

ONLINE RULEMAKING AND OTHER TOOLS FOR STRENGTHENING OUR CIVIL INFRASTRUCTURE

BARBARA H. BRANDON*
ROBERT D. CARLITZ**

TABLE OF CONTENTS

Introduction	1422
I. Rulemaking and the Internet.....	1423
A. An Overview	1426
B. Present Efforts at Electronic Docketing	1433
II. Suggested Improvements	1436
A. Best Practices.....	1436
B. Additional Advantages of Online Rulemaking.....	1442
C. OMB Improvements	1448
D. The Senate's E-Government Act of 2002.....	1450
E. Potential Criticisms of Online Rulemaking.....	1451
III. Other Measures to Increase Transparency	1455
A. Listservs and Other Tools.....	1455
B. Online Permitting	1459
IV. Online Dialogues	1462
A. The National Dialogue on Public Involvement in EPA Decisions	1462
B. Advanced Notices of Proposed Rulemaking and RuleNet	1465
C. Federal Advisory Committees and Public Meetings	1468
D. Deliberative Governance and Online Dialogues	1470
V. Legal and Implementation Issues.....	1471
A. Copyright.....	1472
B. The First Amendment.....	1474
C. Technology	1476
D. Implementation Issues	1477

* Barbara H. Brandon is a law librarian at the University of Miami Law School and a former policy analyst with Information Renaissance. She has a J.D. from the University of Pittsburgh School of Law and a L.L.M from the Harvard Law School. She would like to thank both Professor Craig N. Oren of the Rutgers School of Law-Camden and Thomas C. Beierle of Resources for the Future for their insightful and thought-provoking comments on earlier drafts of this Article.

** Robert D. Carlitz is the Executive Director of Information Renaissance.

1422	<i>ADMINISTRATIVE LAW REVIEW</i>	[54:4
Conclusion		1478

INTRODUCTION

The Internet could fundamentally change how the American public participates in federal policymaking, but changes must be made in our existing civic infrastructure. In particular, the federal government should build a transparent online environment that encourages public input. Such an effort should include two simple innovations: electronic docket rooms and online policy dialogues. These mechanisms would allow groups and individuals from across the nation to have a greater say in how Washington develops new policies and regulations.

This Article will concentrate on rulemaking, although many of the recommendations can be implemented in other contexts. While much of the rulemaking workload is esoteric, many issues, such as accounting standards or environmental regulations, will engage broad segments of the public. As an example, public interest was remarkably high in former President Clinton's initiative to foreclose development in roadless areas in national forests. During this proceeding, well over a million-and-a-half Americans submitted comments to the Forest Service.¹

The moment is certainly ripe for this project. The Bush Administration has outlined an ambitious E-Government Strategy that would deploy online electronic docket systems in all rulemaking agencies.² Members of Congress similarly find this objective worthy. This past June, the Senate unanimously passed the E-Government Act of 2002.³ Section 206 of this

1. See Special Areas; Roadless Area Conservation, 66 Fed. Reg. 3244 (Jan. 12, 2001) (to be codified at 36 C.F.R. pt. 324) (prohibiting road construction on National Forest System lands). The Forest Service performed an extensive outreach effort during this rulemaking. While it was preparing the draft environmental impact statement, the Service asked for public input; this drew 517,000 written responses, and 16,000 people attended 187 public meetings. After issuing the proposed rule and the draft environmental impact statement, the Service hosted two rounds of meetings for each national forest, and 23,000 people attended these sessions. During the comment period on the proposed rule, the Service received over one million form letters and postcards, 60,000 original letters, and 90,000 electronic mail messages. See *id.* at 3248. The dedicated Web site for this rulemaking is U.S. DEP'T OF AGRIC., ROADLESS AREA CONSERVATION, at <http://roadless.fs.fed.us> (last visited May 15, 2002). Implementation of this rule was subsequently stayed by the district court in *Kootenai Tribe v. Veneman*, No. CV01-10-N-EJL, 2001 WL 1141275 (D. Idaho May 10, 2001). This decision is on appeal to the Ninth Circuit.

2. See OFFICE OF MGMT. & BUDGET, E-GOVERNMENT STRATEGY, 1, 14, 27 (2002), available at <http://www.whitehouse.gov/omb/inforeg/egovstrategy.pdf> (last visited May 15, 2002).

3. See S. 803 and the bill summary and status report for the 107th Congress at the Library of Congress's Thomas Web site, available at <http://thomas.loc.gov/cgi->

bill would provide for the phased installation of electronic dockets in all rulemaking agencies.⁴

One observation should be made at the outset. The recommendations that are outlined here are not designed to implement an abstract vision of online democracy. Instead, the focus is instrumental with a simple goal of building a more transparent policymaking environment online. Parts I and II will explore the initial steps that the government has taken and suggest improvements to the first-generation docket systems. Part III will explore other online mechanisms to expand public participation. These sections will outline how thoughtful implementation of electronic rulemaking could capture public interest, particularly in higher profile rulemakings.

Part IV will describe how online dialogues can foster greater public participation in federal policymaking processes. As Resources for the Future (RFF) has noted, online discussions are an entirely new type of participation process, where communication can be “rich, respectful, and well informed.”⁵ The final part will discuss several implementation issues and problems.

I. RULEMAKING AND THE INTERNET

At the federal level, broad congressional policy directives are most often translated into law through the informal rulemaking process. This literally is the engine of the modern administrative state, and its scope is vast.⁶ Last spring’s Unified Agenda,⁷ which outlines the government’s rulemaking

bin/bdquery/z?d107:/sn00903:@@L&summ2=m& (last visited July 11, 2002); Liz Proteus, *E-Government: Bill To Establish E-gov Chief Moves To Senate Floor*, NAT’L TECH. DAILY, Mar. 21, 2002.

4. See S. 803, 107th Cong. § 206 (2001) (promoting and enhancing electronic Government services). Chairman Lieberman and Ranking Member Fred Thompson jointly sponsored this substitute to Chairman Lieberman’s earlier version of S. 803. Representative Turner, the Ranking Member on the Government Reform Committee’s Subcommittee on Government Management, Information, and Technology, has introduced H.R. 2458, 107th Cong. (2001) as a companion to Chairman Lieberman’s earlier version of S. 803.

5. Thomas C. Beierle, *Democracy On-Line: An Evaluation of the National Dialogue on Public Involvement in EPA Decisions*, RFF REPORT (2002), at http://www.rff.orgreports/PDF_files/democracyonline.pdf (last visited May 15, 2002); Tom Beierle, *Use E-Government to Broaden Civic Involvement*, FED. TIMES Feb. 18, 2002, available at <http://federaltimes.com/index.php?S=780193> (last visited Mar. 12, 2002).

6. See CORNELIUS KERWIN, *RULEMAKING: HOW GOVERNMENT AGENCIES WRITE LAW AND MAKE POLICY* 13-15 (2d ed. 1999) (discussing development rulemaking); JERRY L. MASHAW & DAVID L. HARFST, *THE STRUGGLE FOR AUTO SAFETY* 4-10 (1990) (noting superiority of rulemaking to adjudication as a regulatory technique).

7. President Carter created the Unified Agenda in Exec. Order No. 12,044, 3 C.F.R. 152 (1978). This order required agencies to publish a semiannual list of significant regulations under development.

activities, ran 1511, pages through three separate volumes of the *Federal Register*.⁸

Rulemaking is often a challenging task for both an agency and its stakeholders. Congress routinely delegates policy and technical issues to federal agencies for resolution, and some of these matters can be extraordinarily complex.⁹ While much technical expertise resides in federal agencies, no bureaucracy is “omniscient.”¹⁰ Therefore, agencies inevitably turn to regulated industry, public interest groups, academia, non-profit organizations, and the general public for assistance in gathering information and analyzing it appropriately.¹¹

The basics of informal rulemaking are simple.¹² The agency publishes a notice of proposed rulemaking in the *Federal Register* that contains both the text of a proposed rule and a discussion explaining the basis and purpose of the regulatory action under consideration.¹³ The notice asks the

8. 67 Fed. Reg. 32,819-34,320 (May 13, 2002). Not all of the government’s rulemaking activities are covered in the Unified Agenda. For instance, numerous rulemakings at the Environmental Protection Agency (EPA) are not covered, including such actions as approvals or promulgations of state implementation plans under section 110 of the Clean Air Act. See 42 U.S.C. § 7410 (1994).

At the close of the Clinton Administration, the Unified Agenda ran 2,851 pages through several volumes of the *Federal Register*. 65 Fed. Reg. 73,301–75,152 (Nov. 30, 2000). Counting pages in the *Federal Register* has sometimes been used as a surrogate for measuring rulemaking activity during different administrations. A graphical illustration can be found in Robert Pear, *The New Administration; The Regulations; As President Bush Settles In, Rules About to Be Published Might Now Perish*, N.Y. TIMES, Jan. 23, 2001, at A16.

9. See MASHAW & HARFST, *supra* note 6, at 4-10 (providing an overview of the modern era of regulation); Wendy E. Wagner, *The Science Charade in Toxic Risk Regulation*, 95 COLUM. L. REV. 1613, 1618 (1995) (discussing science-policy nature of toxic risk problems); Thomas O. McGarity, *Some Thoughts on “Deossifying” the Rulemaking Process*, 41 DUKE L.J. 1385, 1387 (1992) (discussing different measures for deossifying the rulemaking process).

10. See Steven Croley, *Making Rules: An Introduction*, 93 MICH. L. REV. 1511, 1519 (1995) (explaining how rulemaking is designed to facilitate information exchange between the agency and outside parties.).

11. See KERWIN, *supra* note 6, at 82-83, 144-55 (outlining public participation in the rulemaking process); Steven P. Croley, *Theories of Regulation: Incorporating the Administrative Process*, 98 COLUM. L. REV. 1, 120 (1998) (discussing political and social science aspects of rulemaking participation); Croley, *Making Rules*, *supra* note 10, 1518-21 (reviewing Kerwin’s views on participation in rulemaking). Agencies engage in similar types of information gathering activities during the policy development process. See *id.*

12. See Administrative Procedure Act, 5 U.S.C. § 553 (2000).

13. See JEFFREY S. LUBBERS, A GUIDE TO FEDERAL AGENCY RULEMAKING, 182-83 (1998) (explaining contents of notices of proposed rulemaking); see also *Weyerhaeuser Co. v. Costle*, 590 F.2d 1011, 1030-31 (D.C. Cir. 1978) (positing information supporting proposed rule should be disclosed at the time of issuance); *Portland Cement Ass’n v.*

public to submit comments on the proposal, normally within a sixty-day time period.¹⁴ This period may be extended for rules likely to attract broad attention.

In the final stage, the agency analyzes the submissions and promulgates a final rule that must address all material comments on the proposal.¹⁵ Since the rise of informal rulemaking in the 1970s,¹⁶ opponents and supporters of regulation have warred over the analytical procedures to be used in assessing the costs and burdens of a particular rule.¹⁷ Additional

Ruckelshaus, 486 F.2d 375, 393-94 (D.C. Cir. 1973), *cert. denied*, 417 U.S. 921 (1974) (proposing hard look analysis).

14. *But see* Standards for Privacy of Individually Identifiable Health Information, 67 Fed. Reg. 14,775 (Mar. 27, 2002) (to be codified at 45 C.F.R. pts. 160 & 164) (specifying a thirty-day comment period for a major rulemaking); Robert Pear, *Bush Acts to Drop Core Privacy Rule on Medical Data*, N.Y. TIMES, Mar. 22, 2002, at A1. *See also* LUBBERS, *supra* note 13, at 182-83. Agencies may also opt for a thirty-day period for minor rules or for taking comment after promulgating an interim final rule. In contrast, major proposals may often have comment periods that run longer than sixty-days. *See id.*

15. *See* Portland Cement Ass'n, 486 F.2d at 394 ("Manufacturers' comments must be significant enough to step over a threshold requirement of materiality before any lack of agency response or consideration becomes of concern.").

16. *See* Jerry L. Mashaw, *Improving the Environment of Agency Rulemaking: An Essay on Management, Games and Accountability*, 57 LAW & CONTEMP. PROBS. 185, 186-87 (1994); *see generally* McGarity, *supra* note 9.

17. *Compare* ROBERT W. HAHN, RISKS, COSTS, AND LIVES SAVED: GETTING BETTER RESULTS FROM REGULATION (1996) (advocating the use of the cost-benefit analysis) *with* THOMAS O. MCGARITY, REINVENTING RATIONALITY: THE ROLE OF REGULATORY ANALYSIS IN THE FEDERAL BUREAUCRACY (1991) (pointing out cost-benefit analysis' limitations). Much of the debate has centered on cost-benefit analysis and whether or not it should be utilized to assess the overall costs imposed by a particular regulation. Both the Reagan and Clinton Administrations made the Office of Management and Budget (OMB) the gatekeeper for executive agency rulemaking, and both issued Executive Orders on rulemaking that imposed additional analytical requirements on executive branch agencies.

Several legal scholars have also focused attention on the appropriate standard of review. They have suggested that the "hard look" test developed by the D.C. Circuit and adopted by the Supreme Court in *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Auto Insurance Co.* has been partially responsible for ossification in the rulemaking process. *See* 463 U.S. 29, 43-44 (1983); Richard J. Pierce, Jr., *The Role of the Judiciary in Implementing an Agency Theory of Government*, 64 N.Y.U. L. REV. 1239, 1263-64 (1989) (discussing how lower courts have misapplied the reasoned decisionmaking test); McGarity, *supra* note 9, 1410-26 (discussing substantive review requirements); Peter L. Strauss, *One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093, 1129-35 (1987) (exploring how the hard look doctrine may lead to judicial activism); Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 382-85, 388-91, 393-98 (1986) (stating judges do not have the expertise to properly administer the hard look doctrine but they should take a more aggressive approach in reviewing questions of law); *see also* Merrick P. Garland, *Deregulation and Judicial Review*, 98 HARV. L. REV. 505,

requirements have been imposed, but the notice and comment feature described above remains the key mechanism for public participation.

Two other elements are also noteworthy. At present, many rulemaking agencies only maintain paper docket rooms at their Washington headquarters, which deprives Americans outside the Beltway of access.¹⁸ Second, many of the key analytical materials that support a particular proposal are only available in these Washington docket rooms. Thus, the public cannot view important economic analyses that describe the costs and the benefits of particular regulatory alternatives.¹⁹

A. An Overview

To date, most federal agencies have taken rudimentary steps to utilize the Internet during rulemaking. All proposed and final rules are published simultaneously in the print and online versions of the *Federal Register*.²⁰ Sometimes agencies will post additional materials on their Web sites that amplify and explain policy details in the proposed and final rules.²¹ In addition, many agencies invite the public to submit comments via e-mail,²²

510-13, 525-38, 541-46 (1985) (contending that hard look review has substantive and procedural components that properly cabin agency activities inside their authorizing statutes).

18. Agencies will mail materials upon request, but it is hard to know what to request absent continuing physical access to the paper docket room.

19. See U.S. GEN. ACCOUNTING OFFICE, REP. NO. GGD-00-135R, FEDERAL RULEMAKING: AGENCIES' USE OF INFORMATION TECHNOLOGY TO FACILITATE PUBLIC PARTICIPATION 9 (2000) [hereinafter GAO RULEMAKING REPORT] (recommending online access to regulatory supporting materials). This report is available in a PDF file on the GAO Web site. See also Robert W. Hahn, *How Changes in the Federal Register Can Help Improve Regulatory Accountability*, 52 ADMIN. L. REV. 927, 940-48 (2000) (providing views on reform).

20. See GPO ACCESS, at http://www.access.gpo.gov/su_docs/index.html (last visited May 15, 2002); see also THE NAT'L ARCHIVES AND RECORDS ADMIN. (NARA) WEB SITE, at <http://www.nara.gov/fedreg/> (last visited May 15, 2002).

21. See *infra* notes 64-65, 68-71, and accompanying text (discussing dedicated Web pages). Partially in response to congressional measures such as the Electronic Freedom of Information Act, the Clinger-Cohen Act, and the Government Paperwork Elimination Act, many federal agencies now use the World Wide Web as a mechanism for distributing and presenting information about their policies and rules. See Pub. L. No. 104-231, 110 Stat. 3048 (1998) (amending the Electronic Freedom of Information Act, 5 U.S.C. § 552 (2000)), the Information Management Technology Reform Act of 1996, 104 Pub. L. No. 104-106, 110 Stat. 186 (1996), and the Government Paperwork Elimination Act, Pub. L. No. 105-277, 112 Stat. 2681 (1998); see also AM. BAR ASS'N (ABA), REPORT WITH RECOMMENDATIONS TO THE HOUSE OF DELEGATES FROM THE SECTION OF ADMINISTRATIVE LAW AND REGULATORY PRACTICE, GOVERNMENT, AND PUBLIC SECTOR LAWYER'S DIVISION (2001) (on file with Barbara H. Brandon) (outlining the degree of quality and usefulness of various

fax,²³ or Web page²⁴ during a fixed time period.²⁵ But these are circumscribed efforts that fail to capitalize fully on the Web's capacity for interactive discussion.

federal Web sites). Recommendation 107A on Best Practices for Federal Agency Web Pages was approved at the ABA Annual Meeting in August 2001. *See id.*

Many agencies do have Web pages that list rules open for comment. *See, e.g.,* U.S. DEP'T OF ENERGY OFFICE OF BUILDING AND STANDARDS WEB SITE, at http://www.eren.doe.gov/buildings/codes_standards/rules/index.htm (last visited May 28, 2002); U.S. Dep't of Health & Human Services, Centers for Medicare & Medicaid Services Web site, at <http://www.hcfa.gov/regs/regsnotices.htm> (last visited May 15, 2002); ATF Online, at <http://www.atf.treas.gov/regulations/index.htm#> (last visited May 15, 2002). NARA maintains a Web page that lists all proposed rules currently open for comment at http://www.archives.gov/federal_register/public_participation/fr_e_docket.html (last visited Sept. 11, 2002).

Federal agencies should also work harder to make their Web sites more accessible to a broader cross-section of Americans. Professor Stowers refers to this as the "Other Digital Divide." As she notes the "[d]esigners and developers of public-sector websites must assume that those using their sites have limited training and experience and will need sites designed with usability and effective information architecture in mind." Genie N. L. Stowers, *The State of Federal Websites: The Pursuit of Excellence*, available at <http://www.endowment.pwcglobal.com/pdfs/StowersReport0802.pdf> (last visited Sept. 12, 2002). Stowers advocates that federal Web designers should ignore the glitz of the dot.com world and instead build sites that provide content and services in a straightforward manner. *Id.* at 32-33.

Assessments of federal and state governmental Web sites vary. Darrell M. West of the Center for Public Policy at Brown University ranks the federal sites differently than Professor Stowers. *See* DARRELL M. WEST, CTR. FOR PUBLIC POLICY, BROWN UNIV., STATE AND FEDERAL E-GOVERNMENT IN THE UNITED STATES, 2002, available at <http://www.INSIDEPOLITICS.ORG/EGOV02US.PDF> (last visited Sept. 17, 2002). This report advocates the greater use of interactive technology by governmental agencies. The report also cautions against the growing trends towards restricted areas on Web sites and premium service charges. *Id.* at 19.

22. *See e.g.,* U.S. SECURITIES & EXCH. COMM'N (SEC) WEB SITE, at <http://www.sec.gov/rules/submitcomments.htm> (setting up an e-mail submittal system) (last visited May 15, 2002); *see also* FED. DEPOSIT INS. CORP. (FDIC): ELECTRONIC PUBLIC COMMENTS, at <http://www2.fdic.gov/epc/Faircredit/Index.asp> (adopting a scheme whereby the commentator may submit an e-mail comment on each individual section of a proposed regulation) (last visited May 15, 2002). NARA maintains a list of agencies that take comments via e-mail at http://www.archives.gov/federal_register/public_participation/rulemaking_sites.html (last visited Sept. 11, 2002). Practices on accepting e-mail submissions can also vary widely, even within agencies. *See* GAO RULEMAKING REPORT, *supra* note 19, at 8-9 (comparing various agencies).

23. *See* GAO RULEMAKING REPORT, *supra* note 19, at 8-9. The GAO Rulemaking Report summarizes the fax submittal practices at five major rulemaking agencies. HHS and the American Civil Liberties Union (ACLU) had a vociferous dispute about the propriety of submitting comments by fax during the Clinton Administration's medical privacy rulemaking. *See* Ben White, *A Fight Over the Fax*, WASH. POST, Feb. 10, 2000, at A21. Rather than submit comments electronically, the ACLU Web site encouraged individuals to

Three reforms, two of them Web-based, could change participatory dynamics in rulemaking. First, federal rulemaking agencies should install electronic docket rooms. These are online equivalents to existing paper docket rooms that serve as mechanisms for viewing both the electronic and print commentary on a proposed rule.²⁶ This makes the process far more transparent by allowing participants to view all the commentary on a proposal as it is submitted.

