

AMERICAN UNIVERSITY

CENTER FOR THE STUDY OF RULEMAKING

**TRANSCRIPT OF
PANEL 4:**

PARTICIPATION IN RULEMAKING

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CORNELIUS KERWIN: The session this afternoon, the first one, is devoted to participation in rulemaking. Let me first indicate that we're starting about 15 minutes late, but I think we'll be able to – we provide a little bit of time at the end of the day in between the last session and the reception, so I think we'll be able to accommodate what I think are six very important presentations for this afternoon's agenda.

Bill West is with us. Professor West is at Texas A&M University. For those of you who are familiar with the social science literature on rulemaking, you'll know that Bill has been at this as long as any political scientist has. In addition to the reference that you heard from John Morrall this morning about Bill's work with regard to Office of Management and Budget OIRA review, presidential review of rules, Bill's been very active in research on public participation, is going to report on some recent work he's done.

Next to him is Tino Cuellar from Stanford Law School. Also Tino's been very actively involved in issues with regard to regulation in general, but in public participation in the process.

Next to him is Scott Furlong. Scott is a professor of political science and chair of the department of political science at the University of Wisconsin-Green Bay. He's my co-author, but that need not be held against him for the purpose of the panel. And we have done some work together over the last couple of years on interest group participation in the rulemaking process.

To my left is Stuart Shulman. Stuart is at Pitt at present, and is very much identified with the E-rulemaking movement. Perhaps the scholar right now most identified with empirical work on E-rulemaking.

Next to him is Beth Noveck. Beth is professor of law at New York Law School. Beth will be talking also about the electronic dimension of participation in rulemaking, but probably taking it a – maybe half a generation beyond what the current systems are.

And Oscar Morales is the guy currently responsible for the government's E-rulemaking initiative. Oscar has been with the Environmental Protection Agency for a number of years, but I think is generally acknowledged to be the driving force right now behind the E-rulemaking initiative.

I'm going to ask Bill to start, Scott to follow, Tino after Scott, Oscar after Scott, Stuart after Oscar, and Beth is going to close it out. With any luck at all the presentations will take less time than the intros did. (Laughter)

WILLIAM WEST: Well, I'm going to focus primarily on what I think we don't know about participation in rulemaking. Scholars long neglected participation in rulemaking. The explanation for this probably has to do with the methodological challenges that it faces. Rulemaking simply doesn't lend itself readily to a quantitative analysis. Unlike the enforcement process, for example, the so-called dependent variable in rulemaking is difficult to measure. As a result, although there was considerable literature in political science at least looking at administrative actions such as inspections and citations as a function of various political factors, analysis of the extent and effect of participation in rulemaking was confined primarily to the case studies, and most of these focused on important or high profile rules. Other than that, authorities on rulemaking offered their impressions about the effects of participation.

Fortunately, scholars have begun to redress the neglect of participation. Recent work in this area has focused primarily on the effects of public notice and comment procedures. This has been a natural direction for research to take, given that the ostensible goal of this institutional constraint is to ensure that agencies' decisions are informed by the views of affected interests, or so-called stakeholders.

Scholars have applied different methodologies in examining the impact of public comment. For example, Neil Kerwin and Scott Furlong have surveyed interest group representatives, asking them about their participation in rulemaking proceedings and what they perceived to be the effects of their participation. Others, such as Marissa Golden and Steve Bella and Susan Yackey have sought to measure the effects of participation in rulemaking by correlating changes that have been made in proposed rules with public comments.

The recent research on participation via notice and comment has been excellent. At the risk of over-generalization, it seems to yield some very broad conclusions concerning the conditions that have to be met of public participation in the rulemaking processes to be effective. Obviously comment has to occur if informal procedures are to provide an effective mechanism for bringing the views of affected interests to bear on agencies' policy decision. Studies have shown that this requirement is often satisfied, although the number of comments that agencies receive varies tremendously from case to case, and all of you are familiar with the rulemaking process so that should come as no surprise.

Also not surprising is the fact that – for the finding that public comment tends to be limited primarily to organized interests. At least in a numerical sense, moreover, it tends to be weighted in favor of business groups.

The second general condition that has to be met if participation is going to be effective is that bureaucrats must take the input they receive from the public seriously. In this regard there seems to be a consensus in the literature that agencies spend a good deal of time and effort in evaluating public comment. There also seems to be an emerging consensus that agencies often change proposed rules in directions that are consistent with the comments they receive. If there's broad agreement surrounding certain basic issues,

however, there's much that remains to be learned about the role of notice and comment requirements.

For example, here are some issues that are either unaddressed or unresolved by the literature, at least the literature that I've read. Although we know that comment occurs, we also know that it varies tremendously from one rule to the next, as I just mentioned, and we can all think of factors that explain this. The salience of the rule, the types of groups that it affects, and so forth. Still, scholars have collected little systematic evidence that describes variation and participation across rules, across agencies, and across policy areas.

To say that agencies change proposed rules in ways that are consistent with public comment is not necessarily to say that those changes are produced by public comment. As most of you are aware, for example, some of our rational choice brethren think that the primary purpose of notice and comment procedures is to serve as a fire alarm that triggers political oversight and influence in the rulemaking process. In some of the earlier presentations today some people have made allusions to the fact that after the comment period ends, there are often communications between affected interests and agency officials.

Although they are certainly useful, therefore, studies that merely correlate inputs and outputs in the rulemaking process cannot address this alternative hypothesis. In other words, the changes that are made in proposed rules occur for reasons other than the effects of public – the informative effects of public comment per se. The methodological challenges notwithstanding, more studies are needed that focus on the actual decision-making processes within the comment phase of rulemaking.

Another issue that seems to be unresolved is that although we know that agencies often modify proposed rules, scholars seem to disagree about the significance of those changes. While some at least imply that the changes they observe are important, others contend that the changes tend to occur at the margins. This, of course, is a subjective issue, and I would argue that it can't be divorced from a consideration of the processes through which rules, proposed rules are formulated. In any case, it's an issue that deserves much more explicit attention than it has received.

The last point suggests what I think is a more general limitation of the literature dealing with public participation and rulemaking. Although the notice and comment process is important, to be sure, in some ways it represents the proverbial tip of the iceberg in terms of explaining what agencies do. As you all know, proposed rules are usually very specific and they're usually thoroughly justified. In fact, they're often accompanied by book-length reports explaining why agencies have decided on the proposals they've proposed.

Proposed rules often take years to develop. As such, they represent substantial sunk costs. Arguably, it's during the proposal development phase of the rulemaking process that the most critical decisions are made in terms of framing the problems and in

terms of identifying solutions to those problems from among an array of competing alternative solutions.

If one is interested in issues of participation and responsiveness in rulemaking, therefore, I think it's critical also to examine the proposal development process. There's been relatively little work in this area. I can think of a few exceptions. Tom McGarrity's excellent book, "Reinventing Rationality," looks at proposal development, but primarily he looks at the organizational dynamics of the process, how different actors within agencies communicate with one another and resolve their differences. There also needs to be research, I think, looking at participation – outside participation in the proposal development process.

