text accompanying note 109.

145. *See generally supra* text accompanying notes 112–121 (providing an example of the record-based test); Gerber v. Norton, 294 F.3d 173, 184 (D.C. Cir. 2002).

2. Natural Resources Defense Council v. Wheeler

The next analysis of prejudicial error comes from the 2020 D.C. Circuit decision in *Natural Resources Defense Council v. Wheeler*.[146] The issue in this case arose in 2015, when the Environmental Protection Agency (EPA) "issued a regulation disallowing the use of [hydrofluorocarbons (HFCs)] as a substitute for ozone-depleting substances."[147] That rule was challenged in *Mexichem Fluor, Inc. v. EPA,*[148] where the D.C. Circuit determined that the EPA could validly forbid current users of such substances to switch to HFCs, but that the EPA lacked the authority to force users who had already switched to HFCs to make a second switch to a different substitute.[149]

On remand, the EPA implemented the D.C. Circuit decision by suspending the rule's listing of HFCs as unsafe substitutes in its entirety.[150] The EPA completed this action without going through the notice-and-comment process.[151] The issue raised in *Wheeler* was whether the EPA's new rule was interpretive or legislative; the latter would require the agency to go through the notice-and-comment process.[152] The D.C. Circuit found that the EPA's new rule was legislative in nature and thus the agency was required to go through the notice-and-comment process.[153] Because the court found an agency error, it was necessary for the court to analyze the issue under § 706's harmless error rule.

Instead of completing an outcome-based or record-based analysis of § 706, the D.C. Circuit cited to another case, stating that they "have 'not been hospitable to government claims of harmless error in cases in which the government . . . fail[ed] to provide notice.'"[154] Thus, the court further

146. 955 F.3d 68, 94–95 (D.C. Cir. 2020).

147. *Id.* at 73.

148. 866 F.3d 451, 453 (D.C. Cir. 2017).

149. *Id.* at 454, 457 (holding that the EPA does not have the authority under the Clean Air Act to require manufacturers to replace non-ozone-depleting substances such as hydrofluorocarbons (HFCs) but that the EPA may prohibit manufactures from replacing ozone-depleting substances with HFCs).

150. *Wheeler*, 955 F.3d at 74 (stating that even though the court sustained EPA's authority to prohibit manufactures from replacing ozone-depleting substances with HFCs, the EPA decided to suspend the rule listing HFCs as unsafe in its entirety).

151. *Id.* at 83.

152. *Id.* (stating that the Clean Air Act only requires the EPA to employ notice-and-comment procedures when it promulgates legislative, not interpretive rules, under Title VI of the Act).

153. *Id.* (stating that "a 'legislative rule' is one that has 'legal effect' or, alternatively, one that an agency promulgates with the 'intent to exercise' its 'delegated legislative power' by speaking with the force of law.").

154. *See id.* at 85 (quoting from Allina Health Servs. v. Sebelius, 746 F.3d 1102, 1109 (D.C. Cir. 2014)).

recognized that scenarios where a government agency seeks to promulgate a rule by another name—evading altogether the notice-and-comment requirements—are the most egregious breaches of public participation obligations.[155] These statements encompassed the entirety of the court's analysis regarding the EPA's actions and prejudicial error.[156] Through this limited review, the court held that the EPA's failure to abide by notice-and-comment procedures when promulgating the 2018 rule could not be considered harmless error.[157] Adopting the D.C. Circuit's analysis would mean that any time an agency fails to give proper notice to commenters the error is prejudicial—creating a different outcome than *Little Sisters* even though they were decided in the same year.[158]

In this scenario, the D.C. Circuit chose not to apply any type of test to their analysis of prejudicial error.[159] It seems as though the court wanted to apply the record-based test, but it wholly missed the essential analysis portion and instead pointed to the parties' lack of opportunity to comment on the best way to implement the distinctions between the EPA's rules from 2015 and 2018.[160] The D.C. Circuit should have analyzed the issue of harmless error further by implementing the record-based test. This case was perfectly primed for a record-based analysis because the EPA's failure to abide by notice-and-comment procedures when promulgating the 2018 rule was a clear procedural error.[161] Instead, the D.C. Circuit jumped to a final answer that aligned with the record-based test without any allusion to its use.[162]

It is also worth noting that *Wheeler* would have resulted in a very different outcome if the court had erroneously applied the outcome-based test to the EPA's procedural error.[163] As seen in *Gerber*, it would have been nearly impossible for the Natural Resources Defense Council (NRDC) to assert meaningful harm by the EPA's skirting of notice-and-comment procedures as it could not be definitively shown that the EPA would have come to a

155. *Id.* (citing to Allina Health Servs. v. Sebelius, 746 F.3d 1102, 1109 (2014)).

