



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

**FORUM ON ENHANCING PUBLIC INPUT IN  
Agency Rulemaking**

December 1, 2021

TRANSCRIPT  
(Not Reviewed for Errors)

*Panel 1: Defining and Identifying Sources of Public Input*

**Panelists:**

**Sally Katzen**, Professor of Practice and Distinguished Scholar in Residence, New York University School of Law; Former Administrator, Office of Information and Regulatory Affairs

**Nina Mendelson**, Joseph L. Sax Collegiate Professor of Law, Michigan Law School

**Amanda Neely**, Director of Governmental Affairs, U.S. Senate Committee on Homeland Security and Governmental Affairs

**K. Sabeel Rahman**, Senior Counsel to the Administrator, Office of Information and Regulatory Affairs

**Moderator:**

**Cary Coglianese**, Edward B. Shils Professor of Law and Professor of Political Science, University of Pennsylvania Carey Law School

**Remarks:**

**Mariano-Florentino Cuéllar**, President, Carnegie Endowment for International Peace; former California Supreme Court Justice

***Panel 2: Supplementing the Notice-and-Comment Process***

**Panelists:**

**Reeve Bull**, Research Director, ACUS

**DeWayne Goldmon**, Senior Advisor for Racial Equity to the Secretary of Agriculture, U.S. Department of Agriculture

**Eduardo Martinez**, Assistant Professor of Philosophy, University of Cincinnati

**Karianne Jones**, Senior Counsel, Democracy Forward

**Moderator:**

**Kate Shaw**, Professor of Law, Benjamin N. Cardozo School of Law; Co-Director, Floersheimer Center for Constitutional Democracy

1 (Beginning of Audio Recording.)

2 MR. WIENER: Good afternoon. I'm Matt  
3 Wiener, acting chair and vice chair and  
4 executive director of the Administrative  
5 Conference to the United States or just ACUS,  
6 as we call ourselves. Thank you for joining  
7 us today.

8 This forum comes on the heels of and  
9 builds upon our just-concluded multi-day  
10 forum on underserved communities in the  
11 regulatory process. The original impetus for  
12 today's forum, though, was the debate within  
13 ACUS proceeding its adoption of  
14 Recommendation 20 -- 2021 Managing Mass  
15 Computer Generated -- Managing Mass Computer-  
16 Generated and Falsely-Attributed Comments.

17 Several important questions arose  
18 during the debate: what role should so-called  
19 public opinion play in the notice and comment  
20 process; what sorts of views, to use the term  
21 in the Administrative Procedure Act, should  
22 have a purchase on agency decision-making;  
23 and to carry forward a question from our last  
24 forum, what can agencies do to enhance public  
25 input meaningfully?

1 ACUS Recommendation 2021 specifically  
2 reserved judgment on those questions. We've  
3 assembled two distinguished panels  
4 (inaudible) academics, advocates, agency  
5 officials, and other policy-makers to answer  
6 them and related questions today. Not all of  
7 our panelists, of course, will give the same  
8 answers.

9 Today's forum, like our last forum,  
10 will yield important insights in information  
11 that I suspect agency officials will rely  
12 upon in their ongoing evaluation of their  
13 rule-making processes, and I know that ACUS,  
14 for its part, will rely upon in carrying out  
15 its own advisory mission.

16 Before we turn to date -- today's  
17 panel, I'd like to offer a few thanks to my  
18 colleagues Reeve Bull, Jeremy Grayboyce  
19 (phonetic), and Dani Schulkin for planning  
20 this forum, to our distinguished panelists,  
21 including our former vice chair, Sally  
22 Katzen, for giving us their time and  
23 expertise, and to all of you for joining us  
24 this afternoon and participating in the  
25 conversation.

1 I'd, also, like to send special thanks  
2 to our keynote speaker, the Honorable Tino  
3 Cuellar, the newly-installed president of the  
4 Carnegie Endowment for International Peace  
5 and previously a Justice on the Supreme court  
6 of California and before that, the Stanley  
7 Morrisson professor at Stanford Law School.  
8 I could go on listing the many positions he's  
9 held.

