Discussing the Rules: Electronic Rulemaking and Democratic Deliberation

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Abstract

Of all recent efforts to transform the federal bureaucracy through the use of information technology, electronic rulemaking holds the most potential for enhancing the role of the public in policymaking. In its more expansive formulation, electronic rulemaking would allow citizens to learn about proposed regulations on the Web, comment on them electronically, read comments by others, and even discuss relevant issues with fellow citizens and agency staff. This paper outlines what we should expect from public involvement in electronic rulemaking, concluding that its promise lies in embedding democratic deliberation into administrative decisionmaking. The current move to put rulemaking dockets online, while important, is likely to fall short of electronic rulemaking's potential. For important rules, electronic dockets should be supplemented with electronic dialogues, which support and encourage iterative discussions.

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Introduction

The E-Government Act, signed by President Bush in December 2002, outlines the latest phase of efforts to incorporate information technology into the federal bureaucracy. While much of the law focuses on the efficient delivery of government services, its electronic rulemaking requirement is the most far-reaching federal government effort to date for promoting online public involvement. Addressing one of the administration's 23 e-government priorities identified in late 2001, Section 206(d) of the law requires agencies to establish a single electronic point of access for citizens to locate, learn about, and comment on all proposed federal regulations (OMB 2002a). To begin to fulfill this vision, the administration launched its www.regulations.gov website in January 2003.

Unbeknownst to many, the public notice and comment feature of the rulemaking process offers citizens one of their most direct formal channels for influencing federal law. As a leading scholar on rulemaking writes, "involvement of the public in rulemaking may be the most complex and important form of political action in the contemporary American political system" (Kerwin 1999, 116). However, as traditionally practiced, public involvement in rulemaking is an arcane art, dominated by special interests operating primarily inside the beltway.

Moving rulemaking online promises to increase participation by those not traditionally involved in administrative policymaking and alter the way that opposing interests interact in the policy development process. Such a result is by no means guaranteed; electronic rulemaking may simply provide an easier point of access for traditional interests and their constituents, without significantly changing the nature of the process. This paper examines which outcome is

more likely. It outlines what we should expect from electronically enhanced participation and whether current forms of electronic rulemaking meet that challenge.

Section 1 addresses what enhanced participation in rulemaking is intended to accomplish by reviewing the evolution of theories about the appropriate role of citizen input in administrative governance. Three models of this relationship are introduced—managerialism, pluralism, and civic republicanism—along with an argument that the civic republican ideal of deliberative democracy provides the objectives to which public participation in electronic rulemaking should aspire.

Section 2 briefly describes the rapidly changing state of two of the most salient types of electronic rulemaking reforms in the federal government: electronic dockets and electronic dialogues. To understand the extent to which these reforms may approach a deliberative democratic ideal, Section 3 evaluates nine Department of Transportation (DOT) rulemakings that used electronic dockets and an online dialogue conducted by EPA. Section 4 outlines the bureaucratic and legal barriers to improved participation in electronic rulemaking, and the paper concludes with recommendations for moving forward.

1. Evolution of the Rulemaking Process

Public participation in rulemaking is important because rulemaking itself is so important. Roughly 160 federal agencies issue over 4,000 regulations each year. The Office of Management and Budget (OMB) estimates that major federal regulations promulgated between 1995 and 2001 cost the economy around $50 billion each year and provided annual benefits of between $48 and $102 billion (OMB 2002b). The costs and benefits of all federal regulations may be more than a factor of 10 higher.

What is it that public participation—and electronic enhancement of participation—is intended to contribute to this vast bureaucratic enterprise? Answering the question requires examining evolving theories about the nature of the relationship between public input and administrative governance and the changing role of the public in rulemaking itself over the last half century.

The origins of modern rulemaking reach back to the New Deal Era, when an expansion of executive branch programs challenged the primacy of the legislative branch in dictating government's role in citizens' lives. Public and legislative reaction to a burgeoning bureaucracy

came in the form of rules governing how administrative agencies would exercise their discretion in turning broad congressional mandates into detailed laws.

The most important rulemaking legislation coming out the New Deal Era was the Administrative Procedure Act (APA), passed in 1946. The APA outlined the steps agencies must go through in developing regulations and enshrined three principles for rulemaking: information, participation, and accountability. Rulemaking, as typically practiced, is an expression of these three principles.[1]

Fulfilling informational obligations, agencies undertake scientific, economic, and other types of studies to develop a proposed rule and publish that proposed rule (along with material discussing its purpose and background) in the *Federal Register*. The APA established a participation "floor" by requiring that the public be allowed to comment on the proposed rule within a specified time period.   Agencies review the comments, develop a final rule, and publish both the rule and a response to comments in the *Federal Register*.

