

THE BROOKINGS INSTITUTION
THE FUTURE OF E-RULEMAKING:
PROMOTING PUBLIC PARTICIPATION AND EFFICIENCY

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Introductory Remarks:

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Administrative Conference of the United States

Keynote Address:

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PANEL 1: DIGITIZATION – PAST, PRESENT, AND SHORT-TERM FUTURE

Panelists:

NEIL EISNER
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PRESENTATION: LEVERAGING TECHNOLOGY TO ENHANCE AGENCY EXPERTISE

SALLY KATZEN
Senior Advisor
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PANEL 2: TRANSFORMING THE PROCESS

Panelists:

GARY BASS
Director
OMB Watch

JERRY BRITO
Senior Research Fellow
Mercatus Center, George Mason University

STUART SHULMAN
Assistant Professor
University of Massachusetts at Amherst

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P R O C E E D I N G S

MR. VERKUIL: Hi, I'm Paul Verkuil. I'm the chairman of the Administrative Conference of the United States, ACUS. They've been revived and a lot of people in this room who had a part in that and we're very proud to be able to co-sponsor this with Brookings, this very important program today.

It is one of the few times, Darrell West and I have just talked, that Brookings has actually done a collaboration with a regulatory agency, or an agency that works with the regulatory agencies, which is what we are. We are an independent agency and when we were revived and our counsel was appointed, President Obama said, and I quote, "The Administrative Conference is a public private partnership designed to make government work better."

So the public private part is manifested by this event today. There is the private part, we're the public part even though they're private in the sense they're not for profit; they're still private and not government. And so it's very exciting.

This is such a -- Brookings is obviously one of the great Institutions in America in terms of research and public policy. And so it's a privilege really for us to share the podium here today with this Institution, at this Institution.

A few words about us. We are now live. We're trying to catch up with the new world, the 2.0 world at least. So you can see we have e-rulemaking and you can tweet, and we're going to tweet today. Cathy is here; Kathy Kyle, somewhere, who is our chief tweeter and also director of Communications.

And these are some of the identifications that you need in order to do tweeting as well as listening. Our mandate: This agency started in 1964 and the original proposition -- this was an agency by statute created during the Lyndon Johnson

Administration. And we were to arrange for federal agencies assisted by outside experts cooperatively to study mutual problems, exchange information, et cetera.

The outside experts are largely consultants, academic consultants, frequently law but not exclusively law professors and hopefully not in the future as many law professors as they are just management folks, and PhDs, and others who have experience in the policy process.

We give very small grants but those of you who are academics ought to be alert to that. We do have a website in which you can -- we post our projects and you can take a look at them. We are -- as you know we got zeroed out in 1995 in an awkward moment when the transition came from -- the contract with America arrived and we weren't part of that contract unfortunately.

But we're back and we're back I must say not -- we're back on a bipartisan basis. President Bush put us back in the budget and our team here is Republican and Democrat. We don't -- we're really privileged to be part of the scene, in that respect, in this time when bipartisanship is very important indeed.

In 2004, our mission got a little more specific by statute, as you can see, added in 2004 promote public participation and efficiency in rulemaking. That's why we're here today, that statutory mission, reduce unnecessary litigation. I do think rulemaking and adjudication go together. Better rules maybe reduce litigation.

Improve the use of science. Well, that's a big one as you can appreciate. But that is part of our mandate and we're going to look at that separately. That's the use of science by administrative agencies. And improve the effectiveness of applicable laws, that should, after all, be what we do all of the time and we're part of that system.

Our council. We're very privileged to have prominent public officials, government officials, as well as individuals in the private sector who have had distinguished public careers. And I would say that -- well I'm just going to introduce Judge Wald, who happens to be here I know, right there. Of course, everyone knows Judge Wald and -- who's had a great career on the bench and is now still working with us and we're proud of that. But you can see the quality of the people who are on our council.

And because they're equally public and private and they're politically balanced, we have the opportunity I think to make -- the ideas to make recommendations that stick across administrations. We -- we come together in -- recessions twice a year, our first one since '94 I guess, has been set now for December 9th and 10th at the National Archives. You're all welcome.

It's open and we are a Federal Advisory Committee so we'll be streaming the results of the conference. We'll have a recommendation; for sure at least one involving preemption of state law by a federal agency. It's a very important issue. And other things that will go on, including the swearing in of our new counsel and our membership by Justice Scalia, who was one of my predecessors in this position.

There are 50 -- the conference itself is the 10 members, myself, that's 11, plus 50 government officials, and 40 public members. The government officials are leading sometimes chairs of agencies or heads of agencies but most likely general counsels, chiefs of staffs, or other significant players in the agency process.

This is one of the few places, maybe the only place really, where you can bring together that much talent on the government side and fuse it with smart people on the public side who are -- have been in -- either in government or know a lot about

government to come up with consensus recommendations. That's our goal.

One of the other things we have done now that we're revived; we have a counsel of independent agency chairs. There are 16 independent agencies. They don't really have the opportunity to meet and they frequently, as OMB knows, like to stay away from the Executive Branch when they can, but they will be happy to meet with us. We're an intermediary as an independent agency in the Executive Branch. And so we've been talking to them and that's an important thing to take note of, a communications mechanism among the independents.

Our staff, would they all stand? I'm not going to take the time to introduce but our staff is here. We're very proud of them too. Thank you, thank you, staff. A lot of work went into this project and they deserve all of the credit.

Some of our pending projects, two that have been teed up, one for December, is preemption. I mentioned ethics and government, ethics for government contractors which is a very hot issue, I am sure you appreciate that. And then, of course, approve projects a little further down the list but are moving e-rulemaking, which is really why we're here today.

We're using today -- I have to say, this is a real laboratory for us. We want to get information out of this so that we can assign to a consultant and informed by what happened here; a better program and a better set of instructions to make sure we come up with some good recommendations. And the rest I won't go into detail but you see the possibilities I'm sure, all very what you would call hot issues in administrative law.

The plenary is coming up and that's -- now just a couple seconds on what we're doing today. One of the things about e-rulemaking that's fascinating I think is its potential but also sort of its potential and its dangers. And we have to work our way

through this.

I just throw some of these ideas out from my perspective as someone who's worked in this field. You know, ossification is always the word and those of you in the rulemaking world know, we are worried about how do we -- we don't want to gum up the works, right? We always want rules to get done. And if you're an agency person you're saying, okay, let's make sure we can get them done.

So we always have to be sensitive to the consequences of changing the game in rulemaking or in particular, which if it affects the timing of rules, you know, and it slows it down. Now this, I think obviously e-rulemaking has the potential to do the opposite but only if we work it through in the appropriate way.

The second, what will the record look like? We got into this business; in fact I did the report in 744. I hate to say it means 1974. We had a report on what is the record on review of rulemaking, which I was the consultant for in my former life. And you know, before that time the courts didn't quite know what is was they were to look at and it not only confused review, judicial review, but it also made the courts reluctant to get into things.

Once the record became defined in an informal rulemaking, where there is "no record in a literal sense and in an adjudicate of sense," then of course actually became more active because they knew what they were looking at. Now we're up with a situation, as I said to Judge Wald, you know, the record is a product of the joint appendix, right, where both sides agree.

This is the record for review but now we could be inconceivably in a situation where the record is the entire e-record that's created in the course of rulemaking. And the clerks, at least of the judges on appeal, have had much more

opportunity to participate. Which way does that cut? How does that redefine the record?

A few other issues, consequences of online collaborations. Again, the potential here is that we will see the opportunity to make good ideas within the -- evolve within the course of a rulemaking. That wasn't there before because the rulemaking -- everyone dumped their written comments at the end of the comment period. There was no exchange to speak of and the agency was left with having to work this thing out.

Now during the course of the comment period we can have, you know, effective -- set up very effective exchanges which will be talked about. But what are the consequences of that activity for the courts on review? There is still a duty to participate and -- or is there a duty to participate if people don't come into the exchange and the comments are they are nonetheless bound by what comes out of it.

That's not what the courts say. The courts are very clear that it's up to the agency to announce what's going on and to restate it and things like the logical outgrowth test tell you, you can't go -- stray too far from your notice of proposed rulemaking. And how would that be effected by this dynamic process that is now coming about within the rulemaking? It's a very interesting question.

And finally, you know, this is where we come in, the Administrative Conference, what -- how do we -- how do we measure and weigh the values of transparency, and collaboration, efficiency, and public participation when some of them may be, you know, not all pointing in the same direction? And this after all is President Obama's promise and from the outside of his Administration is to focus on transparency, collaboration, efficiency, and public participation.

So we want to be the agency that makes this thing happen. We're very positive about this but we can see some of the problems that come along. Contact us.

This is -- these are all of our things that you need to have. And by the way, you saw the people stand up. If you have cards and you'd like to be in touch, please -- e-mail addresses are so valuable so don't be shy. Just give your card to any one of our people. Lovely to see you in some other connection.

So let me just go back to these values as a way of introducing our next speaker and -- who I think is one of the proponents of these values. Indeed, I can't think of a person who's come into government services better qualified for the position he's holding than Cass Sunstein is.

Many of you know his work. He is one of the most admired figures in the field, not just in the administrative law field but in the whole idea of regulation and the relationship of government and to the public. And he is someone who deals daily with transparency, collaboration, efficiency, and public participation.

I have to say that while this is not something the Obama Administration gets a lot of credit for, it's one of the great innovative steps that's been taken; that the Government now is in the position to turn around the notion that government information is of value to the public and ought to be shared wherever possible. And there ought to be ways to do that. And the agencies themselves have picked up this theme.

OMB has lead the way, OIRA under Professor Sunstein, if I can still call him that. And this is, for us, such an exciting relationship because we think we can help OIRA and OMB, through our agency, make these recommendations become permanent and send them back to the agencies and to the public with -- well informed by adequate and full discussions starting right now. So let me introduce Cass.

MR. SUNSTEIN: Well, thank you, Paul, very much. Welcome back to ACUS. This is exciting to see you back and in operation and Paul has already

established himself as a phenomenal leader. It's a thrill to be here for many reasons and I'd like to single out three people who have played a large role in both OIRA's life and my life.

Jim Tozzi, with whom I worked back in the Reagan Administration when OIRA first became its current self. Sally Katzen, who was a tremendous leader for OIRA for many years whose work is still very much in place and under which we are operating in so many domains. And Susan Dudley, who did a sensational job at OIRA and whose work is also very much in place and providing help and guidance to us.

I might say by way of preface that whether or not I have any qualifications for OIRA, this is something that has affected both my personal life in a way that involved a close call. I'll tell you the story.

When I was first dating, in fact on our very first date with my wife, Samantha Power, who now works at the National Security Council, it was in connection with a campaign. It wasn't clearly a date. I think I hoped it was a date, but not quite.

And she was trying to get to know me, so she said if you could have any job at all in the world, any job you wanted -- this is kind of a date-like question, isn't it -- what would it be? And I found out many months later she was hoping I'd say play left field for the Boston Red Sox or be backup guitar for Bruce Springsteen. And I responded with apparently a glazed look in my eye looking off into the distance and in an imaginary sunset. I said OIRA.

And she might have said what the heck is OIRA, but the word "heck" might have been a different word. I did get a second date, but it as a close call.

My eventual good fortune in being OIRA administrator was shaped very much by a lunch with Susan Dudley during the transition where she was incredibly

gracious and generous about the office and in providing me some information about what the office did. But what was most important and really played a key role for me and continues to shape daily life was her infectious enthusiasm about the opportunity that the OIRA position affords. That's all preface.

In the domain of regulation, one of the key developments of the last decades has been the emergence of a new set of analytic requirements designed to ensure that before our agencies proceed with rulemaking, they look before the leap, obtaining a clear sense of the consequences, including -- and Jim, I'm looking at you, Jim Tozzi -- including both costs and benefits. That has been a noteworthy development of the last 30 years or so.

