

American University Washington College of Law

## Digital Commons @ American University Washington College of Law

---

Articles in Law Reviews & Other Academic Journals

Scholarship & Research

---

2008

### The Transformation of the U.S. Rulemaking Process - For Better or Worse

Jeffrey Lubbers

*American University Washington College of Law*, [jlubbers@wcl.american.edu](mailto:jlubbers@wcl.american.edu)

Follow this and additional works at: [https://digitalcommons.wcl.american.edu/facsch\\_lawrev](https://digitalcommons.wcl.american.edu/facsch_lawrev)



Part of the [Administrative Law Commons](#), and the [Agency Commons](#)

---

#### Recommended Citation

Lubbers, Jeffrey, "The Transformation of the U.S. Rulemaking Process - For Better or Worse" (2008).  
*Articles in Law Reviews & Other Academic Journals*. 1642.  
[https://digitalcommons.wcl.american.edu/facsch\\_lawrev/1642](https://digitalcommons.wcl.american.edu/facsch_lawrev/1642)

This Article is brought to you for free and open access by the Scholarship & Research at Digital Commons @ American University Washington College of Law. It has been accepted for inclusion in Articles in Law Reviews & Other Academic Journals by an authorized administrator of Digital Commons @ American University Washington College of Law. For more information, please contact [kclay@wcl.american.edu](mailto:kclay@wcl.american.edu).

## The Transformation of the U.S. Rulemaking Process— For Better or Worse

JEFFREY S. LUBBERS\*

Thank you, Dean Crago. Coming from Washington, D.C. and the Washington College of Law, I want to wish you all a happy George Washington's Birthday.

I was very fortunate in my career at the Administrative Conference in the 70's, 80's, and 90's to work with many lawyers and academics who were beginning their careers and have now gone on to do great things. Ohio Northern University Professor Howard Fenton is one of them. Little did I know when I recruited Howard in the late 80's to take on a project on International Trade for us,<sup>1</sup> that I would be seeing him in Tbilisi, Georgia in 2002 and now in Ada, Ohio in 2007.

When Howard was spending his year in Tbilisi as Chief of Party for the USAID project there, he asked me to come and spend a few weeks interviewing officials in the Georgian tax appeals system. That is a story in itself, but shortly after I arrived, there were national elections and Howard was going to be an election observer. The day before election day, some bombs went off in Tbilisi and then, the morning of the election, a truck carrying blank ballots to Rustavi—a city near Tbilisi—was hijacked and all the ballots were stolen. This would have made me a bit nervous to be an election observer, but Howard was not fazed in the slightest. Anyway, I had a great experience there and was very impressed with the success Howard had in his work there, which certainly contributed to the "Rose Revolution" that occurred the next year. So I'm excited to be here. I'm especially interested to learn more about your L.L.M. in Democratic Governance and the Rule of Law.<sup>2</sup> It sounds like a great program.

I thought that I should speak about something I know a little about—the administrative rulemaking process—and I figured that with my newly published *Guide to Federal Agency Rulemaking*,<sup>3</sup> this was as close to an official "Book Tour" as I could come. Now don't get me wrong—I am here

---

\* Fellow in Law and Government, Washington College of Law, American University; Research Director of the Administrative Conference from 1982-1995, J.D., University of Chicago. This article is adapted and updated from an address at ONU as part of the Dean's Lecture Series on February 22, 2007.

1. See Howard N. Fenton, III, *Reforming the Procedures of the Export Administration Act: A Call for Openness and Administrative Due Process*, 27 TEX. INT'L L.J. 1 (1992). This report led to ACUS Recommendation 91-2: "Fair Administrative Procedure and Judicial Review in Commerce Department Export Control Proceedings," 56 Fed. Reg. 33,841, 33,844 (July 24, 1991).

2. The program's website is available at <http://www.llm.onu.edu>.

3. See JEFFREY S. LUBBERS, A GUIDE TO FEDERAL AGENCY RULEMAKING (4th ed.) (American Bar Ass'n 2006).

to praise Administrative Law, not to bury it. I really believe that Administrative Law is endlessly fascinating, partly because it comes up in such a variety of regulatory settings that it never gets tiresome. Especially in Washington, it is of crucial importance to practicing lawyers. In fact I wish I had a dollar for every time a lawyer has told me that he or she regretted not taking administrative law in law school or not paying more attention in the class. Rulemaking may not be the most scintillating topic, even for this audience. But it involves some important issues of good government and numerous useful legal issues for lawyers to invoke in their practices as well. So I hope today's lecture is merely an appetizer for you.