As currently conducted, only Washington-based groups are able to monitor the comment submission process by visiting the paper docket rooms.²⁷ This precludes stakeholders from engaging in a dialogue either

submit personalized faxes to HHS. HHS refused to accept 2400 faxes because its machines jammed. The Department further responded that it had created a Web site for the submission of comments and that mechanism, as well as the submission of three copies by mail, were the exclusive methods for commenting on the rule. *See id.*

24. *See* NPRM: Standards for Privacy of Individually Identifiable Health Information at http://erm.hhs.gov/hipaa/erm_rule.rule?user_Id=&rule_Id=228 (displaying the section by section architecture of a Web-based format for the Clinton Administration's rulemaking on medical privacy) (last visited Mar. 11, 2002). HHS has experimented the most with web page submittal systems; the software interface for this "front-end" submittal system has parties submit comments on each section that is of concern. *See id.*

25. *See* GAO RULEMAKING REPORT, *supra* note 19, at 8 (showing the percentage of rules that expressly permitted the filing of electronic or facsimile comments at five major rulemaking agencies, USDA, HHS, DOL, DOT, and EPA).

26. *See generally* HENRY H. PERRITT, JR., REPORT TO THE ADMIN. CONFERENCE OF THE U.S., ELECTRONIC DOCKETS: USE OF INFORMATION TECHNOLOGY IN RULEMAKING, §§ III-IV (1995), available at http://www.kentlaw.edu/classes/rstaudt/internetlaw/casebook/electronic_dockets.htm. [hereinafter PERRITT ELECTRONIC DOCKETS] (last visited May 15, 2002). This should include all the submittals on a particular proposal whether sent by mail or electronically. Agencies should use scanners to convert paper submissions into electronic files that can be stored as a file on an Internet server.

In addition, the docket should operate as a repository for the background materials that the agency used in developing a proposal. Agencies should post educational materials in the docket room and use this as a mechanism to explain both the regulatory background and the technocratic complexities to lay audiences. *See infra* notes 64-65, 68-71 and accompanying text. These electronic docket rooms should be distinguished from systems that merely allow the public to submit comments via e-mail. *See supra* note 22 and accompanying text. Observers sometimes conflate the two concepts, as NARA does on its e-Rulemaking Web page at http://www.nara.gov/fedreg/rulemaking_sites.html (last visited May 15, 2002).

Finally, it should be noted that the APA does not expressly define the contents of an informal rulemaking docket. *See* PERRITT ELECTRONIC DOCKETS, at n.59. Section 307(d) of the Clean Air Act is an exception; here Congress provided a detailed set of statutory instructions for rulemaking dockets under the Act, 42 U.S.C. § 7607(d) (1994).

27. *See* William Pedersen, *Formal Records and Informal Rulemaking*, 85 YALE L.J. 38, 51-74 (1975) (providing a history of the development of the present paper docket regime at EPA).

with the agency or other parties to the proceeding. As a result, no interchanges can develop between for the substance.²⁸

In contrast, an electronic docket room could allow an interactive discussion to develop. Commentators can raise questions about the regulatory policies that undergird a particular proposal, and this enables the agency to explain why it is charting a particular course.²⁹ But the more significant feature of an electronic docket room is its potential to promote an informed dialogue.³⁰ Now an interested member of the public will not have to visit Washington to learn what positions other parties are advocating. She can review these materials online upon their submission and exchange views with others. As a result, more nuanced comments may be developed, and overall the quality of submissions could improve.³¹

A procedural modification would further stimulate such exchanges. Agencies could routinely institute a two-stage comment submission process

28. See J. CLARENCE DAVIES & JAN MAZUREK, *POLLUTION CONTROL IN THE UNITED STATES: EVALUATING THE SYSTEM* 155-56 (1998) (discussing notice and comment rulemaking).

29. Agencies may be reluctant to answer queries, but this could be used as an opportunity to clarify matters in a proposal.

30. Three legal scholars have concluded that the APA does not pose a bar to electronic rulemaking. See LUBBERS, *supra* note 13, at 151-53 (1998); PERRITT ELECTRONIC DOCKETS, *supra* note 26, at § VIII (discussing legal issues and conclusions); Henry H. Perritt, Jr., *Notes on Electronic Government*, available at <http://globe.lmi.org/erm/docs/perritt.htm> (last visited Mar. 7, 2002.) [hereinafter *OMB Report*]; Stephen M. Johnson, *The Internet Changes Everything: Revolutionizing Public Participation And Access To Government Information Through The Internet*, 50 ADMIN. L. REV. 277, 316-318 (1998). As Dean Perritt observed:

There is little reason to be concerned that running . . . a rulemaking proceeding electronically would violate the basic requirements of the Administrative Procedure Act. With respect to rulemaking, the notice and comment provisions of 5 U.S.C. § 553 are flexible, and if electronic notices and opportunities to comment electronically are organized so as to enhance the opportunity for broader segments of the public to know about agency rulemaking proposals and to submit their views, the purpose of § 553 will be advanced by automation.

PERRITT ELECTRONIC DOCKETS, *supra* note 26; see also Henry H. Perritt, Jr., *The Electronic Agency and The Traditional Paradigms of Administrative Law*, 44 ADMIN. L. REV. 79 (1992) [hereinafter *Electronic Agency*].

31. The Administration for Children and Families in HHS has observed this in certain rulemakings. State governments concerned with welfare rules are the primary participant base, and during some comment periods, states have sometimes built on each other's suggestions. See Notes of Telephone Interview with Margarete Silverstone, Administration for Children and Families (Sept. 16, 1999) (on file with Barbara H. Brandon); see also Walton Francis, *Electronic Rulemaking: Outline of Opportunities and Issues*, available at <http://globe.lmi.org/erm/docs/erm525.htm> (suggesting proposed rulemaking preambles promote these exchanges by encouraging early comment submissions) (last visited Mar. 7, 2002).

to foster a better dialogue between the parties. If rebuttal periods are customarily authorized, the participants can comment on all the submissions made by other parties.³² This assures that one side will not gain a tactical advantage by submitting its views on the final day, which is currently a common practice.³³ As the former Research Director for the Administrative Conference of the United States observes, “[p]ublic comments are much more likely to be focused and useful if the commenters have access to the comments of others. More ample comments benefit the agency, the public, and ultimately, the reviewing courts.”³⁴

32. Neither the APA nor the caselaw presently require agencies to entertain rebuttal submissions. The FCC does so as a matter of practice. *See* FCC Rules of Practice, 47 C.F.R. § 1.145 (specifying pleadings and filing periods). The Library of Congress used a rebuttal comment feature in its “fair use” rulemaking under the Digital Millennium Copyright Act. The Library asked commenters to respond to the points made by submitters in the opening round of comments and also during public hearings that were scheduled after the initial round of commenting. *See* Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 65 Fed. Reg. 64,556, 64,557 (2000) (to be codified at 37 C.F.R. pt. 201).

33. The increased transparency provided by electronic dockets may make comment submittal deadlines less “final.” Examination of the DOT docket on Tire Pressure Monitoring System (TPMS) shows that comments continued to come into NHTSA until the proposal was forwarded to OMB. *See* DEP’T OF TRANSP., DOCKETING MANAGEMENT SYSTEM, DOCUMENT NHTSA-2000-8572, available at http://dms.dot.gov/search/hitlist.asp?dkt_docketId=8572 (last visited Mar. 16, 2002) [hereinafter TPMS DOCKET]. Parties examining this docket may have decided to file additional comments based on the *ex parte* submittals of others. This transparency allows opposing parties to rebut new arguments even after the comment period has ended. *See infra* text accompanying footnotes 84-85, 88-91.

Adoption of rebuttal comment periods does pose one problem. Statutory or court-ordered schedules often govern the proposal and promulgation of rules. In these circumstances, an agency may not have the time to incorporate a rebuttal comment period into a rulemaking. However, courts and plaintiffs who have brought mandatory suits may recognize that filing deadlines have become less “final” where an agency has an electronic docket room. This could lead to modifications in promulgation schedules to accommodate rebuttal periods formally.

34. *See* LUBBERS, *supra* note 13, at 214. The heightened transparency in electronic docket rooms should also diminish the likelihood that a reviewing court would overturn a rule because the agency failed to provide the public with adequate notice that a particular issue was under consideration. At present, the federal courts are split as to whether or not issues raised in the comments but not in the proposed rule provide adequate notice to other members of the public. *See id.* at 186-92; *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 547 (D.C. Cir. 1983) (explaining that a final rule must be a logical outgrowth of the proposal).

Electronic dockets may also make it easier to launch a second cycle of notice and comment under circumstances where the final rule materially differs from the proposal. A multitude of factors, such as new scientific studies or intervening court decisions, can impel an agency to ask for a second round of comments during a rulemaking. EPA has sometimes

The second Web-based reform would incorporate online discussions into those policy discussions and rulemakings that interest wider audiences. These would be moderated, asynchronous discussions mounted on a public Web site.³⁵ Participants would read and respond to messages that are organized into “threads” covering a particular topic. The format allows these series of linked messages to develop into an online conversation.³⁶

Information Renaissance conducted such a discussion when the Federal Communications Commission (FCC) proposed its Universal Service rule under the landmark 1996 Telecommunications Act.³⁷ Here, the FCC laid

struck a middle ground when faced with this dilemma. It has posted a draft final rule both in its paper docket and on its Web page and asked for public comment. As Professor Oren has noted, this practice prompted EPA to revise its draft final operating permit rule because of the comments that it received. *Compare* Notice of Availability of Draft Rules and Accompanying Information, 62 Fed. Reg. 30,289 (June 3, 1997), with Operating Permits Program, Notice to Defer Comments on Draft Part 70 Revisions, 62 Fed. Reg. 36,039 (July 3, 1997). See LUBBERS, *supra* note 13, at 193-94. This said, the logical outgrowth rule would still serve a function in an era of electronic docketing; an agency’s stakeholders should not have to monitor tangential rulemakings to assure themselves that they will not be impacted by an abrupt change of policy.

Another observation should be made here. A rebuttal feature solves several “sociological” problems. First, sixty-day comment periods do not leave submitters much time to prepare and coordinate the submission of detailed comments. See ELIZABETH D. MULLEN, *THE ART OF COMMENTING: HOW TO INFLUENCE ENVIRONMENTAL DECISION-MAKING WITH EFFECTIVE COMMENTS*, 6-7, 15-20, 26-35 (2000); see *infra* notes 144-45. This coupled with the human tendency to procrastinate makes late filings the norm. Finally, a rebuttal period negates the incentive to game the system by waiting until the last moment to file.

35. In an asynchronous format, participation is not restricted to any particular time of day; this flexibility easily accommodates different time zones and busy schedules in contrast to a chat room. This Article uses the terms online dialogues, asynchronous discussions, or online discussions as interchangeable terms of art.

36. An asynchronous format is fundamentally different from a synchronous setting. As Coleman & Gotze observe:

[T]he gaps between utterance, reception and response are fundamentally different from those in face-to-face or other synchronous settings. In online discussion listening (and lurking) can be just as important a function as speaking (message-posting) or the best deliberative results are often achieved when messages are stored and archived and responded to after readers have had time to contemplate them.

STEPHEN COLEMAN & JOHN GOTZE, *BOWLING TOGETHER: ONLINE PUBLIC ENGAGEMENT IN POLICY DELIBERATION* 17, available at <http://bowlingtogether.net/intro.html> (last visited May 15, 2002).

37. This was not the first effort in this area. The Office of Management and Budget (OMB) used electronic methods to provide notice and comment on a revision to its information collection and dissemination guidelines in 1992. See Henry H. Perritt Jr., *Symposium: Electronic Records Management and Archives*, 53 U. PITT. L. REV. 963, 972 (1992). The Nuclear Regulatory Commission (NRC) launched its RuleNet experiment in late 1996. See *infra* Part IV B.

out a plan to adopt a cross-subsidy, the E-rate, to finance Internet connections for the nation's schools and libraries. Based on its experience in school networking efforts, Information Renaissance thought it vital that educators and librarians offer their comments to the FCC, share their views with one another and most importantly learn about the proposal. To this end, Information Renaissance built an electronic docket room and conducted an online seminar during the rulemaking.³⁸

The discussion was moderated to deal with the rare occasion where an overly-heated exchange developed and summarized weekly so those new participants could easily catch up and join in. During this effort, Information Renaissance brought together more than 500 individuals from all fifty states and Puerto Rico.

The seminar participants learned about the policymaking process by viewing and discussing the regulatory materials. Almost invariably, the text of a proposed rule is encumbered by dense layers of statutory and regulatory language that the lay reader must struggle to master. This "enshrouding" in "technocratic complexities" often makes a rule "inaccessible to public control."³⁹ An open-ended forum like this online seminar allows those interested in the regulatory issues to peel away these layers and gain a greater understanding of the policy problems.⁴⁰

This effort brought together experienced teachers and librarians, whose voices had not previously been heard; they explained how they currently used information technology and offered their thoughts on how this new program should operate. This group had several thousand person-years of experience in the application of networking technologies, which the FCC staff found most useful in crafting the final rule.⁴¹

38. See INFO. RENAISSANCE, WELCOME TO THE ONLINE SEMINAR: UNIVERSAL SERVICE/NETWORK DEMOCRACY, at <http://www.info-ren.org/universal-service> (last visited May 15, 2002). The seminar ran from August 26, 1996 through September 27, 1996. This was after the formal public comment period had expired, but the FCC entertained the comments because the docket was still open. See also GAO RULEMAKING REPORT, *supra* note 19, at 11 (discussing FCC's moderated, online policy dialogues).

39. Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. CHI. L. REV. 1, 8 (1995). Efforts like President Clinton's Plain English Initiative may also help. See Presidential Memorandum on Plain Language in Government Writing, 63 Fed. Reg. 31,883 (June 10, 1998); see also Plain Language Initiative, available at <http://www.plainlanguage.gov/cites/memo.htm> (last visited May 15, 2002).

40. Of course this approach will not work well on every issue. Some regulatory matters are just too complex. For instance, a topic like new source review under the Clean Air Act can be a difficult topic for lawyers to master.

41. See Conversations between the FCC staff and Robert D. Carlitz, Executive Director of Information Renaissance during the fall of 1996 (on file with author). Patricia Figliola Lewis has studied this rulemaking closely. She points out that the FCC proposed an expansive interpretation of what the E-rate subsidy should cover and that the policy

One other aspect of the seminar is noteworthy. While the national school and library groups participated effectively during this process, only two of the nation's 16,000 school districts weighed in during the official comment period. Applying for funds under this program was a new and difficult task for schools and libraries, and this discussion served as an effective outreach tool for disseminating information about the FCC's plans for the E-rate.⁴²

B. Present Efforts at Electronic Docketing

At least eleven permanent electronic docket rooms have been constructed in scattered corners of the federal bureaucracy.⁴³ Two

environment was favorable to the adoption of this approach. *See* Political Influence on the Federal Communications Commission Rulemaking on Universal Service for Schools and Libraries, 192-93 (1999) (unpublished Ph.D. dissertation, University of Florida) (on file with Barbara H. Brandon). Lewis found an atypical pattern of participation in this rulemaking where comments filed by the organized school and library groups and the telecommunications public interest groups outnumbered those submitted by traditional business interests by three-to-one. *Id.* at 33-34. Lewis concluded that although industry normally has the upper hand in mobilizing input during a rulemaking, "that the public interest community, if it has the dedicated assistance of a few key champions in high places, can overcome that tendency." *Id.* at 213. As she notes, the proposed rule reflected Chairman Reed Hundt's commitment to issuing a comprehensive rule and that he had the strong backing of President Clinton and Senators Snowe, Rockefeller, Exon, and Kerrey, key Senators who had sponsored the authorizing provision in the Senate. *See also* Reed E. Hundt, *You Say You Want a Revolution: a Story of Information Age Politics* (2000).

42. Dedicated Web pages can serve as effective outreach tools during a rulemaking and as educational efforts once a rule is promulgated. *See infra* notes 64-65, 68-71 and accompanying text (discussing dedicated Web pages).

43. This may not be an exact tally of present efforts and features in more limited systems may be changing for the better. For instance, EPA installed an electronic docket system this past summer, *available at* http://cascade.epa.gov/RightSite/dk_public_home.htm (last visited July 11, 2002). In addition, agencies may create an electronic docket for a single rulemaking. The National Telecommunications and Information Administration in the Department of Commerce set up an electronic docket room for its rulemaking on the Internet Domain Name transition, *at* <http://www.ntia.doc.gov/ntiahome/domainname/domainname130> (last visited Mar. 7, 2002). The agency has not established this as a permanent feature but this may be because it does little rulemaking. In a rulemaking on the Federal Advisory Committee Act Management process, the General Services Administration (GSA) created a limited electronic docket room. *See* 65 Fed. Reg. 2504 (Jan. 14, 2000). The site's address was <http://policyworks.gov/org/main/mc/rulecom.htm>. The extent of the Federal Trade Commission's electronic docketing efforts is not clear. However, electronic comments are posted online for certain matters. *See* The Proposed Modification To Its Children's Online Privacy Protection Rule, 64 Fed. Reg. 59,887 (1999) (to be codified at 16 C.F.R. pt 312), *available at* <http://www.ftc.gov/privacy/coppa2/comments/index.html> (last visited Mar. 7, 2002). The Department of Justice has created an online docket for the September 11 Victim Compensation Fund, *at* <http://www.usdoj.gov>

independent agencies, the FCC⁴⁴ and the Nuclear Regulatory Commission (NRC),⁴⁵ have installed good first generation efforts. The Department of Transportation (DOT) has the most extensive system, providing an electronic image-based database for every agency rulemaking and adjudicatory matter.⁴⁶ Similarly, the Food and Drug Administration (FDA) has built fully electronic docket rooms both for its rulemaking proceedings and its advisory committees.⁴⁷ Six other agencies: the Environmental Protection Agency (EPA),⁴⁸ the Federal Energy Regulatory Commission (FERC),⁴⁹ the Occupational Safety and Health Administration (OSHA),⁵⁰ the National Institute for Occupational Safety and Health,⁵¹ the Social Security Administration⁵² and the United States Patent and Trademark Office have installed electronic rulemaking systems as well.⁵³

Elsewhere the record is much more mixed. The Department of Agriculture (USDA) has taken some steps in this direction. Its Animal and Plant Health Inspection Service (APHIS), an early pioneer, has now

/victimcompensation/civil_03.html (last visited Mar. 11, 2002). This site illustrates the impenetrability of a docket page that lacks an author or organizational index page and that limits users to a search engine. See text accompanying *infra* notes 74-77.

44. See <http://www.fcc.gov/e-file/ecfs.html> (last visited Mar. 4, 2002) (docket entry point).

45. See <http://ruleforum.llnl.gov/> (last visited Mar. 4, 2002) (docket entry point).

46. See <http://dms.dot.gov/> (last visited Apr. 14, 2002). Last April, this site's initial interface was upgraded. An improved search engine allows users to locate the correct docket without a docket number. Two individual agencies inside DOT, the Federal Aviation Administration (FAA) and the Office of Hazardous Materials Safety, have Web pages listing rules open for comment. The FAA does this from its Office of Rulemaking site at <http://www.faa.gov/avr/arm/proc.cfm> (last visited Mar. 4, 2002); the Office of Hazardous Materials Safety also does the same, at <http://hazmat.dot.gov/rulemake.htm#nprm> (last visited Mar. 4, 2002). See also Revised Filing Procedures for the OST Docket, 61 Fed. 29,282 (1996) (to be codified at 14 C.F.R. pt 302); Filing Procedures for the DOT Docket; Electronic Submission, Notice Requesting Comment, 63 Fed. Reg. 28,545 (1998); Docket Management System (DMS), Notice Requesting Comments, 65 Fed. Reg. 65,976 (2000).

47. See <http://www.fda.gov/ohrms/dockets/default.htm> (last visited Mar. 11, 2002) (docket entry point stating that the site serves as the official repository for the administrative proceedings and rule making documents of the FDA).

48. See http://cascade.epa.gov/RightSite/dk_public_home.htm (last visited July 11, 2002). This effort is not yet fully implemented.

49. See <http://www.ferc.gov/documents/documents.htm> (last visited Sept. 11, 2002)

50. See <http://dockets.osha.gov/> (last visited Sept. 11, 2002).

51. See <http://www.cdc.gov/niosh/ocas/ocasdoc.html> (last visited Mar. 11, 2002) (explaining contents of a public docket).

52. See <http://policy.ssa.gov/pnpublic.nsf/LawsRegs> (last visited Mar. 11, 2002) (exhibiting how to navigate the rulemaking databases of the SSA).

