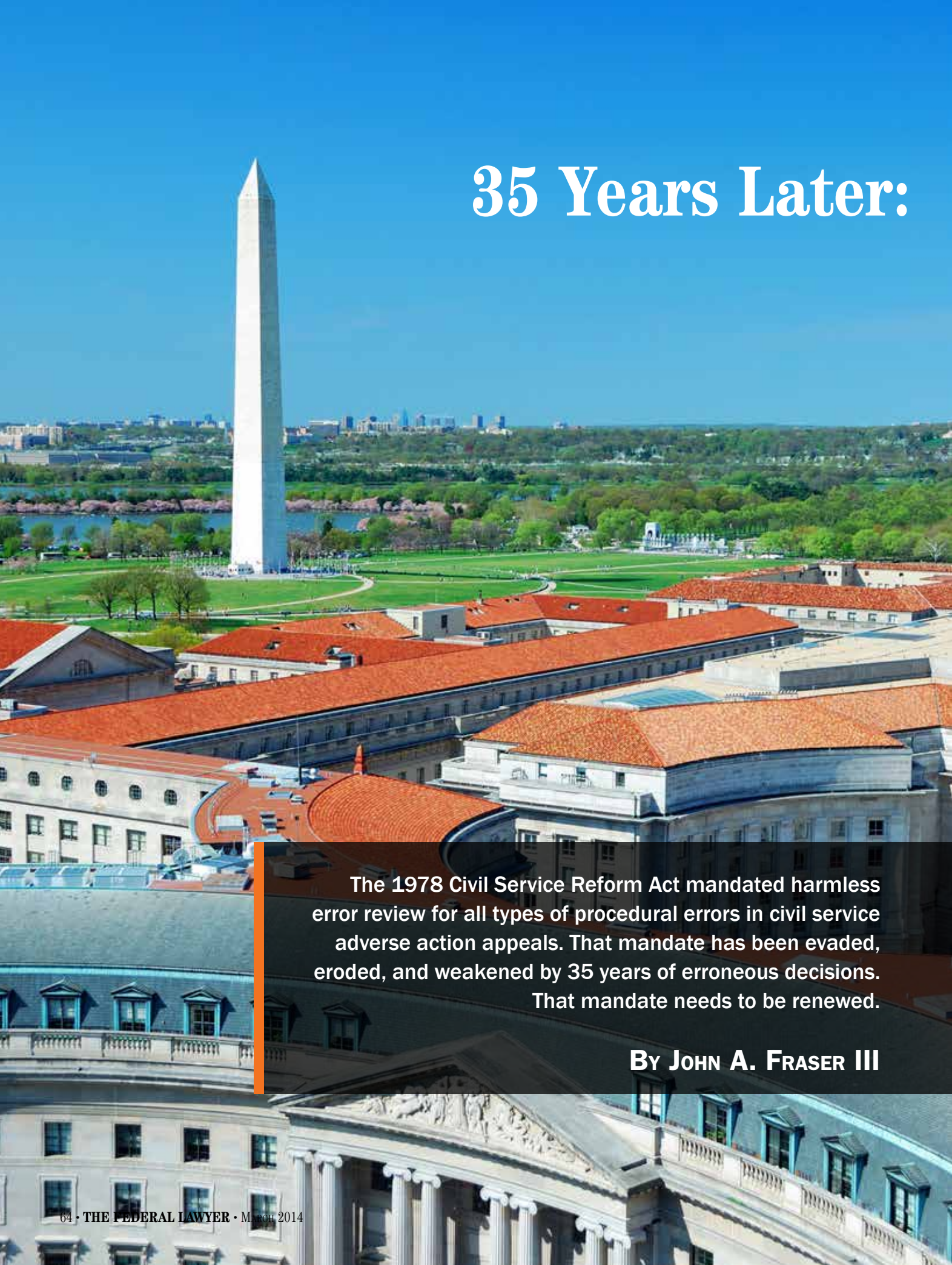
35 Years Later:



The 1978 Civil Service Reform Act mandated harmless error review for all types of procedural errors in civil service adverse action appeals. That mandate has been evaded, eroded, and weakened by 35 years of erroneous decisions. That mandate needs to be renewed.