The first thing I want to point out is that administrative rulemaking is not a new phenomenon. As Jerry Mashaw has explained in his fascinating Yale Law Review study of administrative law in the first few years of our country,<sup>4</sup> the very first Congress delegated rulemaking authority to the Executive Branch. By an Act of September 29, 1789, Congress assumed responsibility for the payment of the pensions to disabled Revolutionary War "veterans that had originally been paid by the states."<sup>5</sup> The statute—one sentence long—provides simply that pensions should be paid "to the invalids who were wounded and disabled during the late war . . . under such regulations as the President of the United States may direct."<sup>6</sup>

Nevertheless, I found that over 100 years later, one of the earliest Administrative Law Treatises, by Frank Goodnow, written in 1905, cautioned that, "The extent to which the administrative law of the national government is to be found in executive regulations is not ordinarily appreciated."<sup>7</sup> Things had changed by 1970, when the writer of the most famous and influential treatise in Administrative Law, Kenneth Culp Davis (my administrative law professor) wrote these words: "The procedure of administrative rule making is one of the greatest inventions of modern government."<sup>8</sup> But contrast this with a comment made about rulemaking last year by another keen observer of the rulemaking process—Stephen Johnson of Mercer Law School: "Over the past few decades, Congress, the courts, and the executive branch have layered so many significant procedural requirements on notice and comment

---

4. See Jerry L. Mashaw, 34377;34377Mashaw, *Recovering American Administrative Law: Federalist Foundations, 1787-1801*, 115 Yale L.J. 1256 (2006). He has since written a sequel, Jerry L. Mashaw, *Reluctant Nationalists: Federal Administration and Administrative Law in the Republican Era, 1801-1829*, 88;88, 116 YALE L.J. 1636 (2007).

5. See Jerry L. Mashaw, *Recovering American Administrative Law: Federalist Foundations, 1787-1801*, 115 Yale L.J. 1256, 1295-96 (2006).

6. An Act Providing for the Payment of the Invalid Pensioners of the United States, ch. 24, § 1, 1 Stat. 95, 95 (1789).

7. FRANK GOODNOW, *THE PRINCIPLES OF ADMINISTRATIVE LAW IN THE UNITED STATES* 87 (1905).

8. KENNETH CULP DAVIS, *ADMINISTRATIVE LAW TREATISE* § 6.15 (Supp. 1970).

rulemaking that most academics and policymakers agree that the process has become ossified and inefficient.”<sup>9</sup>

This last observation takes on more ironic importance as the U.S. attempts to spread the gospel of notice-and-comment rulemaking with some success around the world. In recent years I have been asked by the USAID, World Bank, and the State Department to participate in law reform activities around the world, promoting rulemaking in such diverse places as China,<sup>10</sup> Georgia,<sup>11</sup> Japan,<sup>12</sup> Latvia,<sup>13</sup> Mexico, and Morocco,<sup>14</sup> all with some measure of success. But at the same time we are promoting public participation through rulemaking in far-off places, our own home-grown process is being criticized as “ossified,”<sup>15</sup> and U.S. agencies are seeking ways to circumvent the increasingly formal “informal” rulemaking process.<sup>16</sup> Is there any proof

---

9. Stephen M. Johnson, *Junking the “Junk Science” Law: Reforming the Information Quality Act*, 58 ADMIN. L. REV. 37, 61 (2006).

10. See Jeffrey S. Lubbers, Notice-and-Comment Rulemaking Comes to China, 32 ADMIN. & REG. L. NEWS 5-6 (Fall 2006).

11. See Jeffrey Lubbers, *Georgian Tax Appeals System Assessment/Desk Audit*, Georgia Rule of Law Project, prepared for IRIS Center, University of Maryland, under a task managed by Abt Associates, pursuant to USAID Contract 114-C-00-01-00136-00, Task Order No. 106/000.4-02-218 (Abt Associates, July 15, 2002) (on file with author).

12. See Jeffrey S. Lubbers, Rulemaking in the United States and Japan, (Center for Legal Dynamics of Advanced Market Societies, CDAMS Discussion Paper 04/27E Nov. 2004), available at <http://www.cdams.kobe-u.ac.jp/archive/dp04-27.pdf>.

13. See Malcolm Russell-Einhorn, Jeffrey Lubbers, & Vedat Milor, *Strengthening Access to Information and Public Participation in Transition Countries—Latvia as a Case Study in Administrative Law Reform*, 54 ADMIN. L. REV. 459 (2002).

14. See U.S. Morocco Free Trade Agreement, art. 18.1, June 15, 2004 (specifying that each country (1) “shall ensure that its laws, regulations, procedures, and administrative rulings of general application respecting any matter covered by this Agreement are promptly published or otherwise made available in such a manner as to enable interested persons and the other Party to become acquainted with them” and (2) “[t]o the extent possible, and within its constitutional framework, each Party shall: (a) publish in advance any such measures that it proposes to adopt, and (b) provide interested persons and the other Party a reasonable opportunity to comment on such proposed measures.” Included in “Achieving Regulatory Transparency—Approaches and Experience,” at 2, program of a national workshop, July 7, Rabat, Morocco (on file with author).

15. See, e.g., Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59 (1995); Thomas O. McGarity, *Some Thoughts on “Deossifying” the Rulemaking Process*, 41 DUKE L.J. 1385 (1992).

