



# **The Future of Electronic Rulemaking: A Research Agenda**

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## The Future of Electronic Rulemaking: A Research Agenda\*

By Jeffrey S. Lubbers\*\*

When offering an agenda for the future it is sometimes a good thing to revisit previous diagnoses. In 1996, I participated in a symposium about the administrative law agenda for the next decade, and I just want to read two short paragraphs from what I said then, because many of the issues are still with us.

I cited what we then called the “Information Revolution” and said the following:

As the Internet washes over us all, what will this mean for agency proceedings? Electronic rulemaking has already begun. Will we be shortly seeing global rulemaking complete with chat rooms and word searches of all records?

Agencies are beginning to computerize their documents as well. What new problems likely will be caused by this? Issues include security, confidentiality, hacking, authentication, need for backups, and access to hard copies of documents for those who do not know how to get onto the information highway. Moreover, how does our increasing reliance on e-mail fit into our conceptions of the Freedom of Information Act, not to mention, of course, the Paperwork Reduction Act? This area is going to require some enlightened and balanced policymaking mixed with technical expertise. We all know that lawyers and techies often do not get along; however, this is one area where communication across the professions is necessary.<sup>1</sup>

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<sup>1</sup> Jeffrey S. Lubbers, *The Administrative Law Agenda for the Next Decade*, 49 ADMIN. L. REV. 159, 165-66 (1997) (in *Symposium: The Future of the American Administrative Process*). For a more expansive review of the possibilities, see Stephen M. Johnson, *The Internet Changes Everything: Revolutionizing Public Participation and Access to Government Information Through the Internet*, 50 ADMIN. L. REV. 277 (1998). See also U.S. General Accounting Office, *Federal Rulemaking: Agencies Use of Information technology to Facilitate Public Participation*, Report GGD-00-135R (2000).

We have come a long way in those six years. Government websites have become enormously useful. The online *Federal Register*,<sup>2</sup> *Code of Federal Regulations* (C.F.R.),<sup>3</sup> and *Unified Agenda of Federal Regulatory and Deregulatory Actions*<sup>4</sup> have eclipsed the paper versions in a few short years. And the Electronic Freedom of Information Act Amendments of 1996<sup>5</sup> have geometrically increased the amount of information provided proactively by agencies.

Technology is moving at its usual rapid clip. But legal developments are moving more slowly, and there is still a wealth of e-rulemaking issues for administrative law scholars, with the help of their technologically adept colleagues to study.

I view my task today as trying to catalog and perhaps order these issues for future researchers. The issues are obviously not original with me. But here goes:

The main issue, as I see it, is nothing less than how to design a transformation of the rulemaking process as a whole.

This has two main purposes. The first is an *informational* one of providing a global seamless view of each rulemaking. By “global,” I mean both a “horizontal” view—meaning access to every meaningful step in the generation of a rule, from the statute enacted by Congress that authorizes the rule, to the earliest agency action (perhaps an “advance notice of proposed rulemaking”), to the last step in the process—whether it be the final rule, a decision in a court challenge, or later agency amendments, interpretations, guidelines, or enforcement actions. This will require proper docket definition and numbering so that agencies can properly catalog these actions and so that

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<sup>2</sup> See [http://www.access.gpo.gov/su\\_docs/aces/aces140.html](http://www.access.gpo.gov/su_docs/aces/aces140.html)

<sup>3</sup> See <http://www.gpo.gov/nara/cfr/index.html>

<sup>4</sup> See <http://www.reginfo.gov/>

<sup>5</sup> Pub. L No. 104-231, 110 Stat. 3049 (1996). An important addition to the Act was a requirement that the agencies affirmatively make available documents that have been requested frequently in the past or are likely to be in the future. 5 U.S.C. § 552(a)(2)(D). Most agencies have chosen to make these available on their websites.

interested viewers can be sure that everything is there. By everything, I would include not just the text of the proposed and final rules, but the public comment files, preambles, ex parte communications, videotaped or audio taped public hearings, OMB review documents,<sup>6</sup> “SBREFA” review panel documents,<sup>7</sup> relevant impact statements, models, risk assessments, Congressional review documents,<sup>8</sup> relevant court proceedings, etc. A good first step is to make sure at least that proposed and final rules are linked.

What constitutes a “meaningful step” should ideally be determined by the user as much as possible. Since many new rulemakings grow out of older rulemakings, or have implications for other concurrent rulemakings, a truly seamless view should permit users to search across past or current rulemakings, to find connections, analogies, and consistencies (or inconsistencies).<sup>9</sup>

In addition to this chronological view, I also mean a “vertical” view, what might be called “boring down” into the meaningful agency and outside studies and analyses that are now found in the docket, along with the public comments, for any significant proposed and final rule—and, where possible through links, into those secondary studies and analyses referenced in the primary studies. And so on.

