The Internet Still Might (But Probably Won't) Change Everything

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ABSTRACT

The evolution of information and communication technologies has the potential to revolutionize citizen participation in the democratic process. The Internet, in particular, could vastly expand the number of citizens who participate in the 'notice and comment' process established by the Administrative Procedure Act. Some policy analysts and scholars are advocating greater reliance on information and communication technologies in the notice and comment process. Greater participation, this argument suggests, generally means better democracy. Based on information gathered from ten June 2004, Washington DC workshop-based focus groups, this paper argues that the Internet still might, but probably won't, change everything. Expectations for the transformative role of the Internet may be overly optimistic. There is very little agreement and a great deal of uncertainty about how the Internet and other information and communication technologies will impact the role of public comment in the rulemaking process.

INTRODUCTION

The scope and nature of public participation in regulatory rulemaking is shifting, perhaps significantly. A number of new opportunities exist to use information and communication technology (ICT) and the Internet to realize more fully the intent of the "notice and comment" process set out in the Administrative Procedure Act (5 U.S.C. Section 553). By fostering large, dialogical, and heterogeneous public comment datasets and building appropriate tools to analyze them, federal agency personnel can expect to complete critical regulatory actions with the best available information.

Some call it democracy's cutting edge: the potential for distributed, reflexive, transparent, information rich, asynchronous, widespread, low-cost, meaningful, and transformative participation in timely decision making. Others are less sanguine. Many fear a growing wave of electronic mass submissions will overwhelm and thus delay agencies with limited resources. Furthermore, some warn us that electronic rulemaking may already have instantiated a sense that

rulemaking decisions are akin to a plebiscite. Thus a big question for many observers is: Does electronic rulemaking matter?

A growing electronic rulemaking (eRulemaking) research and practice community is starting to shed light on this,[1] yet the answer will in many respects remain subjective. How one defines an observable measure of better procedures or improved rulemaking outcomes is highly dependent on one's location inside or outside the system. Nonetheless, some scholars are either predicting a "revolution," or at least looking for signs of a positive deliberative evolution, as a result of electronic rulemaking.[2]

To understand better the actual impact, new metrics will be developed and implemented over time. In part, these new metrics will be performance measures that capture indications of improved agency efficiency, cost effectiveness, transparency, and responsiveness.[3] Other baseline data will emerge on how public users and agency officials interact with electronic dockets and respond to new human language technologies, such as tools for detecting duplicate submissions, near duplicates, as well as salient issues and opinions.[4] It bears repeating, even though it has been noted before, that much of this work remains to be done. The interdisciplinary subfield of electronic rulemaking is just now coalescing after three years of NSF-funded workshops and focus groups. There are significant unanswered questions regarding

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[1] Cary Coglianese, "E-Rulemaking: Information Technology and Regulatory Policy," Regulatory Policy Program Report No. RPP-05 (2004), http://www.ksg.harvard.edu/cbg/rpp/erulemaking/papers_reports/E_Rulemaking_Report2004.pdf. Coglianese summarized four broad and now widely accepted goals for new rulemaking technologies as: 1) increase democratic legitimacy, 2) improve regulatory policy decisions, 3) decrease administrative costs, and 4) increase regulatory compliance.

[2] Beth Noveck, "The Electronic Revolution in Rulemaking," *Emory L.J.* 53 (2004): 434-518, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=506662. Noveck asserts that "this radical overhaul of the administrative process is conducted in a closed and almost secretive manner without public consultation." See also Barbara H. Brandon and Robert D. Carlitz, "Online Rulemaking and Other Tools for Strengthening Our Civic Infrastructure," *Admin. L. Rev.* 54, no. 4 (2002): 1421-78; Stuart W. Shulman and others, "Electronic Rulemaking: A Public Participation Research Agenda for the Social Sciences," *Social Science Computer Review 21*, no. 2 (2002): 162-78.

[3] Mordecai Lee, "E-Reporting: Strengthening Democratic Accountability," *The Business of Government Sixth Anniversary Issue* (2004): 72-9, http://www.businessofgovernment.org/pdfs/BOG_summer_04.pdf.

[4] Stuart Shulman and others, "SGER Collaborative: A Testbed for eRulemaking Data," *Journal of E-Government* 1, no. 1 (forthcoming), http://erulemaking.ucsur.pitt.edu/doc/articles/egov-journal-project-highlight.pdf.

the information technology to develop and the data to collect. Also, there are uncertainties about what to ask of the data, government partners, and other electronic rulemaking stakeholders.[5]

The current Bush Administration E-Government initiatives at the federal level are predicated on "citizen-centric" changes in service delivery.[6] Information technology and e-commerce techniques in particular offer interesting possibilities for tracking the development of public comments and rule development. Some early hunches about why electronic rulemaking indeed may matter may well prove naïve, or at least overly optimistic.[7]

Rulemaking is, after all, embedded in politics that can trump all other factors.[8] Scholars have speculated that electronic rulemaking may result in a more powerful and democratic corrective mechanism. Rulemaking may indeed prove to be an enabler of better comments, deliberative communication, and more durable rules. More widespread

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[5] Significant "Digital Government" research challenges are associated with having multiple government agencies as "partners" while studying and also tweaking the effect of this particularly important citizen-government interface. Apart from the obvious conflict of formally studying a process that federal funding is designed to aid, there are issues posed by the appearance to both governmental and nongovernmental organizations that the research is part of the federal government's overall effort. The best hope is that an honest broker role is preserved for the wider eRulemaking research community.

[6] See http://www.whitehouse.gov/omb/egov/ for updated information on the Federal E-Government Initiatives. The Congress has been critical of limited progress while appropriating insubstantial sums for cross-agency efforts. On the progress to date, see the U.S. General Accounting Office Report, *Electronic Government: Initiatives Sponsored by the Office of Management and Budget Have Made Mixed Progress,* GAO-04-561T (Washington, D.C.: Mar. 24, 2004), http://www.gao.gov/new.items/d04561t.pdf; Dave McClure of the Council for Excellence in Government notes the "E-government initiatives are sometimes victim to overblown expectations." David Perera, "E-gov to get PR Makeover," *Federal Computer Week*, September 6, 2004, http://www.fcw.com/fcw/articles/2004/0906/pol-egov-09-06-04.asp.

[7] Stuart W. Shulman, "An Experiment in Digital Government at the United States National Organic Program," Agriculture and Human Values 20, no.3 (2003): 253-65; Thomas C. Beierle, "Discussing the Rules: Electronic Rulemaking and Democratic Deliberation," Resources for the Future, 03-22 (April 2003), http://www.rff.org/Documents/RFF-DP-03-2.pdf (accessed September 2004); Stephen Zavestoski and Stuart W. Shulman, "The Internet and Environmental Decision-Making: An Introduction," Organization and Environment 15, no. 3 (2002): 323-27; Robert D. Carlitz and Rosemary W. Gunn, "Online Rulemaking: A Step Toward E-Governance," Government Information Quarterly 19, no. 4 (2002): 389-405.

[8] See Amy Goldstein and Sarah Cohen, "Bush Forces a Shift in Regulatory Thrust," *Washington Post,* August 15, 2004, A1, which was the first of a series of three in the *Post* on recent regulatory politics, and which appeared about the same time as Joel Brinkley, "Out of Spotlight, Bush Overhauls U.S. Regulations," *New York Times,* August 15, 2004, A1.

use of ICT in rulemaking may bridge divides between experts and lay persons or traditionally adversarial interests. Most likely, the answer to the question, "Does electronic rulemaking matter?" will appear slowly in several unexpected ways, as citizens, interest groups, and government innovate and make counter-adjustments in response to the parameters of the new digital landscape.

Despite the general lack of consensus on this and other important questions, a meaningful workshop dialogue recently took place about the present and future implications of electronic rulemaking.[9] Critical issues for research and future policy deliberations were highlighted. Participants came away from the workshop with a better idea of how organized interests and the public at large will interface with government agency personnel in rulemakings in an era of rapid technological change.