Without attempting to be exhaustive, here are some questions that I think are important. Where do rulemaking initiatives come from? The answer to this question is of course that they come from various sources. Some emerge from research by agency staff, some are identified by agency officials in the field who are implementing programs. Some are suggested by stakeholders or members of Congress, or the White House increasingly, or sometimes the courts. Yet we know very little about the relative frequency of such sources and how those sources might vary from one agency to the next.

How does participation in proposal development occur? Once an agency has identified the possible need for a regulation, or once it's begun working on a regulation, how does it communicate with outside interests? Those of us who study rulemaking know that no simple generalization is possible here for it occurs in many different ways. These range from informal communications between agency staff and affected interests, to advisory committees, to comments received in response to advance notices of proposed rulemaking. Sometimes agencies even use focus groups monitored from behind one-way mirrors.

What we don't know, though, is how frequently different participatory mechanisms are used and how patterns may or may not vary systematically among agencies in policy areas.

When does participation occur in the proposal development process? Here as well I suspect that there is tremendous variation. Based on my own conversations with agency staff, some tell me that they communicate with affected interests throughout the proposal development process. On the other hand, some say that they cease communications with affected interests once they start to work on a specific proposal. So here again I think there's tremendous variation, and more descriptive research is needed to describe when participation occurs and when it's cut off in proposal development.

Who participates in proposal development? With the exception of advanced notices, which are used relatively infrequently, participation in the proposal development process usually occurs by invitation. As such, it can be more or less inclusive. Is it confined to a limited range of sub-government actors, to use an over-used term, or the usual suspects, as somebody said earlier today? Or do agencies attempt to solicit

feedback from all the relevant stakeholders? Obviously issues such as these have important implications for our understanding of responsiveness in the rulemaking process. They may also have important prescriptive implications for institutional design.

So basically I guess my appeal is initially for more descriptive research dealing with participation in rulemaking, not only in the notice and comment process but also in the proposal development process.

SCOTT FURLONG: I have no idea what this is going to look like because I sent it as a Word file, so we'll see what happens.

Bill talked a little bit about what we don't know. I'm going to talk a little bit about what we do know, and Neil asked me to keep it short, so I thought I'd take out everything that he wrote. (Laughter) He's gone, right?

Okay, as you've talked a lot about already today, most of the research, most of what we know in regards to rulemaking is really on the formal aspects of what I would call the notice and comment, and Bill has already commented a little bit about this. And a lot of that, a lot of what we also know was based on the survey that Neil and I did back in 1993, which at the time was the first, we think, the first systematic survey of any type of organizational participation, specifically on the rulemaking process.

And at the time, back in 1993, it was clear that many organizations felt that rulemaking was important. In fact, in many cases more important than their activities in regards to legislative lobbying. And then what we did about, oh, I guess it was about two summers ago now, we re-did that survey to try to test what has changed over that decade in terms of participation in rulemaking and an upcoming article will discuss some of those changes. And some of them are in Neil's most recent edition of the rulemaking book.

He's here. Don't tell him what I said about him.

Okay. I'm not going to go through all of this. I just wanted to sort of highlight some of these key findings of these two surveys that we did. What we find is that rulemaking is still an extremely important activity between 1992 and 2002. In fact, we saw an increase in the percentage of groups that are actually rating the importance of rulemaking compared to other forms of lobbying as more important. They get more important than even lobbying Congress. Again, trade associations, businesses – Bill talked about this as well – continue to dominate rulemaking and participation in rulemaking.

And again, just some selected comments here on the data that's presented is some of the – one of the more interesting findings, I would say, that we found over this second survey was the increase in the number of organizations that were focusing on what I would call more face-to-face participation with the agency rule makers, face-to-face either through public hearings, through what we have called informal contacts with the

rule makers, and those informal contacts could happen either prior to proposal or after the proposal. And again, both of those issues have already been raised by others at the conference.

We've also looked at, again as has been mentioned, whether or not these interest groups feel that these techniques are particularly effective, and again almost across the board the interest groups that have responded to the survey suggested that just about every method that they use to try to participate in the rulemaking process, again both formal and informal methods, they find it to be a very effective method. This was a scale from one to five, and again, what the results show are a percent of three or higher. And again, not much variation but always an increase in terms of whether or not these are effective methods or not.

More recently Neil and I have been working on a relatively small survey looking at E-rulemaking, and I'm sure Stuart's going to talk about his paper that I just got an advance copy of last week. That's a much more sophisticated, much more larger than what we did, that looks at E-rulemaking participation. And again, we don't know a whole lot yet about E-rulemaking. We're collecting more and more data.

What a lot of the research to date has looked at in regards to E-rulemaking is really focused on what the agency is doing. Do they have good portals, are they easy to use, things like that. Not as much is known about who is using these portals. Are they effective uses of participation. And again, some of the benefits that we know of we think that these E-portals and E-rulemaking processes provide for an ease of access. We think they are some potential time and resource savings.

So what we did with this survey – well, two surveys really. On the 2002 survey that we did as a follow-up to our first survey back in the 90s, we asked a few questions about E-rulemaking and then we did a follow-up. And that first survey, again what we saw that these interest groups are using these E-rulemaking portals to stay informed about these activities. Again, about 71 percent said that they were staying informed through electronic means in some way.

And again, that spurred on some additional questions for us in terms of E-rulemaking, which is why we sort of developed a second survey to look specifically at E-rulemaking. And this was very focused on E-rulemaking. We tried to keep the survey relatively short to encourage responses on this topic. And again, what we found is that over half of the respondents are using online portals, 78 percent of the respondents that were using it said that they rated the effectiveness of these portals very high. Over half believed that the information provided by the agency is of higher quality, which is I think a particularly important result. Seventy percent said it's easier to provide comments to agencies. Again, that's what we would expect.

Something that, again, was been touched on already to some extent is that these portals are being used by interest groups to accent what other people are saying about the

agency. So there's a little bit of, you know, give and take I think going on here, at least potentially, that can occur.

Something that I think is interesting – I don't know quite what it means other than people like to use resources, that even though interest groups are using the E-portal to solicit comments, 64 percent of them are still sending written comments and they're the same comments. I'm not sure how agencies are counting those comments. Is that one comment or is that two comments? But they're sending it both over e-mail, if you will, as well as as a written comment.

Then we asked a couple of questions about advantages, disadvantages of the E-rulemaking portals. And again, the greatest advantage, not surprisingly, the ability to access the docket. Those of us who have studied rulemaking in the past know that it was an extreme hassle if you didn't live in Washington, D.C. to actually – and even if you did live in Washington, D.C. – to actually access the docket and get access to the docket and any information you need. It does simplify the filing of comments. The interest groups suggested that was a tremendous benefit.