53. See <http://www.uspto.gov/web/offices/pac/dapp/opla/comments/index.html> (last visited Mar. 11, 2002) (docket entry point).

installed a fully electronic system.⁵⁴ USDA also built electronic docket systems for two of its high priority rulemakings on marketing standards for organic food and roadless areas in the National Forests.⁵⁵ In addition, the Securities and Exchange Commission (SEC)⁵⁶ and the Administration for Children and Families in HHS⁵⁷ have built partial electronic docket systems. Unfortunately, neither agency scans print submissions onto the Web, thereby depriving the public of access to all the commentary.⁵⁸

54. See <http://www.aphis.usda.gov/ppd/rad/> (last visited Mar. 4, 2002) (explaining the rulemaking process).

55. See *infra* notes 99-102 and accompanying text (discussing the organic marketing rule); see also *supra* note 1 (discussing the roadless rule). The electronic docket systems for these two rulemakings were flawed; the public could submit comments electronically, but only access the commentary via a search engine. The Agricultural Marketing Service at USDA has also installed a site, but it is unclear how comprehensive it is. See <http://www.ams.usda.gov/fv/fvrulemaking.htm> (last visited Mar. 11, 2002). Moreover, the text of the opening page is troubling because it suggests that the Service is treating the comment process as a "referenda."

In comparing the efforts of USDA and DOT in this area, high-level institutional support should be seen as a key factor. Secretary Pena was critical to DOT's success in building a Department-wide system. See Neil Eisner & Charlotte Boeck Comments at The Symposium on Citizen Participation and Electronic Rulemaking sponsored by the National Science Foundation's Digital Government Program (May 30, 2001). Other federal officials have told the GAO that "the commitment and support of top-level leaders is critical to the successful development and implementation of IT-based systems to improve regulatory management." U.S. General Accounting Office, REGULATORY MANAGEMENT: COMMUNICATION ABOUT TECHNOLOGY-BASED INNOVATIONS CAN BE IMPROVED, 25 Report No. GAO-01-232 (2001) [hereinafter GAO Regulatory Management Report].

56. See <http://www.sec.gov/rules/submitcomments.htm> (last visited Mar. 4, 2002) (explaining how to submit comments).

57. See <http://www.acf.dhhs.gov/hypernews/> (last visited Mar. 6, 2002). This has primarily been due to financial constraints. See Telephone Interview with Margarete Silverstone. HHS also created a strange variant, an electronic docket that was only visible *after* the comment period closed. See Standards for Privacy of Individually Identifiable Health Information, 64 Fed. Reg. 59,918 (1999) (to be codified at 54 C.F.R. pts. 160 & 164) (proposed Nov. 3, 1999). The comments are now available at http://erm.hhs.gov/hipaa/erm_rule.rule?user_Id=&rule_Id=228 (last visited Mar. 11, 2002). See also *supra* note 23 (discussing the ACLU fax submittal controversy).

58. This failure to create a single docket online greatly limits the utility of an electronic docket to the agency. Having all the comments online allows an agency to categorize the submissions easily; this should significantly minimize the agency's burden in preparing the comment response document, a key part of the final rulemaking. Second, agencies can develop templates to sort out both print and electronic form letters. See text accompanying *infra* notes 128-131.

II. SUGGESTED IMPROVEMENTS

A. *Best Practices*

Certain “best practices” should be implemented.⁵⁹ The design of most existing docket rooms makes them useful only to the cognoscenti.⁶⁰ The EPA has developed a far more citizen-friendly interface for its EDOCKET

59. Prompt posting of comments is critical. Here DOT is the model. The Department promptly scans print submissions into the docket system within a twenty-four hour period. This contrasts favorably with GSA’s electronic docket for its Federal Advisory Committee Act Management rulemaking in early 2000; GSA was very slow in posting comments to its dedicated docket page. Comments submitted electronically by Information Renaissance were promptly acknowledged, but were not posted until after the comment period had closed. See 65 Fed. Reg. 2504 (Jan. 14, 2000). The site’s address was <http://policyworks.gov/org/main/mc/rulecom.htm>.

Certain procedural features should be commonly adopted. A prompt confirmation receipt should be sent listing the proceeding, author, date, and file format and file size. For instance, this is the FCC’s practice at <http://www.fcc.gov/e-file/ecfsfaq.html> (last visited Mar. 7, 2002). Authentication concerns should be minimal. Commenters can easily be advised to check online to determine if authentic materials have been accurately posted in the docket. In the long term, these concerns may also be addressed by wider adoption of electronic signature and public key encryption systems.

60. The GAO found that the FAA’s docket system to be the most straightforward in providing the public with an easy way to comment. See GAO RULEMAKING REPORT, *supra* note 19, at 9; FAA Web site, at <http://www.faa.gov/avr/arm/proc.cfm> (last visited Mar. 15, 2002). The public can “read a copy of the proposed rule in Microsoft Word, click on a link for DOT’s docket management system, and then access that system’s electronic commenting process.” GAO RULEMAKING REPORT *supra* note 19, 9 n.7. Dedicated rulemaking Web sites, like USDA’s organic marketing proposal and HHS’ medical privacy rulemaking, provided separate links to both the proposed rule and the electronic comment procedure. See *id.*

The HHS Web page submittal system used for the Clinton Administration’s medical privacy rulemaking allowed the commentator to post comments directly under the section of interest. See discussion in *supra* note 24. This is a useful mechanism. However, the site had two major flaws. It was not easy to access from the Department’s home page. See Patrice McDermott, *Online but Off-Target*, FED. COMPUTER WEEK, Mar. 13, 2000 (criticizing the accessibility of the medical privacy rule), at <http://www.civic.com/fcw/articles/2000/0313/fcw-pol-mcdmmt-03-13-00.asp>. Secondly, HHS only made the commentary accessible after the final rule was promulgated.

When the Bush Administration proposed changes to the Clinton Administration rules, it did have a link on its Home page to the proposed revisions to the medical privacy rules, available at <http://www.hhs.gov/> (last visited Mar. 29, 2002). However, the Department did not deploy the same Web-based submittal system as it did during the Clinton Administration and it only provided a thirty-day comment period. See 67 Fed. Reg. 53,182 (Aug. 14, 2002).

system that highlights proposed rules open for comment.⁶¹ While a common “look and feel” for all agency Web sites is not necessary, home pages should provide a direct route to a page that lists all proposed rulemakings open for comment.⁶² In addition, user manuals and Web tutorials for the public should be posted online as the FCC and FERC have done.⁶³

Better public education efforts should be undertaken; at a minimum links to explanatory materials should be a common feature for all docket rooms.⁶⁴ If the proposal is significant, weekly summaries and subject

61. The EPA system is a work in progress. Barbara H. Brandon participated in external stakeholders’ test of EPA’s system on January 29, 2001. The current system contains a good FAQ feature, but a planned Web tutorial has not yet been installed (last visited Sept. 11, 2002). See E-mails from Dawn Roddy, Policy Analyst EPA and Barbara H. Brandon (Mar. 7, 2002 12:48:29 and 13:13:45 EDT) (on file with Barbara H. Brandon). However, the system has a significant design flaw; it does not include a public index to the docket. See text accompanying *infra* notes 74-77.

GAO has identified the desirability of placing a notice about high visibility rules on an agency’s home pages. See GAO Rulemaking Report, *supra* note 19, at 8-9. For instance, during the Clinton Administration, OSHA’s proposed ergonomics rule was featured on both the Department of Labor’s home page and the OSHA home page. See *id.* at 5. USDA also took this step for its organic food marketing and roadless proposals during 2000, available at http://web.archive.org/web/20000501-20000910re_/http://usda.gov (last visited on Mar. 4, 2002).

62. The Bush Administration has logically designated DOT as its lead agency in implementing its electronic docketing efforts. See text accompanying *infra* note 252. The biggest flaw in DOT’s present design is that its main opening docket page is not as user-friendly as other sites.

States have also undertaken efforts in this area. The GAO reports that the state of Washington has developed a proactive e-mail system to notify subscribers of proposed rules, rulemaking hearings, and semiannual regulatory agenda updates. See Regulatory Management Report, *supra* note 55, at 21. The Commonwealth of Virginia has taken a different course by establishing a Web site called the Virginia Regulatory Town Hall, at <http://www.vatownhall.com/index.cfm> (last visited Mar. 31, 2002).

63. The Electronic Comment Filing System User Manual at the FCC site is excellent. See <http://www.fcc.gov/e-file/ecfsmanual/completemanual.pdf> (last visited Sept. 11, 2002). The FERC tutorial may be found at <http://www.ferc.gov/documents/electronicfilinginitiative/efi/efilingtutorial.pdf> (last visited Sept. 11 2002).

64. During the Clinton Administration, USDA built two exceptional sites to educate the public about its proposed rules on organic food marketing and roadless areas. The former site has been taken down and the latter has been substantially modified, at <http://roadless.fs.fed.us/> (last visited Mar. 4, 2002). One other good example was the informative site that EPA built for the total maximum daily load rulemaking during the Clinton Administration, available at <http://www.epa.gov/owow/tmdl/> (last visited Mar. 4, 2002). This site has also been modified.

The FDIC has adopted an interesting feature for its electronic e-mail submittal system. It displays each section of the regulation with a separate explanation of the

matter indices should be created to allow the public to review prior submissions easily and to post more informed comments in turn. Good search engines are also a necessity.

Electronic docket rooms will also allow agencies to post many of the materials that are developed to satisfy various ancillary legal requirements as a rule is developed. These may include cost/benefit analyses or information addressing concerns under the Small Business Regulatory Enforcement Fairness Act (SBRFA) or the Paperwork Reduction Act. As the General Accounting Office (GAO) observed, "access to these materials can permit public comments. . . to be more informed and targeted."⁶⁵

Other recommendations along this line have also been made. Robert Hahn believes regulatory accountability can be improved if more economic analysis is incorporated into *Federal Register* notices. He argues agencies should "summarize potentially useful information on the impacts of regulation" in a regulatory impact summary.⁶⁶ Hahn also recommends that if an agency has prepared a regulatory impact report for a significant rule under Executive Order 12,866,⁶⁷ this analysis be placed on its Web site.⁶⁸

R. Scott Farrow, Eva Wong, Rafael Ponce, Elaine Faustmann, and Richard Zerbe take this a step further.⁶⁹ They suggest the utilization of openly structured models where a common software platform allows all an agency's stakeholders to participate in the analysis. Their framework allows users to test different benefit and cost assumptions in a "(relatively) transparent" manner.⁷⁰ These templates could easily be mounted on a Web

regulatory provision in "plain English" in an adjacent box. See <http://www2.fdic.gov/epc/Faircredit/Index.asp> (last visited Mar. 7, 2002).

65. See GAO RULEMAKING REPORT, *supra* note 19, at 9. The ABA has taken a similar position. See REPORT WITH RECOMMENDATIONS TO THE HOUSE OF DELEGATES, 2001 ANNUAL MEETING RECOMMENDATION FROM THE SECTION OF ADMINISTRATIVE LAW AND REGULATORY PRACTICE, GOVERNMENT AND PUBLIC SECTOR LAWYER'S DIVISION, 11-14 (on file with Barbara H. Brandon) [hereinafter ABA REPORT]. Recommendation 107C on Recommendation on More Effective Public Participation in Significant Agency Dissemination Efforts was approved at the ABA Annual Meeting in August 2001.

66. See Hahn, *supra* note 19, at 939.

67. The Bush Administration has not modified the threshold test for what constitutes a significant rulemaking under this Clinton era Executive Order.

68. See Hahn, *supra* note 19, note 50 at 940.

69. See R. Scott Farrow, Eva Wong, Rafael A. Ponce, Elaine M. Faustmann, Richard O. Zerbe, *Facilitating Regulatory Design and Stakeholder Participation: The FERET Template with an Application to the Clean Air Act in Improving Regulation: Cases in Environment, Health, and Safety*, Paul S. Fishbeck and R. Scott Farrow editors, 2001.

70. See *id.* at 433. FERET can be run using commercial software like Excel or Crystal Ball. While average citizens will find these types of analyses daunting, such practices will heighten the transparency of the decisionmaking processes. Moreover, this is not a simple tool. The instructions caution that "a Masters degree or higher in a relevant field" is

site during a rulemaking or during earlier stages of the development process.⁷¹ Such efforts at building more transparent tools could prove useful as a way for differing sides to explore assumptions embedded in a particular analysis.⁷² That said, there is no gain saying that these approaches do impose steep learning curves on parties who are unfamiliar with this type of analysis.

Electronic docket rooms should permit anonymous browsing and copying just like paper docket rooms.⁷³ However, anonymous filing should

useful in running the analysis. Introduction to CD-ROM instructions at 1 (on file with Barbara H. Brandon).

71. Professor Felleman has also suggested that the Internet can be used as a mechanism to facilitate open modeling of environmental systems to promote sustainable development. *See Internet Facilitated Open Modeling: A Critical Policy Framework*, 16 Policy Studies Review, 193-216 available at <http://www.esf.edu/es/felleman/OpenMod/OM-Paper.html> (last visited Mar. 6, 2002).

72. Professor Wagner has emphasized how technical complexity in environmental analysis can deter citizen participation. In assessing the water quality standard setting process, she notes that watershed management issues are often unnecessarily cloaked in technical language that hide uncertainties and variability's in the measurements. As a result, citizens must dedicate weeks or months to decoding the process. As she observes, "[t]o the extent that decisions are portrayed as scientifically ordained when in fact they are not, then lay efforts to participate in public decisions regarding water quality become more time-consuming and unsettling." *See Restoring Polluted Waters with Public Values*, 25 WM. & MARY ENVTL. L. & POLICY REV. 429, 452-53 (2000); *see also* Wagner, *supra* note 9, at 13; Ashley Schannauer, *The WTI Risk Assessment: The Need for Effective Public Participation*, 24 VT. L. REV. 31 (1999) (stating risk assessments need to provide effective opportunities for public participation.).

73. In 2000, the United States International Trade Commission proposed that users of its electronic docket rooms had to register before browsing or copying documents. *See* Posting of Paul Schaffer to the Government Information Access listserv, gov-info-access@ombwatch.org (Feb. 24, 2000) (on file with author); *see also* Posting of Barbara H. Brandon to gov-info-access@ombwatch.org (Mar. 2, 2000) (copies on file with Barbara H. Brandon). The Trade Commission's dockets cover adjudicatory matters and at present they may be viewed without registration, SUBCOMM. ON PRIVACY & PUBLIC ACCESS TO ELECTRONIC CASE FILES, COMM. ON COURT ADMIN. & CASE MGMT., JUDICIAL CONFERENCE REPORT available at <http://dockets.usitc.gov/eol/public/> (last visited Mar. 22, 2002). *See generally* Julie E. Cohen, *A Right to Read Anonymously: A Closer Look at "Copyright Management" in Cyberspace*, 28 CONN. L. REV. 981 (1996) (arguing that reading anonymously is intimately connected to freedom of speech and thought under the First Amendment).

Unlike rulemaking, electronic judicial dockets do raise personal privacy concerns. *See* Privacy Policy Recommendations adopted by the Judicial Conference of the United States at its September/October 2001 session, at <http://www.privacy.uscourts.gov/Policy.htm> (last visited Mar. 22, 2002). The Subcommittee on Privacy and Electronic Access to Case Files of the Court Administration and Case Management Committee of the Judicial Conference had solicited comments on a draft of this policy using an electronic docket, available at <http://www.privacy.uscourts.gov/> (last visited Mar. 22, 2002).

be discouraged once a person or organization is submitting comments for the record.⁷⁴ Both the governmental entity and other participants have a legitimate interest in knowing who is commenting. While such submittals should not be rejected out-of-hand, commentors should be advised that identity could be an important factor in assessing the merits of a particular submission.⁷⁵

Dockets should contain index pages that allow the public to browse the filings by name and organization.⁷⁶ Agencies should not limit access to the commentary to a search engine, as USDA did during its organic food marketing rulemaking.⁷⁷ Research suggests that search engines give users

74. However provisions should be made to allow commentors to mask their e-mail addresses so that this information is not publicly available.

75. DOT and EPA do make it a practice to accept all anonymous filings while USDA does not. *See* Statements made by agency representatives at a May 30, 2001 Symposium on Citizen Participation and Electronic Rulemaking sponsored by the National Science Foundation's Digital Government Program. A uniform government-wide rule should be adopted.

76. DOT and OSHA amongst others deploy docket index pages as a primary access tool for their dockets. *See* index page at the TPMS Docket, *supra* note 33, at http://dms.dot.gov/search/hitlist.asp?dkt_docketId=8572 (last visited Mar. 29, 2002) and index page at H054A, Occupational Exposure to Hexavalent Chromium at <http://dockets.osha.gov/search/easySearch.asp> (last visited Sept. 11, 2002). FDA used to do this, but now that it has adopted a feature that allows a user to subscribe to an automated e-mail service that forwards each addition to the docket to the requester, *available at* <http://www.fda.gov/ohrms/dockets/FDAMAIL/DMBemallist.htm> (last visited Mar. 4, 2002).

When EPA held a demonstration of its electronic docket system for its external stakeholders, the agency stated that it had opted not to provide an electronically accessible index page because of privacy concerns. This seems misguided, particularly when this shields the identity of organizations submitting comments. In addition, the agency's current paper dockets do not protect an individual commentator's identity and judicial dockets do not allow a party to mask his or her identity, except under very rare circumstances. Furthermore adoption of such a practice defeats one of the central virtues of electronic filing - it forces a visit to the paper docket room to determine the identity of the submitter.

In addition, comments in a rulemaking record clearly meet the definition of "agency records" under FOIA, 5 U.S.C. § 552(a)(4)(B). As such they are subject to disclosure under the two-pronged test of *Department of Justice v. Tax Analysts*, 492 U.S. 136 (1989). Moreover, the Privacy Act, 5 U.S.C. § 552a(a)(4), only applies to individuals and should not serve to protect organizational identity or the identity of a person acting in a representative capacity such as a lawyer or lobbyist representing a client. In commenting on the DOT system, Shaw, Pittman, Potts, and Trowbridge, a large Washington law firm, saw no need for anonymity in its practice when commenting on electronic filing procedures at DOT. *See* comments at page 11 at Filing Procedures for the DOT Docket: Electronic Submission, Docket OST-96-1436 (on file with Barbara H. Brandon).

77. Major difficulties flow from limiting access to a search engine. First, the end user may not be confident that he or she has retrieved all the appropriate documents. Second, if

a false sense that they have reviewed the appropriate documents when retrieval is often spotty.⁷⁸ In contrast, an online index allows the public to browse the docket to locate comments made by organizations, trade associations and public interest groups and to learn the perspectives of these groups.⁷⁹

Active notification systems are also important. In 2001, the American Bar Association (ABA) endorsed using electronic methods like listservs or Web postings to expand participation beyond the *Federal Register*.⁸⁰ and other passive notification systems.⁸¹ For example, the State of

the search engine is flawed, this fear is justified. Third, many users will find it easier to use a docket index to locate comments that interest them.

Other problems also exist. First, the set of words in a text does not necessarily constitute the meaning of the text. Second, English has a plethora of homonyms. Third, decent retrieval becomes difficult in large databases. See Walt Crawford, *The Card Catalog and Other Digital Controversies: What's Obsolete and What's Not in the Age of Information*, 30 AM. LIBRS., 52 (Jan. 1999) (discussing problems with online public access catalogs). Librarians have focused on these problems because of the relatively unsuccessful change from card catalogs to online public access catalogs. See also Davod B. Dabney, *The Curse of Thamus, An Analysis of Full-Text Legal Document Retrieval*, 78 LAW LIBR. J. 5 (1986) (discussing the limitations of full-text computer assisted research systems in searching large legal document sets). David C. Blair and M. E. Maron, *An Evaluation of Retrieval Effectiveness for a Full-text Document-retrieval System*, 28 Communications of the ACM 289 (1985) (studying user retrieval effectiveness in Lexis and finding that less than twenty percent of the relevant documents are found).

78. As both Professors Cleveland note, "an index has two general purposes: to minimize the time and effort in finding information, and to maximize the searching success of users." Donald B. Cleveland & Ana D. Cleveland, INTRODUCTION TO INDEXING AND ABSTRACTING, 3 (3d ed. 2001).

79. This is not a burdensome requirement; USDA almost certainly generated an index while the organic food rulemaking was ongoing. Moreover, such an index must be prepared if there is an appeal under Rule 17 of the Federal Rules of Appellate Procedure. See FED. R. APP. P. 17.

80. In 1997, the print version had a base of 13,750 subscribers nationwide. See Stephen P. Croley & William F. Funk, *The Federal Advisory Committee Act and Good Government*, 14 YALE J. ON REG. 451, 529 n.467 (1997).

81. See ABA REPORT, *supra* note 65, at 12-13. HHS adopted such a mechanism in implementing the Health Insurance and Portability Act. Subscribers to a broadcast listserv known as HIPAA-REGS received notice of all proposed and final rules under the Act. See Philip A. McAfee, *Electronic Rulemaking: Broadcast List Servers, Hypertext Manuscripts, Proprietary Formats and Tagged Email*, available at <http://www.llrx.com/features/electronic.htm> (last visited Mar. 7, 2002). The ABA report discusses the e-mail notification practices of APHIS.