The overarching finding growing out of these meetings and presented here is that there is very little agreement and much uncertainty about how rulemaking procedures or outcomes will change as electronic rulemaking matures. Indeed, after reviewing these sessions, it was tempting to entitle this article "The Internet Changes Nothing," as a rejoinder to Stephen Johnson's compelling 1998 argument in the *Administrative Law Review* article, "The Internet Changes Everything."[10] Both titles err on the side of oversimplification; hence my bets are hedged in the actual title. This article argues that the Internet still might (but probably won't) change everything for reasons set out below.

Professor Johnson persuasively held out the possibility for Internet-driven innovation which has in many ways come to fruition. For those with reliable Internet access and the necessary skills and desire, a vast array of new information is now accessible, searchable, and reproducible via the World Wide Web.[11] The existing technology

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[9] See http://www.drake.edu/artsci/faculty/sshulman/eRulemaking/June-2004-NSF-Workshop.htm for the workshop web site. A total of 10 focus groups were convened over a three-day period with a diverse group of governmental and non-governmental stakeholders. The complete workshop report is available at http://erulemaking.ucsur.pitt.edu. See Appendix A for the outreach efforts to identify focus group participants. Appendix B & C detail the institutional affiliations of the participants and focus group protocol respectively.

[10] Stephen M. Johnson, "The Internet Changes Everything: Revolutionizing Public Participation and Access to Government Information through the Internet," *Admin. L. Rev.* 50, no. 2 (1998): 277-337.

[11] Patrick Leahy, "The Electronic FOIA Amendments of 1996: Reformatting the FOIA for On-line Access," *Admin. L. Rev.* 50, no. 2 (1998): 339-44.

employed by most agencies has delivered many new opportunities, as predicted, but the practical importance of this innovation remains murky. Johnson argued the use of the Internet in rulemaking could increase the transparency, efficiency, participation, accountability, and legitimacy in a process characterized by "obvious shortcomings." Computers and the Internet, wrote Johnson, "can dramatically expand public access . . . broadening the influence of citizens." Six years later, it remains uncertain whether the technology has delivered many benefits beyond the periodic spike in public participation and education fostered by organized interest groups that have traded in their postcards for the lure of the mass e-mail and web site-driven awareness campaigns.

With approval of the E-Government Act in 2002 and a far-reaching Presidential Management Agenda,[12] the eRulemaking Initiative and its centerpiece, the government-wide Federal Docket Management System (FDMS), became an imminent fact of regulatory life for agency personnel and stakeholders. Module One, which is complete and operational, created a web portal that allows users to search for and comment on any open federal rulemaking.[13] Commercial off-the-shelf (COTS)-based architecture (Oracle and Documentum) will be the basis for the FDMS, or Module Two. The Module Three plan calls for an "Integrated Federal Rulemaking System," which will blend ICT tools with improvements in institutional rulemaking practices to create Internet and desktop tools that help gather, process, analyze, and communicate information in the rule writing process.

Concurrently, the nongovernmental organizations most attuned to rulemaking have been developing new strategies, or at least digitizing their old strategies, to take advantage of information and communications technologies. A new sub-sector of the economy is taking root to provide electronic advocacy services for trade associations and public interest groups.[14] Of particular interest are those innovations that may increase the likelihood and manageability of massive stakeholder responses in controversial rulemakings.[15] The

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[12] See http://www.whitehouse.gov/omb/egov/pres_state.htm on the E-Government Act and http://www.whitehouse.gov/omb/budget/fy2002/mgmt.pdf for the President's Management Agenda.

[13] See www.Regulations.gov.

[14] Exs., see http://www.ctsg.com/, http://www.getactive.com/, or http://capitoladvantage.com/.

[15] Recent Environmental Protection Agency (EPA) notices about possible rulemakings in the Federal Register concerning the definition of U.S. waters and mercury emissions each

fear of information overload in this context is multifaceted, encompassing concerns about ossification of the rulemaking process as a result of what some describe as "spam-like" submissions as well as a denigration of the role of public input in regulatory decision-making, to name just a few.[16]

At every workshop session, Dr. Jamie Callan of Carnegie Mellon University showed simple text analysis techniques that can be used to organize and summarize the contents of large public comment databases. He asked that attendees share their responses in the focus group sessions as to how these tools might or might not be useful in the future. Public comments, Dr. Callan noted, are expressed in human language. Although computers cannot understand human language the way people do, they can still be useful in helping people make sense of large public comment databases.

Text analysis software can identify letters that are exact duplicates (e.g., form letters from a letter-writing campaign) and near-duplicates (e.g., "form+" letters that have been modified to represent their opinions better or append extra information). Simple phrase recognition techniques can identify concepts that people mention frequently, which can serve as a starting point for "drill down" activities that examine comments addressing particular topics or points of view. People often identify their roles with respect to a particular regulation—for example, "As a mother, I believe ...," or "I have been a truck driver for 25 years and ...." Relatively simple techniques can be used to find and organize such references, enabling policy makers, rule writers, and other interested parties to understand better who commented on a particular aspect of the rule.

These and a wide variety of similar techniques are possible in the near future. Today regulatory agencies are struggling with basic ICT issues related to capturing public comments electronically. Soon these will be mastered, and attention will turn to better use of language analysis and text mining software. At present there is an opportunity to provide better tools for rapidly analyzing large public comment

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have resulted in hundreds of thousands of emailed public comments (see EPA's EDOCKET OW-2002-0050 & OAR-2002-0056). Recently, 15 EPA EDOCKET staff members sorted through approximately 680,000 mercury comments, manually identifying about 5,000 unique comments for inclusion in the docket.

[16] Various workshop participants and observers of electronic rulemaking have invoked the concept of spam as a derisive term for electronic mass mailing campaigns that result in vast quantities of duplicative e-mail. Actual commercial spam has also started to appear in the agency in-boxes devoted to receiving emailed comments.

databases, and, consequently, for increasing transparency and efficacy in the comment submission and analysis process.[17]

The remainder of this article briefly summarizes the background information presented at the June 2004 eRulemaking workshop and reports on the input gathered from a range of actors whose choices will collectively affect the future of electronic rulemaking. At the workshop, agency rule writers and managers shared their insights and learned more about how and why public participation in rulemaking is changing. A common set of concerns emerged about the quantity and quality of electronic submissions, and the related issues of usability, public education, and comment management. Developers of the Federal Docket Management System were able to see that a significant and diverse cross-section of stakeholders in rulemaking believed that the nature and scope of public participation will be critically affected by current and future design choices and decisions ought to be made in an open and transparent manner with sustained public input.

Members of nongovernmental organizations attending the workshop sessions were able to envision uses of information technology that might increase or undermine the efficacy of their memberships' engagement with the rulemaking process. As I note in the conclusion, these groups may "inadvertently petition themselves into obscurity" as a result of unleashing vast quantities of duplicative comments using information technology. With federal agencies developing ad hoc criteria for what counts as an original comment, large numbers of citizens generating so-called "form+" comments may in fact be sorted out of consideration at the very moment that they believe the Internet has facilitated their deeper involvement with the decision-making process.

In what follows, the main themes animating the focus group discussions are presented and some concluding thoughts are offered. After the workshops, the taped focus group sessions were transcribed into Microsoft Word documents and loaded into Atlas.ti (a qualitative data analysis software package). Based on a review of the full transcripts, a list was generated of 15 themes raised by the workshop participants. These broad, often over-lapping themes became the codes that were the basis for the following analysis. The transcripts were re-read in Atlas.ti and codes were associated with passages in the transcript that touched on one or more of the themes used for the

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[17] See Dr. Callan's presentation on tailored text analysis tools online at: http://erulemaking.ucsur.pitt.edu/doc/talks/Callan.pdf. The text analysis problem and our approach are described in detail in the successful grant narrative available online at: http://erulemaking.ucsur.pitt.edu/doc/proposals/Project.pdf.

analysis. Code reports were exported for closer analysis of each theme and their intersections. A total of 10 major themes are reported below. Readers will find good cause both to challenge and support Professor Johnson's thesis that the Internet changes everything.