16. Professor Herz has noted the increasing tendency of courts and commentators to blur the distinction between formal and informal rulemaking. He described the more frequent use of the oxymoronic phrase “formal notice-and-comment” and ascribed it to the facts that (1) traditional formal rulemaking has “virtually disappeared,” (2) agencies increasingly rely on policy statements, where the procedure is even less formal, and (3) the Supreme Court’s jurisprudence on the *Chevron* case (discussed in Part IV) has introduced different notions of “formality.” MICHAEL HERZ, DEVELOPMENTS IN ADMINISTRATIVE LAW AND REGULATORY PRACTICE 2002-2003, *Rulemaking Chapter*, at 144 (Jeffrey S. Lubbers ed., 2004).

for this last statement that agencies are shying away from the notice-and-comment rulemaking process? There is certainly a lot of anecdotal evidence if you talk to agency lawyers. Moreover, the number of court cases challenging agency regulatory letters, opinions letters, guidance, and other supposedly non-regulatory policy statements has markedly increased.<sup>17</sup>

At first blush though, agencies seem to be doing as much rulemaking as ever, at least if you count the number of pages in the *Federal Register*. By this measure, federal agencies have been busy in the Bush Administration. According to statistics compiled by the Competitive Enterprise Institute (“CEI”), from 2003-2005 the *Federal Register* ran between about 75,800 and 78,800 pages, and in 2002 reached 80,332 pages.<sup>18</sup> There have only been two years in the history of the *Federal Register* in which it was larger—both in the final years of outgoing Democratic administrations when imminent departure concentrates the mind:<sup>19</sup> 2000 (83,294) and 1980 (87,012, the all-time

---

17. See, e.g., *Indep. Equip. Dealers Ass’n v. EPA*, 372 F.3d 420 (D.C. Cir. 2004) (rejecting a challenge to a series of EPA letters concerning importation requirements for selling or importing off-road engines; they were held to be non-final because they had no “concrete impact” on the association or its members); *Air Brake Sys., Inc. v. Mineta*, 357 F.3d 632 (6th Cir. 2004) (finding the NHTSA Chief Counsel’s opinion letters do not “directly bind” petitioner; they “are simply advisory opinions about a set of facts presented to the Chief Counsel. In the final analysis, these letters do not constitute ‘final’ agency action subject to review under the APA.”); *Reliable Automatic Sprinkler Co., Inc. v. Consumer Prod. Safety Comm’n*, 324 F.3d 726, 730 (D.C. Cir. 2003) (holding a letter from agency compliance officials informing the company that agency intended to make the preliminary determination that the product presented a substantial product hazard, as defined by the Consumer Product Safety Act, and requesting company to take “voluntary corrective action,” was not final agency action); *Colo. Farm Bureau Fed’n v. U.S. Forest Serv.*, 220 F.3d 1171, 1174 (10th Cir. 2000) (holding that neither an agreement between the U.S. Department of the Interior and the state of Colorado concerning programs to manage Colorado’s declining native species nor a letter written from the regional forester pledging the Forest Service’s readiness to aid Colorado in implementing a lynx recovery plan is final agency action); *Ass’n of Int’l Auto. Mfrs., Inc. v. Comm’r, Mass. Dep’t of Envtl. Prot.*, 208 F.3d 1, 4-5 (1st Cir. 2000) (holding an EPA opinion letter regarding questions that the court had referred to the agency under the doctrine of primary jurisdiction was not final agency action, because the agency refused to state that the letter reflected its definitive position on the issues, and because the letter’s only effect would be via its influence on the court’s decision in this case). But see *Ciba-Geigy Corp. v. U.S. EPA*, 801 F.2d 430, 436 (D.C. Cir. 1986) (holding a letter in which the Director of Pesticide Programs “unequivocally” stated the agency’s relevant position was sufficiently final for purposes of judicial review). See also Kevin M. McDonald, *Are Agency Advisory Opinions Worth Anything More Than the Government Paper They’re Printed On?*, 37 TEX. TECH L. REV. 99 (2004) (comparing the courts’ analyses in *Ciba Geigy* and *Air Brake Systems*; preferring the former); Randolph J. May, *Ruling Without Real Rules—Or How to Influence Private Conduct Without Really Binding*, 53 ADMIN. L. REV. 13 (2001) (discussing the effect of posting and subsequent withdrawal of controversial OSHA compliance letter from agency website).

18. CLYDE W. CREWS, JR., COMPETITIVE ENTERPRISE INSTITUTE, TEN THOUSAND COMMANDMENTS 27-28 (2006), available at <http://www.cei.org/pdf/5407.pdf>.

19. See, e.g., JAY COCHRAN III, THE CINDERELLA CONSTRAINT: WHY REGULATIONS INCREASE SIGNIFICANTLY DURING POST-ELECTION QUARTERS (2001), available at <http://www.mercatus.org/pdf/materials/459.pdf>.

record).<sup>20</sup> Indeed, during President George Bush's first term, there were more *Federal Register* pages than in any other presidential term, and the total pages from 2004-2006 exceeded the total for any other three-year period in the nation's history.<sup>21</sup> Of course the number of pages is a very rough proxy. It does not really measure the number of rulemakings—rather it seems to reflect the increasingly long preambles to both proposed and final rules.