By John A. Fraser III

A Look at Harmless Error Under the Civil Service Reform Act of 1978

In 1978, Congress enacted the Civil Service Reform Act (CSRA), one of the signature reforms of the Carter Administration. Before 1978, an array of minor procedural errors could lead to the reversal of adverse employment actions taken against federal employees. The Civil Service Commission, the district courts, and the Court of Claims all provided open forums in which to challenge adverse personnel actions, including challenges based on highly technical grounds unrelated to the merits.[1] Many of the procedural errors committed by federal personnel managers were harmless to the employee's substantive rights, however, a type of procedural perfectionism held sway on appeal. Many errors were deemed so serious an affront to the law that no proof of harm was required—and a rule of per se reversal was followed.[2]

In 1978, Congress acted to abolish this doctrine of *per se* harmful procedural error in civil service adverse action appeals. The Senate committee that drafted the CSRA said that a "central task" of the CSRA was to allow "civil servants to be able to be hired and fired more easily, but for the right reasons."[3] To accomplish this purpose, Congress acted to repeal the "welter of inflexible strictures that have developed over the years [that threaten] … to asphyxiate the merit principle itself."[4]

Congress criticized the pre-CSRA approach of the Civil Service Commission and the courts because it deprived agency managers of the necessary tools to manage the federal workforce[5] and because it protected employees who had not been prejudiced in regard to the merits of an adverse action.[6] To achieve reform, the CSRA abolished the Civil Service Commission and created the Merit Systems Protection Board (MSPB) to hear employee appeals.[7]Additionally, under 5 U.S.C. § 7701(c)(2)(A) of the CSRA, Congress directed that "[a]n employee who elects to appeal an agency disciplinary decision to the [Merit Systems Protection Board] must prove that any procedural errors substantially prejudiced his rights by possibly affecting the agency's decision."[8]

Congress mandated that the new MSPB conduct all adverse action reviews under the new standard created in § 7701(c)(2)(A).[9] The Supreme Court has stated in analyzing CSRA § 7701, "[w]e do not believe that Congress intended to force the government to retain these erring employees solely in order to penalize the agency for non-prejudicial procedural mistakes it committed while attempting to carry out the congressional purpose of maintaining an effective and efficient Government."[10]

Procedural perfection is not a permissible goal under the CSRA because *per se* procedural error is *exactly* what § 7701(c)(2)(A) of the CSRA was intended to abolish.[11]

The CSRA Created a Single Standard of Review for Procedural Error

When an MSPB appellant alleges that harmful procedural error occurred during the processing of an adverse action, under the CSRA, the analysis of this allegation proceeds down a single, well-worn path. First, the appellant must demonstrate that a procedural error occurred and that the error affected a significant procedural right.[12] The appellant also bears the burden to prove that the error caused prejudice. Once a demonstration of some prejudice and error is entered into evidence, the burden then shifts to the agency to demonstrate that there was no error, or no real prejudice, or that the prejudice was not material to a substantive right, or that the appellant in fact was not materially hampered in regard to the merits of the adverse action.[13] When all of the evidence is consid-

ered, the CSRA permits reversal for harmful procedural error only when the error probably caused prejudice to the appellant on the merits of the case.[14]

What About Constitutional Due Process Errors?

In 1978, Congress was well aware of the Supreme Court rulings that provided due process protections for the property rights of civil servants. Acknowledging this body of law, the Senate committee that drafted the bill stated in plain terms that the act's statutory terms intended to protect these due process rights.[15]

By its plain terms, § 7701(c)(2)(A) requires the appellant to prove harmful error in all cases. There is no exception in the statute for "serious" or "due process" errors that are labeled as having a constitutional dimension.[16] In many cases, the MSPB has ruled and the Federal Circuit has affirmed, that alleged constitutional errors must be reviewed for harm or prejudice.[17]

Congress was well within its constitutional authority to enact a rule of harmless error in civil service cases.[18] Procedural errors derived from constitutional standards are routinely reviewed for harmful error in civil and administrative cases of all kinds in the federal courts. For example, the Federal Circuit has held (in another context) that harmless error analysis is appropriate for constitutional claims.[19] Further, the Supreme Court has repeatedly held that most due process errors are subject to the harmless error analysis, even in criminal matters.[20]The rule of harmless error review has been codified for the U.S. courts in Title 28,[21] in the Federal Rules of Evidence,[22] the Federal Rules of Civil Procedure,[23] and the Federal Rules of Criminal Procedure.[24] The rule of harmless error is also mandated by the Administrative Procedure Act.[25] Moreover, as part of the harmless error rule, procedural errors are waived in MSPB cases if the appellant does not take procedural steps to preserve the record for review.[26]

Congress also underlined its intent to require harmless error analysis by confining the MSPB to its stated jurisdiction. The CSRA is a "comprehensive overhaul" of the civil service system.[27] The CSRA describes in great detail the permissible claims by federal employees and sources of MSPB jurisdiction.[28] Under the CSRA, the MSPB has no authority to create novel interpretations of the CSRA or the Constitution and no power to expand its own jurisdiction.[29] Congress thus cut off any possible route for the MSPB to create a rule of *per se* due process procedural error.

Congressional Intent Meets Stubborn Resistance

Unfortunately, the crystal clear expression of congressional intent in 1978 has been disregarded in a significant number of MSPB and Federal Circuit cases in the past 35 years. Beginning with *Sullivan v. Navy Department*[30] and continuing to *Alford v. Dept of Defense,*[31] the MSPB and the Federal Circuit have reverted to a *per se* rule in many cases of alleged denial of due process.[32] *Sullivan* offers an example of cases decided under the *per se* rule where there was no issue of serious misconduct having occurred. In this case, the employee was disciplined for falsifying timesheets, but the court reversed it because of an undisclosed *ex parte* contact with the deciding official. The court relied only upon a pre-CSRA precedent.