The greatest disadvantage, and I'm sure some of the agency people here can speak to this, what was called sort of the sloppiness of the comments coming in, as well as the volume and what was actually specifically called the flood of comments. I'm imagining this as similar to what many members of Congress have to, or have dealt with over the last 50, 60 years in terms of the postcard responses that Congress get on legislation. Now many of the rule makers are getting that in terms of the public comment period. Here's an e-mail address, and a lot of comments that are basically saying this is a stupid rule, and it's a one-sentence comment, that doesn't really provide a whole lot of good substantive information to the agency, although perhaps some political information that they might be able to use in some way, shape or form.

Improvements. Again, almost everyone wants it to be easier to use. And as someone who has tried to use some of these portals for data access and data evaluation, would make that argument from a research perspective, although I know that's not why the portals are necessarily being developed. More information available, which surprised me. Some people actually want to see more stuff on electronically. And then the improvement of the search capacity was also something that was mentioned as what they would want to see as an improvement.

So that's my stuff.

MARIANO-FLORENTINO CUELLAR: I can't begin without just thanking all of you for actually spending such a big chunk of your day listening to what many people in America consider to be one of the most incredibly dry, boring topics. (Laughter) Which of course they're wrong about, so thank you for being here.

How many of you have actually written a comment on a regulation? Raise your hand if you have. Okay. This is a biased sample, obviously. But to frame what I'm

about to say – and I’m going to try to really make this short, in part in deference to the fact that you’ve been listening to stuff for like six hours and you’ve still got several hours to go. My research is in part on what sorts of factors were associated with making the comments that you’ve written actually salient to regulators. And granted that the notice and comment process is just a tiny slice of what’s going on, it’s nonetheless an interesting slice, and studying that, I would argue, can tell us a lot about how regulators make decisions.

But what I’d like to do actually, instead of just spending all my short time on my research, is to sort of talk about my research in passing by telling you maybe three things that I think are really useful to just put out there as very important basic things that maybe you’ll agree with me, maybe not, but I would just want to say them as a basic sort of starting point for any discussion on participation and regulation.

The first is this. For at least 30 or 40 years one of the dominant narratives about what happens in regulation is agency capture, the idea that basically interest groups with fairly common interests, or one interest group captures the regulatory process. So my first of three points I’d like to make to you is that I think that’s an incredibly shallow and actually stupid way of really thinking about what happens in regulation.

Now here I’m largely preaching to the choir because many of you are actually lawyers for agencies. You spend time – or economists working for agencies. You spend time thinking about what these interests are. You recognize that they’re not nearly as monolithic. You recognize that if you get 388 comments from banks, that doesn’t mean they all agree with each other. That doesn’t mean that they all want the same thing from the rule. You know that in fact people who might objectively have been described as having almost the same interests ahead of time turn out to have really contradictory or competing interests.

You might also recognize that there are times when industry, if it is monolithic in what it wants, really desperately wants something and yet it doesn’t get its way. And I could give you examples, but I think the best example of this, and a sort of book-length treatment was written by a guy named Lawrence Rothenberg, who talked about the ICC, which was once considered the sort of poster child of agency capture, and he sort of impacts this and says, look, these interest groups are actually often very powerfully competing with the agency to change over time. Presidential involvement had a big difference, and so on and so on.

In my own work – this is sort of my own little piece to the anti-capture literature. So what I looked at is a variation on some of the methodologies that some people have used before, including some people in this room, where you basically try to take a proposed rulemaking statement in the final rule and you try to discern what’s happened in the process, in the time. And you recognize, of course, that maybe other things besides the comments happened that maybe made the agency change position. But it’s still interesting, nonetheless, to look at what the comment said and who is saying the things that the agency seemed to do.

But instead of then just breaking it down by interest group, I looked at what lawyers from the agencies were telling me mattered to them about the comments, so I interviewed several lawyers, none of whom are in this room, most of whom decided that they'd like this to be off the record and confidential. But they basically told me what it is that would make them look at a comment and say, I'm going to reject this, versus this is interesting, I'm going to pay attention to it. And they said things that seemed fairly straightforward and logical, although I wasn't sure whether I could believe it. Like, if the comment is written smartly, if it's complex, if it distinguishes between the statute and what the regulation is trying to do, we're much more likely to pay attention.

So the quantitative study, I then tried to see if these factors were predictors of whether the comment had a recommendation that the agency actually adopted. And I looked at these different factors even when controlling for whether the comment was written by a directly regulated industry, so that, you know, the type of point it was supposed to capture. And what I found is actually that these factors matter a great deal.

So just to give you one example, if the comment that you write carefully distinguishes between what you think the statute requires and what you think the regulation does, the probability that it will include a recommendation that the agency adopts goes up by 46. So the odds ratio goes up by 46. And there are various other examples that I can give you. But this suggests to me that what's going on is not capture. It's a lot more subtle and much more complicated.

Second, let's be clear about what we mean when we say effective participation. What does that mean? I'm a big fan of participation, but I don't actually know what it means for there to be effective participation, which then makes me not into a skeptic about E-rulemaking and all that, but it just makes me ask the question of what we're really trying to accomplish here. And I think that both academics and policymakers have been extraordinarily sloppy sometimes, and I include my own early work in this. Hopefully the more recent stuff I've done is different in this regard, in just trying to unpack what the rationales are, what it is that makes us happy about participation. Presumably we don't want participation to do more ossification, more – what is it, cold and old rules. But at the same time then what do we expect it to deliver and what costs are worth bearing in exchange for getting what?

So in some of my work I distinguish between at least two different positions that I think are out there and often asserted by people, including some folks in this room, and then others, both of which are reasonable positions but it's useful to distinguish them.

One position, which I call the idealized position, is to say, look, what really gives us legitimacy and regulation isn't participation, isn't the APA's and any of that stuff. It's the fact that the legislature has a very big role in what happens and the president has some role, which means that if the agency really runs too far with the ball, these representatives can come in and constrain things. So you hear this all the time and I suspect that many people would disagree with this and have a more nuanced position,

which I refer to as compromise acceptance, which goes something like this. Again, I'm collapsing various distinctions, but I just want to give you a flavor for how many different positions you could have. And this would be, well, actually, it would be really nice if we could in an ideal world to take a random sample of citizens and ask them what they think. But they're bored, they're not interested, they don't have sophisticated knowledge, their ranking of risks isn't what the experts would come up with. So we do the best we can, and notice and comment is pretty close to it because, you know, you hear from the parties that already know they have an interest. Maybe you tweak it a little with negotiated rulemaking here and there, but really radically thinking out of the box is not that possible. And I would actually associate people like Cass Sunstein and Steve Breyer with this position.

Well, I think that what's interesting about these different positions is they don't really think hard about what exactly we expect the rulemaking process to deliver. Presumably – I mean, if I read Sunstein and Breyer, what they seem to be saying is, we want the rulemaking process to give us better rules. But what does it mean for a rule to be a better rule? I mean, that in itself is what you could argue this sort of participation process could lead you to decide. But if that's what you're going to do then simply having a demand-driven process, where you wait for people make comments, regardless of whether it's electronically or not, is arguably not going to make that much of a difference.