10 ACUS counts Tino, if I may, among its  
11 very best friends. He's served on ACUS's  
12 council, and he has co-authored ACUS's  
13 pathbreaking report on the use of artificial  
14 intelligence in federal regulatory programs.  
15 We're honored that he's made time for us  
16 today in his unenviably busy schedule.

17 I'm now pleased to recognize another  
18 leading light in our field, Professor Cary  
19 Coglianese of the University of Pennsylvania,  
20 the chair of ACUS's rule-making committee to  
21 kick off our first panel. Professor  
22 Coglianese brings to us his experience  
23 chairing the committee meetings from which  
24 ACUS's recommendation on mass comments arose.  
25 Professor Coglianese?

1 MR. COGLIANESE: Thank you very much,  
2 Matt, and welcome to everyone who is  
3 attending today. Needless perhaps to say,  
4 rule-making is an important part of the law-  
5 making function in the United States,  
6 arguably by volume the principal means by  
7 which law is made in the United States today.

8 But for many members of the public,  
9 rule-making has been, and still is, a  
10 relatively hidden process. It's not part of  
11 really what is in normal civics education.  
12 We don't learn about it from School House  
13 videos about how a bill becomes a law and so  
14 forth.

15 But there is a rule for the public  
16 that's built into the Administrative  
17 Procedure Act and its rule-making procedures  
18 through notice and comment. There are other  
19 ways for the public to be involved, as well.  
20 We do know that on occasion there are rules  
21 that elicit hundreds of thousands, maybe even  
22 millions, of comments from members of the  
23 public.

24 But as a general matter -- and we have  
25 empirical research on this -- the medium

1 number of comments per rules is closer to  
2 about 12, and the module number of comments  
3 on agency-proposed rules is zero. So there  
4 are opportunities.

5 It seems clear to think about the role  
6 of public input and enhancing the role for  
7 public input, and we're hearing this opening  
8 panel of today's symposium on public input in  
9 the rule-making process to focus on different  
10 forms of public input and how it can be  
11 useful in crafting agency rules.

12 I, also, want to note that this is a  
13 timely issue. The President has issued an  
14 executive order calling for greater attention  
15 to equity and inclusion in rule-making.  
16 There's interest on Capitol Hill in these  
17 issues. In fact, a sub-committee hearing in  
18 the House Judiciary Committee was held on the  
19 Administrative Procedure Act and some of  
20 these questions arose there.

21 And as Matt has already indicated,  
22 ACUS has an interest in both rule-making and  
23 public participation in it. As he mentioned,  
24 this session builds on some very recent work,  
25 Recommendation 2021-1 on Managing Mass

1 Comments, Computer Generated, and Falsely-  
2 Attributed Comments. It, also, builds, as  
3 well, on ACUS's Recommendation 2018-7 on  
4 Public Engagement in Rule-Making. And as  
5 Matt noted, I chair the Rule-Making Committee  
6 and develop -- like, as full-disclosure --  
7 developed the recommendations that lead the  
8 committee into developing recommendations in  
9 both of these areas.

10 And Dani Schulkin, the attorney  
11 advisor tasked with Recommendation 2021-1,  
12 has also been instrumental in organizing  
13 today's dialogue, and I want to thank her for  
14 her leadership role.

15 We're here in this first session to  
16 consider questions about what it means for  
17 the public to provide input to an agency,  
18 what is public input, what purpose does input  
19 from the public serve, and what types of  
20 public input do agencies, courts, the  
21 legislature, or the public perceive to be  
22 useful.

23 And I'm really excited and pleased  
24 that -- to sort through these questions we  
25 have four distinguished and expert panel



1 members. Sally Katzen is the Professor of  
2 Practice and Distinguished Scholar in  
3 Residence at NYU Law School, and she is the  
4 former administrator of the Office of  
5 Information and Regulatory Affairs, as well  
6 as formerly a Deputy Assistant to the  
7 President for Economic Policy and Deputy  
8 Director of the National Economic Council in  
9 the Clinton Administration.