Agency accountability is ensured through judicial review and transparency. Stakeholders can appeal to the courts for review of the process by which the rule was developed and whether its substance was consistent with its underlying statute. Transparency comes through agencies' written responses to comments and the retention of all key rulemaking resources (including public comments) in public dockets available to any citizen who visits an agency docket room or requests information through the Freedom of Information Act.

Despite the APA's participation requirements, it was largely consistent with the prevailing New Deal view that administrative policy should be established primarily by expert bureaucrats.   Under this managerial view, public agencies were the guardians of the public interest and should be insulated from excessive political and judicial oversight and second-guessing. Public participation in rulemaking was seen largely as an opportunity for those outside of government to improve the factual foundation for rules, supplementing the expertise brought by government administrators.

Managerialism was challenged during the post-war expansion of social regulation by the concept of pluralism (Stewart 1975, Reich 1985). Pluralism opened the door to a much wider range of voices contributing to policymaking. According to the pluralist view, government

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[1] The APA outlined both formal and informal processes for rulemaking, but it is the informal process that has become the norm (Kerwin 1999, Johnson 1998).

administrators should act less as objective experts pursuing the public interest and more as arbiters among the various interests within the public. It involved a more complex view of the public interest, insisting that it could only be identified through implicit or explicit negotiations among a wide range of interests (Williams and Matheney 1995).

Under pluralism, public comments were seen as providing not just additional expertise on the substance of a rule, but also information about the competing preferences, values, and opinions of different interests. Rulemaking procedures evolved from the floor established by the APA to a "hybrid process" that reduced the deference accorded to agency expertise and forced administrators to become much more responsive to external input (Harter 1982). New provisions required agencies to support their decisions with adequate evidence and rationale and respond directly to interest groups' arguments. Public transparency was enhanced, as was the influence of more "political" executive branch institutions. Part of the test of the quality of a rule became the degree to which it effectively increased the collective gains for all relevant groups.

Pluralism was the model for the most extensive reform of rulemaking since the APA: negotiated rulemaking as formalized in the 1990 Negotiated Rulemaking Act. Under negotiated rulemaking, agencies formally convened relevant interest groups to negotiate the content of a rule. If parties came to a consensus agreement, the sponsoring agency issued it as a proposed rule, followed by traditional public notice and comment as outlined in the APA.

Regulatory negotiation was always envisioned as the exception, not the rule, for regulatory development, and it was deemed most appropriate in situations sharing a relatively long list of restrictive characteristics (Kerwin and Langbein 1995, Harter 1982). Between 1990 and 1997, for example, the Environmental Protection Agency convened only 16 regulatory negotiations (Davies and Mazurek 1998). However, the spirit that animated regulatory negotiations—a realization that identifying the "public interest" needed to involve those whose interests would be affected—led to greater use of advisory committees, policy dialogues, workshops, and other forms of consultative public participation at the agency.

In situations where it was used, proponents saw regulatory negotiation as a "cure for malaise" that had settled over rulemaking, largely as a result of adversarialism and lack of legitimacy (Harter 1982). As traditionally practiced, rulemaking encouraged extreme positions and discouraged the generation of appropriate information. It masked parties' true priorities and was inadequate for developing integrative solutions to complex multi-party disputes. Along with the continuing dominance of managerialism, the adversarial process undercut legitimacy. Since the APA was passed, the public increasingly granted legitimacy to a regulatory institution

because of its responsiveness to public input, not because of its expertise. Regulatory negotiation was seen as increasing legitimacy by facilitating face-to-face interaction, deep involvement in the substance of a rule, incentives for producing useful information, more attention to detail, and less subsequent litigation because the principals of organizations—not their intermediaries—committed to the results.

