

ONLINE RULEMAKING: A TOOL FOR STRENGTHENING CIVIC INFRASTRUCTURE©

Barbara H. Brandon¹ <bhb@info-ren.org>

Robert D. Carlitz² <rdc@info-ren.org>

Information Renaissance

425 Sixth Avenue, Suite 1880

Pittsburgh, PA 15219

(February 28, 2001)

Public participation in federal rulemaking is too often a pro forma exercise, involving just Washington-based groups. The Internet can change this by engaging more Americans in the process. Two simple innovations, electronic docket rooms and online policy dialogues, can allow groups and individuals all across the nation to have a say in how Washington develops regulations.

We are not offering this as an abstract vision of online democracy; our focus is utilitarian. The federal government should build a civic infrastructure where the public and the bureaucracy can engage in interactive dialogues at key junctures in the

¹ Barbara H. Brandon is a policy analyst with Information Renaissance; she has a J.D. from the University of Pittsburgh and an LLM. from Harvard Law School.

² Robert D. Carlitz is Executive Director of Information Renaissance and a Professor of Physics at the University of Pittsburgh.

administrative process. The scope would be as broad as Washington's reach, ranging from environmental standards to insider trading rules.

While much of the regulatory workload is mundane, there are many issues that will engage broad segments of the public. For example, public interest was remarkably high in President Clinton's initiative to foreclose development in roadless areas in our national forests. The Forest Service received comments from well over a million Americans.³ Thoughtful implementation of electronic rulemaking can capture this interest by making civic participation easier and more effective.⁴ More importantly, Washington will not just be hearing from the usual suspects.

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.⁵ Last November's Unified Agenda, which outlines the government's rulemaking activities, ran two thousand eight hundred and fifty one pages through several volumes of the Federal Register.⁶

³ 66 Fed. Reg. 3244, Jan. 12, 2001. 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 1 million form letters and postcards, 60,000 original letters and 90,000 electronic mail messages. 68 Fed. Reg. at 3248. The dedicated Web site for this rulemaking is <http://roadless.fs.fed.us/>.

⁴ Smaller rulemakings will also benefit from online rulemaking. See discussion *infra* at note 62.

⁵ Cornelius Kerwin, *Rulemaking: How Government Agencies Write Law and Make Policy*, 13-15 (2d ed. 1999); Jerry L. Mashaw & David L. Harfst, *The Struggle for Auto Safety*, 4-10 (1990).

⁶ 65 Fed. Reg. 73, 301 – 75,152, Nov. 30, 2000. 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; these include significant actions such

The mechanics of the informal rulemaking process are simple.⁷ 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. The notice asks the public to submit comments on the proposal, normally within a 60-day time period.⁸ In the final stage, the agency analyzes the submissions and promulgates a final rule that must address all material comments on the proposal. Since the heyday of informal rulemaking in the nineteen seventies,⁹ opponents and supporters of regulation have warred over the analytical procedures to be used in assessing the costs and burdens of a particular rule.¹⁰ Additional requirements have been imposed, but the notice and comment feature described above remains as the key mechanism for public participation.

Two other features are noteworthy. Each rulemaking agency maintains a paper docket room only at its Washington headquarters, which deprives Americans outside

as the approvals of state implementation plans under Section 110 of the Clean Air Act, 42 U.S.C. § 7410.

⁷ 5 U.S. C. § 553 of the Administrative Procedure Act (APA). The APA authorizes formal rulemaking as well, but this approach has fallen into disuse. See Wesley A. Magat, *Rules in the Making: A Statistical Analysis of Agency Behavior* 15 (1986) cited in Stephen P. Croley, *Theories of Regulation: Incorporating the Administrative Process*, 98 Columbia Law Review 1, 108 (1998).

⁸ Agencies will often shorten the comment period to thirty days for minor rules.

⁹ Jerry L. Mashaw, *Improving the Environment of Agency Rulemaking: An Essay on Management, Games and Accountability*, 57 Law & Contemporary Problems 185, 186-87(1994); Thomas O. McGarity, *Some Thoughts on 'Deossifying' Rulemaking*, 41 Duke Law Journal 1385 (1992); Kerwin, *supra* note 5.

¹⁰ 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. See Robert W. Hahn, editor, *Risks, Costs, and Lives Saved: Getting Better Results from Regulation*, (1996) [advocating its use] and Thomas O. McGarity, *Reinventing Rationality: the Role of Regulatory Analysis in the Federal Bureaucracy*, (1991) [pointing out its limitations]. 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.

the Beltway of access.¹¹ Second, many of the key analytical materials that support a particular proposal are also available only in the Washington docket rooms. Thus the public can not view important economic analyses that describe the costs and the benefits of particular regulatory alternatives.¹²

To date, most federal agencies have taken rudimentary steps to utilize the Internet during rulemaking. All proposed and final rules are published simultaneously online¹³ and in the Federal Register. Sometimes agencies will post additional materials on their Web sites that amplify and explain policy details in the proposed and final rules.¹⁴ In addition, many agencies invite the public to submit comments via e-mail,¹⁵ fax¹⁶ or Web page¹⁷ during a fixed time period. But these are circumscribed efforts that fail to capitalize fully on the Web's interactivity.

¹¹ In a 1993 *Reinventing Government* report, the Clinton Administration recognized that public participation in rulemaking needed improvement and suggested that information technology could play a role in expanding public access at www.npr.gov/library/reports/reg04.html. However the Administration did not follow through with this and its December 1999 e-government initiatives are strangely silent on expanding public input into this aspect of governmental decision-making. See documents at www.pub.whitehouse.gov/uri-res/I2R?urn:pdi://oma.eop.gov.us/1999/12/20/5.text.1 and www.pub.whitehouse.gov/uri-res/I2R?urn:pdi://oma.eop.gov.us/1999/12/20/2.text.1.

