

**‘To Submit a Form or Not to Submit a Form, That is the (Real) Question’:  
Deliberation and Mass Participation in U.S. Regulatory Rulemaking**

David Schlosberg, Northern Arizona University  
Stephen Zavestoski, University of San Francisco  
Stuart Shulman, University of Pittsburgh

**ABSTRACT**

*In this paper we report data collected through a survey of 1,553 recent participants in regulatory rulemaking public comment processes. Our analysis focuses on the differences between those who used newly available electronic tools and those who mailed or faxed letters on paper and also between those who submitted original letters and those who submitted a version of a mass-mailed form letter. We first discuss current research and theory developing around the issue of electronic rulemaking and online policy deliberation. Next we provide background on the particular rulemakings from which our sample of survey respondents was drawn. After describing the survey methodology, we focus on three types of findings: 1) the absence of a significant difference in deliberative practices between electronic and paper commenters, 2) the presence of unexpectedly high levels of deliberative engagement across all survey respondents, and 3) the significant differences between respondents who submitted original comments and those who submitted form letters. Finally, we conclude with discussion of the implications of our findings and suggestions for further research.*

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# **To Submit a Form or Not to Submit a Form, That is the (Real) Question: Deliberation and Mass Participation in U.S. Regulatory Rulemaking<sup>1</sup>**

David Schlosberg, Northern Arizona University  
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*This is a draft; please do not quote without permission of the authors. Comments, critiques, and suggestions welcome to david.schlosberg@nau.edu, smzavestoski@usfca.edu, and shulman@pitt.edu.*

## **Introduction**

The United States federal government is, more uniformly than ever, facilitating the electronic submission of citizen comments during federal regulatory rulemaking comment periods.<sup>2</sup> Concurrently, activists of many stripes (but particularly environmentalists) are taking advantage of newly developed web-based tools for generating large numbers of public comments. The confluence of these two trends—the pull of an increasingly accessible and searchable federal system for collecting public comments and the push of advocacy coalitions and their electronic tools—has created a hybrid eRulemaking environment. Interest group-initiated mass mailed postcards, familiar from past activism, have been modestly enhanced as customizable form letters, often by expensive for-profit intermediaries.<sup>3</sup> This Internet-enabled

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<sup>2</sup> The federal eRulemaking Initiative (<http://www.regulations.gov/eRuleMaking.cfm>) is one of 24 E-Government efforts at the federal level (<http://www.whitehouse.gov/omb/egov/>). On the progress of the President's Management Agenda to date, see the GAO report "Electronic Government: Initiatives Sponsored by the Office of Management and Budget Have Made Mixed Progress" GAO-04-561T available at: <http://www.gao.gov/new.items/d04561t.pdf>.

<sup>3</sup> See <http://www.getactive.com/> or <http://capitoladvantage.com/> for examples of firms that sell e-advocacy services to groups by highlighting millions of constituent messages delivered and dollars raised for their customer organizations. The pitch is backed by claims that tools such as "Email Relationship Manager," for example, will improve communication not only between citizens and their government, but also between group leaders and members. The data mining that goes on, however, tends to be for the purpose of building and strengthening the

participation will likely be the dominant form of mass political communication between average citizens and decision-makers in controversial rulemakings.

As a result of these and other trends, a growing research community is looking closely at electronic rulemaking (Shulman et al. 2003; Shulman 2004a; Coglianese 2004; Lubbers 2002) and the possibilities for online political deliberation in general (Shane 2004). A range of scholarly activities spanning elaborate conceptual specifications for deliberation (Berkman Center 2005) to research centers and interdisciplinary conferences<sup>4</sup> and online deliberative polls<sup>5</sup> now dot the intellectual landscape. This new scholarship begins to more systematically articulate and test theories about the role of deliberation (Beierle 2004; Schlosberg & Dryzek 2002; Sunstein 2001), information (Bimber 2003 & 2000), communications technology (Froomkin 2004; Coleman and Götze 2001), architecture (Lessig 1999), design (Noveck 2004), as well as a host of other factors linked to theories of democratic governance (Zavestoski & Shulman 2002).

The fledgling interdisciplinary research community is generally long on theory, hopes, and predictions while too often short on empirical data. For many indicators of online deliberative political activity we have no baseline data or agreed upon metrics. In this paper we offer an attempt at generating precisely such baseline data, in this instance collected through a survey of 1,553 participants in regulatory public comment processes. Our analysis focuses on the differences between those who used newly available electronic tools and those who mailed or faxed letters on paper. We also examine differences between those who submitted original letters and those who submitted a version of a mass-mailed form letter.

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organization itself through targeted electronic mail appeals to commenters. Some activists privately report that limits on staff time and resources mean that organizations rarely mine their own members' comments for good ideas.

<sup>4</sup> See: <http://www.online-deliberation.net/conf2005/>.

<sup>5</sup> See: <http://cdd.stanford.edu/polls/docs/2004/onlinedp-release.pdf>.

Our initial research question (Shulman, et al. 2003; Schlosberg, et al. 2005) asked whether new electronic forms of participation introduce a degree of public deliberation absent in the traditional mailing or faxing of letters that dominated pre-Internet era public comment periods. Contrary to much research and development in this field, we did not seek to develop new forms of online interaction that optimize deliberative behavior; rather, we set out to evaluate the deliberative nature of existing forms of electronic citizen participation.

Though our data failed to reveal evidence of deliberative differences between electronic and paper commenters, we did find some support that the comment process does induce some deliberative behavior generally. We also discovered that some fundamental attitudinal differences exist between citizens who submit original comments and those who submit form letters. The differences exist not just in terms of their self-described deliberative practices, but also in terms of their overall trust in government and feelings of efficacy as participants in the rulemaking process. Stated bluntly, form letter writers, whether using paper or the Internet, are simplistic, cynical, and less inclined to deliberative behavior, whereas the writers of original comments report personal letter-writing practices that embody many of the characteristics of deliberative democracy.

In what follows, we first discuss current research and theory developing around the issue of online policy deliberation. Next we provide background on the particular rulemakings from which our sample of survey respondents was drawn. After describing the survey methodology, we focus on three types of findings: 1) the absence of a significant difference in self-reported practices between electronic and paper commenters, 2) the presence of unexpectedly high levels of deliberative engagement across all survey respondents, and 3) the significant differences between respondents who submitted original comments and those who submitted form letters.