156. *See id.*

157. *Id.*

158. *See generally* Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania, 140 S. Ct. 2367, 2385 (2020) (holding that promulgating a Notice of Proposed Rulemaking by another name was not a prejudicial error because it otherwise met the APA requirements).

159. *See Wheeler*, 955 F.3d at 84–85 (D.C. Cir. 2020) (providing a more fact-based analysis without explicitly invoking a test for prejudicial error).

160. *See id.* at 85.

161. *See id.* at 75.

162. *See id.* at 84–85.

163. *See supra* notes 112–121 and accompanying text (providing analysis on outcome-based versus record-based tests with the facts of *Gerber v. Norton*).

different conclusion with or without the comments of the NRDC.[164] With this in mind, the D.C. Circuit would not successfully find that the NRDC was harmed, thus requiring a finding in favor of the EPA. As this example shows, applying the wrong prejudicial error test to a case may amount to a dramatically different conclusion of law.

III. APPLYING THE PREJUDICIAL ERROR RULE IN AN EFFECTIVE MANNER

Considering the outcome-based test, record-based test, and recitation of § 706, courts have more than enough tools to analyze and decide an issue of administrative prejudicial error successfully. However, as seen in *Little Sisters* and *Wheeler*, courts often answer the issue of prejudicial error without explaining how they arrive at their decisions.[165] The lack of a fully reasoned analysis allows lower courts to misapply or misinterpret Supreme Court opinions when faced with their own prejudicial error issues.[166] For these reasons, the doctrine remains ill-defined in practice and enables continued confusion for both litigants and judges.[167] To eliminate such confusion, the Supreme Court should strictly identify how to analyze prejudicial error. Alternatively, if Congress amends the APA, Congress should consult with ACUS and consider its recommendation, as it is the leading expert in this area of law.

A. Clarification of Administrative Prejudicial Error by the Supreme Court

Given the complex nature of the prejudicial error rule, no single test will apply to every case. The civil and criminal law practices for determining whether an error is harmless would not sufficiently consider the complexities of many administrative law cases.[168] In the majority of civil and criminal law cases, the parties before the court are the only parties substantially invested in whether an error is prejudicial.[169] In these contexts, it is also easier to determine whether an error would impact the

164. *See id.*

165. *See* Little Sisters of the Poor Peter & Paul Home v. Pennsylvania, 140 S. Ct. 2367, 2385 (2020); Nat. Res. Def. Council v. Wheeler, 955 F.3d 68, 84–85 (D.C. Cir. 2020).

166. *See Little Sisters of the Poor Peter & Paul Home*, 140 S. Ct. at 2385 (providing most recent Supreme Court opinion on the issue of administrative prejudicial error without a clear mandate for lower courts to follow).

167. *See id.*

168. *But cf.*, Shinseki v. Sanders, 556 U.S. 396, 407 (2009) (finding "no relevant distinction between the manner in which reviewing courts should treat civil and administrative cases").

169. Often, administrative law cases have consequences. *See, e.g.*, Make the Road New York v. McAleenan, 405 F. Supp. 3d 1, 12 (D.D.C. 2019) (providing an explanation for why an agency action found to be unlawful must be enjoined nationwide, not just towards a particular party).

substantial rights of a party, somewhat like an outcome-based assessment.[170] In administrative law, it is often impossible to determine if an error ultimately affected an agency's final decision.[171] Claims of arbitrary and capricious, abuse of discretion, or that an agency's action was not based on substantial evidence do not lend themselves well to harmless error analysis.[172] Courts often decide that an action was arbitrary or that there was no real abuse of discretion rather than find the action to be prejudicial because this type of analysis is well-established in case law.[173] Because of this, finding the right cases to invoke prejudicial error is difficult.

The Supreme Court and subsequent reviewing courts must first acknowledge that cases controlled by the APA automatically invoke a § 706 analysis requiring judges to analyze each point at issue in a particular case. It is not sufficient to simply restate the text of § 706 and apply it to a fact-based review.[174] While a fact-based analysis is important, it does not provide parties with a fully reasoned analysis of how a reviewing court came to its ultimate decision.[175] One judge may find the facts before the court and the agency record harmless, while another judge may not. The perpetuation of an only fact-based analysis would further lead to imbalanced decisions as judges may push precedent in one way or another, leaving challenging parties and agencies without a clear path forward.

The outcome-based test and record-based test should be consistently applied to substantive errors and procedural errors, respectively.[176] For

---

170. McDonough Power Equip. v. Greenwood, 464 U.S. 548, 553 (1984) (stating that courts should use their discretion when reviewing errors and ignore errors that do not affect the overall fairness of a trial); McCandless v. United States, 298 U.S. 342, 347–48 (1936) (concluding that the common law rule remains in place for errors that affect the substantial rights of appellants).