Regulatory negotiation and the pluralism on which it rested have been challenged by the revival of civic republicanism. In the republican view, agencies shouldn't just play umpire to interest group wrangling, but should step back from the bluster of demands and seek out a publicly "informed vision of the common good" (Applegate 1998, 12–13; Seidenfeld 1992). The key institutional mechanism of civic republicanism is democratic deliberation rather than negotiation or the application of agency expertise. Through such deliberation, individuals exercise "civic virtue" by transcending self-interest and asking what actions are best for the broader community. Policy is developed through "practical reason," by which participants consider "what can be justified to people who reasonably disagree with them." (Sunstein 1988, 1541; Gutmann and Thompson 1996, 2). Additionally, the act of participating builds citizenship and strengthens the nature of civic life (Reich 1985, 1632).

Civic republicanism, moreso than pluralism, grants administrative agencies a leading role in formulating the substance of policy—a role that can threaten to veer off into managerialism. Unlike the traditional managerial model, however, in civic republicanism it is knowledge of, and means for determining, the "informed vision of the common good"—not substantive expertise—that justifies the administrator's role.

Regulatory negotiation, from the viewpoint of civic republicans, was an inadequate response to rulemaking's "malaise."   In particular, it exacerbated the problem of participation being the exclusive realm of organized interest groups and encouraged participants to focus on self-interest rather than higher-order shared values. It was seen as particularly unsuitable for issues that affected large, diffuse, and unorganized constituencies, and for issues where differences over values rather than interests dominated. In practice, regulatory negotiations could respond to some of these critiques. Conveners identified representatives who could stand in for the interests of unorganized groups, and agencies notified the public about impending efforts. The dynamics of interaction among participants and the nature of information sharing could encourage participants to remain mindful of a broader public interest, particularly when an effective government leader pushed them to do so.

To the extent that regulatory negotiations involved unorganized interests and kept an eye on the public interest, they were approaching the civic republican notion of deliberative forums. Such forums shared four characteristics: broad and representative participation, informed participants, deliberative interaction, and credibility (Weeks 2000). However, forums on national policy that combine two of these factors—broad participation and deliberation—are as rare as they are complex (Weeks 2000). There are substantial practical barriers to face-to-face processes that engage large groups in deliberative interaction. Even advocates of civic republicanism acknowledge that truly deliberative forums are mostly aspirational (Sunstein 1988) and that "the number of people who at the same time can have even a simple conversation, let alone an extended moral argument, is limited" (Gutmann and Thompson 1996, 131). Others suggest that the deliberation and broad participation envisioned by civic republicans are, beyond a certain threshold, diametrically opposed (Rossi 1997).

It is in realizing the vision of deliberative democracy, mainly through a combination of broad participation and deliberation, that electronic approaches to public interaction show promise. By breaking down barriers of geography, knowledge, and access, electronic forums reach more and different kinds of people than do traditional off-line processes. At the same time, they can intensify the participation process, turning a static commenting procedure into a reciprocal conversation. Francis (1997) illustrates the advantages of such a process in the context of state government input on a rule:

> "Instead of Alaska, Alabama, and Arkansas each independently sending inconsistent comments on the 60th day to a dusty document room on the same bothersome point, Alaska can propose a change early in the process, Alabama can suggest an improvement, Arkansas can recommend an even better way to handle the concerns of all three states, and Alaska can agree with Arkansas."

2. Electronic Dockets and Electronic Dialogues in the Federal Government

Soon after its advent, the Internet was seen as a means for involving the public more deeply in rulemaking. An early recommendation of Vice President Gore's National Performance Review (1993) was to "use information technology and other techniques to increase opportunities for early, frequent, and interactive public participation during the rulemaking process." However, by the time President Clinton issued an executive memorandum in 1999 calling on agencies to satisfy the public demand for "on line Government interaction," there were relatively few examples of electronic rulemaking and related policymaking efforts (Clinton 1999). That picture is changing as agencies adopt electronic approaches for managing the

rulemaking process and migrate their systems onto the new one-stop site for all federal rulemaking.

Electronic participation in rulemaking largely falls into two categories. First are electronic dockets, by which people can submit comments online. More sophisticated e-docket applications also allow people to read comments submitted by others. Following years of development and experimentation, a period of centralization and standardization of electronic dockets is now on the horizon. The second format, electronic dialogues, actively encourages considered back-and-forth conversation. Such dialogues are still in an experimental phase, with ad hoc efforts being undertaken inside and outside government.

The OMB-led Online Rulemaking Initiative, now buoyed by the 2002 E-Government Act, is the driving force behind the integration of electronic dockets across the executive branch. One of the initiative's principal goals is to provide the public with a single electronic point of access (or "portal") to all docket systems, including the ability to comment electronically on open rules.