Finally, we conclude with discussion of the implications of our findings and suggestions for further research.

### **Online Deliberation and the Focus on Rulemaking**

Citizen access to rulemaking information is quite different from what it was when the Administrative Procedure Act (APA) was initially adopted in 1946. The framers of the APA could not have imagined the ways that new media and tools created using information and communications technologies (ICTs) have created a complex and teeming digital landscape. It is a democratic and deliberative environment unlike anything ever encountered by modern representative forms of government. Though many observers continue to note the potential to use these technologies to fulfill the transparency and public participation goals of the APA, these new tools also pose many challenges. The once reasonably straightforward processes of democratic participation found in the classic works of political science (for example Dahl 1961; Truman 1960) are now largely antiquated in the age of web logs (blogs), listservs, mass email campaigns, and a proliferating array of web services. Deliberation today, aside from still crucial questions of digital inequality,<sup>6</sup> is open to anyone who cares to participate. A pressing question in this context is: exactly how do they deliberate?

With the 2004 publication of *Democracy Online: The Prospects for Political Renewal Through the Internet*, we can glimpse the spirit animating the short history of online deliberation research. Editor Peter Shane signals the tempered hopes of a growing body of cautious “cyberrealist” reaction to earlier scholarship, reminding readers “we cannot really know the promise or limitations of ICTs until people can actually experience them” (Shane 2004: xx; see

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<sup>6</sup> A recent report from the American Political Science Association Task Force on Inequality and American Democracy stated “the Internet may ‘activate the active’ and widen disparities between participants and the politically disengaged by making it easier for the already politically engaged to gain political information.” See “American Democracy in an Age of Rising Inequality” at <http://snipurl.com/7egy>.

also Coglianesse 2003; Muhlberger 2004). One of the problems with this research is that there are so many avenues for such an experience—websites, usenets, bulletin boards, chats, blogs, podcasts—making it difficult to systematically track and measure the impact of online deliberation. As Froomkin notes, “the Internet can be seen as a giant electronic talkfest, a medium that is discourse-mad” (2003, 777). Our focus, however, is on just one particular element in that talkfest: public participation in regulatory rulemaking.

Why focus on rulemaking in an examination of electronic deliberation? First, the development of new rulemaking technology has embodied a democratic direction. Many agencies now use open electronic dockets, which allow citizens to see and comment on the rules proposed by agencies, supporting documentation, and the comments of other citizens. In an early benchmark case of mass deliberation online, personnel managing the National Organic Program rulemaking at the United States Department of Agriculture (USDA) allowed citizens to read comments as they were posted, whether they came via fax, paper, or online. The Environmental Protection Agency (EPA) and the Department of Transportation (DOT) were path-breaking agencies that developed and deployed open-docket systems that were agency-wide. Electronic rulemaking in the U.S. is therefore an ICT testbed in which large numbers of actual citizens have begun to experience concretely the limits and opportunities afforded by the online environment.<sup>7</sup>

Second, electronic rulemaking systems are highly structured, hence quite different from other web-based discourse that is one-way, isolated, or homogenous. Sunstein (2001) argues that

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<sup>7</sup> One of the central challenges for research in this field is that most cases are exceptional; the business practice of an institution or the architecture of an electronic interface is often novel, experimental, or entirely idiosyncratic (Beierle 2004; Shulman 2003). Our own research looks only at those environmentally-driven regulatory actions where the architecture of the online notice and comment process permitted commenters to view other comments before writing their own comments, and where the total number of public comments received numbered in the tens or hundreds of thousands. Our survey respondents are therefore drawn from exceptional rather than ordinary rulemakings.

the web enables people to pay attention to other, like-minded people, and ignore those who are unlike them or disagree with their positions on issues. The web, for Sunstein, diminishes exposure to heterogeneity and is far from the ideal of a real public forum. Yet the argument here is that the structure of e-rulemaking, in particular the open docket system, may enable and indeed encourage citizens to engage the positions of others, including those with whom they disagree. The open docket architecture of e-rulemaking may mitigate some of the anti-deliberative dangers lurking elsewhere on the web.

Other reasons to examine rulemaking are more specifically political. For example, on environmental issues, the big political battles have moved out of the legislative arena and into the realm of regulatory rulemaking. “Perhaps the most significant administrative law development during the last two decades,” notes Jeffrey Lubbers, “has been the increased presidential involvement in federal agency rulemaking” (Lubbers 1998: 19). While one of the reasons for this move has certainly been to try to avoid controversy, recent administration decisions and proposals have drawn considerable attention to the rulemaking process itself, in turn increasing the likelihood of large numbers of public comments.<sup>8</sup>

Rulemaking also goes somewhere; simply put, the process frequently leads to actual changes of agency-enforced rules. Here, a focus on rulemaking differs from other examinations of web-based discourse. A common critique of online deliberative polling, cyberjuries, or web-based policy discussions is that the deliberative work often produces few if any tangible or pragmatic results. People spend time and energy working toward consensus, only to see it ignored or rejected politically. This is a problem of implementation deficit and it can deplete citizen energy devoted to discourse. Under the APA, rulemaking requires agencies to respond

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<sup>8</sup> See Amy Goldstein and Sarah Cohen, “Bush Forces a Shift in Regulatory Thrust,” *Washington Post* (August 15, 2004), A1, the first of a series of three in the *Post* on recent regulatory politics and which appeared about the same time as Joel Brinkley, “Out of the Spotlight, Bush Overhauls U.S. Regulations,” *New York Times* (August 14, 2004).

to, and incorporate, substantive public comments. It may be the only form of online deliberation that regularly ends in some form of actual implementation.

Finally, and interestingly, from the point of view of democratic discourse, one of the intents of the APA was to increase the gathering of substantive information from the public before agencies were to implement decisions. In its focus on substance, rather than aggregative opinion, the rulemaking process is a ripe area of study for deliberative, rather than aggregative, democrats.

### **Electronic Deliberation: Recent Research and Theory**

Public participation and citizen deliberation continue to be hallmarks of democratic theory. Over the past decade, there has been a renewed and expanded interest on deliberation as a crucial aspect of democratic practice; the role of discussion, reasoning, and engagement across lines of difference has become a central focus of democratic theorists. Some deliberative democrats make the argument that deliberation already occurs in current liberal democratic governments, legislatures, and/or courts (see, for example, Bessette 1994; Rawls 1996). Most in the field, however, call for expanding public discourse and deliberation on policy issues (Barber 1984; Bohman 1996; Dryzek 2000; Habermas 1996; Young 2000). As Dryzek (2000: 1) notes, “the essence of democracy itself is now widely taken to be deliberation.” Our central aim in this project is to evaluate the move to web-based public participation in rulemaking against various criteria established by theorists of deliberative democracy.