So my last point is that we ought to really push ourselves to think hard out of the box about what very concrete, very practical, very cost-effective institutional reforms would get us past this demand-driven paradigm which is associated with notice and comment and with compromise acceptance of it where you just wait passively for people to do things.

Now of course agencies have sometimes done things differently. They have town meetings, they do the focus groups on occasion, but systematically they don't. I've very rarely found in my own interviews with lawyers and positions like the practitioners in this room, that this is sort of a routine thing. So what I'd just close with is to say a few things about what we might expect or think or hope that participation could accomplish.

There's no doubt in my mind that something that could pass along the descriptions of cost-benefit analysis might serve very useful purposes for many, many, many kinds of rules, particularly those involving health and safety. But even those rules require value choices, and that's a debate that of course could take us, you know, hours and hours, so I won't get totally into it except to say that consulting and informing members of the public in some reasonable way, and I'm happy to talk about them in Q&A, is not necessarily a bad alternative to simply assuming away the value choices or letting the agencies just make them on their own, or letting representative politicians make them in response to what interest groups are telling them to make.

Unlike people who view rulemaking primarily in technocratic terms, I don't. I think there's a lot going on in rulemaking, even in the health and safety ones, but

certainly also in rules from the Federal Election Commission or the Treasury. Just to give you one example. If anyone tries to tell me that an expert process can resolve the question of whether a presidential candidate should get a salary paid when he or she runs, I'll tell them that they're smoking crack. I don't think that that's expert determination.

So – which leads me to conclude that participation isn't just about getting the rule closer to the right answer. It's about other things. It's about learning, for example, how the public might respond to rules if circumstances change dramatically, if there's what an economist would call an exogenous shock, like a 9/11, that suddenly makes people care a ton more than they used to about rules regarding the length of a knife that you can bring on a plane. Rulemaking and participation might partly be about educating these samples of the public that right now would never in a million years figure out that they might want to waste their time, or not waste their time, writing a comment. So I just sort of invite you to take part in that conversation. Thank you.

STUART SHUMAN: Hi. I'm Stuart Shulman. I have a lot of slides and eight minutes, so slides are on the web site here, the draft ones, and slides, a lot of stuff on my web site at Pitt, which you can find very easily. If you like what I'm doing and you think it's important, you should write an e-mail or paper postcard to your member of Congress and say that the NSF is more important than the little groundhog. You got that joke. I appreciate that.

This is my group. A couple of computer scientists, Jamie and Ed, sociologists Steven, and David, who's a political theorist. I'm going to talk very little about the computer science project. A lot of you have heard it before. Focus mostly on the other side of the project, which is a deliberative democracy project. David Schlossberg and I are both students of a political scientist by the name of John Krysak (ph), who studies deliberative democracy, and that's how we got our interest in looking at public comment, notice and comment in particular, to see whether or not electronic commenting would lead to a more deliberative, democratic system for making decisions about rules.

So very briefly, I'm going to talk a little bit about the research question, quickly skip over some slides that give you a sort of a feeling for what the landscape is like and where things are going with mass participation online in rulemaking. I want to talk about some very fresh survey findings that are being presented tomorrow at the Western Political Science Association meeting in the Bay area, which, Neil, I skipped to come here to be with you. And I'll give you some update on qualitative work if I have any time left.

Okay, essentially the agenda, as I mentioned, was driven by basically our association with a mentor in the political science discipline who looks at deliberative democracy as an indicator of sort of leading edge of where we're going with modern democratic practice. And some of the questions that were just raised are possibly answerable by looking at some of the stuff we've written about this and what Drysak has written extensively about this. The problem is when you try and operationalize some of

the tests that you might use to determine whether or not an electronic environment is more deliberative than the old paper-based one it gets very sticky and slippery.

What we've decided to do is to take a three method approach – quantitative survey research method, its qualitative data analysis method – that is, we were coding lots of public comments that were actually submitted – and we also meet regularly with rulewriters and people in the interest groups, and also the web advocacy sector to talk to them about what they're doing and why they're doing it, and we're going to look from all three angles. And not surprisingly, depending on which angle you look from, you see a very different picture, and I'll say a little bit about that.

What we wrote in our original proposal about this project was that we would try and develop instruments or metrics that would look for deliberation, inclusion, respect, and transformation, expanding discourse and authenticity in the process. Some of the answers maybe to some of your questions, and these are very difficult things to develop metrics for, and the tools, I will admit right up front, are crude and don't give us a very precise or I think reliable answer to some of these questions.

However, I'm starting to feel after about five years of doing this that we're understanding a little bit better what's going on. And though my colleagues disagree, I've started saying publicly every time I speak that e-mail may do more harm than good to the process, and it's got me in trouble with a number of people but I'm sticking by it. I think e-mail may do more harm than good to the deliberative nature of the rulemaking process. I'll say why in a second.

Here's one of my leading examples. Why? There is a sector of the economy called the e-advocacy firms, that, you know, hang their hat on the fact that they can generate a lot of e-mail, and they sell their services at a fairly high price to advocacy organizations, which then generate through web services standardized and modified standardized comments for the rulemaking process and for other political deliberative processes as well. Here's one example. Here's another example. Move the crowd. They are doing it. And something that I think is indicative of what you are likely to see in the future, people selling products and services to the advocacy community that emphasize things like donations made and supporters recruited as the reason for submitting comments. And this is why I think e-mail may do more harm than good.

The motives for participation in this case driven by the groups tend not to be, in many instances, the production of a better rule but rather the production of a better group, a more politically efficacious group, a more well financed group, a larger group, but not necessarily a better rule. A political process and organizational process, but not really a deliberative democratic process.

Here you can see with Get Active, one of the big web services providers, the web site makes specific mention of dollars raised and membership growth as a claim for the basis of why you want to buy these services. More and more of these services are being employed by various groups to generate these comments. Here was a big one recently.

This was the Move On spin-off. A lot of you know Move On. This is Bush Greenwatch, advertising on their web site unprecedented public protest, 600,000 citizens have submitted comments, and I'll say more about that in a minute. But you know this routine. E-mail comes to your box, you're on a list, it's got a hyperlink in it that takes you to this web site, you see the evocative picture, the evocative text. You get all wound up with emotion and feeling and then you're going to submit your comment because you're mad as hell. And then you get – you know, this is the place you come to. It's the post card digitized, and enhanced to the extent that the postcard can be modified. And so what agencies are receiving are large numbers of exact duplicates and large numbers of near duplicates that are a part of these campaigns.

And I ask, and I continue to ask why these web services or advocacy groups are telling their members or their users that just adding words is going to make a comment more meaningful without giving them any guidance about what types of words they ought to add. And I'll show you in a little bit what they tend to add, and it's pretty insubstantial. I think you all probably know that already.