With www.regulations.gov, OMB has deployed its first common electronic docket system for all federal agencies. A leading inspiration for www.regulations.gov and a model for further improvements is EPA's EDOCKET system, which the agency put online in 2002. EDOCKET grew out of a long-term bottom-up effort by docket managers in various EPA offices to improve docket management by using information technology. The new electronic docketing system has co-evolved with a physical consolidation of EPA dockets into one location.

EDOCKET provides some distinct improvements in making the commenting process more accessible, user-friendly, information-rich and potentially interactive. It establishes a single point of access for all docket information, including rules' goals and objectives, relevant laws, *Federal Register* notices, links to other relevant dockets, information on EPA contacts, and other background material. To encourage a more reciprocal approach to commenting, the system gives users the ability to search for and read others' comments. This ability is hampered somewhat, however, by the lack of any function to easily allow users to locate or list comments according to the identity of their authors.

Part of the difficulty of integrating dockets government-wide is the proliferation of different systems at different agencies. The Department of Transportation has a well-established Docket Management System (DMS), which preceded EPA's EDOCKET by a number of years. Systems of varying scope and quality exist in at least 11 federal departments and agencies (Brandon and Carlitz 2003). The most dramatic use of an electronic docket was the U.S.

Department of Agriculture's rulemaking on standards for organic food labeling, which generated over 275,000 public comments (Shulman 2000). Agencies' efforts to move the regulatory process online have been supported by parallel improvements in electronic access to the *Federal Register* and *Code of Federal Regulations*.

Compared to electronic dockets, electronic dialogues are in a far more experimental phase. Such dialogues are characterized by a few basic features. They typically offer broad, open access—available to anyone who hears of the opportunity and is interested enough to participate. Participants are typically asked to post messages to a website, replying to other messages when appropriate to create a "thread" or conversation. This threading feature encourages back-and-forth dialogue, and an asynchronous structure allows adequate time for considered reading and posting. Dialogues typically stay focused on a particular topic through a structured and time-limited design that often involves daily themes, the identification of roles for various participants, and some degree of facilitation.

An early experiment in electronic dialogues called RuleNet was carried out by the Nuclear Regulatory Commission in 1996 on proposed changes to fire protection rules for nuclear reactors (Ferenz and Rule 1999). Although regarded as a "mixed success," the architecture of RuleNet remains one of the more thoughtful efforts to incorporate the principles of deliberation into an online forum, with explicit phases for exploring problems, proposing solutions, and developing recommendations. An online dialogue conducted in conjunction with the Federal Communication Commission's rulemaking on the E-Rate program—which provided money for Internet access at schools—was instrumental in bringing the voices of teachers and librarians into the policy development process (Brandon and Carlitz 2003). The Federal Aviation Administration and the Department of Transportation have used relatively unstructured online public forums on various topics undergoing rule development as well (FAA 2000, Stanley et al. 2002). Some dialogues have been carried out for less formal policymaking activities, such as two dialogues held in 2000 and 2001 by EPA, one of which is described below (ELI 2000, Beierle 2002). Keeping track of electronic rulemaking dialogues is a moving target, with new efforts cropping up all the time.

3. Electronic Deliberative Democracy?

The advent of electronic dockets and electronic dialogues has the potential to introduce new forums for deliberative democracy into rulemaking, but it is not clear whether this potential will translate into practice. In this section, specific examples of electronic dockets and an

electronic dialogue are evaluated according to two key aspects of the civic republican vision of deliberative democracy.

The first aspect is the extent to which processes foster broad and representative participation, involving more people than would be likely to participate in an off-line setting. Ideally, participants would be representative both in terms of the diversity of interests and values they bring and also by reflecting the demographics of the broader public.

The second is the extent to which communication in these electronic processes is considered deliberative. As used here, deliberation means critical reflection that moves participants from individual opinion to group choices and plans of action. A threshold condition for deliberation is reciprocity—the back-and-forth in a conversation as people engage with what others have said. But reciprocity alone is not sufficient. Holt et al. (1997) describes six subsequent steps through which deliberation ought to proceed:

1. Participants make a personal investment in the process and begin by seeking to understand the issues, introducing themselves, and learning about each other.

2. Participants express how they feel about issues, begin to identify with those who hold similar beliefs, and build on messages submitted by others.