A central challenge in this research is the search for valid inferences about the impact of deliberation on an individual’s decision process, or observable indicators of deliberative behavior in cyberspace. Developing widely agreed upon metrics poses stiff conceptual and operational

challenges (Janssen and Kies 2004). Many in this field identify deliberative attributes (such as autonomy from power, reflexivity, heterogeneity, inclusion, equality, etc.) as conducive to better decisions and democratic legitimacy (Froomkin 2004; Witschge 2004; Dahlberg 2001). These attributes are drawn from various theories of reflexive democratic discourse. Yet major differences exist across such theories of deliberation and discursive democracy (see Dryzek 2000), making a specific focus on deliberative attributes rather difficult. Research ranges from the specific aspects of speech to the larger effect of deliberative processes on the public sphere.

In this study, we focus on a few key attributes of deliberation noted across the spectrum of deliberative democratic theory. For example, one of the basic concepts in the field is that deliberation is reflective rather than simply reactive. We assume reflection is based on collecting diverse information and forming an understanding of various positions on an issue. A second central concept in deliberative theory is that such engagement with other positions will bring recognition of others in the process. Participants in democratic deliberation ideally listen to others, treat them with respect, and make an effort to understand them. Third, deliberative theory examines the relation between discourse and the transformation of individual preferences. The ideal of deliberation is that of communication that actually changes the preferences of participants as they engage the positions of others. The perceived authenticity of the process and citizen efficacy are also central to deliberative democracy, as deliberation is offered as a more authentic form of political participation. Our questionnaire, which we describe shortly, included items intended to measure each of these dimensions of deliberation. While we do not claim to cover the full range of concerns of every deliberative theorist, our measures capture the concepts central to recent developments in democratic theory, and will give a reasonable indication of the level of deliberative activity present in the rulemaking process.

## **Research Design, Case Selection, and Sampling Frame Construction**

Our interest in the deliberative characteristics of regulatory rulemaking public comment processes originated with two cases characterized by a large volume of public comments and much political controversy: the USDA's National Organic Standard (300,000+ comments in two rounds); and the U.S. Forest Service's Roadless Area Conservation rulemaking (which received over 1.5 million comments spanning several rounds). Though these two cases were excluded due to data quality issues, the choice to focus the study not just on large comment-receiving regulatory actions, but ones focused on environmental issues, was based on several factors (Zavestoski et al 2005).

First, environmental rules, especially over the last few years, have been highly controversial, attracting large numbers of comments. More comments potentially could mean more discourse and increasingly diverse participants.<sup>9</sup> We also sought to ensure a chance for deliberation, which meant restricting ourselves to rules in which the lead agency posted citizen comments to its website so that visitors could see the comments of others. Both the EPA and DOT implemented such "open docket" systems.

Second, much of the environmental politics literature claims high levels of democratic involvement in environmental policy-making. "One of the most distinctive features of modern U.S. environmental protection policy," writes Andrews, is the "broad right of access to the regulatory process, which extends not only to affected businesses but to citizens advocating environmental protection" (1999: 240). Paehlke (1989) argues that the environmental arena has led all others in the scope and extent of innovations in public participation, including public

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<sup>9</sup> Future papers will report on the multi-year coding effort underway. To date, teams of undergraduate and graduate students have coded over 2500 randomly selected public comments from a range of rulemakings looking for indications of deliberative practice.

inquiries, right-to-know legislation, alternative dispute resolution, advisory committees, and policy dialogues. Hence a leading edge of democratic public participation in the US is in the environmental field; this seems to have continued into web-based participation processes.

## **Overview of the Regulatory Actions**

Given our interest in controversial environmental regulations that elicited large numbers of public comments, we settled on the following cases (with the colloquial designations shown in bold):

- 1) EPA's advanced notice of proposed rulemaking (ANPRM) on the Clean Water Act regulatory definition of the "Waters of the United States" (**Waters**)
- 2) EPA's proposed National Emissions Standards for Hazardous Air Pollutants (**Mercury**)
- 3) DOT's advanced notice of proposed rulemaking (ANPRM) on the Corporate Average Fuel Economy Standards (**CAFE**).

We summarize the events leading up to each of the regulatory actions that we selected as cases below.

### *The Waters ANPR*

On January 15, 2003, the EPA published an Advance Notice of Proposed Rulemaking (ANPR) on the Clean Water Act regulatory definition of the "Waters of the United States" and in response the EPA received approximately 133,000 public comments.<sup>10</sup> An EPA press release dated December 16, 2003 announced that the EPA would not issue a new rule clarifying the extent of federal jurisdiction over so-called "isolated" wetlands.<sup>11</sup> Critics of the Bush

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<sup>10</sup> See *Federal Register* Vol 68, No. 10 pp. 1991-1998 (available at: <http://snipurl.com/dac3>). At a June 10, 2003 hearing before a Senate Subcommittee, G. Tracy Mehan, Assistant Administrator for Water, noted that most of the comments received were "the result of e-mail or write-in campaigns," whereas about 500 were "substantive" comments. See S. HRG. 108-352, p. 16.

<sup>11</sup> See <http://snipurl.com/dace>.

administration's environmental policies were "surprised and delighted"<sup>12</sup> by the unexpected decision to forgo a rulemaking in the wake of the confusion created by the 2001 Supreme Court's controversial ruling in *Solid Waste Agency of Northern Cook City v. Army Corps of Engineers* (SWANCC). Whereas development lobbies saw the prospect of a Bush administration rulemaking as an opportunity to free up considerable chunks of land that had been protected for 30 years, environmentalists feared the potential rollback of federal regulatory powers would undermine core principles articulated in the landmark 1972 Clean Water Act.

