THE BROOKINGS INSTITUTION

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

Washington, D.C.
Tuesday, November 30, 2010

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P R O C E E D I N G S

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

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

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

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

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

And these are some of the identifications that you need in order to do tweeting as well as listening. Our mandate: This agency started in 1964 and the original proposition -- this was an agency by statute created during the Lyndon Johnson Administration. And we were to arrange for federal agencies assisted by outside experts

cooperatively to study mutual problems, exchange information, et cetera.

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

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

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

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

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

Our council. We're very privileged to have prominent public officials, government officials, as well as individuals in the private sector who have had

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

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

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

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

This is one of the few places, maybe the only place really, where you can bring together that much talent on the government side and fuse it with smart people on the public side who are -- have been in -- either in government or know a lot about government to come up with consensus recommendations. That's our goal.

One of the other things we have done now that we're revived; we have a counsel of independent agency chairs. There are 16 independent agencies. They don't

really have the opportunity to meet and they frequently, as OMB knows, like to stay away from the Executive Branch when they can, but they will be happy to meet with us. We're an intermediary as an independent agency in the Executive Branch. And so we've been talking to them and that's an important thing to take note of, a communications mechanism among the independents.

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

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

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

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

I just throw some of these ideas out from my perspective as someone who's worked in this field. You know, ossification is always the word and those of you in the rulemaking world know, we are worried about how do we -- we don't want to gum up

the works, right? We always want rules to get done. And if you're an agency person you're saying, okay, let's make sure we can get them done.

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

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

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

This is the record for review but now we could be inconceivably in a situation where the record is the entire e-record that's created in the course of rulemaking. And the clerks, at least of the judges on appeal, have had much more opportunity to participate. Which way does that cut? How does that redefine the record?

A few other issues, consequences of online collaborations. Again, the potential here is that we will see the opportunity to make good ideas within the -- evolve within the course of a rulemaking. That wasn't there before because the rulemaking -- everyone dumped their written comments at the end of the comment period. There was

no exchange to speak of and the agency was left with having to work this thing out.

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

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

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

So we want to be the agency that makes this thing happen. We're very positive about this but we can see some of the problems that come along. Contact us. This is -- these are all of our things that you need to have. And by the way, you saw the people stand up. If you have cards and you'd like to be in touch, please -- e-mail addresses are so valuable so don't be shy. Just give your card to any one of our people. Lovely to see you in some other connection.

So let me just go back to these values as a way of introducing our next speaker and -- who I think is one of the proponents of these values. Indeed, I can't think

of a person who's come into government services better qualified for the position he's holding than Cass Sunstein is.

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

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

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

MR. SUNSTEIN: Well, thank you, Paul, very much. Welcome back to ACUS. This is exciting to see you back and in operation and Paul has already established himself as a phenomenal leader. It's a thrill to be here for many reasons and I'd like to single out three people who have played a large role in both OIRA's life and my life.

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

work is also very much in place and providing help and guidance to us.

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

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

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

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

My eventual good fortune in being OIRA administrator was shaped very much by a lunch with Susan Dudley during the transition where she was incredibly gracious and generous about the office and in providing me some information about what the office did. But what was most important and really played a key role for me and continues to shape daily life was her infectious enthusiasm about the opportunity that the OIRA position affords. That's all preface.

In the domain of regulation, one of the key developments of the last decades has been the emergence of a new set of analytic requirements designed to ensure that before our agencies proceed with rulemaking, they look before the leap, obtaining a clear sense of the consequences, including -- and Jim, I'm looking at you, Jim

Tozzi -- including both costs and benefits. That has been a noteworthy development of the last 30 years or so.

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

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

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

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

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

improving regulations?

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

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

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

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

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

In requiring openness, the President has emphasized three separate

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

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

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

Emphasizing the importance of information that people can readily find and use, the President asked agencies to harness new technologies and solicit public feedback to identify information of greatest use to the public. This is in a way a second order commitment to transparency where we not only promote transparency but have transparency about the appropriate ways of promoting transparency.

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

The checklist is a way of emphasizing and clarifying the requirements

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

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

Of course it's true that the numbers don't tell the whole story. To turn from dollar equivalence with the indispensible assistance of public comment, we've issued rules and undertaken initiatives that are promoting electronic health records, thus promising health benefits and economic savings. Saving lives on the highways and in workplaces, helping students to obtain school loans and so on to attend college, promoting reduction in paperwork burdens -- and I'll have a fair bit to say about that before very long -- protecting consumers and investors against manipulation, fraud, and conflicts of interest, and creating a race to the top in education.