10 And before joining the Clinton  
11 Administration, Sally was a partner in the  
12 Washington Law Firm of Wilmer, Culter, and  
13 Pickering. And she is currently a senior  
14 fellow with the Administrative Conference.

15 Our -- our next panel member, Sabeel  
16 Rahman, is Senior Counsel to the  
17 Administrator of the Office of Information  
18 and Regulatory Affairs. He's on leave  
19 currently from his faculty position as an  
20 Associate Professor of Law at Brooklyn Law  
21 School. And previously, he served as  
22 president of DEMOS (phonetic), a think-tank  
23 dedicated to racial equity, economic  
24 inclusion, and -- and democratic  
25 participation.

1        Our next panel member, Nina Mendelson,  
2 is the Joseph L. Sax Collegiate Professor of  
3 Law at the University of Michigan Law School  
4 -- go Blue -- and a Senior Fellow at the  
5 Administrative Conference. Previously,  
6 before joining the faculty at Michigan, she  
7 served as an attorney with the Justice  
8 Department's Environment and National  
9 Resources Division.

10        And last but not least on our panel,  
11 Amanda Neely is currently the Director of  
12 Governmental Affairs on the U.S. Senate on  
13 Homeland Security and Governmental Affairs,  
14 and she, also, serves as general counsel to  
15 Senator Rob Portman and previously served in  
16 other positions on Capitol Hill and clerked  
17 for the D.C. Circuit Court of Appeals and  
18 practiced law with the Washington office of  
19 Gibson and Dunn. She is a liaison  
20 representative to ACUS today.

21        I want to thank you, Sally, Sabeel,  
22 Nina, Amanda for being her today. For  
23 members of the audience, I just want to alert  
24 you that we are going to start with some  
25 initial conversation with the panel members,

1 and then we will turn to questions from you.  
2 And there's a little button down at the  
3 bottom of your Zoom screen labeled Q&A, and  
4 you can press that button and enter questions  
5 in there that I will be able to see. And I  
6 will try to pose as many of the questions  
7 from the audience as I can to the panel  
8 members. So those are our -- our ground  
9 rules for how we will proceed.

10 Let's get to the conversation. And,  
11 Sally, if I might start with you and invite  
12 you to tackle some foundational questions for  
13 us. Would you, to get us started, offered  
14 kind of a big-picture view of the role and  
15 the value of public input in the rule-making  
16 process. You know, in particular, is rule-  
17 making a plebiscite? If not, then how should  
18 agencies view the contributions that the  
19 public can make in the rule-making process?

20 MS. KATZEN: Well, thank you, Cary,  
21 and thanks to ACUS for assembling this stream  
22 of symposia and seminars. I think it's  
23 serving a very useful function. And now,  
24 Cary wants me to talk big-picture, say, 3,000  
25 feet, public input in notice and comment

1 rule-making.

2 And I guess you're basically asking  
3 what are the theories, what's the value at  
4 stake, what's the practice, what's the  
5 potential in a few minutes. So let me start  
6 particularly for those who are not crazed  
7 administrative-lawyer types. And there must  
8 be somebody in this world doesn't live and  
9 breathe this stuff.

10 You start with 553 of the APA, which  
11 is fairly simple and straight-forward.  
12 Agencies are to provide notice of what they  
13 intend to do. And that's only fair to those  
14 affected that they get a heads-up. And  
15 agencies are to afford interested persons an  
16 opportunity to comment.

17 They, especially those on the ground,  
18 may have something to contribute to the  
19 decision-making process. Now, over the years  
20 since 1946 when the APA was enacted, the  
21 courts have fleshed-out or some would say  
22 dramatically expanded these skeletal  
23 requirements.

24 So now, the agencies notice not only  
25 has to say what it is thinking of doing but

1 why, and specifically, the agency has to lay  
2 out what data or studies or analysis it is  
3 relying on to support its proposed cause of  
4 action.

5 And the rationale for this was that  
6 commentators would be able to meaningful  
7 critique the basis for the agency's work,  
8 either affirmatively support and collaborate  
9 it with additional data or studies or dispute  
10 it by challenging the methodologies used or  
11 providing different, contrary studies or  
12 data.