In the same period, off and on a separate track, an equally -- development has been the emergence of disclosure and public participation as foundational principles for regulation. Kenneth Culp Davis, a long time ago, described notice and comment rulemaking as one of the greatest inventions of modern government, a sentence which to the ordinary observer seems peculiar and a little obsessed with the Administrative Procedure Act.

What Davis foresaw has become newly underlined and italicized with the emergence of disclosure and public participation as modern tools. In countless areas disclosure and participation are being used to improve the performance of both private and public institutions.

Electronic rulemaking, our topic today, with its emphasis on public participation, tries to use disclosure and new accessibility as a way of obtaining the comments of diverse people and eventually making rules better.

My central claim in these remarks, the one claim that if you remember

anything I hope you will remember is that there is an inextricable relationship, not merely a close connection but an inextricable relationship, between evidence based government of the sort that analytical requirements are designed to promote and open government.

If regulatory choices are based on careful analysis and subject to public scrutiny and review, we're going to be able to identify new and creative ways to maintain and to promote entrepreneurship, innovation, competitiveness, and economic growth. With that claim in mind, one of my primary points is that e-rulemaking and associated steps should be evaluated largely, it would probably be too strong to say exclusively, but largely by asking a single empirical question. Are we taking steps that are actually improving regulations?

So my suggestion is when we evaluate e-rulemaking and the steps associated with it we want to keep an empirical question in mind, are those steps making regulations better. And I'm going, actually, to make one announcement today -- I'll hold you in suspense until about three-fourths of the way through -- one announcement that bears on the answer to that question.

These points have special importance in a period in which the economy is struggling and it is crucial to consider the effects of regulation on diverse stakeholders to ensure in accordance with the first Declaration of Purpose in the Regulatory Flexibility Act, that agencies "seek to achieve statutory goals as effectively and efficiently as possible without imposing unnecessary burdens on the public."

Rulemaking with public input is an indispensable method for achieving that goal. Since his inauguration, President Obama, as Paul emphasized, has placed a great deal of emphasis on an open government. In January 2009, he issued a memorandum asking for a presumption in favor of disclosure under the Freedom of

Information Act.

He also issued a memorandum, a memorandum that's turned out to be defining, on openness in general asking for new measures to promote transparency, participation, and collaboration. Of course it's true that the interest and openness has important qualifications including the legitimate interests in protecting national security, personal privacy, and the deliberative process.

But the broader point is that a great deal can be done and has already been done to open up rulemaking to the American people and to benefit from their knowledge, concerns, experience, I'd emphasize experience, and perspectives.

In requiring openness, the President has emphasized three separate points and it's valuable to keep their -- the distinctions in mind. First, he's emphasized the importance of accountability and quoted the words of Supreme Court Justice Louis Brandeis, "Sunlight is said to be the best of disinfectants."

Second, in a statement that has long roots going back to the Greeks through a person on whom I'll have more to say, Friedrich Hayek, he has said, "Knowledge is widely dispersed in society and public officials benefit from having access to that disperse knowledge and hence to collective expertise and wisdom."

Third, the President said that transparency enables people to find information that they, and this is a quote, "can readily find and use." If you have an iPhone, or a BlackBerry, or anything that has apps, you will be able to find information that you can probably use today or tomorrow as a result of our efforts to deliver on the President's commitment.

Emphasizing the importance of information that people can readily find and use, the President asked agencies to harness new technologies and solicit public

feedback to identify information of greatest use to the public. This is in a way a second order commitment to transparency where we not only promote transparency but have transparency about the appropriate ways of promoting transparency.

At the same time that the Administration has stressed the importance of open government, it has been placing a great deal of emphasis on the importance of sound analysis and of ensuring a careful accounting of the anticipated consequences of regulation. OIRA recently issued, it's on our website, an agency checklist for cost benefit analysis, regulatory impact analysis, which reduces to a page and a half approximately the requirements of some documents that are pretty long and not exactly bedtime reading.

The checklist is a way of emphasizing and clarifying the requirements that's on -- includes. As the President said in a speech in March, sometimes regulation fails and sometimes its benefits do not justify its costs. The word analysis of course includes a number of overlapping requirements including the cost benefit analysis called for by Executive Order 12866 and the regulatory flexibility analysis required by the Regulatory Flexibility Act with its emphasis on small business. And there are other related requirements as well.

It's worth noting that in part because of our commitment to careful analysis and to taking comments from effected stakeholders the quantified benefits of final rules significantly exceeded the quantified cost of final rules for the calendar year 2009. We're paying a great deal of attention to both benefits and costs and in our first year the benefits of regulations; the monetized benefits exceeded the monetized costs by \$3.1 billion.

Of course it's true that the numbers don't tell the whole story. To turn

from dollar equivalence with the indispensable assistance of public comment, we've issued rules and undertaken initiatives that are promoting electronic health records, thus promising health benefits and economic savings. Saving lives on the highways and in workplaces, helping students to obtain school loans and so on to attend college, promoting reduction in paperwork burdens -- and I'll have a fair bit to say about that before very long -- protecting consumers and investors against manipulation, fraud, and conflicts of interest, and creating a race to the top in education.

Drawing on the President's emphasis on sunlight, dispersed knowledge, and data that people can readily find and use, I'll be making a simple point here. Analysis in general should be seen as a part of a very broad effort to subject regulatory -- including regulatory analysis to public scrutiny and thus improving them, not least by increasing benefits, decreasing burdens, reducing paperwork requirements, and pointing the way toward creative and sometimes original solutions.

Okay, accountability. When the President quoted Justice Brandeis, he referred to the idea of accountability with the notion that accountability requires transparency. By promoting accountability, transparency policies can help track our own performance and in that way make public officials accountable for what they do including in the regulatory arena.

In this way electronic rulemaking, if it's done right, is a partner of the accountability project. One thing that we've emphasized at OMB is the importance of performance review and regulatory analysis done in the open is best seen as a form of performance review.

Proposed rules are a way of subjecting both conclusions and analysis to performance review. There's a cliché in administrative law circles. You can even find

that in a well-known case book, at least I hope it's well known, but I won't tell you the authors of the case book. Maybe I'm one of them.

The cliché in administrative law circles -- I'm looking at Professor Strauss, who I bet does not accept this cliché as I once did. The cliché is that notice in comment rulemaking has a kind of kabuki theater quality that what really happens in rulemaking is before the rule is proposed there is a process of engagement with stakeholders, interagency review, deliberation and analysis, and (inaudible) notice in comment rulemaking this is the cliché, is a bit of an artifice. It's a play; it's not the real thing.

In the last year and a half at least, and I bet it's true before, this is -- this cliché just turns out to be wrong. Proposed rules are a way of obtaining comments on rules and the comments are taken exceedingly seriously. I read lots of them personally, people in the agencies, and OIRA pay enormous attention to the comments that have come in from stakeholders.

In areas such as worker's safety and environmental protection, some risks are little and other risks are big. For business, including small business, some precautions are exceedingly burdensome and expensive and other precautions aren't. Some precautions have unintended bad consequences perhaps by creating excessive burdens in a way that has adverse effects on job creation, innovation, and entrepreneurship.

Other precautions have unintended good consequences, not only by protecting the environment and saving lives, but also by spurring creativity, reducing costs, and creating jobs. Some precautions have disproportionate adverse effects on small business, which may have a hard time handling requirements that don't affect

larger enterprises quite so much.

The principle of accountability suggests that before acting we need to get a clear and concrete understanding of the likely effects of rules. Electronic rulemaking helps to provide exactly that, sunlight. In our 2009 report on the cost and benefits of federal regulation, OMB specifically underlined the relationship between careful analysis and open government.

Indeed the report says careful regulatory analysis, if transparent in its assumptions and subject to public scrutiny, should be seen as a part and parcel of open government. It helps to ensure that policies are not based on speculation and guess work but instead on a sense of the likely consequences of alternative courses of action.

In particular, we emphasize that if members of the public, and I hope you're thinking of electronic rulemaking here, which provides an unprecedented opportunity, if members of the public have fresh evidence or ideas about improvement of existing regulations, including expansion, redirection, modification, or repeal, it is important to learn about that evidence or those ideas.

A general goal is to connect the interest in sound analysis with the focus on open government in part by promoting public engagement and understanding of regulatory alternatives. We are urged and we've been following up on this recommendation that the best practice is to accompany every significant regulation with a tabular presentation placed prominently at offering a clear statement of qualitative and quantitative benefits and costs together with a presentation of uncertainties so people can see them and similar information for reasonable alternatives to the proposed for planned action.

It may not be the largest news of the last 20 months but if you look

through rules, preambles, regulatory impact analysis, you will find time and again a prominent clear presentation early on of the expected cost and benefits of rules, qualitative and quantitative, a clear and often tabular discussion of alternatives in a way that has succeeded in triggering public comment about the best approach to problems that are calling for rules.

In numerous cases the public comments that the transparency is eliciting, including often comments through the internet, have made rules a lot better, more effective, less burdensome, or both.

Dispersed information. The second function of transparency is very different. It involves not sunlight, but access to widely dispersed knowledge, the President's second claim. Here what I want to underline is not the idea of promoting accountability by correcting error but instead the idea of aggregating information that government officials lack, however experienced and well motivated they are, and that the private sector will have.

This point I'm suggesting is especially important in connection with rulemaking. To understand this point let's turn to Friedrich Hayek, Nobel Prize winner and incidentally University of Chicago professor at one point, whose most important contribution to social thought is captured in a short paper from 1945 called "The Use of Knowledge in Society."

What Hayek emphasized, speaking of the price system, that's his emphasis, is the unshared nature of information, the dispersed bits of incomplete and frequently contradictory knowledge which all of the separate individuals possess. Hayek, whose target was socialism, emphasized the social problem of how to incorporate that unorganized dispersed knowledge.

What Hayek said, with his eye on socialist planning, is the problem can't possibly be solved by any particular person or board. Arguing against much of the economic tendency of the time, he insisted that planners and officials cannot have access to the knowledge that dispersed people have.

Emphasizing the price system, he claimed it is more than a metaphor to describe the price system as a kind of machinery for registering changes or, and notice this point, a system of telecommunications which enables individual producers to watch the movement of a lot of pointers. Hayek described this process as a marvel.

Later in his career, Hayek went well beyond the price system and emphasized that number of social institutions, including language and culture, not just the market, have the function of aggregating dispersed knowledge. In criticizing centralized planning by reference to dispersed knowledge, Aristotle -- Hayek went back to an idea from the Greeks, and indeed Aristotle, who claimed that when diverse people "all come together, they may surpass collectively and as a body, although not individually, the quality of the few best."

In the current era, it is much easier than ever before to have access to that dispersed knowledge and to go beyond the limited, though often impressive knowledge, held within individual agencies. A big advantage of notice and comment rulemaking and the reason the administrative law cliché turns out happily, to be a myth, is that it allows agencies to offer proposals and supporting analysis that are subject to public scrutiny and the gain from knowledge that's widely dispersed in society.

On numerous occasions in the last 20 months, final rules have been hugely different from proposed rules with public comments and dispersed knowledge being a key reason. Recently, we requested public suggestions about regulatory

changes, and this is a federal register notice, that would promote economic growth with particular reference to increasing employment, innovation, and competitiveness.

We saw its suggestions for reforms that would have significant net benefits that might increase exports, key interest of the administration, and that might help innovation and competitiveness for small business perhaps by increasing their flexibility.

We're continuing to seek suggestions from the public in an effort to reduce the risk that regulation will either impose on justified costs or contain unjustified rigidity. More specifically, we've taken a series of steps, and now I'm going to get more concrete, to promote e-rulemaking.

In April of 2010, we issued a memorandum, a small step to be sure, designed to improve regulatory dockets by requiring all documents to contain a regulatory identifier number. How many of you know what the expression RIN stands for? Not so bad. Now you all do regulatory identifier number.

