

**I Noticed, Then Commented –
Thoughts on a New Application for the Notice and Comment Process**
by the Honorable Eric L. Lipman

At the close of last year, I had a something of an old home week. I had the chance to catch up with some professors – Michael Abramowicz and Thomas Colby – who are teaching at my *alma mater*. Abramowicz and Colby are leading lights in the faculty of the George Washington University’s National Law Center and had just posted their latest article to the Social Science Research Network.

In their article, ***Notice-and-Comment Judicial Decisionmaking*** (a complete copy of which is accessible here: <http://tinyurl.com/5vq5l7>), Abramowicz and Colby argue that the notice and comment processes of administrative rulemaking might be useful in warding off error by state and federal courts. Noting that judicial opinions often contain errors that have far-ranging and untoward consequences, Abramowicz and Colby contend that if interested persons had an opportunity to preview yet-to-be finalized judicial opinions, commentators could assist the courts in avoiding error. As it is with administrative rulemaking, the professors explain, notice and comment procedures could improve the work product of, and public’s confidence in, our courts.

In keeping with their theme, Professors Abramowicz and Colby also suggested that I submit my reactions to their proposals for “notice and comment” by others. I decided that I would write about the professors’ work, and my own reactions to it, in these pages here. Whether you love or hate their suggestions, Abramowicz and Colby’s article presents ideas that every Public Lawyer should think about closely.

The authors begin their analysis with *Kennedy v. Louisiana*, 128 S. Ct. 2641 (2008) – a high profile case from the last U.S. Supreme Court term. In that case, the Justices considered whether the Eighth Amendment’s Cruel and Unusual Punishments Clause precluded a state from imposing the death penalty for the crime of raping a child. As the authors explain:

The Court based its holding on “evidence of a national consensus” that such a punishment is excessive, and noted that, “[a]s for federal law, Congress in the Federal Death Penalty Act of 1994 expanded the number of federal crimes for which the death penalty is a permissible sentence, including certain nonhomicide offenses; but it did not do the same for child rape or abuse.” A few days after the Court issued its opinion, a blogger pointed out that, contrary to the Court’s implication that there is no provision for the death penalty for child rape in federal law, Congress revised the Uniform Code of Military Justice in 2006 to add child rape to the list of crimes that can trigger the death penalty under military law. That blog post triggered substantial news coverage criticizing the shows that the usefulness of public participation goes well beyond the correction of the occasional objective error.

[We] argue that the case for notice-and-comment judicial decisionmaking is in most respects at least as strong as the case for notice-and-comment administrative rulemaking. In administrative law, the notice-and-comment process serves several related functions: providing information to decisionmakers, legitimating the decisionmaking process, and constraining decisionmakers by pushing them to confront arguments that point away from their preferred course of action. All of those functions could be served equally as well, if not better, in the judicial context.

Kennedy v. Louisiana – and, for that matter, nearly every other case decided in modern time – also points up the professors’ second critique; that judicial decisions tend to reach beyond the specifics of a particular case so as to describe broader rules of law. As Abramowicz and Colby explain:

[I]n deciding narrow disputes, judges issue opinions that are necessarily broader in scope than the specific facts of the case. And those opinions have the force of law, controlling the result in future cases, and requiring nonparties to alter their conduct to conform to the judges’ pronouncements. In some sense, then, every opinion is an advisory opinion, insofar as it purports to, and functionally does, control other parties and other circumstances not actually before the court.

The authors conclude: “Not only may [important cases] be decided without the input of the broader public that they affect, but [opinions] are also written by judges who will not necessarily be politically representative of that public.”

While Professors Abramowicz and Colby put forward a very substantive critique, to my mind, their cures would be far worse than the disease. If aggressive treatments are needed, I know of some better (and milder) therapies for judicial error. A few points deserve emphasis.

First, the case of *Kennedy v. Louisiana*, and Justice Kennedy’s sweeping contention that Congress has never provided for the death penalty for the crime of child rape, is a poor founding block for reform. While the Justices may have been red-faced about the misstep, it appears that source of the mischaracterization was the Court itself. As Justices Clarence Thomas and Samuel Alito remarked later, “[u]ntil the petition for rehearing, none of the briefs or submissions filed by the parties or the *amici* in this case cited or discussed the [Uniform Code of Military Justice] provisions.” This should be the primary lesson: Woe to the judge who strays from the underlying record! The most useful thing that we can do now is to include both *Kennedy v. Louisiana*, and the later critiques, in law school casebooks and continuing legal education materials. We should all study (and practice saying in unison) the tenet that departing from the record is ill-advised and potentially hazardous to the esteem of our courts.

Second, while Professors Abramowicz and Colby acknowledge that a process by which some draft opinions are circulated and subject to public comment, would involve additional costs, they propose to underwrite their innovations by boosting the number of nonprecedential opinions. Because nonprecedential opinions are often drafted by staff

attorneys, the authors suggest that increasing the number of these opinions could free up Judges and Law Clerks to sift through public comments in more complicated cases.