And then down here at the bottom, I just call your attention to this, remember me, what kind of trust is required here. Well, basically I think a lot of trust. Trust that your comment will be efficacious, trust that the overall process of submitting hundreds of thousands or millions of comments to the federal government will improve the deliberative nature of the process rather than degrade it. And in this case, you know, trust that you're not being lied to by your group, which I think is fairly shocking as a Sierra Club member, that the web vendor would tell a lie to the membership, which is that you can't send anonymous comments to the EPA. You certainly can. But the reason they do this is because the comment isn't what matters. It's those fields – name, e-mail, phone number. That's the data they want because they want to grow their group and they want to do their targeted mail campaigns.

Okay, so the (unintelligible)-mercury rule is out, as you know. It is going to be in the courts forever probably, and so maybe this – was this an effective process? Did we get what we wanted? I'm not sure. An example from one of our cases, CAFÉ standards. Look familiar, Neil? Have you seen these before?

MR. KERWIN: I don't read comments. (Laughter)

MR. SHULMAN: Lucky you. Can we quote you on that?

Obviously what's showing up here, these are all form letters. Interestingly enough, all of these form letters came in on paper, unsigned. That is to say – and with upside down question marks in them. And there are lots of them. They are bundled in groups of 25 in the docket, and I didn't get an exact count yet but there are plenty. Essentially somebody went to the web services site, and the translation between the web services and the device that printed the comments took all the apostrophes and turned them into upside down question marks. The group printed them off and sent them in without even looking. Tells you something about the nature of deliberation right now.

Okay. Little sidebar here. Part of what we're doing with the computer scientists is developing tools for dealing with this information flood, and we're making some progress on developing the computer science side where we'll be able to deliver a tool to agency personnel who want to identify quickly as possible those clusters of duplicate and near-duplicate e-mails. This was an early non-gooey (ph)-base, just a text-based version of clustering. This is based on large number of documents we got from EPA, e-mails, and the top cluster wasn't too hard to determine, was the Move On cluster, 173,000 docs. It allows you to drill down in there, and in the other talks I've talked about how you can identify the unique text automatically and read through it hopefully very quickly. And if it needs to be put into the recycling bin, where is where it honestly ends up, it will be done much more quickly in the future.

Another thing we've found with this tool was a bunch of comments that were submitted for the wrong rule. So a lot of publicity about the 680,000 comments that came in to the EPA on mercury. In fact, the revised number is around 490,000 because of the spam, real spam, the duplicates, the triplicates, and various other things like comments that were to the wrong rule that ended up in that data set.

Okay, so what we're doing now is digging through the result of this large end survey. And what we did is we identified a couple of rulemakings in which there were – well, CAFÉ 66,000, mercury hundreds of thousands, and waters over 100,000 comments. We went about trying to take systematic random samples of paper and electronic comments and identify those people for the telephone survey. And this was difficult. It's very hard to get reliable random sample of public participants in rulemaking for a number of reasons, not the least of which has to do with the deleting of some e-mails at EPA, on the order of 125,000 that weren't preserved in electronic format unfortunately. The paper is sitting in a box somewhere but we weren't going to go dig through the paper, and there were various other problems.

But we were able to come up with essentially 1,500-plus person survey and broken down by whether the submission was electronic or paper, or whether it was a form or form variant, or an original comment, and I'm going to quickly guide you through some of what appear to be the most salient findings.

First of all, there's really not – what we expected to find, or what some of my collaborators hoped to find, was that the electronic submitters would be in a more deliberative environment, in fact that they were submitting online meant that they might be surfing around online and reading other comments. And what we found using the various indicators is that there really aren't that many differences at all between people who submit electronically and people who submit on paper. As you can see from the upside down question mark example, the whole distinction between paper and electronic is a moot point now anyway. A lot of people are using electronic means to generate paper comments.

In the survey, though, our questions that tried to get at the levels of descriptions of activity revealed that whether they were electronic or paper, everybody engages in some of the things that we defined as observable indications of discursive activity. That is, they were reading other people's comments, they were gathering information from the docket, they were using the available resources to be more presumably informed about how they commented. And the main difference that came out of this survey, and what's really going to guide our research from here going forward is the difference in the attitudes and the perspectives of people who submit original comments versus the attitudes and perspectives of people who submitted form letters. There are substantial and significant differences in statistical terms between the writers of original comments and the writers of form letters. They're not writers; they're scribblers, I think I could call them fairly safely.

So here's an example. One significant difference we did find between paper and electronic comment is that the paper commenters, contrary to our expectations and our hypothesis, were more likely to refer to the arguments of others, and that was one of our metrics for measuring or operationalizing deliberation. A significant similarity, however, and I mentioned this already, is that they are all using the web. Whether they're submitting on paper or submitting electronically, everybody is using the Internet and computers to create their public comments. The implication here is that our original research project, which is now a couple of years old, it's just not viable. There's really not much point in trying to distinguish between paper and electronic comments. We're all living in the Internet age, they're all essentially – with the exception of the handwritten, crayon-written letters that do show up in the dockets, they're all essentially electronic comments, even if they do come in on paper.

Some other more interesting findings about the discursive activity. Four very significant findings, I think. All the comments – all the commenters were highly – claimed to be –

(TAPE CHANGE.)

MR. SHULMAN: -- a full third and change say that in some sense they had changed their position, which is another measure for the deliberative democrats out there of discursive activity, that exposure to other people's point of view would in some way transform your preferences or your beliefs. Now it's going to take follow-up research, focus groups, and a whole bunch of other stuff to figure out whether they changed their position from disliking the rule to hating the rule, or whether it changed, you know, in some other way. We really can't say right now at this stage.

But some other things that I think might be very interesting to people in this room. People who write their own comments are much more likely to say that they have a better understanding of the positions of others, to think – and this is where I think it is very salient – that their comments will actually be reviewed. Form-letter writers are less likely

to think that their comments will actually be reviewed. They are more likely to have a positive view of the agency when they've written their own comment rather than sending in a form, and they're more likely to be satisfied in the end. And these are all, you know, rough-hewn metrics, and I'm open to hearing comments or taking e-mail from you about what better way to operationalize these measures are, but for a first cut and a baseline, we think we're starting to, you know, sink our heels into better understanding what people do when they're online, commenting on rulemaking, and what they think they're doing and what effect they think they're going to have. Also trust in government to do what is right, higher for people who write their own comments.

Now very quickly, the qualitative side of the project involves using a software package called Atlas TI and a bunch of trained graduate students to go through a random sample of the actual comments themselves and code them, identify particular passages of text that correspond with things that we're interested in looking at. So we've done a couple of rounds of coding on a random sample out of the mercury e-mails and we're about to do a second sample and we've done some coding of the waters e-mail, the CAFÉ e-mails, all told over 2,000.