FOCUS GROUP FINDINGS

1. TOOLS FOR ELECTRONIC RULEMAKING

Many of the discussions at the workshops focused on the role of new tools and technology that are, or soon will be, part of the digital landscape of rulemaking. A wide range of opinions were expressed on the impact of the Internet, web portals (e.g., Regulations.gov), electronic dockets (e.g., DOT's Docket Management System or EPA's EDOCKET), government and nongovernmental organization (NGO) web sites, e-advocacy techniques, and human language technologies (e.g., Google or duplicate detection algorithms). While a number of possible impacts and outcomes were raised, many of the participants qualified their own remarks, or the comments of others, by suggesting the true impact of these developments was not yet known, or perhaps even knowable.

Thus, at the very least, there was a convergence of viewpoints around the notion that questions about the impact of these new tools were rife with uncertainty. Some suspected that the unintended consequences of technological innovation might overshadow the hoped-for gains. One participant pointed out that any improvements would be "illusory" if they were not designed carefully and measured accurately. Readers of the transcripts and this report will note the frequent juxtaposition of technological impacts that constitute, in the words of one speaker, a "double-edged sword" in the e-rulemaking environment.[18]

As a result, more ubiquitous and accessible information in rulemaking was seen as potentially a benefit and cost—both in and out of government—that might either help or hurt the process and its outcomes. For example, amid the general sense that more accessible information generally is a positive development lay a solid undercurrent of skepticism that the information "flood" could be managed. It was suggested this was true not only for individual citizens and overburdened agency officials, but also for many

[18] Full workshop transcripts can be viewed at: http://erulemaking.ucsur.pitt.edu/group_report.htm.

organizations with staff and resources spread thin. Unless there were user-friendly technological and procedural innovations, electronic rulemaking would result in *de facto* information overload.

A number of participants nonetheless mentioned the likelihood of time and cost savings derived from better on-line navigation tools and automated categorizing of more complete and well-indexed dockets.[19] In a nutshell, electronic rulemaking would be more efficient and effective, overcoming many of the shortcomings associated with paper dockets, while pushing the benefits out to a more geographically and demographically diverse set of stakeholders.[20] Automation of mundane tasks was called a "great time saver." One person stated: "I want to see what my industry is saying about this rule or other comments, and be able to click and say, sort by industry. Sort comments by industry: printing industry. This is what this rule does for the printing industry." Other comments, however, predicted an increase in the number of hours or dollars devoted to developing and using information technology during both the preparation of comments and in the agencies' analytical process. Some of the top quality e-advocacy services available in the current market, as one person noted, are not cheap.

The paradox for many observers is that the same technologies that make it easier to submit or read public comments and aggregate supporting information also can make it both easier and more difficult to make sense of the comments and the agency's underlying rationale for its decisions. Several participants noted that the presence and associated implications of these new tools would mean unmanageable

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[19] In separate focus groups with EPA officials in late July 2004, participants remarked that the EPA's current EDOCKET system lacked many of the rudimentary document categorization and indexing principles that were routine in the paper docket era. Several mentioned the irony that the move to a rigid electronic repository without categories or adequate navigational tools had been a step backward. Personal communications with the managers of the eRulemaking Initiative suggest they recognize the limits of EPA's current EDOCKET system. On the history of disorderly dockets and judicial frustration with the status of the legal record, see Jeffrey S. Lubbers, *A Guide to Federal Agency Rulemaking*, 3rd ed. (Chicago: ABA, 1998), 215-19.

[20] It is possible that ICT will succeed where legislative reforms have fallen short, such as in the effort to reduce the paperwork burden. See the U.S. General Accounting Office, *Federal Rulemaking: Procedural and Analytical Requirements at OSHA and Other Agencies*, GAO-01-852T (Washington, D.C.: June 14, 2001), http://www.gao.gov/new.items/d01852t.pdf. It is almost certain to improve the ability of agencies and nongovernmental actors to show in court that a final rule does or does not meet the requirements of the "logical outgrowth doctrine." See Phillip M. Kannan, "The Logical Outgrowth Doctrine in Rulemaking," *Admin. L. Rev.* 48, no. 2 (1996): 213-25.

costs and time burdens for NGOs with limited resources or for citizens with limited time to master the details of navigating through a sea of documents. One asked that designers of these tools attend to the unique needs of small business owners.[21] Another thought that for some constituencies not already accustomed to conducting mass-mail campaigns, electronic rulemaking was another opportunity simply beyond their ken. One person was concerned electronic rulemaking would formalize an existing "two tier system," in which the possession of superior resources results in the production of higher impact comments.

A set of participants focused on the idea that e-rulemaking tools would result in better comments. Rulemaking submissions during "notice and comment" could be better informed and expertly guided in a hyperlink-intensive, interactive, or well-structured commenting environment. The guidance could come from experts inside the agencies as well as interest groups with specialized knowledge.[22]

The idea that information and communication technology necessarily will result in better comments was not universally accepted. For example, to the extent ICT is employed to mobilize one-click "me too" comments, the fear for some is that far from improving the quality of public comments, the current e-advocacy model will result in a dramatic increase in comments that have little or no value to the administrative process. The proliferation of these "electronic postcards" might give the impression that the administrative process is actually a forum for direct democracy via nose-counting plebiscites.[23] Dissenters spoke of the right for anyone to submit any quality of comment, with some arguing effective engagement with the rulemaking process legitimately could be a secondary concern. Some nongovernmental representatives described the notice and comment

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[21] The recent final "Report of the Small Business Paperwork Relief Act Task Force," June 28, 2004, echoed this concern when it outlined a number of information access needs. Among these is the ability to search the full volume of Federal information by subject or task, rather than through older structures based on agency organization. See http://www.whitehouse.gov/omb/inforeg/sbpr2004.pdf.

[22] For more on improving the quality of public comments, see Barbara H. Brandon & Robert D. Carlitz, "Online Rulemaking and Other Tools for Strengthening Our Civil Infrastructure," *Admin. L. Rev.* 54, no. 2 (2003): 1421-78.

[23] A leading rulemaking scholar asserted the "overall trend has been away from the expertise model and toward the politics model," as the comments submitted increase by orders of magnitude. See Jeffrey S. Lubbers, ed., *Developments in Administrative Law and Regulatory Practice 2002-2003* (Chicago: ABA, 2004), 150.

process as a legitimate forum to propel political and legal strategies into the spotlight or the courts.

The gap in the ability to mobilize resources to perform these functions was noted as an issue for participants both in and out of government. Resource-poor groups and ICT-dollar-strapped agencies cannot necessarily be counted on to provide the needed content and delivery mechanisms required to produce better comments. One participant questioned whether it is the proper role of government to concern itself with improving the quality of the public comments.

A number of participants also raised the notion that new tools for on-line collaboration might result in innovative deliberation possibilities. The most commonly mentioned tools were listservs, online chats, and moderated discussions. Here again, there was a recurrent tendency to temper enthusiasm for new communications technologies with considerations that were much more social, political, and legal in nature then they were technical. One person remarked that commenting on comments was "just something we are going to have to live with . . . it has the potential to fundamentally change [sic] the regulatory process."

Significant concerns were expressed by some attendees that the ongoing development of the Federal Docket Management System (FDMS)—a centralized system for the entire federal government—might constrain innovation in the marketplace of ideas about electronic rulemaking. An inflexible architecture for citizen government interaction might result in "a vast, monolithic system" that functions poorly and draws in few users. Instead of fostering innovation in the manner of deliberation at the agency or sub-agency level, in the words of one participant, "you have the potential to slow down some of the thousand flowers blooming," if the new centralized system forestalls constituency- or agency-specific creativity.

The effort to build a FDMS that is "all things to all people," noted another participant, likely would produce a "lowest common denominator" system that rulemaking agencies and stakeholders alike would reject or ignore. Similarly, if the FDMS was perceived as incomplete by agencies with existing docket systems, over time duplicative systems might emerge and compete. Furthermore, one person stated that if the FDMS were developed in a secretive, top-down manner, the likelihood of its failure as a government-wide information technology application would increase.

A key debate concerned who, or what entity, was able to make legitimate choices about the nature and scope of new deliberative mechanisms. Many non-governmental stakeholders questioned whether even a well-meaning federal government can get the critical design choices right. Others wondered if a single design choice for the

FDMS would ill-serve the divergent business processes at the 180 or so rule-writing entities in the federal government or their many constituencies.