To fully implement this vision, it would be helpful for agencies to place archival records on-line. This can be done to some extent retrospectively with existing rules, if existing paper records currently in regular agency dockets are scanned, and made accessible through the new e-rulemaking systems. If done comprehensively and carefully, this

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<sup>6</sup> Pursuant to the Paperwork Reduction Act, Executive Order 12,866, “Regulatory Planning and Review,” and other related orders. Section 6 of Exec. Order 12,866 requires disclosure by OMB and agencies of information about communications between OMB and outside parties, and between OMB and the agency, concerning rulemakings under review by OMB.

<sup>7</sup> This refers to special review panels, required by the Small Business and Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. § 609, convened for rulemakings conducted by EPA and OSHA.

<sup>8</sup> Pursuant to 5 U.S.C. §§ 801-808.

<sup>9</sup> Thanks to Professor Cary Coglianese for this insight.

could be an expensive proposition. But with the advent of electronic rulemaking, this sort of “forward” archiving should become much more feasible in the future.

The second purpose of the transformation of rulemaking is a *participatory* one—making it possible for participants to participate in real time with other stakeholders in a rulemaking process, (the glorified “chatroom” if you will) that will allow a more rational, interactive, and less adversarial path to an optimum final rule.

Both the informational and the participatory goals have some stumbling blocks to which research should be directed.

I. Let’s take the informational goal first. Here are some questions:

- A. How should we best integrate existing sources of information? The Office of Federal Register now is able to constantly update the electronic C.F.R.—which in itself is a great boon to anyone who needs to know what government regulations are in effect at the moment. Should there be an agency (perhaps in the National Archives and Records Administration) that tries to integrate all of these documents electronically—the Federal Register, C.F.R., Unified Agenda—to begin with? In other words, should there ultimately be a single U.S. Government Rulemaking Portal?
- B. What about the gloss that agencies are constantly adding to codified rules through non-legislative rules? Some years ago I commented on an interesting article by Professors Hamilton and Schroeder of Duke University.<sup>10</sup> They had catalogued all of EPA’s hazardous waste regulations under the Resource Conservation and Recovery Act that appeared in the C.F.R. by counting each C.F.R. decimal point number as a

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<sup>10</sup> See Jeffrey S. Lubbers, *Anatomy of a Regulatory Program: Comment on “Strategic Regulators and the Choice of Rulemaking Procedures,”* 57 LAW & CONTEMP. PROBS. 161 (Spring 1994).

separate rule.<sup>11</sup> This yielded 697 separate rules. Then they examined all of the related agency guidance documents (office directives, guidance memos, and hotline responses) since the beginning of the program and matched them with the appropriate C.F.R. rule. Some rules, they discovered, had many associated guidances; some had none. This was done by a consulting firm, by hand, and it must have been a tedious task in the early 90s. But it could be done fairly easily now—leading to a sort of “*C.F.R. Annotated.*”

C. What about docketing issues?<sup>12</sup>

1. Should written (paper) comments be scanned immediately so that a complete on-line docket is available? Is there still some loss of search capability and some risk of errors with scanning? Or is this susceptible to a technological solution?
2. Archiving issues. Do (redundant) paper copies need to be kept? How about cover e-mails?
3. How should exhibits, forms, photographs, etc be dealt with?
4. Barbara Brandon has highlighted the need to deal with copyright concerns—both where the submitter asserts a copyright in his or her own comments, and where the submitter includes copyrighted work without permission.<sup>13</sup> How should these knotty issues be resolved?

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<sup>11</sup> See James T. Hamilton & Christopher H. Schroeder, *Strategic Regulators and the Choice of Rulemaking Procedures: The Selection of Formal vs. Informal Rules in Regulating Hazardous Waste*, 57 LAW & CONTEMP. PROBS. 111 (Spring 1994).

<sup>12</sup> See generally Henry J. Perritt, Jr., *Electronic Dockets: The Use of Information Technology in Rulemaking and Adjudication* (Administrative Conference of the United States 1995) available at [http://www.kentlaw.edu/classes/rstaudt/internetlaw/casebook/electronic\\_dockets.htm](http://www.kentlaw.edu/classes/rstaudt/internetlaw/casebook/electronic_dockets.htm). (last visited April 2, 2002).

<sup>13</sup> Barbara H. Brandon, *Online Rulemaking: A Tool for Strengthening Civic Infrastructure*, 54 ADMIN. L. REV. \_\_\_\_ (No. 3, forthcoming 2002), citing Perritt, *supra*, note 12.