¹² U.S. Government Accounting Office, *Federal Rulemaking: Agencies Use of Information Technology to Facilitate Public Participation* 9, Report No. GGD-00-135R (2000) available in a PDF file on the GAO Web site (hereinafter GAO Report).

¹³ The Government Printing Office's online link is at http://www.access.gpo.gov/su_docs/index.html.

¹⁴ Two excellent examples are the Forest Service's Web site for the roadless area rulemaking at <http://www.roadless.fs.fed.us> and EPA's Web site for its rulemaking on achieving water quality standards in degraded waters at <http://www.epa.gov/owow/tmdl/index.html>.

¹⁵ See http://www.epa.gov/opptsfrs/home/Elec_comm.htm. Practices on accepting e-mail submissions vary widely, even within agencies. GAO Report, *supra* note 12, at 8-9.

¹⁶ The Department of Health and Human Services (HHS) and the American Civil Liberties Union recently had a dispute about the propriety of submitting comments by fax. Ben White, "A Fight Over the Fax," *Washington Post*, Feb 10, 2000, A21 at <http://washingtonpost.com/wp-srv/national/feed/a34346-2000feb10.htm>. Rather than submit comments by e-mail, the ACLU Web site encouraged individuals to submit personalized faxes to HHS. HHS refused to accept 2400 faxes because its machine jammed. HHS further responded that it had created a Web site for the submission of comments, and that mechanism as well as the submission of 3 copies by mail

Two Internet-based innovations, electronic docket rooms and online policy dialogues, will transform public participation in rulemaking.¹⁸ First, electronic docket rooms make 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. This precludes the public from engaging in a dialogue either with the agency or with other parties to the proceeding. No interchanges can develop that allow views to evolve and thoughts to be refined. Indeed, the process seems to be “carried out...as much for the sake of appearance” as for the substance.¹⁹

In contrast, an electronic docket room allows an interactive discussion to develop. The public 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. But the more significant feature of an electronic docket room is its potential to promote an informed dialogue. 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

were the exclusive methods for commenting on the rule. The GAO report also summarizes fax submittal practices at various agencies. *Supra* note 8, at 8-9.

¹⁷ See http://erm.aspe.hhs.gov/ora_web/plsql/erm_rule.rule?user_id=&rule_id=2.

¹⁸ An electronic docket room is an online equivalent to a paper docket. It serves as a mechanism for viewing all the comments submitted on the proposed rule. It should also operate as a repository for the background materials that the agency used in developing a proposal. Finally, agencies should post educational materials in the docket room and use this mechanism to explain both the regulatory background and the technocratic complexities to lay audiences.

¹⁹ J. Clarence Davies & Jan Mazurek, *Pollution Control in the United States: Evaluating the System*, 155-56 (1998).

result, more nuanced comments will be developed, and overall the quality of submissions should improve.²⁰

The second aspect of our Web-based reform would incorporate online policy dialogues into those rulemakings that interest wider audiences. These would be moderated asynchronous discussions and should not be confused with informal real-time chat rooms.²¹

We conducted just such a discussion when the Federal Communications Commission (FCC) proposed its Universal Service rule under the landmark 1996 Telecommunications Act. Here the FCC laid out a plan to adopt a cross-subsidy, the E-rate, to finance Internet connections for the nation's schools and libraries. We thought it vital that key beneficiaries of this rulemaking, educators and librarians, should learn about the proposal, share their views with one another and most importantly offer their comments to the FCC. Thus we built an electronic docket room and conducted an online seminar during the rulemaking.²²

The discussion was moderated to avoid 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 we brought together more than 500 individuals from all 50 states and Puerto Rico.

²⁰ Three legal scholars have concluded that the Administrative Procedure Act does not pose a bar to electronic rulemaking. See Henry H. Perritt, *Electronic Dockets: The Use of Information Technology in Rulemaking and Adjudication* (The Administrative Conference of the United States, 1995); Jeffrey S. Lubbers, *A Guide to Federal Agency Rulemaking*, 151-153; (1998); Stephen M. Johnson, *The Internet Changes Everything: Revolutionizing Public Participation and Access to Government Information Through the Internet*, 50 Admin. L. Rev. 277 (1998).

²¹ With an asynchronous format, participation is not restricted to any particular time of day; this flexibility easily accommodates different time zones and busy schedules.

The seminar participants learned about the policy making process by viewing and discussing the regulatory materials. Almost invariably the text of a proposed rule is encumbered with dense layers of statutory and regulatory language that the lay reader has to struggle to master. This “enshrouding” in “technocratic complexities” often makes a rule “inaccessible to public control.”²³ An open-ended forum like our online seminar allows those interested in the regulatory issues to peel away these layers and gain a greater understanding of the policy problems.

Our efforts also benefited the FCC, which had to formulate a new program in an area where it had little background. Experienced teachers and librarians, whose voices had not previously been heard, 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 FCC staff found most useful in crafting the final rule.²⁴

It is instructive to examine the range of commenters on the E-Rate rule before and after the online discussion. In the official comment period there were submissions by some 100 individuals and groups. Almost all of the nation’s telecommunications companies were represented, as were numerous trade groups and professional organizations, but only two of the nation’s 16,000 school districts had spoken. Thus over 95% of the industry groups weighed in while scarcely 0.01% of the affected school

²² <http://www.info-ren.org/universal-service/network-democracy.html>. The seminar actually ran after the formal public comment period had expired, but the FCC entertained the comments because the docket was still open. See also discussion in GAO Report, *supra* note 12, at 11.

²³ Richard Pildes & Cass Sunstein, *Reinventing the Regulatory State*, 62 *University of Chicago Law Review* 1,7 (1995).

²⁴ Conversations between the FCC staff and Robert D. Carlitz.

districts spoke out.²⁵ The online discussion thus provided a counterbalance to what had been a narrow conversation between Washington-based interest groups.