The decline in notice-and-comment rulemakings is better shown by reviewing the number of actual proposed and final rules. Using the CEI's statistics, the high water mark in both proposed and final rules was in 1979 with the Carter Administration—7,611 final rules and 5,824 proposed rules.<sup>22</sup> Even in 1983, in the middle of the anti-regulation Reagan Administration, there were 6,049 final rules and 3,907 proposed rules. But in 2005 (the most recent year of CEI's data) the country reached the lowest point—just 3,943 final rules and 2,257 proposed rules.<sup>23</sup> This means that the government was publishing 48% fewer final rules and 61% fewer proposed rules as compared to 1979, and even 34% fewer final rules and 42% fewer proposed rules than the Reagan Administration in 1983.

This precipitous drop in final rules published in the *Federal Register*—and the even more dramatic drop in proposed rules published for comment—are clear indications of the ossification of rulemaking or at least increased agency reluctance to use the APA's rulemaking process. What accounts for this? Like Stephen Johnson, I think the causes can be laid at the feet of all three branches—Congress, the President, and the courts. Congress has enacted several important statutes that have made rulemaking more complicated both procedurally and analytically. First, it enacted several “hybrid rulemaking” provisions with additional oral hearing procedures in statutes governing major health and safety agencies such as the Consumer Product Safety Commission,<sup>24</sup> Environmental Protection Agency (“EPA”),<sup>25</sup> Federal Trade Commission,<sup>26</sup> and Occupational Safety and Health

---

20. CREWS, *supra* note 18, at 26-27.

21. I owe this insight to Professor Michael Herz, who pointed this out at a meeting of the ABA's Section of Administrative Law and Regulatory Practice that I attended.

22. CREWS, *supra* note 18, at 28.

23. *Id.*

24. See Consumer Product Safety Act, 15 U.S.C. §§ 2056, 2058 (1972).

25. See, e.g., Safe Drinking Water Act of 1974, 42 U.S.C. § 300g-l(d); Toxic Substances Control Act, 15 U.S.C. § 2605 (1976), Federal Water Pollution Control Act, 33 U.S.C. § 7606(d) (1977); and Endangered Species Act Amendments of 1978, 16 U.S.C. § 1533.

26. See Magnuson-Moss Warranty-Federal Trade Commission Improvement Act, 15 U.S.C. § 57a (1975).

Administration (“OSHA”),<sup>27</sup> mostly in the 1970’s. After a lot of criticism,<sup>28</sup> Congress stopped doing this, but these laws are still on the books.

Second, it enacted a series of new analytical requirements modeled on the environmental impact statements (“EISs”) originating in the 1970 National Environmental Policy Act.<sup>29</sup> This law, of course, was hailed by environmentalists and other pro-regulatory forces, and was used extensively to slow down development that might harm the environment, but the EIS spawned a series of other impact analysis requirements that were primarily promoted by business groups and others who were skeptical of regulation.

One was contained in the Paperwork Reduction Act of 1980<sup>30</sup>—an Act that not only created the Office of Information and Regulatory Affairs (“OIRA”) in the White House’s Office of Management and Budget (“OMB”), but gave it the authority to review not only forms and questionnaires, but also the paperwork impact of rules that contain reporting requirements—even those rules issued by independent regulatory agencies. In the same year, the Regulatory Flexibility Act<sup>31</sup> was enacted, requiring agencies to do an analysis of proposed and final rules’ impacts on small businesses and small towns, and to analyze alternative approaches to the rule as well. This law was markedly strengthened in 1996 by the Small Business Regulatory Enforcement Fairness Act (“SBREFA”)<sup>32</sup> which subjected these requirements to judicial review, and also added a new layer of review panels for OSHA and EPA rules affecting small businesses.<sup>33</sup>

A year earlier, in 1995, Congress enacted the Unfunded Mandates Reform Act,<sup>34</sup> which requires agencies to do special assessments where proposed and final rules have an impact on state and local governments (and due to a last minute, non-germane, amendment) where the rule has a major impact on the private sector. For now at least, however, this law lacks a strong judicial review provision.

Another part of SBREFA, the so-called Congressional Review of Rules Act,<sup>35</sup> also required agencies to send all their rules over to Congress and, if

---

27. See Occupational Safety and Health Act of 1970, 29 U.S.C. § 655.

28. See e.g., Administrative Conference of the U.S., Recommendation 72-5, “Procedures for the Adoption of Rules of General Applicability” (urging “that statutory requirements going beyond those of section 553 should not be imposed in absence of special reasons for doing so”), 38 Fed. Reg. 19,782 (July 23, 1973), available at <http://www.law.fsu.edu/library/admin/acus/305725.html>.

29. 42 U.S.C. §§ 4321-4347 (1970).

30. Pub. L. No. 96-511, 94 Stat. 2812 (1980) (current version codified at 44 U.S.C. §§ 3501-21).

31. Pub. L. No. 96-354, 94 Stat. 1164 (1980) (codified as amended at 5 U.S.C. §§ 601-612).

32. Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996) (codified in scattered sections of 5 U.S.C.).

33. 5 U.S.C. § 601(1) (1996).

