Chair's Message: Technology as a Driver of Change within Agencies "The Internet changes everything."

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Technology as a Driver of Change within Agencies
“The Internet changes everything.”

Technological determinists identify technologies as historical causes. So, for example, the invention of the cotton gin is said to have “caused” the Civil War. Beforehand, slavery and the plantation system were starting to collapse along with the price of tobacco, and cotton was not and could not have become the major Southern crop. The gin saved the economic viability of slavery, which otherwise would have withered away. And the rest is history. No cotton gin, no Civil War.

Technological change indisputably affects history. But reductionist technological determinism seems to me to overlook several things. One is the lawyer’s distinction between but-for and proximate cause. History is full of but-for causes—it might be said to consist of nothing else. Thus, every day there’s a new book about some hidden but vital contributor to the world as we know it. At least according to the subtitles of the books written about them, the things that have “changed the world” include pepper (unless it’s salt1), cod2, sugar3, coffee4 (no, wait: not coffee, tea),5 gunpowder,6 the Irish7 (or just their best-known beer8), a handful of mathematical equations,9 the 1960 Summer Olympics,10 and, let’s not forget, the banana.11 It turns out that “changing the world” is a pretty low bar. The flapping wings of the chaos theorist’s butterfly changed the world. Of course the world would look different had there been no cod or salt or Irish. However, but-for causes are less interesting precisely because they are countless.

Second, technological determinist accounts are a version of “winner’s history.” The many, many technologies that didn’t change the world are invisible, as are the many ways in which successful technologies have left the world unaltered.

Third, human beings decide how to use technologies; these choices, options pursued and options forgone, determine a given technology’s impact. The Internet is a but-for cause of many contemporary changes, inside and outside law. It is less clear that it is a proximate cause of any; like other tools, the Internet is what people make of it. Of course, the nature of a technology limits the choices. This has always been true: “If all you have is a hammer, everything looks like a nail.” And sometimes human beings choose to use a particular technology thoughtlessly, simply because they can. But the effect of a new technology is neither built in nor automatic; human agency looms large.

This truth was brought home to me at the Section’s Spring Meeting, which began with a day-long conference at Princeton University, co-sponsored by two Princeton entities, the Program in Law and Public Affairs and the Center for Information Technology Policy. The day’s topic was “The Administrative Agency in an Electronic Age,” and attendees were treated to a series of truly first-rate presentations on agency websites, open government, e-rulemaking, and new monitoring techniques. Over the course of the day, I was struck at how in some settings the new technologies have changed things less than one might have expected and in others more.

Consider e-rulemaking, which was the subject of a panel composed of Cynthia Farina, Neil Eisner, Tino Cuellar, and Carol Ann Siciliano. With different emphases, each speaker made clear that the much-anticipated e-rulemaking “revolution” has not happened—at least not yet. We have moved from the traditional paper-based notice-and-comment process to an electronic version thereof; “Rulemaking 1.0.” That has been an improvement. But it is an improvement like, say, automatic transmissions, which have plusses and minuses but all in all are a step forward, not a transformation like the invention of the automobile. The rulemaking process remains completely recognizable. “Rulemaking 2.0”—a more fully participatory, dialogic process that would employ electronic tools such as Twitter, Facebook, continued on next page


4 Mark Kurlansky, Cod: A Biography of the Fish That Changed the World (Penguin 1998).


9 Thomas Cahill, How the Irish Saved Civilization: The Untold Story of Ireland’s Heroic Role from the Fall of Rome to the Rise of Medieval Europe (Anchor 1996).


13 Dan Koeppel, Banana: The Fate of the Fruit That Changed the World (Plum 2008).
blogs, discussion forums, collaborative content creation, and others that do not yet exist—may never happen, and it certainly will not happen by itself. As Cynthia put it, in the case of e-rulemaking it is emphatically not the case that “if you build it, they will come.” At least in the rulemaking arena, new technology has not led to or required a reconceptualization of the process. In isolated instances, it has led to a huge number of comments, but such rulemakings remain the exception, and even when it has occurred, the deluge has not proved especially useful. Crowds do not always bring wisdom, and the move online has not brought with it a newly engaged, thoughtful, and participatory citizenry.