Present Efforts

To date, seven electronic docket rooms have been constructed in scattered corners of the federal bureaucracy.²⁶ Two independent agencies, the FCC²⁷ and the Nuclear Regulatory Commission (NRC),²⁸ have installed good first generation efforts.²⁹ The record is far more mixed in the executive branch. The Department of Transportation (DOT) has the most extensive system, providing an electronic image-based database for every agency rulemaking.³⁰ At the Animal and Plant Health Inspection Service (APHIS) in the Department of Agriculture (USDA)³¹ and the Administration for Children and Families in Health and Human Services (HHS),³² resource constraints have

²⁵ <http://www.info-ren.org/universal-service/network-democracy.html>.

²⁶ This may not be an exact tally of the present effort; more public dockets systems are presently being constructed. For instance, EPA proposes to bring up an electronic docket system in the last quarter of this year. See post by Barbara H. Brandon at OMB Watch's Government Information Policy listserve, <http://lyris.ombwatch.org/cgi-bin/lyris.pl?visit=gov-info-access&id=141531872>.

²⁷ <http://www.fcc.gov/e-file/ecfs.html>.

²⁸ <http://ruleforum.llnl.gov/>.

²⁹ Unfortunately the Securities and Exchange's Commission's initial effort falls short. See <http://www.sec.gov/rules/proposed.shtml>. The SEC allows the public to view the text of comments submitted electronically but not those submitted by other means. Moreover the Commission dismantles this feature after each rule is promulgated.

³⁰ <http://dms.dot.gov/>. This site's design could do more to encourage public participation. A user has to know the docket number to access the docket rooms. The search engine can fail to locate a docket room if the docket number is not supplied. In addition, the help line staff provides no assistance without a docket number. Finally, while the site provides information tracking a regulation's progress through the bureaucracy, access to this data requires registration and a password.

³¹ <http://www.aphis.usda.gov/ppd/rad/>.

³² <http://www.acf.dhhs.gov/hypernews/>. HHS has also created a post-comment period electronic docket. During its recent rulemaking on medical privacy, HHS stated that it would grant

precluded scanning postal submissions onto the Web, thereby depriving the public of access to all the commentary.^{33 34} In contrast, the Food and Drug Administration (FDA) has built fully electronic docket rooms for both rulemaking and its advisory committees.^{35 36}

Suggested Improvements

Agencies with electronic docket systems should institute a two-stage comment submission process to foster a better dialogue between the parties. If rebuttal periods are routinely authorized, the participants can comment on all the submissions made by the other parties. This assures that one side will not gain a tactical advantage by

electronic access to all the commentary on this proposal *after* the comment period had closed. See also discussion on the ACLU fax submittal controversy in footnote 16.

³³ 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 the 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 form letters, a step that parts of FDA have taken to index comments.

³⁴ Agencies that engage in online rulemaking should encourage the parties to submit comments in HTML, the Web formatting language. Many word processing programs make this a simple conversion. This would make it easy to search these submissions.

³⁵ <http://www.fda.gov/ohrms/dockets/default.htm>. The FDA has also done a good job in creating an electronic reading room under E-FOIA, the 1996 amendments to the Freedom of Information Act.

³⁶ 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, <http://www.ntia.doc.gov/ntiahome/domainname/domainname130>, but the agency has not established this as a permanent feature of its rulemaking activities.

In a rulemaking on the Federal Advisory Committee Act Management process last year, the General Services Administration created a limited electronic docket room; from its operation it became apparent that the agency was very slow in posting comments to its dedicated Web page. Comments submitted electronically by Information Renaissance were promptly acknowledged, but were not posted until after the comment period had closed. <http://policyworks.gov/org/main/mc/rulecom.htm>.

Several other agencies maintain Web pages which list the rules open for comment and explain how to submit comments by email. See for instance the Web page of the Bureau of Land Management in the Department of Interior, <http://www.blm.gov/nhp/news/regul/regul.html>.

submitting its views on the final day, which is currently a common practice.³⁷ As the former Research Director for the Administrative Conference of the United States³⁸ 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.”³⁹

Certain “best practices” should also be implemented. The design of most existing docket rooms make them useful only to the cognoscenti.⁴⁰ The Environmental

³⁷ Neither the APA nor the case law presently require agencies to entertain rebuttal submissions. The Clean Air Act does provide for such comments where the proposed rule is national in scope. See Section 307 (d)(5), 42 USC § 7607(d)(5). The FCC does so as a matter of practice. FCC Rules of Practice, 47 CFR 1.145.

The Library of Congress recently 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 rulemaking had closed.

³⁸ The 104th Congress abolished the Administrative Conference. Established in 1968, the Conference served as an advisory agency on administrative law and procedure.

³⁹ Lubbers, *supra* note 20, at 214. The heightened transparency provided by 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. Lubbers, *Supra*.

In addition, summaries of *ex parte* communications with agency staff during a rulemaking can be docketed electronically in order to minimize the chance of reversal under *Sierra Club v. Costle*, 657 F.2d 298 (D.C. Cir. 1981). During its recent rulemaking on marketing standards for organic food the USDA provided a direct link to memoranda detailing these *ex parte* communications. GAO Report, *supra* note 12, at 12.

⁴⁰ The GAO found that the FAA’s docket system was the most straightforward in providing the public with an easy way to comment. GAO Report, *supra* note 12, at 9. 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.” *supra*. Dedicated rulemaking Web sites like USDA’s organic marketing proposal and HHS’s medical privacy rulemaking provided separate links to both the proposed rule and the electronic comment procedure. *supra*. http://erm.aspe.hhs.gov/ora_web/plsql/erm_rule.rule?user_id=&rule_i.