13 And as the nature of the agency's  
14 notice -- notices changed, so, too, did the  
15 nature of the comments that were filed.  
16 Longer and more detailed filing became the  
17 norm, often with voluminous reference  
18 materials or original studies attached.

19 In one respect, this is a very good  
20 development in that one of the purpose of  
21 comments is to educate the agency, and all  
22 this material can provide additional  
23 resources for the agencies. Another purpose  
24 of the -- or objective of the comment period  
25 is to encourage buy-in. If you participate

1 in the discussion, so to speak, and the  
2 agency has to consider your data and say why  
3 it accepts or rejects it, then you're more  
4 likely to cooperate, which is very important  
5 to the regulatory world because there is no  
6 enforcement officer on every block assuring  
7 that regulatory agencies fulfill their  
8 responsibilities.

9 But not all who are affected by a  
10 proposed rule have either the incentive or  
11 the capacity to prepare and submit detailed  
12 comments. I'm referring here principally to  
13 the intended beneficiaries of the proposals.

14 There are some NGOs that do a very  
15 good job, but the man or woman in the street  
16 who lives or works next -- or lives next to  
17 or works in a particular factory has been  
18 conspicuously missing from the discussion.

19 Now, somewhere along the lines,  
20 somebody got the bright idea of generating  
21 public support or opposition via postcards or  
22 Xeroxed copies of form letters expressing  
23 enthusiasm or outrage, and these manifested  
24 themselves later in mass emails to the  
25 docket.

1 But how do we know if they're real or  
2 if they're truly representative of public  
3 opinion? Then we had those who shouted,  
4 wait. They were upset with this development.  
5 Rule-making should be data-driven, not a  
6 plebiscite.

7 We are not taking a vote, and that was  
8 the crux of the debate that led to this  
9 panel, actually. And -- and Richard Pierce  
10 from GW is just adamant it is not a  
11 plebiscite. I wish he were here so I didn't  
12 have to channel him, but let me say, no one  
13 thinks it's a plebiscite.

14 We are not arguing it is a plebiscite.  
15 We are not talking taking a vote. But those  
16 cards and letters and emails that people were  
17 motivated to send may have something to  
18 contribute.

19 Remember I mentioned the contribute of  
20 those on the ground and buy-in by regulated  
21 entities? Their data-driven analysis is  
22 essential to good decision-making, but it's  
23 not sufficient. A corollary of what they are  
24 looking at is public acceptance of the  
25 proposal. And it is perceived as not solving

1 the problem, or even if the intended  
2 beneficiaries don't have confidence it will  
3 solve the problem, then it might never really  
4 get off the ground.

5 And old-timers -- there's some of you  
6 out there -- may remember DOT's Ignition  
7 Interlock Rule for seatbelts, which died a  
8 very quick death in public opinion and  
9 shortly thereafter in Congress. The younger  
10 generation need only look at mask mandates.  
11 I will say no more because I will otherwise  
12 get in trouble.

13 So without treading on the topics that  
14 the other panelists will want to discuss, let  
15 me end by saying that there's a lot of space  
16 between data-rich comments and a plebiscite.  
17 And there are opportunities in the rule-  
18 making process beside the 552 notice and  
19 comment to accommodate increased public  
20 participation. Thank you.

21 MR. COGLIANESE: Thank you very much,  
22 Sally. And if any panel member does want to  
23 argue that rule-making is a plebiscite, I  
24 certainly invite you to do that. Let's turn  
25 to Nina if -- if we -- if I may. You know,



1 sometimes with the kind of outpouring of  
2 public support that Sally referred to in the  
3 Ignition Interlock case or mask mandates or  
4 net neutrality, we do see a large outpouring  
5 of emails and public expressions of -- of  
6 views.

7       And sometimes people worry about  
8 embracing public input and encouraging public  
9 participation because it might mean agencies  
10 become flooded with lots of public input that  
11 contains little by way of substance and --  
12 and maybe they -- agencies don't even know  
13 what to do when they're inundated with  
14 these -- these comments.

15       Can you help us understand? Do you  
16 think these worries are valid? How do you  
17 think agencies should respond? Are there  
18 instances when these type of mass comments,  
19 in particular, might be important?