Additionally, in *Hodges v. U.S. Postal Service*, an employee was suspended from duty as an air marshal because his security clearance was suspended at the early stages of a criminal investigation. The MSPB reversed because the deciding official who suspended the marshal did not have the authority to overrule security officials and reinstate the clearance. In *Edwards v. U.S. Postal Service*, a supervisor was placed on emergency suspension status without a hearing into the reasons. The board ruled that proper due process requires a hearing before the suspension and disregarded an agency regulation that allowed otherwise.

To err is human, so procedural errors continue to occur. With a federal civilian workforce in excess of 2.7 million and thousands of adverse action appeals filed each year, it is unlikely that procedural errors will ever be eliminated.

In *Young v. Department of Housing and Urban Development*, an arbitrator upheld the termination of an employee who threatened a witness in an agency proceeding. The arbitrator found the procedural errors of the deciding official to be harmless, but the court held that the deciding official's error of investigating the facts of the case and probing into its circumstances was *per se* error. The agency and the arbitrator were reversed. Further, in *Jenkins v. Environmental Protection Agency*, an employee was removed for threatening other employees. The deciding official considered a portion of a published table of penalties that was not cited in the letter proposing the discipline. The MSPB reversed this removal due to the consideration of an agency policy not recited in the proposal letter and did not consider whether the employee deserved to be removed. Importantly, some of these cases contain no mention or discussion of the harmful error standard of the CSRA.[33] Alternatively, some cases state that the ruling is based on a precedent decided before the enactment of the CSRA.[34]

In each such case, it appears that the MSPB or the Federal Circuit are offended that the employing agency has violated an important procedural right and have determined that it is necessary to punish the agency.[35] Having decided to send a message to the agency, reversal and reinstatement of the employee with back pay and attorney's fees is ordered, which forces the errant agency to restart the adverse action or to abandon the proposed discipline.[36]

These *per se* error rulings seem to grow from a sense of fundamental "fairness" or a desire to respond to an affront to the dignity of the law. No other pattern of decision emerges from a study of the cases. In essence, the MSPB and the Federal Circuit have decided that the agencies require supervision in addition to that provided by Congress or the President.[37]

These numerous rulings have not, however, reformed or educated the errant agencies. To err is human, so procedural errors continue to occur. With a federal civilian workforce in excess of 2.7 million[38] and thousands of adverse action appeals filed each year, it is unlikely that procedural errors will ever be eliminated. Congress decided in 1978 that punishing the agencies when procedural error has not caused substantive harm to the employee was bad policy. In

the CSRA, Congress had attempted to remove from the MSPB and the federal courts the power to set a different policy on this issue.

Where Congress said that it intended to give federal personnel managers the authority to discipline employees for the right reasons regardless of technical procedural errors, the MSPB and the Federal Circuit have decided that Congress was wrong. Technical oversights having zero impact on the merits of the cases continue to cause reversals and reinstatements of employees. Yet, the back pay and attorney fee awards produced are nothing compared to the other costs inflicted on the agencies. As before 1978, federal personnel managers have reason to doubt that they can reliably discipline employees for the right reasons, regardless of technical procedural errors.

This series of *per se* rulings directly contradicts the CSRA and the Supreme Court ruling in *Cornelius v. Nutt*. Reversion to a *per se* rule effectively repeals the harmless error provision of § 7701(c)(2)(A) of the CSRA for those cases where the rule is not applied and stymies the mandate of the statute.

How to Address Years of Error?

There are four means by which to address this state of affairs. First, the agencies that litigate before the MSPB should ask it and the Federal Circuit to correct erroneous interpretations. Second, the Federal Circuit should grant a petition for *en banc* review of this issue, when an appropriate occasion presents itself. Third, the Supreme Court should grant review of a Federal Circuit decision that squarely presents the issue. Fourth, Congress should draft a more specific harmless error provision in the CSRA.

The Agencies Should Squarely Present the Issue to the MSPB and the Federal Circuit

The CSRA provides that the appellant must show "harmful error in the application of the agency's procedures in arriving at such decision…"[39] As discussed above, the prejudice that must be shown is not a mere variation from "normal" procedures or a lapse in the technical aspects of the adverse action that is challenged.[40] In MSPB cases, the agencies should demand that the appellant demonstrate that the error caused by the agency official who made the adverse decision to decide the matter differently than had there been no error.[41]

This is an evidentiary question to be decided by a preponderance of the evidence upon the entire record.[42]Agencies should argue that the appellant must demonstrate it is more probable than not that the deciding official would have taken a different approach if the error were corrected.[43] This is a common issue in employment law and civil rights cases, where factual findings on this issue are reviewed under a "clearly erroneous" standard.[44]

In cases applying the CSRA, the MSPB and the Federal Circuit have provided guidance on what types of evidence are admissible to address this factual question.[45] In essence, the appellant must demonstrate that the adverse action is of a different nature or character than what the agency deciding official perceived at the time the decision was made. The agency witnesses, in turn, should offer evidence that they correctly perceived the nature and character of the adverse action and that it was decided under a correct understanding of the facts that bear on the merits.[46] The agencies should then strive to prove that the error would make no difference if the matter were remanded.[47] In other words, Congress directed the MSPB and the parties to focus on the accuracy of the underlying decision. Therefore, the agencies should strive to demonstrate that the correct decision was made.