The beauty, as these things go, of this requirement, is that if every relevant document has a RIN number on it then the members of the public can find and view all information relevant to the action in question. As I've said, this is a modest step but it is already helping to promote clarity and transparency. For my -- I go on Reginfo.gov and regulations.gov a lot and it's easier to find relevant material.

More ambitiously, in May 2010, we required agencies to compile and maintain comprehensive documents on regulations -- dockets on regulations.gov, among other things, by requiring that all supporting materials are posted and made available to the public making the electronic docket consistent with the paper document -- docket.

There are people in this room who have been pushing measures of this

sort convincingly in the last months and years and we are grateful for them -- to them for helping us, inspiring us, to take this step. Regulations.gov is better now. The range of documents that you can find this month are -- is greater than the range of documents you could find a couple of years ago and it's improving transparency, allowing people to see comments and indeed to comment on comments.

Here's my announcement. In that memo, we asked the e-rulemaking program management office and partner agencies to produce a best practice document designed to realize the promise of our memo and to move rulemaking a bit further into the information edge.

I can announce that this document was submitted in a timely fashion last night. They've been working hard, the group, over the last six months to produce a document that promotes the strategic goals outlined in our memo for improving electronic dockets and for developing best practices to ensure that agencies will achieve these goals.

The document will be available within the week and it is a living document, kind of second order openness, where we're trying to get public comments to make sure that our best practice is designed to promote openness, themselves benefit from openness.

Our first strategic goal is to increase the public's access to federal regulatory content. This means use one docket to manage a single regulatory action, use social media tools to engage the public early. That's something we've been keenly interested in. Use plain writing in regulatory content, a requirement of Executive Order 12866, that's let's acknowledge has not been 100 percent complied with, notwithstanding Neil Eisner's excellent efforts in making DOT rules as clear and transparent

as possible, and increasing access to the full lifecycle of federal regulatory content so people can see how rules change as they move throughout the process.

Our second goal is to use a common taxonomy in protocols for managing documents and dockets. Often there are different terms for the same thing which makes it very hard for the public to follow exactly what's happening in rulemaking. We are establishing in this document naming conventions for documents that can make things a lot easier and clearer for people.

Just as a by the way, OIRA issued a few days ago initial guidance on the Plain Writing Act of 2010, which the President signed relatively recently. And we tightly connected the goal of plain writing to the goal of open government with the note -- additional note that participation in federal programs and compliance with federal requirements is undermined if the government doesn't write clearly. And plainness is actually friendly to compliance with the law and participation in benefit programs.

Our third strategic goal is to increase agency efficiency, something Paul referred to in his early remarks today, by compiling electronic dockets that are comprehensive rather than partial. One requirement of -- consistent with this strategic goal is that all relevant dockets are in the electronic docket. Another is the data exchange between different federal regulatory information system is enhanced.

This best practice document will be available for public review and comment in the coming days. It will be, as noted a living document. Everyone here is encouraged to provide input and help.

We've also taken steps to improve regulations.gov, to improve reginfo.gov, and to improve our own website at OIRA. On reginfo.gov you can see the OIRA dashboard, a word that hasn't made it into a common parlance yet but we use it a

lot at OIRA and we all know what it means.

The OIRA dashboard gives a clear sense of the rules that under -- are under review at OIRA and eases public understanding of what's here, and what the content is, and provides a way for people to comment on the rules once they are proposed, or if proposed it makes it easy for them to see what they should be commenting on. We're continuing to explore new possibilities and we welcome ideas. That's the Hayekian point about dispersed information.

Third and last of the President's troika, beyond accountability and dispersed information, to emphasizing the value of providing access to material that people can readily find and use. In emphasizing that idea, the President signaled a distinctive notion which is that transparency promotes social learning by making evidence and data accessible, including evidence and data that underlie proposed and final rules.

Anecdotes, speculation, and guesswork, this is the goal for the American public, can be replaced with information and evidence. That is a central goal of transparency. On data.gov, we started by putting dozens and then hundreds of datasets online. Consistent with OMB's open government directive, we now have over 300,000 data sets available to the public.

They cover an immense range of diverse topics and if you haven't spent time on data.gov, I would encourage you to go on in your spare time and see what's there. The diverse topics that are covered include retirement plans, automobile safety, something of particular interest to my son Declan, infant car seats and ease of installation, product recalls, clean air, clean water, crime, and much more.

The datasets on data.gov, and this is a particularly exciting development, are being used by the private sector to create apps, which as noted you can put on your

cell phone, to find out things about recalls, what products are being recalled, what are conditions at various airports like, and much more.

There are new and dramatic developments created by this download to the American people every day. In addition, a number of dashboards are now in place, allowing people to find information about important public practices.

The first and the most visible, still I think, is the information technology dashboard, a website enabling federal agencies, industry, stakeholders, and very important, the general public to see details about federal information technology investments and to monitor performance. And that monitoring, on the information technology dashboard, has already produced significant and good results.

This point about information that people can readily find and use bears directly on e-rulemaking and the rule role of analysis. If people are providing in an accessible clear and transparent matter -- manner, both the content of rules and the analysis that support rules, they are providing something that people can find and use in part in order to improve and criticize and reform rules if the proposed form isn't ideal and in part to provide people information in advance because advance notice promotes predictability and avoids unfair surprise.

Practice. This isn't the place for a full empirical analysis of the countless regulations in the past 21 months or so that have been improved by transparency and openness. What I will assert broadly is that in many cases a careful accounting of costs and benefits has helped to move regulations in better directions.

In numerous cases, engagement with the public has uncovered important facts and perspectives, facts and perspectives that notice in comment rulemaking made it possible for rule makers to have. In many cases, stakeholders have

brought important information to bear helping to produce a better balance than that what was in the proposal.

In numerous cases, costs and burdens have been significantly reduced and important clarifications have been made. A few examples: in the Joint Fuel Economy Rule for cars, EPA and DOT incorporated significant flexibilities for small volume manufacturers addressing concerns explicitly expressed during the comment period.

In the Agricultural Department's access to pasture final rule, there were significant changes based on the reactions of small farms. This rule imposes new requirements on farmers who participate in the certified organic labeling program. Many small firms said that provisions of the proposed rule would just be too burdensome. In response, the final rule eliminated or relaxed a lot of these provisions.

If you go through EPA's rules over the past year and a half, you will find that in many cases it has incorporated large flexibility, sometimes with exemptions, total exemptions, sometimes with delayed compliance date, taking account of the current economic situation. Indeed, a rule in Florida just announced in the last few weeks, had a significant delay in the compliance date, 15 months in fact, a recognition of concerns express in rule -- in the process by Florida and effected stakeholders.

One rule that received a great deal of attention at the time involving information technology for healthcare, which grows out of the recovery act, requires meaningful use of health IT to accompany the receipt of federal funds. The basic idea is if you're going to get federal funds for health IT, you have to be meaningful user of health IT. You can't just have the money and do basically nothing with the technology.

The original rule was relatively aggressive. It proposed pretty strong

requirements for receipt of federal funds. A number of doctors and hospitals came back and said of the rulemaking process and many of these comments were received electronically, this rule is simply too burdensome. If you impose requirements of this sort then you're going to defeat your own program because we're not going to take the money.

HHS responded with great care to the concerns expressed during the notice in comment rulemaking. The ultimate result is by all accounts, a much better balance and it was immensely influenced by the comments and concerns the agency received.

These are just a few illustrations of the numerous rules that have benefited from a process that ensures that analytic government is also open government. More generally, we've issued two relevant data calls to agencies. The first, coming from a federal register notice we issued trying to have openness, and I don't know if this had been done before, with respect to the operation of the Paperwork Reduction Act.

We asked for public comments about how to make the Paperwork Reduction Act work better and we read those comments extremely carefully. We've done a great deal in response to the comments we received in connection with the Paperwork Reduction Act. I'm just going to tell you about one.

In April we asked for burden reduction initiatives that promote a variety of important goals, including increased use of electronic forms, pre population, electronic signatures, administrative simplification, and reduction of burdens on small businesses. We asked all agencies and departments of the federal government to come up with burden reductions, we hoped in these domains.

The response we received as the response by the way to our open

government directive was phenomenal. We recently published, that is within the last few weeks and it's on our website, the list of 72 burden reduction initiatives. Last night in preparation for this talk I did something that doesn't come naturally which is complicated math. Well okay, arithmetic, and added up the numbers and we're saving, as a result of these 72 burden reduction initiatives from the Department of Labor, over 2 million hours in burden, from the Department of Homeland Security, over 4 million hours in burden.

If you put the sum together, we're saving over 60 million hours in burden as a result of this initiative; greatly informed by public comments on the Paperwork Reduction Act, which asked us, among many other things, to pursue a greater use of electronic filing and to pursue administrative simplification.

In July, in response in part to a federal register notice we issued on our Executive Order, which involves rulemaking, and we received a number of comments to which we've been responsive. We reminded each agency of its obligation to "tailor its regulations to impose the least burden on society, taking into account, among other things, and to the extent practicable, the cost of cumulative regulations."

We also asked each agency to do the following things for the regulatory plans to highlight rulemakings that promote open government and that use disclosure as a regulatory tool. We want to see those rulemakings that are enlisting the President's commitment to open government. To highlight rulemakings that simplify or streamline regulations and reduce or eliminate unjustified burdens.

To include, to the extent feasible, preliminary estimates of the anticipated costs and benefits of each rule. We want the public to be able to see that early. To identify rulemakings that are expected to have high net benefits that is benefits well in excess of costs. We want to see those and know what they are at an early stage.

To identify regulations that are a particular concern to small businesses, the administration is alert to the struggles that small entrepreneurs are having in the current economic environment and we are interested in seeing regulations that are of particular concern to them at an early stage to analyze them as best we can.

With these steps, we've been encouraging agencies to combine open government with the effort to improve analysis and thus regulation. Return to one of my principal themes, one way to evaluate e-rulemaking and efforts to make it better -- we're at the tip of the iceberg here -- is to ask how concretely will it improve the content of rules. How empirically will proposed changes in the process increase benefits, decrease burdens, or help to generate new and creative approaches?

The best practices document which I said will be out within a week or so should be evaluated by reference to questions of that kind and we hope that this will be a significant step forward for transparency and public participation and eventually improving rules.

It's time to conclude. What I've emphasized is that over the past decade there have been simultaneous and separate efforts to increase and improve analysis and to increase and improve transparency. These efforts have emerged along very different tracks. They should be taken together.

In the last 20 months and more, we've emphasized at once, the importance of careful analysis and openness and treated those commitments as inextricably intertwined. It's important to emphasize, as I have, that the monetized benefits of our rules have been high, higher than the cost. Recent regulations are working to improve health, save lives, and safeguard the interests of consumers and investors.

Some rules are reducing error at water pollution, others are increasing fuel economy, some are helping young people to obtain school loans, and thus to attend college, some are combating childhood obesity. All of these have been improved by transparency and by close engagement with the public.

Open government and the President's formulation is animated by three central goals: sunlight as a disinfectant, access to dispersed information, and providing people with material that they can readily find and use, recall data.gov.

In the current economic environment, it is all the more important to see that analysis and openness are mutually reinforcing. If the two are taken together, they can help us to find new ways in the coming years to promote important social goals, to eliminate unjustified regulatory burdens, and to identify approaches that will promote entrepreneurship, innovation, and competitiveness in the process benefiting the countless Americans who are counting on economic recovery and growth. Thanks.
(Applause)

MR. WEST: Thank you, Cass. I know you have to run to your next meeting. Do you have to run?

MR. SUNSTEIN: I have some time.

MR. WEST: Okay. He has time for one or two questions. So we have one question in the very back.

MR. SNYDER: Jim Snyder from Isolan. I certainly agree with you that notice of comment is one of the great innovations of modern government, but your comment about the quality of the questions and notice in proposed rulemaking; there I think you're quite off base. A case in point is the FCC.

Over the last few decades, I have, you know, read dozens of dockets,

thousands of comments submitted to the FCC rulemakings. The FCC has given literally hundreds of billions of dollars of public airwaves to the private industry and you would never know that reading those rulemakings.