Dissenting views on this point stressed that the rollout of the FDMS would solve a significant digital divide that exists within the federal government, between those agencies (about 30) that have electronic docketing systems and the over 150 rule-writing entities that do not. Another participant remarked that it actually required a process of forcing rule writers to use a new technology to make them think creatively and feedback critical information about how to improve it over time. Another stated that no amount of planning could overcome the complexity involved, and that trial and error was unavoidable. Agency representatives noted they tend to worry that technical error in a rulemaking procedure could endanger years of work on an important rule.

Perhaps most importantly, many stakeholders identified the open application programming interface (API), or protocol, as a necessary corrective for present or future flaws in the design of the FDMS. An API is a set of procedures and protocols that enable one software process to communicate with or control another software process. One computer is providing a service (the one that publishes the API), and the other is using the service (the one using the API). One participant explained,

> You publish technical information to help third parties write programs that do things on your website; that's an API. So for example if I wanted to write my own program that will search your website or retrieve particular documents from your website or something like that; if you published a suitable API then I could use that to do that thing.

A clear consensus was expressed that an open API would relieve the developers of the FDMS from the burden of making their comment submission portal "all things to all people." For nongovernmental actors and electronic advocacy specialists, this single FDMS design choice—whether to publish an open API—seemed to hold the promise that the traditional intermediaries (the interest groups) would use their own electronic interfaces to inform their members, dissect the docket, prepare meaningful comments, and manage high-value client lists. "This is a catch to the API thing," remarked one participant, "How can you do it in a way that doesn't put a cost of mobilization or a cost of participation on the members of specific constituency groups?"

2. USABILITY OF THE NEW TOOLS AND THE FEDERAL DOCKET MANAGEMENT SYSTEM

Workshop participants were in general agreement that the usability of electronic rulemaking systems was a high priority. If future systems, such as the FDMS, were to make usability studies a central part of an iterative development process, the perception was widely shared that electronic rulemaking would become a "great mobilizer" and a net benefit to society. In the absence of such studies, many participants could imagine the new FDMS being underutilized by agencies and the public. One participant worried about "exclusivity" and the "need to acknowledge that the people who are excluded are not a random selection of people." Echoing this digital divide theme was an expressed concern that new functionality will be tied to broadband access. Also, if the system is slow (with or without broadband), lacks adequate categorization, navigational options, or is poorly indexed, it will inspire "work-around" and off-system solutions to conduct routine business for which the system was supposed to be used.

One participant noted that future regulatory reforms, such as those promulgated by Congress or the Office and Management and Budget (OMB), ought to target those aspects of rulemaking that have the effect of confusing or overwhelming non-expert participants. Some of the specific sources of confusion noted were themselves past regulatory reforms.[24] While it was widely thought that ICT can help in this regard, if done properly, there also was a sentiment that no amount of technology can trump the numbing effect of the Paperwork Reduction or Data Quality Acts on the ability of average citizens to engage the process. "I think there is a hazard," noted one person, "that there is a move on the part of OMB which may give the agencies a blanket excuse to disregard public comment." For others, these measures represent a healthy "corrective mechanism" allowing the public better opportunities to monitor agency practices.

It was noted that e-commerce firms, such as eBay and Amazon.com, pay particular attention to every mouse click, looking for signs in their web logs that their systems are losing or confusing users at specific points in a transaction. One participant thought it would be desirable to have a "scorecard" that showed the nature of the visits to electronic dockets. The most rudimentary web log analysis

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[24] Some of the same arguments appear in U.S. General Accounting Office, *Regulatory Reform: Procedural and Analytical Requirements in Federal Rulemaking*, GAO/T-GGD/OGC-00-157 (Washington, D.C.: June 8, 2000), http://www.gao.gov/archive/2000/g800157t.pdf.

would tell researchers and practitioners a great deal about how electronic dockets are utilized.

The hope was expressed that the federal government would improve a poor record in this area (what one person called "the challenge of writing a reg in eBay style") by commissioning regular and extensive user studies and borrowing the best practices from e-commerce where applicable. The web-based interface allows unique opportunities for anonymous tracking via session cookies; thus the e-commerce model can be employed to compile baseline data on how the system is used. Referral systems, for example, seamlessly could facilitate easier and broader dissemination of the most commonly-viewed documents and comments, making navigation inside a complex docket more manageable for non-experts.[25]

Some concern was expressed about how future systems might be technologically sophisticated and therefore difficult to use. For example, one person noted a system that automatically chops up complete comments and compartmentalizes them for analysis can be cumbersome analytically in the absence of the full context of the original comment. Similarly, the widely discussed hope that ICT-enhanced systems will increase transparency in the process, noted some participants, can be realized only if you can search for and find what you need with the efficacy and ease that many now attribute to Google searches. A related issue was "the disappearance of information products off agency websites," which has been of particular concern to the library community over the last decade.

3. THE STRUCTURE OF THE FDMS AND THE COMMENT PROCESS ITSELF

There were two predominant lines of discussion about the role of structure in electronic rulemaking. At the micro level, participants talked about how to structure the comment intake to improve the ability of people submitting comments to provide usable information and the analysts, in and out of government, to sort through the comments. At the macro level, there was concern (and some hope) expressed about the notion that all agencies and constituencies would be adapting to a single, centralized structure for electronic rulemaking.

On the issue of comment intake, a central question was whether comment intake can be structured usefully, and if so, by whom. If such a structured commenting platform were to be developed, would

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[25] Respondents to an eRulemaking web survey also identified value-added features that would cluster and rank frequently viewed comments or supporting documents. See http://erulemaking.ucsur.pitt.edu/survey.htm.

anyone want to use it? One person thought a structured form would be more reliable, but cautioned "people can make mistakes and then can sue and say, the form is confusing, there were too many boxes to check." There also was a fear expressed of forms that ask "stupid" questions.

One participant warned about the apparent limited thinking about the process itself, and the excessive focus on technology. It was stated repeatedly that the needs of the rulemaking process, and not the availability of the technology, should be the driver of change. Another remarked that the people in and out of government who understand the business process and the nature of the available ICT are rare but critical for transformational activities to take place.

The development to date of a centralized FDMS was criticized by some participants and praised by others. The different agency cultures and constituencies were pictured as a barrier to effective centralization that in the worst case might thwart innovation at the agency level and foist an unwanted system on thousands of rule analysts and millions of commenting citizens.[26] One speaker noted "it is very, very hard on day one to say this is what the system should look like and have something which is really right." Another praised efforts in other E-Government initiatives to embrace the design principles based on federal enterprise architecture, noting that the developers of the FDMS had no such affinity for "modularity" or architectural transparency.

4. LEGITIMACY GAINS AND LOSSES

On the issue of increasing rulemaking legitimacy, participants remarked that hopes were high, but the ultimate impact was uncertain. "The risk," stated one participant, "is that we develop an eRulemaking process, and then the agencies and departments say, 'We have democracy now, because anyone can get on the Internet and submit comments.'" The benefits of enhanced legitimacy, one participant noted, were difficult to gauge due to the number of intangible factors and the lack of a reliable metric. One speaker identified less

[26] There has been evidence of agency resistance to cross-agency standardization for some time. For example, consider the GAO letter to Congressman Henry Waxman and Senator Joseph Lieberman on the subject. See Brostek to Waxman and Lieberman, June 30, 2000, B-284527, *Federal Rulemaking: Agencies' Use of Technology to Facilitate Public Participation,* GAO/GGD-00-135R, http://www.gao.gov/archive/2000/gg00135r.pdf. More recent signs have emerged in the House appropriations process. Some individual agencies balked at the idea of joining a centralized docket management system. See Jason Miller, "House Plans E-Gov Cuts," *Government Computing News,* June 28, 2004, http://www.gcn.com/23_16/news/26365-1.html.

controversial rulemaking outcomes as a precondition to rules that are more likely to be implemented effectively and observed. Another stated categorically that enforceable rules are not by definition good, because the ability to overturn a bad rule is fundamental to the mission of their organization.