The HHS Web page allowed the commenter to post directly under the section using a comment button on the Web page. This is a useful mechanism. However the site had two big flaws. It was not easily accessible from the Department’s home page. See Patrice McDermott, “Online but Off-Target” *Federal Computer Week*, 3/13/00. <http://www.civic.com/fcw/articles/2000/0313/fcw-pol-mcdrmtt-03-13-00.asp>. In addition, HHS only planned to post the commentary after the final rule was promulgated.

Protection Agency (EPA) has developed a far more citizen-friendly interface for its proposed Regulatory Public Access System.⁴¹ The system's home page highlights the proposed rules open for comment, thereby curing a widespread failing in many of the current docketing efforts.⁴² While we are not advocating a common "look and feel" for all agency Web sites, home pages should provide a direct route to a page that lists all proposed rulemakings open for comment.

Electronic docket rooms should permit anonymous browsing and copying just like paper docket rooms.⁴³ However, anonymous filing should not be permitted once a person or organization is submitting comments for the record. Both the governmental entity and other participants have a legitimate interest in knowing who is commenting.⁴⁴

⁴¹ EPA's design contains a useful Frequently Asked Questions feature. The agency also stated that it plans to develop a Web tutorial for the public. However, the proposed design has a significant design flaw; it does not include a public index to the docket. See discussion *infra* at note 46.

⁴² No agency currently does this across the board, although certain high visibility rules have been featured on home pages. GAO Report, *supra* note 12, at 8-9. For instance, the Department of Labor's (DOL) proposed ergonomics rule was featured on both the DOL home page and the Occupational Health and Safety Administration (OSHA) home page. GAO Report, *supra* note 12, at 5. The USDA did this with the organic food rule and the roadless proposal as well.

⁴³ Last year United States International Trade Commission's proposed that all users of its electronic docket room had to register before browsing or copying documents.

⁴⁴ In a recent beta test demonstration of its new docket system, EPA stated that it had opted for anonymous filing because of privacy concerns. See post by Barbara H. Brandon, *supra* note 26. At a minimum, the authors do not think that the Privacy Act should be construed to shield the identity of organizations submitting comments. The agency's current paper docket systems do not protect the identity of any commenter, and judicial dockets never allow a party to mask his or her identity. Moreover, adoption of such a practice would defeat one of the central virtues of electronic filing by forcing 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. It is noteworthy that Shaw Pittman Potts and Trowbridge, a large Washington law firm, saw no need for anonymity in its practice when

Indeed, anonymous filings are not accepted under the existing rules for paper dockets during rulemakings or adjudicatory proceedings.

Dockets should contain index pages that allow the public to browse the filings by name and organization.⁴⁵ Agencies should not limit access to the commentary to a search engine, as USDA did during its organic food marketing rulemaking last year.⁴⁶ 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.⁴⁷

Electronic methods like listserves or Web postings should be adopted to expand participation beyond the narrow subscription base of the Federal Register and the other passive notification systems that agencies presently utilize.⁴⁸ For example, the State of Washington's Division of Information Services manages a central listserve that allows citizens to custom tailor a list that that will automatically alert them of opportunities to participate in governmental decision-making processes like rulemaking.⁴⁹ 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 General Accounting Office (GAO)

commenting on electronic filing procedures at DOT. See comments at page 11 at DOT Docket OST-96-1436.

⁴⁵ FDA and DOT deploy docket index pages as the primary access tool for using their dockets.

⁴⁶ Three major difficulties flow from limiting access to a search engine. The public may not be confident that they have retrieved all the appropriate documents. Two, if the search engine is flawed, this fear is justified. Third, many citizens will find it easier to use a docket index to locate comments that interest them.

⁴⁷ This is not a burdensome requirement; USDA almost certainly generated just such 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.

⁴⁸ The print version has a base of 13,750 subscribers nationwide. Stephen P. Croley & William F. Funk, *The Federal Advisory Committee Act and Good Government*, 14 *Yale Journal of Regulation* 451, fn. 467 at 529 (1997). During the FCC rulemaking, we reached out to teachers and librarians through electronic contacts with professional organizations and through online interest groups frequented by our target audience. Such practices should be routinized.

recently noted, locating information about a specific rulemaking can be a “daunting” task.⁵⁰

Better public education efforts should be undertaken; at a minimum links to explanatory materials should be a common feature for all docket rooms. If the proposal is significant, weekly summaries, specialized search engines and subject matter indices should be created to allow the public to review prior submissions easily and to post more informed comments in turn.

Electronic docket rooms will also allow agencies to post many of the materials that are developed to satisfy various ancillary legal requirements. These include cost/benefit analyses or information addressing concerns under the Paperwork Reduction Act.⁵¹ As the GAO observed in a recent report, “access to these materials can permit public comments...to be more informed and targeted.”⁵²

Additional Advantages of Online Rulemaking

Other benefits will flow from online rulemaking. Increased transparency will allow commenters to learn from earlier submissions and to refine their views accordingly. Indeed, some set of participants may reach a consensus on an issue that the agency can incorporate into the final rule. Online interchanges will further benefit the judiciary, because the rulemaking record will provide more insights into how a regulation will work in practice.

⁴⁹ GAO Report, *supra* note 12, at 13.

⁵⁰ *Supra* note 12, at 3-4.

⁵¹ 44 U. S. C. § 35 *et seq.*

⁵² GAO Report, *supra* note 12, at 9.

We do not envision online rulemaking as a panacea that will cure the post-promulgation rush to the courthouse door.⁵³ The legislative design of modern regulatory statutes often reflects a deliberate congressional determination to pass the hard questions on to the agency for resolution.⁵⁴ The logical outgrowth of this buck-passing is an adversarial rulemaking process. But a more open, interactive process can minimize disputes and show the agency where the bulk of public concern lies on a particular matter.⁵⁵

These measures should also broaden the participation base in federal rulemaking. At present, little good data exists showing both who is participating in rulemakings and what influence parties exert.⁵⁶ However, it is clear that business groups predominate.⁵⁷ A recent study of rulemaking participation found in a randomly selected group of rules proposed by EPA and the National Highway Safety

⁵³ Professor Johnson offers such a rosy prognostication in his article, *supra* note 20, at 303-04.