They're framed in technical ways that don't address the question of a vast giveaway of public resources. And this morning, at 10:30 this morning, the FCC has released another notice of proposed rulemaking that will give literally billions of dollars to the TV broadcasters and expanded flexibility rights. I can assure you in that notice of proposed rulemaking, there will be no discussion about the giveaway, it will all be framed in technical and other economic terms.

MR. WEST: Okay. Can we get your question, please?

MR. SNYDER: So the question is, how can we improve that process to make the notice -- the questions really reflect fundamental questions of concerns of the American public when members of Congress don't want the FCC asking those questions?

MR. SUNSTEIN: It's a great question, thank you for that. I should say that the domain of the Office of Information and Regulatory Affairs is the executive agency; it's not the independent agency, so I can't really speak to the FCC. But I can tell you a couple of things about the executive agencies and I can answer your question directly about how to make the rulemaking process better, one part very much in response to the President's call and the public's call both during transition and after.

We have worked really hard, and by we, I mean people at the Department of Transportation, people at the Department of Health and Human Services to make the rules as clear as possible, make the analysis as clear as possible, make the choices as clear as possible. If you look at our agency check list, and while a check list

might not be the most exciting thing to look at at any particular hour of the day, a goal of it is to help with questions like yours.

It says what the regulatory impact analysis should have in it, and it's short and simple. We work very hard to make sure the analysis has those things in it. If it doesn't, and if the proposed rule is obscure about relevant questions, then it's perfectly legitimate in the comments to say your analysis is opaque and the questions you've asked are not clear, or you've missed something very large.

So there have been times over the last months where there's a proposed rule, the commenters on the proposed rule have questions which prompt the agency to issue a supplemental notice which asks for more comments on another issue, so what ultimately emerges will be a logical outgrowth.

So within the executive domain, the comments of stakeholders who are concerned about choices, about analysis, about unasked questions, those are very, very important.

MR. WEST: Okay. I think we have time for one more question here in the second row.

SPEAKER: (inaudible) been there, the question is this, taking your point about the Kabuki Theater, hearing much of what you said, it sounded to me like the process that you're describing is a process that begins when (inaudible) receives a draft analysis and sends that out to various sources for notice and comment, which is a wonderful element of transparency, but also occurs before the agency has engaged in its own notice and comment.

And I suppose a number of the comments that you get come from other government agencies, and those are not as transparent to the public as such information

that comes in from the public. So are we describing a shift in the rulemaking process from the agencies to the White House because the real notice and comment process begins in the White House?

MR. SUNSTEIN: I wouldn't say that, I wouldn't put it quite that way. I can just describe the process for you and see what you think. Something that -- there are other people in the room far more expert than I, including you, Peter, is the internal development of rules before OIRA even sees them. And my understanding is that that internal development includes a lot of engagement and outrage with relevant members of the public. So it's not notice and comment, strictly speaking, but if it's working well, it's not people in offices putting things on their computer. That itself has an openness to it.

When it comes over to OIRA, that's hardly when everything starts. Let's say it's a proposed rule, because a lot of great work has been done before. When it comes over to OIRA, we oversee an interagency process which has a deliberative character in which you get comments from different parts of the government which often have a tentative quality, and the practice that I guess Jim Chosie's responsible for, but a lot of people have endured the practices that that internal give and take between the agency and the relevant commenters, which isn't notice and comment, it's a deliberative process, that the content of that isn't made public.

And the reasons that both republican and democratic administrations have made that judgment is that there's a kind of tentative give and take to it, and you don't want to chill it by turning what are often speculative suggestions into something that would be deterred. So the agency in the end goes out with a rule that's informed by a deliberative process, and then the public notice and comment goes. And what I'm emphasizing is the absolute centrality of that period of public comment to outcomes.

The internal deliberative process also matters a great deal, but what I think is insufficiently appreciated by at least some administrative law professors is -- and there's an empirical project to be done, maybe it can be done at Columbia or at Brookings, on tracking and having some sort of metric for evaluating changes in rules that have come from public comments, and that would be a very worthy project, to see how it differs across agencies and over time. I've been very struck by the pervasiveness of changes that the notice and comment process is responsible for.

MR. WEST: Okay. Thank you very much, Cass, for sharing your views and also announcing your best practices document and we'll look forward to seeing how that gets implemented, thank you very much.

MR. SUNSTEIN: Thank you all.

MR. WEST: Okay. I'd like to invite the speakers on our next panel to come forward, Neil, Scott and Steven. And I also want to thank Paul for the leadership that he has demonstrated on this issue of electronic rulemaking. Many of you know Paul himself is a leading authority on electronic rulemaking, he has written several articles on the subject, and he really understands the importance of this issue, and he is the inspiration behind this event, so I just wanted to thank him for the leadership that he has exercised on that.

Cass laid out a number of interesting ideas in terms of electronic rulemaking, in terms of what the goals, better rules, more efficiency in the process, facilitating greater and more meaningful public involvement, but, of course, there always are difficulties in terms of implementation, and as some of the questions suggested, there's some ways in which we are falling short and need to do a better job.

So to help us better understand some of these issues, we're pleased to

welcome several distinguished speakers. First of all, Neil Eisner is the assistant general counsel for regulation enforcement at the U.S. Department of Transportation. And prior to that, Neil was the assistant chief counsel for regulation enforcement at the Federal Aviation Administration. He has testified many times before congressional committees, published a number of articles and lectured at various universities.

Also with us is Scott Pattison. Scott is the executive director of the National Association of State Budget Offices. This is the professional organization for state budget officials. Prior to that, Scott served for four years as Virginia's State Budget Officer, and he also has worked as an attorney advisor at the Federal Trade Commission.

Steven VanRoekel is managing director of the Federal Communications Commission. In that position, he oversees all of the Commission's operations and its use of technology and new media. Prior to joining the Commission, Steven was an executive at Microsoft in its Window Server and Tools Division, and he also served as speech and strategy assistant to Bill Gates. It sounds like that was a fun job.

Our format on this panel will be, Neil will start with an overview of e-rulemaking and will talk about some of the obstacles to success, and then we will hear from Scott and Steven. So, Neil, thank you.

MR. EISNER: Thank you, Darrell. I always like an opportunity like this where I get to ask the questions and don't have to provide any answers. I'm supposed to raise today the issues that I see in terms of the various opportunities we have for e-rulemaking. And let me stress that e-rulemaking doesn't just involve dockets; it involves a whole range of issues that agencies are involved in, from tracking the rules, to providing information, to doing research, having blogs online, et cetera.

So we have to understand that these issues are broader than just those

we confront in dockets, however, that's where a lot of the issues do come up.

I want to point out also that I'm talking just about legal issues, but there are a lot of practical issues that we face in the government when we have to decide what we're going to do about rulemaking, not the least of these, for example, the budgetary and staffing limitations. There's still some inertia or resistance to change. People are afraid to give up hard copies, for example, want to keep a separate set of records, a lot of other things like this that go on in day to day life.

But the legal issues are the ones that I want to concentrate on here. And I want to stress that a lot of the hard copy record problems we have are still problems on the Internet, and some problems that we didn't have before are becoming problems on the Internet. Some problems, for example, censorship, should we censor obscenity, that was always a problem when you had a hard copy record, but you didn't have too many 10 year olds or 12 year olds coming in and asking the docket clerk for a copy of the docket. Now they have easy access on the Internet.

So what are the legal issues? This is the range of issues that I'd like to go over today. I'm not saying these are the only ones, but these are the ones that I confront most frequently in my work with respect to various things that we're trying to do on the Internet. And probably one of the most important ones is whether agencies have to be consistent in the way they address some of these problems.

When we all had our separate hard copy dockets, it was difficult for people to compare how we handled whether or not we were going to place copyrighted material on the docket, whether we were going to scan for obscenity and delete the obscenity from the record. Now we're all in one central docket, and surprisingly, nobody is raising the issue of the inconsistent treatment on these issues.

What about the legal record, what has to go into the docket, it's already been mentioned a few times in prior speakers, what do we have to keep in there, but also the question of whether or not the legal record can be the paper record, excuse me, can be the electronic record or do we still have to maintain a paper record of everything that's in there, still an issue in the federal government, still some people who don't believe that the electronic record can be the legal record.

There's also an issue of tampering. People believe that electronic dockets can be tampered with. Well, hard copy records could be tampered with also. People could come in, pull a paper copy out of the record. The official record now is missing something; people may never have even known that. But it is easy also to tamper with, or some people think it is easy, to tamper with electronic records.

And what must the agency put in the docket? Questions have been asked about things like blogging initiatives. For example, if an agency is not doing the blogging, a private enterprise is doing it, must the agency put in just the summary that it receives from the person who's conducting the blog, or must it put in the entire record of the blog, which could be 100 times or 1,000 times greater than the one summary that is submitted? Do we have to put in every standard form comment that we get, or if they are exactly alike, can we put in one and say we've received several thousand more like this? Do we have to put in every document to which there is a link in a document that is sent to us in case some people can't get access to the linked document?

What about signatures, can commenters be anonymous, do they have to tell us who they are, and if they do, what do I do if they simply come in and say my name is John Smith? Do I have some obligation to make sure that the signature on the docket is from a real person, or am I allowed to just go on the basis of the fact that they made a

good point and I should make that change to the proposed rule regardless of who they are?

Obscenity, should I delete everything from the docket that is obscene? Does this mean that I have to review everything that comes into the docket before I can post it online? Because this would be a tremendous burden, especially since so much comes in on the last day, it could be months before the agency reviews everything and gets to post it online, and if I do, what are the standards I apply to what is obscene? If you use a four letter dirty word, do I have to delete it even if one of the letters is replaced by an asterisk but it's very obvious to everybody what was meant? What about copyrighted material? If the federal agency relies on copyrighted material and it's not readily available to the public, should the agency post the copyrighted material on the docket considering it to be a fair use, especially if it reasonably limits it to that part on which it relied?

Does it matter whether the government relied on it in preparing its proposal in terms of whether it puts it in the docket, or should it put it in the docket even if it's submitted by a private party?

Does the agency have an obligation to determine whether it has copyrighted protection? And what conditions should be applied to the decision as to what to put in the docket?

Then there's something I would refer to in the general area of fairness. Maybe the agency choose, for example, to use one online site like Facebook over a competitor's site simply because it doesn't have the time to post information on multiple sites, and may I provide less opportunity to people who don't have Internet access on the assumption, well, everybody can easily get Internet access. So, for example, can I

provide a short reply comment period when not everybody in the public will have access to the comments quickly in order to be able to reply to them?

What about illegally obtained information, something I've never confronted, but partly because maybe we don't check where everything comes from. But one agency once called me and said we have information indicating that information that was submitted to our docket is based on an illegal wire tap. Are they allowed to put it in the docket? Do we have any legal obligation to check everything that comes in to make sure that it is legally obtained?

Then there are the privacy issues that come up, especially when you have a more easily accessible and accessed docket, where you can search, for example, by people's names. Do people expect privacy when they submit a comment to the agency? Can they provide us with their Social Security number or their credit card number on the assumption that we wouldn't make this available online where people could easily obtain it? Must I review all comments again before I can post them online simply because they may have privacy information in them? And what do I do if I get a nine-digit number? It could be a Social Security number if I count the digits correctly, so do I have to stop and look at every nine digit number and decide whether to take it out because it could be a privacy number? Do I have to, if I make a scan of an e-mail and place it in the docket, do I have to delete the address, the e-mail address, of the person who is the commenter? And does it matter whether I warn people in my rulemaking document that everything will be placed online as received?

Then there's electronic participation. Can I require all participants to submit their comments electronically or do I have to accept paper copies? And may I require all comments to be submitted in an easily searched electronic or standard

format? Can I ask specific questions on the form and put specific headings in and say, if you don't fill out this form, I will not review your comment?

Giving you a bunch of issues, my ending note would be, they're difficult to resolve, but they can't be ignored. Thank you.