34. Pub. L. No. 104-4, 109 Stat. 48 (1995) (codified at 2 U.S.C. Chs. 17A, 25).

35. 5 U.S.C. §§ 801-808 (1996).

major, to delay the effective date for 60 days to give Congress a chance to pass a joint resolution of disapproval using procedures that avoid filibusters. To keep this procedure constitutional,<sup>36</sup> the joint resolution requires a presidential signature—accordingly, the process has only been successfully used once—when an OSHA rule issued in the last days of the Clinton Administration was disapproved by the Republican Congress and the disapproval was signed by the newly inaugurated President Bush.<sup>37</sup> I note that this unusual alignment could occur again in 2008 if a Democratic President and Congress are elected and some last minute Bush Administration rules are subject to review.

And last, the little-known Information Quality Act (“IQA”) was enacted in 2000 as an undebated amendment of the Paperwork Reduction Act inserted into an omnibus appropriations bill.<sup>38</sup> The IQA requires every agency to issue guidelines, with OMB oversight, to ensure and maximize the quality, objectivity, utility, and integrity of information disseminated by the agency. Agencies must also establish administrative mechanisms allowing affected persons to seek and obtain correction of such information. The IQA does not, by its terms, specifically apply to rulemaking, but OMB has taken the position that it applies to information that an agency cites in its notice of proposed rulemaking because the agency is thereby endorsing the reliability of that information.<sup>39</sup>

In addition to this list of statutory accretions to Section 553 of the APA, there are a series of presidential additions. The most important one is Executive Order 12,866 which established the most recent in a series of rulemaking-review programs that, along with the Paperwork Reduction Act, have made OMB/OIRA the center of the rulemaking universe.<sup>40</sup> By now, OMB review and the attendant need to do cost-benefit analysis for major

---

36. *See* *Immigration and Naturalization Serv. v. Chadha*, 462 U.S. 919 (1983) (holding existing legislative veto provisions unconstitutional because they lacked bicameralism and presentation to the President).

37. The rule was a controversial set of ergonomics regulations issued after ten years of development by OSHA that addressed the concerns that surround repetitive lifting and motions in the workplace. *See* *Ergonomics Program*, 66 Fed. Reg. 20,403 (Apr. 23, 2001) (providing official notice of withdrawal of the regulation). For House and Senate votes on Pub L. 107-5, *see* *Cong. Rec. H684*, Mar. 7, 2001 (roll call no. 33); *Cong. Rec. S51888*, *Cong. Rec. H684*, Mar. 7, 2001 (roll call no. 33); and *Cong. Rec. S51888*, Mar. 6, 2001 (vote no. 15).

38. Consolidated Appropriations Act of 2001, Pub. L. No. 106-554, § 515, 114 Stat. 2763, 2763A154 (2000) (codified at 44 U.S.C.A. § 3516 Note).

39. *See* Office and Management and Budget, *Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies; Notice; Republication*, 67 Fed. Reg. 8452, 8460 (Feb. 22, 2002).

40. Exec. Order No. 12,866, *Regulatory Planning and Review*, 58 Fed. Reg. 51,735 (Sept. 30, 1993). For a history of executive orders by previous Presidents, *see* Lubbers, *supra* note 3, at 20-26.

("economically significant") rules with a \$100 million impact on the economy are such fixtures that any President would want to keep them.

It is hard to criticize the idea of presidential supervision of agency rulemaking. Even Judge Patricia Wald, a staunch liberal, extolled its virtues in her *Sierra Club v. Costle* decision in 1981.<sup>41</sup> However, even after the Clinton Administration added a good deal of needed selectivity and transparency to the process,<sup>42</sup> it does lead to delays, the cost-benefit analyses are expensive to produce, and as a recent study has shown, it also probably leads to an over emphasis on burden reduction at the expense of stronger protection of the human health and the environment. Two scholars recently interviewed 30 of the 34 surviving Presidential appointees to the EPA from the first Bush and both Clinton administrations and found that 71.5% said it was rarely or never true that the White House sought changes that would make a regulation more protective of human health and the environment, but 89.3% said it was often or always true that the White House sought changes that would make a regulation less burdensome for regulated entities.<sup>43</sup>

OMB review is not going away any time soon, but its impact on the rulemaking process should not be underestimated. A recent amendment by President Bush has added new potential impacts as well.<sup>44</sup> But this is not the end of Presidential mandates in the rulemaking process. There are eight other extant Executive Orders that require extra analyses or assessments:

- (1) Federalism: requires agencies to consult with state and local governments and consider impacts of rulemakings on them.<sup>45</sup>
- (2) Indian Tribal Governments: requires agencies to consult with Indian Tribes and consider impacts of rulemakings on them.<sup>46</sup>

---

41. 657 F.2d 298 (D.C. Cir. 1981).

42. See Interview with Sally Katzen, OIRA Administrator, *Clinton Regulation Will be "Rational"* REGULATION MAGAZINE No. 3 at 36 (June 29, 1993) (explaining the modifications to be made to the Reagan Executive Order).

43. See Lisa Schultz Bressman & Michael P. Vandenbergh, *Inside the Administrative State: A Critical Look at the Practice of Presidential Control*, 105 MICH. L. REV. 47, 73 n.141 (2006).