3. Participants analyze available alternatives by identifying and weighing pros and cons from diverse perspectives.

4. Participants move beyond their private interests and consider how the consequences of the alternatives affect others and the general public good.

5. Participants make choices based on the public good, although they may not all make the same choice (i.e., they may not reach consensus).

6. Participants discuss how to put their choices into practice, often by articulating what each can do.

To evaluate the extent to which electronic dockets may support these two deliberative democratic criteria, nine of the most active rulemakings in 1999 and early 2000 from DOT's Docket Management System (DMS) are examined. DOT was the first major federal department to go to a system of electronic dockets, launching its system in 1997.

The nine dockets examined received from 29 to 2,223 comments in comment periods ranging from two weeks to 10 months.[2] In seven of the cases, the electronic format didn't appear to change the nature of the commenting process. Most comments were simply formal letters sent by established interest groups via regular mail and scanned into the system by DOT staff.   It is reasonable to assume that these comments would have been received regardless of whether DMS existed or not.

In two cases, however, a substantial number of citizens rather than organized interest groups emailed their comments. One rule dealt with the use of locomotive horns at grade crossings. It addressed the conflict between safety and the nuisance of train horns in residential communities. DOT publicized the roll-out of its draft rules and conducted 12 public meetings around the country. The comment period extended over nearly a year. The rule galvanized municipalities and counties with existing bans on train horns, and many encouraged their citizens to send comments on the rules. Numerous municipal websites guided residents to the DMS site, as did DOT's own website describing the rule.[3] DOT staff felt that there would have been far fewer people submitting comments had the process not been on-line (Flatau 2001).

The second rule with many comments submitted electronically by individuals dealt with safety release latches for trunk compartments. Many of the people commenting were parents, victims, or the friends of victims affected by related accidents. A flurry of comments were spurred by the appearance on the Oprah show (January 26, 2000) of a family that had been abducted and locked in the trunk of a car. The family formed the group Trunk Releases Urgently Needed Coalition (TRUNC), which has pushed for the DOT rule. On the Oprah show, the family directed viewers to TRUNC's website, which provided directions for commenting electronically via DMS.[4] Interestingly, the site (along with Oprah's website) provided information for mailing comments in as well, although many fewer comments were mailed than emailed.

DOT has reported that the total volume of comments since the launch of DMS in 1997 rose from just over 3,000 comments on 155 rules that year to nearly 63,000 comments on 119 rules in 2000 (Skrzycki 2003). Evidence from the nine rulemakings suggests that this rise in

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[2] For dockets with more than 130 comments, 50 were randomly selected for examination.

[3] An example of a municipal website is http://www.vernonhills.org/info/trainwhistle.htm. The DOT website for the rule is: www.fra.dot.gov/horns .

[4] See: www.sfo.com/~rishad/trunc/index.html.

comments was reflected in some rules much more than others. Seven out of the nine cases examined here involved mainly the "usual suspects" of law firms, industry, trade associations, and consulting firms using the familiar approach of sending formal letters by mail. However, the train horn rulemaking and the safety latch rulemaking (not to mention the overall rise in comments) suggest that individual citizens can be mobilized to participate electronically on issues of particular salience to them. In both rulemakings, it took the work of intermediaries— from local governments to Oprah—to encourage citizens to participate, and that participation was easier for most when it could be undertaken electronically. Interestingly, TRUNC and municipalities seeking to influence the train horn rulemaking utilized their own websites as a means of informing constituents, mobilizing them to comment, and directing them to DOT's electronic docket site.

There is little evidence, however, of deliberation, or even reciprocity, in the DOT electronic dockets. In only one of the nine DOT cases examined were there more than a few comments that referred to previous comments, much less the six higher order aspects of deliberation outlined by Holt et al. (1997). More subtle reciprocity may be at work, however. People have told DOT staff that they use the Web to review comments before sending their own, even if their submissions are through formal letters in regular mail (Meers 2000).

Rather than the contents of a reciprocal conversation, most of the comments submitted electronically were statements of support for one side of a debate or another. Although a flood of such comments may greatly expand the workload for rule writers, it is not clear that it adds much to the substance of a rule or to a better understanding of the various interests affected. In an analysis of two prominent electronic rulemaking efforts—including the USDA effort that generated over 275,000 comments—Zavetovsky et al. (2003) conclude, albeit tentatively, that "comments received electronically are not necessarily more focused or substantive than pre-Internet era comments." Rossi (1997, 224) argues that the informational benefit of participation levels off at some threshold, and mass participation beyond that point not only undermines citizen-to-citizen deliberation, but also hampers the ability of administrators to think critically about the substance of a rule as they "miss the forest for the trees." At worst, a cacophony of unreflective comments tempts rule writers to lapse into preference aggregation, counting up support and disagreement in an inappropriate application of a voting model (Schlosberg and Dryzek 2002).