MR. WEST: Thank you, Neil. Scott, you are executive director of the National Association of State Budget Offices, and before that you worked in Virginia state government. We spent a lot of time already this morning talking about the national level, but can you tell us what's going on at the state level, and what are the challenges for meaningful participation?

MR. PATTISON: Sure, no, I'd be happy to. And I have to start by saying I do share something with Cass, and that was a -- I was having dinner with the budget director in Virginia, I think it was 1990, and she said what do you aspire to be in the budget agency, and I said I wanted to head the Regulatory Section, which I eventually did.

But a lot is going on in states and I just will take a few minutes to kind of give a quick summary. And I do recommend, to the extent folks can, to look at some of the activities happening at the state level, because, of course, it can give you some ideas, lessons learned, as well as some challenges to look at, too.

The first thing I want to say about states, just kind of a quick overview, there's no question that states have improved their technology, and they find it very useful in rulemaking, as well as in other processes and transactions, but there's a huge amount of improvement that they really need to work on in terms of their data systems and IT alone, just kind of the mechanics and technicalities of that. The other thing is that public participation, transparency, efficiency are huge trends at the state level, and you're

really seeing a push. Sometimes they're going kicking and screaming, but there's enough push among the public and other interest groups that you are seeing that trend.

And then finally, and I think this is really important, they're finding that the biggest challenge at the state level is how to make the interaction meaningful. And I'll use an analogy.

A lot of states are very frustrated, they put all kinds of financial and budget information on the web, it's easily accessible for the public, and the only thing that a lot of folks in the media and the public seem interested in are the salaries of state employees. And there's so much other information. There have got to be ways to think about how do we inform the public and get meaningful interaction.

Now, I'm going to very quickly go through the example of Virginia, because I'm very proud of it. I was there then when we started putting everything online, it's called the Virginia Town Hall, and I think it's a very good example of a regulatory review process at the state level. Now, it's not perfect, but I think it's really gone a long way to show some improvement. And I have to mention a University of Virginia professor now, Bill Shobe, who was at the Budget Department at the time and was instrument in doing this, and he really gets the credit for having the vision to make all this happen.

But it's very interesting because there was a lot of resistance at first to any change, doing anything electronic, and this, of course, was the mid to late '90's. And the resistance in the agencies and the Virginia bureaucracy was intense. And what's very interesting to me now is I don't think they could live without it, I think they love the efficiency it brings, and the ability to manage and track everything that you didn't have before.

I have story after story of stacks and stacks of paper in my office. I

remember the Department of Environmental Quality person bringing the regulation, a proposed regulation in on a hand truck. I remember paper in literally milk crates, and that's all gone, and it's kind of nice to see that things are much more efficient that way.

Now, of course, the process involved a lot of extra time for things that really you don't have to worry about now with the electronics because of mail or waiting for someone to come back and bring it over to you and that type of thing and that's all been eliminated. And what has for the most part been eliminated, too, are late regulations.

I'm embarrassed to say, when I was there, regulations were often late, and it really was virtually impossible to meet the statute, just given that you had to rely on people and you had to rely on mail and things like that, and they just slowed things up, sometimes beyond your control. Sometimes one person gets sick and you don't know where the paper is in their office and that's all been eliminated.

So what you're seeing now is an electronic system where you manage and track everything. You have notifications to the public. Several interest groups have said, hey, we don't need to hire a law firm now because we, say an environmental group, we can do it all in our small office in Richmond, Virginia, and track everything, so that's kind of nice, and it has saved a lot of time, and it has increased participation. In fact, almost every public comment now is online.

Now, a couple of comments to finish up about state government on the web, because I think there are a lot of analogies, not just for the regulatory process. As I mentioned, there's a huge trend toward transparency. You're seeing a lot of searchable data bases now that the states are offering, they're slowly enrolling these. And so I think there's an opportunity to inform and educate the public, and interestingly, I think the Q&A

got some of that as to how you really do that.

Because I went on, for example, the Virginia Town Hall last night in preparation for this, and I just read some random comments about ag proposed regs and things like that, and I was kind of disappointed at the quality of those, and I wonder if there are better ways to provide information to get more meaningful comment, or how can the agencies think about how do we look at this and really get a lot out of it.

Now, the challenges, though, and again, I think we can look at the state level and make analogies to the federal level, are that IT systems are still lacking. Part of the problem, again, it's just that very technical aspect, the substantive IT systems, it has nothing to do with the rulemaking, per se, but those have to be improved, and often there's the inability, financially and otherwise, to get that done, so that's an impediment. Overcoming resistance to any change among a lot of civil servants who are concerned about what kind of changes, whether it's going entirely electronic or changing something electronic now to something different, and then finally really making it meaningful and focusing on ensuring transparency, making sure the review process is efficient, but also provides the right amount of public participation and interaction.

And finally, and this is huge, and I've heard a lot of state folks talk about this over the years, ensuring consistency. I can't tell you how many times I'd be in a meeting of the cabinet in Virginia, and I've heard the Kansas budget director was talking about this, too, recently, the inconsistency, put one reg out of the environmental area, you put another out of say economic development in commerce, and they're really totally cross purposes.

And there's not always a lot at the state level of time and analysis and central look at how those all fit together. I think a lot more work can be done at all levels of

government, looking at how many times there's duplication and inconsistency.

So the final thing I'll say, too, is that there really needs to continue to be more analysis at how the public comment and public interaction can be really meaningful, not that there isn't a lot now, but I think that can still be improved. And I think looking at how different states over time have done this is one way for the federal government to figure out how can we use those laboratories of democracy, as Brandeis said, and really use those analogies and improve the federal e-rulemaking process. Thank you.

MR. WEST: Thank you, Scott. Now, Steven, you are the managing director of the Federal Communications Commission, so how is the FCC dealing with e-rulemaking?

MR. VANROEKEL: Well, I think I'll build off both Neil and Scott's challenges in that there is still, you know, room to grow, things to do I think in both of all -- in all of these areas. We at the FCC, you know, have some challenges I think that are not unique to us, but pretty standard, in that when I came to the FCC about two years ago, we were, you know, largely paper-based.

We have a room, a docketing room on one of our floors that has about 7 million linear feet of paper in it that really -- our interpretation of the Administrative Procedures Act was one that, if you wanted to make public comment, you really had to hire a law firm or be a lawyer to be involved in that. We have a window right inside the front door where you can bring your piles of paper. And we were doing the electronic best practice, in that we were taking those and scanning them in and putting them up online, but to navigate that very antiquated system, you had to really understand the docketing process, the bureau or office that was running the procedure, and really be legally focused in many ways.

We started very much a crawl, walk, run strategy in that our first foray into e-rulemaking and public participation was largely taking some new Internet technologies and wrapping them around the things we do today, things like really simple subscriptions or RSS feeds and some of that so people could get up-to-date information on what was happening.

The second step, and I think this is more kind of getting into the walk phase, was starting to kind of expand the access to the commenting process. If you were to go up to broadband.gov when we had an open proceeding happening in building the national broadband plan and comment on our blog, those blog comments went into the official record.

We then launched openInternet.gov on our network neutrality work to open up public comment there, and used a crowd source, a third party crowd sourcing platform where the public could input comments, other people could vote on those comments, move them up and down, and we fed that into a system through numerous events and thinking through what we were doing with other social media outlets. We got about 300,000 comments on that proceeding, and so it, you know, other challenges exist there.

We find ourselves now sort of at the inflection point in the intersection of technology, law and citizen participation, really why we're all here today. And our focus really going forward and looking back has really been around three things, communication, data and participation.

We identified the challenges, Neil and Scott outlined a lot of those, but we saw challenges really as kind of more at the tangible level. One is awareness, both citizens' awareness of rules that maybe affect them and the fact that the government is

working on these rules and people can get access to the ability to comment on them.

Plus, to Scott's point on kind of a well informed public and people making well informed comments, the challenge around, and I think the question that came up during the first session around, you know, are we doing the right thing, getting the right level of information out so people can make well informed, I think there's work to do there, and so we have an awareness problem there.

The second is really around access. You know, we know through our work and our analysis of the national broadband plan, not every American has access to a computer. Sure, you can go to a local library, maybe to a school and get access to those, so we're looking at mechanisms in which to do that.

And then the third, I think the process that came up, and Neil really hit this on the head, around the ability to process comments. When you get 300,000 comments in, how do you process those?

Our first focus on communication, kind of tackling the awareness problem, has largely been around building great social networks, thinking about how, at the FCC, we build a great Twitter following, we now are the third largest Twitter following in government, largest independent agency following government, and how we use that as a mechanism to both get awareness and kind of publish out the fact that we're working on different proceedings or different things are happening to the general population. I think every one of our tweets on our Twitter network gets re-tweeted, and we hit millions of people that way, so we think a lot about that. We're thinking a lot about e-mail programs and how do we let people sort of subscribe to the FCC so they can get e-mail updates, and then how do we build a more informed public around the web, you know, turning on live streaming and archiving of all video data, using new technology to reach

new people, and how do we create mechanisms for really prepping the public to make substantive comments.

We're using much of the methodologies you see in deliberative polling and thinking about the first stage of deliberative polling, which is really informing the people you're about to take a poll from, and thinking about how do we sort of manifest that on the Internet to create a great package of information for people to understand, and there's work to do there.

The second mechanism for us is around data, not only, you know, fully embracing the open government initiative around data and publishing datasets, we've taken that a step further, and we've opened up programmatic access to our data. So not only can application developers write applications that use our data, they can write applications that use our data in real time. So as our data updates, those applications reflect those updates versus just them taking a snapshot. We launched FCC.gov/developer, one of the first I think developer outreach sites that do this. And then probably more important in this mechanism, and I think this is a government-wide challenge, is how we collect data.

You know, data comes in in many different ways into the FCC, and I'm sure across the federal landscape, you see lots of paper, lots of different Excel spreadsheets, different mechanisms in which that comes in. We've kicked off an effort to work with the White House and others on standardizing the way in which we, as a government, collect data from the industry, bringing that in in a clean machine readable XML way will really improve the way that data gets delivered to the public in a much more transparent way, so thinking through those.

And the last one really to hit on what we're here to talk about is around

participation. And I mentioned collaboration and crowd sourcing. Our vision is that the future of FCC.gov allows you to comment on any proceeding in front of the agency, in that we'll be launching in the next few months a new FCC, a re-imagined FCC.gov, which will look drastically different than what you see there today, that will give you the ability for any open proceeding just to engage in public comment and to get involved in that.

As I mentioned, one of the challenges is access. So we're building mechanisms such as allowing citizens to simply dial a phone number, dial an 800 number, and leave a voicemail on a proceeding.

And with speech to text conversions and things like that, we're looking at mechanisms to allow broad access to those, as well as launching mobile applications and doing the commenting mechanisms inside the contextable mobile application. Many of American citizens get their "broadband" via their mobile phone, and so making that a realization is another focus for us.

And then last is how do we analyze comments. I think in the next panel you're going to hear from Stu Shulman, who we've worked a lot with, to talk about tools in which you can take large volumes of comments and in a small group way, break those down also using high volume text analysis tools to strip out redundant comments, not strip them out, but consolidate them into a single comment with a count number on top of them and look at things like that to really do that. I'm excited to see how these mechanisms are opening new doors, excited to see the number of comments coming in, and I think the vision that the APA had when it established can finally be realized through a lot of these new technologies.

I also want to give a slight shout out to a couple members of our general counsel team who are here in the room. The secret sauce hands down in our ability to

do any of this stuff has been a forward thinking general counsel staff and team on really lowering barriers for us. Just negotiating terms of service on a Facebook account, for example, is an arduous task in government and so help make that easy, so thanks to them for that.

MR. WEST: Okay, Steven, thank you very much. Let's take a couple questions and then we'll give our panel a chance to respond to them. So there's somebody with a microphone circulating. Questions for our panel. Here in the front row we have a question. There's a microphone coming forward. So if you can give your name, your organization, and we'd ask that you keep your question brief just so we can get to as many people as possible.