The Agencies Must Seek Review by the MSPB and the Federal Circuit

To squarely present the issue for ultimate review by higher authorities, the agencies must take on the task of building a factual record of harm at the trial level in each case. Then, they must seek the full cooperation of those portions of the Department of Justice and Office of Personnel Management that represent the public interest before the appeals office of the MSPB and before three judge panels of the Federal Circuit.[48] The legislative history of the CSRA should be briefed in these appeals.

The Agencies Must Build a Case for the Solicitor General to Consider

Petitions for *en banc* review at the Federal Circuit and for *certiorari* to the Supreme Court are the province of the solicitor general of the United States.[49]Agencies that wish to persuade the solicitor general to seek the intervention of the entire Federal Circuit or of the Supreme Court must build a complete record and present the harmless error argument at all stages of the case. They must arm the solicitor general with the arguments that will cause the Supreme Court to expend its time on correction of the error, in a situation where there will not likely be a conflict in the circuit courts.[50]

Congress May Again Need to Speak

In the absence of judicial correction of longstanding errors, it may be necessary for Congress to again legislate on the topic of harmless error review in adverse action appeals. In a time of furloughs, sequestration, sustained budget cuts, and headcount reductions, it is a form of waste to place a budget priority on procedural niceties. If an employee's substantive rights are prejudiced, then correction of the error is a budgetary necessity.

A reenactment of the same language now contained in § 7701(c)(2)(A), with the addition of the words "any of," would send a loud and clear message that harmless error review is required in all adverse action appeals.[51] While such action should not be necessary, Congress was given Article I powers to legislate and investigate and oversee the operations of government. When legislation is incorrectly administered, corrective legislation is sometimes essential.

Conclusion

Millions of dollars are wasted each year when harmless procedural errors result in the reversal of adverse actions years after the events, giving rise to the claim. The congressional purpose stated in 1978—to give agency management the flexibility to remove employees for the right reasons—has largely been thwarted.[52] This is a form of waste that can and should be fixed. ⊙

John A. Fraser III is an attorney employed by the Department of Defense. The views expressed herein are entirely his own.

Endnotes

[1]See Richard A. Merrill, *Procedures for*

Adverse Actions Against Federal Employees, 59 VA. L. REV. 196 (1973)(reviewing prevailing legal practices.).

[2]Congress disapproved of this body of civil service law, stating that it intended to eliminate the reversal of adverse actions for "technical procedural oversights." S. Rep. 94-969, p. 54, 95th Cong. 2d Sess. (1978)(hereafter S. Rep. 94-969). Congress also designed the CSRA to "give agencies greater ability to remove or discipline expeditiously employees who engage in misconduct, or whose work performance is unacceptable." *Id*. at 51.

[3]S. Rep. No. 95-969, p. 4 (1978).

[4]*Id*. at 3.

[5]5 U.S.C. § 7101(b) explains that a purpose of CSRA is the preservation of the "ability of federal managers to maintain an effective and efficient Government." The authors of the CSRA said that the provisions of the act were designed to expedite dismissals and fully protect the "due process" rights of employees. S. Rep. No. 95-969, p. 24.

[6]The Senate report also stated, "Henceforth, the Board and the courts should only reverse agency actions under the new procedures where the employee's rights under this title have been substantially prejudiced." S. Rep. No. 95-969, p. 5. On page 52, it expressed the intention to "eliminate unwarranted reversals of agency actions" and on page 54, the intention to "avoid unnecessary reversal of agency actions because of technical procedural oversights."

[7]*Elgin v. Dept of Treasury*, ___ U.S. ___, 132 S. Ct. 2126, 2136 (2012)(CSRA scheme of appeals and review is the exclusive means of review of employee termination. Additionally, MSPB preliminary rulings on constitutional law are subject to *de novo* review by the Federal Circuit); *Bush v. Lucas*, 462 U.S. 367, 388 (1983)(courts will not create a cause of action outside the CSRA for terminated federal employees because Congress has created CSRA remedies that it deems adequate).

[8]*Cornelius v. Nutt*, 472 U.S. 648, 661 (1985).