Some procedural rules might help make electronic dockets more explicitly reciprocal and perhaps deliberative. For example, Brandon and Carlitz (2003) suggest instituting rebuttal comment periods, in which parties are explicitly allowed to comment on submissions already in

the record. Such a requirement would discourage the common practice of waiting until the very end of the comment period to submit material in hopes that other parties won't see it in time to react. Brandon and Carlitz also advocate indexing comments by the identity or affiliation of the author, as DOT does, rather than relying primarily on key word searches as a means of identifying previous comments, as EPA's system does.

In contrast to electronic dockets, electronic dialogues explicitly encourage reciprocal interaction. One such dialogue was EPA's National Dialogue on Public Participation, convened in 2001 by EPA as a vehicle for obtaining input on the content and implementation of the agency's draft Public Involvement Policy (PIP) (Beierle 2002). The PIP provides agency-wide guidance on how to plan for and conduct public participation in agency programs. Although not a rulemaking effort, the EPA dialogue has clear implications for regulatory development.

Active participants in the dialogue were asked to contribute by posting messages on daily topics outlined by EPA. Participants could either post a new message or respond to an existing message, generating a "thread"—an online conversation of linked messages. In addition to extensive advertising for participants, project organizers recruited 36 EPA "hosts" from agency headquarters and regional offices and 36 expert "panelists" who represented a range of interest groups, levels of government, academic institutions, and so forth. Each day, different hosts and panelists were asked to help guide the discussion, and many stayed very active throughout the dialogue.

By the end of the dialogue, 1,166 people from all over the country had registered to participate. This level of participation was in stark contrast to a related public comment process that attracted relatively few commenters. Dialogue participants were representative of the broader public in the sense of bringing to the process a diverse set of interest affiliations, attitudes about EPA, and geographical locations. However, compared to the U.S. population as a whole, they were much more likely to use the Internet and were considerably older, better educated, and somewhat more likely to be female and white.

A total of 1,261 messages were posted by 320 people over the course of the dialogue. The dynamics of this exchange of messages demonstrated a high level of reciprocity. After the first day, when most people were simply introducing themselves rather than replying to earlier messages, the volume of messages that were replies to previous messages leveled off at 50% to 75% of all messages each day. Eighty-three percent of all messages in the dialogue were part of threads (i.e., a series of messages and replies).

Despite this high degree of reciprocity, the dialogue only possessed some of the elements of deliberation described by Holt et al. (1997). There was ample evidence that participants made a personal investment in the process and were ready to identify with others with shared beliefs. As revealed in a follow-up survey, participants' second most frequent motivation for posting a message (after interest in the topic) was "a sense of responsibility to actively participate." Participants also appeared to identify with others of like mind. For example, 33% of survey respondents said "others had already made my point" was frequently or very frequently their reason for not posting a message.

There is less evidence that participants were weighing the pros and cons of different decisions and moving toward a perspective of the public good. For participants to analyze available alternatives, they need to know what they are deciding, but there was little in the dialogue to identify particular decision points. More subtlely, these steps require that participants look at issues from all perspectives, and there was some reluctance in the dialogue to look at issues from the perspective of the more angry and frustrated participants. Often these messages stood alone with no replies, lost in the jumble of conversation.

The principal reason that the dialogue didn't move into the final stages of deliberation—a group decision mode—is that participants were not encouraged to do so. All of EPA's language to participants about the dialogue was expressed in terms of "sharing," "seeking," or "learning about" participants' thoughts, ideas and concerns, not about making decisions regarding various aspects of the policy under discussion. The agenda was not set up to identify particular decision points or frame questions that needed resolution.

Although neither EPA's online dialogue nor DOT's online dockets fully supported the civic republican vision of deliberative democracy, they are steps toward that ideal. Evidence suggests that access to electronic dockets can encourage broader participation in some cases. The extent to which it can do so appears to depend on the content of the rule and the willingness and ability of intermediaries to bring it to communities of interest through outreach. Where online dockets fall short, however, is in making communication more deliberative. Online dialogues, in contrast, hold much more potential for turning a static commenting process into an interactive and dynamic discussion. Further refinement of the dialogue model may bring these processes closer to full-fledged examples of deliberative democracy.