Electronic methods can quickly alert interested individuals and groups about policy issues of interest to them. During the National Dialogue on Public Involvement in EPA Decisions, Section 4 A, *infra*, EPA and Information Renaissance used electronic methods to reach out to a wide variety of environmental interests, including environmental organizations, states and local governments, small businesses and tribal groups. In a month,

Washington's Division of Information Services manages a central listserv that allows citizens to custom tailor a list that will automatically alert them of opportunities to participate in governmental decisionmaking processes like rulemaking.⁸²

At the federal level, such measures are clearly necessary because of the voluminous nature of both the Unified Agenda and the *Federal Register*. As the GAO recently noted, locating information about a specific rulemaking can be a "daunting" task.⁸³

B. Additional Advantages of Online Rulemaking

Other benefits can flow from online rulemaking. With increased transparency, commentors may learn from earlier submissions and refine their views accordingly. In smaller rulemakings, some set of participants may reach a partial consensus on an issue that the agency can incorporate into the final rule.⁸⁴ Online interchanges may further benefit the judiciary, because the rulemaking record could provide more insights into how a regulation will work in practice.⁸⁵

This increase in transparency could also minimize concerns about the impact that ex parte communications have on decisionmakers. Prompt docketing of summaries allows others monitoring a particular docket to stay abreast of matters.⁸⁶ As an example, DOT posts summaries of such

these contacts enlisted 1167 participants. See Beierle, *supra* note 5, at 21. Some registrants reported hearing about the dialogue from multiple sources. See *id.* at 16-17. Such practices should be routinized.

Last spring, the NRC asked the public to comment on whether it should adopt active notification systems in its request for comments on rulemaking communications improvements. See 67 Fed. Reg. 37,773 (May 30, 2002).

82. See GAO RULEMAKING REPORT, *supra* note 19, at 13.

83. *Id.* at 3-4. In addition, the Government Printing Office's search engine for the *Federal Register* should be upgraded. At present, it returns search results that are hard to interpret and frequently off the mark. This is not just a question of searching skill. Dr. Amy Knapp, an Adjunct Professor at the Department of Library and Information Science at the University of Pittsburgh, teaches both Government Documents and Information Retrieval; she often finds that her students and patrons at the main University library have difficulty utilizing this search engine effectively. See Interview of Dr. Amy Knapp (Mar. 19, 2002).

84. This would probably happen more often in smaller rulemakings. See text accompanying *infra* note 103.

85. Dean Perritt thinks that electronic dockets will make it far easier for a reviewing court to retrieve necessary materials from the certified index to the record. In 1992, he predicted that technology would allow a court to access the appropriate material simply by clicking on an electronic pointer. See Perritt, ELECTRONIC DOCKETS, *supra* note 30, at 97.

86. See *Sierra Club v. Costle*, 657 F.2d 298, 400-01 (D.C. Cir. 1981); see also LUBBERS, *supra* note 13, at 225-44 (discussing ex parte rulemaking).

contacts in its electronic dockets thereby enabling interested parties to reply to information presented in an off-the-record meeting.⁸⁷

Online rulemaking will not be a panacea that will cure the post-promulgation rush to the courthouse door. The legislative design of modern regulatory statutes often reflects a deliberate congressional determination to pass the hard questions on to the agency for resolution.⁸⁸ The logical outgrowth of this buck-passing is an adversarial rulemaking process. But a more open, interactive process could minimize disputes and show the agency where the bulk of public concern lies on a particular matter.⁸⁹

The interactive capability of online technology may also have an impact on the nature of the rulemaking process itself. In 1992, Henry H. Perritt predicted that the technology might work to blur distinctions between incomplete and final rulemaking decisions over time.⁹⁰ Certainly, the medium's flexibility makes it easier for an agency to reopen a proceeding or to solicit further comment on a particular issue during a rebuttal period.⁹¹

This has clear advantages. As Dean Perritt noted, however, such efforts could "blur the concept of a 'record' . . . and would erode the final decision concept."⁹² These are important concerns. If agencies are to be held accountable, certain discrete final decisions must be made to permit judicial scrutiny of an agency decision.⁹³

87. See, e.g., TPMS Docket, *supra* note 33 (demonstrating that DOT's docket management system displays *ex parte* communications rulemaking). During its rulemaking on marketing standards for organic food, USDA provided a direct link to memoranda detailing these *ex parte* communications from a Web page. See GAO RULEMAKING REPORT, *supra* note 19, at 12. It is also noteworthy that the FCC Web site does not discourage the filing of late comments; it merely asks the submitter to denominate the filing as *ex parte*/late filed. See ELECTRONIC COMMENT FILING SYSTEM USER MANUAL 3-3, available at <http://www.fcc.gov/e-file/ecfsmanual/ecfsmanual.pdf> (last visited Mar. 7, 2002) (noting requirements for late filings).

88. See Mashaw, *supra* note 16, at 206-07 (recognizing modern statutes require agencies to perform massive research efforts when Congress has not increased agency funding); see also Wendy E. Wagner, *Congress, Science and Environmental Policy*, 1 U. ILL. L. REV. 181 (1999) (emphasizing environmental legislation problems often stem from Congress and not agencies).

89. See Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. REV. 1 (1997) (proposing model of collaborative governance where agencies and stakeholders share responsibility for administrative rule-making).

90. See *Electronic Agency*, *supra* note 30, at 97, 101 (stressing judicial scrutiny of administrative agencies requires discrete "final decisions" by agencies).

91. See *supra* note 34 and accompanying text.

92. *Electronic Agency*, *supra* note 30, at 101.

93. Cf. *Abbott Labs. v. Gardner*, 387 U.S. 136 (1967) (finding the Federal Food, Drug and Cosmetic Act allows for pre-enforcement review). Ripeness challenges could certainly increase under these circumstances. It is important to note that the final agency action

Online dockets could also broaden the participation base in federal rulemaking.⁹⁴ At present, little good data exists showing both who is participating in rulemakings and what influence parties exert.⁹⁵ However, it is clear that business groups predominate.⁹⁶ A recent study of rulemaking participation found in a randomly selected group of rules proposed by EPA and the National Highway Safety Transportation Agency that corporations, public utilities or trade associations submitted between two-thirds to one hundred percent of all comments.⁹⁷ Professor Coglianese

requirement serves two key purposes. First, it minimizes judicial intrusions into agency decisionmaking by recognizing that matters may become moot as the policy process develops. Second, it saves the resources of the judiciary, the agency and the involved parties by barring multiple attacks on a particular policy. See RICHARD J. PIERCE, JR. ET AL., *ADMINISTRATIVE LAW AND PROCESS* §§ 5.73–5.75 at 195-206 (3d. ed. 1999).

94. See E-GOVERNMENT STRATEGY, *supra* note 2, at 27 (estimating creation of “more collaborative and transparent” system could lead to 600 percent increase in citizen and business participation in rulemaking).

95. Professor Kerwin has observed that good empirical studies “are as rare as hen’s teeth.” See CORNELIUS M. KERWIN, *RULEMAKING: HOW GOVERNMENT AGENCIES WRITE LAW AND MAKE POLICY*, 192 (1st ed., 1994); see also Stephen P. Croley, *Public Interested Regulation*, 28 FLA. ST. U. L. REV. 7, 54-85 (2000) (emphasizing difficulty in determining what motivates administrative decisionmakers and how administrative process works); see Marissa Martino Golden, *Interest Groups in the Rule-Making Process: Who Participates? Whose Voices Get Heard?*, 8 J. OF PUB. ADMIN. RESEARCH & THEORY 252 (1998) (analyzing patterns of citizen and interest group participation and influence in agency rulemaking); see also Scott R. Furlong, *Interest Group Influence on Rule Making*, 29 ADMIN. & SOC’Y 325, 325-47 (1997) (explaining interest group influence on rule making using political science research).

96. The most comprehensive study is dated. In 1977, the Senate Committee on Governmental Affairs studied public participation at eight agencies by reviewing the dockets for thirty rules at each agency. The Staff found that parties representing regulated interests significantly outnumbered groups representing broad outside interests. See STAFF OF SENATE COMM. ON GOVERNMENTAL AFFAIRS, 95TH CONG., *STUDY ON FEDERAL REGULATION, VOL. III: PUBLIC PARTICIPATION IN REGULATORY AGENCY PROCEEDINGS* (1st Sess. 1977) (recognizing single greatest obstacle to active citizen participation in regulatory proceedings is lack of financial resources).

97. It is also interesting to note the wide variability in the amount of commentary that agencies receive on their major rules. See KERWIN, *supra* note 6, at 185-89 (explaining each agency compiles participation data differently and summaries of rulemaking activities in *Federal Register* are often not illuminating on this issue). The following is an arbitrary sample of the amount of commentary that was submitted during some of the more newsworthy rulemakings during the last six months of the Clinton Administration.

The public response was greatest in response to the roadless area proposal. See *supra* text accompanying note 1; see also Environmental Protection Agency, 66 Fed. Reg. 5002, 5012 (Jan. 18, 2001) (noting EPA’s adoption of standards covering heavy-duty diesel engines and fuel standards drew over 55,000 comments). See *supra* text accompanying note 55; see also HHS ANNOUNCES FINAL REGULATION ESTABLISHING FIRST-EVER NATIONAL STANDARDS TO PROTECT PATIENTS’ PERSONAL MEDICAL RECORDS (Dec. 12, 2001) (asserting

2002] *ONLINE RULEMAKING AND OTHER TOOLS* 1445

found comparable participation patterns while studying twenty-eight significant EPA hazardous waste rulemakings.⁹⁸

over 52,000 Americans submitted comments during HHS's medial privacy rulemaking), available at <http://www.hhs.gov/news/press/2000pres/20001220.html>; National Organic Program, 65 Fed. Reg. 80,548 (Dec. 21, 2000) (to be codified at 7 C.F.R. pt. 205) (noting that USDA received 40,774 comments to rulemaking on marketing standards for organic food). See Ergonomics Program Standard, 65 Fed. Reg. 68,261, 68,265 (Nov. 14, 2000) (stating OSHA received 5900 comments and 714 submissions regarding its controversial ergonomics rule); see also Selective Disclosure and Insider Trading, 65 Fed. Reg. 51,716, 51,717 (Aug. 24, 2000) (to be codified at 17 C.F.R. pts. 240, 243, 249) (specifying SEC received 6000 comments when adopting a rule to promote full and timely disclosure of financial information to public); see also Revision of the Commission's Auditor Independence Requirements, 65 Fed. Reg. 76,008, 76,009 (Dec. 5, 2000) (to be codified at 17 C.F.R. pts. 210, 240) (remarking that 3000 organizations and individuals commented on SEC's proposal for insuring that auditors remain financially independent from their clients); see National Drinking Water Regulations; Arsenic and Clarifications to Compliance and New Source Contaminants Monitoring, 66 Fed. Reg. 6976, 7024 (Jan. 22, 2001) (to be codified at 40 C.F.R. pts. 9, 141, 142) (noting EPA received 1100 comments on what subsequently became its controversial arsenic drinking water standards); see also Energy Conservation Program for Consumer Products: Central Air Conditioners and Heat Pumps Energy Conservation Standards, 66 Fed. Reg. 7170, 7174 (Jan. 22, 2001) (to be codified at 10 C.F.R. pt. 430) (asserting Department of Energy received 800 comments for their energy conservation standards for central air conditioners and heat pumps); Hazard Analysis and Critical Control Point (HAACP); Procedures for the Safe and Sanitary Processing and Importing of Juice, 66 Fed. Reg. 6138, 6140 (Jan. 19, 2001) (to be codified at 21 C. F. R. pt. 120) (stating FDA received 800 comments on its new safety standards for fruit juice); Retained Water in Raw Meat and Poultry Products; Poultry Chilling Requirements, 66 Fed. Reg. 1750, 1752 (Jan. 9, 2001) (to be codified at 9 C.F. R. pts 381, 441) (specifying USDA received 252 comments, mostly from industry or trade associations and three from consumer groups, regarding their setting poultry handling standards). See Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents, 61 Fed. Reg. 44,395, 44,418 (Aug. 28, 1996) (stating 700,000 comments were received, 300,000 from one astro-turf campaign, 500 different form letters and 95,000 people mailed their individual views); The cigarette industry submitted one comment that was some 200 pages long with 45,000 pages of supporting documents; see also Croley *supra* note 95, at 66; see David Kessler, A Question of Intent: a Great American Battle with a Deadly Industry, Public Affairs 2001, 353-54 (describing FDA's review of comments during tobacco rulemaking).

98. Coglianese found that a total of 1 275 organizations and individuals filed comments in these rulemakings. Nearly sixty-seven percent of the comments came from industry, whereas two percent came from environmental groups. In looking at individual rulemakings business interests participated in eighty-nine percent of the rules and trade associations participated in seventy-five percent. National environmental groups participated in only half of the rulemakings. See Cary Coglianese, *Litigating within Relationships: Disputes and Disturbance in the Regulatory Process*, 30 LAW & SOC'Y L. REV. 735, 741 (1996) (describing comments to rules issued under Resource Conservation and Recovery Act).

To date, the partial deployment of information technology in the rulemaking arena has had some interesting results. Professor Shulman has observed that the first proposed rule on marketing standards for organic food was notable for the public response. USDA received over 275,000 public comments by e-mail, the Web, fax, and mail. Most of the commentary challenged the proposed marketing and labeling standards and this prompted Secretary Glickman to have the proposed rule redrafted.⁹⁹

During the second comment period on these standards, a USDA official told the GAO that the electronic docket changed the dynamic of public participation.¹⁰⁰ In most rulemakings commentors typically wait until the last minute to file comments so no one else could see their views.¹⁰¹ But during this rulemaking, the early submitters had “the greatest influence on the evolving discussion.”¹⁰²

The Animal and Plant Health Inspection Service, another part of the USDA, had a slightly different take on electronic rulemaking. They found that electronic docket rooms were particularly helpful when the rule was less controversial. During these rulemakings, commentor interaction provided “a real-time, informal ‘peer review.’”¹⁰³

This last experience could be transferable, especially in smaller rulemakings. Active notification systems and electronic dockets could generate more input from specialized audiences at universities, nonprofit organizations and individuals who share a particular expertise. These individuals and groups could share their thoughts with each other and offer valuable input to the agency.

Online rulemaking may also aid in the implementation and enforcement of a rule after it is promulgated. Online documentation, particularly the background materials in a docket, could facilitate the agency’s tasks in notifying and educating regulated entities about a new rule. In addition, agencies could follow OSHA’s lead and develop downloadable programs

99. Stuart W. Shulman, *Citizen Agenda-Setting, Digital Government and the National Organic Program*, 4-7 (unpublished paper prepared for delivery at the 2000 Annual Meeting of the American Political Science Foundation, Washington D.C.) (on file with Barbara H. Brandon); see also Stuart W. Shulman, *Citizen Agenda-Setting: The Electronic Collection and Synthesis of Public Commentary in the Regulatory Rulemaking Process*, at <http://www.drake.edu/artsci/faculty/ssshulman/NSF/research.htm> (last visited Mar. 24, 2002) (summarizing proposal to the National Science Foundation for examining impacts of new communications technology on public involvement in rule-making process).

100. See GAO RULEMAKING REPORT, *supra* note 19, at 12.

101. See, e.g., Shaw, Pittman, Potts, and Trowbridge, *supra* note 76, at 3-10.

102. See GAO RULEMAKING REPORT, *supra* note 19, at 12 (explaining comments for AMS organic standards rule).

103. See *id.* at 11 (discussing APHIS’s experimentation with several approaches to accepting and posting electronic comments on ten proposed rules).

that allow affected businesses to determine how a regulation applies to their work sites offline.¹⁰⁴

A final benefit will be cost savings to the taxpayer. As the GAO has documented, these savings can be substantial.¹⁰⁵ After the DOT installed its electronic docket system, it saved more than a million dollars a year in administrative costs.¹⁰⁶ Benefits included the ability to provide agency-wide access to a rulemaking file; this can be particularly important when geographically divided offices must coordinate their review efforts.¹⁰⁷ Similarly, the USDA estimates that it saved more than \$100,000 dollars in administrative costs during the organic marketing rulemaking,¹⁰⁸ while simultaneously boosting public awareness and participation.¹⁰⁹

104. See OSHA'S EXPERT ADVISOR LINKS AT ITS E-TOOLS AND ELECTRONIC PRODUCTS FOR COMPLIANCE ASSISTANCE WEB PAGE, available at <http://www.osha.gov/dts/osta/oshasoft/index.html#eTools> (last visited Mar. 31, 2002).

105. See GAO RULEMAKING REPORT, *supra* note 19, at 9 (explaining cost savings in DOT's extensive docket system that covers every adjudicative, policy development and rulemaking activity within DOT).

106. See *id.* (describing how the DOT docket also facilitates rulemaking by permitting agency professionals to review comments at their desks or at home). Neil Eisner, Assistant General Counsel for Regulation and Enforcement at DOT, provided a hand-out detailing these cost savings at a March 26, 2002 Workshop on Information Technology and Rulemaking sponsored by the John F. Kennedy School of Government at Harvard University and The National Science Foundation's Digital Government Research Program. See Neil Eisner, Remarks at the Workshop on Information Technology and Rulemaking (March 26, 2002) [hereinafter Eisner Handout] (handout on file with Information Renaissance). The system results in over \$1.3 million per year in savings from reduced staff and space needs. In particular, electronic docketing solved two critical problems, a lack of reading room space and the need for frequent archiving and retrieval of records. Mr. Eisner also points out that the DOT system saves money for the system's users. *Id.*

The Department of Ecology in the State of Washington found that its e-mail regulatory alert system saved it over \$132,000 in printing and mailing costs in its first year of operation because the public downloaded more than 3000 rules per month. See GAO REGULATORY MANAGEMENT REPORT, *supra* note 55, at 21 (noting e-mail alert system notifies customers of publication of proposed rules, rulemaking hearings, issuance of interpretative statements and semiannual regulatory agenda updates) (citation omitted).

107. Another tool that could save agencies' money is a regulatory tracking system. USDA's Risk Management Agency has developed an Internet-based tracking system to manage its regulatory activities. See GAO Regulatory Management Report, *supra* note 55, at 10 (pointing out USDA system permits agency employees and outsiders to identify where a regulation is in the rulemaking process and to estimate time frames for proposal or promulgation.). DOT is planning to adopt a similar system in the near future, although it is not clear whether the public will be able to utilize this system. Eisner Handout, *supra* note 107, at 2.

108. See GAO RULEMAKING REPORT, *supra* note 19, at 12-13 (stating USDA utilized a proprietary software package that cannot be used again). Nevertheless, agency staff pointed to several types of cost savings in a power point presentation. Lee Keely and Keith Jones of the Agricultural Marketing Service point out that the online effort reduced paper handling,

C. OMB Improvements

Since the Reagan Administration the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget (OMB) has served as each President's gatekeeper for the rulemaking process.¹¹⁰ During the 1980s the office's practices often proved controversial due to a lack of transparency, undocumented ex parte communications and long delays in approvals.¹¹¹ In Executive Order 12,866 the Clinton Administration addressed several of these issues by making OIRA's review processes more open.¹¹² The present Bush Administration has taken this recommendation a giant step further.

filing and printing costs as well as reading room costs for public access to the administrative record. There were less frequent internal briefings and meetings, and fewer FOIA requests and inquires from the media and Congress. They also note that there was a labor cost savings associated with compressing the timetable for completion. DIGITAL DEMOCRACY GOVERNMENT IN THE SUNSHINE *available at* http://www.ams.usda.gov/nop/nop2000/nop_fose.ppt. (last visited Mar. 7, 2002).

109. The GAO also reported that some federal officials thought that electronic docket systems would require substantial resources that could better be used on other activities. *See* GAO RULEMAKING REPORT, *supra* note 19, at 15. This is a penny-wise but pound-foolish approach, because administrative cost savings will be realized on an annual basis. This attitude may also be changing according to a recent Hart-Teeter Survey. *See infra* text accompanying notes 134-35.

110. Presidential oversight of the rulemaking process dates back to the Nixon Administration. *See* Harold H. Bruff, *Presidential Management of Agency Rulemaking*, 57 GEO. WASH. L. REV. 533 (1989) (highlighting Nixon's "Quality of Life" review, an interagency review of proposed regulations dealing with environmental quality and consumer protection).

111. *See* KERWIN, *supra* note 6, at 220-32, 247-49 (providing historical background on OMB during the Reagan and first Bush Administrations); *see also* LUBBERS, *supra* note 13, at 19-29 (stressing presidential review of federal agency rulemaking results from executive orders and Paperwork Reduction Act); Rebecca Adams, *Regulating the Rule-Makers: John Graham at OIRA*, 60 CONG. Q. 520, 525 (Feb. 23, 2002) (discussing White House disclosure requirements for any closed-door meeting with OMB officials and outside groups on regulation).