### *The Mercury Rulemaking*

On January 20, 2004, the EPA published a proposed rule titled "Proposed National Standards for Hazardous Air Pollutants" and in response the "Mercury" rulemaking received approximately 500,000 public comments.<sup>13</sup> An EPA press release dated December 15, 2003 quoted Administrator Leavitt claiming the proposed actions represented "the largest air pollution reductions of any kind not specifically mandated by Congress."<sup>14</sup> Like many significant federal regulatory actions, the EPA's mercury rule resulted from a drawn out mix of congressional, administrative, and legal proceedings stretching back to the Clean Air Act (CAA) Amendments of 1990. A suit by the Natural Resources Defense Council filed in 1992 and another by the Sierra Club in 1994 were settled later in 1994 and ultimately resulted in a "Mercury Study Report to Congress" (RTC), which was released in December of 1997.<sup>15</sup> On December 14, 2000, one day

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<sup>12</sup> See [http://www.nrdc.org/bushrecord/water\\_wetlands.asp](http://www.nrdc.org/bushrecord/water_wetlands.asp).

<sup>13</sup> See *Federal Register* Vol. 69, No. 20 pp. 4652-4752 (available at: <http://snipurl.com/dab9>). "As of February 2005, EPA E-Docket shows an actual count of more than ~490,000 public comments and close to 4,500 unique comments received. The initial count of 680,000 and 5,000 included duplicate and triplicate e-mails and comments related to other rules." See: <http://snipurl.com/dabd>.

<sup>14</sup> See <http://snipurl.com/dabh>.

<sup>15</sup> See: <http://www.epa.gov/mercury/report.htm>.

after Al Gore conceded the 2000 election, EPA Administrator Carol Browner announced an EPA “finding” that it was “appropriate and necessary” to regulate coal- and oil-fired electric utilities under section 112 of the CAA. This proposed rule was the Bush administration’s response. After the rulemaking process, the EPA issued a final rule on March 15, 2005, a court appointed deadline, and was met with promises of lawsuits by a number of states and non-governmental actors.

### *The CAFE ANPR*

On December 29, 2003, The DOT published an Advance Notice of Proposed Rulemaking on reforming the automobile fuel economy standards program and in response the “CAFE” ANPR received 66,786 public comments.<sup>16</sup> Congress enacted the Energy Policy and Conservation Act (EPCA) in 1975 as a response to the 1973-1974 oil embargo, thereby creating an automotive fuel economy regulatory program. The Corporate Average Fuel Economy (CAFE) program set requirements for the manufacturer’s fleets of 19 mpg for 1978 and 27.5 mpg for 1985. These requirements were frozen for most of the 1990s by Congress and in 2001 DOT Secretary Mineta successfully asked the Senate appropriations committee to lift the restriction on improvements to the CAFE standard. In late 2002 the DOT issued new proposed rules that took effect in late 2004 increasing CAFE standard by 1.5 mpg over the model years 2005-2007. The ANPR published in 2003, however, sought public comments on revising the CAFE program’s structure to address the continuing criticism of the CAFE program related to energy security, traffic safety, economic practicability, and the definition of the separate category for light trucks.

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<sup>16</sup> See Federal Register Vol. 68, No. 248, pp. 74908-74931 (available at: <http://snipurl.com/daw6>).

## **Sampling Frame Construction**

Having selected our cases, we worked with the Social Research Laboratory (SRL) at Northern Arizona University to construct a sampling frame that would be used to complete the telephone survey portion of the study. Submitted comments become part of the public record, so we were able to rely on relatively open access to the comment sets on each rule. Our challenge was to find commenters who left a phone number, or at least a full name and address so that we could locate their phone numbers using a reverse phone-number look-up.

Because our research design did not require comparisons across the cases, we did not attempt to sample proportionally from the three cases. Instead, we were interested in making two types of comparisons. First, we wanted to compare attitudes of people who submitted electronically as opposed to on paper. Second, we were interested in comparisons between those who submitted original letters as opposed to form letters. The goal was to complete 375 surveys for each of the following four types of commenters: 1) electronic submission of form letters (E/F); 2) electronic submission of originals (E/O); 3) paper submission of form letters (P/F); and 4) paper submission of originals (P/O). Table 1 lists the number of completed surveys for each of the four types of commenters we were looking for. Table 2 describes the total number of comments on each rule, the number of comments to which we had access, the limitations with respect to the way in which the accessible comments had been selected by the agencies, and the approach we took to sampling for each rule.

### **TABLE 1 ABOUT HERE**

As Table 2 illustrates, we had to employ a number of different approaches to reach our sample size goals. In each case, graduate research assistants trained as sample collectors located

the comments on the Federal agency web-based docket systems (EPA’s “EDOCKET” or DOT’s “Docket Management System”).<sup>17</sup> Comments were available from these websites as either Adobe Acrobat (.pdf) or text (.txt) files. In the case of the mercury rule, EPA also provided us with a large number of .txt files containing roughly 536,000 e-mailed comments.<sup>18</sup>

Determination of submission type was based on the content and/or appearance of the submitted comment. Form letters included identical content and were submitted by multiple participants that filled in their contact information. Determination of an original comment was based on whether the letter contained a unique opinion, authored by the commenter.

## **TABLE 2 ABOUT HERE**

As sampling progressed, it became apparent that we lacked access to a sufficient number of form comments on the EPA rules to ensure a balance of comment types across all three rules. This was due to the EPA’s practice of putting one example of each form letter, rather than every single submission, into the EDOCKET system. As noted above, comparing across rules was not integral to the research design, so we relied on access to a greater number of form submissions in the CAFE set of comments to complete the sample.

Since potential respondents were to be contacted by telephone, we obtained telephone numbers either from the actual comment or by looking them up using a web-based phone number database.<sup>19</sup> Because we were using a systematic random sampling method, when we could not locate a phone number, we moved to the next “*n*<sup>th</sup>” comment. Due to the range of

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<sup>17</sup> Thanks go to Michael Aquino, Tina Eyraud, Meg Inokumu, Jonathan Nez, Suzuki Susumu, Paul Vaughn, and Baohua Yen.

<sup>18</sup> Between the time we received the 536,000+ text files and this writing, the EPA determined that nearly 50,000 of the e-mails were exact duplicates, triplicates, spam, or submissions for other rulemakings, hence there is a discrepancy between the estimated total number of comments received and the number of comments in our sample frame.

<sup>19</sup> We used [www.whitepages.com](http://www.whitepages.com), and found that we were able to obtain phone numbers for slightly more than 60% of the names and addresses we entered.

difficulties faced—from agencies failing to provide access to the entire set of submitted comments, to obtaining phone numbers for individuals—the results of the survey are not generalizable to the whole population of citizen commenters on these regulatory actions.