⁵⁴ Mashaw, *supra* note 7, at 206-07; Wendy Wagner, *Congress, Science and Environmental Policy*, 1999 University of Illinois Law Review 181 (1999).

⁵⁵ See Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA Law Review 1 (1997).

⁵⁶ Professor Kerwin has observed that good empirical studies “are as rare as hen’s teeth.” *supra* note 5, at 192. See also Stephen P. Croley, *supra* note 7, at 37-38; Marisa Golden, *Interest Groups in the Rule-making Process: Who Participates?* 2 Journal of Public Administration Research and Theory, 252 (1998). As Professor Kerwin notes, each agency compiles participation data differently and the summaries of rulemaking activities in the Federal Register are often not illuminating on this issue. Kerwin, *supra* note 5, at 185-89.

⁵⁷ 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. Staff of Senate Comm. on Governmental Affairs, 95th Cong., 1st Sess., Study on Federal Regulation, Vol. III: Public Participation in Regulatory Agency Proceedings 1977.

More recently, Professor Coglianese studied participation in twenty-five EPA rulemakings on hazardous waste. In these rulemakings between 1989-91 parties representing businesses participated 96% of the time while environmental and citizen groups participated 12% of the time. Trade associations were active over 80% of the time. See Unpublished Ph.D. dissertation cited in Croley, *supra* note 7, at 472.

Transportation Agency that corporations, public utilities or trade associations submitted between 66.7% to 100% of all comments.^{58 59}

To date, the partial deployment of information technology in the rulemaking arena has had some interesting results. During the comment period on marketing standards for organic food, a USDA official noted that electronic rulemaking changed the dynamic of public participation.⁶⁰ In most paper rulemakings commenters typically wait until the last minute to file comments so no one else could see their views.⁶¹ But during this rulemaking, the early submitters had “the greatest influence on the evolving discussion.”⁶²

APHIS, another part of the USDA, had a slightly different take on the process.

They found that electronic docket rooms were particularly helpful when the rule was less

⁵⁸ Golden, *supra* note 56.

⁵⁹ It is also interesting to note the wide variability in the amount of commentary that agencies receive on their major rules. The Clinton Administration issued numerous important rules during its last six months. The public response was greatest in response to the roadless area proposal. See discussion *supra* at note 3. EPA’s adoption of standards covering heavy-duty diesel engines and fuel standards drew over 55,000 comments. 66 Fed. Reg. 5002, at 5012, Jan. 18, 2001. Over 52,000 Americans submitted comments during HHS’s medial privacy rulemaking. <http://www.hhs.gov/news/press/2000pres/20001220.html>. USDA received 40,774 comments during its rulemaking on the marketing standards for organic food. 65 Fed. Reg. 80548, Dec. 21, 2000. In promulgating its highly controversial ergonomics rule, OSHA received 5,900 comments and 714 submissions from witnesses at public hearings. 65 Fed. Reg. 68,261, 68265, Nov. 14, 2000. When adopting a new rule to promote full and timely disclosure of financial information to the public, the SEC received 6,000 comments. 65 Fed. Reg. 51,716, 51, 717, Aug. 24, 2000. Three thousand organizations and individuals commented on the SEC’s tightening requirements for insuring that auditors remain financially independent from their clients. 65 Fed. Reg. 76,008, 76,009, Dec. 5, 2000. In setting an arsenic drinking water standard EPA received 1,100 comments. 66 Fed. Reg. 6976, 7024, Jan. 22, 2001. The Department of Energy recently set energy conservation standards for central air conditioners and heat pumps and received 800 comment. 66 Fed. Reg. 7170, 7174, Jan. 22, 2001. The FDA received 800 comments on its new safety standards for fruit juice. 66 Fed. Reg. 6138, 6140, Jan. 19, 2001. In setting poultry handling standards the USDA received 252 comments, mostly from industry or trade associations and three from consumer groups. 66 Fed. Reg. 1750, 1752, Jan. 9, 2001.

⁶⁰ GAO Report, *supra* note 12, at 12.

⁶¹ See e.g. Shaw Pittman Potts and Trowbridge’s discussion of its filing needs, *supra* note 45, at 3-10.

⁶² GAO Report, *supra* note 12, at 12.

controversial. During these rulemakings commenter interaction provided “a real-time, informal ‘peer review.’”⁶³ This experience should be transferable. Active notification systems and rebuttal comment periods should generate more input even when a rule is very technocratic. Specialized audiences at universities, nonprofit organizations and individuals with a particular expertise have valuable input to offer if Washington makes it easy to do so.

A final benefit will be cost savings to the taxpayer. As the GAO has documented, these savings can be substantial.⁶⁴ After the DOT installed its electronic docket system, it began saving approximately a million dollars a year in administrative costs.⁶⁵ Similarly, the USDA estimates that it saved more than \$100,000 dollars in administrative costs during the organic marketing rulemaking while simultaneously boosting public awareness and participation.⁶⁶

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. However, the Internet’s civic potential should not be ignored because of legitimate concerns about access. Simply put, the digital divide should not prevent us from utilizing the Web to re-engage more Americans with their government.

⁶³ *Supra* at 11.

⁶⁴ *Supra* at 9.

⁶⁵ *Supra*.

⁶⁶ *Supra* at 12. However USDA utilized a proprietary software package that it cannot use again. *Supra* at 13.