SPEAKER: I have a question for Steven, maybe you can give us a preview of what the new FCC will look like. Right now you go to FCC.gov, you go to the home page, which is really where everything that the FCC is about, that's where it is. Today there was an open meeting, the Commission released several proposed rulemakings, and when you go there, the only way you can access them is in either Microsoft Word or in Adobe PDF format, not very accessible formats. Is that going to change, are we going to see it in html, can we hope for xml, can we hope for open API's?

MR. VANROEKEL: All of that will definitely change and drastically change. We are going to -- for one, the home page is going to drastically take a -- be really re-imagined into a page that will be more focused on the citizen, the consumer, people that care about, you know, their cell phone bills and things like that, we're going to take more of a citizen view from the outset.

And on the section of proposed rules, on any documents and things like that, we're going to have a broad set of open formats that will be available there that --

plus, we're anticipating a video synopsis of open rules and things with people kind of in plain language explaining what those are, so that's all coming, so stay tuned.

MR. WEST: Okay. We have time for one more question, Jonathan.

MR. SEGAL: I'm John Segal with the Administrative Conference. A couple of you touched on the point that e-rulemaking can be a great tool for enhancing public participation, but it doesn't work for people who don't have Internet access. Does e-rulemaking make that problem worse or does it just replicate a problem that already existed when everything was done on paper? Are you making it harder for people to access or are you just not making it better by using e-rulemaking?

MR. VANROEKEL: Well, I'll make a couple of comments about our experience in Virginia and then other states. It was rather interesting because it was like an add on. Most -- almost all the comments now are online. But there are quite a few people; it's a minority, but they still send a letter in. I like the voicemail idea, I'm not sure how many states do that, but I did find that it didn't -- it created an additional access, and that those who chose not to do the online method still, frankly, still get snail mail letters.

MR. EISNER: I would add to that that it should not have to be a problem, but it can be a problem if you need to see documents that are only available on the web, for example, and you don't provide opportunities for people to get more time to find them in some remote library, or if you, for example, shorten a comment period, a reply comment period where people don't have ready access to things. But under normal circumstances, no, if you don't think everybody has Internet access and you take that into account, it should not be a problem.

MR. PATTISON: I think generally I think they're right, generally that I think people that don't have access today, that don't live in Washington, D.C., wouldn't

have access to a lot of the information. I think the problem -- there is an opportunity in this I think that through electronic means, by putting electronic hooks into our commenting systems, we can make those comments available to third parties in a much better way.

So public interest groups, local groups, people that are more in the periphery of the citizen and maybe closer to that community that maybe doesn't have access could then take those comments and make the synopsis of them or other aspects more available. You know, we do that -- much of what we do today I think is through the press channels, not through sort of expanding the scope through public interest.

We're building mechanisms into our commenting system so public interest groups can actually do bulk uploads of comments. So if they want to collect comments on their own web site and then think about how do we bring those in in a bulk way, we're building mechanisms like that. So reaching out I think could be a way we think about that.

MR. WEST: Okay, I want to thank Neil and Scott and Steven for sharing their views with us, both in terms of what's going on at the state level, as well as the federal level. So you guys can take your seats. And I want to -- so, yeah, please join me in thanking them for their contributions.

And I want to introduce our next speaker. This is a dynamite packed morning and we appreciate your patience on our logistics here. We're very pleased to have Sally Katzen here with us today. Several people already have referred to Sally, so she really doesn't need an extensive introduction, but it doesn't mean I won't give her one. Sally has held many positions in the federal government. She was deputy director for management in the Office of Management and Budget. She also served as a deputy

assistant to the President for economic policy, deputy director of the National Economic Counsel, and administrator of the Office of Information and Regulatory Affairs. So she was one of Cass' predecessors.

Now she is a senior advisor to the Podesta Group. She'll be teaching a course at the NYU School of Law in the spring. And she's one of the very thoughtful people who work in this area, so we're very delighted to have Sally with us here this morning, thank you.

MS. KATZEN: Thank you, Darrell. It's a pleasure to be here and I'm going to try to cover a variety of issues. But I was asked, my assignment is to somehow link the first panel and the second panel; that is my mission. I think the reason I was chosen to speak is not because of the various positions I have held, but that I chaired a blue ribbon committee on the status and future of e-rulemaking that was convened under the offices of the American Bar Association. And this may seem like old hat, but it was in the early 2000s, when regulations.gov was in its formative period. It was making significant advances over what the Clinton Administration had been trying to promote, but it was still really trying to find its own way.

And I was approached by Cynthia Forena, Peter Strauss, and some other members of the ad law section to see if I would chair a blue ribbon committee -- I love the title -- to provide a clear-eyed assessment of the state of federal e-rulemaking and to chart a course forward.

Now, once assembled, our members -- and there are several here in the audience today -- came from varied backgrounds. Some were experts in technology and informatics, some were prominent scholars on regulation, public administration or information science, some were experienced practitioners in the regulatory field, from the

public interest groups and from business, and we had then current and then former state and government officials.

And we spent about a year, year and a half researching, discussing, interviewing, discussing, drafting, discussing, editing, and we finally produced a unanimous report, but that does not happen often in this town. I have copies for anyone who wants them; we put some out on the back table. This was in early 2008, this was before the election, and our bottom line was that regs.gov was up and working, there was an e-rulemaking system that had been accomplished, but that a great deal more needed to be done and to be done differently if we were going to achieve the potential, that was our goal, the potential.

The report made a series of interrelated recommendations, and I stress interrelationship here because there is -- one clear lesson from the history is the interdependence among governance, funding, and system design. If all of the agencies contribute to the project, as they do, then they all want to say in the governance, which they had, which led then to the lowest common denominator, least risk adverse decision-making process that comes from a group of people who are coming from very different backgrounds and all have skin in the game.

We made a number of recommendations about the governance. We wanted a lead agency that was not one of the major regulatory agencies, so that it did not have its own system in the forefront. We wanted critical input from both an interagency and a public advisory body. With respect to system architecture, we wanted a break from the single centralized system to an open architecture by which other agencies and the public could interconnect. What we got I think from Gary Bass was a no wrong door approach, where you could go in any way and get all of the information you could get by

going in any other way, which would extend the system without jeopardizing the system integrity.

And on funding, we wanted appropriations to fund a core system, what everybody sort of could get by on, supplemented by coordinated investments by agencies for innovations tailored to their own specific stakeholders.

Now, these recommendations are, I believe, very constructive, still pertinent, very important, and I'm pleased that some of them, if not almost all of them, are reflected in the Lieberman-Collins bill that was recently introduced to get the legislative process started. I'm a little surprised that I'm the first to mention that there is a bill in Congress, bipartisan, that doesn't often happen, bipartisan bill that was introduced a week ago to promote e-rulemaking, which is I think really critical. In our report, we said, gee, the administration can do lots, but there are some things that the Congress can and should do.

Obviously, funding is critical and is within the domain of the Congress, and there are other aspects of the authorization process that would be very useful for them to speak to.

So we were delighted to see the bill dropped. We've been told that they're looking forward to comments and feedback from agencies and from the public, and I would encourage you to do that.

But just as important as our recommendations or the draft legislation, they speak to how or what, that's what we heard, very lucid and information, from the first panel, what's going on, what are the problems, what do we need to do, what should be done. And I want to stress, what's equally important for the what is the where. Where are we going with all of this?

I speak now as someone who has practiced administrative law, who, for almost a quarter of a century, I ran a federal regulatory program during the Carter Administration and was regulating the regulators, as the administrator of OIRA has frequently described, and I've taught administrative law for virtually the past decade to law students, and a dumb down version to undergraduates.

And I want to focus now on the rulemaking part of e-rulemaking, and not just to change, but to transform rulemaking, and I think this is the pivot to the next panel. It is not rocket science that rulemaking has become one of the most important and demanding activities of the federal government, yet rulemaking is often legitimately criticized for taking too long and costing too much. At the same time, its capacity to produce methodologically sound and substantively effective policy has often been legitimately criticized.

The vast majority of Americans do not know enough about agencies or administrative processes to understand rulemaking and the role of public comments. And with respect to those in the audience who are the more sophisticated stakeholders, you often are unable to use the opportunity to comment effectively. But the most standing observation, in my mind, is that the process that we keep talking about, 553, notice and comment rulemaking -- and this is notwithstanding Kenneth Culp Davis, who I adore the rest of them -- rulemaking is stuck in 1946, when the APA was enacted. It's a one dimensional process, where the agency does its work, proposes a rule, the affected entities comment on the proposal, and the agency accepts or rejects.

And I stand with Cass, there is actually a lot of acceptances, and the process does change. But frequently there is no opportunity for reply comments, and so the issues are not even joined. Read comments, ships passing in the night, they are not

talking the same language.

And moreover, dare I say that there is a substantial amount of posturing in the comments, particularly when they're public. It strains credibility sometime to read the comments. And there is no incentive for compromise or negotiations among opposing sides during this process. So, not surprisingly, we often end up in court. This is where Paul was starting his comments this morning. We go to court, where the adversarial juices can really flow. This is not a pretty picture. This is not a productive process. Should it change? Yes. Can it change? Yes. How? With technology. But it's critical that we not tinker at the margins, or as we used to say in the '90s, please don't pave the cow path.

The objective should be transformative, to foster a greater understanding of the rulemaking process, to expand access to the regulatory information, to provide mechanisms for the public to participate in regulatory decision-makings, and for the government to facilitate information and programmatic management, and it should not be confined to transforming the 553 rulemaking process, for that is only one facet of the many regulatory processes, and their statutory precedence, okay, I got the wrong word there, but it's in my head, precedence, or the judicial, I want to say subsequent, I screwed this one up, never mind, you get the idea, it's part of a longer process, starting with Congress enacting a law, then you've got the rulemaking, then you've got the courts doing its job.

Within the rulemaking, think about engaging the public at the earliest possible stages. I'm not going to exactly go where Peter was going with his comment earlier, but think about engaging the public before rules proposed or before the agency comes up with some regulatory alternatives and risk management strategies. This allows

the parties to identify concerns or potential problems very early in the process. They may be able, with their dispersed knowledge that Cass speaks about, to help frame the issue better or focus the agency research, potentially facilitating and hastening a rules development.

And in the process, it wouldn't hurt to educate the public about the antecedents, that's the word I was looking for earlier, the antecedents of the regulatory decision-making, the legislation. I mean, agencies are not free agents. They have to do what Congress has told them to do, they sometimes have to do it the way the Congress tells them to do it, so it's helpful to know what the legislative branch has imposed and has impacted and can impact the regulatory process, and then I encourage them to think about the other end of the process, after the rule has been published in the federal register and is about to take effect.

Think about providing some links to subsequent court actions. Sometimes it can go on for years and there are people who don't even know if the rule is in effect yet. Sometimes it is in effect and the agency has provided interpretations or enforcement policy decisions, all of which inform the public on what this rule is all about. And as Cass was suggesting, it's good to have the public provide some feedback on the impacts of the regulation, because the people on the ground, those who may be burdened, but those who may benefit from a regulation, have firsthand practical experience about what it is that this rule is actually doing, and that feedback, I'm not talking about the public conducting a retrospective analysis of a rule, I'm talking about providing information to the agency so it can correct its mistakes and modify its rules.

But ultimately e-rulemaking can and should improve the quality of regulatory decision-making in its broadest sense, from the beginning to the end. Bringing

rulemaking into the 21st century should greatly strengthen civic participation in our democratic form of government, and that's a challenge and I think the underpinnings for our next panel. Thank you.

MR. WEST: That was a smooth transition. I really like the fact that she took on the role of bridging the first panel and the second panel when she hasn't heard the second panel, so very impressive. If I could ask the speakers for our next panel to come forward. What we have been doing is, as Sally pointed out, the first panel kind of talked about what's going on, a view from the trenches, various things that are going on both at the state and federal level. She reviewed some of the challenges that she sees and some of the recommendations that she believes would improve the process.