4. Barriers to Electronic Rulemaking

Barriers to the refinement of electronic dockets and dialogues, and their integration into administrative governance, are not primarily technological. Both processes rely on relatively simple information technologies. The real challenges are bureaucratic and legal.

In an analysis of what she refers to as the "virtual state," Fountain argues that adoption of innovative information technology occurs as an overlay on normal bureaucratic operations and "leave[s] the deep structure of political relationships intact" (Fountain 2001, xi). She describes innovations as a "patch" that often "enhance[s] efficiency and capacity but that otherwise maintain[s] the status quo" (Fountain 2001, 19).

Fountain's analysis explains the relatively speedy adoption of electronic dockets compared with electronic dialogues. Electronic dockets largely replicate existing processes without disrupting the status quo of who has what kind of input into decisionmaking. Moreover, they can save agencies money.   DOT's DMS system reportedly saves the department more than a million dollars a year in administrative costs (GAO 2000). The savings are not surprising when one considers that at any given time under the old system, DOT had as many as eight million pages of active docket material located in offices all over Washington. Reportedly, "one DOT organization found it necessary to fly a staff member from Boston to Washington, D.C., several days each week just to locate and review docketed material housed throughout the nine separate docket offices" (Meers undated).   USDA reports that its electronic rulemaking on organic labeling rules saved it more than $100,000 in administrative costs (GAO 2000). At DOT and EPA, the electronic consolidation of records corresponded to a cost-saving physical consolidation of records as well.

The move to electronic dockets, however, still poses some bureaucratic challenges. One of the greatest is coordination and integration across programs in seeking to put a consistent public face on agency operations and seamless access to agency resources (CPRN 2000). The electronic docket systems at DOT and EPA, for example, required an unusually high degree of coordination among disparate staff and systems in separate offices. What some have regarded as the slow progress of the Online Rulemaking Initiative can also be attributed to the challenge of integration.

Greater participation spawned by electronic dockets is not necessarily in the interest of rule writers, docket management staff, or even agency upper management. More participation means more work and possibly delays in rulemaking processes that are already criticized as overly drawn out. There are, as yet, no proven ways to use information technology to do the

qualitative data analysis required to substantially replace human efforts in processing public input, although there are some electronic techniques that could be employed to assist staff (Shulman 2000).   An analysis of state environmental agency staff found skepticism that the democratic payoff from electronic participation is worth the effort (Beierle and Cahill 2000).

Electronic dialogues share some of the bureaucratic disincentives of electronic dockets, and add some of their own. While the added costs of electronic dockets are counter-balanced by savings from better operating efficiency, electronic dialogues generally just increase costs. The EPA dialogue described above cost around $100,000, including an evaluation report. In the EPA case, the expense was entirely additional to the cost of a traditional comment process, which occurred in parallel. Particularly until digital divide issues are diminished, agencies will have a difficult time using online dialogues as substitutes for off-line processes.

Dialogues also present bureaucratic challenges in real time. The participating public doesn't necessarily make fine distinctions about the roles of various offices within an agency, the boundaries of particular policies, or other bureaucratic distinctions. Questions, complaints, and demands may well arise that are outside the jurisdiction of a sponsoring office. Indeed, staff monitoring the EPA dialogue spent a great deal of time forwarding queries and messages to other offices within the agency to which they pertained. Public participants may also demand real-time resolution to policy problems that agency staff can't deliver. Some of the most awkward moments and stilted communication in the EPA dialogue came when agency staff felt that they were being asked to "make policy" on the fly.

Like bureaucratic issues, legal issues involving electronic dockets are somewhat more straightforward than those involving electronic dialogues. In an early analysis of the relationship between electronic rulemaking and administrative law, Perritt (1995) concluded that electronic dockets were consistent with the Administrative Procedure Act.   Likewise, introducing rebuttal comment periods would not require new legislation, and some agencies currently use them routinely (Brandon and Carlitz 2003).   Some parallel reforms to increase the civic republican nature of rulemaking more generally would require new legislation, such as a suggestion by Seidenfeld (1992) to amend the APA to require public involvement in earlier stages of policy formulation.