20       MS. MENDELSON: Yeah. Well, first,  
21 thanks so much to ACUS for putting this panel  
22 together and for including me on it. I'm  
23 very pleased to be a part of this discussion.  
24 And of course, as you already mentioned in  
25 your opening remarks, we sometimes do, in

1 some rule-makings -- by no means all -- get  
2 large volumes of comments pouring in from  
3 ordinary individuals. And some commentators  
4 have been dismissive of these kinds of  
5 comments, and I just want to acknowledge that  
6 there are occasionally, if you will, you  
7 know, clunkers among individual comments, as  
8 there are no matter who submits them.

9 I once found an uploaded credit card  
10 statement on Regulations.gov. Amanda -- I'm  
11 sure she'll talk about it in more detail --  
12 lead a report identifying comments that at  
13 best have to be understood as having from  
14 internet trolls. And we do still see  
15 occasionally, I think, one-sentence  
16 statements along the lines of the postcard  
17 campaigns that Sally alluded to, you know,  
18 one sentence in Regulations.gov that says,  
19 you know, I support this rule, or I oppose  
20 this rule.

21 But I do want to emphasize that lots  
22 and lots of comments coming in from  
23 individuals include statements of reasons,  
24 why people hold the views that they hold and  
25 reports of their personal experiences. Right

1 now, there's an open docket on the Dreamer's  
2 Policy, and lots of individuals have filed  
3 very thoughtful comments and reports of their  
4 own needs and preferences in that comment  
5 period.

6 So why might this be relevant?

7 Everyone agrees that rule-making cannot be a  
8 plebiscite, if nothing else because agencies  
9 function under a statutory mandate that tells  
10 them to take into consideration lots of  
11 issues.

12 Public views have never been the only  
13 issue that an agency could consider, but  
14 there are clearly lots of times when public  
15 views are going to be relevant to the policy  
16 issues that an agency has to resolved. So  
17 I -- I thought it might be useful for me just  
18 to provide a couple of examples on this.

19 There is an Americans with  
20 Disabilities Act rule-making that considered  
21 the importance of near-by accessible  
22 bathrooms to wheelchair users and the dignity  
23 of wheelchair users. You know, comments from  
24 individuals are going to be of obvious value  
25 here as the agency assesses essentially the

1 importance of a policy like this. Comments  
2 can alert an agency that a mandate is going  
3 to face serious public resistance perhaps  
4 because it's too burdensome or paternalistic,  
5 along the lines of the Ignition Interlock  
6 that Sally mentioned, or it could, also, be  
7 the wrong use of a shared resource.

8       Here I would just share a story from  
9 my one part of the world, Michigan, right? A  
10 few years ago the Coast Guard decided it  
11 would create live fire zones in the Great  
12 Lakes for weapons practice. They thought  
13 this was a good idea. They thought it was  
14 justified. They thought it was not too  
15 risky.

16       They did not put the proposal out for  
17 public comment. If they had, they  
18 undoubtedly would have detected the  
19 substantial public opposition that ultimately  
20 just halted the project. People did not want  
21 this important shared resourced used in this  
22 way. This is a function that public comment  
23 appropriately serves and usefully serves, I  
24 think.

25       One last example, environmental

1 justice. You know, there's an issue pending  
2 right now under the National Environmental  
3 Policy Act about whether agencies doing  
4 environmental analyses need to think about  
5 cumulative impacts.

6 This is especially going to impact  
7 low-income communities and communities of  
8 Color, and again, an example from my area,  
9 southwest Detroit where residential  
10 neighborhoods are placed alongside multiple  
11 polluting sources.

12 Okay, to be clear, this is not a  
13 technical issue. This is really a policy  
14 question, and the policy question is, does  
15 the -- or the do the community quality of  
16 life concerns outweigh the burden, if you  
17 will, of longer environmental analyses? How  
18 important are these issues? Are they  
19 important enough to justify asking agencies  
20 to do more in-depth analysis that considers  
21 cumulative impacts?