Most of the participants seemed to agree that to the extent the transparency of the process, data, and models in rulemaking increased, so, too, would procedural and substantive legitimacy. Hyperlinked navigation to the statutory authority for a rule, or OMB guidance on rulemaking itself, was also mentioned as an innovation likely to enhance the legitimacy of the process. One participant noted electronic rulemaking would result in more supportive comments and with a visible rationale, thereby enhancing agency legitimacy. Better access to a more complete set of documents might translate into fewer Freedom of Information Act (FOIA) requests. Conversely, increased access to FOIA procedures could produce a spike in requests for agency documentation. Either way, the hoped-for effect is that rulemaking legitimacy may increase as the public comes to understand and appreciate better the regulatory process and their rights and role in it.

A dissenting view, however, argued that super-transparency, revealing perhaps long-obscured aspects of agency discretion in an unflattering light, could inadvertently harm the legitimacy of the process. Awareness of a shift from black box to glass box in sensitive aspects of rulemaking might compel rule writers and regulatory managers to move substantive decision-making and deliberations into forums that in effect fly below the information highway's transparency radar.

It was suggested that electronic rulemaking could enable more open peer review of scientific studies. Some participants recoiled at the suggestion that an e-commerce-style rating system might allow the public to vote on the validity of a particular study. Nonetheless, most participants seemed to agree that getting models used in the process into the public domain, available for public comment and subject to a rebuttal, would help to "de-bug" error-prone assumptions. A particular problem mentioned more than once was the reliance on proprietary models that are not transparent. For some participants, increasing the transparency level would make the agencies more vulnerable to technical and procedural challenges. One person remarked that "retroactive reanalysis of the costs and benefits and the impact of regulations would be very beneficial."

Several participants remarked that legitimacy might be enhanced if new tools rendered the assumptions involved in cost-benefit analysis more amenable to inspection and analysis, by experts and lay persons

alike. This innovation might also expose any failures to understand fully the nature of stakeholder needs. Whether the stakeholder is a small business owner or an organic farmers' association, the ability to see, submit, and comment on the use of cost-benefit data is likely to improve the opportunity to shape the outcome of rulemaking.

Some participants worried that human language technologies might be used by agencies to discount form letters "automatically." One participant voiced concern about "this kind of automated taking of language to see what people are concerned about without actually reading the comments. That is how the agency is going to see the results of what they are getting from what is being submitted, as opposed to what the person is actually presenting, and how they are presenting it." Another participant thought it "would be really helpful if people were able to review how the agency is using the technology to analyze things."

It was noted that currently accepted administrative procedure demands that duplicative comments be treated as a single substantive comment and that technology would simply render it a less burdensome and more accurate process. One person remarked that recent regulatory reforms and Executive Orders put rulemaking on a trajectory to diminish the significance of all non-expert public commentary, regardless of the media used to deliver it. For some, the implementation of the Data Quality Act and OMB peer review guidelines represent an overt threat to all public comment; to others, there are clear and fair options to eliminate non-substantive input from consideration in the decision process. Several participants linked concerns about the aims of regulatory reform to the expanding power of information technologies.

One participant claimed the ability to point to and view one million public comments, duplicative or not, instills a sense of legitimacy about the transparency of the process. Another noted that some courts will occasionally cite the agency's tally of the yeas and nays in their decision. There was general agreement that transforming mass email campaigns into distributed data collection enterprises had the potential to remake the model of e-advocacy and public participation in rulemaking. Nonetheless, advocacy groups are likely to cling to the mass email campaign as long as there is potential political, legal, or organizational utility in doing so. [27]

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[27] In the case of the January 15, 2003 Advanced Notice of Proposed Rulemaking (ANPR) the EPA issued related to issues associated with the scope of waters that are subject to the Clean Water Act in light of the U.S. Supreme Court decision in *Solid Waste Agency v. United States Army Corps of Engineers*, 531 U.S. 159 (2001), the total volume of public comment

A related discussion concerned uncertainty about how different comments, submitted via different media, would be valued. Whereas some fear sorting technologies will cause paper (especially handwritten comments) to lose relevance versus electronic comments, others predict a diminished fate for the e-comment and the continued supremacy of the paper comment, particularly on organizational letterhead. One person noted it was not so important to be concerned about how your medium of choice is viewed. Rather, what matters is the ability to see how your input is used. The generation of an automatic acknowledgement of a received comment and a link to it in the docket were considered easy places to realize legitimacy gains. Another participant, however, spoke of concerns that federal agencies will foster and avail themselves of a citizen management industry — something more like an automated public relations firm designed to "manage people's anger and frustration" rather than an administrative law enterprise.

5. ISSUES RELATED TO THE LAW & LITIGATION

There was strong sentiment expressed by some that radical change indeed is underway at the confluence of ICT, presidential Executive Orders, and the regulatory reform efforts in Congress over the past two decades. There was consensus that the regulated community is better informed and more strategic than ever before. The proliferation of litigation opportunities, whether to delay or derail unpopular rules, has increased the perception that there is a general up-tick in interest group opportunism.[28] One participant worried agencies "may have algorithms that statistically work very, very well, but if a company with plenty of lawyers submits something and their submission is misinterpreted then the agencies could get sued." Another participant predicted we will see "groups who are opposed to rules using the [ICT] accessibility, the information and the comments on the comments and so forth, as a mechanism to litigate wherever they see an opportunity to benefit their posture or position."

The optimists see ICT used as a mechanism for enhanced early participation by stakeholders to stave off time- and resource-

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(over 130,000 individual comments) was discussed in a White House West Wing meeting on whether to go ahead with the rulemaking (Source: EPA focus group, July 26, 2004).

[28] "Delay, in varying degrees is endemic to our legal system." Mark H. Grunewald, "E-FOIA and the 'Mother of All Complaints:' Information Delivery and Delay Reduction," *Admin. L. Rev.* 50, no. 2 (1998): 345-69.

consuming litigation. Especially in an era of declining agency resources and expanding responsibilities, some participants thought the use of ICT in this manner might free up agency resources. Others were less sanguine. One person remarked that "many people do not file comments because they are attempting to influence the regulation, or because they think we are going to reach some kind of community consensus and sing Kumbayah. Many people are filing comments primarily for the purpose of preparing a record for litigation."

Whereas the agency personnel seem to view legal challenges as roadblocks, the interest group representatives were more likely to characterize them as needed checks against arbitrary administrative powers. When asked if the rate of litigation in the era of electronic rulemaking was a proxy for better or worse rulemaking, many agreed subject matter, level of political involvement, and the supporting regulatory analyses (e.g., cost-benefit, risk, and environmental analyses), not the availability of ICT, determine whether there will be litigation. Whereas ICT can help members of a group shape, understand, and comply with a rule, ICT equally well provides the tools to undermine an undesirable outcome.

6. COLLABORATION: OPPORTUNITIES AND BARRIERS

Participants generally were optimistic about the impact of ICT on collaborative elements of the process, although one dissenter noted collaboration was an "overblown" goal. Another stated that interagency meetings help to sort out unresolved issues and spread best practices by talking about how different agencies experience the same process. A concern was expressed that, although some interagency agreement on data collection and other business process questions was possible, the tendency for agencies to covet their own way of doing business was not necessarily going to be reduced by collaboration on the development of the FDMS. The complexity is manageable, noted one participant, but the minutiae represented a considerable burden.

It was suggested that electronic rulemaking also will ease and thereby increase the level of state and local government interactions with federal rulemaking. "There is a lot of interaction already between local and state jurisdictions," noted one participant, "it wouldn't be too much of a jump to bring them in a more systematic way into the eRulemaking initiative so that they can let folks know that this is happening at the federal level."

Following on the idea that mass mail campaigns might be converted to more useful data gathering exercises, one participant noted it would take substantial, possibly ICT-enabled, collaboration

between agencies and stakeholders to make this happen. One participant stated that some form letters are the product of significant collaboration, between, for example, the experts in the various divisions of an NGO or advocacy coalition and the supporting membership. In such cases, some contextual knowledge about the source of the form letter and the collaborative process by which it was derived would be needed to realize the extent to which the "form letter" is in fact the end-product of a lengthy, deliberative process. One participant referred to a mass mail campaign as a "constituency" whose "signatures on form letters are actually endorsements of that entire set of priorities" rather than an insubstantial rant based on ideology or a summer project of an isolated intern.