112. Executive Order 12,866 provides that all submissions to OIRA be made publicly available; OIRA must also identify all rule changes made at its behest. In addition, OIRA must forward all ex parte communications to the agency, and it must invite agency officials to meetings with outsiders. The Order also cut back on the number of proposals subject to OIRA review. *See* LUBBERS, *supra* note 13, at 25-29 (analyzing Clinton's attempt to reestablish bipartisan consensus on rulemaking review through Executive Order 12,866). To date, the Bush Administration has continued to adhere to these provisions. *See* September 20, 2001 Memorandum on Presidential Review of Agency Rulemaking by OIRA *available at* http://www.whitehouse.gov/omb/inforeg/oira_review-process.html (last visited Mar. 9, 2002) (stating the President's Chief of Staff directed Graham to work with the agencies to implement vigorously E.O. 12866).

John Graham, the current Administrator, has directed OIRA to become an exemplar of e-government by providing fuller electronic access to public materials relating to its reviews of regulations.¹¹³ The Office now provides online access to lists of rules pending review, logs of meetings, phone calls, other oral communications, and a listing of written correspondence that it receives.¹¹⁴ In addition, the site includes “prompt,” “return,” and post clearance letters to agency officials.¹¹⁵

OMB also plans to install a new computerized tracking system in the latter half of 2002. OIRA promises that this will be a “single comprehensive database for regulatory review and Unified Agenda

During the Clinton Administration, OMB did take some interest in online public participation but this waned over the life of his presidency. In 1994, Henry H. Perritt, Jr. submitted a report to OMB on electronic government. See *OMB Report*, *supra* note 30 (promoting rulemaking authorities take full advantage of information technology). However, the Administration did not follow through with online public participation. See Pub. Papers William J. Clinton 1999 Vol. 2, 2315-18 (December 17, 1999) Memoranda to the Heads of Executive Departments and Agencies on the Use of Information Technology and Electronic Government. These documents are strangely silent on expanding public input into this aspect of governmental decision-making.

113. See MEMORANDUM FROM JOHN D. GRAHAM, ADMINISTRATOR, OFFICE OF MANAGEMENT AND BUDGET, TO THE PRESIDENT’S MANAGEMENT COUNCIL (SEPT. 20, 2001) available at http://www.whitehouse.gov/omb/inforeg/oira_disclosure_memo-b.html [hereinafter OIRA Disclosure Memorandum]. Graham was a controversial choice for this post, but his critics warmly greeted this step. See OMB WATCHER ONLINE, available at <http://www.ombwatch.org/ombwatcher/ombw20011029.html#oira> (last visited Mar. 9, 2002) (applauding Graham’s decision). Several articles covered Graham’s confirmation hearings. See Stephen Labaton, *Bush Is Putting Team in Place for a Full-Bore Assault on Regulation*, N.Y. TIMES, May 23, 2001, at C1 (emphasizing Graham’s approach promotes many benefits not easily quantifiable); see also Cindy Skrzycki, *Regulatory Nominee Assailed in Report*, WASH. POST, Mar. 14, 2001 at E1.

114. See Web page index for these materials, available at <http://www.whitehouse.gov/omb/inforeg/regpol.html> (last visited Mar. 9, 2002). The OIRA disclosure memorandum states that correspondence in OIRA’s docket will eventually be placed online. *Id.*

115. Return letters send a proposed regulation back to the agency with suggested changes. Graham has also invented “prompt” letters that invite an agency to write, rewrite, or rescind a regulation. See GRAHAM MEMORANDUM, *supra* note 113 (explaining OIRA’s process in reviewing draft rules); see also PRESIDENTIAL MANAGEMENT OF THE REGULATORY STATE (Dec. 17, 2001), available at http://www.whitehouse.gov/omb/inforeg/graham_speech121701.html (describing advantages of prompt letter). Adams, *supra* note 111, at 525 (specifying Graham’s tools for regulating the rulemakers: return letter, prompt letter, target list, OIRA’s web site). During his tenure Graham “has rejected 21 proposed regulations in 17 ‘return letters,’ more than the Clinton administration sent back in eight years.” See *id.* at 520-21 (describing how Graham is reshaping how federal government regulates businesses and implementing legislation enacted by Congress).

processing.”¹¹⁶ The current plan calls for fully query searching and improved report functions.¹¹⁷

D. *The Senate's E-Government Act of 2002*

The Senate has also acted. On June 27th the Senate unanimously passed the E-Government Act of 2002.¹¹⁸ This bill creates an Office of Electronic Government in the OMB and establishes a broad framework of new initiatives requiring the federal government to use Internet-based technology to enhance citizen access to government information and services.¹¹⁹

Section 206 authorizes agencies to install electronic docket rooms in order to enhance public participation in rulemaking and to improve “access, accountability, and transparency.”¹²⁰ The dockets are to contain, at a minimum, all the information that the agency is required to publish in the *Federal Register*. In addition, all submissions and materials, which by agency rule or practice are maintained in the docket, are to be made available online “to the extent practicable as determined by the agency in

116. See OIRA Disclosure Memorandum, *supra* note 113, at 6. Thought should be given to melding this design with the features of the USDA regulatory tracking system. See *supra* note 107.

117. See *id.* at 5. The Bush Administration's e-government strategy also is breaking new ground in focusing on the need to develop consistent archiving practices for electronic records. Electronic documents present challenging long-term archival issues. Preservation and migration to newer formats are important issues for both OMB and NARA. In 2001, NARA issued an advanced notice of proposed rulemaking on a petition for rulemaking on management, scheduling and preservation of electronic documents. See Records Management; Electronic Text Documents, 66 Fed. Reg. 51,740 (Oct. 10, 2001) (to be codified at 36 C.F.R. 1234) (providing Web site for electronic copy of Public Citizen petition for rulemaking); see also ACUS Recommendation 90-5, 1 C.F.R. § 305.90-5 (1995) (specifying federal agency electronic records management and archives). A related archival issue concerns how long these dockets should be maintained. While storage costs for electronic records are very low, preservation and the need to migrate records to newer formats makes it desirable to develop selection criteria. Dockets of obvious historical importance, like FDA's tobacco rulemaking or the Forest Service's roadless proposal, are obvious candidates for preservation as are rules identified in the yearly regulatory plans and those deemed “economically significant.” But selection criteria are more difficult to establish for less important rules. Sampling may be one approach to consider. See Michael Stephen Hindus, Theodore M. Hammett, Barbara M. Hobson, *The Files of the Massachusetts Superior Court, 1859-1959: An Analysis and a Plan for Action*, 3-16 (1980).

118. S. 803, 107th Cong. (2002).

119. Maureen Sirhal, *E-Government: Senate Passes Bill to Create E-Government Office*, NAT'L JOURNAL'S TECH. DAILY, June 6, 2002; David Silverberg, *Lieberman Leaps into High-Tech*, THE HILL, June 19, 2002 at 18.

120. S. 803, 107th Cong. § 206 (a) (2002). The E-Government Act would also require agencies to accept all e-mail and fax submissions. S. 803, 107th Cong. § 206 (c) (2002).

consultation with” OMB.¹²¹ Hopefully, this language will be interpreted broadly to require agencies to provide the types of analytical materials that a best practices approach would suggest.

One significant change was made to the original version of S. 803 introduced by Chairman Lieberman. That bill required all rulemaking agencies to install electronic docket rooms within four years after the Act’s passage.¹²² As passed, S. 803 provides that the Director of OMB shall establish a timetable for implementation when he submits his first annual report to Congress; there is no longer a statutory deadline.¹²³ The Senate Committee on Governmental Affairs made this change when it unanimously approved the substitute jointly sponsored by Chairman Lieberman and Ranking Member Fred Thompson.¹²⁴

E. Potential Criticisms of Online Rulemaking

Critics may focus on access problems faced by the information “have-nots.” This is a fundamental issue of societal equity that we must face as a nation.¹²⁵ However, the Internet’s civic potential should not be ignored because of legitimate concerns about access.¹²⁶ Simply put, the Digital

121. S. 803, 107th Cong. § 206 (d)(2) (2002).

122. S. 803, 107th Cong. § 206 (e) (2001).

123. S. 803.

124. See Liza Porteus, *supra* note 3.

125. The Bush and Clinton Administrations have characterized the Digital Divide in very different terms. Compare U.S. DEP’T OF TRANSPORTATION, NATIONAL TELECOMMUNICATIONS AND INFORMATION ADMINISTRATION (NTIA), A NATION ONLINE: HOW AMERICANS ARE EXPANDING THEIR USE OF THE INTERNET (asserting access to Internet has soared for people in all demographic groups and geographic locations), at <http://www.ntia.doc.gov/ntiahome/dn/index.html> (last visited Mar. 7, 2002) with U.S. DEP’T OF COMMERCE, NAT’L TELECOMM. & INFO. ADMIN., FALLING THROUGH THE NET: TOWARD DIGITAL INCLUSION (2000) (measuring extent of digital inclusion by looking at households and individuals that have a computer and Internet connection), available at <http://www.ntia.doc.gov/ntiahome/digitaldivide/index.html> (last visited Mar. 7, 2002) and DEP’T OF COMMERCE, NAT’L TELECOMM. & INFO. ADMIN., FALLING THROUGH THE NET: DEFINING THE DIGITAL DIVIDE (1999), available at <http://www.ntia.doc.gov/ntiahome/ftn99/contents.html> (last visited Mar. 7, 2002). See Norris Dickard, *Federal Retrenchment on the Digital Divide: Potential National Impact*, Benton Foundation Policy Brief # 1 (Mar. 18, 2002) (noting that the Digital Divide is wider than ever but that limited community technology investments are paying off) available at <http://www.benton.org/policybriefs/brief01.html> (Apr. 7, 2002); see also Pippa Norris, *Digital Divide? Civic Engagement, Information Poverty and the Internet in Democratic Societies* (2000) (defining digital divide as a multidimensional phenomenon encompassing global democratic and social divides), available at <http://ksghome.harvard.edu/~pnorris.shorenstein.ksg/acrobat/digitalch1.pdf> (last visited Mar. 7, 2002).

126. See Francis, *supra* note 31, at 3 (emphasizing that very few citizens have “subscriptions to the *Federal Register* or the time and money to travel to a docket room.”)

Divide should not stop utilization of the Web to re-engage more Americans with their government.

A second fear is that increased participation will overwhelm agencies with citizen input.¹²⁷ In the rulemaking context, this issue is easily disposed of, because an electronic docket room offers agencies an immediate internal payoff. First, unlike a bulky paper docket, online comments can easily be sorted, indexed, and searched. In particular, electronic robots¹²⁸ can help sort astro-turf submissions.¹²⁹ Second, it matters very little if an agency receives 10, 100, or 1000 repetitive messages electronically; it need only respond once to the substance. Third, an agency does not have to respond to every aspect of every submission; its legal obligation is limited to responding to all material comments.¹³⁰

Finally, tools like content analysis can aid an agency in mastering a voluminous docket.¹³¹ During the roadless area rulemaking, the Forest Service used these techniques to organize and analyze the comments that it

127. See generally Jim Rossi, *Participation Run Amok: The Costs of Mass Participation for Deliberative Agency Decisionmaking*, 92 NW. U. L. REV. 173 (1997) (arguing citizens express less confidence in government with the rise of greater public participation).

128. An electronic robot is a software tool that searches data and makes a selection according to pre-programmed criteria. Thus it is simple to program a robot to find all the form letters in a particular docket. USDA took this step in its National Organic Food rulemaking and displayed a link to such comments prominently on the dedicated Web page. See GAO RULEMAKING REPORT *supra* note 19, at 12 n.8 (describing how USDA used automation during this rulemaking).

129. Low rates of participation are often the norm during rulemaking. See *supra* text accompanying notes 94-98. Walton Francis, a former Senior Advisor, Office of the Assistant Secretary for Planning and Evaluation at HHS, states: “[t]he great majority of government rulemakings generate only a few hundred or a few thousand comments, and this is unlikely to change significantly using electronic rulemaking.” See Francis *supra* note 31, at 6 (explaining electronic rulemaking will not drown agencies in millions of uninformed, frivolous, or scatological comments).

130. See *Portland Cement Ass’n v. Ruckelshaus*, 486 F.2d. 375, 393-94; see also LUBBERS, *supra* note 13, at 376 (specifying a threshold requirement of materiality before an agency must respond to commentary). This aspect of rulemaking does contrast with referenda, election campaigns or legislative voting. See Croley, *supra* note 95, at 36 (observing, “[a] single, small interest group submitting important arguments during a rulemaking can potentially have as much influence on an agency’s final rule as many groups that present the same argument duplicatively.”).

131. Content analysis is used to quantify and analyze the presence, meanings and relationships of words and concepts within text. Robots often help in this process. See Shulman, *Citizen Agenda-Setting, Digital Government and the National Organic Program*, *supra* note 99, 1-2, 7-15; see also Shulman, *Citizen Agenda-Setting: The Electronic Collection and Synthesis*, *supra* note 99, at Section C of National Science Foundation Proposal (recognizing future experiments in digital government will generate data sets that provide more information).

received.¹³² However, agencies should be very careful when utilizing these tools not to overlook material comments that could trigger a remand.¹³³

The GAO found several federal officials who were skeptical about the benefits of electronic rulemaking.¹³⁴ They questioned whether these changes would enhance public participation in terms of numbers or quality of the commentary.¹³⁵

The numbers claim can be easily dismissed. Where an agency makes an effort to involve the public, like the Forest Service did, many Americans are happy to contribute their thoughts.¹³⁶ This point is further buttressed by a recent public opinion survey performed for the Council for Excellence in Government.¹³⁷ Hart and Teeter found that sixty-two percent of Americans think e-government will make government “more accountable.”¹³⁸ When

132. See Prohibitions; Use of Motor Vehicles Off Forest Service Roads, 66 Fed. Reg. 2795, 3248 (describing Forest Service Content Analysis Enterprise Team, which consisted of one group reviewing proposed rule and other group reviewing alternatives); see also Stuart W. Shulman, *Citizen Agenda Setting: The Electronic Collection and Synthesis of Public Commentary in the Regulatory Rulemaking Process*, *supra* note 99 (discussing USDA's use of content analysis in developing the National Organic Food rule).

133. See Portland Cement Ass'n, 486 F.2d at 393-94. Agencies will not need to resort to tools like content analysis in many rulemakings because the amount of commentary is relatively small. Nevertheless, information technology will assist agencies in preparing final rulemaking packages more quickly.

134. See GAO RULEMAKING REPORT, *supra* note 19, at 15 (discussing how agency representatives questioned whether electronic systems would enhance public participation). This attitude may be changing at some levels. In a recent public opinion survey Hart and Teeter found that more than three in four government decision makers think that “e-government has had a somewhat or very positive effect on the way government operates.” Council for Excellence in Government, *e-Government: The Next American Revolution*, 6-7, 18-19, Feb. 2001 (finding that senior GOVERNMENT managers are putting a higher priority on e-government than year before), available at <http://www.excelgov.org/techcon/egovex/index.htm> (last visited Mar. 22, 2002).

135. See GAO RULEMAKING REPORT, *supra* note 19, at 15 (providing examples of how federal agencies use information technology to facilitate public participation in rulemaking process).

136. See *supra* text accompanying note 1.

137. See COUNCIL FOR EXCELLENCE IN GOV'T, *supra* note 134 at 6, 18-19 (discussing findings of poll).

138. See *id.* at 1. An additional study further bolsters these findings; see Elena Larsen and Lee Rainie, PEW INTERNET & AM. LIFE PROJECT THE RISE OF THE E-CITIZEN: HOW PEOPLE USE GOVERNMENT AGENCIES' WEB SITES, available at http://www.pewinternet.org/reports/pdfs/PIP_Govt_Website_Rpt.pdf (last visited April 7, 2002). This study for the Pew Internet & American Life Project found that 42 million Americans have used government Web sites to research public policy issues and 23 million Americans have used the Internet to transmit comments to public officials about particular policy matters. See *id.* at 2. Sixty-two percent of those surveyed that had used government Web sites had sought information on a public policy issue and thirty-four percent had sent comments about an issue to a public official. See *id.* at 3, 8-9.

asked a follow-up question on how this would improve accountability, twenty-nine percent said that it would allow “citizens to communicate their opinions on major issues more quickly and easily.”¹³⁹

Three responses address the quality objection in the GAO Rulemaking Report. First, some regulatory issues do not call on the public for their expertise—they ask Americans what they think about a straightforward issue. For instance, during the Clinton Administration the Park Service imposed a ban on snowmobiles in Yellowstone and the Grand Tetons. The public submitted 5273 comments on the proposal with 4395 commentors supporting a ban and 817 opposing one.¹⁴⁰ Second, this critique seems both shortsighted and insular. Not all knowledge resides inside the Beltway; experts in academia and non-profit organizations should have much to contribute if outreach efforts are improved. Third, more technical rules often entail choosing between conflicting public values. Americans are entitled to express their preferences between competing alternatives such as saving jobs or setting tighter environmental standards. Indeed, some programs like the Clean Water Act’s water quality standard setting process “drift in a state of analytical paralysis” because the technocratic framework obscures “difficult political decisions about allocating loads among polluters.”¹⁴¹

Others like Steve and Cokie Roberts offer a fourth criticism of online activism.¹⁴² They characterized the Federal Trade Commission’s (FTC) request for e-mail comments on a proposed merger as an improper attack on representative democracy. As Andrew Shapiro notes, knee jerk

139. See *id.* at 18. The report contains a breakdown of the habits of more frequent visitors at 14–15. In addition, Pew reports that seventy-six percent of users rate the quality of federal government Web sites as “good” or “excellent,” in comparison to a 61 percent rating for local government sites. See *id.* at 10.

140. Special Regulations, Areas of the National Park System, 66 Fed. Reg. 7260 (Jan. 22, 2001) (to be codified 36 at C.F.R. pt. 7). The Bush Administration has reopened this rule. Special Regulations; Areas of the National Park System, 67 Fed. Reg. 15,145 (Mar. 29, 2002) (to be codified 36 at C.F.R. pt. 7). See also Eric Pianin, *Snowmobiling to Continue at Two Western Parks, With Curbs*, WASH. POST, June 26, 2002 at A7 (reporting on the Bush Administration’s decision to allow snowmobiling to continue); Blaine Harden, *Snowmobilers Favoring Access to Yellowstone Have Found an Ally in Bush*, N.Y. TIMES, Mar. 6, 2002, at A16 (discussing the Bush Administration’s support of snowmobilers); Dennis McAuliffe Jr., *Snowmobilers Could Shift Into Park Again: U.S. May Ease Ban on Vehicles in Yellowstone*, WASH. POST, Feb. 15, 2002, at A3 (noting new changes to allow snowmobile use).

141. See Wagner, *supra* note 72, at 471; see also Robert W. Adler, *Addressing Barriers to Watershed Protection*, 25 ENVTL. L. 973 (1995) (discussing problems in watershed programs).

142. See Cokie Roberts, *Internet Could Become a Threat to Representative Government*, SALT LAKE CITY TRIB., April 5, 1997, at A11.

opposition to electronic input wrongly confuses the Internet's capacity for promoting civic engagement with an appropriate concern for maintaining the distinction between direct and representative democracy.¹⁴³

Two potential objections are more troubling. Several legal scholars find rulemaking processes too "ossified" by complicated analytical procedures designed to measure the costs and benefits of a particular course of action and by judges hostile to an agency's regulatory mission.¹⁴⁴ Although the reforms suggested here do create more work for those agencies most encumbered by these analytical burdens, the potential gains in civic engagement seem to outweigh the risk of further delay. This is especially true when greater deployment of information technology should shorten turn-around times between proposal and promulgation of agency rules.

A second and related objection states a truism. Increasing transparency does entail efficiency losses. However, electronic rulemaking and improved information technology could promise that the process would be more open and effective without incurring too high a productivity penalty.

III. OTHER MEASURES TO INCREASE TRANSPARENCY

The previous section explored how the Internet could make notice and comment rulemaking more open. But, online tools can also make administrative processes more "permeable" so that small businesses and citizen groups can follow a proceeding and offer their input earlier.¹⁴⁵ This section explores how such tools could be deployed in earlier stages of rulemaking and in the permitting process.

A. Listservs and Other Tools

The transparency of online rulemaking can certainly change the formal comment stage of the process, but additional mechanisms will be needed if the rule development process is to become more accessible. Often participation is invited too late in the process, after options have been

143. See ANDREW L. SHAPIRO, *THE CONTROL REVOLUTION: HOW THE INTERNET IS PUTTING INDIVIDUALS IN CHARGE AND CHANGING THE WORLD WE KNOW* 195 (1999) (discussing the Internet and electronic activism's impact on American politics).