We use a system of multiple coders on single documents so that we can develop effective tests of inter-rater reliability amongst coders. Let me tell you that it's low to begin with. It's very difficult for two people to look at the same piece of text and code it the same way. This is a multi-year process in the process of setting up an institute to do nothing but code documents. And it will take years to get the inter-rater reliability up to the point where people can take it seriously, although the one that we're getting good at is identifying unique text in a form letter, which we can do at a rate of about 70 percent effectiveness, which is about how good the computers are right now.

The goal here is essentially to create a method for going through these comments that allows us to make inferences that we can stand by and feel good about. The software doesn't do anything special. It just keeps us organized and keeps us on task. This is an example of the type of stuff that you can do with this qualitative software, however. We were looking for places where people in their comment, one minute had commented on another comment. And in this sample of 680 out of 1,000 that were only quoted by one person, there was only one example of that we were able to find in the whole batch of e-mails where somebody had actually commented on somebody else's e-mail, and when I looked at it it wasn't a comment on somebody else's comment at all. It was a mistake in code. So essentially there were no – either we chose the wrong metric, right? This is the wrong way to get at this problem, and this may get at the gap between the survey research and the qualitative research; there's some work to be done there. But essentially what we found is that there's very little evidence in the comments themselves of the things we expected to find as indicators of discursivity. The same way we had two coders looking at 320 e-mails.

A sample of the kind of stuff you get, in the unique text added to form letters, found about 140 examples of those in 680 comments. Quickies was a sub-code. Essentially one- or two-sentence comments. So these are things that the coders would be

able to identify that were tacked on to e-mails. And you can see, you know, comments like, where does the stupidity originate. That, I don't know, is about par for the course for the way that e-mail mass form letter campaigns for adding text.

Occasionally you can find a substantive claim. These were the three that I could find. My profession working with neurological disability, mercury is one of the most damaging elements, particularly developing brains. I don't know. Neil, you tell me, is that – it's my best guess in 1,000 e-mails, this is – this is the closest I could get to substantive comments added to e-mails.

Agency mission, E is for environment in EPA, you idiot. That's what it says.

Last couple of slides. Some interesting stuff here. We can also – we can code passages of text and we can code whole documents. And this is actually where we're starting to find something I find very interesting. In the waters case, which was the post-*Swank* Supreme Court decision about isolated wetlands, we found an eight-to-one ratio favoring more protection versus less protection in the electronic comments, and a three-to-one ratio of more protection versus less protection in the paper comments. So that to me is an indicator, maybe that there's some difference that's there in the actual practice of electronic commenting.

And then this one I think should be very interesting to people. We coded the waters comments as to whether or not they seemed to be reasoned, substantive comments versus just opinion comments. And what you see here is again that the ratio of opinion to reasoned comments in electronic comments is higher than the ratio of opinion to reasoned comments in the paper comments.

Last slide here, just give you – it's from a public comment, browsed through the posted comments. This is actually someone who claims to have read through the docket. You can't find very many comments like that. Amazing that federal agencies would take opinion polls. Most comments are recommending EPA rewrite the Clean Water Act, et cetera.

Anyway, that's what we're doing. Thanks.

OSCAR MORALES: Good afternoon. It's always good to come after Stuart because he gives you so much data that you don't even know what the heck to say. A brief comment at the beginning. I do work for EPA. I'm the director of the E-Rulemaking Initiative, but since I do work for a government agency, like John said earlier, I'm here on my own and my ideas don't represent the EPA. They might represent some of the frustrated bureaucrats from across the agency, some of whom are in this room, who are working on the construction of this IT application, but nothing substantive from EPA. As the Monty Pythonists used to say, now for something different.

I'm here to provide an update on the E-rulemaking and to briefly respond to some of the more salient public and academic recommendations and critiques of the recent

past. I'm going to update you on the E-Rulemaking Initiative, including the strategy that we purposely took, in spite of some of this criticism, and on the current web site, and to raise future possible research areas.

As you should know by now, we're an inter-agency team. The E-Rulemaking Initiative, one of the 24 e-gov initiatives. Our inter-agency team has been busy in a project management mode constructing what we're calling module 2. It's a full-featured online federal docket management system built on regulations.gov. It uses a centralized IT architecture, commercial off-the-shelf technology with a distributed management of data, which means each agency owns and manages the content or the work flow.

We've just completed an extensive beta testing and are in the midst of usability testing with our first of three scheduled launches planned in June of this year, with the ultimate goal of having from 65 to 70 percent of all rulemakings published to the Federal Register by the end of this year in this new version. The rest will come through the normal way on regulations.gov. We continue to hear and collect ideas from the public, the usability users, the beta testers, and the agency, and most of these go to our change management board.

My second purpose for being here – this is just a chart that shows the – my second purpose for being here is to consider a few of our reviews. Since the last rulemaking conference we've heard extensively from the public as a result of the hearings we held in several cities. Two extensive GAO reports, both of which are still going on, which is why I said those remarks. Two OMB-mandated reviews – one's a full-fledged IV&V, and the other is a strange one, 10 of the 24 were reviewed by a Madison Avenue PR firm, public relations firm to take a look at our outreach and PR performance. As well as from many of you in this room at various conferences and in various published texts, Cary and Neil and Stuart, and even some of our former OMB-er's, Mark Foreman, Tad Anderson, they've all come back and given us their recommendations and solutions, even when they didn't ask them.

Two of the most persistent general themes that we received have been that we're moving too slowly, and that our current application, regulations.gov, is insufficient. During this period from our perspective we concentrated most of our aggregate efforts inwards, trying to convince the agencies to participate, fund, comply, and/or simply accept our endeavor. Let me remind you that we were dealing with 200-plus agencies. These are representatives – lawyers, IT people, docket people, reg writers. So the numbers can get close to thousands. Cajoling them to participate in our activities, demonstrating each version of the application and asking them, or more importantly, to ante up their annual contribution.

We tended to be – this effort tended to be a little more difficult and time-consuming than we imagined. The serious problems that we encountered trying to implement this imitative really rested on a pretty common characteristic – the governmental cultural insensitivity and sometimes frustrating and impenetrable agency-specific business processes. In trying to address these issues, however, I feel that we

addressed your broader concerns, enough that I would assert that E-rulemaking is moving as fast as our environment allows it, and there are existing – and especially our planned applications contain sleeper functions just waiting for the right or ripe agency moment to appear.

This is the focus of my remarks this afternoon. Marty Wagner from GSA at an Oxford conference recently said that we've not pursued this project in federal government as part of an E-Democracy objective or goal, and he's probably correct. But he goes on to note that E-rulemaking is only one of several components of E-Democracy that must be seen as a whole rather than examined separately. With this I agree.

Our focus has been on technology. We decided very early on that in order to address the special organizational features I noted of the federal government, this cross-agency, inter-agency E-Gov mandate versus inherent stultified business culture, in order to do this we needed to construct a project, a technical solution that would best allow the system itself to handle current and future demands by the public and by the agencies.