One message of the panel—explicit in Cynthia’s presentation and implicit in the others—is that a fully collaborative and participatory process is actually not appropriate for all rulemakings. For particular rules and particular issues, the extensive participation made possible by electronic tools will be valuable, but for many others it will be cumbersome, effortful, and unsatisfying. So the key is to identify the settings where it will be valuable and figure out how to ensure it happens. In this respect, Rulemaking 2.0 may be something like negotiated rulemaking, an initiative the Section has long endorsed, notwithstanding some reservations within our ranks. “Reg neg” is not a technological change, of course, but it too involves a new way of doing an old task, and it shares some of the same goals as e-rulemaking. The theory is that adopting a more open and collaborative process (in the reg neg setting, the greater participation is by proxy) will produce better rules, more buy-in, more democracy, less litigation, and better compliance. Like e-rulemaking, reg neg has not lived up to its supporters’ highest hopes. Happily, I don’t need to get into the question of why that is; for present purposes it is enough to note that everyone, including the Administrative Conference of the United States, the United States Congress, and reg neg’s enthusiasts, all agree that it is not appropriate for every rulemaking. The circumstances have to be right. The same seems to be true for Rulemaking 2.0. The technology is not going to tell us when it should be used and when not; that remains a task for human beings.

If technology is not producing the heralded revolution in rulemaking, it is having a greater substantive impact with regard to freedom of information. Since the Freedom of Information Act was passed in 1966, the FOIA regime has rested on a request-driven model. The government has “records” in its possession; anyone can obtain copies of those records by asking for them. But why, one might wonder, must the government wait to be asked?

Well, one answer is in the form of another question: how would the government disseminate records without being asked? The pre-Internet tools—newspapers, the Federal Register, agency reading rooms, federal depository libraries—were expensive and pretty unsatisfying if the idea really is broad dissemination and meaningful availability. The electronic revolution generally, and the Internet in particular, have provided the perfect tools for affirmative disclosure of government records. And with the development of those tools has come a substantive shift in the law and policy of disclosure.

There have been two significant lurches toward greater affirmative disclosure since FOIA’s enactment. The first was adoption of the Electronic Freedom of Information Act of 1996, which made two essential amendments. First, EFOIA required that records that already had to be “made available” in agency reading rooms also be made available in electronic format. (Dating itself, the statutory language indicates that “electronic format” can mean floppy disks or CDROMs. However, those media are acceptable only if an agency has not established “computer telecommunications.”) At this point, all federal agencies have done so; so as a practical matter, the Act now requires posting to the Internet. This change did not expand the scope of affirmative disclosure requirements; it just made the covered records more meaningfully available. Thus, it was a change akin to the move to eRulemaking 1.0; not a change in the nature of the process but a gain in convenience and accessibility.

But the 1996 law also made a substantive change, meaningfully expanding the sorts of records that must be affirmatively disclosed. Under what is generally referred to as the “frequently requested records” provision, an agency has to put into the reading room (and thus online) any record that (i) has been provided to a requester and (ii) is likely to be, or has been, requested at least two more times (subsequent “requests,” plural). Thus, anything that would otherwise be “(a)(3) material,” available by request, becomes “(a)(2) material,” affirmatively disclosed, once it has been flagged as being interesting to three requesters. I don’t think it was a coincidence that this significant expansion of the affirmative disclosure obligation occurred simultaneously with the then new-found ability to provide records in electronic form.

The second large shift toward affirmative disclosure is taking place right now. Congress has had less to do with this. While the E-Government Act, the Federal Funding Accountability and Transparency Act, and other specific enactments have played a role, more important has been agency initiative and White House directive. While the Obama Administration’s Open Government Initiative perhaps promised more than it has delivered, that is primarily an indication of how bold the promises have been. The fact is that agencies are now making publicly available an unprecedented amount of data (the term “records” is in many respects anachronism).15

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15 5 U.S.C. § 552(a)(2)(D) (“Each agency...shall make available for public inspection and copying...copies of all records, regardless of form or format, which have been released to any person under paragraph (3) and which, because of the nature of their subject matter, the agency determines have become or are likely to become the subject of subsequent requests for substantially the same records...”).

16 In addition to individual agency websites generally, see each agency’s electronic reading room and open government page (http://www.[agency].gov/open), as well as data.gov, recovery.gov, USASpending.gov, and reginfo.gov. Particularly notable individual agency disclosure sites include the SEC’s EDGAR database, http://www.sec.gov/edgar.shtml; the Toxic Release Inventory, http://www.epa.gov/tri/; EPA’s “ECHO” page, with details on inspections and enforcement at 800,000 regulated facilities, http://www.epa.gov/compliance/data/systems/multimedia/echo.html; and OSHA’s equivalent site, http://oshsdvw.dol.gov. And this is just the tip of the iceberg.
Federal Districts of Georgia. Earlier in his career, he served as an Assistant District Attorney in the Chattahoochee Judicial Circuit in Columbus, Georgia.