22 Community views that individuals have  
23 an opportunity to submit through the comment  
24 period are clearly going to be relevant to  
25 this agency decision and, I think, important

1 to this agency decision. So that's just a  
2 few examples. You know, comments will not be  
3 relevant to every single agency decision  
4 that's put out for public comment, but  
5 they're going to be relevant to many. And I  
6 think the door is open to public comments,  
7 and we -- we really need to recognize their  
8 importance.

9       So what should agency do with them?  
10 I'll just say, you know, when I first started  
11 working on this issue ten years ago, agencies  
12 seemed frequently to treat these comments  
13 with short shrift. They might not offer any  
14 response at all, beyond saying, we got a lot  
15 of comments. I think that's not the right  
16 approach.

17       Agencies should take large volumes of  
18 comments coming in from individuals quite  
19 seriously. They can't serve as a plebiscite,  
20 but we could think of them or perhaps  
21 agencies could think of them as a little bit  
22 like a yellow traffic light, all right? They  
23 might prompt any agency to pause. Perhaps an  
24 agency might actually recognize that there's  
25 a significant enough of people with

1 particular experiences they hadn't consider.  
2 They might consider outreach to a  
3 particularly affected community and -- and  
4 investigate those issues more deeply. The  
5 public comment process could -- could prompt  
6 that kind of act.

7       At -- in a -- at a minimum, I think it  
8 is appropriate and feasible for an agency to  
9 offer a brief answer, at a minimum, to issues  
10 raised in comments. Even if an agency does  
11 receive a lot of comments that are like --  
12 feel post-card campaigns -- they just state a  
13 simple preference -- the agency could at  
14 least acknowledge their receipt so public  
15 commentors know they're being heard. And  
16 I'll just say happily, I think more agencies  
17 are systematically taking individual comments  
18 quite seriously now, and I think that's a  
19 great development.

20       So, you know, even in the net  
21 neutrality rule-makings, during both the  
22 Obama and Trump administrations, the FCC  
23 acknowledged the comments it received. And  
24 the Labor Department recently issued new  
25 regulations under the Fair Labor Standards

1 Act for jobs where customers tip, the tip  
2 regulations, and they recognized and  
3 responded, you know, numerous issues raised  
4 by individual commentors, both employees who  
5 worked in job where customers tip and  
6 employers of those people.

7 So I think that's a great development,  
8 and I'm hoping that that will be the norm,  
9 that agencies will respond to these comments.  
10 Agencies already respond systematically and  
11 thoroughly to comments filed by trade  
12 associations, regulated entities, non-  
13 profits.

14 They should, also, acknowledge and  
15 engage significant issues raised in comments  
16 that come in from individuals, even when they  
17 arrive in large quantities.

18 MR. COGLIANESE: Well, and -- and --  
19 and to that point -- and maybe to make it a  
20 little more feasible for agencies to engage  
21 in that kind of response -- I would just make  
22 a plug for the work that ACUS did in leading  
23 up to and developing Recommendation 2021-1,  
24 which is all about managing mass comments,  
25 computer-generated comments, falsely-



1 attributed comments so that it's -- it is  
2 easier to handle an onslaught of large volume  
3 of comments and to -- to be able to process  
4 them meaningfully and respond to them.

5       Sabeel, if I could turn to you. Right  
6 now we have -- you know, up until now we've  
7 been talking a lot about commenting and the -  
8 - the part of the -- the, you know, 553  
9 process that -- that's a part of the  
10 Administrative Procedure Act for the public  
11 to provide input.

12       But you're at an office that has  
13 something to do with rule-making, and yet  
14 isn't in the APA, so there's other -- other  
15 aspects here of public input, and I wondered  
16 if you could focus our attention on when and  
17 how public input can take place, beyond just  
18 submitting comments on proposed rules. And  
19 do you see there might be any particular  
20 value, for example, to early input before a  
21 proposed rule is issue, or -- or perhaps some  
22 value even after a final rule has been  
23 issued?

24       MR. RAHMNA: Yeah, absolutely, and  
25 thanks again to Cary and ACUS and this panel.

1 It's great to be here with Sally, Amanda, and  
2 Nina. So just picking up on that theme, you  
3 know, I think a lot of examples actually that  
4 Nina just shared really just apply more --  
5 beyond just the notice and comment period  
6 itself, right?