### **Administering the Survey**

A telephone survey instrument developed in collaboration with the SRL, was administered using a computer-assisted telephone interviewing (CATI) system. Thirty trained interviewers completed the telephone surveys. The interviews took an average of 14 minutes to complete. Respondents qualified to complete the interview if they recalled submitting a comment to a Federal public agency and if they were 18 years of age or older. The survey was completed by 1553 respondents between the dates of August 30 and November 24, 2004. This represented a response-rate of 48% with a margin of error of +/- 2.5%.<sup>20</sup>

The survey asked questions regarding the respondents' general commenting practices such as the number of times that they had commented, how much information they obtained before commenting, how they typically submit a comment, whether they refer to other citizens' comments and, if so, the effect this has on their comments, and the reasons that they commented. Respondents were also asked questions pertaining to the results of the final rule-making process such as whether they thought their comments were reviewed by a government employee, whether they heard about the final agency decision, and if so, were they satisfied with the final decision. Respondents were also asked questions about Federal agency websites that include the frequency of the visits, the type of information they accessed, whether they used these websites

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<sup>20</sup> While we are discussing “citizen” commenters, we should make clear that a small percentage of our respondents were involved in the rulemaking process in roles other than private citizen. Of those surveyed, 86.4% reported that they generally commented as private citizen, 7.1% as a paid employee, 3.4% as an unpaid volunteer, and 3.2% as something else (though mostly as a representative of an interest group).

to submit a comment, their general perceptions of the effect Federal agency websites have on commenting, and if they would be likely to submit a comment on an agency rule in the future. Finally, respondents were asked if they believe submitting comments individually, or as a group, has the ability to change the outcome of the final rule. Demographic variables include age, gender, education, income, political ideology, voting behavior, race, ethnicity and weekly internet use (in hours).<sup>21</sup>

## **Survey Findings**

We organize the discussion of our findings around three important discoveries. First, electronic commenters do not appear to be any more deliberatively engaged than paper commenters. In fact, we observed a significant difference on only one measure, where in fact paper commenters scored higher on one key deliberative measure. Second, despite failing to find that electronic commenters are more deliberative, we observed greater levels of self-reported deliberative activity across all types of commenters than expected. A surprisingly large number of respondents reported that they read other individuals' comments, acquire increased understanding of other people's positions as a result, and even occasionally change their own positions. Third, rather than significant differences between electronic and paper commenters, the main differences we found were between individuals who submitted original comments and those who posted form letters.

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<sup>21</sup> Obviously, there are problems with operationalizing our questions within the methodology of survey research. Participants may understand the questions in ways different than we intended, self-reporting may exaggerate discursive indicators, and citizens may simply be mistaken about what they actually did during the rulemaking process. Still, we think it is central in an examination of these issues to get direct input from a large number of citizen participants in the rulemaking process, and are confident that our methods meet the standards of survey research.

### Differences Between Paper and Electronic Commenters

The main goal of the survey was to look for differences between those who submitted comments on paper, either through postal mail or fax, and those who used agency web-based forms, interest group websites, or email to comment. The survey suggests that those differences simply do not exist. There was a significant difference between electronic and paper commenters on only one question. Paper commenters, by 74.6% to 67.1% (df=9; p<.01) over web-based commenters, were more likely to refer to the “arguments, studies, statements, or positions made by agencies or individual organizations.” Since paper submitters are more likely to say that they reference other people’s work, an essential practice for creating quality discourse, our hypothesis that electronic commenters would demonstrate greater deliberative activity than paper commenters is not supported. We suspect this may be due to the fact that many submitters of original paper comments also use the Internet extensively as a resource to collect information in crafting their comments. When asked whether they had ever used a federal agency website to read information on a proposed rule, 42.7% of paper form submitters reported having done so, as did 45.9% of electronic form submitters, 50.0% of paper original submitters, and 58.4% of electronic original submitters (df=6; p<.01). While there is a distinction between the means citizens use to comment, all types of commenters used electronic means to gather information in the commenting process. As for the lack of discursive indicators by electronic commenters, it may be that the technology, which makes commenting easier than ever before, encourages the rapid submission of comments, which is antithetical to more thoughtful and carefully reasoned arguments.

### The Prevalence of Deliberative Indicators

While differences between electronic and paper commenters are practically nonexistent, there are indicators that all types of commenters practice, or benefit from, certain types of deliberative activity. In this section we report on four indicators of such deliberative discourse: the frequency with which commenters seek out a variety of information, the tendency to review other citizen's comments, gaining an understanding of the positions of others, and changing one's own position after being exposed to the arguments of others. The findings are summarized in Table 3.

#### *Commenters are information-seekers*

The use of information in developing a public comment is quite high. Overall, commenters, regardless of medium, are information-seekers. When asked how much information they receive on rules before submitting a comment, 45.2% said they get a lot of information, and a full 90% say they get a lot or some information. Those that write original paper comments claim the most; nearly 51% say they get a lot of information before submitting a comment. Over 71% of those surveyed said that they referred to the arguments, studies, statements or positions of agencies or independent organizations before submitting a comment; again, those that submitted original paper comments were at the top with 76.7%. Agency websites are important sources of information for commenters; a full 50% surveyed said they used these sites in developing their comment. Again, a large majority of commenters are seeking out information, even those who submit form letters. Few commenters, at least from what they report, simply submit comments without trying to understand the issue.

#### *Commenters review other's comments*

Surprisingly, 68.0% of those surveyed said that they had read the comments of others at some point. As these comments are only available either in person in the agency docket rooms

in DC or on the newly developed agency websites, it may be that all types of commenters are using the agency websites to examine the docket, when such comments are available. For those that specifically reported using the agency websites, 69.4% said that the site helped them review other citizens' comments. Again, and counter to our original hypotheses, such access to information was reported highest (75.5%) by those who ultimately submitted original paper comments. Still, overall reporting of the review of others' comments is high regardless of submission type, illustrating attention to the positions of others in the rulemaking process.