**Vice Chair – Anna Shavers**

Anna is the Cline Williams Professor of Citizenship Law at the University of Nebraska Law School, where she teaches, among other things, administrative law and immigration law, and where she founded the school’s immigration clinic. She served as Secretary of the Section from 2006-2009, was a long-time Chair of both the Publications Committee and the Immigration Committee, was the Section’s Liaison to the ABA Commission on Immigration, and served as a Council Member. In the larger ABA, Anna has served as a member of the ABA Commission on Law and Aging and a member of the ABA Coordinating Committee on Immigration Law. Anna received her undergraduate degree from Central State University, her Master of Science from the University of Wisconsin, and her J.D. from the University of Minnesota.

**Last Retiring Chair (by operation of the bylaws) – Michael Herz**

Michael is Professor of Law and Co-Director of the Floersheimer Center for Constitutional Democracy at the Benjamin N. Cardozo School of Law, Yeshiva University. He has taught at Cardozo since 1988 and has also been a visiting professor at the NYU Law School and Princeton’s Woodrow Wilson School and an adjunct professor at Columbia. He teaches and writes primarily in the areas of administrative law, environmental law, and constitutional law, and recently became co-editor of the Breyer-Stewart administrative law casebook. Before entering academia, Michael was an attorney at the Environmental Defense Fund and a law clerk for Justice Byron White of the U.S. Supreme Court and Chief Judge Levin Campbell of the U.S. Court of Appeals for the First Circuit. He is a graduate of Swarthmore College and the University of Chicago Law School.

**Secretary – Renée Landers (Incumbent)**

Renée is Professor of Law at Suffolk University Law School and teaches administrative law, constitutional law, and health law. She also is the Faculty Director of the school’s Health and Biomedical Law Concentration. Renée was president of the Boston Bar Association in 2003-2004, the first woman of color and the first law professor to serve in that position. She has worked in private practice and served as Deputy General Counsel for the U.S. Department of Health and Human Services and as Deputy Assistant Attorney General in the Office of Policy Development at the U.S. Department of Justice during the Clinton Administration. Renée recently completed a term as a member of the Massachusetts Commission on Judicial Conduct, serving as vice chair from April 2009 until October 2010. She was a member of the Supreme Judicial Court’s committees studying gender bias and racial and ethnic bias in the courts. She is a graduate of Radcliffe College and has served as President of the Harvard Board of Overseers. Renée has held the following Section leadership positions: council member, 2000-2003, Nominating Committee member, 2003-2004; Membership Committee chair 2004-2006; co-vice chair, Health and Human Services Committee 1998-2000.

**Budget Officer – Ron Smith (Incumbent)**

Ron is Pro Bono Counsel with Finnegan, Henderson, Farabow, Garrett & Dunner, LLP. He manages Finnegan’s veteran’s pro bono program of more than 100 pending appeals in federal courts. Prior to joining Finnegan in the summer of 2008, he was Deputy General Counsel for Veterans Claims for the Disabled American Veterans, where he supervised all appeals to the federal courts for the DAV. Prior to joining the DAV in February 1989, Ron worked in the Department of Veterans Affairs Office of Inspector General. He has authored a number of articles on veteran’s law topics and has prosecuted more than 400 appeals in the federal courts, resulting in more than sixty published opinions. Ron has served on the Court of Appeals for Veterans Claims Rules Advisory Committee for many years and is a past chair of that committee. He has also been appointed to and presently serves on the Federal Circuit Advisory Council. Ron is a past President of the Federal Circuit Bar Association and a past chair of the Federal Bar Association Veterans’ Law Section. He presently serves in the ABA House of Delegates on behalf of the Federal Circuit Bar Association and was the Section’s Assistant Budget Officer for 2008-2009. He is a founding member of the Court of Appeals for Veterans Claims Bar Association.

**Asst. Budget Officer – Edward Schoenbaum**

Ed is an Administrative Law Judge for the Illinois Department of Employment Security. He is currently the ex officio Council Member on behalf of State Administrative Law and is a long-time co-chair of the State Administrative Law Committee. Ed is also a past President of the National Association of Administrative Law Judges and past Chair of the ABA’s National Conference of Administrative Law Judges (NCALJ). He is currently the Chair-Elect of the Senior continued on next page