7       So if you think about all the -- all  
8 the policy judgements and all the different  
9 types of information, quantitative and  
10 qualitative, that go into designing a policy  
11 before it becomes, you know, the many  
12 hundreds of pages of regs -- or reg text that  
13 we see published in the Federal Register when  
14 it goes out for comment. There's a lot of  
15 judgement calls that need to be made at that  
16 early stage.

17       I think one thing that is really  
18 interesting to think about -- there's a lot  
19 of, I think, need and desire to -- to do more  
20 is to think about how do we engage  
21 particularly-affected communities and in  
22 particular those kinds of -- those  
23 beneficiaries are impacted, communities that  
24 Sally mentioned, who are -- might be  
25 underserved or might be traditionally not

1 able to engage in sort of traditional notice

2 and comment.

3 How do we find ways to engage those

4 constituencies upstream from when a notice

5 and comment goes out, when -- when the agency

6 is thinking about, you know, its overall

7 design strategy for that policy, how it's

8 going to implement a set of policy choices,

9 right?

10 If we think, for example, in service

11 delivery of various kinds. I think many

12 agencies do. Really vital services. Lots of

13 design choices going into, you know, what

14 kinds of forms do people need to fill out,

15 what might be the administrative burdens that

16 might be perhaps unnecessary or create

17 downstream affects that make it harder for

18 people to get access to the benefits they

19 need to get to.

20 There are a lot of design questions

21 that, you know, some of it might come up once

22 it goes out for comment, but that --

23 especially if we're talking about engagement

24 from constituencies who might not be bringing

25 tons of data, say, or, you know, a well

1 footnoted report. That input might actually  
2 be more impactful and more helpful early on  
3 in the process. So I think that's one piece  
4 to really think about.

5       The second piece is that after, once a  
6 rule is finalized and out in the world, how  
7 do we create systems to learn from what's  
8 happening on the ground and make improvements  
9 over time? And so I know there's lots of  
10 interest from -- starting from a couple years  
11 ago, right, in retrospective reviews of  
12 regulation.

13       But I think public engagement is a  
14 part of that, right? Are some of these  
15 policies that might be designed to, say, have  
16 an impact there on a particular community  
17 facing pollution or some of these service  
18 delivery programs that I mentioned -- is it  
19 actually reaching the people who we need it  
20 to reach?

21       Are there other implications that  
22 weren't thought about or that might have been  
23 assessed in one way when the rule was  
24 proposed, but it turns out that once it's out  
25 in the world, we're seeing a different kind

1 of impact, right? Those are things that we  
2 want to learn from, and I think, you know,  
3 good policy-making sort of requires some good  
4 channels for doing that. Public engagement I  
5 think is important to that, too.

6 The last thing I'd mentioned -- and  
7 there's lots already to talk about for all of  
8 us -- is I, also, think it's helpful for  
9 agencies and just for all of us who care  
10 about this to be thinking about what's the  
11 right mechanism for engaging with these  
12 communities, right?

13 We sort of have our standard, open-  
14 government toolkit, right? You know, put  
15 things out for comments, maybe there's a  
16 townhall meeting of some kind and so on, but,  
17 you know, for folks who do work in  
18 organization and civic engagement, sort of  
19 wearing some of my earlier hats from before  
20 this particular job, one of the best  
21 practices in civic engagement is actually the  
22 real -- the need to work with communities  
23 where they're at, right, to work with trusted  
24 intermediaries and -- whether it's non-profit  
25 organizations or locally-imbedded

1 organizations to find ways to proactively  
2 engage in communities whose voice we need to  
3 hear from, right?

4 The kind of passive, open-door works  
5 for those who have resources and  
6 sophistication and know-how but doesn't  
7 always get you the full range of -- of voices  
8 and -- that we might need to hear.

9 And -- and, also, I think to the point  
10 of -- about mass comments and, you know,  
11 date -- worries about sort of that this is --  
12 we don't want this to be a plebiscite, I do  
13 think structured engagement that is more  
14 proactive, right, also changes the tenor and  
15 quality of the discussion, right?