171. Safari Aviation, Inc. v. Garvey, 300 F.3d 1144, 1151–52 (9th Cir. 2002) (finding failure to consider challenger's arguments harmless because the agency considered another interested party's arguments of the same substance).

172. *See generally* Louis J. Virelli III, *Deconstructing Arbitrary and Capricious Review*, 92 N.C. L. REV. 721, 726–27 (2014) (providing an overview of the application of arbitrary and capricious or "hard look review" in administrative law).

173. *Id.* (stating that the "federal courts are no strangers to arbitrary and capricious review").

174. As discussed above, both *Little Sisters* and *Wheeler* invoke a fact-based analysis without additional reasoning to understand what test the deciding court applied. Little Sisters of the Poor Peter & Paul Home v. Pennsylvania, 140 S. Ct. 2367, 2384 (2020); Nat. Res. Def. Council v. Wheeler, 955 F.3d 68, 83 (D.C. Cir. 2020).

175. *Cf.* Shinseki v. Sanders, 556 U.S. 396, 407 (2009) (warning against the use of mandatory presumptions and rigid rules rather than a case-specific judgment based on the examination of the record).

176. *See generally* Smith, *supra* note 14 (making the same assertion but not analyzing how to implement a new rule).

substantive errors, courts should apply the outcome-based test to actions such as *ultra vires* and constitutional error claims. These types of errors lend themselves well to an outcome-based assessment because they are easily seen by reviewing the ultimate agency action, not just the record.[177] The burden of proving harm is also easier in substantive error cases because a challenging party can point to a specific instance of harm that was directly caused by the agency action. In substantive error cases, a reviewing judge should review the ultimate agency action and determine if that action's outcome was prejudicial to a challenging party's rights.

Second, courts should apply the record-based test only to procedural errors.[178] However, procedural errors should be split into two types. First, an agency's failure to undertake a clearly required procedural step, such as allowing public comment, and second whether an agency overlooked something in the administrative record. If a clear procedural violation occurred, such as not allowing for public comment, a challenging party should not have to demonstrate harm, and a strict record-based test should be applied.[179] The harm to the challenging party would be presumed in this instance, and the agency would hold the burden of rebutting that presumption.[180] Taking these steps in a case that presents clear procedural violations provides the only way of ensuring a fair result, as it is nearly impossible for a challenging party, to prove harm in the absence of information. If there was a procedural violation, then a reviewing court should find in favor of the challenging party and the agency should be required to remedy the violation in the most efficient manner possible.[181]

In the second procedural violation scenario, the agency overlooked something in the administrative record.[182] In these types of cases it may be hard for a challenging party to prove harm, however, there should be no presumption of harm. A challenging party should present their best evidence, and the reviewing judge should determine whether the harm caused a prejudicial result.[183] This is because it is often impossible for a challenging party to determine whether an agency would have acted

177. *Id.* at 1740.

178. *Supra* text accompanying notes 112–120 (conducting the proper analysis of prejudicial error to a procedural violation).

179. *See e.g.*, Gerber v. Norton, 294 F.3d 173, 175 (D.C. Cir. 2002) (failing to provide complete information during notice-and-comment).

180. *Id.*

181. *Id.*

182. *Supra* text accompanying notes 146–153 (providing an example of a complex procedural violation).

183. *E.g.*, Nat. Res. Def. Council v. Wheeler, 955 F.3d 68 (D.C. Cir. 2020).

differently if the error had not occurred.[184] It is also nearly impossible to determine an agency's final rule when only reviewing the comments of interested parties. In accordance with these facts, a reviewing judge should review the entirety of the record to determine if full vacatur and remand are warranted. This application of the record-based test may be more lenient toward agencies but would provide remedies in a more measured manner as full vacatur and remand should not always be required.[185]

Finally, a reviewing court should take into account the practical results of a ruling on prejudicial error. A court decision on prejudicial error does not always amount to the most efficient or pragmatic answer to the problem at hand.[186] The consequences of a procedural or substantive error could result in a harsh outcome that is not commensurate with the degree of violation.[187] If a court cannot determine that a challenging party has suffered prejudice or harm from an error, then it would be a waste of time and money for a decision to be made solely to correct a procedural violation that will not change the overall outcome.[188] By implementing an analysis of prejudicial error, as laid out above, a court would ensure that its decisions align with the overall harm to the parties. Further, if courts sought to make their decisions proportional to the agency violation, that would provide an incentive for an agency to follow the correct procedure from the beginning.