In less than a year we've worked across federal government, and at every step of the way we've involved hundreds of federal regulatory staffers and managers. For example, for four weeks, more than 100 people from 25 to 30 agencies sat in a room at the Reagan building – I'm not going to tell you the irony about that – and constructed the requirements assessment and documentation. As far as I know, this is the broadest requirements development ever attempted and achieved in the entire federal government.

The solution we picked draws on built-in flexibility and inter-operability in the design, and on its functionality, neither of which are immediately apparent on the screen. I believe we've constructed an IT infrastructure for the entire federal government, and as I said briefly, we'll be launching it in June for the first batch of agencies.

We're also providing each agency with internal IT desktop tools that will immediately convert paper-driven systems into electronic ones. Very much into what we used to call module 3 arena. We will have equipped the entire rulemaking community in a very short period of time. We'll incrementally allow each agency to be in charge of its entire regulatory content, not papers but content, pushing and pulling as it desires, in effect to maintain its existing business processes. In all these systems, the electronic draft rule and the workflow will begin with a regulatory work group and continue through each regulatory legal docket and IT manager. They're all going to be using the same application and desktop tools.

At each point the level of access will be established, as well as the work flow rules. The meta data tags – those are the little bitty things that you've got to stick on documents so that people – so that we'll be able as researchers to take a look at everything. The meta data tags drawn and used will be the same ones used in the final rulemaking repository, that will contain all the closed dockets, once the rules go final, for use by researchers, future reg writers, and the public.

The sheer beauty of this architecture is that it allows us to unify the entire federal government when appropriate as a by-product of the IT construction, while at the same time allowing each agency to retain its inherent or perceived differences, also when appropriate.

So this is the new home page. This is what it's going to look like, of regulations.gov in June. Many of you suggested solutions that called for different comment web forms. I'm going to show that in a minute. We've provided that. Because we built what we're calling the best of breed, we're just taking the best of the leading capabilities of all the existing agency systems and some additional capabilities. If an agency so desired, they can use it for non-regulatory purposes to do their public notices and to do their comments.

Right now we're in the process, and I mentioned this earlier, of talking with many of the agencies and to OMB about publishing the peer review – the requests that OMB put out about peer reviews. The agencies can divide up their rule if they so desire in component parts, allow commentators to make comments on specific sections, or ask sub-questions, which again I'm going to show you. Comments can be made on comments. But the important thing to note is the agencies themselves have to choose these alternatives, and I fully expect that they won't choose them in the beginning.

The new software and the hardware available to the system designers and architects support this process. For instance, the use in the adherence to what they call service-oriented architecture within the centralized architecture that the executive committee selected will make it entirely feasible to the use of what they call web services to accommodate much of the interest group and current and specific future businesses, like many of you suggested.

This is the second page. We're going to pick a rule, EPA of course. If we go to the – this particular rule, on the next three pages that I'm going to show you, this is what the agencies get to choose by way of their comment. This is as much information as they can put out there. Some agencies like a lot of information, others, as Stuart mentioned earlier, EPA, you can send anonymous comments. As you can see in the next couple of pages, this application is designed to allow for most changes proposed. Note the questions, the name and address and the comments on the comments. A lot of these are possible. But again, they're not going to be mandated beforehand because of legal constraints.

In this section here you can see that the agencies, if they so choose, can ask questions. Can ask questions about sub things if they want. We're creating, or we've created an infrastructure that will allow future individual regulatory groups to implement any or all of the above suggestions. The application that we've provided will allow them to design a system for their own agency needs, workflow capture and accessibility, as well as to expand as they see fit and add many of the newest analytic tools at very little cost.

Another feature that we've got, if we ever get to the point, are the state and local regulations. We've already begun discussions with the appropriate representative organizations, and the application that we will launch will have that possibility there, but for future work. It's not going to be there for a while.

So here are some of the features that commenters suggested that we heard at the public hearings and from some of the folks in here that will be included in the first release. We'll have the ability for comprehensive docket detail screen information, for multiple docket file formats for configurable agency work flow, electronic recordkeeping, the ability to categorize comments, for structured input forms, for search by period of time, and for custom reports by agencies.

Among those that we expect for possible release, perhaps into the next year, or easily within the next year or two, are going to be threaded discussions, interfaces with web services, capture the first page of each document, a Java (ph), applet for advanced editing, and full text search.

Why do we choose to go this route? Quite simply because it was our opinion that we had to accept two of the unique characteristics of this project, that it was stovepipe driven and conservative. To put it in more social science terms, the regulatory agencies don't see themselves as community of interests, not even as communities within their same agencies.

The conservative nature of the process has long been noted in many of your analyses but forgotten in your solutions. The lack of community interest has been a persistent problem, and that's why the PR and outreach agencies – to agencies has always been a part of this initiative.

A word about the current regulations.gov. Although our statistics look rather low for the comments received, we compared this to some of the other web forms used at the Department of Education, the IRS e-form, and the online for patents, and it took from 7 to 13 years for them to catch on. So we favor, I think, very effectively for them.

As for the future, we'd like – in terms of our future relationship with the academic community, first I want to thank everybody for their support and your critiques. How else can we go except with new ideas, although sometimes I cringe and grimace when I hear Stuart talk about do we really put comments on the recycling page, or Beth on the installation of chat rooms while we're watching FCC rules or the virtual group Jacuzzi therapy sessions that you'll hear about and see again.

What I'd like for you all to focus on is us. Rather than look at the communities of interest outside, look at us. Take some of the more mundane things, like how to transfer money between agencies. I have one lawyer that works full-time after agencies agree on funding us, to make sure that money actually gets through. I wanted to reward somebody in another agency. I was unable to reward somebody in another agency. She's the co-leader of one of our work groups. We operate under some very, very, very old rules.

Lastly, we need you to focus on metrics. We don't have very good metrics right now. We are about to launch an application. We could add a lot of the metrics on there as we get going. Together I think that we can ensure our common goals, whether E-democratic or not. Thank you.

BETH NOVECK: In the interest of the late hour why don't I start without the slides, and at least just set the stage for what I'm going to say in response to Oscar. That is, the work that I do on rulemaking in fact is part of a larger project and work on exactly the E-democratic questions, focusing particularly on the impact of new technology on the way people organize themselves, on the dynamics of groups, and the ability for people to come together as a result of networks to do more together than they can do alone. So I'm deeply interested in exploring the impact of new technology, particularly in the rulemaking context, and the impact more generally on the structure and processes of legal institutions.

So I just want to make three very brief points today and actually focus my remarks on showing you an innovation that grows not out of simply out of the writing that I've done, which you can read elsewhere, but on some of the software design that we've done because we are attempting to make practical solutions, not simply academic suggestions.