7. INNOVATION

There was wide agreement about the nature of ICT as a driver of innovation. As with other elements of the discussion, the participants did not agree whether the innovation would help or hurt the process. One concern was that the FDMS would be slow to respond to the needs of its users. There were discussions about how best to ensure flexibility, agility, privacy, security, and reliability. Participants noted that rigid architectural choices could produce stagnation in the evolution of electronic rulemaking. Another predicted a fight for control of the structure of the FDMS, making it a site for battles over the hard-wired rules for public participation in rulemaking. The solutions noted ranged from open source code to the facilitation of web services via an open API.

Discussions of procedural innovations facilitated by ICT focused on the ability to see and comment on other comments or documents in the docket, as well as the possibility of making rebuttal comment periods (which currently are rare) a standard part of the rulemaking process. While ICT could greatly facilitate such a change, it would take Congress or an Executive Order to get all the agencies on board for such a major innovation. The rebuttal comments on the comment process, most agreed, would address the gaming of the system by those participants who file comments at the last minute, to avoid being subjected to a rebuttal comment. One participant noted that ICT speeds the process up, creating more pressure on those who prepare comments, and leaving those who prepare public comments with the sense of rising expectations about their work. One participant explained: "When you are submitting electronically, you could be working on changing the comments on a 3:00 conference call or an

electronic bulletin board discussion for submittal by 5:00 pm that same day."

There were a number of remarks about the way that on-line tools might transform the nature of advocacy, activism, and the analytical process itself. Perhaps the most salient advocacy transformation was the idea that the increasing trend toward mass campaigns of identical (or nearly identical) public comments might be replaced over time with more sophisticated methods for gathering and synthesizing data, or novel ideas, that are applicable to the decision-making process under the traditions, laws, and rules of administrative practice. The hope expressed by some was for a steady move away from duplicative form letters toward more interactive electronic forms and forums that cull actual data and truly innovative ideas from stakeholders.[29]

The dissenting view, generally held by NGO representatives, was that these mass mailing campaigns have a meaningful role that is both educational and political, even if 500,000 nearly identical, opinion-based, vote-like submissions count only once in the decision process. Many participants had a hard time imagining that the campaigns would go away or that form letter submitters would find the time for more demanding forms of engagement. Others insisted the preservation of this form of comment was critical to ensuring democratic legitimacy, even if the comments ultimately had no bearing on the decision.

The perception of a tool-driven transformation of activism was two-fold. First, some participants viewed the new technologies as enablers of more litigation that would increase the vulnerability of agencies to legal challenges from "losers" in the most vigorously contested rulemakings. For those activists who thrive on playing the game of defeating, delaying, or substantially altering undesirable rules, some said the new ICT would be a boon. The fear of electronic monkey-wrench activities was palpable for the agency participants, while some nongovernmental speakers saw it instead as the check and balance of last resort when politics or some other factor precludes winning on the presumed merits.

The second activist transformation suggested was that electronic rulemaking would either expose, or else proliferate, "flawed" models

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[29] U.S. DOT officials have explained in other interviews, focus groups, and personal correspondence that an unmistakable benefit derives from public comments that call attention to overlooked data, studies, or novel concepts. In the case of the Corporate Average Fuel Economy (CAFE) standards, a well thought-out public comment resulted in the addition of a missing benefit in the critically important cost-benefit analysis. This is perhaps suggestive of a future direction for e-advocacy. Instead of 60,000 form letters, a campaign might use ICT to foster a massive brainstorming session that raises, debates, and distills the best ideas a constituency can offer collectively.

that sometimes are the basis for a rulemaking decision. Better access to industry, academic, or government data would increase the ability to replicate and test models. Others noted the same tools might just as well explain and demonstrate the legitimate models on which many expert decisions rest. Many seemed to agree that user-friendly, non-expert visualization and manipulation applications (akin to UrbanSim[30]), would make the operative assumptions and rationale more transparent.

In terms of the transformation of the analytical process, there were concerns that new technologies invariably will bias the process. One participant asked whether the tools themselves would be transparent. If agencies are sorting and categorizing public comments using advanced technologies, participants wondered about the extent to which that fact and the technical details behind it need to be made public. Others questioned whether the expertise in agencies might shift from knowledge of rules and data to mastery of large-scale language analysis tasks. The dissent here was to note that good tools would take an already-bogged-down process and shift the analyst workload from sorting similar and identical documents to actually doing analysis on all the unique and valuable submissions.[31]

8. EDUCATIONAL IMPACT

Many participants spoke positively about the educational potential for electronic rulemaking. The hope was expressed that ICT-enhanced rulemaking would contribute to making better citizens and comments, while increasing compliance with and understanding of federal rules. Citizens would benefit not only from the ubiquity of accessible information, but also the ability to personalize government and interest group information services. While some predicted better education for traditionally underrepresented groups, dissenters warned that no amount of on-line information or tools will solve education issues for the many digitally and otherwise illiterate citizens who disproportionately make up underrepresented groups.

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[30] See http://www.urbansim.org/.

[31] Most agencies farm out to the private sector or special internal branches of government, such as the USFS Content Analysis Team, the task of sorting and doing content analysis on the large batches of public comments (personal interviews with officials at the DOT, EPA, and the USFS). Some new and experimental tools for accessing and analyzing the docket are already in use. An interesting question is whether the public is aware of the extent to which contractors are involved in the process.

One thread of discussion focused on the proper role of government as an educator of its citizens. One person remarked it was insufficient simply to post information on the web, since the rulemaking process and its imperatives were unfamiliar to many citizens. It was suggested that the FDMS could have a prominent link to a "This is Rulemaking" page, a tutorial that explained the notice and comment process in straightforward terms. It was suggested this page could explain what constitutes a good public comment, and that page could link to agency-specific definitions of the type of information that is credible to rule writers (e.g., scientific studies, reports, data, replicable models, etc.). Another participant reported "the agencies can be more productive in promoting their own mandates. They will be able to get more information out."

A recurrent theme expressed by agency personnel in these and other focus groups stressed the need for those facilitating and participating in mass mail campaigns to understand better the limited impact of such efforts. Agency personnel have stated consistently that whether it is 50 or 500,000 identical or similar comments, the value added to the rulemaking process is considerably less than one careful, specific, substantive comment. One participant, however, stated that for many of the one-click submitters participating in a rulemaking, the sending of a form letter as part of an email campaign is often a first step into the political process, one that can be a gateway to more significant engagement and participation.

Others expressed interest in having the government use the web to get an explanation of the agency mandate into the hands of the public. It was noted that most citizens remain ill-informed not only about the rulemaking process and its statutory authority but also the rules themselves once they are part of the *Code of Federal Regulations*. One participant was concerned that government use of ICT to produce more informed comments or better-informed citizens might exceed the proper scope of its role and generate a whole new set of issues. There was general agreement, however, that the government bore some responsibility to try and reach the affected stakeholders in a rulemaking, regardless of whether they spoke English. To that end, many agreed that a *Federal Register* notice was insufficient and that ICT presented a new toolbox for educational outreach.

It was noted that there exists a possibility for traditional intermediaries (interest groups) to educate their membership more carefully, with the goal of generating more detailed, high-impact public comments. One participant stated that thousands of associations count educating their members among their top priorities. In return, many of those groups rely on having their members go through their system for preparing and submitting comments on rules. The ability to

harvest membership data via these systems in turn educates the groups about the needs and composition of their constituency. For one participant, this data became the basis for more carefully targeted action alerts and other campaigns. Another person suggested that there ought to be annual conferences on the "ABCs" of rulemaking, which might ensure that the groups' leaders and mobilization specialists themselves better understand the function of public comment in agency decision-making.