A good starting point for courts to attempt to consistently apply the prejudicial error rule is to split up substantive and procedural errors.[189] However, the Supreme Court has been reluctant to differentiate between the errors, even after years of case law on the issue.[190] Numerous cases have been presented to the Court that would invoke an analysis of prejudicial error, but the Court has chosen not to prescribe one for one reason or another.[191] Because of this, it is prudent to find another avenue to fix the problem.

B. Congressional Amendment of the APA

If the Supreme Court does not define the administrative prejudicial error rule, Congress should clarify the rule by amending the APA. The APA has

184. *Id.*

185. *See generally* Bagley, *supra* note 20 (arguing that there is a lack of fit between the error and the remedy in administrative law cases).

186. *Id.* at 255.

187. *Id.*

188. *Id.*

189. Smith, *supra* note 14, at 1729.

190. Shinseki v. Sanders, 556 U.S. 396, 407–08 (2009).

191. *Id.* at 407–09.

been amended numerous times since its original enactment in 1946.[192] Most of the amendments have shifted around headings for organizational purposes or applied slight changes to language for clarification.[193] Evidently, Congress recognized areas of the APA that needed clarification and subsequently addressed these problems.[194] These efforts emphasize that Congress is amenable to changing or clarifying the statute. The prejudicial error rule in § 706 now falls into this category, as congressional clarification of the rule would allow for a more consistent judicial application.

Congress should amend § 706 by clarifying that substantive and procedural errors need to be determined separately. The amendment should also demonstrate that the outcome-based test should only apply to substantive errors, while the record-based test should be reserved for procedural errors. This action could be taken by simply adding a period after the word "party" in the section. Then, starting with a new sentence, Congress could state, "Courts should take due account of whether an agency's error, procedural or substantive, was prejudicial to the party bringing the challenge." This change alone would clarify the rule and create more efficiency and predictability for challenging parties in court.

Congress should also consult with other agencies for further guidance on the issue by requesting a recommendation from ACUS. ACUS is an independent federal agency that has long provided recommendations to the government on how to proceed on a wide variety of administrative issues.[195] ACUS's expertise in this area would ensure that no undue consequences arise from the clarification of § 706.[196] Most recently, ACUS has provided recommendations on the issuance of guidance documents and how to implement the rules in the Equal Access to Justice Act.[197] Taking these steps would allow courts to apply the prejudicial error rule in a more uniform fashion. This would ensure that parties challenging procedural errors do not have the unfair burden of demonstrating harm, while parties challenging substantive errors may easily establish their case by showing harm. The amendment would further reserve Congress's power as the legislative body and minimize pressure on the courts to establish a rule via legislating from the bench.

---

192. 5 U.S.C. §§ 551–559, 561–570a, 701–706.

193. Most recently, in 2004, the word "purpose" was substituted for "purposes" in § 591. *Id.*

194. *Id.*

195. *Recommendations*, ADMIN. CONF. OF THE U.S., https://www.acus.gov/recommendations (last visited Apr. 20, 2021).

196. *Id.*

197. Admin. Conf. of the U.S., Recommendation 2019–1, *Agency Guidance Through Interpretive Rules* (June 13, 2019); Admin. Conf. of the U.S., Recommendation 2019–4, *Revised Model Rules for the Implementation of the Equal Access to Justice Act* (June 13, 2019).

CONCLUSION

The administrative law prejudicial error rule's history is long, with no definitive end in sight. Despite years of cases and several scholarly works on the topic, courts are nowhere near reaching a cohesive solution. The applicability of the rule and its solution tend to be muddled by judicial attempts to push precedent in a particular way. The Supreme Court and subsequent lower courts should separate substantive and procedural errors to determine whether to apply the outcome-based or record-based test.[198] Once the type of error is established, courts should be required to apply the appropriate test in conjunction with a fact-specific analysis.[199] Because courts tend to stray away from this type of analysis, the prejudicial error rule has become more ambiguous, as seen in *Little Sisters* and *Wheeler*. To further resolve this ambiguity and allow for predictability of litigation for both agencies and challenging parties, Congress should clarify the rule in § 706 in conjunction with an ACUS recommendation to ensure that the rule is applied consistently.[200] This amendment would substantially aid in the public's trust in government agencies and allow for agencies to further their work without the fear of an action being deemed reversible error, only to be fixed by vacatur and remand. The application of this recommendation would limit the high costs of litigation for challenging parties and create a more efficient and effective administrative law system.

198. *Supra* text accompanying notes 176–79.

199. Shinseki v. Sanders, 556 U.S. 396, 406 (stating that a fact-based analysis may always be required).

200. *Supra* text accompanying notes 192–197.