Electronic dialogues generate more substantial legal issues. Without much precedent, it is most useful to examine the legal issues that arose during EPA's electronic dialogue when EPA's Office of General Counsel (OGC) became uncomfortable with the legality of some proposed features (Beierle 2002). The OGC's interpretation of the Paperwork Reduction Act

and the Privacy Act, for example, prevented organizers from collecting demographic data and interest group affiliations on each participant via the dialogue's registration form. In order not to violate the Privacy Act, OGC advised project staff against allowing an index of messages sorted by author and rejected the idea of voluntarily submitted biographies of participants. Concerns about violations of free speech led OGC to restrict the role of a moderator to merely setting the tone each day with an introductory message, offering support for participants encountering technical difficulties, and monitoring messages for obscene language. Free speech concerns also prevented organizers from establishing rules about the length of messages, the number of messages a person could post each day, and so forth. Analysts have challenged some of OGC's decisions, and there is disagreement even among different federal agencies on the degree to which the constraints were justified (Brandon and Carlitz 2003).

None of the legal issues raised in relation to the EPA dialogue affected its basic structure. However, they did limit the ability to fine tune the process to foster more informed dialogue and easier participation. Some of the legal restrictions would prevent organizers from establishing rules to counter abuse of the forum, from inappropriate language to "hijacking" by a single interest, although none occurred in that particular dialogue. Managing the process to more closely resemble a deliberative democratic ideal could run afoul of constricted legal interpretations.

Legal issues aside, future efforts to push electronic dialogues toward more sophisticated deliberation should pursue improvements in five areas. First is dialogue format, which could be explicitly modeled on the six steps of deliberation and supported by an active moderator encouraging participants through those steps and applying the best practices of the off-line world. If the capture of a dialogue by small groups is a concern, the format could also limit daily submissions or otherwise encourage broader discussion. Second is software design, which could improve people's ability to follow the evolving conversation through graphical representation and summarization. Software could also be used to support the identification of common views through collaborative filtering or built-in mechanisms for registering agreement among participants. A third area of improvement is in fostering behavioral norms, such as asking participants to probe contentious voices for underlying issues or encouraging nonexperts to actively participate. Fourth are institutional issues, such as government agency outreach to those not normally represented in policymaking. Finally are access issues that encourage broader online access across socio-economic groups.

Conclusions and Recommendations

The principal promise of electronic rulemaking, from the point of view of public involvement, is making the policy development process in this important aspect of governance more inclusive of a wide range of citizens and more deliberative. On-line dockets are a step in the right direction, and online dialogues are a step beyond that. Neither has proven that it can actually make these processes fully deliberative, and both would benefit from much further refinement, but we are still in the early stages of experimentation.

If electronic rulemaking is going to enhance the relationship between citizens and government, important steps are needed. First, improved systems for alerting the public to the opportunity to participate would boost the breadth of input. There are far more examples of electronic participation hampered by not enough participation rather than too much. One possible model for notification is the eNotice program launched by the Pennsylvania Department of Environmental Protection, which alerts registered users about permitting activity in their geographical area and allows them to track the permit application process.[5] DOT has introduced a similar process for alerting people about regulations in particular topical areas.

Second, electronic participation needs to be more integrated into agency operations. Electronic dockets are getting there quickly, while dialogues are not. One option for integrating electronic dialogues is to follow the regulatory negotiation model. This would involve new supporting legislation, explicit guidelines for when and how to conduct such processes, and internal and external consulting resources to provide rulemaking offices with access to guidance, support, and facilitators. Along with regulatory negotiations and other processes, electronic dialogues would then be part of the toolbox available for use selectively on particular rules. A presidential executive order could encourage all federal agencies to conduct pilot on-line dialogues on appropriate rules. A stakeholder task force could be convened to develop the specifics of this model. A parallel effort by agencies and perhaps the Office of Management and Budget would be needed to clarify the application of the Paperwork Reduction Act, the Privacy Act, and other relevant legislation to online dialogues.

Third, a better understanding of how electronic dockets and dialogues work in practice is needed. A broad research program would focus on evaluating agency dialogues, researching administrative law issues related to on-line dialogues, developing information technology tools

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[5] eNotice can be found at: http://www.dep.state.pa.us/enotice/ .

for electronic democracy, and providing training to agency staff. Parallel efforts on effective ways to increase computer access in poor and minority communities in order to assure equal access to electronic democracy tools would be appropriate as well.

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