9. LEVEL AND NATURE OF PUBLIC PARTICIPATION: QUANTITY VS. QUALITY

Many of the groups wrestled with the sense that increased public participation might degrade the overall quality and efficacy of public comment. The implicit assumption seemed to be that a quantity/quality tradeoff exists. According to this view, the increasing number of comments necessarily means more duplicative, non-substantive form letters and possibly less attention to those comments that might contribute meaningfully to a better rule. One participant commented that:

> the benefits are engaging more people in that process . . . and, I think that is possibly one of the costs. You create a process whereby it really does become sort of no more value than people sending mass emails or spam ... you need to design the process so that people actually feel they do have a voice and role in all of this, and that their voice is being heard.

An "explosion" of anecdotal comments also was thought, by some, to be a net loss for the overall quality of the comment process. One person saw the move to rhetoric-based comments as unlikely to solve any of the problems rule writers face. Another remarked that some of the web applications currently running are automated dumps without any practical meaning. Another participant noted a trade-off for groups that might take on the task of synthesizing all their members' input into one coherent, high-impact comment, or could instead seek a newsworthy large count of forms and what the US Forest Service Content Analysis Team calls "form+" comments. One person noted any turn to technology that limits or marginalizes participation would constitute a democratic loss. Conversely, any technology that ensures every comment submitted gets considered, even in a torrent produced

by well-organized campaigns, would increase the public legitimacy and legal defensibility of the process.[32]

There was some debate about what actually counts as participation. Most seemed to agree that the submitter who never reads the proposed rule or even the preamble before clicking on an email or web site link to comment barely passes the lowest possible threshold. When that person goes to an automatically populated web action form (the 2-click, cost-free comment), the temptation for some is to dismiss this act for failing to clear the threshold of meaningful participation. While some participants identified this as a less than fully legitimate form of engagement in rulemaking, others saw it as a proper compliment to more thorough, costly comments prepared by organized interests. One person stated the EDOCKET system was designed to limit participation until it was too late to make a difference. Another suggested the focus ought to be on the entire process and not simply improving notice and comment.

Some were concerned that the logical outgrowth of these actions would be the full and formal disenfranchisement of mass submissions.[33] Another spoke to the fear that the people are being written out of the process. One person remarked that the goal is not to ensure everyone can participate in every rule; rather, the goal is to get real stakeholders interested in rules that impact them, and to do so early in the process. Many agreed with the notion that letter counts were inferior by definition to solid data and facts, yet one person recognized there is a "legitimate tension" between anecdotes grounded in values and facts or inferences derived via the scientific method.

Some participants were ambivalent about the benefits of a point-counterpoint dialogue. A proponent stated that a visible and open debate would sharpen both sides, and another saw potential for more scientists pointing out flaws in assumptions. One person questioned whether such a dialogue would feature statements such as "there's no science" by people who have never read any scientific studies themselves. There were several discussions of the use of rebuttal periods as a way to get in-depth responses to specific assertions. One

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[32] In several interviews and focus groups, agency personnel at the EPA have expressed concern about losing an otherwise carefully prepared rule in the courts based on the failure to address substantive comments that are lost amongst thousands of modified form letters.

[33] Depending on whom you ask, the U.S. Department of Agriculture Forest Service either floated, or had a free-wheeling staff member let slip, the idea that electronic mass submission of public comments on its rule-making process could be ignored. See Elsa Wenzel, "Lobbying by Form E-mail Endangered," *PC World*, April 17, 2003, http://www.pcworld.com/news/article/0,aid,110305,00.asp.

person called the ability to see and respond to the comments of others a source of checks and balances in the system. Another predicted:

> electronic comments and replies to those comments will become more of a discussion or dialogue on line than traditional rulemaking has been . . . agencies may want to encourage that, because it allows alternative views to be laid out and debated. It takes the agency off the hook to some extent.

10. OVERALL COSTS & BENEFITS

The groups highlighted the many unknowns with regard to the costs and benefits of electronic rulemaking. Will the FDMS work? Will anyone use it? Will it reduce or increase the costs and hours devoted to sorting through information or the comments on comments? Will it lead to quicker promulgation of rules, and should it? How much will it actually cost? Will it facilitate the proliferation of "me too" votes, or bring the wisdom of more diverse opinion to bear? As was the case for so many of the issues raised in this article, there was no overarching consensus, except to say, as one person did, that "we just don't know yet."

It was suggested that cost savings ought to be less of a factor if the money spent resulted in much better information services. The reduction of manual labor and content analysis subcontracting was identified as an avenue of real savings. One nongovernmental participant, however, thought it would be a significant cost to monitor discussion threads and rebuttals to be able to get the "last word" in. Another spoke of the privacy cost if companies used the new tools to gather data on citizens. A consistent concern was expressed about the misuse of tools designed to enhance the process. One person worried:

> For us government analysts, the thing I think of as a cost is how many people you will need and how will we sort through all that information. I have visions of people commenting on the comments on the comments, and that there will be millions of comments; [h]ow will we get all this done?

The reduction of paper and potential ease of access were noted regularly. An ability to produce and share a better legal record was considered a plus. One representative of a group with 8,000 scientist members noted a steady increase in the willingness of scientists to engage in the rulemaking process. Another stated that the focus on E-Government meant too little time was spent dealing with the digital

divide.[34] There was a potential benefit noted in tracking visitors to the site and how they use the materials and tools that were made available. Electronic rulemaking, remarked one person, would allow the agencies to communicate better with and understand the regulated community. To fulfill this promise, however, the agencies would need to commit to substantial outreach to stakeholders and the general public.

CONCLUSION

Much of what has been written and said about electronic rulemaking over the last three years has been forward-looking and highly speculative. The dearth of empirical studies with agreed-upon metrics was characteristic of rulemaking scholarship prior to the emergence of electronic government.[35] We continue to sort out exactly what to measure and how best to measure it. Simultaneously, developers of the FDMS are determining what to build and how to fund it. While questions remain unresolved, several likely scenarios are unfolding. At first glance, some of these seem mutually exclusive, but in fact they are more often complimentary and may be sustainable over time.

Electronic rulemaking may fundamentally transform the process, or may simply digitize established paper-based processes. Evidence gathered at this series of focus groups supports the latter conclusion. The pace of procedural and technological change is slow due to considerable inertia and territoriality among both governmental and nongovernmental actors. Despite idealism among advocates of a highly engaged digital democracy, people and institutions tend to do what they've always done. If there is a stamp-free method to register a practically effortless preference on a favorite issue, the evidence suggests that many citizens will take the chance to cast what they

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[34] A recent report from the American Political Science Association Task Force on Inequality and American Democracy stated, "the Internet may 'activate the active' and widen disparities between participants and the politically disengaged by making it easier for the already politically engaged to gain political information." American Political Science Association, "American Democracy in an Age of Rising Equality" (2004), http://www.apsanet.org/Inequality/taskforcereport.pdf.

[35] For more on the nature of rulemaking and the trends in its scholarship, see Cornelius M. Kerwin, *Rulemaking: How Government Agencies Write Law and Make Policy,* 3rd ed. (Washington, D.C.: CQ Press, 2003).

perceive as a vote for a favorable decision, often as defined and scripted by their interest group of choice.[36]

Moreover, citizens and interest groups are wise to the fact that both the prevailing architecture of first-generation electronic government and practices in administrative rulemaking impede truly deliberative opportunities. In addition, many submitters of comments prefer not to have their comments rebutted and therefore submit on the last day or, with the advent of the electronic mode, even at the last minute. The anti-deliberative effect of this practice might be mitigated through various technological or procedural innovations; but how would this then affect citizens' willingness to commit the extra time to provide input and consider feedback?

We know very little about how the behavior of affected groups will change when and if duplicate detection algorithms or moderated on-line dialogues emerge as regular features of electronic rulemaking. It is safe to surmise that some individuals and groups will find the value-added by advanced information and communications technologies useful to submit more effective public comments. Others will look for new ways to beat the system, and a cat-and-mouse game may move from the paper-based to the digital playing field. One participant stated the:

> whole mass form mail is sort of a game like radar detectors. I've begun using scripts to take massive lengthy well documented comments, carve them up into paragraphs, randomly combine them, and feed them to my users, so that they can be signed and submitted to get past your filter. I'm wise to the game. It allows us to then have that input.