[9]Congress also required the MSPB to take account of the same harmless error rule in both Chapters 43 and 77 of Title 5, stating that it intended to alter prior review practices in adverse action reviews occurring under both chapters. S. Rep. No. 95-969, pp. 24, 44, 51, and 54.

[10]*Cornelius*, 472 U.S. at 663.

[11]Section 7701(c)(2)(A) provides that "…the agency's decision may not be sustained … if the employee … (A) shows harmful error in the application of the agency's procedures in arriving at such decision…" In an early CSRA case, Judge Nies of the Federal Circuit carefully analyzed the legislative history of the CSRA and rejected an argument that the denial of a statutory seven-day reply period was *per se* harmful. Judge Nies ruled that the statute was intended to abolish such arguments. *Adams v. Dept of Transportation*, 735 F.2d 488, 495-496 (Fed. Cir. 1984)(Nies, J. concurring).

[12]For example, minor imperfections in dates or wording of notices are not considered errors. *See*, *e.g*., *Haynes v. Department of the Navy*, 727 F.2d 1535, 1538-1539 (Fed. Cir. 1984)(mis-statement of the date of the misconduct in notice of removal was harmless error because the employee was aware of the actual date of the misconduct); *Greenough v. Dept of the Army*, 73 MSPR 648, 655 (1997)(date of the incident was not material in context of this case); *Rodriguez v. Dept. of Justice*, 117 MSPR 73 (2011), *aff'd. mem.*, 493 Fed. Appx. 100 (Fed. Cir. 2012)(non-precedential)(it was not material that the officer was not charged with drawing rather than pointing a weapon).

[13]*Stone v. FDIC*, 179 F.3d 1368, 1377 (Fed. Cir. 1999)(this opinion also contains *dicta* concerning the effect of constitutional errors and automatic reversal).

[14]*Cornelius v. Nutt*, 472 U.S. 648, 663 (1985); *Blackford v. Dept. of the Navy*, 8 MSPR 712, 713 (1981)(reviewing legislative history of CSRA and ruling that technical procedural oversights without prejudice to the appellant are not harmful errors); *Scott v. Dept. of Justice*, 69 MSPR 211, 242 (1995)("Reversal of an action is warranted only where a procedural error, whether regulatory or statutory, is likely to have had a harmful effect upon the outcome of the case before the agency."); *Parker v. Defense Logistics Agency*, 1 MSPR 489 and 505 (1980)(reversing finding of prejudice without preponderance of evidence demonstrating harm).

[15]In discussing appeals of adverse actions under § 7701, the Senate report stated: "This section makes important changes in the procedures governing review by the Board and the courts of adverse actions, such as removals, and other appealable actions taken by the agency. The changes protect the right of employees, recognized by the Supreme Court in *Arnett v. Kennedy*, 416 U.S. 134 (1974), to a full and fair consideration of their case. At the same time, they are intended to give agencies greater ability to remove or discipline expeditiously employees who engage in misconduct, or whose work performance is unacceptable. Henceforth, the Board and the courts should only reverse agency actions under the new procedures where the employee's rights under this title have been substantially prejudiced." S. Rep. 94-969, p. 51. The same report stated that the CSRA was written to provide "due process" protections to employees. *Id*. at 24. Congress thus plainly demonstrated its awareness of constitutional rights in adverse action procedures and its intent to subject such claims to harmless error review.

[16]*Cheney v Dept. of Justice*, 720 F.2d 1280, 1285 (Fed. Cir. 1983); *Stephen v. Air Force*, 47 MSPR 672, 682-683 (1991)(reversal of an adverse action merely because of a due process violation risks "doing exactly what Congress sought to avoid" in the CSRA by reversing an action for violations that caused no harm to the employee.)

[17]*See Darnell v. Dept. of Transportation*, 807 F.2d 943, 945-946 (Fed. Cir. 1986)(alleged constitutional due process violation was harmless error); *Mercer v. Department of Health and Human Services*, 772 F.2d 856, 859 (Fed. Cir. 1985); *Smith v. USPS*, 789 F.2d 1540, 1545 n.5 (Fed. Cir. 1986); *Adams v. Dept. of Transportation*, 735 F.2d 488 n.3 (Fed. Cir. 1984)(*en banc*)(6 days rather than 7 for reply is harmless error); *Henton v. USPS*, 102 MSPR 572, 576-577 (2006)(error is harmless); *Rawls v. USPS*, 94 MSPR 614, 619-623 (2003), *aff'd* 129 Fed. Appx. 628 (Fed. Cir. 2005)(unpublished); *Warren v. USPS*, 117 MSPR 698 (2012)(non-precedential), *aff'd*, 497 Fed. Appx. 22 (2012)(affirming MSPB analysis of harmful error in face of constitutional claim). *But see, Edwards v USPS*, 112 MSPR 196, 200-202 (2009)(failing to determine prejudice after finding denial of due process in suspension).