144. See Freeman, *supra* note 89, at 9 (noting increased analytic requirements imposed on agencies makes ossification worse); Thomas O. McGarity, *The Courts and the Ossification of Rulemaking: A Response to Professor Seidenfeld*, 75 *TEX. L. REV.* 525, 539-556 (1997) (stating that courts have been integral to the ossification of informal rulemaking); see generally McGarity, *supra* note 9 (discussing effects of ossification on agencies).

145. See Anne E. Simon, *Valuing Public Participation*, 25 *ECOLOGY L. Q.* 757, 758 (1999) (suggesting permeability image for regulatory process).

framed and data has been gathered.¹⁴⁶ As a former EPA Assistant Administrator for Air and Radiation has observed, “[v]ery early involvement of the public in actually choosing the options to be analyzed (and the data to be collected) is vitally important if the public actually are to have frequent opportunities to influence more than just minor changes in EPA’s thinking.”¹⁴⁷

At present, only Washington-based groups can closely monitor the development of a rule as it is drafted by agency working groups.¹⁴⁸ This enables them to offer their input at key, early stages. Outside the Beltway, individuals, small businesses, grassroots consumer, and environmental groups are effectively barred from having this type of substantive input as a proposal is crafted.

An EPA example illustrates the problem. In July 2001, the agency proposed new air pollution regulations to control hazardous emissions from coke ovens in the steel industry.¹⁴⁹ The outcome of this rulemaking will greatly impact the communities surrounding the approximately twenty-five

146. Despite open government laws, access to information remains asymmetrical for citizen groups, local governments, and small businesses. See JoAnne Holman & Michael A. McGregor, “Thank You for Taking the Time to Read This:” *Public Participation via New Communication Technologies at the FCC*, 159 JOURNALISM & COMM. MONOGRAPHS 160-69 (Winter 2001).

147. Chuck Elkins, *Who Chooses the Alternatives to be Studied?*, National Dialogue on Public Involvement in EPA Decisions, at <http://www.network-democracy.org/epa-pip/archive/seq01055.html> (last visited Feb. 27, 2002.). See also Carol E. Hays, Any Comments?: An Analysis of the Factors Influencing the Participation of Organized Interests in Federal Administrative Rulemaking Proceedings 163-204 (1997) (unpublished Ph.D. dissertation, Southern Illinois University (Carbondale)) (on file with Barbara H. Brandon) (performing a chronological and a quantitative analysis of group participation in wetlands rulemakings from 1980 to 1995). Hays points out that smaller regional and local groups lacked the time and technical expertise to be effective participants in many of the EPA and Corps of Engineers rulemakings under § 404 of the Clean Water Act, 33 U.S.C. § 1344. (2000). As she notes, this is not just a question of staff or volunteer resources—it also is a function of the difficulty of tracking issues on the national stage, coupled with the technical complexity of many proposals. See *id.* at 195.

148. Hays points out that national environmental groups also participate at the pre-proposal level on topics of interest to them, but that they are stretched too thin. See *id.* at 181, 195-96, 214.

149. See National Emission Standards for Hazardous Air Pollutants for Coke Ovens: Pushing, Quenching, and Battery Stacks, 66 Fed. Reg. 35,326 (July 3, 2001) (to be codified at 40 C.F.R. pt. 63). Coke ovens emit high levels of carcinogens, and Congress highlighted this source for specialized treatment in the 1990 amendments to the Clean Air Act § 112(d)(8), § 112(i)(8) § 112(n)(2), 42 U.S.C §§ 7412(d)(8), 7412(i)(8), 7412(n)(2) (2000). This particular rulemaking addresses pushing, quenching and combustion stack emissions from these plants.

active coke plants in the country.¹⁵⁰ Nevertheless the comment period was only open for ninety days.¹⁵¹

EPA received little commentary on this proposal, which is not surprising.¹⁵² Local environmental groups in the Pittsburgh area had no prior notice that this proposal was forthcoming.¹⁵³ No national environmental group participated in this rulemaking, and the ninety-day time period limited the opportunity that local groups had to develop meaningful commentary on this complex topic. As several observers have noted, it takes time to coordinate and prepare effective comments, especially when a topic is technically challenging.¹⁵⁴ This is especially difficult for local groups that lack the staff resources of the national groups.¹⁵⁵

The difficulties facing these local groups should be contrasted with the options available to the American Iron and Steel Institute and its member companies. The industry had the time and the resources to influence this

150. See National Emission Standards for Hazardous Air Pollutants for Coke Ovens: Pushing, Quenching, and Battery Stacks, 66 Fed. Reg. at 35,328 (noting twenty-five coke plants operating sixty-eight coke oven batteries as of January 2000).

151. EPA had long failed to meet statutory schedules for promulgating MACT standards under § 112, 42 U.S.C. § 7412 (2000). A longer comment period would not significantly impact a program that is often well behind its statutory implementation schedule.

152. See Docket Index A-2000-34 (on file with Barbara H. Brandon). EPA received only a total of 18 comments on this proposal.

153. Pittsburgh has two active coke plants, including the nation's largest, USX's Clairton Coke Works; two local environmental groups have focused much of their attention on these facilities. Martin Arnowitz, Western Pennsylvania Director of Clean Water Action learned of the proposal from the Pennsylvania Department of Environmental Protection in a conversation on another matter in mid-July. See Telephone Interview with Martin Arnowitz (Mar. 15, 2002) Walter Goldberg, President of the Group against Smog and Pollution, learned of the proposal in late July. See Telephone Interview with Walter Goldberg (Mar. 15, 2002). Neither group has the resources to track the Federal Register closely.

154. See Hays, *supra* note 147, 43-44, 181-204, 208-209. Holman and McGregor similarly point out that "[r]egulators will be more receptive to proposals from the public if those suggestions are couched in familiar terms, and reflect professionalism and expertise." Holman & McGregor, *supra* note 146, at 165. Thus information that is shared between policymakers and the public leads citizens to formulate specific and targeted recommendations and increases the effectiveness of public input. See Perritt, *Electronic Agency*, *supra* note 30, at 99 (stating that participation is more effective when public is well informed); see generally MULLEN, *supra* note 34.

155. See HAYS, *supra* note 147, at 181, 195-200, 206-08. In the coke oven context, EPA did offer the public the opportunity to request a public hearing at its offices in Research Triangle Park in North Carolina. But this was not a convenient locale for groups in the Midwest. Dean Perritt has suggested a possible alternative for situations like this. He advocates convening an "electronic hearing" that is announced in the *Federal Register* and points to a Web site where all the relevant electronic documents referenced in the proposed rulemaking are posted. See Perritt, *ELECTRONIC DOCKETS*, *supra* note 26.

process as the proposed standards were framed; they undoubtedly supplied much of the data. They also had the resources to track EPA's activities closely and to meet with members of working group drafting the proposed standards if they so desired.

There are some solutions to this asymmetry. Making key regulatory documents available online prior to proposal of the rule could shift this dynamic.¹⁵⁶ In 2001, the ABA recommended establishing an electronic service where interested parties could enroll to receive automatic notifications of developments on particular matters listed in the Unified Agenda.¹⁵⁷ The ABA also suggests that each agency posts its section of the Unified Agenda on its Web site and that this material be made easily searchable.¹⁵⁸

These recommendations would do much to establish a continuous electronic record for each rulemaking proposal from its gestation to its promulgation.¹⁵⁹ The ABA's listserv recommendation could also be implemented in a manner that provides e-mail notification to all subscribers once a particular document or draft has been publicly released to one stakeholder. Alternatively, agencies could establish Web pages for particular proposals where materials could be posted as they are released.

The NRC and the Federal Highway Administration (FHWA) have also experimented with other approaches. The NRC has established an online Technical Conference Forum where the public can offer input on draft rulemakings, draft guidance and other initiatives.¹⁶⁰ For instance, this site

156. In 1996, Congress enacted the Electronic Freedom of Information Act Amendments, Pub. L. No. 104-231 to guarantee public accesses to governmental information by electronic means. A 1999 OMB Watch critiques the Act's implementation. See Patrice McDermott, *A People Armed?* (1999). E-FOIA encourages federal agencies to utilize the Internet to provide information to the public but the Act does not establish rules to assure that the public has easy online access to policy documents and databases. The proposed E-Government Act of 2002 has several provisions that would supplement these requirements.

157. As the Administrative Law Division observed, "one could argue that the impulse behind the Unified Agenda demands such a step." ABA REPORT, *supra* note 65, at 12.

158. See *id.* at 11-12. This is a worthwhile suggestion. At present a user without access to Lexis or Westlaw can only browse the Unified Agenda. This becomes very time consuming if an agency has large rulemaking components. The OIRA Disclosure Memorandum is unclear on how "searchable" the Office plans to make the Agenda. See OIRA disclosure memorandum, *supra* note 113 (describing OIRA disclosure procedures). At present, the Regulatory Information Service Center in the General Services Administration arranges for the University of Massachusetts to host the files that make up the Unified Agenda. See also *The Regulatory Plan and the United Agenda*, at <http://ciir.cs.umass.edu/ua/> (Mar. 7, 2002) (providing the Regulatory Information Service Center's main publication is the Unified Agenda).

159. See *supra* note 107 (discussing regulatory tracking systems).

160. See <http://techconf.llnl.gov/> (last visited Sept. 11, 2002).

shows the Commission's plans for upgrading its fuel cycle facility inspection program. The site has background materials, a document library and an asynchronous discussion forum.¹⁶¹

The FHWA has adopted a community of practice approach (CoP) using asynchronous discussions to promote greater public involvement. In order to encourage states to use rumble strips on shoulders to reduce road accidents the agency created a Web-enabled community of state and federal governmental officials where individuals could share information, resolve technical matters and engage in debate with each other and the general public.¹⁶² In addition, the Administration has established a similar vehicle to encourage discussion of the NEPA process and related environmental issues in transportation decisionmaking.¹⁶³

B. Online Permitting

Similar types of participatory reforms would also work in the areas of permitting and licensing, another key function of the administrative state. A modest restructuring would make these activities much more visible and allow many more Americans to offer their thoughts on critical local issues whenever a particular activity is authorized or renewed.

The first step would be online posting of permit applications and renewals.¹⁶⁴ At present, such materials are only accessible if the public travels to a federal, state or local office to examine an application. Because many groups lack the resources to gather this necessary information, public

161. See <http://techconf.llnl.gov/> (last visited Sept. 11, 2002). The NRC is also experimenting with placing draft rule text online, available at <http://ruleforum.llnl.gov/cgi-bin/rulemakedc?type=risk> (last visited Sept. 12, 2002).

162. See FEDERAL HIGHWAY ADMINISTRATION KNOWLEDGE SHARING SUCCESS STORY: RUMBLE STRIPS GOVERNMENT TO GOVERNMENT COMMUNITY OF PRACTICE, available at <http://www.km.gov/stories/stories.html> (last visited Sept. 15, 2002). This document contains an interesting discussion of the program's success and the lessons that were learned for future projects.

163. See Fed. Highway Admin., Re: NEPA, available at <http://nepa.fhwa.dot.gov/ReNepa/ReNepa.nsf/home>, (last visited Sept. 22, 2002); see also J. Woody Stanley, Christopher Weare, & Juliet Musso, "Participation, Deliberative Democracy, and the Internet: Lessons from a National Forum on Commercial Vehicle Safety" forthcoming in the "Prospects for Electronic Democracy: An Interdisciplinary Conference" at Carnegie Mellon University Sept 20-21, 2002 Proceedings.

164. As Professor Rena Steinzor has observed in the environmental area, the complexity of the permitting process, particularly a renewal, poses a major obstacle to public participation. She wrote that "[w]hile I have no way to prove it, I would be shocked to find anyone who would disagree with the assertion that public participation in the process of renewing existing permits is virtually nonexistent." Rena I. Steinzor, *EPA and Its Sisters at 30: Devolution, Revolution or Reform?*, 31 THE ENVTL. L. REP. 11,086, 11,089 (2001).

participation can easily become a fig leaf.¹⁶⁵ This is especially true when a federal office located in another state is the sole repository of publicly available information on a particular application.¹⁶⁶

Posting permit applications online should not impose a burden on the licensor. An applicant can easily be required to submit information electronically where it can be easily converted into HTML or a PDF file. Indeed applicants already submit many applications electronically.¹⁶⁷

In addition, agencies can use the Internet to improve existing public notification procedures. Instead of just placing legal notices in local publications, an agency can easily use listservs, e-mail or bulletin boards to notify local governments and existing community organizations of pending applications. As Professor Foster has noted, obscure placement of these notices can effectively deprive citizens of their opportunity to comment.¹⁶⁸

Just as in rulemaking, the Internet's educational capacity may also come into play. Agencies can use the Web to make it easier for the public to decipher the complexities in administrative review and approval functions. By posting guides that explain the permitting process in non-technocratic terms, an agency could improve public understanding of its mission. This could have a large payoff in the environmental arena, especially if state or federal agencies amplify and explain technical complexities to a lay audience online. In particular, this would remedy a long-term EPA failing.¹⁶⁹

Next, agencies should establish online databases that help citizens to assess the merits of a particular application. A good model already exists. The EPA has a clearinghouse that lists the technology determinations made in issuing permits under the Clean Air Act.¹⁷⁰ This can be a most complex

165. See DAVIES & MAZUREK, *supra* note 28, at 159-60 (noting faults of notice and comment procedure in garnering public participation).

166. Trade secret and confidential business information would be handled as they are now.

167. RFF reports that "New Jersey now receives more than eighty percent of its air permit applications electronically." See TERRY DAVIES, ET AL., RES. FOR THE FUTURE REFORMING PERMITTING 9 (2001), available at http://www.rff.org/reports/PDF_files/reformingpermitting.pdf (last visited Apr. 1, 2002).

168. See Sheila Foster, *Justice from the Ground Up: Distributive Inequities, Grassroots Resistance, and the Transformative Politics of the Environmental Justice Movement*, 86 CAL. L. REV. 775, 814-15 (1998) (describing permitting notification difficulties faced by a minority community challenging the siting of waste disposal facilities in Chester, Pennsylvania).

169. See DAVIS & MAZUREK, *supra* note 28, at 159-60 (noting the EPA's inadequacies in environmental permitting).

170. See the RACT/BACT/LAER CLEARINGHOUSE, available at <http://cfpub.epa.gov/rblc/htm/bl02.cfm> (last visited Mar. 15, 2002). The Clean Air Act requires new sources to install differing levels of technology depending on the region's air quality. Simply put,

process as reflected in the three acronyms in the site's name, RACT, BACT and LAER, but this archive allows citizens to assess whether a particular draft permit asks enough from the company.

The Web also can play an additional role. Informational resources on the Internet enable citizens to increase the technical sophistication of their comments. As an example, online air quality models are now available that permit groups to contest the technical simulations offered by the applicant. This in turn should promote a more thorough review of the application by the licensor.¹⁷¹

Regional EPA offices have also taken some steps in this direction. Region 9 posts draft Clean Air Act permits on a Web site¹⁷² and Region 10 does the same for Clean Water Act permits.¹⁷³ Regions 4 and 5 post their correspondence with state agencies about the acceptability of state drafted Clean Air Act permits.¹⁷⁴

Business interests may oppose such efforts, but confidential business information and trade secrets can be treated in the same manner as they are now. Besides, large law firms and consultants routinely maintain these materials in their files in order to guide clients in administrative licensing matters.¹⁷⁵ The Web can cheaply and efficiently provide the public with similar resources and such archives should be created now.¹⁷⁶

dirtier air requires new sources to install more expensive technology. State or local agencies make most of these decisions.

171. See Pildes & Sunstein, *supra* note 39, at 91; Felleman, *supra* note 71, at 193-219 (arguing environmental sustainability depends on integration of ongoing technology systems and participatory democracy).

172. See EPA REGION 9 AIR PROGRAMS: AIR PERMIT PROGRAM, at <http://www.epa.gov/region9/air/permit/index.html> (last visited Mar. 15, 2002) (providing draft permits).

173. See EPA Region 10 The Pacific Northwest: Draft NPDES Permits, at <http://yosemite.epa.gov/R10/WATER.NSF/95537302e2c56cea8825688200708c9a/69ff15a642cd3e2c882566650079408d?OpenDocument> (last visited Mar. 15, 2002) (providing draft permits and modifications).

174. See EPA Region 4: Air Permitting, at <http://www.epa.gov/region4/air/permits/index.htm> (last visited Mar. 15, 2002) (listing permits and notices for Region 4); EPA Region 5: Air and Radiation Division, at <http://yosemite.epa.gov/r5/ardcorre.nsf/6884a425aa073c2a862564b4004cc5be?OpenView> (last modified May 14, 2002) (providing submitted correspondence by category).

175. One argument that business interests often make against disclosure—that the agency data may be inaccurate—has no applicability in this context. Archives of applications and issued permits reflect the regulatory status quo in licensing matters.

176. Much of this data may already be archived on state and federal Intranets and could easily be transferred to public sites.

IV. ONLINE DIALOGUES

Online dialogues can work well as a public participation tool in developing policies and regulations at the national level. As Beierle notes, they operate as an “electronic commons” that can bring together thousands of Americans in a virtual forum.¹⁷⁷ This tool could be utilized broadly; a discussion could serve as an adjunct to an advanced notice of proposed rulemaking, a proposed rulemaking, a federal advisory committee act (FACA) proceeding or in developing a general statement of policy. This section will examine two rudimentary steps that the federal government has taken in this direction and suggest further efforts that could be taken.¹⁷⁸

A. The National Dialogue on Public Involvement in EPA Decisions

In Summer 2001, EPA held a National Dialogue on Public Involvement in EPA Decisions.¹⁷⁹ This two-week online discussion complemented a formal notice and comment process on the agency’s draft Public Involvement Policy (PIP).¹⁸⁰ The dialogue brought together 1166 people from all fifty states, and Guam to solicit thoughts on how EPA should implement the policy.¹⁸¹ Afterwards, RFF published an assessment of this effort, *Democracy On-line: An Evaluation of the National Dialogue on Public Involvement in EPA Decisions*.¹⁸²

A little background on the policy will help in assessing the Dialogue as a public participation tool. After twenty years EPA decided to update its first

177. See BEIERLE, *supra* note 5, at 1.

178. Other efforts have occurred. The GAO has reported that DOT has have held chat room discussions during some rulemaking comment periods. See GAO RULEMAKING REPORT, *supra* note 19, at 11.

179. U.S. ENVTL. PROT. AGENCY & INFO. RENAISSANCE, NATIONAL DIALOGUE ON PUBLIC INVOLVEMENT IN EPA DECISIONS, at <http://www.network-democracy.org/epa-pip/welcome.shtml> (last visited Mar. 14, 2002).

180. The formal comment process and the dialogue occurred simultaneously, but the registrants’ comments in the Dialogue were not part of the official administrative record. EPA repeatedly alerted the participants that if they wanted to comment formally on the draft involvement policy they had to use the comment submission form on the Dialogue Web site. See U.S. ENVTL. PROT. AGENCY & INFO. RENAISSANCE, NATIONAL DIALOGUE ON PUBLIC INVOLVEMENT IN EPA DECISIONS: SUBMITTING FORMAL COMMENT ON EPA’S DECEMBER 28, 2000 DRAFT PUBLIC INVOLVEMENT POLICY, at <http://www.network-democracy.org/epa-pip/comment/comment.shtml> (last visited Mar. 14, 2002).

181. Final registration data is from the contractor’s files. See *id.* at 21-23. Participants also came from Canada, Australia and South Africa. See *id.*

182. See *id.* (explaining RFF’s work was also funded by the grant from The William and Flora Hewlett Foundation).

agency-wide Public Participation Policy.¹⁸³ In October 1999, a cross-program workgroup at EPA began work, and by Fall 2000 the Agency wanted public input on a new draft policy.¹⁸⁴

Initially, EPA had wanted to hold a series of public meetings on the policy in various venues around the country. The agency had done this when developing the earlier policy;¹⁸⁵ however, funding was unavailable for this type of outreach. EPA's Policy Office¹⁸⁶ then decided that an online discussion might be as good an alternative to a series of public meetings in scattered locales.¹⁸⁷

Both the Agency and its contractor, Information Renaissance, aggressively recruited participants through targeting organizations, mailing lists and listservs.¹⁸⁸ The Dialogue was structured around an agenda that highlighted key elements in the policy. In addition, expert panelists were recruited from varied interest groups, academia, and government to help frame issues for discussion. Finally, a Briefing Book of materials was assembled to educate the participants.¹⁸⁹

183. See Responsiveness Summary and Preamble on Public Participation Policy, 46 Fed. Reg. 5,736 (Jan. 19, 1981) (describing EPA's Innovations Task Force recommended that the policy be revisited in 1999 in "Aiming for Excellence: Actions to Encourage Stewardship and Accelerate Environmental Progress" (EPA 100-R-99-006)).