*Commenters gain an understanding of other positions*

Reading of other citizen's comments is not just for information; commenters report that they gain an *understanding* of the positions of others as well. Overall, nearly three-quarters (73.2%) say they get a better understanding of the positions of other citizens by reading their comments, and 41.5% say that they have found the comments of other citizens persuasive. Of the commenters who said that they visited and used agency websites, a very large percentage (71.7%) said that they somewhat or strongly agreed with the statement that the agency websites helped them to understand the positions of others. As the difference across types of commenters is insignificant, this finding suggests that commenters in general are gaining an understanding of the positions of other citizens commenting on a rule. Agency websites seem to have added to this particular indicator of democratic deliberation.

*Commenters change their own positions*

Finally, over one-third (36.3%) of those surveyed report that their position on an issue actually changed after reading others' comments. That is less than the 47% who report no change in their position, but the percentage that acknowledges such change is significant, and is yet another indicator that the limited discourse made possible by access to others' comments is

having an impact on the reasoning of citizen commenters. However, this is a question that needs further research. It may be that people are not changing their positions from “opposed” to “for” or vice versa, but instead changing one or more reasons for being opposed, or for, the proposed rule. Other commenters might change their reasons due to information or arguments learned from commenters with whom they agree. Overall, participants may simply be getting more familiar with a variety of reasons for taking a position.

### **TABLE THREE ABOUT HERE**

#### Differences Between Original and Form Commenters

The interesting and significant differences in this study are between those who submit original comments and those who submit form-based comments (see Tables 4 and 5). A better understanding of these differences may impact how agencies respond to public comment and how interest groups refine their campaigns. Numerous civil servants have reported at workshops, focus groups, and interviews over the last four years, that agencies are required to respond to substantive comments, but not to sheer numbers. Notice and comment rulemaking was designed to bring diverse information into rulemaking process, not to be a referendum (Shulman 2004a). Agency officials and rulewriters are consistently adamant on this point. Many interest groups, in addition to drawing on their legal and scientific staff to draft detailed comments, respond to the rulemaking process with an aggregative approach, soliciting mass numbers of identical or near-duplicate comments from their members and other interested citizens. By all accounts, new ICTs have enabled the number of comments to increase well beyond the capacity of agencies to cope without expensive, outside private consulting firms to

report on the content of citizen comments. A key question is whether or not this technology improves or degrades the overall efficacy of citizen discourse (Shulman 2004b).

*Form versus original differences in information-seeking*

In the survey findings, the differences between original and form commenters start with the use of information. Over half (54.2%) of original commenters report having used an agency website to read information on a proposed rule. This compares to only 44.2% of the form commenters, suggesting a significant difference ( $df=2$ ;  $p<.01$ ). Both form and original submitters, however, claim they gather information on rules before submitting a comment. 48.1% of original submitters claim to receive “a lot” of information, compared to 42.4% of form submitters ( $df=f$ ; ns). Similarly, there is not a great difference in the rate at which the two types of commenters report referring to other arguments in their comments. Nevertheless, the substance of a comment—original or form—is a bigger indicator of the use of information before commenting than is the method of submission.

*Form versus original differences in viewing of others' comments*

While there is no significant difference between original and form commenters on their reading of others' comments, their perceptions of others' comments as persuasive, or their having changed their mind as a result of reading another comment, original commenters are significantly more likely to report (76.7% vs. 69.8%) gaining “a greater understanding of the positions or arguments of other citizens by reading their comments” ( $df=3$ ;  $p<.05$ ). While both sets of commenters read the positions of others, original submitters are more likely to report having a better understanding of those positions. It may be that original commenters see others' comments as part of a larger discourse and so pay attention to all sides of the issue. Yet this difference may also be a function of original commenters having greater faith that their

comments could actually change an outcome. If form commenters are more pessimistic about their ability to affect outcomes, they may not read others' comments with any intentions of actually understanding others' positions. The differences, as well as some similarities, are summarized in Table 4.

#### **TABLE 4 ABOUT HERE**

##### *Form versus original differences in trust*

In addition to the modest differences between original and form commenters on the deliberative indicators described above, there are significant differences between the two on a number of indicators of trust in the process and the agency involved. For example, 62.7% of original commenters (both paper and electronic) believe their comments were actually read by a government employee, compared to only 45.6% of form commenters (df=3; p<.01). This is one of the most significant differences we found between form and original commenters. Electronic form commenters appear to be the most cynical in terms of their feeling that their participation will have an impact on their satisfaction with the final rule. Conversely, those that sent paper original comments are the most satisfied with their participation and the outcome. Not only are form submitters more cynical about having their comments read and making a difference, they are also more likely to say that their participation led to a negative view of the agency running the rulemaking (45.4% for form commenters, vs. 36.0% of original commenters). Original commenters are about 6% more likely (19.7% to 13.4%) to report a positive view of the agency (df=5; p<.01). Original commenters report being slightly more satisfied than form commenters with agency decisions on issues they have commented on (57.7% of originals are unsatisfied vs. 65.7% of form submitters) (df=3; p<.05).

Finally, users of form letters are simply more negative about the government in general. By 41.3% to 27.8% compared to original commenters they “rarely” trust the government to do what is right (df=4; p<.01). When “rarely” and “never” trust the government are combined, 49.5% of form commenters report this distrust, while 32.5% of original commenters do. Simply put, original submitters have significantly higher levels of trust in the government to do what is right. These differences are reported below in Table 5.

#### **TABLE FIVE ABOUT HERE**

Overall, the survey illustrates that people believe that form letters are less likely to be read by government employees and have an actual impact. It may be the case that a negative view of the agency and government in general was one of the reasons for commenting in the first place. A central question here is whether a lack of faith in the agency has led to some citizens’ refusal to take the time to write an original letter. On the other side, it may be the case that original commenters understand the rulemaking process more thoroughly, and have more knowledge of (and maybe sympathy for) the agency involved.

#### On the Value of Electronic Comment and Mass E-Mail Campaigns

There is one other key finding regarding the difference between form and original commenters. Though it contradicts the lack of trust in government noted above, form commenters are more likely than original commenters to think that groups that organize mass mail campaigns have the ability to change proposed rules (86.7% to 81.7%). This may partly explain why form commenters are much more likely to submit comments more often than original commenters. Sixty-two percent of form commenters report submitting comments more than ten times, while only 44% of original commenters report that level of participation. This

difference, however, can also be explained by the expertise and time involved in many original comments.