The proposal is problematic on a number of fronts. In my view, it significantly underestimates the practical impacts of receiving hundreds, or perhaps thousands, of comments in high-profile cases. If one were to make an analogy between the number of comments reviewed by a federal agency in high-profile rulemakings, and the number of comments that might be submitted to a reviewing court under the professors' hoped-for procedures – say, during a later Administrative Procedure Act challenge to those same rules – the impacts to the court could be very large indeed. Also, it strikes me as ironic, that in order to boost the public's confidence in judicial processes, Professors Abramowicz and Colby urge delegating more opinion writing away from Judges and for fewer of their decisions to be precedential. In terms of invigorating public esteem in our courts, those modifications seem like “robbing Peter to pay Paul.”

The proposal also has a “kick the can” problem. If there is a lack of public confidence in the decisions made by our courts now, I am concerned about the results that would follow if Judges received public comments on their drafts but did not later revise their opinions so as to specifically acknowledge, discuss and disclaim comments that were not well taken. Is a notice and comment process that is not genuinely interactive with commentators worthwhile in terms of building public confidence? Similarly, if a Judge did disclaim a line of reasoning that was submitted during the comment phase, does this peroration increase confidence in the final result or merely postpone the day of dissatisfaction for those who do not prevail? Are we simply “kicking the can” down the road?

More importantly, I think that the proposed notice and comment methods send the wrong message to the public – namely, that judicial decision-making is an inductive process that invites, collects and sifts the policy preferences from a wide range of stakeholders so as to produce the “best outcome.” While a search for the optimum policy outcome might be appropriate for legislative bodies; and perhaps for agencies that are undertaking rulemaking; this is not what judges do. I doubt that any program for building public confidence in the courts could proceed from such a false start.

As I noted above, however, there are some good alternatives to Professors Abramowicz and Colby's ideas – renovations that build on the strengths of our courts; are simpler to implement; and which are more likely to reduce the shortcomings about which the professors rightly complain.

My first set of alternatives is cultural. The case of *Kennedy v. Louisiana* could become the new shorthand for the perils of moving outside of the record. Imagine a day when a skeptical judge might say: “Counsel, I don't want this to be a case like *Kennedy v. Louisiana*,” and the lawyer would instantly understand that she had made a claim that was not firmly grounded in the record. Likewise, I think that we all would be better served if the re-argument of cases were not such a rarity. If additional comment is

needed, or would serve a useful purpose, I would prefer returning to the parties and *amici* who filed appearances in the first instance.

A second suggestion is procedural. I would prefer a revision to the Federal Rules of Appellate Procedure that obliged parties to state early in the appeal process the rule of law that they would have the court announce. If it is useful to have appellants “designate the judgment, order, or part thereof being appealed” (see, Fed. R. App. P. 3 (c)(1)(b)) – surely a statement of the rule to be announced would be as beneficial.

A third suggestion is technological. As Internet-based social networking sites become more popular, we can envision what a service like “Twitter” could mean for sharing information about on-going litigation. Twitter is a free social networking service that permits users to send short messages to their own web page and to the profile pages of other users who have subscribed to receive such communications. Taking the suggestion that I make immediately above, imagine if the Circuit Courts of Appeal broadcast over the Internet the “Rule to Be Announced” sought by each party to an appeal. Lawyers across the globe could sort and review potential developments in the law from their desktops and potential *amici* could be alerted to important appeals before those proceedings were well underway. (*Cf.* Fed. R. App. P. 29 (e) (an “*amicus curiae* must file its brief, accompanied by a motion for filing when necessary, no later than 7 days after the principal brief of the party being supported is filed.”))

Some last alternatives are jurisdictional. Congress could move more matters arising under federal law to Article I tribunals. Large chunks of the system that Professors Abramowicz and Colby hope for in their article are alive and well here in Minnesota, under our version of the Administrative Procedures Act. Most of my work, for example, is developing recommended decisions for Commissioners of Departments or independent Boards. These decisions are, in a sense, draft findings and conclusions when I sign them; and as to which the parties have an opportunity to file exceptions with the final decision-maker after a review of my report. (Following a final decision by the agency head, appeals to the appellate courts can follow in the ordinary course.) Congress has substantial powers to select the forum and methods of dispute resolution for claims arising under federal law; and the system that has worked well in Minnesota for more than three decades could be a model to emulate.

Whatever the best methods for eliminating error and boosting confidence in our courts, there is one thing that we all should notice and comment upon: Professors Abramowicz and Colby’s article is important contribution and is a must read.

Eric L. Lipman is an Administrative Law Judge and the Secretary-Treasurer of the MSBA Section on Administrative Law.