Our last panel is going to address ways to transform the process and how to actually move forward. So we've brought together three speakers. Stuart Shulman is assistant professor at the University of Massachusetts at Amherst. He's written extensively on e-rulemaking. He's one of the people who actually got into this field in its early days and has written a number of very thoughtful pieces in that area. He's associate director of the National Center for Digital Government, editor of the *Journal of Information Technology and Politics*, and CEO of a new company, Texifter, which undertakes computer based analysis of text.

Gary Bass is founder and director of OMB Watch. Many of you know, I'm sure, that OMB Watch is a nonprofit that promotes greater government accountability and increased citizen participation, so he's actually out there doing what many of our speakers said needs to get done. He's done terrific work on using technology, as well as other means, to improve government transparency. And next year he's going to become chief executive of the Ballman Family Foundation, so he's going to move from asking for

money to giving out money, which should be a very interesting transition.

Jerry Brito is senior research fellow at the Mercatus Center of George Mason University. He directs its technology policy program. He's an adjunct professor of law at George Mason, and he focuses on technology, government transparency and accountability.

So, Stuart, let's start with you. You've written extensively on e-rulemaking. What do you think the future, excuse me, what do you think the future should look like and what needs to get done?

MR. SHULMAN: Thanks, Darrell, thanks to Brookings for having me, and to Scott Rafferty and Paul from ACUS for giving me moral encouragement and support as we do this tough work. Should we bring the slides up?

I'm a political scientist, but I've been working with computer scientists funding for about 10 years on the problem of information overload as rulemaking moves online, and I was asked to talk about the future, not the past, so I'll spare you the story about the polar bears and the 600,000 comments and the jar of jam that I got from the guy who had to read all 600,000 comments and just go straight into the vision for the future.

So let's think about the future of projects. They've got components that you may need to adjust your thinking to be comfortable with over time. So, first of all, and for us, most important are credentials. Many of you have credentials, they may be hard wired to your e-mail address, they may be hard wired to your URL of your home page, they may be a page on a web site where your position and agency is listed, or in a firm, credentials are important to every part of the future of projects, because as projects as move online and documents are shared, you use credentials for controlling access to

documents and for forming peer relationships.

We were inspired by Beth Noveck's work at the U.S. Patent and Trademark Office on building a peer-based system. Credentials are key for both documents and peers. We work in an area called advanced social search, that means over time we use the accumulated metadata, network effects, and also filtering based on metadata and network and peer credentials to improve the way that you do search through large document collections.

We've developed tools for rapidly tagging or labeling or coding documents and sharing that analysis online. And part of what we hope that projects of the future will look like is a package of credentials, documents, peers, search and findings.

So how does this work? We thought that FDMS would be the single repository for all documents on rulemaking. As it turns out, it's not. I won't belabor the point about all the things that don't make it into FDMS, but a number of the earlier speakers have mentioned other things that are going on in the rulemaking space that are germane. So we're developing ways of bringing all of your electronic documents into a single repository and building projects around that.

The future of search is one that is iterative, that is, as I said earlier, social, that reflects the previous work of other people searching. If Jeff Lubbers goes online and searches and leaves certain marks on a document, I'd like to have access to those marks. Jeff has great credentials. I've learned a lot from Jeff and Peter and Neil. If they're doing work with search or with tagging or any kind of memo writing, I want to be able to reuse that stuff over time. I don't want that to disappear into the dustpan of history.

MR. SHULMAN: Some of the most important books I've read lately, Jeff Jarvis and David Weinberger, what FDMS isn't, is *What Google Would Do*, right? The Federal Document Management System is not a platform on which developers like us can build new applications that everyone can use. FDMS is an application and there is a big difference between building a platform -- think Google Maps, thing Google anything -- and building an application. The future of electronic rulemaking should be platforms on which developers can build tools. We asked six years ago for an open API so that we could take the documents out of the docket and put them into other systems to allow people to more effectively use them. We have that open API to Twitter, we have it to Facebook, we do not have it to FDMS, we're still waiting.

Everything is Miscellaneous is a great book. If you haven't read it, you should read it. Wonderful book. The old way of thinking about classification was that everything -- think Dewey decimal system -- has a place where it has to go and you have to get it in the right place and when you go looking for that thing, it's in that place. Actually, the documents in rulemaking belong in many places, right? There is no one right place to put Jeff's comments or Neil's comments, or a certain document, it should be many places and advanced search should help you to find it -- meta data, tagging, filtering, building up these marks on texts over time. That's the future.

What we're working on my laboratory in the start up are a variety of tools, the first one that we -- this is done, this is polished science, duplicate -- near duplicate detection, nobody should worry about information overload based on duplication. There is a very well-established -- think plagiarism -- detection, there's a very well-established information science of duplicate detection.

Dynamic User (inaudible), well, people should interact in a more dynamic

way with tools that suggest, you know, visualization, what's in a docket or what's in a collection of comments and that these tools, like topic models or shared memos, should evolve over time and be socially accumulative. Right? And in some ways you've got to -- you've got to adjust to a new way of thinking about text and about documents before you get to a comfort level. The technology is not the hard part, right, it's when I go into federal agencies and talk to people about working in the cloud or even on a local area network where they collaborate in this way, it's the human factor and the organizational factor, not the technology factor that prevents innovation.

So, what do I mean about the future of peer relationships? Well, we all have them, we all depend on them, we all know certain people we trust, people we don't trust, people whose insights we value and we don't. We expect the future of e-rulemaking to really seriously involve a way in which you leverage networks, peer relationships, and credentials to control access to the documents that may be relevant to your project.

Coding is really fundamental to what we do. In the 10 years of research, my lab was a coding lab. We specifically studied the way in which different humans look at the same piece of text and mark it up and whether they can do that reliably and efficiently over time. The future of e-rulemaking is very much based in a systems of coding, tagging, labeling; this is where we accumulate our social wisdom about documents.

Nobody -- well, I think the term crowd sourcing has been mentioned once or twice here. Let me invoke the keynote speaker from a conference we held last year on the politics of open source, Professor Von Hippel, who basically has written the book and a number of really interesting articles on the fact that all the great innovations come from

users, not from designers like me, but from users. And crowd sourcing is one way that we tap into the wisdom of users or commenters or the public to come up with better decisions. Other people have referred to this. It's a matter of architecting this into your software to take advantage of it.

The biggest barrier I hit in going from agency to agency and talking to people about using these tools is concern over the nature of the security. Will my documents be secure? Will my items be secure? Will my memos that I write about a decision be secure? All I can say is it is going to take some time before people get to the next level of comfort with something like cloud computing or some of these sharing principles I've referred to, but it's coming. And in our shop we hire hackers, who hack the DOD website as well, and they expose vulnerabilities, we fix them. That's the future of security.

Probably the most exciting thing going on in computer science right now and in language technology is the development of active learning and machine learning engines, and basically what this means is -- again, I'll use Jeff because he's such a nice guy -- if Jeff makes a bunch of decisions about whether a document is important or useful or a search result is useful or a clustering result is useful, those should accumulate over time and be fed back into the tools that produce the search results or the clustering results or the natural language results.

So, we're building active learning layers to make sure that no decision by a human is thrown away, that all decisions are useful and you may have heard the term artificial intelligence -- forget about artificial intelligence. Human intelligence is important in intelligence and in rulemaking. And capturing human intelligence and using it to improve the quality of machines is what our research is really focused on right now.

So, let me just sum up, probably over time, but we see the future of text analytics being very bright, it's a big expanding area of interest, there's a lot of text out there, we see people doing e-discovery in ways that are novel and interesting and very social. A lot of people have invoked the need to get more diverse voices involved in rulemaking, certainly architecting a system that promotes crowd sourcing and diversity will ensure that.

The coding, the tagging, the labeling, different people will do it in different ways using credentials as filters or as tools to improve your own -- you say, well, you've got a dirty word list. That's a very popular dirty word list. It's got 220 dirty words on it. All right? Well, you might only want to have 100 of those words on your list and then you might want to look at what other government agencies are doing with obscenity or hate speech or other things and borrow the FCC's list or borrow some combination of lists. You'll be able to do that. Save money, better governance. That's my speech. Thanks.

MR. WEST: Thank you, Stuart. Actually, I didn't realize there were 220 dirty words. I need to improve my vocabulary, obviously.

Gary, you are the director of OMB Watch, you promote greater government accountability and increased citizen participation. What should we do in the e-rulemaking area to improve accountability and participation?

MR. BASS: Well, obviously, we should just turn it all over to Stuart. He just solved it.

It seems we've heard some incredibly important reasons for doing e-rulemaking. The one thing I want to pick up on is one item that was sort of touched on by Scott and wasn't pursued much further and that is, it isn't only about accountability, it isn't only about improving efficiency, it's also about leveling the playing field. It's a means -- a

tool for bringing more people into the process in a way that makes sure that those who may not normally be part of a process suddenly could be part of it.

So, I think if you bring the accountability theme, the leveling the playing field theme, the efficiency theme all together, we're talking about a process that ultimately builds great trust in our government and starts to make sure that the public begins to ensure that it's a government that is reflecting the needs of the public. That's why I think e-rulemaking is important.

But I want to go to where both Neil and Sally started to take us which is it's more than just simply about regulation or Section 553 of the APA. I think what we want to talk about is something much broader about the administrative governance process. This is, for me, the more transformative end. Wouldn't it be wonderful if we transformed, if you will, regulations.gov into a citizens center, a citizens center where one element you can find out about, how rulemakings work, how administrative decision-makings work. So, one piece of it is sort of an educational tool.

A second piece could be the whole notion of engagement. It's not only notice and comment and how to submit comments, but why don't we have, say, an electronic FOIA submission? Why don't we have tools that allow the public to engage more directly in the administrative process?

A third level of the citizens' center would seem to be more like a library. Why not have all -- not only the rulemaking records we've talked about today, but why not all source documents, legal documents, tie it back to the statute? Why not tie it to consent decrees? Why not tie it to a number of documents that we can go to one place and really find the material that we all find difficult to obtain?

So, a citizens' center is the notion of really looking through the

administrative part of government. And how might that be envisioned in the context of e-rulemaking? It seems to me we've been mostly focused on what might be called the rulemaking process itself, the notice and comment phase. But today's discussion also talked about really, if you will, three phases. There's pre-rulemaking phase, which occurs at the stage during which -- long before the notice and comment period occurs. We actually don't know when the start of that pre-rulemaking period is, but there is some point where it is beginning. So maybe one phase of e-rulemaking is looking at the pre-rulemaking phase, a second phase is looking at the rulemaking phase itself, and the third is post-rulemaking.

Sally made a quick mention to the word enforcement. Why are we not able through our e-rulemaking thinking having all enforcement data up online in a searchable format so we can really begin monitoring how post-rulemaking is working?

So, that is sort of the broad vision. To get there let me just highlight two quick things and then wrap it up.

I think the first challenge is some of the technology issues. Stuart, I'm really pleased that you gave us a few solutions, but I think what we need in the technology realm is also the ability for the public to begin to see all these things, if you want to call it, interoperable or connected, whatever the language you want to have. Why is it that the *Federal Register* is over here? Why is it that Reg.info has the OIRA review here? Why is it the Unified Agenda is over here? It is just not a comprehensive system.

So, the technology has to bring mechanisms to tie these things together so that it's much easier. Then the web services and the various tools to make it accessible to both agencies and nine governmental groups are the tools to make that more available.

So, technology is one kind of challenge. The second are the policy challenges that still remain. I mentioned, when does a rulemaking begin. We've had the APA since 1946, right? We still don't have a definition of when a rulemaking starts. It seems to me that that kind of policy maneuver to begin talking about what should go into a rulemaking and when does it begin is a critical question. And connected to it is what goes into rulemaking -- goes into the rulemaking record itself? You know, you had a 1999 Justice Department memo that more or less has been denuded, if you will. We need to go back -- that described what should go into a rulemaking record -- we should go back to that Justice Department memo and not only make it alive again, but we should examine it in the 21st century what kinds of content should be in the rulemaking record and make sure that that is consistently employed -- deployed throughout the government.