184. See U.S. ENVTL. PROT. AGENCY, *Engaging the American People: A Review of EPA's Public Participation Policy and Regulations with Recommendations for Action* (Dec. 2000), available at http://www.epa.gov/stakeholders/pdf/eap_report.pdf (last visited Mar. 14, 2002).

185. See RESPONSIVENESS SUMMARY AND PREAMBLE ON PUBLIC PARTICIPATION POLICY, 46 Fed. Reg. 5736 (Jan. 19, 1981) (indicating that in 1980, EPA held public meetings in Boston, Chicago, Columbus, Minneapolis, Denver, Seattle, Portland, Boise, Anchorage and Washington). Close to 500 Americans attended these meetings.

186. See *Welcome to the Online National Dialogue* (1999) (explaining this office had conducted a similar online discussion in September 1999 on Libraries as a Community Resource for Environmental Information), available at <http://www.network-democracy.org/epa/> (last visited Mar. 14, 2002).

187. See *Draft Public Involvement Policy*, 65 Fed. Reg. 82,335, (Dec. 28, 2000) (asking for comment on the Draft Public Involvement Policy). EPA requested that all public comments be submitted by April 27, 2001. See *id.* After funding for the dialogue was found, the agency decided to reopen the comment period on the policy and announce the online dialogue in the Register. See *Draft Public Involvement Policy—Extension of Public Comment Period and Announcement of Public Dialogue*, 66 Fed. Reg. 21,755 (May 1, 2001).

188. The original registration goal was 500 participants. EPA asked Information Renaissance to lift the registration ceiling during the middle of the first week of the Dialogue.

189. See *infra* Section 4B, RuleNet lacked such a resource. See also Mathew L. Wald, *Nuclear Agency to Use Internet to Receive Ideas for New Rules*, N.Y. TIMES, Nov. 24, 1995, at A 30 (quoting Eileen Quinn, of the Union of Concerned Scientists, criticizing the NRC

Once the Dialogue began, participants posted messages on daily topics in threads that could be sorted in various formats.¹⁹⁰ The panelists' exchanges helped to build the discussion, especially since these specialists had been selected for the diversity of their viewpoints.¹⁹¹

In addition, Information Renaissance compiled two or three page summaries that condensed the previous day's discussion. These were posted on the Web site early the following day and promptly e-mailed to the registrants as well. This allowed all the participants to learn what ground had been covered.¹⁹²

Over the course of two weeks, 320 individuals posted messages during the dialogue and many more read the messages and the daily summaries.¹⁹³ At the end of the Dialogue the registrants were asked to fill out a voluntary survey developed by Beierle.

Beierle found that the Dialogue "was a clear improvement over the notice-and-comment process that it complemented."¹⁹⁴ He concluded that: This was not just a normal public participation process put on-line—it is a new process altogether. The number of participants, their locations throughout the country, the variety of times they posted messages, and their varied ways of hearing about the dialogue all speak to the Internet's ability to reach a much larger and broader cross-section of the public than

for not providing background materials and for limiting participation by using excessive jargon).

190. See BEIERLE, *supra* note 5, at 16-17 (discussing how messages could be sorted by date, subject thread or daily topic). Information Renaissance proposed sorting by author, but EPA's Office of General Counsel vetoed this and another proposal to allow participants to submit short biographies on a voluntary basis. See *id.* at 17.

191. Different EPA regional offices also served as hosts for separate days of the dialogue.

192. See Press Release, Resources for the Future Innovative EPA On-Line Dialogue Shows Internet Aids Public Participation in Environmental Decisionmaking (Feb. 6, 2002), (quoting Beierle's observation that many participants relied heavily on the summaries because of the flood of messages and the number of separate threaded topics), available at <http://www.rff.org/news/releases/onlinedialogue.htm> (last visited Mar. 14, 2002).

193. See BEIERLE, *supra* note 5, at 21-28 (noting that Beierle estimated that participants read about seventy messages for each message posted). This cannot be pinned down with accuracy because the federal government's policy on cookies does not allow this data to be tracked precisely. See also *id.*, at 9, 21-30. Web site data shows that each visit averaged about 17 minutes and each viewer read about twenty Web pages. [Each message had its own Web page.] See *id.* at 23. Beierle also determined that the median participant spent half an hour to one hour on the discussion on each of three to five days. This participant also read slightly more than a quarter of all the messages and made slightly fewer than 5 posts. See *id.* at 25; see also the graphical data in chapter three of the report. See *id.* at 23-28.

194. See *id.* at 8-9.

traditional participation processes.¹⁹⁵ Beierle also characterized the discussion as “rich, respectful and well informed.”¹⁹⁶

Beierle also highlights the key dynamic in this type of discussion—its reciprocal nature. Unlike a public comment process, this discussion turned a static paper process into a responsive series of exchanges.¹⁹⁷ This allowed the dialogue to evolve because the participants and the Agency jointly controlled the flow of the discussion. While there was a preset agenda, the participants’ interest in a topic determined how long and how intensively it was discussed.¹⁹⁸

The survey results showed that most participants were highly satisfied with the process and thought that EPA should “definitely or probably conduct such dialogues in the future.”¹⁹⁹ Moreover, the process “clearly reached a far larger and more geographically diverse group than could ever have participated in person.”²⁰⁰ But that said, the group’s demographics²⁰¹ do reflect a wealthy college-educated base.²⁰²

B. Advanced Notices of Proposed Rulemaking and RuleNet

Dialogues could also be utilized to obtain public input prior to proposal, serving as an effective adjunct to an advanced notice of proposed

195. See Resources for the Future Press Release, *supra* note 192.

196. See BEIERLE, *supra* note 5, at 8. This is noteworthy for two reasons. First, EPA’s Office of General Counsel had concluded that the dialogue could not be moderated. Second, many registrants did make highly critical comments of the agency, but the tone of the discussion never degenerated.

197. See *id.* 36-37. However, there were stilted exchanges where the Agency spoke in bureaucratic language designed to obscure its position. See *id.* at 38.

198. See *id.* at 40 (describing an online forum as well suited as a middle ground between control and flexibility of the agenda).

199. See *id.* at 9 (noting in the post-Dialogue survey, seventy-six percent “of the respondents rated the [experience] as very or somewhat positive . . .”). Only nine percent rated it as “very or somewhat negative” with four percent saying that the agency “should definitely or probably not conduct future on-line dialogues.” See *id.*

200. See *id.* at 10. This obvious point has significance. The participant base of this dialogue is much larger than the 1980 proceeding where 500 individuals attended meetings in ten cities. See *supra* note 185. In addition, other Americans, who did not register but were interested in the topic, were free to visit the site as well.

201. EPA made an extensive outreach effort to Native Americans in particular. A participatory divide remained; however, attention needs to be paid to bridging it. Efforts like workshops or online tutorials may be of some help.

202. See BEIERLE, *supra* note 5, at 25-28 (describing participants, who considered themselves more knowledgeable, as posting with greater frequency) This was not unexpected. The less frequent posters attributed their “relative inactivity” to thinking that others had already made their point, to being too busy or not knowing enough about EPA procedures. See *id.* However, it is noteworthy that those who felt less knowledgeable launched most of the topics. See *id.* This shows how reciprocal the discussion was.

rulemaking. Often an agency will publish a notice in the *Federal Register* to solicit public input on a particular topic prior to shaping a proposed rule. An online dialogue would be an effective supplement that allows interested parties to exchange their thoughts and viewpoints with each other and with the agency.²⁰³ The NRC has tried such an experiment.

In 1996, the NRC used an online discussion during its “RuleNet” initiative to determine whether the fire protection rules governing nuclear power plants should be changed from prescriptive rules to performance-based standards. After posting background material online, the Commission hosted an electronic forum where both the agency and the participants identified topics that needed to be addressed in formulating a new rule.²⁰⁴ A moderator, hired by the agency, led the discussions, summarized the comments, and periodically asked participants to vote in favor of or against various positions.²⁰⁵ The NRC’s stated goal was the solicitation of a broad range of public input, but it also tried to develop a consensus proposal as would occur during a negotiated rulemaking.

The Commission’s effort is hard to assess. Michele Ferenz, Colin Rule, and others have viewed RuleNet as a “mixed success”²⁰⁶ and indeed the

203. The documents generated during a negotiated rulemaking could also be posted online, which could serve to broaden input into the negotiations. Once viewed as a promising mechanism to increase the settlement of contested regulatory issues, negotiated rulemaking has fallen on hard times. Professor Cary Coglianese’s research indicates that this process has not reduced litigation as its proponents had hoped it would. See Cary Coglianese, *Assessing Consensus: The Promise and Performance of Negotiated Rulemaking*, 46 DUKE L. J., 1255, 1257 (1997). Moreover, EPA, which had utilized the process the most, has used it much less frequently during the 1990s. See DAVIES & MAZUREK, *supra* note 28, at 156-158. Increasing the transparency of the process might reinvigorate it by providing potential objectors to the negotiated rule with the opportunity to offer input to an appropriate side during the negotiations. See also William Funk, *Bargaining Toward the New Millennium: Regulatory Negotiation and the Subversion of the Public Interest*, 46 DUKE L.J. 1351 (1997).

Others disagree with Coglianese’s assessment. See Philip J. Harter, *Assessing the Assessors: The Actual Performance of Negotiated Rulemaking*, 9 N.Y.U. ENVTL L.J. 32 (2000); Philip J. Harter, *Fear of Commitment: An Affliction of Adolescents*, 46 DUKE L.J. 1389 (1997); Jody Freeman & Laura I. Langbein, *Regulatory Negotiation and the Legitimacy Benefit*, 9 N.Y.U. ENVTL L.J. 60 (2000). But see Cary Coglianese, *Assessing the Advocacy of Negotiated Rulemaking: A Response to Philip Harter*, 9 N.Y.U. ENVTL L.J. 386 (2001).

204. In effect, this was an online substitute for an advanced notice of proposed rulemaking.

205. See Croley, *supra* note 95, at 36 (noting rulemaking is not an electoral process where an agency’s decision is based on the views of the dominant group); see also *supra* note 130.

206. See Michele Ferenz & Colin Rule, *RuleNet: An Experiment in Online Consensus Building*, in LAWRENCE SUSSKIND ET AL., *THE CONSENSUS BUILDING HANDBOOK* 879-80 (Sage Publications 1999).

NRC has yet to propose a standard in this area.²⁰⁷ But, most of the negatives are attributable to the overly ambitious goals of the experiment. Consensus-building in rulemaking is hard to do face-to-face as the history of negotiated rulemaking demonstrates. Online processes face many more obstacles.²⁰⁸

As a participatory vehicle, Ferenz and Rule found that the discussion was “highly detail oriented” and that “the same small and dedicated core of . . . participants” were the most active.²⁰⁹ They concluded:

Framed in highly technical terms the RuleNet debate left emotional, big-picture policy questions, such as the desirability of commercial nuclear power out of bounds. The result was a process for the initiated few: reactor operators, antinuclear activists, fire protection engineers, and a handful of consultants and academics who specialize in fire safety concerns.²¹⁰

A second problem also arose. The industry trade association precluded its members from speaking individually; all input to the discussion had to be channeled through Washington to avoid visible splits in positions.²¹¹ The Washington-based public interest community was also not forthcoming. This was 1996, and they primarily viewed the exercise as a “toy for techies.”²¹²

While RuleNet did have its pitfalls, a different focus and greater planning could produce better results. Using an asynchronous forum as a vehicle for public participation, rather than as a consensus-building device, should accomplish more. This would allow the forum to focus on how to frame issues for future resolution, rather than trying to reach a compromise online.²¹³

207. See 66 Fed. Reg. 65,661 (Dec. 19, 2001) (to be codified at 10 C.F.R. pt. 50) (explaining that the NRC was making available a draft rule wording of a possible amendment). This was not a notice of proposed rulemaking.

208. As a moderator in the RuleNet experiment observed: “[T]he relative anonymity of the computer medium may have encouraged participants to exaggerate their views and to state them more aggressively. The *complete* lack of face-to-face meetings in this case and not the medium itself may have been a major factor affecting online behavior.” See Connie Ozawa, *Making the Best Use of Technology in THE CONSENSUS BUILDING HANDBOOK*, *supra* note 206, at 416 (emphasis in original).

209. See *id.* at 889.

210. See *id.* at 891.

211. See *id.* at 892.

212. See *id.* at 893.

213. See THOMAS C. BIERLE & JERRY CAYFORD, *RESOURCES FOR THE FUTURE, DEMOCRACY IN PRACTICE: PUBLIC PARTICIPATION IN ENVIRONMENTAL DECISIONS* (2002) (analyzing environmental case study record to assess what factors lead to success and what efforts improve public involvement).

C. Federal Advisory Committees and Public Meetings

Online discussions could also prove a useful adjunct to some FACA proceedings. These committees provide federal agencies with guidance on general policy matters or regulations and often serve as a “meaningful method for citizen input and interchange.”²¹⁴ These committees often become just “Beltway” phenomena with Washington-oriented memberships and agendas set by Washington-based officials.²¹⁵

The General Services Administration has recently promulgated new rules governing agency management of their advisory committees. Unfortunately, these new rules do not mandate use of the Internet as a notification or participatory tool.²¹⁶ It should be simple and routine for agencies to use listservs to notify interested members of the public about meetings and materials.

In addition, agencies should be required to maintain a Web page for each chartered committee where meeting notices, minutes and materials used by committee members could be posted and where the public could comment on the activities of the committee. The FTC has already taken these steps in administering its advisory committee on online privacy and security and this approach be mandated government-wide.²¹⁷

Online dialogues should also be considered as an option when broader input is sought. These dialogues should also be easy to setup. Interest group presentations could be placed online and representatives from each group could exchange views with each other and the public.²¹⁸ Fears of

214. See DAVIS AND MAZUREK, *supra* note 28, at 158.

215. See Croley & Funk, *supra* note 80, at 453 (discussing the Federal Advisory Committee Act. and its implementation). The authors, two law professors conducted this study for the Administrative Conference of the United States just prior to its abolition.

216. See Federal Advisory Committee Management, 66 Fed. Reg. 37,728, 37,340 (July 19, 2001) (to be codified at 41 C.F.R. pts. 101-6 & 102-3) (suggesting in § 102-3.95 (d) that agencies explore using the Internet as a way to be inclusive).

217. FTC, ADVISORY COMMITTEE ON ONLINE ACCESS AND SECURITY (establishing Advisory Committee in December 1999 to provide advice and recommendations to the FTC regarding implementation of fair information practices by domestic commercial Web sites), available at <http://www.ftc.gov/acoas/index.htm> (last visited Mar. 18, 2002); see also U.S. ENVTL. PROT. AGENCY, OFFICE OF WATER, TOTAL MAXIMUM DAILY LOAD (TMDL) PROGRAM, TMDL ADVISORY COMMITTEE, (explaining that EPA followed a similar course to that of the FTC when it convened a Federal Advisory Committee to help it develop new water quality planning regulations, and posted the minutes of the meeting online with other materials), available at <http://www.epa.gov/owow/tmdl/advisory.html> (last visited March 18, 2002).

218. This recommendation should not be misinterpreted. Online hearings are not a substitute for traditional public hearings. In particular, federal and state officials should continue to hold public hearings on local matters such as permitting decisions, Superfund cleanups and other such matters in the relevant locale. This is particularly true where the

disruptive behavior can be addressed by the adoption of viewpoint-neutral participation rules.²¹⁹

Moderated dialogues offer other advantages. They can be administered as efficiently as a series of public meetings, especially with electronic notification. The following example illustrates the limitations of the present practice of holding a few hearings in scattered locales across the country. In late 1999, the FDA held three public meetings in Chicago, Oakland, and Washington on the safety of bio-engineered foods.²²⁰ These meetings were well-attended according to the press coverage and the debate was heated.²²¹ An online dialogue would have broadened the FDA's audience beyond these three venues, letting it hear what consumers nationwide thought about the use of biotechnology in foods.²²²

Additionally, a moderated discussion can be both civil and deliberative, whereas public hearings can often descend into polemical slugfests, full of one-sided diatribes. Had the FDA used an online dialogue to discuss biotechnology in foods, it could have adopted a roundtable format where opposing experts discuss the issues with each other, the agency, and the public.²²³ This allows all sides to make considered presentations, and to respond fully to each other claims. The discussion also serves as an informative online archive for others interested in the issue.

This latter point is significant. While FDA archived its public hearing transcripts online, the material was not searchable. This made it highly unlikely that the public would peruse 1330 pages to learn more about the topic. In contrast, an online dialogue automatically creates a long-term,

matter is controversial. The point here is that asynchronous discussions are a worthy add-on, particularly where a policy topic is national in scope.

219. See *infra* text accompanying notes 244-52.

220. See Press Release, U.S. Department of Health and Human Services, FDA Announces Public Meetings on Bio-engineered Foods (Oct. 18, 1999) (describing public meetings were scheduled for Chicago, Oakland and Washington in November - December, 1999) available at <http://fda.gov/bbs/topics/NEWS/NEW00695.html> (last visited Mar. 5, 2002).

221. See William Claiborne, *A Biotech Food Fight: Two Sides Square Off at FDA Hearing*, WASH. POST, Nov. 19, 1999, at A03 (describing interest was intense at the Chicago forum); Greg Burns and Phat X. Chiem, *Food Fight for the FDA: Dozens Protest Use of Altered Ingredients*, CHIC. TRIBUNE, Nov. 19, 1999.

222. See Public Comments (displaying an archive of public comments solicited by the FDA through their web site), at <http://www.fda.gov/ohrms/dockets/dockets/99n4282/99n4282/c000501.pdf> (last visited May 13, 2002).

223. See Network Democracy Social Security at <http://www.network-democracy.org/social-security> (last visited May 13, 2002) (demonstrating a successful incorporation of a roundtable discussion into an online discussion of Social Security reform). Leading lawmakers and national policy experts debated the issues fully and civilly and interacted with online audience. See *id.*

searchable archive of the discussion, which can become an educational resource for the general public.

Finally, online dialogues could be more participatory than many public hearings. Most often, federal officials convene a hearing and listen passively as presentations are made. Few questions are asked and substantive matters are almost never discussed in depth. During five public hearings on emission standards for sport utility vehicles, the EPA staff addressed only a handful of questions to the presenters;²²⁴ the whole effort could just as easily have been carried out by mail.²²⁵ This is in notable contrast to the numerous interchanges between EPA officials and the registrants during the Public Involvement Dialogue.²²⁶

D. Deliberative Governance and Online Dialogues

Online dialogues could partially resolve another policy dilemma. The OMB has placed limits on the number of advisory committees that each agency may charter.²²⁷ Because these committees can sometimes work out a limited consensus on a policy issue, this limitation is troubling. Online dialogues might promote more collaborative frameworks to resolve some aspects of a policy matter. This is not a claim that consensus can be achieved online; it is a statement that more visible government decisionmaking is a public good.

This point is worth expanding upon. Robert Reich has advocated a broader vision of public administration. He thinks agencies should reach

224. See U.S. ENVTL. PROT. AGENCY, TIER 2/GASONLINE SULFUR RULE MAKING (archiving transcripts from the debate), at <http://www.epa.gov/OMSWWW/regs/ld-hwy/tier-2/nprm/tr2-nprm.htm#> (last visited May 3, 2002). This passivity makes sense in that EPA had undoubtedly heard from key outside constituencies in private meetings beforehand. See *id.* The Agency therefore had little need or incentive to explore topics in a public forum. An online dialogue would have created a different dynamic.

225. See Thomas C. Beierle, *Public Participation in Environmental Decisions: An Evaluation Framework Using Social Goals*, RESOURCES FOR THE FUTURE, 21 (expressing view that most public hearings on environmental issues are so pro forma in nature that they should be viewed as “active forms of notice and comment procedures . . .”), at http://www.rff.org/disc_papers/PDF_files/9906.pdf (last visited May 3, 2002).

226. The authors recognize that this may have been an artifact of the topic under discussion. During a more contested rulemaking the dynamic may revert to its real-world form.

227. See Thomas C. Beierle & Rebecca J. Long, *Chilling Collaboration: The Federal Advisory Committee Act and Stakeholder Involvement in Environmental Decision-making*, 29 ENVTL. L. REP. 10,399, 10,403 (1999) (discussing President Clinton’s Executive Order 12,838, which cut the number of advisory committees by one-third); see also DAVIES & MAZUREK, *supra* note 28, at 159 (pointing out that this was a somewhat counterintuitive move given the stress that the Clinton Administration’s reinvention initiatives placed on the need for collaboration and consensus building).

beyond a narrow calculus that focuses just on what each group wants, to adopt a more deliberative conception of what is good for society.²²⁸ This would entail the government engaging in an ongoing dialogue with the public, both to evaluate a problem and to address what is at stake when a particular decision is made.