44. See Exec. Order No. 13,422, 72 Fed. Reg. 2763 (Jan. 23, 2007) (requires: OIRA to review "significant" guidance; requires agencies to now identify specific market failure before regulating; requires that the Regulatory Policy Officer appointed under the original Order be a presidential appointee; requires that this Officer must approve the agency's annual Regulatory Plan; and, that no rulemaking may commence without being on the Plan, that the Plan aggregate costs and benefits for all rules, and most curiously, that "formal" (on the record") rulemaking to be considered for "complex determinations.")

45. See Exec. Order No. 13,132, 64 Fed. Reg. 43,255 (Aug. 10, 1999).

46. See Exec. Order No. 13,175, 65 Fed. Reg. 67,249 (Nov. 9, 2000).

- (3) Civil Justice Reform: requires agencies to comply with requirements to improve rulemaking drafting to reduce needless litigation.<sup>47</sup>
- (4) Governmental Actions Interfering with Property Rights: agencies should avoid improper “takings” of private property.<sup>48</sup>
- (5) Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations.<sup>49</sup>
- (6) Protection of Children from Environmental Health & Safety Risks.<sup>50</sup>
- (7) Implementation of the North American Free Trade Agreement: requires agencies to provide a 75-day comment period for any proposed technical regulation.<sup>51</sup>
- (8) Regulations affecting Energy Supply, Distribution, or Use.<sup>52</sup>

Like the above-mentioned statutes, it is difficult to criticize any one of these Orders individually. They all represent considerations that could be important in certain rulemakings. But to force agencies to do special analyses for all these matters has a cumulative effect, not unlike barnacles on a ship. A few will have a negligible effect, but as they multiply, the ship begins to slow down.

And now OMB is beginning to issue numerous bulletins with even more requirements affecting the rulemaking process. Its Peer Review Bulletin, issued in 2004<sup>53</sup> requires all agencies to conduct a “peer review of scientific information disseminations that contain findings or conclusions that represent the official position of one or more agencies of the federal government.”<sup>54</sup> It, along with the Updated Principles for Risk Assessment,<sup>55</sup> originally issued as a more sweeping proposed bulletin,<sup>56</sup> place greater procedural and analytical requirements on agency rulemakings involving scientific issues.

---

47. See Exec. Order No. 12,988, 61 Fed. Reg. 4729 (Feb. 7, 1996).

48. See Exec. Order No. 12,630, 53 Fed. Reg. 8859 (Mar. 18, 1988).

49. See Exec. Order 12,898, 59 Fed. Reg. 7629 (Feb. 16, 1994).

50. See Exec. Order No. 13,045, 62 Fed. Reg. 19,885 (Apr. 23, 1997).

51. See Exec. Order No. 12,889, 58 Fed. Reg. 69,681 (Dec. 30, 1993).

52. See Exec. Order No. 13,211, 66 Fed. Reg. 28,355 (May 22, 2001).

53. See Office of Management and Budget, “Final Information Quality Bulletin for Peer Review,” Dec 16, 2004, 70 Fed. Reg. 2664 (Jan. 14, 2005), available at <http://www.whitehouse.gov/omb/memoranda/fy2005/m05-03.pdf>.

54. *Id.* at 8.

55. See Memorandum from Susan E. Dudley, Administrator, Office of Information and Regulatory Affairs, Office of Management and Budget and Sharon L. Hays, Associate Director and Deputy Director for Science, Office of Science and Technology Policy, “Updated Principles for Risk Analysis,” M-07-24, (Sept. 19, 2007), available at <http://www.whitehouse.gov/omb/memoranda/fy2007/m07-24.pdf>.

56. See Office of Management and Budget, “Proposed Risk Assessment Bulletin,” 71 Fed. Reg. 2600 (Jan. 17, 2006).

To quote an Ethiopian proverb: “When spiderwebs unite, they can tie up a lion.”<sup>57</sup> So, it is not so surprising, perhaps, that agencies are resorting to issuing “non-rule rules,” using various forms of “guidance” in order to avoid some of these spiderwebs. OMB has reacted to this tendency to circumvent by issuing a bulletin in 2007 on Good Guidance Practices.<sup>58</sup> Many of the prescriptions of this bulletin are sensible approaches to the problem of abuse of the policy statement exemption from notice-and-comment rulemaking, but on the same day, OMB amended Executive Order 12,866 to require that “significant guidance documents” be submitted for OMB review,<sup>59</sup> thus making it more difficult for agencies to offer any form of important guidance. I have not even mentioned the role of judicial review and the “hard look” doctrine in making agencies even more cautious and verbose in developing their rulemaking preambles.<sup>60</sup> How did we come to this pass, and is there any way out?

One way out may be through the most influential tool perhaps ever developed—the Internet—which is being used to institute electronic rulemaking or “e-rulemaking.”<sup>61</sup> The titles of two pieces by experts on e-rulemaking show the two main points of view on this development. One article is entitled “The Electronic Revolution in Rulemaking,”<sup>62</sup> and another

---

57. Quotation found on “A Quotation-A-Day from Education World,” available at [http://www.education-world.com/a\\_lesson/TM/WS\\_back\\_to\\_school\\_quotes.shtml](http://www.education-world.com/a_lesson/TM/WS_back_to_school_quotes.shtml).