So three quick points. First, we have to recognize that what the technology allows us to do is to translate the legal right of participation into participative practices, and that means we need to think about designing the tools that are most effective, I would argue not simply for individuals to participate in the process – as we have seen from Stuart's presentation there is a danger that kind of what I call the notice and spam problem, of focusing simply on individual participation, and rather we need to focus on developing tools and technologies that allow and facilitate groups to participate. Now by groups I don't mean interest groups or further entrenching the kind of activity of which Stuart complained. I am talking about developing the rulemaking community of practice and process so that people can shape and refine their ideas in collaboration with one another.

That means in terms of concrete design, actually taking a lesson from the social software movement and creating interfaces that allow us not simply to see text but to see ourselves as part of the group of rulemaking practice. This is an example of a chat tool, but I use it just to show you the idea of using the screen to see yourself as part of a community. Let me show you another example of one of the things that my student created. This is using a tree map, a free technology developed at University of Maryland, that allows you to use color and shape and size to see yourself as part of the community. In this case it shows the volume and intensity of commenting in a particular area, but we could take exactly the slide that Stuart just gave us showing the list of which group – these were the Move On comments and this was the Sierra Club comments, and show you this a priori to see which rulemaking communities you're a part of, to see yourself as part of a process and as a way of reforming practice.

For example, let me just mention, I just got an e-mail right now that Lawrence Lessig is putting up his book “Code and Other Laws of Cyberspace” on the web to be collaboratively edited in a wiki, a collaborative editing tool, as a way of editing the book. There will be a conference at Stanford on deliberative democracy coming up in May in which we will explore the use of such wicki’s for policymaking, and one can imagine the use of such collaborative authoring tools, again, for seeing the group and helping the group to participate both in drafting as well as in compliance.

Second, I would argue that we need to focus not simply on the deliberative practices as we traditionally understand them, but on visual deliberation. And that is to say what we’ve always understood to be deliberation and what we’ve understood to be the practices that lead to the public exchange of reasoned ideas, in fact the technological assumptions that undergird those assumptions – excuse me, technological assumptions that undergird our definition of deliberative democracy are changing, and in fact we can use the visual screen and the visual interface often more effectively and quicker to help manage communication and make more deliberative communication.

So whatever the goals, to get back to Tino’s point, whatever the goals of participation may be, I think we can use the screen to do it better by creating better visual interfaces. And this is counter-intuitive for a lawyer like me, or for lots of lawyers who love and rely on text, but to think about how we can use the visual screen to get better quality participation and easier participation. This is an example of a tool developed by a colleague of mine called the clickable statute, which takes complicated statutory language and turns it into an interactive and clickable diagram – it’s not a very good picture but you can click on it to see whether you’ve complied with the various portions of the statute and it lights up to tell you if you’ve satisfied a particular cause of action. It’s just one example of a way of using visual technology as a way of representing information that might make it more intelligible to many people. Not to everyone, but at least to some people.

This is a redesign of regs.gov by one of my students, who thought this would be a better way to have an introduction than a simply text-based page. It would be more engaging, it would draw people in, and it would help create ultimately better comments.

I can’t help but thinking and looking at Stuart’s presentation and some of the tools that he’s developed that I would love to see those used not after the fact, as a social analysis tool, but up front again to show people the effect of their own comments because I think by visualizing it you end up participating in a better way.

Finally, the third point is that I think we need not simply – and this is particularly to respond to Oscar – not to require everything of him. And the suggestions that I made in the article he was referring to are not aimed at him or really a critique in fact of what the government is doing. It’s to say that the rest of us have a responsibility, including the technology community, to build additional tools, to create the kind of informal participation mechanisms that Neil spoke about at lunch.

So I think what we need to do is articulate the demand to the tech community, to tell other people about it, to give people the data. So you give Stuart the data and he creates all these wonderful tools. You can take the data as three different groups are doing now from the Thomas web site and three different groups are creating better ways, or different ways of visualizing legislative information as an alternative to Thomas. There are two different open Congress projects right now. Other people will build it. The blogosphere will come, like it or not. So I think we need to think about the ways of creating a culture of rulemaking and using the tools more effectively to do that.

So let me just say how might we go from this, and now the new four boxes instead of one, and how can we do that in a concrete and practical way and a helpful way. How can we help Oscar to do his job instead of being academic pains in the ass, and that is by, I think, trading and sharing ideas for innovations. And that is not simply, I would like to suggest – and what we've done is not simply focus only on the very large kind of back end problems with which the government has to wrestle, but to focus on some of the front end or interface issues, the screen through which citizens will experience the government.

So what we have done is to create a gallery of rulemaking innovations. I think I can go there if this will come up. The moment everyone dreads in every demonstration. There we go. Okay. It's a little hard to see here but this has just been created, and this allows you to share and upload innovations in rulemaking practice. I'll just show you one quick example. It would allow you to come in, for example, and say let me get ideas for how to do the comment process better. This will create, we hope, a way to share and trade innovations across levels of government, across from the technology community to the legal and policy community. So for example, here is an innovation created by one of my colleagues. And it's very simple. He simply uploaded a picture, he's uploaded a description – I'm sorry the screen size makes this a little hard to see – and allows people to come in and in fact to rate it, post a comment, and engage in a discussion about what kind of interfaces, practices and methods might be most useful.

The idea behind this is to, again, create a way to facilitate the sharing and exchange of information, not necessarily only the visual interfaces that we have developed and created and that my own students focus on, but to focus on innovations in practice, in method, in sharing ideas across communities so that we can get at, for example, the kinds of solutions to the kinds of problems that Neil was suggesting and raising at lunch. I couldn't help but thinking that in regard to your how do we speed up the processing problem, there's a wonderful system that's been developed in Seoul, Korea for managing and administrative work called the Open System. Very hard to share and trade that information unless we have a place to do it and a way that's simple and easy to use. So this in every pathway there's an easy way to both create new pathways and upload an innovation, and I'm happy to share the URL for this. It will be on our web site. And to get your participation in helping to refine and develop this piece of software, and hopefully to use it. It's only as useful as – as it turns out to be, and if people actually find it helpful. So we look forward to developing it.

And I wouldn't be complete if I did not show you the virtual hot tub, of which Oscar has complained and Stuart makes me show this every time. And I must mention just finally as – that we have just received a grant, together with the University of Florida Center on Family and Children to develop – to actually develop a rulemaking in a virtual world process, so to experiment with creating the virtual rulemaking hot tub. So in fact we have gotten the grant, which I had hoped we would, so Oscar, we will see you in the Jacuzzi, and thank you very much.

MR. KERWIN: I am going to suggest as a time management tool that we go ahead and hold the questions for this panel, and the questions that will follow the evaluation panel that's about to start for the final session of the day, which is the day on setting agendas. Curtis and Cary are going to lead us in a discussion of agenda-setting based on both a policy agenda and some research issues. What was raised at this panel is extraordinarily important and has tremendous implication for the conduct of rulemaking, as will the evaluation session that follows now.

So I will first thank the panelists very much for the insights. Ask the panel on evaluations, please join me here, and ask people to hold their questions until the final session.

(END OF PANEL.)