Okay, so, it seems to me that if we begin thinking in a much more transformative way, in a broader sense than simply about regulations.gov, it's an opportunity to reconnect to "We the people," that's what e-rulemaking is for me. Thanks.
(Applause)

MR. WEST: Thank you very much, Gary. Jerry, you work at the Mercatus Center at George Mason University and I know you have looked at both the past development of e-rulemaking and also have some ideas in terms of how we can improve things in the future.

MR. BRITO: Thank you, Darrell, and thanks to Chairman Verkuil, Scott, everybody at ACUS for inviting me to be here today.

You know, when we talk about e-rulemaking, we often think about a first generation of e-rulemaking and a second generation of e-rulemaking. The first generation is focused on making available online all of the information related to

regulation and the rulemaking process as well as making it simple for citizens to participate electronically in traditional rulemaking.

And in this way we improve the transparency and accountability of the regulatory process. The second generation moves beyond the basics to leverage the new social technologies of the internet to increase citizen participation and enhance agency expertise. And this is the exciting stuff of using Twitter and Facebook and wikis and collaborative commenting systems to achieve a truly democratic, efficient, and responsive rulemaking process. And while I'm very excited about the prospect of this transformation, I feel that we have to suggest some caution here.

For one thing, I'm not sure we have successfully graduated from the first generation. Less than two years ago we launched openregs.com because regulations.gov did not offer something as simple as RSS feeds and had a less than ideal user interface. Since then it has been much improved, but if we look at the recommendations of the ABA, Administrative Law Section's report on e-rulemaking, which -- I know some of you folks here were involved in that -- with recommendations of OMB Watch's task force on e-rulemaking, we can see that we're a very long way from where we should be to say that the first generation is complete.

The data that is made available online is often not standardized or structured in any meaningful way and the interface for public interaction, in my opinion, could be greatly improved. So, you know, technology is not the problem. The technology exists, and in many cases freely, to vastly improve the accessibility and transparency of rulemaking dockets online.

What's missing are institutional reforms to require meaningful transparency. And that's why I'm happy to see Senator Lieberman's and Senator Collin's

efforts on the E-rulemaking Act of 2010, which would address many of these concerns including how e-rulemaking is funded.

I'd also love to see reform of federal contracting rules to allow agencies to entice open source communities and the types of small firms that are at the cutting edge of innovation, to help them develop great tools for e-rulemaking. FDMS and regulations.gov were originally developed by Lockheed-Martin, and they are now operated under contract by Booz Allen Hamilton.

I'd love to see the sorts of experiences that firms like 37 Signals or Adaptive Path, would create given the opportunity.

Now, this is all not to say that the first generation of e-rulemaking must be done completely before we can begin experimenting in a second generation, but it does mean that to the extent that there are tradeoffs, government should allocate resources to making sure that we have access to all relevant rulemaking data in structured, searchable formats.

If we're given the data, third parties will be able to begin the second-generation experimentation by employing social networks to increase awareness and collaborative tools to distill the wisdom of the crowds. For example, look at the amazing work that Cynthia Farina has been doing with Cornell's E-rulemaking Initiative. In partnership with the Department of Transportation, it has developed an experimental platform for citizen outreach through social media, also human moderated discussions and collaboration on comments.

With early access -- and this is sort of key to what we're getting to, the pre-rulemaking process -- with early access to data from DOT, they have been able to leverage networks like Facebook and Twitter and off the shelf open source tools,

including Word Press and Digress.it to bring together hundreds of interested citizens to collaborate on two live rulemakings. If more agencies made more of their data available early and often in useable formats, I'd like to think that we'd see more experiments like Cornell's.

Now, in keeping with the cautionary tone of my remarks, I have to also give a little bit of warning about the second generation of e-rulemaking. Ideally we turn to regulation only when there is a market failure. One reason we prefer markets is that we recognize that regulators can't possibly have all the information possessed by the myriad individual market actors, information that's communicated by prices, as Cass Sunstein mentioned.

I fear that because new technologies make it easy for regulators to tap into the wisdom of the crowds, they may believe that they have solved what Friedrich Hayek called "the knowledge problem," that's a conclusion, that at least for now, we must resist.

Another thing that the Cornell Initiative's experience has taught us is that it is very difficult to engage ordinary citizens in a rulemaking, much less getting them to make useful contributions, and that doing so is very labor intensive.

Now, I understand Wikipedia is written and edited by an incredibly small fraction of its users and yet they're able to build a remarkable resource, but this small number of Wikipedians forms a persistent community that has developed over the course of almost a decade with clear norms and a real culture, and so while the pure production of knowledge to improve regulation no doubt shows promise, we should understand that we have not solved the knowledge problem and may never be able to do more than marginally improve regulations in that manner.

So, let's focus on finishing the first step towards the promise of e-rulemaking -- greater online transparency -- so that we can facilitate the experimentation towards the next. Thank you. (Applause)

MR. WEST: Thank you, Jerry. We have a few minutes for questions and comments from the audience. So, if you have a question -- there's a question back there -- and give us your name, your organization, and again we ask that you keep your questions brief so we can get to as many people as possible.

MR. PARKER: Hi, Richard Parker, University of Connecticut Law School. I also work on e-rulemaking with the AVA Administrative Law Section.

I just wanted to see -- ask if Stu could talk a little bit more about his credentialing idea and how it applies to what I see as a kind of a fundamental disconnect between the vision that Stu lays out, and the vision that the other speakers have laid out, and it may just be a matter of my understanding of Stu's vision. But when speaking of credentialing, it seems to me you're speaking of a more elite process, of bringing in people who are knowledgeable in various areas, and structuring a dialogue among them that is helpful to the agency that produces better rules, but that is perhaps confidential, perhaps controlled, perhaps behind the scenes.

All the other speakers have been talking about a process that sort of empowers citizens, that makes it a very democratic, a very plebiscitary process. Two different visions for fundamental reform. If I understand them correctly -- correct me if I'm misunderstanding, but if they are different, maybe you could talk and the other speakers could talk about how to harmonize those visions.

MR. SHULMAN: Thanks, Richard. Good to see you, by the way.

The credentialing idea is actually based on feedback from agencies who

feel cautious about crowd sourcing, so when we think about credentialing, it's not about only gathering expert opinion, it's about gathering all opinion, all annotation, all decision, all feedback, and then just creating hooks into that data via credentials so that you could filter -- not filter out, but filter -- for the purpose of analysis, say you want to look only at what is being said by non-governmental officials. Right? Then you might filter for everyone who doesn't have a .gov e-mail address and look at all their comments. Then you might flip the switch and look at only what's being said by people who have a .gov e-mail address. You're not excluding anybody, you're just creating more functionality or greater dexterity with the comments you do get.

Another way of thinking about it is that my friend up in Anchorage who sends me the jam might be interested in particular in what marine mammal biologists are saying, and that's a kind of credential as well. It doesn't mean he's not interested in the 600,000 e-mails that more or less didn't add anything to the process, right, they're still there, he can still look at them, but very quickly he could filter down to just what the marine mammal biologists are saying to get that slice. It's really about slicing and dicing not about exclusion.

MR. WEST: Yes, in the very back. Microphone please?

MR. MANHEIM: Frank Manheim, George Mason University. Your comment brings up another important issue that individuals and smaller groups may be squeezed out of input because they're squeezed between the large organized political campaigns on the one hand and lobbying or expert groups that have network access to the system on the other. So, when you have 600,000 comments at any EPA hearing, the ability of individuals to provide meaningful input is often virtually nil. How do you deal with that problem?

MR. SHULMAN: I'd defer to Gary on that one.

MR. BASS: Well, I think what you're tackling is what we hope to be the vision of e-rulemaking which is to level that playing field just the way you're talking about so that those with resources who live and breathe -- whether it's the lobbyist or the -- whoever it may be -- isn't alone in the playing field on the rulemaking. It is always hard, whether you're a worker, because you're busy during the day and you can't comment -- there are many reasons why the system is stacked in favor of those who have a lot of resources, but it strikes me, that's the potential we want to achieve, is to find a system that does the right kind of balancing that brings people in.

By the same token I'm reminded by what Professor Strauss did talk about early on in the process and that is we don't want to create an e-rulemaking system that's simply a plebiscite. We're looking for some kind of an approach that allows for qualitative involvement, so we will have to go through probably more than just two generations, Jerry, of getting e-rulemaking right. I think it's going to be an iterative process until we get the right balance.

MR. BRITO: You know, I think the folks you're talking about could especially benefit from the sort of collaborative writing that is often talked about in this process, so the entrenched interests who have a stake in the rulemaking are always going to have their comments in that space, but you can imagine a third party organization putting together a way for these smaller folks to come together, bring their little bit of knowledge, and have that all be brought together in a facilitated manner and then submitted in one larger way.

MR. BASS: Just to tack on one other thing, I was really impressed by Steven's comment about potential use of video. I mean, one of the things it triggered for

me is why do we not have a three-minute or a four-minute YouTube presentation that the agency describes in neutral tones what the proposed rulemaking is and then the various sides each get their two minutes or one and a half minutes, so that we get it in English. You know, what is the key issues?

In other words, we need to find new ways of reaching out to the public to better engage them in a process, not just simply the various interest groups, all of us putting out our talking points.

MR. WEST: Okay, I think we have time for one more question. In the very back.

MS. FINKIN: Ann Finkin, Department of Energy, and my question is just for -- I think there's a potential between agencies for horizontal diffusion, and there was an example of DOT in Cornell and I'm wondering if each of you could give an example of who's doing it well and where do we look to for those examples?

MR. BASS: Well, in addition to the regulation room that DOT is wrestling with, I'm also impressed with EPA's rulemaking gateway. But I think what's missing here is, while we want to foster agency innovation, it needs to be in the context of a whole, and right now the regulation room and the regulatory -- the rulemaking gateway at EPA are all going off on their own doing things.

It seems to me that this is the moment in time, this is the opportunity, to have whether it's OMB or another agency who's going to play the leadership role, give us the framework, give us the vision, and the allow that diffusion of innovation from the agencies to fit into that.

MR. BRITO: You know, dare I say it, I think the FCC is making great strides here and I'm really excited to see what the new FCC.gov is going to look like.

I was talking to Greg Allen who's a chief data officer for the FCC and he wanted me to file some comments about their e-rulemaking, e-docketing system, and I said, so where do I file those? And he said, well, anywhere. He said, go to our blog where we ask for feedback and just post -- file -- write your comments and post them on the blog and those will be submitted.

I think the problem with what they're doing a little bit is it's a little too diffused, so for each new initiative they have a completely different URL, so -- and that can be a little confusing, but the fact that, as you say, they have lots of doors to bring the data in and this all makes it into the final docket and is ultimately all reviewed, I think is a good idea.

MR. WEST: And also I just want to point out, the FCC is now becoming the first federal agency to really move in a big way towards cloud computing, so it'll be interesting to see how that affects the opportunities for e-rulemaking.

Stuart?

MR. SHULMAN: I would say the USDA is doing it well, Fish and Wildlife, but these are agencies who are pushed by necessity to innovate, right? Some of the first agencies to adopt, you know, new software that doesn't have a past performance track record are those that are facing, sort of, insurmountable obstacles in the form of many, many comments, and so innovation comes hard and there is this innovation curve. So, those are agencies, Fish and Wildlife, USDA, and the FCC, where there are midlevel people, not top level people, but midlevel people on the frontlines of sorting comments who are taking a chance on some new ideas to see if they can improve their business process.

MR. WEST: There you go. So, for those of you who are midlevel

bureaucrats, according to Stu, you people are the crucial players here.

But I want to thank Stuart and Gary and Jerry for sharing their views and Paul and the Administrative Council for your leadership. Thanks very much. (Applause)

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