5. The OMB has recently issued new guidelines on the quality, objectivity, utility, and integrity of information disseminated by federal agencies.<sup>14</sup> Will these strictures (including the requirement that agencies establish appeal mechanisms to resolve disputes over the accuracy of the data) limit agency willingness to provide wider electronic access to agency rulemaking documents?
6. Should there be different levels of user classifications? So that one type of participants (like agency staff) could see everything, but others might have more limited access? Should agencies be allowed to ask viewers to register?
7. Have we finally solved the digital signature issue?
8. Security issues have become of heightened concern—both in terms of preventing unauthorized tampering, and in making sure that sensitive information is not made available to potential terrorists.
9. A slew of privacy issues are presented. Should anonymous comments be permitted? Ought commenters be identified or searchable by name? Should the names of submitters be indexed? This would seem to transform agency rulemaking files into “systems of records” under the Privacy Act.<sup>15</sup> Doesn’t this mean that OMB must approve such “systems”? Should such files be exempted from the coverage of the Act?
10. What legal impediments prevent agencies from *requiring* e-comments to the exclusion of paper comments?

II. Next are some issues concerning the participatory goal:

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<sup>14</sup> Office of Management and Budget, “Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies” (Jan. 3, 2002), *available at* <http://www.whitehouse.gov/omb/fedreg/reproducible.html>.

<sup>15</sup> *See* 5 U.S.C. § 552a(a)(5), defining “system of records” as information “under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular . . . .”

- A. How can we best reach the goal of better, more targeted notices—through electronic listservs?<sup>16</sup>
- B. Can we also provide easier, more convenient comment opportunities, through linking “pop-up” comment forms to electronic notices of proposed rulemakings?
- C. What rules should govern rulemaking “chatrooms”?
  - 1. Should they be moderated or not (and by whom?)
  - 2. First Amendment concerns: as Barbara Brandon highlights, some participants, especially anonymous ones, can be very disruptive through “incivility, aimlessness, or high-volume posting.”<sup>17</sup> How to best combat this?
  - 3. How to deal with e-mail attachments with their attendant risk of viruses, and of overloading systems? What about the ease with which commenters can “dump” huge files or links within their electronic comments? What should the agency’s responsibility be to sift through everything that is “sent over the transom”?
  - 4. What rules should pertain to archiving of chats? To be consistent with the above informational goals, this should be done, but how much flexibility should there be, opportunity for correction, disclaimers, etc.?
  - 5. What about electronic “negotiated rulemaking”? Would this just become a more formalized, more highly moderated, version of “regular” electronic rulemaking? Or would it add value by liberating negotiated rulemaking from the up-front cost concerns (of convening meetings) that seem to be holding it back now.<sup>18</sup>

### III. Other issues

- A. Should the Administrative Procedure Act be amended to reflect the electronic age, just as the Freedom of Information Act was in 1996?

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<sup>16</sup> Apparently the Department of Transportation, which has digitized all of its rulemaking and adjudicative dockets, now does maintain listservs for particularized notices. Statement of Neil Eisner, Assistant General Counsel, DOT, at this meeting. For a description of DOT’s e-docket system as of 1995, see Perritt, *supra* note 12 at Chapter V.

<sup>17</sup> Brandon, *supra* note 12 at \_\_\_\_\_, citing LAWRENCE LESSIG, *CODE AND OTHER LAWS OF CYBERSPACE* (New York, Basic Books 1999) and Cass R. Sunstein, *Deliberative Trouble? Why Groups Go to Extremes*, 110 YALE L. J. 71 (2000).

<sup>18</sup> See, e.g., Matthew J. McKinney, *Negotiated Rulemaking: Involving Citizens In Public Decisions*, 60 MONT. L. REV. 499, 511 (1999) (citing as a reason for not using negotiated rulemaking, “the costs to an agency, in both time and money”).

- B. How much uniformity in e-rulemaking should be sought across the government? Or is a best practices approach preferable?
- C. Do we need a government-wide regulatory thesaurus to be used in agency websites?
- D. What about the usefulness of electronic meetings/hearings outside rulemaking context? Are there Federal Advisory Committee Act or Government in the Sunshine Act concerns?
- E. Is there any reason for different approaches in electronic rulemaking between executive and independent agencies?

And, finally, one last issue to consider. We've obviously made great strides in the area of agency e-rulemaking, but what if anything have we done in the area of *e-adjudication* by agencies? Many agencies, such as the National Labor Relations Board, Merit Systems Protection Board, and the Patent and Trademark Office, still develop significant policies through case-by-case adjudication (sometimes with oral arguments and significant participation by intervenors or *amici curiae*), but there is very little government-wide focus on the informational and participatory goals of such proceedings.

In closing, I realize it is a lot easier to throw out issues and questions than to solve them. I applaud the Kennedy School and the National Science Foundation for encouraging this dialogue. If my old agency, the Administrative Conference of the United States, still existed,<sup>19</sup> I would hope we would be commissioning the best research minds in the country to help solve these questions, because the vision of a seamless informational and participatory rulemaking process is not only an attractive one, but it has now become an attainable one.

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<sup>19</sup> For further information on the history (and the 1995 demise) of the ACUS, see *Symposium, Administrative Conference of the United States*, 30 ARIZ. ST. L. J. No. 1 (Spring 1998).