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. This is a

A second fear is that increased participation will overwhelm the agencies with citizen input.⁶⁷ In the rulemaking context this issue is easily disposed of, because an electronic docket room offers the agencies an immediate internal payoff. Unlike a bulky paper docket, online comments can easily be sorted, indexed and searched. Second, it matters very little if an agency receives 10 or 100 or 1000 repetitive messages electronically; it need only respond once to the substance.⁶⁸ 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.⁶⁹ Finally, tools like content analysis can aid an agency in mastering a voluminous docket. During the roadless area rulemaking, the Forest Service used content analysis techniques to organize and analyze the comments that it received.⁷⁰

GAO found several federal officials who were skeptical about the benefits of electronic rulemaking.⁷¹ They questioned whether these changes would enhance public participation in terms of numbers or quality of the commentary.⁷²

The numbers claim can be easily dismissed. Where an agency makes an effort to involve the public like the Forest Service did, Americans are happy to contribute their thoughts.⁷³ This point is further buttressed by a recent public opinion survey performed

penny-wise but pound-foolish approach, because administrative cost savings will be realized on an annual basis.

⁶⁷ See e.g. Jim Rossi, *Participation Run Amok: The Costs of Mass Participation for Deliberative Agency Decision-making*, 92 Northwestern University Law Review 173 (1997).

⁶⁸ If large volumes of “astro-turf” comments become a problem, software can be deployed to scan and sort these submissions. USDA took this step in its National Organic Food rulemaking, and the FDA staff developed a template to sort and index form letter submissions quickly.

⁶⁹ Portland Cement v. Ruckelshaus, 486 F.2d 375 (D.C. Cir. 1973); Lubbers, *supra* at 376.

⁷⁰ 66 Fed. Reg. at 3248.

⁷¹ GAO Report *supra* note 12, at 15.

⁷² *Supra*.

⁷³ See discussion *supra* note 3.

for the Council for Excellence in Government.⁷⁴ More Americans want the federal government to use the Internet as a tool to enable them to become better informed and more involved in governmental activities.⁷⁵ Fifty-nine percent of the adults sampled chose greater public participation as their preferred focus for future governmental initiatives, as opposed to thirteen percent who selected the provision of more online governmental services.⁷⁶

Our response to the quality objection is threefold. Some regulatory issues do not call on the public for their expertise – they ask Americans what they think about a straightforward issue. For instance, the Park Service recently imposed a ban on snowmobiling in Yellowstone and the Grand Tetons. The public submitted 5,273 comments on the proposal with 4,935 commenters supporting a ban and 817 opposing one.⁷⁷ Second, more technocratic 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. Third, this critique seems both shortsighted and insular. The USDA’s experiments with electronic rulemaking and the FCC’s experience during the E-rate show that Washington has much to gain by hearing from more than Washington-based groups.

⁷⁴ Council for Excellence in Government, *e-Government: The Next American Revolution*, Feb 2001, available at <http://www.excelgov.org/techcon/egovex/index.htm>

⁷⁵ *Supra* at 25.

⁷⁶ The Hart-Teeter survey also points out that about three in four Americans (73%) want e-government to be a high priority for the Bush Administration. *Supra* at 18. The survey also revealed that e-government may improve public confidence in the federal government. Thirty-six percent of Americans who use the Internet to access a government Web site have a “high level of trust in the government” as compared to twenty-two percent of users who never have visited a government Web site or the 19% who do not use the Internet at all. *Supra* at 19.

⁷⁷ 66 Fed. Reg. 7260, Jan. 22, 2001.

Steve and Cokie Roberts offer a fourth criticism of online activism.⁷⁸ 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, their knee jerk 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.⁷⁹ Rather than argue that agencies remain tightly insulated within the Beltway, such critics should recognize that the solicitation of public input is sound practice in a republican government.⁸⁰

Leveling the Playing Field

The Internet can make earlier stages of the rulemaking process more transparent. At present, business groups based in Washington monitor the development of a rule as it is drafted by agency working groups, enabling them to offer their input at these key, early stages. Outside the Beltway, grassroots consumer and environmental groups are effectively barred from having any substantive input as the proposal is crafted. As a former EPA general counsel has observed, "notice and comment

⁷⁸ "Internet Could Become a Threat to Representative Government," United Features Syndicate, April 5, 1997.

⁷⁹ Andrew L. Shapiro, *The Control Revolution: How the Internet is Putting Individuals in Charge and Changing the World We Know*, 195 (1999).

⁸⁰ One potential source of objections could be troubling. Several legal scholars find the present rulemaking process 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. See Thomas O McGarity, *supra* note 9 and *The Courts and the Ossification of Rulemaking: A Response to Professor Seidenfeld*, 75 *Texas Law Review* 525 (1997); Freeman, *supra* note 54, at 9. Although our suggested reforms do create more work for those agencies most encumbered by these burdens, overall we think the gains in civic engagement outweigh the risk of further delay. Moreover the deployment of information technology should shorten the turn-around times between proposal and promulgation.

rulemaking is to public participation as Japanese Kabuki Theater is to human passions - a highly stylized process for displaying in a formal way the essence of something which in real life takes place in other venues.”⁸¹ Making key regulatory documents available online prior to proposal of the rule could shift this dynamic.⁸²

In the near future, EPA will propose new air pollution regulations to control hazardous emissions from coke ovens in the steel industry.⁸³ This rulemaking will deeply interest grassroots environmental groups located near these plants in the Midwest, but these organizations have little practical ability to monitor EPA’s internal drafting efforts. In contrast, the American Iron and Steel Institute and its member companies will be closely observing EPA’s activities, and they will undoubtedly obtain early access to the key analysis that assesses the state of pollution control technology in this area. This will be the single most important document developed during this rulemaking, and viewing it at the earliest possible stage will allow the grassroots groups to coordinate a far more effective submission during the public comment period. Thus, if

⁸¹ E. Donald Elliott, *Re-Inventing Rulemaking*, 41 Duke Law Journal 1490, 1492-93 (1992). Mr. Elliott served during the Bush Administration.