[18]The Supreme Court has recently reminded the Federal Circuit that when Congress creates a statutory rule of harmless procedural error, the Federal Circuit is not authorized to alter that rule. In *Shinseki, Secretary of Veterans Affairs v. Sanders*, 556 U.S. 396 (2009), the Supreme Court held that the Federal Circuit erred when it created its own strict harmful error rule and substituted that rule for the statutory rule provided for review of errors in the processing of veterans' benefit claims. The Supreme Court ruled that Congress had provided

for a harmful error rule by statute and that the Federal Circuit had impermissibly created a rule that presumed prejudice from any error.

[19]*Christian v. United States*, 337 F.3d 1338, 1343 (Fed. Cir. 2003), *cert denied*, 158 L. Ed. 2d 467 (2004)(military reinstituted salary case).

[20]*Arizona v. Fulminante*, 499 U.S. 279, 306 (1991).

[21]28 U.S.C. § 2111. "On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties."

[22]Fed. R. Evid. 103(a).

[23]Fed. R. Civ. Pro. 61.

[24]Fed. R. Crim. Pro. 52(a).

[25]5 U.S.C. § 706(2)(D).

[26]*Bogumill v. OPM*, 1998 U.S. App. Lexis 18750 (Fed. Cir. 1998) (unpublished); *Cross v. Veterans Affairs Dept*, 8 MSPR 370, 372 (1981).

[27]*Lindahl v. OPM*, 470 U.S. 768, 773 (1985).

[28]*United States v. Fausto*, 484 U.S. 439, 445-447 (1988).

[29]5 U.S.C. § 7701(a)(defining MSPB jurisdiction); *Elgin v. Dept of Treasury*, ___ U.S. ___, 132 S. Ct. 2126, 2136 (2012)(CSRA scheme of appeals and review is exclusive means of review of termination. MSPB preliminary rulings on constitutional law are subject to a *de novo* review by the Federal Circuit); *Bush v. Lucas*, 462 U.S. 367, 388 (1983)(courts will not create a cause of action outside the CSRA for terminated federal employees because Congress has created CSRA remedies that it deems adequate); *Manning v. MSPB*, 742 F.2d 1424 (Fed. Cir. 1984)(MSPB has no jurisdiction to consider constitutional challenge to reassignment that CSRA does not assign to its jurisdiction); *Moore v. Dept of State*, 15 MSPR 488 (1983)(no MSPB jurisdiction to consider constitutional challenge as to directed fitness examination); *Preece v. Dept. of the Army*, 50 MSPR 222, 226 (1991)("The Board does not have jurisdiction over all matters that are alleged to be incorrect").

[30]*Sullivan v. Dept. of the Navy*, 720 F.2d 1266, 1273-1274 (Fed. Cir. 1983)(relying on pre-CSRA Court of Claims precedents to find *per se* harmful error; no discussion of CSRA § 7701).

[31]118 MSPR 556, 559-560 (2012)(reversing administrative judge who found harmless error in due process violation in not considering reply); *Hodges v. USPS*, 118 MSPR 116 (2012)(reversing adverse action for technical violation in consideration of reply); *Gray v. Dept. of Defense*, 116 MSPR 461, 463-467 (2011)(applying *per se* rule to *ex parte* communications with deciding official); *Jenkins v. EPA*, 118 MSPR 161, 164-167 (2012)(reversing adverse action because deciding official considered section of table of penalties not cited in proposal letter)

[32]*Young v. HUD*, 706 F.3d 1372, 1376 (Fed. Cir. 2013)(procedural errors amounting to a denial of due process are not subject to the rule of harmless error); *Ward v. United States Postal Service,* 634 F.3d 1274, 1280 (Fed. Cir. 2011); *Stone v. FDIC*, 179 F.3d 1368, 1377 (Fed. Cir.1999)(rejecting harmless error argument in certain circumstances); *Hodges v. USPS*, 118 MSPR 116 (2012) (reversing adverse action for technical violation in consideration of reply); *Gray v. Dept. of Defense*, 116 MSPR 461, 463-467 (2011) (applying *per se* rule to *ex parte* communications with deciding official and employee was automatically entitled to an entirely new and constitutionally correct removal proceeding); *Jenkins v. EPA*, 118 MSPR 161, 164-167 (2012)(reversing adverse action because deciding official considered section of table of penalties not cited in the proposal letter); *Edwards v. USPS*, 112 MSPR 196, 200-202 (2009)(failing to determine prejudice after finding denial of due process in suspension.).

[33]*See, e.g., Wildberger v. SBA*, 1999 U.S. App. LEXIS 17714 (Fed. Cir. 1999)(unpublished)(reversing and remanding because of possible procedural error).

[34]*See, e.g., Kelly v. Dept. of Agriculture*, 225 Fed. Appx. 880 (Fed. Cir. 2007)(unpublished)(citing Court of Claims case from 1978 to override any proof of harmless error).