To illustrate his concept, Reich points to an experiment that William Ruckelshaus engaged in during his second tenure as EPA's Administrator. The agency was faced with imposing a new health-based arsenic standard that had the potential to shut down the Asarco smelter in Tacoma, Washington. In a series of public meetings, Ruckelshaus engaged the local community in a dialogue to explore the classic trade-off between jobs and the environment, and to assess the continuing risks posed by arsenic exposure.

An online dialogue may achieve some of Reich's objectives. Interested parties could explicate their positions in depth and exchange views with the public. Reich hopes that a more transparent deliberation "properly managed, can build on itself" allowing the public to define and evaluate its collective goals.²²⁹ This would be particularly valuable in areas such as environmental risk, where an agency is struggling to decide how protective it should be and the public is faced with the same questions of safety and cost. At best, an interactive deliberation could build a partial consensus and at worst, it could foster greater public appreciation for the complex issues confronting governmental decisionmakers.²³⁰

V. LEGAL AND IMPLEMENTATION ISSUES

Several problems must be surmounted before the federal government can build a fully electronic infrastructure for its rulemaking and policy development processes. Dean Perritt identified several legal and technical matters in his 1995 Report to the Administrative Conference of the United States,²³¹ but the legal landscape has changed since then. In addition, certain practical issues must also be addressed. These concern resources, governmental coordination and the speed of implementation.

228. See Robert Reich, *Public Administration and Public Deliberation: An Interpretive Essay*, 94 *YALE L.J.* 1617, 1632 (1985); see also Pildes & Sunstein, *supra* note 39, at 89-94 (discussing Asarco/Tacoma effort).

229. See ROBERT REICH, *THE POWER OF A PUBLIC IDEA* 6 (1990).

230. *Contra* Cary Coglianese, *Is Consensus an Appropriate Basis for Regulatory Policy?*, ENVIRONMENTAL CONTRACTS 94 (Eric Orts & Kurt Deketelaere, eds. 2001) (outlining arguments in favor and against consensus decision-making).

231. See Perritt, *Electronic Dockets*, *supra* note 26 (enumerating several legal and technical issues).

A. Copyright

Electronic dockets raise new issues regarding copyrighted materials. With paper dockets, copyright and fair use questions did not arise with great frequency. In a print regime, normally only the agency and a limited public audience viewed copyrighted materials.²³² Now electronic docket rooms require agencies to strike a new balance between the competing interests of the public, the agency and the copyright holder.

Problems arise in two areas. First, what should happen when the submitter asserts copyright protection in his or her own comments and second what should happen when a filer transmits a copyrighted document where a third party holds the copyright. The first issue is easy to solve. The government should take the position that submittal of one's own copyrighted material comes with an implied grant that it may use these materials in its internal deliberations.²³³

The second issue is more difficult. Perritt has constructed two arguments to support a governmental privilege that addresses this question. First, he points out that the policies supporting the fair use doctrine buttress a governmental use privilege during internal rulemaking deliberations.²³⁴ Alternatively, he argues that the Copyright Act, the Administrative Procedures Act (APA) and the Freedom of Information Act (FOIA) should all be construed together to allow copyrighted information to be used during the ordinary course of business.²³⁵

However, a governmental privilege does not resolve issues surrounding the public's viewing of copyrighted works in an electronic docket room, nor does it handle new issues raised by passage of the Digital Millennium Copyright Act (DMCA) in 1998.²³⁶ In particular, this statute has

232. See Perritt, *Electronic Dockets*, *supra* note 26 (discussing copyright issues).

233. See *id.* at n.291 (indicating that “[when] a copyright holder submits a copyrighted work there is an implied grant . . . to the government to make use of the submitted work . . .”).

234. See 17 U.S.C. § 107 (2000) (codification of the fair use doctrine); see, Perritt, *supra* note 26 at n.289 (explaining that a governmental privilege would not protect the filer but that a filer may have a fair use privilege under traditional doctrine).

235. See Perritt, *Electronic Dockets*, *supra* note 26, at 20 (arguing that an “agency’s privilege extends to reasonable means of providing public access using current “dissemination technology.”). As Perritt points, out the privilege argument becomes stronger, the more utilitarian the submission. Agencies are likely to rely on items such as a technical standard or a maps during regulatory proceedings. See *id.*

A copyright does not alter agency obligations to disclose materials under FOIA. 5 U.S.C. § 552(a). An agency record that a filer submitted without permission must be disclosed upon request. Perritt, *supra* note 26.

236. See Digital Millennium Copyright Act, Pub. L. No. 105-304, § 1201(a)-(b), 112 Stat. 2863-2864 (1998); see also 17 U.S.C. § 1201(a)-(b) (2000). The DMCA employs a dual approach to control unauthorized copying of digital materials. It prohibits any person

strengthened the hand of the copyright holder by authorizing the erection of “digital fences” around protected works.²³⁷ On the other hand, these new “fences” may provide a solution to the copyright problem in rulemaking dockets.

Technology now allows copyright holders to engineer secure software controls that can prevent purchasers and third parties from making unauthorized copies of digital works.²³⁸ As envisioned, the publishing industry will be able to prohibit all copying of controlled content, whether or not the copying would constitute a fair use. However, the digital code in these rights management systems can also be engineered to protect both the public domain and the rights holder simultaneously. Dan Burk and Julie Cohen, two critics of the DMCA, have outlined a system where fair use software could be built into these rights management systems.²³⁹

Under this scheme, a submitter’s work would be encoded so that the government could copy and download these materials for its use. In addition, code could be written to permit members of the public to read docket submissions multiple times and to copy certain portions. Thought should be given to how extensive these copying rights should be.²⁴⁰

from circumventing a technological control measure and it prohibits the manufacture or importing of any decryption technology that is primarily designed to circumvent technological locks.

237. The DMCA’s impact on the fair use doctrine has been severely criticized by legal scholars. See Glynn S. Lunney, Jr. *The Death of Copyright: Digital Technology, Private Copying, and the Digital Millennium Copyright Act*, 87 VA. L. REV. 813 (2001); see generally John Thieren, *Exorcising the Specter of a ‘Pay-Per-Use’ Society*, 16 BERKELEY TECH. L.J. 979, 1016-17 (2001); Jane Ginsburg, *Copyright Use and Excuse on the Internet*, 24 COLUM.-VLA J. L. & THE ARTS 1, 7-10 (2000); Yochai Benkler, *Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, 74 N.Y.U. L. REV. 354-456 (1999); Pamela Samuelson, *Intellectual Property and the Digital Economy: Why the Anti-Circumvention Regulations Need to Be Revised*, 14 BERKELEY TECH. L.J. 519 (1999); Julie E. Cohen, *Lochner in Cyberspace: The New Economic Orthodoxy of “Rights Management,”* 97 MICH. L. REV. 462-561 (1998).

238. See Mark Stefik, *Shifting the Possible: How Trusted Systems and Digital Property Rights Challenge Us to Rethink Digital Publishing*, 11 DIGITAL CONTENT 137, 138 (1997) (describing how copyright management regimes can provide publishers with far greater control over access to their works), available at http://www.law.berkeley.edu/journals/btlj/articles/12_1/Stefik/html/reader.html (last visited May 13, 2002).

239. See Dan L. Burk & Julie E. Cohen, *Fair Use Infrastructure for Rights Management Systems*, 15 HARV. J.L. & TECH. 41, 55-58 (2001) (setting forth systems that rely either on fair use software or an ingenious public key cryptography scheme).

240. The suggestion presented here may not fully address one problem. Compliance with § 508 of the Rehabilitation Act of 1973, Pub. L. 105-220, 29 U.S.C. § 794d, may require utilization of devices that will print out materials in order to allow a conversion to an accessible format. This should be viewed as permissible as well. The public key cryptography proposals outlined in Burk & Cohen, *supra* note 239, at 54-65, could be invoked to address this issue.

Nevertheless, implementation of such a scheme would strike a fair balance among competing interests.

B. *The First Amendment*

Observers such as Lawrence Lessig²⁴¹ and Neil Netanel²⁴² have pointed out how easily online discussions can be disrupted by anonymous posters who operate in an unfettered manner. The most common problems are incivility, aimlessness, anonymity, the dominance of some high-volume posters and the failure to set clear procedural and behavioral norms. Many experienced observers of online discussions believe that online discourse works best when the discussion includes a moderator.²⁴³

In the public involvement dialogue, EPA counsel took the position that the discussion could not be moderated because of First Amendment concerns.²⁴⁴ The constitutional question turns on public forum analysis and how one characterizes asynchronous discussions.²⁴⁵ If a dialogue is viewed

241. LAWRENCE LESSIG, *CODE AND OTHER LAWS OF CYBERSPACE*, 142-43 (Basic Books, 1999); see also Cass R. Sunstein, *Deliberative Trouble? Why Groups Go to Extremes*, 110 YALE L.J. 71 (2000).

242. Neil Netanel, *Cyberspace Self-Governance: A Skeptical View from Liberal Democratic Theory*, 88 CAL. L. REV. 395, 430 (2000) (commenting on how social gatherings on the Internet can be disrupted by a few individuals).

243. See Berkman Ctr. for Internet & Soc'y at the Harvard Law School. ONLINE DELIBERATIVE DISCOURSE RESEARCH PROJECT, PHASE 1: SPECIFICATION FOR ONLINE ENVIRONMENT PLATFORM, 2.2 at 8-10, available at <http://cyber.law.harvard.edu/projects/deliberation> (last visited May 13, 2002); Stephen Coleman and Gotze, *supra* note 36; see generally Jay G. Blumer & Stephen Coleman, *Realizing Democracy Online: A Civic Commons in Cyberspace 1* (2001), available at <http://www.ippr.org.uk/publications/covers/Realising%20Democracy%20Online%20-%20in%20.pdf> (last visited May 13, 2002); DUTCH MINISTRY OF THE KINGDOM & INTERIOR RELATIONS, *ELECTRONIC CIVIC CONSULTATION: A GUIDE TO THE USE OF THE INTERNET IN INTERACTIVE POLICY MAKING*, available at <http://www.democracy.org.uk/centre/articles/elcivco.pdf> (last visited Mar. 17, 2002); LYNSAY GREEN, *PLAYING CROQUET WITH FLAMINGOS: A GUIDE TO MODERATING ONLINE CONFERENCES*, available at http://olt-bta.hrhc-drhc.gc.ca/download/flamingo_e.pdf (last visited Mar. 17, 2002); LYNSAY GREEN, *ONLINE CONFERENCING: LESSONS LEARNED*, available at <http://www.emoderators.com/moderators/lessonse.pdf> (last visited Mar. 17, 2002).

244. See BEIERLE, *supra* note 5, at 16-17

245. See *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 801 (1985) (stating that in defining the forum under the First Amendment, a court should focus on the access sought by the speaker); see also *Perry Educ. Ass'n v. Perry Local Educators' Association*, 460 U.S. 37, 44 (1982) (finding First Amendment requires equivalent access for a the teachers union and the board of education); *Chicago Police Dep't v. Mosley*, 408 U.S. 92, 95 (1973) (voiding a Chicago ordinance under the First Amendment's public forum doctrine); Daniel A. Farber & John E. Novak, *The Misleading Nature of Public Forum Analysis: Content and Context in First Amendment Adjudication*, 70 VA. L. REV. 1219, 1220 (1984) (reviewing the historical back-drop of public fora and free speech); Noah

as an online public hearing, and the software controls are transparent and administered in a content neutral manner, the constitutional concern should be lessened. However, a different outcome would result from viewing asynchronous discussions as electronic bulletin boards with no potential for encouraging “discursive participation.”²⁴⁶

To date, no First Amendment challenge has arisen contesting the appropriate ground rules for an asynchronous discussion sponsored by an American governmental unit.²⁴⁷ The doctrine in this area is murky. The Supreme Court has focused too often on placing particular for a into one of three place-based categories: a public forum, a limited public forum or a nonpublic forum.²⁴⁸ This analysis becomes very tricky when applied to new media like cable TV systems or the Internet.

*Arkansas Educational Television Commission v. Forbes*²⁴⁹ points in a different direction. In this case, the Supreme Court upheld a public broadcast station’s decision to ban a ballot-qualified candidate from participating in an on-air debate. The Court saw the exclusion as an appropriate editorial judgment made in a viewpoint neutral manner.²⁵⁰ This case could support certain content neutral controls during an online discussion such as limits on the length of posts and the number of messages that can be transmitted by a participant in a single day. Of course, these restraints should be transparent and administered uniformly.

D. Zatz, Note, *Sidewalks in Cyberspace: Making Space for Public Forums in the Electronic Environment*, 12 HARV. J. L. & TECH. 149 (1998) (exploring public entitlements to participate in cyberspace and what a new public forum doctrine might look like).

246. See Paul Brest, *Further Beyond the Republican Revival: Toward Radical Republicanism*, 97 YALE L.J. 1623, 1624 (1988).

247. See *Putnam Pit, Inc. v. City of Cookeville*, 221 F.3d 834, 841 (6th Cir. 2000) (permitting a city to remove an online newspaper’s link to the official municipal Web site). *But see* R. Johan Conrod, Note, *Linking Public Websites to the Public Forum*, 87 VA. L. REV. 1007, 1022 (2001) (criticizing the *Putnam Pit* decision).

248. See Randall P. Bezanon & William G. Buss, *The Many Faces of Government Speech*, 86 IOWA L. REV. 1377, 1401-09 (2001) (exploring the limits of public forum analysis); see also Farber & Novak, *supra* note 245, at 1234-45.

249. 523 U.S. 666, 682 (1998) (holding that “[t]o be consistent with the First Amendment, the exclusion of a speaker from a nonpublic forum must not be based on the speaker’s viewpoint and must otherwise be reasonable . . .”). See also Randall P. Bezanon, *The Government Speech Forum: Forbes and Finley and Government Speech Selection Judgments*, 83 IOWA L. REV. 953, 957-58 (1998) (revisiting the holding of the *Forbes* case).

250. See *Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 518 U.S. 727, 800 (1996) (stating that so long as “the government is acting as a proprietor, managing its internal operations . . . regulations of speech need only be reasonable and viewpoint neutral.”).

A second serious question concerns the propriety of using moderators, and the role agency officials should play during online discussions.²⁵¹ In the public involvement dialogue, the lack of a moderator did not detract from the polite and respectful tone of the discussion, but this was not a forgone conclusion.²⁵² As a prudential measure, agency staff should assume a chairperson-like role during an online discussion, treating the proceeding as if it were a public hearing.

A related First Amendment question concerns what, if any, standards should apply in filtering electronic rulemaking dockets for obscenity and threats. HHS and USDA screen these out²⁵³ whereas EPA and DOT do not.²⁵⁴ Government-wide standards should apply here and the Office of Legal Counsel in the Department of Justice could do much to clarify these matters by recommending a common set of practices.

C. Technology

The development of electronic docket rooms will be an evolutionary process towards systems where all materials are quickly accessible even over low-speed links. Storage as electronic text rather than as scanned images will make dockets more searchable. Instead of using the single word find feature in an Internet browser, users will be able to find what they are looking for far more quickly.²⁵⁵ Given how long some submissions can be, this will be a helpful feature for most end-users.

Thought should also be given to the development of tools that allow the submitter to convert materials almost instantaneously into a format that can

251. See Ferenz & Rule, *supra* note 206 (explaining that the NRC did moderate RuleNet).

252. RuleNet had a general discussion forum where the moderator placed posts that were viewed as inappropriate for the more structured part of the dialogue. See Ferenz & Rule, *supra* note 206, at 886. In *Americans Discuss Social Security, Information Renaissance* adopted a similar course of action.

253. See Walton Francis, *Electronic Rulemaking: Outline of Opportunities and Issues*, Department of Health and Human Resources (describing the Health and Human Resource's position on Electronic Rulemaking), available at <http://globe.lmi.org/erm/docs/erm525.htm>. (last visited May 14, 2002). The NRC also censored obscenity and threats during the RuleNet proceeding. See *id.* A USDA Web page in the National Organic Food rulemaking stated that the agency would censor comments for obscenity. (on file with author). USDA officials also reaffirmed this position at a May 30, 2001 Symposium on Citizen Participation and Electronic Rulemaking sponsored by the National Science Foundation's Digital Government Program.

254. Neil Eisner, Assistant General Counsel for Regulation and Enforcement at the Department of Transportation, and Dawn Roddy, EPA Policy Analyst Statements at the Symposium on Citizen Participation and Electronic Rulemaking sponsored by the National Science Foundation's Digital Government Program (May 30, 2001) (on file with author).

255. Some browsers are not so limited.

be quickly mounted on the Web. While such steps would be voluntary, such measures could be performed automatically rather like the HTML conversion feature in Microsoft Word.²⁵⁶

In addition, the costs of a front-end submittal system, like HHS's web-based submission format, should be studied and compared to the back-end systems that agencies like DOT have utilized. This assessment should focus on the cost of docket administration and internal usability of the product to the parts of an agency analyzing the submissions.

Finally, the government should consider developing open source software to manage their dockets, and to analyze and process the resulting content. A number of proprietary programs exist, but the government could save money and possibly obtain better software if it chose not to purchase proprietary products.²⁵⁷

D. Implementation Issues

The White House has designated DOT as its lead agency in this effort; it also has decided that First Gov should serve as a common portal to all agency rulemaking sites.²⁵⁸ These are worthwhile steps but they should not become a design strait jacket. The OMB should recognize that the Web is a plastic medium and allow agencies the freedom to structure dockets and

256. These tools should perform with greater reliability than the Microsoft Word conversion feature. XML may be a solution, but its tagging requirements may make developing an appropriate document type definition difficult. The GAO has suggested that the federal government adopt an explicit XML strategy including "a registry of government-unique XML data structures." U. S. GEN. ACCOUNTING OFFICE, ELECTRONIC GOVERNMENT: CHALLENGES TO EFFECTIVE ADOPTION OF THE EXTENSIBLE MARKUP LANGUAGE, REPORT NO. GAO-02-32 at 5 (Apr. 2002). Efforts are also underway to develop document formats for the judicial arena. See LegalXML available at <http://www.legalxml.org/> (last visited Mar. 22, 2002); Bradley J. Hillis, *The Digital Record: A Record of Electronic Court Filing in the United States*, 2 J. OF APP. PRACT. & PROCESS 319 (2000) (providing an overview of electronic dockets in the judicial arena).

257. See BEIERLE, *supra* note 5, at 52 (stating that attention also needs to be paid to improving the software for online discussions). This could include assessing the use of emoticons to flag messages or the utility of collaborative filtering. See *id.* The latter mechanism would allow participants to highlight the messages that they agreed with or the message that expressed their views most articulately. See *id.*; see also Herbert Van de Sompel & Oren Beit-Arie, *Open Linking in the Scholarly Information Environment: Using the OpenURL Framework*, 7 D-LIB MAG. (Mar. 2001) available at <http://www.dlib.org/dlib/march01/vandesompel/03vandesompel.html> (last visited May 14, 2002).

258. See OFFICE OF MGMT. & BUDGET, *supra* note 2 at 12 (recommending that the First Gov be the primary online portal).

dedicated Web pages that meet their needs and those of their individual constituencies.²⁵⁹

Timing is also of concern. As the GAO found, electronic dockets pay for themselves. Thus, information technology not only makes government more transparent; it also saves rulemaking agencies money.

Greater coordination is needed across the government. Prior to its abolition, the Administrative Conference of the United States would have played this role. But, as the GAO has noted, each agency has more or less reinvented the wheel in this area because there was no government-wide mechanism to share information.²⁶⁰ The OMB's interest in this issue could make all the difference.

Other steps need to be taken to promote online dialogues as a participatory tool. A formal presidential directive encouraging agencies to experiment with online policymaking discussions would be useful. Greater funding is needed for research to evaluate dialogues and to develop software. Agency staff will also need training.²⁶¹

Expanding computer access in minority communities will also be important. Passage of the E-Government Act of 2002 would partially address this last concern through its provision on Community Technology Centers,²⁶² but here too funding is a key.

CONCLUSION

Building a better infrastructure for the public sphere should be a priority for the federal government during this decade. The Internet, properly utilized, can make policymaking more transparent, and enable Americans outside the Beltway to participate more effectively in the activities of the federal government. Many federal agencies have exploited the Internet's potential to distribute information, but the Web's interactive potential must also be embraced. This includes building electronic docket rooms, using the Internet as a pro-active communications device and using online dialogues to discuss public policy issues.

259. See GAO RULEMAKING REPORT, *supra* note 19, at 13-16 (stating that the GAO found a mixed reaction to a common portal proposal from public interest groups and agencies). However, more of the public interest community seemed in favor of this approach. *Id.*

260. See GAO REGULATORY MANAGEMENT REPORT, *supra* note 55, at 30-31 (stating that many Federal offices are using IT to improve regulatory management).

261. See OFFICE OF MGMT. & BUDGET, *supra* note 5 (stating similar recommendations made by Beierle).

262. See S. 803, 107th Cong. § 213 (2001) available at <http://thomas.loc.gov/cgi-bin/query/C?c107:./temp/~c107iyomph>.