This faith that mass email campaigns have an impact has led to the increase in the popularity of the tactic. Nearly 50% of those surveyed said they submitted their last comment through an interest group website, and almost 40% reported that this method will also be how they comment next time. Only those that had submitted paper original comments said that they would continue that route over all others. While agencies such as the EPA and DOT have worked to improve the information on their web-based docket systems, and the federal government continues to develop a Federal Docket Management System as a single web-based public comment portal, very few commenters plan to use such systems, only 12% versus the nearly 40% who plan to use interest group websites. Mass-mailed form letter comments originating from various environmental and other interest groups make up the vast majority of comments submitted on rules, and will continue to do so for the near future.

This practice should be worrisome for those interested in the potential of the web to increase discourse on important issues in the rulemaking process. Commenters who submitted using form emails via interest group websites were the least likely to look at other information and the least likely to report that their positions have changed as a result of reading others' comments. In other words, electronic form commenters show the lowest scores on many deliberative indicators. Mass email campaigns, as they are currently designed, are only useful in an aggregative form of democracy; such an approach is better suited to pressure on legislators than it is on agencies required to abide by the APA.

In addition, there is little evidence to support the belief that mass email campaigns actually do change proposed rules. While the proposed "Waters" rulemaking was dropped, other

highly controversial rulemakings went forward while tens of thousands and sometimes hundreds of thousands of comments came in against them. Interviews with agency rulewriters and officials show that agencies do not value (and often openly resent) form letters; they simply do not meet the minimum requirement of a “substantive” comment. The EPA, in fact, simply prints and stores an inaccessible hard copy of all but one example of each identical or similar mass e-mail after taking note of how many they received of each specific version. Importantly, however, our interviews and focus groups show that these same officials would welcome more substantive and original comments, as they could return the rulemaking process to that designed by the APA – based on the collection of information and substantive input from interested parties outside of the government.

### **Conclusion: Building Political Capability Among New Commenters**

The distinction between paper and electronic commenters, which was the basis of our original set of hypotheses, simply does not exist as we imagined it might. A majority of commenters, regardless of the medium of submission, are using electronic means of researching an issue, with paper commenters reporting a greater use of web-based agency docket systems. Comparing paper and electronic commenters on recent rules does not help us understand whether the new electronic systems are more deliberative than past paper-based notice and comment processes. One could try to explore differences between current rulemaking processes and past, pre-internet processes, but given the weakness of the human memory, a survey would be an inappropriate method.

That said, the issue of the difference between original and form-based participation is obviously at the forefront of the questions regarding the potential deliberative activity centered

on the rulemaking process. Original commenters embody many of the deliberative qualities we hypothesized given the move to an accessible open-docket system. The range of significant differences between original letter writers and form letter submitters might be partially explained by the introduction of a large number of commenters (mostly form users) who are new to the rulemaking process. The ease with which interest groups can spread information to constituents about proposed rules open for public comment, and the sophistication of email action alert systems that allow individuals to “participate” by doing little more than clicking the “send” button on an interest group’s website, means agencies are getting more comments, especially from people who have not participated in the process in the past. Though many of these participants, even electronic form submitters, reported to us that they seek out information before sending in their comments, form submitters are nevertheless much more cynical about the process, and much less deliberative in their engagement. This leads us to conclude that there is a certain amount of political capability that must be acquired before these new participants have a level of efficacy and trust in the process that will justify the effort required to become more deliberative participants.

Perhaps as the very technology that has brought more participants into the process is better utilized to handle increased levels of participation, all types of participants—from paper original letter writers to electronic form submitters—will feel their participation is meaningful. In turn, theoretically, these participants will invest time in becoming more educated, thoughtful, and deliberative commenters. This is important since 91% of respondents said they are very or somewhat likely to submit comments again in the future. Whereas 39.7% report they will go through an interest group website to submit their comments (and, presumably, the majority of these will send the “click to send” variety of form letter), only 12% plan to use an agency

website. Federal agencies do not necessarily need to figure out how to get more people to comment through their websites, but they do need to figure out how to get more commenters to trust the process and invest time in enhancing the discourse surrounding a proposed rule. In the meantime, the deliberative divide between citizens who invest time to write original letters and those who merely submit form letters has the potential to increase feelings of powerlessness or disenfranchisement.

So we conclude by noting the potential of electronic rulemaking to enhance democratic deliberation on key issues in the American polity. Certainly, we see that some citizens are interested in rules, information surrounding various issues, and in what other citizens have to say in the comment process; many citizens are also willing to have their own positions challenged and possibly transformed in the engagement with others. We also see that technology exists both to enhance the deliberative process (the open dockets and access to information on agency websites) and to degrade discourse (the easy click-to-send web pages on interest group websites). Obviously, the technology will not stand still; we only hope that research like this will push the agencies and interest groups alike to develop systems that meet the ideals of both the APA notice and comment process and deliberative democracy to increase the amount of information and exchange of views in the development of better policy.

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**Table 1. Summary of Completed Surveys**

	Electronic Submission	Paper Submission	Total
Form Comment	376	421	797
Original Comment	381	375	756
<b>Total</b>	<b>757</b>	<b>796</b>	<b>1553</b>

**Table 2. Case Characteristics and Data Access.**

	<b>Waters</b>	<b>Mercury</b>	<b>CAFE</b>
<b>Estimated total number of comments</b>	~135,000	~490,000	66,786
<b>Comments in sampling frame</b>	3,223	4,264; +~536,000 emails	66,786
<b>Access to comments</b>	EPA's "eDocket" web-based docket management system	EPA's "eDocket" web-based docket management system; EPA also supplied .txt files containing ~536,000 emails	DOT's web-based "Docket Management System" (DMS)
<b>Limitations</b>	EPA places only unique original comments in the eDocket system, plus one example of each type of form letter received, therefore our ability to include submitters of form letters on this rule was limited; EPA reports having deleted over 125,000 emails	Access to limited form letters in the eDocket system was off-set by .txt files containing all ~536,000 emails submitted, the vast majority of which were form submissions	DOT did not enumerate all 66,786 comments in the DMS, but rather created "records" of form comments containing anywhere from 2 to 25,432 versions of a form letter
<b>Sampling approach</b>	We collected contact info from every single electronic and paper form letter that existed in eDocket (therefore no sampling actually took place); for original letters, we collected info from eDocket using systematic random sampling until the target of 125 paper and 125 electronic originals was reached	We collected contact info from every single electronic and paper form letter that existed in eDocket, and then used text searching to acquire phone numbers from the ~536,000 email submitters; for original letters, we collected info from eDocket using systematic random sampling until the target of 125 paper and 125 electronic originals was reached	Systematic random sampling was used to select records from DMS; when a record contained no contact info, the next record was selected; when a record contained multiple versions of a form letter, systematic random sampling was used within the batch of form letters