⁸² 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. Last year OMB Watch issued a report critiquing 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. For instance, the general public has to register and pay a fee to obtain access to EPA’s enforcement database, IDEA. This database tracks the issuance of notices of violations, administrative orders, civil penalty actions, civil injunctive relief and criminal referrals by both EPA and the states. Because businesses routinely obtain this enforcement data under the Freedom of Information Act, such a restrictive approach does not seem defensible.

⁸³ Coke ovens emit high levels of carcinogens, and Congress highlighted this source for specialized treatment in the 1990 amendments to the Clean Air Act. Section 112, 42 USC § 7412.

EPA posted this document online as soon as its first internal draft is released to the industry, the playing field would be less tilted against the grassroots.

Another online experiment also shows the Web's potential to increase public participation prior to proposal. The NRC used an online "chat group" 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.⁸⁴ After posting all the necessary background material online, the Commission hosted an electronic forum where both the agency and the participants identified topics that needed be addressed in order to formulate a new rule.⁸⁵ A moderator from the agency led the discussions, summarized the comments and periodically asked participants to vote in favor of or against various positions. The agency's stated goal was the solicitation of a broad range of public input rather than the development of a consensus proposal as would occur during a negotiated rulemaking.⁸⁶

Asynchronous dialogues could also be utilized to obtain public input prior to proposal, serving as an effective adjunct to an advanced notice of proposed rulemaking. Under the Administrative Procedure Act an agency often will publish a notice in the Federal Register when it wants to solicit public input on a particular topic prior to shaping a proposed rule. An online dialogue would be an effective supplement where

⁸⁴ <http://nssc.llnl.gov/rulenet>. The GAO Report states that DOT also has used a chat room arrangement during certain comment periods. GAO Report, *supra* note 12, at 11.

⁸⁵ In effect, this was an online substitute for an advanced notice of proposed rulemaking.

⁸⁶ Because the Commission has yet to publish a proposed rule on this topic, it is hard to judge the success of this particular effort.

interested parties could exchange their thoughts and viewpoints with each other and with the agency.⁸⁷

Other Uses for Online Dialogues

Online dialogues should also be considered as a replacement for public hearings where the government wants to hear from a larger audience outside the Beltway. These dialogues would be easy to set up. Interest group presentations could be placed online, and representatives from each group could exchange views with each other and the public.

Moderated dialogues offer other advantages. They can be administered as efficiently as a series of public meetings, especially with electronic notification. In late 1999 the FDA held three public meetings around the nation on the safety of bioengineered foods.⁸⁸ These meetings were well attended according to press coverage, and the debate was heated.⁸⁹ An online dialogue would have broadened the

⁸⁷ The documents generated during a negotiated rulemaking could also be posted online, which could serve to broaden public input into the negotiations. Once viewed as a promising mechanism to increase the settlement of contested regulatory issues, negotiated rulemaking has recently fallen on hard times. Professor Cary Coglianese's research indicates that this process has not reduced litigation as its proponents had hoped it would. *Assessing Consensus: The Promise and Performance of Negotiated Rulemaking*, 46 Duke Law Journal, 1255 (1997). Moreover EPA which had utilized the process the most, has used it much less frequently during the nineties. Davis & Mazurek, *supra* note 18, at 156-158. Increasing the transparency of the process might reinvigorate it by providing potential objectors to the negotiated rule with the opportunity to provide input to the appropriate side during the negotiations.

⁸⁸ See press release at <http://vm.cfsan.fda.gov/~lrd/hhbioeng.html>.

⁸⁹ Interest was intense at the Chicago forum. See William Claiborne, "A Biotech Food Fight: Two Sides Square Off at FDA Hearing" *Washington Post*, Nov. 19, 1999, A03. <http://washingtonpost.com/wp-srv/Wplate/1999-11/19/1701-1119999-idx.html>; Greg Burns and Phat X. Chiem, "Food Fight for the FDA: Dozens Protest Use of Altered Ingredients" *Chicago Tribune*, 19 Nov. 1999.

FDA's audience beyond Chicago, Oakland and Washington, letting the Agency hear what consumers nationwide think about the use of biotechnology in foods.⁹⁰

An online dialogue offers other advantages. A moderated discussion can be both civil and deliberative, whereas public hearings 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 would discuss the issues with each other, the agency and the public.⁹¹ This allows all sides to make considered presentations and to respond fully to each other claims. The discussion also serves as an informative archive that can later be viewed by others interested in the issue.⁹²

Finally, online dialogues are far more participatory than most 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 its emission standards for sport utility vehicles EPA staff addressed only a handful of questions to the presenters;⁹³ the whole effort could just as easily have been mailed in.⁹⁴

⁹⁰ The FDA did solicit public comment on this topic at its Web site and it has archived the public comments in Docket # 99-4282 at <http://www.fda.gov/ohrms/dockets/dockets/99n4282/99n4282.htm>.

⁹¹ Information Renaissance and Americans Discuss Social Security successfully incorporated a roundtable format into an online discussion of Social Security reform in the spring of 1999. Leading lawmakers and national policy experts debated the issues fully and civilly and interacted with online audience. See <http://www.network-democracy.org/social-security>.

⁹² This point is significant. While FDA has archived its hearing transcripts on bioengineered food online, the material is not indexed and it is not searchable. This makes it most unlikely that the public will peruse these 1330 pages to learn more about the topic. In contrast, an online dialogue serves the long-term interests of agencies and interest groups alike, because the archive automatically becomes a permanent educational resource for the general public.

⁹³ The transcripts can be found at <http://www.epa.gov/OMSWWW/regs/ld-hwy/tier-2/nprm/tr2-nprm.htm#> This passivity is logical in one sense. EPA had undoubtedly heard from key

Deliberative Governance and Online Dialogues

Robert Reich has advocated a broader vision of public administration. He thinks agencies should reject a narrow calculus that just focuses on what each interest group wants and instead adopt a more deliberative conception of what is good for society.⁹⁵ This would entail the government's engaging in an ongoing dialogue with the public, both to evaluate a problem and to address what's 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 fora, Ruckelshaus engaged the local community in a dialogue to explore the classic trade-off between jobs and the environment and in assessing the risks posed by continuing exposure to arsenic.