[35]*See, e.g.*, *Boddie v. Navy Dept.*, 827 F.2d 1578, 1580 (Fed. Cir. 1987)(concluding that change in the proposing official (not the deciding official) could have resulted in a greater penalty for the appellant, who slapped a subordinate, and was not based on a permissible reading of a Navy shipyard regulation. While acknowledging the existence of the harmless error rule, the panel decision found no means of applying it to the facts).

[36]*Id*.

[37]For example, Congress enacted and President Jimmy Carter also signed the Inspector General Act in 1978. Pub. L. 95-452, Oct. 12, 1978, 92 Stat. 1101, (codified at 5 U.S.C. Appendix Section 1 *et seq.).*

[38]www.opm.gov/policy-data-oversight/data-analysis-documentation/federal-employment-reports/employment-trends-data/2012/september/table-1.

[39]5 U.S.C. § 7701(c)(2)(A).

[40]*Gibson v. USPS*, 116 MSPR 679 (2011)(non-precedential)(due process is satisfied when the record demonstrates that appellant fully understood the charges and was able to reply); *Alvarado v. Dept. of the Air Force*, 97 MSPR 389, 391-394 (2004)(case record demonstrates that appellant fully understood the charges against him and was provided due process and chart that was "cryptic" to judge was very clear to appellant).

[41]5 C.F.R. § 1201.56(c)(3) "Error by the agency in the application of its procedures that is likely to have caused the agency to reach a conclusion different from the one it would have reached in the absence or cure of the error. The burden is on the appellant to show that the error was harmful, i.e., that it caused substantial harm or prejudice to his or her rights."

[42]5 C.F.R. § 1201.56(b)(1); *Blank v. Dept. of the Army*, 247 F.3d 1225, 1229-1230 (Fed. Cir. 2001)(affirming rejection of harmful error assertion because preponderance of evidence demonstrated a lack of harm).

[43]*See*, *e.g.*, *Warren v. USPS*, 117 MSPR 698 (2012) *aff'd,* 497 Fed. Appx. 22 (Fed. Cir. 2012)(non-precedential)(agency deciding official credibly testified that different disciplinary record would produce same adverse action; no harmful error).

[44]*See*, *e.g.*, *Mt. Healthy City Bd. of Ed. v. Doyle*, 429 U.S. 274, 287 (1977)(termination allegedly for First Amendment activity is defensible where city proved that it would have terminated the employee without the activity); *Sheehan v. Dept of Navy*, 240 F.3d 1009, 1013 (Fed. Cir. 2001)(following *Mt. Healthy* in USERRA case on appeal from MSPB); *Gerlach v. FTC*, 9 MSPR 268 (1981)(adopting *Mt. Healthy* causation standard under CSRA).

[45]In *Smith v. USPS*, 26 MSPR 185, 187 (1985) *aff'd*, 789 F.2d 1540, 1545-1546 (Fed. Cir. 1986), the MSPB found harmless error in a case where less than 30 days notice was provided and the Court ruled that the appellant should have presented all of the evidence that allegedly was omitted at the agency level. Further, the appel-

lant should present arguments as to how this different evidence would have influenced the deciding official on the merits.

[46]The appellant would be well advised to offer evidence as to how she would cross examine such testimony in attempting to prove prejudice. *See Drumheller v. Dept. of the Army*, 49 F.3d 1566, 1569 (Fed. Cir. 1995)(upholding finding of no denial of due process and no harmful error when appellant was not confronted with all of the evidence in a security clearance revocation appeal. Further, no evidence was offered of an intended cross examination of the additional witness or other harm).

[47]*Schapansky v. Department of Transp.*, 735 F.2d 477, 486 (Fed. Cir. 1984)(*en banc*)(nothing in the record indicates an impairment of rights); *In re Watts*, 354 F.3d 1362, 1370 (Fed. Cir. 2004)(Patent Act appeal from USPTO ruling expressed "The question now is whether under these circumstances a remand to the Board is required. In appeals from the Board, as in all other appeals, we must consider whether an error by the Board was harmful error. Section 2111 of the Judicial Code directs us to disregard "errors or defects [in the decision on appeal] which do not affect the substantial rights of the parties." 28 U.S.C. § 2111 (2000). The purpose of this rule is to avoid wasteful proceedings on remand where there is no reason to believe a different result would have been obtained had the error not occurred. …. Thus, to prevail the appellant must not only show the existence of error, but also show that the error was in fact harmful because it affected the decision below.")(citations omitted); *Munoz v. Strahm Farms, Inc.*, 69 F.3d 501, 504 (Fed. Cir. 1995)("The correction of an error must yield a different result in order for that error to have been harmful and thus prejudice a substantial right of a party).

[48]5 U.S.C. § 7703(d) spells out the authority of the OPM to represent the government's interest in MSPB proceedings.

[49]28 U.S.C § 518; *see* www.justice.gov/osg/about-osg.html (describing the role of the solicitor general).

[50]Only the Federal Circuit hears appeals from the MSPB, except in cases of alleged discrimination and a narrow class of other statutes. 5 U.S.C. Section 7703(b).