**Table 3. Summary of Deliberation Measures**

<i>(Cell values are percentages Ns are reported in "Total" column)</i>		Paper Original	Paper Form	Electronic Original	Electronic Form	Total %(N)	Signif- icance
<i>Commenters are information-seekers</i>							
In general, how much information do you receive on rules before submitting a comment?	"A lot"	50.8	43.3	45.4	41.4	45.2 (700)	.284 (df=12)
	"Some"	40.4	47.6	44.4	47.3	45.0 (697)	
	"A little"	7.0	6.2	7.6	9.9	7.6 (118)	
	"None at all"	1.1	1.9	1.3	.8	1.3 (20)	
	"Don't Know"	.8	1.0	1.3	.5	.9 (14)	
When preparing your comments, do you refer to arguments, studies, statements or positions made by agencies or independent organizations?	YES	76.7	72.6	67.5	66.7	70.9 (1099)	.009 (df=9)
	NO	7.0	11.4	12.6	16.3	11.8 (183)	
	OTHER	16.3	16.0	19.9	17.1	17.3 (268)	
Have you ever used a federal agency's website to read information on a proposed rule?	YES	50.0	42.7	58.4	45.9	49.1 (763)	.000 (df=6)
	NO	48.9	55.0	39.5	51.5	48.9 (760)	
	OTHER	1.1	2.4	2.1	2.7	2.1 (32)	
<i>Commenters review other comments</i>							
Have you ever read other citizen's comments before sending in a comment?	YES	70.1	72.6	67.9	71.6	70.6 (806)	.605 (df=6)
	NO	27.3	23.6	27.6	26.2	26.2 (299)	
	OTHER	2.5	3.7	4.4	2.2	3.2 (37)	
<i>Commenters gain an understanding of other positions</i>							
<i>Among those who reported reading others' comments:</i>							
Do you gain a greater understanding of the positions or arguments of other citizens by reading their comments?	YES	79.5	69.0	74.1	70.6	73.2 (824)	.196 (df=9)
	NO	9.5	13.4	9.7	11.0	10.9 (123)	
	OTHER	11.0	17.6	16.2	18.3	15.8 (178)	
Have you found that other citizen's comments are persuasive?	YES	37.5	44.3	45.4	38.1	41.5 (459)	.488 (df=9)
	NO	22.7	23.5	19.4	27.3	22.0 (243)	
	OTHER	39.8	32.1	35.2	39.6	36.6 (405)	
<i>Commenters change their own positions</i>							
Has your own position on issues EVER changed at all as a result of reading other citizens' comments?	YES	36.9	37.2	37.4	33.6	36.3 (408)	.939 (df=9)
	NO	46.9	45.2	45.7	51.5	47.2 (531)	
	OTHER	16.2	17.6	16.9	15.0	16.4 (185)	

**Table 4. Summary of Form vs. Original Differences in Deliberation Measures**

<i>(Cell values are percentages Ns are reported in "Total" column)</i>		Originals	Forms	Total %(N)	Signif- icance
<i>Information Seeking</i>					
In general, how much information do you receive on rules before submitting a comment?	"A lot"	48.1	42.4	45.2 (700)	
	"Some"	42.4	47.5	45.0 (697)	
	"A little"	7.3	7.9	7.6 (118)	.225 (df=4)
	"None at all"	1.2	1.4	1.3 (20)	
	"Don't Know"	1.1	.8	.9 (14)	
Total (N=)		755	794	1549	
When preparing your comments, do you refer to arguments, studies, statements or positions made by agencies or independent organizations?	YES	72.0	69.8	70.9 (1099)	
	NO	9.8	13.7	11.8 (183)	.110 (df=3)
	OTHER	18.1	16.5	17.3 (268)	
	Total (N=)		755	795	
Have you ever used a federal agency's website to read information on a proposed rule?	YES	54.2	44.2	49.1 (763)	
	NO	44.2	53.3	48.9 (760)	.000 (df=2)
	OTHER	1.6	2.5	2.1 (32)	
	Total (N=)		756	799	
<i>Viewing Others' Comments</i>					
Have you ever read other citizen's comments before sending in a comment?	YES	69.0	72.2	70.6 (481)	
	NO	27.5	24.9	26.2 (299)	.497 (df=2)
	OTHER	3.5	2.9	3.2 (37)	
	Total (N=)		571	571	
<i>Among those who reported reading others' comments:</i>					
Do you gain a greater understanding of the positions or arguments of other citizens by reading their comments?	YES	76.7	69.8	73.2 (824)	
	NO	9.6	12.2	10.9 (123)	.041 (df=3)
	OTHER	13.7	18.0	15.8 (178)	
	Total (N=)		563	562	

**Table 5. Original vs. Form Differences in Trust and Satisfaction**

<i>(Cell values are percentages Ns are reported in "Total" column)</i>		Originals	Forms	Total %(N)	Signif- icance
Do you think the comments you have submitted were viewed by a government employee?	YES	62.7	45.6	54.0 (837)	.000 (df=3)
	NO	11.0	17.8	14.5 (225)	
	OTHER	26.3	36.6	31.5 (490)	
	Total (N=)	756	796	1552	
Does your participation generally lead you to have a positive or negative view of the agency involved?	POSITIVE	19.7	13.4	16.5 (173)	.003 (df=5)
	NEGATIVE	36.0	45.4	40.7 (427)	
	OTHER	44.3	41.2	42.8 (448)	
	Total (N=)	512	536	1048	
Have you been satisfied with the agencies' decisions on issues that you have commented on?	YES	13.7	10.9	12.3 (162)	.022 (df=3)
	NO	57.7	65.7	31.8 (816)	
	OTHER	28.6	23.4	25.4 (342)	
	Total (N=)	643	677	1320	
How often do you trust the federal government to do what is right?	All or some of the time	66.1	49.1	57.3 (872)	.000 (df=4)
	Rarely or Never	32.5	49.5	41.2 (627)	
	Don't Know	1.4	1.5	1.4 (22)	
	Total (N=)	740	781	1521	