An online dialogue would work well in this area. Interested parties could explicate their positions in depth and exchange views with the public. And, as Reich hopes, such a "process, properly managed, can build on itself" allowing the public to

outside constituencies in private meetings beforehand; it therefore had little need or incentive to explore topics in a public forum. An online dialogue would have a different dynamic.

⁹⁴ Thomas C. Beierle views most public hearings on environmental issues as so pro forma in nature that they should be viewed as "active forms of notice and comment procedures." *Public Participation in Environmental Decisions: An Evaluation Framework Using Social Goals*, Discussion Paper 99-06 at 21 in Resources for the Future Library at http://www.rff.org/disc_papers/PDF_files/9906.pdf.

⁹⁵ Robert Reich, *Public Administration and Public Deliberation: An Interpretive Essay*, 94 Yale Law Journal, 1617 (1985); Pildes & Sunstein, *supra* note 23, at 89-94.

define and evaluate its collective goals.⁹⁶ 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 consensus, and at least, it would foster greater public appreciation for the complex issues confronting governmental decision-makers.

The benefits of these dialogues could flow in another direction as well; they could make Americans better citizens. Instead of just talking past each other, the public could engage in “discursive participation” to adopt Paul Brest’s phrase.⁹⁷ He envisions a process where Americans justify their positions in an open forum and reflect on what their fellow citizens think as well. If implemented with care, online dialogues could develop into a civic tool where these types of thoughtful and reflective interchanges become commonplace.

Structuring dialogues that achieve these goals will be interesting and challenging. Agencies must recognize that they do not want to create a debating forum for the scoring of rhetorical points. Here recruitment becomes key. Last fall EPA funded a National Dialogue on Libraries as a Community Resource for Environmental Information.⁹⁸ This forum was notable for its civility and the thoughtfulness. Much of this was due to the breadth of the participants’ backgrounds and their ability to listen to each other reflectively.

But this may not always be the case. “Discursive participation among people who are misinformed or who represent a relatively narrow spectrum of views may create

⁹⁶ Robert Reich, *The Power of a Public Idea*, 6 (1990).

⁹⁷ Paul Brest, *Further Beyond the Republican Revival: Toward Radical Republicanism*, 97 *Yale Law Journal* 1623, 1624 (1988).

⁹⁸ <http://www.network-democracy.org/epa/welcome.html>.

or re-inforce a distorted but strongly-held consensus.”⁹⁹ Thus educational materials should be provided and techniques should be developed to make participants more empathetic listeners.

Further Steps

Most Americans believe that the Bush Administration should put the adoption of information technology at the top of its to-do list.¹⁰⁰ The Administration could speed the adoption of electronic rulemaking by issuing an Executive Order. Others have suggested that President Bush appoint a Technology Czar to foster the rapid implementation of e-government initiatives.¹⁰¹ As an alternative, Congress could require all rulemaking agencies to establish electronic docket rooms by a date certain.

President Bush and Congress should also encourage the quick adoption of a minimum number of “best practices.” Agencies should be directed to utilize rebuttal comment periods and to abandon a total reliance on passive public notification through the Federal Register. Some design features should be mandated like public index pages and easy to locate lists of rulemakings that are open for comment.

Certain policy questions need to be addressed as well. These include the propriety of anonymous filing, the handling of copyrighted material and censorship

⁹⁹ Paul Brest, *Constitutional Citizenship*, 34 Cleveland State Law Review 175, 196 (1986).

¹⁰⁰ See Council for Excellence, *supra* note 74, at 18.

¹⁰¹ Last year Chairman Horn of the House Subcommittee on Government Management, Information, and Technology held hearings on whether a Federal Chief Information Officer should be established. See <http://www.house.gov/reform/gmit/hearings/2000hearings/000912cio/000912sh.htm>. The Council for Excellence in Government called for the naming of an Assistant to the President for Electronic Government with Cabinet level rank. *Supra* note 74, at 7. The Council also suggested that the Deputy Director of OMB should head an Office of Electronic Government and Information Policy. *Supra* at 8.

standards for inappropriate messages.¹⁰² We are not advocating a one-size-fits-all approach. Each agency does face different challenges in implementing online rulemaking because of its authorizing legislation, executive orders and organizational structure. This, however, is no excuse for not adopting common conveniences that would aid the public in accessing these rulemaking dockets.

In addition, both Congress and President Bush should encourage agencies to experiment with more open and interactive processes. This should include online policy dialogues and other efforts to increase public input to the rulemaking process. At a minimum, agencies should be encouraged to frame issues for discussion during the opening round of commentary and during the rebuttal period.

Greater funding of information technology will also be necessary. In particular, software needs to be developed to allow thousands of Americans to engage in online discussions during rulemakings and public hearings. Second, more work needs to be done to aid agencies in sorting and analyzing the commentary that they receive.¹⁰³

Conclusion

The USDA's recent rulemaking activities and efforts like our E-rate seminar demonstrate that the Web can reinvigorate the public sphere. If agencies use the Web thoughtfully, Americans living beyond the Beltway can shape rulemaking proposals just as Washington-based interests do. Properly utilized, the Web can become a vibrant mechanism for improving our civic culture by allowing sophisticated policy issues to be

¹⁰² Currently there is no structure or resource in the federal government that serves as a common resource and thus each agency has to "reinvent the wheel." GAO Report, supra note 12, at 14.

well explained and thoroughly debated. It is time to build the necessary civic infrastructure so that this more open and interactive public arena can be ours.

¹⁰³ This is area where the government could profitably sponsor research and make use of results that would be placed in the public domain for all federal, state and local agencies.