Administrative law scholars worry about a perceived shift away from agency discretion and expert decisions toward the politics and the psychology of plebiscites. They are not alone. At a recent agency focus group, one participant stressed, "Rulemaking is not a democracy." While some NGOs seem committed to mass mailings, many agency personnel and other observers believe these efforts aim to undermine the role of expertise in public administration. Mass mailers may inadvertently petition themselves into obscurity. The use of mass-mailing campaigns during public comments periods, while

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[36] Stuart W. Shulman, "Whither Deliberation? Mass e-Mail Campaigns and U.S. Regulatory Rulemaking," remarks delivered December 14, 2004 at the IPAC-sponsored "International Brainstorm: The Future of the Regulatory State. See http://erulemaking.ucsur.pitt.edu/doc/papers/Smarttape12.04.pdf.

occasionally effective, engenders a degree of cynicism and resentment among those intended to be influenced by such comments. As a result, the general level of respect of agency personnel for citizen comments and values may decline over time.

Despite the skepticism linked to mass submissions, electronic rulemaking will nonetheless result in at least some better quality comments and perhaps more durable rules, alongside a proliferation of quasi-spam in the form of automated junk mail, that one-click cacophony striving for a virtual direct democracy. Promising opportunities exist for ICT to facilitate, structure, and guide informed, meaningful public input. Rule-writers agree that public comments can be more on point, substantial, and manageable than they are currently. At stake is whether the guiding or interactive structure will reside inside or outside the federal government. Focus group participants made it clear that the best thing developers of the FDMS can do to ensure innovation is to publish an open application programming interface. The result will be a vibrant marketplace for ideas, data, studies, and other comments relevant to the rulemaking enterprise.

Two further outcomes are possible. One likely scenario is that ICT will increase the transparency and legitimacy associated with federal rulemaking. Another is that less transparency will result as agencies fail, for whatever reason, to document the interagency or *ex parte* communications on which some critical decisions are based. Consider the current debate over the role of OIRA review and early participation in decisions about the scope of regulation. The Internet as potentially a 24-7 spotlight on agency activities may result in further blurring the boundary between informal and formal interagency communications.[37] With formal communications subject to Freedom of Information Act (FOIA) requests, government personnel may shift their communicative routine to compensate for the enhanced transparency radar.

The impact of information and communication technology and the Internet is limited. Clearly, ICT cannot solve problems that are legal, political, social, and economic in nature; therefore, it cannot "change everything" and confirm the Johnson thesis. However, it can provide more choices and tools than ever before to those with the knowledge of electronic opportunities to engage the rulemaking process.

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[37] It has been suggested that to "speak of a 'record' in this context, then, is highly artificial—at least, if we are imagining a collection of data all of which was exposed to the interested public for its response and challenge. . . ." Peter L. Strauss, An Introduction to Administrative Justice in the United States (Durham, NC: Carolina Academic Press, 1989), 162.

The playing field is shifting and much is unsettled. Significant choices lie ahead for the developers and users of the Federal Docket Management System, Congress, and the courts. As the constitutional scholar Lawrence Lessig might say, how you build it matters.[38] Balancing the interests of regular users and other stakeholders against the imperatives of governing a complex democratic society is no easy task. To the extent we talk openly about the challenges and opportunities, the democratic potential for innovative and equitable solutions remains intact.

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[38] Lawrence Lessig, *Code and Other Laws of Cyberspace* (New York: Basic Books, 1999), 7.

[39] See National Science Foundation Grant No. EIA-00328914, "SGER COLLABORATIVE: A Testbed for eRulemaking Data," which was one of four linked SGER awards in 2003 from the NSF's Digital Government Program (http://erulemaking.ucsur.pitt.edu).

APPENDIX A

WORKSHOP OUTREACH AND PARTICIPANTS

In April 2004, an electronic call for participants was issued via ICT- and E-Government-related listservs and through our professional eRulemaking network. The call was designed to encourage input from a diverse set of actors with a clear stake in the development of the federal eRulemaking Initiative.[40] Participants were invited from six broadly defined stakeholder constituencies: 1) larger businesses, 2) smaller businesses, 3) labor and environmental advocacy groups, 4) good government and public participation groups, 5) state and local government, and 6) the legal and lobbyist professions. We asked for participants who were willing to attend the specific half-day session devoted to their constituency and that only individuals committed to contributing to a serious dialogue register.

Initially, the response to the electronic call for participants was cause for concern. At one point in May, reducing or even canceling the workshop was a distinct possibility. A number of more direct measures were undertaken to generate an appropriate number of participants from the six constituencies. Three full-time students were hired to identify and telephone directly the appropriate representatives in non-governmental organizations over a two-week period in May. In addition, e-mail lists of state and local officials (about 1,000) and DC-area groups (about 1,700) were purchased, and a mass e-mail of the workshop call for participants was distributed. As a result of these efforts, a sufficient number of participants registered, and the workshop went ahead as planned.

In total, counting the 2 Principal Investigators and the 4 student assistants, 64 individuals participated over the course of the 3 days. A total of 10 focus groups were conducted, ranging in size from 7 to 11 participants. Not counting the researchers and research assistants, a total of 7 individuals participated in more than one session. There were 33 participants who chose to keep their identity confidential, while 31 indicated attribution of their comments in future publications was permissible. None of the comments presented in this report are attributed to their speaker. Federal agency personnel and academics were welcome at any of the sessions. Participation was free, and lunch was provided. Our expressed intent was to share the findings, via this

[40] See http://www.regulations.gov/eRuleMaking.cfm.

report, with government agency managers, members of Congress, ICT contractors, academics, and the general public.[41]

[41] See Appendix B for the affiliations of the workshop participants.

APPENDIX B

WORKSHOP PARTICIPANT INSTITUTIONAL AFFILIATIONS

AFL-CIO
Alliance for Healthy Homes
American Association of Law Libraries
American Petroleum Institute
American University
ASRC Aerospace Corp.
Associated Builders and Contractors
Association of State and Territorial Solid Waste Management Officials
Carnegie Mellon University
Center for Regulatory Effectiveness
Committee on Small Business
Congressional Research Service
Defenders of Wildlife
Drake University
Ecological Society of America
Electronic Frontier Foundation
George Washington University
Government Printing Office
Information Renaissance
Insero
Iowa State University
National Academy of Public Administration
National Association of Home Builders
National Association of Schools of Public Affairs and Administration
National Campaign for Sustainable Agriculture
National Environmental Trust
National Federation of Independent Businesses
National Science Foundation
National Security Archive
National Small Business Association
Physicians for Social Responsibility
Public Citizen
Small Business Administration, Office of Advocacy
Social Security Administration
Specialty Graphic Imaging Association

Transportation Security Administration
United States Coast Guard
United States Department of Agriculture
University of Michigan
University of Nebraska at Omaha
University of Pennsylvania
University of Pittsburgh
US Chamber of Commerce
US Department of Labor
US Department of Transportation
US Environmental Protection Agency
Virginia Department of Planning & Budget

APPENDIX C

FOCUS GROUP PROTOCOL: ERULEMAKING WORKSHOP 2.0
JUNE 2-4, 2004

{For the purpose of this discussion, we will use IT to denote the wide range of information and communications technologies that are used in eRulemaking}

1. What are some of the costs and benefits of applying IT to the rulemaking process?

2. How can information technology improve the rulemaking process?
   a. How do you define "improved" in the context of rulemaking?

3. How do stakeholder groups currently use IT to realize the objectives of their organization?
   a. How will this use likely change in light of the tools and capacities discussed during the presentations?

4. What kinds of cultural changes do you think IT may facilitate or necessitate in stakeholder organizations?
   a. Will IT result in a more collaborative rulemaking process?

5. What specific things would you suggest to make electronic rulemaking more transparent, accessible, and effective?

6. Will eRulemaking help "level the playing field" between large/small organizations and/or between urban/rural entities?

7. Would government decision-making be improved if eRulemaking created the opportunity for a dialogue among stakeholders?
   a. If so, how would you structure it?

8. What role should IT play improving regulatory compliance?

9. Is there anything else we should discuss that we have not addressed?