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

the way toward creative and sometimes original solutions.

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

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

Proposed rules are a way of subjecting both conclusions and analysis to performance review. There's a cliché in administrative law circles. You can even find that in a well-known case book, at least I hope it's well known, but I won't tell you the authors of the case book. Maybe I'm one of them.

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

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

come in from stakeholders.

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

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

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

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

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

important to learn about that evidence or those ideas.

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

It may not be the largest news of the last 20 months but if you look through rules, preambles, regulatory impact analysis, you will find time and again a prominent clear presentation early on of the expected cost and benefits of rules, qualitative and quantitative, a clear and often tabular discussion of alternatives in a way that has succeeded in triggering public comment about the best approach to problems that are calling for rules.

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

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

This point I'm suggesting is especially important in connection with

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

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

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

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

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

In the current era, it is much easier than ever before to have access to

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

On numerous occasions in the last 20 months, final rules have been hugely different from proposed rules with public comments and dispersed knowledge being a key reason. Recently, we requested public suggestions about regulatory changes, and this is a federal register notice, that would promote economic growth with particular reference to increasing employment, innovation, and competitiveness.

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

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

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

The beauty, as these things go, of this requirement, is that if every relevant document has a RIN number on it then the members of the public can find and view all information relevant to the action in question. As I've said, this is a modest step

but it is already helping to promote clarity and transparency. For my -- I go on Reginfo.gov and regulations.gov a lot and it's easier to find relevant material.

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

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

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

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

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

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

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

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

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

This best practice document will be available for public review and

comment in the coming days. It will be, as noted a living document. Everyone here is encouraged to provide input and help.

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

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

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

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

They cover an immense range of diverse topics and if you haven't spent time on data.gov, I would encourage you to go on in your spare time and see what's there. The diverse topics that are covered include retirement plans, automobile safety,

something of particular interest to my son Declan, infant car seats and ease of installation, product recalls, clean air, clean water, crime, and much more.

The datasets on data.gov, and this is a particularly exciting development, are being used by the private sector to create apps, which as noted you can put on your cell phone, to find out things about recalls, what products are being recalled, what are conditions at various airports like, and much more.

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

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

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

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

In numerous cases, engagement with the public has uncovered important facts and perspectives, facts and perspectives that notice in comment rulemaking made it possible for rule makers to have. In many cases, stakeholders have brought important information to bear helping to produce a better balance than that what was in the proposal.

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

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

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

One rule that received a great deal of attention at the time involving information technology for healthcare, which grows out of the recovery act, requires meaningful use of health IT to accompany the receipt of federal funds. The basic idea is if you're going to get federal funds for health IT, you have to be meaningful user of health

IT. You can't just have the money and do basically nothing with the technology.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Some rules are reducing error at water pollution, others are increasing

fuel economy, some are helping young people to obtain school loans, and thus to attend college, some are combating childhood obesity. All of these have been improved by transparency and by close engagement with the public.

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

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

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

MR. SUNSTEIN: I have some time.

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

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

Over the last few decades, I have, you know, read dozens of dockets, thousands of comments submitted to the FCC rulemakings. The FCC has given literally hundreds of billions of dollars of public airwaves to the private industry and you would

never know that reading those rulemakings.

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

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

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

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

We have worked really hard, and by we, I mean people at the Department of Transportation, people at the Department of Health and Human Services to make the rules as clear as possible, make the analysis as clear as possible, make the choices as clear as possible. If you look at our agency check list, and while a check list might not be the most exciting thing to look at, at any particular hour of the day, a goal of it is to help with questions like yours.

It says what the regulatory impact analysis should have in it, and it's

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

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

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

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

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

And I suppose a number of the comments that you get come from other government agencies, and those are not as transparent to the public as such information that comes in from the public. So are we describing a shift in the rulemaking process from the agencies to the White House because the real notice and comment process begins in the White House?

MR. SUNSTEIN: I wouldn't say that, I wouldn't put it quite that way. I

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

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

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

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

how it differs across agencies and over time. I've been very struck by the pervasiveness of changes that the notice and comment process is responsible for.

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

MR. SUNSTEIN: Thank you all.

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