58. See Office of Management and Budget, “Final Bulletin for Agency Good Guidance Practices,” Jan. 18, 2007, 72 Fed. Reg. 3432 (Jan. 25, 2007).

59. See Exec. Order No. 13,422, *supra* note 44, at § 7 (adding a new § 9 of Exec. Order No. 12,866 on review of significant guidance documents).

60. See Paul R. Verkuil, *Judicial Review of Informal Rulemaking: Waiting for Vermont Yankee II*, 55 TUL. L. REV. 418 (1981) (arguing that the Supreme Court forbid courts from imposing on agencies the “hard-look” version of the arbitrary and capricious test, because hard-look review has adverse effects similar to those of the judicial practice of procedural review the Court outlawed in *Vermont Yankee*). See also Richard J. Pierce, Jr., *Waiting for Vermont Yankee II*, 57 ADMIN. L. REV. 669 (2005) (renewing this suggestion).

61. For a succinct history, of the “rise of e-rulemaking,” see Cary Coglianese, *E-Rulemaking: Information Technology and the Regulatory Process*, 56 ADMIN. L. REV. 353, 363-366 (2004). See also Stuart W. Shulman, *E-Rulemaking: Issues in Current Research and Practice*, 28 INT’L J. OF PUB. ADMIN. 621 (2005); Beth Simone Noveck, *The Electronic Revolution in Rulemaking*, 53 EMORY L.J. 433 (2004); Barbara H. Brandon & Robert D. Carlitz, *Online Rulemaking and Other Tools for Strengthening Our Civil Infrastructure*, 54 ADMIN. L. REV. 1421 (2002); Stephen Zavestoski & Stuart W. Shulman, *The Internet and Environmental Decision Making: An Introduction*, 15 ORG. & ENV’T 323, 326 (2002). Links to some of these and many other related papers and studies are available on the website of the Harvard University’s John F. Kennedy School’s Regulatory Policy Program, available at <http://www.ksg.harvard.edu/cbg/rpp/erulemaking/papers&reports.htm>.

62. Noveck, *supra* note 61.

monograph is entitled “The Internet Still Might (but Probably Won’t) Change Everything: Stakeholder Views on the Future of Electronic Rulemaking.”<sup>63</sup>

I am cautiously optimistic that the e-rulemaking revolution will lead to not only a better informed public but also a more user-friendly process for all of us. Already e-rulemaking has democratized the process by making it possible for the average person in Dubuque to access all the important documents relating to a rulemaking with the click of a mouse. Until ten years ago one needed to hire a Washington law firm to go down to the agency docket room and read the hard copy documents. This may not be the most beneficial development for Washington lawyers, but from the standpoint of the general public it could be a great boon. As the federal government’s centralized rulemaking portal ([www.regulations.gov](http://www.regulations.gov)) improves it should become a lot more efficient for commenters to comment. I suspect that in ten years, paper comments to agencies in rulemaking will be as rare as a first class letter in our own mailboxes.

But these developments will also bring some risks alongside the obvious benefits. Will agencies be inundated with “notice-and-spam?”<sup>64</sup> Will the technology that is out there for sorting comments by type and subject lead to an arms race between well-financed computer-generated comment machines on the one hand, and computer-aided comment-sorters in the agencies, on the other?<sup>65</sup> Already congressional offices are employing techniques to ward off unwanted out-of-district e-mails. Might this spread to agencies as well?

Moreover, e-rulemaking will also bring with it a lot of legal and technical challenges, some of which I write about in my book:<sup>66</sup> On the technical side, I would mention the following challenges:

*Access issues:* Finding a way to provide public 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. In addition to this chronological view, the public should be provided a “vertical” view of pending or final rules—what might be called “drilling down” into the

---

63. See STUART W. SHULMAN, *THE INTERNET STILL MIGHT (BUT PROBABLY WON’T) CHANGE EVERYTHING: STAKEHOLDER VIEWS ON THE FUTURE OF ELECTRONIC RULEMAKING* 21 (2004), available at [http://erulemaking.ucsur.pitt.edu/doc/reports/e-rulemaking\\_final.pdf](http://erulemaking.ucsur.pitt.edu/doc/reports/e-rulemaking_final.pdf).

64. Noveck, *supra* note 61, at 441.

65. For a technical paper describing promising techniques for sorting comments, see Hui Yang, Jamie Callen & Stuart Shulman, *Next Steps in Near Duplicate Detection for eRulemaking*, Proceedings of the Fifth National Conference on Digital Government Research (2005), available at <http://erulemaking.ucsur.pitt.edu/doc/papers/dgo05-huiyang.pdf>.

66. See Lubbers, *supra* note 3, at 217-239.

meaningful agency and outside studies and analyses that are now found in the docket, and through links to get to those secondary studies and analyses referenced in the primary studies.