[51]The new statute would provide: "…the agency's decision may not be sustained … if the employee … (A) shows harmful error in the application of any of the agency's procedures in arriving at such a decision…"

[52]A 2012 OPM survey found that only 42 percent of government supervisors felt that poor performance was appropriately being addressed within their agency. www.fedview.opm.gov/2010/Reports/SupvCompPCT.asp?AGY=ALL&SECT=2 (question 23).

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[17]*Preferred Care Partners Holding Corp. v. Humana, Inc.,* 258 F.R.D. 684, 689-690 (S.D. Fla. 2009) (citations omitted); *see also In re Buspirone Antitrust Litig.,* 211 F.R.D. 249, 253 (S.D.N.Y. 2002); *United States v. International Business Machines Corp.*, 66 F.R.D. 206, 210 (S.D.N.Y. 1974) ("even legal advice is unprivileged if it is incidental to business advice").

[18]*In re Buspirone Antitrust Litig.,* 211 F.R.D. at 253.

[19]*See, e.g., In re Pfizer Inc. Sec. Litig.,* No. 90 Civ. 1260 (SS), 1994 U.S. Dist. LEXIS 7454, at *4-5 (S.D.N.Y. June 6, 1994) (documents which "make broad projections and analyses regarding the extent of [a party's] financial exposure" are not protected by the attorney–client or attorney work-product privileges despite in-house counsel's participation); *Spread Enterprises,* 2013 U.S. Dist. LEXIS 22307, at *5-7; *see also Durham Industries v. North River Insurance Co.,* No. 79 Civ. 1705 (RWS), 1980 U.S. Dist. LEXIS 15154, at *8 (S.D.N.Y. Nov. 21 1980) ("even legal advice is unprivileged if it is incidental to business advice") (citation omitted).

[20]*GenOn Mid-Atlantic, LLC v. Stone & Webster, Inc.*, No. 11 Civ. 1299 (HB) (FM), 2011 U.S. Dist. LEXIS 133724, at *42 (S.D.N.Y. Nov. 10, 2011); *see Bush Ranch v. E.I. du Pont de Nemours & Co.,* 918 F. Supp. 1524, 1548 (M.D. Ga. 1995) (neither facts nor data gathered in connection with case were privileged where the gatherers' "function was not merely to put information gained from DuPont into usable form such that the attorney could use the information effectively").

[21]No. 03 Civ. 3573 (LTS) (RLE), 2005 U.S. Dist. LEXIS 33334, at *5-6 (S.D.N.Y. Dec. 14, 2005).

[22]*Id.* at *6.

[23]*Id.*

[24]*Id.* at *6-7 (concluding that, because "legal issues do not predominate in the e-mails … the communications are not protected by the attorney–client privilege").

[25]*Hardy v. New York News, Inc.*, 114 F.R.D. 633, 643-44 (S.D.N.Y. 1987) (citation omitted).

[26]*NXIVM Corp. v. O'Hara*, 241 F.R.D. 109, 126 (N.D.N.Y. 2007) (citation omitted).

[27]*Ames v. Black Entertainment TV*, No. 98 Civ. 0226, 1998 U.S. Dist. LEXIS 18053, at *21-22 (S.D.N.Y. Nov. 18, 1998) (citations omitted).

[28]*In re Seroquel Prods. Liab. Litig.,* 2008 U.S. Dist. LEXIS 39467, at *110 n.7.

[29]*See Affordable Bio Feedstock,* 2012 U.S. Dist. LEXIS 164949, at *1 & *9-15 (noting court's decision based on its review of challenged documents *in camera*); *Baklid-Kunz*, 2012 U.S. Dist. LEXIS 158944, *passim* (same); *Bennett v. Berges*, 84 So. 3d 373, 375 (Fla. 4th DCA 2012) ("If a party seeks to compel the disclosure of documents that the opposing party claims are protected by attorney–client privilege, the party claiming the privilege is entitled to an in camera review of the documents by the trial court prior to disclosure.") (citations omitted); *see also United Services Auto. Ass'n v. Crews,* 614 So. 2d 1213, 1214 (Fla. 4th DCA 1993) (opining that the only way to determine which communications with in-house counsel were privileged was to conduct an *in camera* review).

[30]*See, e.g., Baklid-Kunz,* 2012 U.S. Dist. LEXIS 158944, at *22 (holding that "[t]o the extent any of the remaining entries in the privilege log contain privileged information, as categorized in Section II, *supra*, those entries shall first be redacted and then produced"); *In re Seroquel Prods. Liab. Litig.,* 2008 U.S. Dist. LEXIS 39467, at *111 (holding that "AstraZeneca may also be entitled to a privilege with respect to any actual legal advice rendered as part of the drafting effort, even though the rest of the process is not protected. As to such items, AstraZeneca could redact the request for legal advice and the attorney's response.").