*Docketing issues:* Agencies are now faced with the need to develop a strategy for handling a combination of electronic and paper comments. At a minimum, agencies will need to provide a single list of all comments, whether filed electronically or in paper format.<sup>67</sup>

*Legal Issues:* First, there may be problems with archiving requirements. Do (redundant) paper copies need to be kept due to federal archiving requirements? How about cover emails?<sup>68</sup> Second, we also need to consider attachments. How should exhibits, forms, and photographs be dealt with? Attachments can pose a risk of viruses and of overloading systems. Electronic technology makes it all too easy for commenters to “dump” huge files or links within their electronic comments. Third, there are knotty copyright concerns. As public comments have been transformed from easily controlled physical files in Washington D.C. to Internet-accessible digitized documents, copyright issues have suddenly become much more important—both where the submitter is the copyright holder of the comments and where the submitter uses someone else’s copyrighted work without permission. The former situation seems to be relatively unproblematic because the government can take the position that “submittal of one’s own copyrighted material comes with an implied grant that it may use these materials in its internal deliberations.”<sup>69</sup> The submission of another person’s material raises more difficult issues. Various technological fixes have been suggested such as software controls that would code documents so that downloading and copying can be regulated (as is now being done with digital music and films). Professor Noveck suggests that a “simple innovation is to amend the comment interface to allow the user to designate an attachment as nonpublic [confidential business information] or critical infrastructure information by means of a drop-down menu. Once designated, that data could be encrypted and transmitted to the relevant official but not

---

67. In this connection the federal government is nearing the completion of the development of a single electronic rulemaking docket known as the Federal Docket Management System (FDMS). See OFFICE OF MANAGEMENT AND BUDGET, FY 2003 REPORT TO CONGRESS ON IMPLEMENTATION OF THE E-GOVERNMENT ACT 20 (2004) (reporting that OMB established a goal of completing migrations to the common federal wide electronic docket management system by September 2005). The migration is nearing completion at the end of 2007 with the inclusion of one of the largest remaining agencies, the Department of Transportation, see U.S. Dep’t of Transportation, DOT’s Migration to the Federal Docket Management Systems (sic) (FDMS), 72 Fed. Reg. 54,315 (Sept. 24, 2007).

68. See National Archives & Records Administration, Implementation of the E-Government Act of 2002 (Dec. 6, 2004), available at <http://www.archives.gov/about/plans-reports/e-gov>.

69. Brandon & Carlitz, *supra* note 61, at 1472.

made available to the public.”<sup>70</sup> Fourth, we need to look at security issues. In a post 9/11 world, security issues have raised heightened concerns both in terms of preventing unauthorized tampering and in making sure that sensitive information is not made available to potential terrorists. Fifth, we must concern ourselves with privacy issues. Should anonymous comments be permitted? Ought commenters be identified, or at least searchable by name? Sixth, censorship issues may also present a problem. Can agencies “sanitize” or use the phrase “expletive deleted” in order to clean up obscene comments? Finally, can the government begin mandating e-comments? What legal impediments prevent agencies from requiring e-comments to the exclusion of paper comments?

Moreover, if we are really trying to achieve enhanced participation, can we meet the goal of organizing real-time chat rooms or negotiated rule-makings? What rules should govern these real-time rulemaking discussions? A lot of the issues I just mentioned are magnified even more in informal, spontaneous discussions that occur in chat rooms where civility can be in short supply.

I’d like to conclude with some commentary on the impact of e-rulemaking on the rulemaking process itself. First of all, the flip side of increased public participation, of course, is increased responsibilities on agencies to digest and react to a higher volume of comments. Blizzards of comments have become increasingly common in controversial rulemakings, and e-rulemaking will only further this trend. This could lead to “information overload.” It might also lead to a general politicization of the rulemaking process. We may be inadvertently moving away from the technocratic model of rulemaking—where the substance of the comment is more important than who submitted it or how many times it was repeated—towards a referendum-like system.

Moreover, the possible increased politicization of rulemaking due to new technology has the potential for even greater White House control of the process. Professor Peter Strauss has suggested that not only is OMB playing a central role in “creating this new apparatus,” but “to have all information travel through [its] gateway only adds to the possibilities of [its] influence. . . . As agencies become more transparent, they become more transparent to the President as well as to the public. . . . Now the docket is immediately available on equal and easy terms to all who want it, including the President, and

---

70. Noveck, *supra* note 61, at 487.

politics will give him the incentive to attend to it.”<sup>71</sup> This is a potentially profound development that deserves more debate and consideration.

What is the lesson that we learn from all of this? As a bottom line, I suggest that as lawyers interested in good government we should have these two primary goals in mind: (1) reducing ossification in rulemaking and (2) optimizing the potential of e-rulemaking to increase public access to information, and enhance public participation and online “deliberative democracy.”<sup>72</sup>

Thank you.

---

71. RICHARD G. STOLL & KATHERINE LAZARSKI, DEVELOPMENTS IN ADMINISTRATIVE LAW AND REGULATORY PRACTICE 2003-2004, *Rulemaking Chapter*, at 160 (Jeffrey S. Lubbers ed., A.B.A. 2004) (attributing this portion of the chapter to Professor Peter Strauss).

72. See David Schlosberg, Stephen Zavestoski, & Stuart W. Shulman, *Democracy and E-Rulemaking: Web-Based Technologies, Participation, and the Potential for Deliberation*, 4 J. INFO. TECH. & POLITICS 37 (2007).