16 If -- if you're convening stakeholders  
17 in a particular way, you know, depending on  
18 how you set it up, you can actually get much  
19 more detailed information than what might on  
20 a postcard but actually get some nuance and -  
21 - and (inaudible), especially if we're  
22 talking about the kind of value judgements,  
23 say, involving human dignity or involving  
24 complex trade-offs between, you know, health  
25 and -- and technical issues that, you know,

1 might come up in an environmental justice,  
2 say, that need a mention.

3       So I think it's both the  
4 upstream/downstream, sort of when do we  
5 engage and, also, the how, right, getting --  
6 getting above and beyond the notice and  
7 comment vehicle.

8       MR. COGLIANESE: Yeah, that how makes  
9 me, you know, think about the body that  
10 Amanda works within, the -- what has been  
11 called the greatest deliberative body in the  
12 world. We'll leave for another discussion  
13 whether that's, you know, true still today,  
14 but certainly, it's true that Congress, both  
15 Houses, provide opportunities for the public  
16 to provide input to their elected  
17 legislatures about many issues, some of which  
18 include agency rule-making.

19       So, Amanda, if we could turn to you.  
20 A couple of years ago, you led a subcommittee  
21 report on the public comment process in rule-  
22 making. Can you tell us what you learned,  
23 what lessons you draw from the work you've  
24 done in the -- the work that you do within  
25 the legislature about how public input can

1 inform the rule-making process? And in  
2 particular, do you think there's a role for  
3 Congress here?

4 MS. NEELY: Thank you so much, Cary.  
5 I really appreciate it. And thank you to  
6 ACUS for hosting us here today for this  
7 exciting discussion. I always enjoy this  
8 topic, and I will offer the standard  
9 government caveat that all the opinions I  
10 express today are my own and not necessarily  
11 those of Senator Portman or the Senate or the  
12 Senate Homeland Security and Governmental  
13 Affairs Committee.

14 So I previously had the real honor and  
15 privilege to work on the permanent  
16 subcommittee on investigations, which is just  
17 this great subcommittee that allows staff to  
18 sit around and think for a long time about  
19 big problems and -- and research them and  
20 investigate them and produce reports on them  
21 and then hopefully write legislation based on  
22 those reports.

23 And if anyone has been following this  
24 saga with -- with any intention, you'll see  
25 that there's not new legislation on this



1 particular problem that I'm about to talk  
2 about, and I would love to open the floor to  
3 our -- our -- everyone here today, our  
4 audience here today.

5       If you have suggestion about how to  
6 address some of these issues without  
7 trampling on the First Amendment and without  
8 harming the ability of individuals and groups  
9 from submitting their legitimate comments,  
10 and so -- and let me back up there a little  
11 bit when I talk about -- the vocabulary is --  
12 I'll use legitimate, but we can see if  
13 there's a better word for it than that.

14       So this opportunity at PSI gave me the  
15 chance to look back at the foundations of the  
16 Administrative Procedure Act, and I found  
17 this report from 1939 -- or, well, it was a  
18 directive from President Roosevelt in 1939 to  
19 his attorney general, and he said that his  
20 attorney general should look into how the  
21 regulatory process worked and how they could  
22 improve it.

23       And his attorney general produced a  
24 report in 1941, and it stated that knowledge  
25 is rarely complete, and it must always learn

1 the frequently-clashing viewpoints of those  
2 whom its regulations will affect. And I'll  
3 paraphrase the rest of this. Participation  
4 by these -- the groups of people who affected  
5 by regulations and the rule-making process is  
6 essential in order to permit administrative  
7 agencies to inform themselves and to afford  
8 adequate safeguard to private interests.

9 And the report instructed that agency  
10 procedures should be adapted to give adequate  
11 opportunity to all persons affect to present  
12 their views, the facts within their  
13 knowledge, and the danger and benefit of  
14 alternative courses.

15 And I really appreciated that that's  
16 what underpins the APA and what I think has  
17 been the driving force behind a lot of our  
18 thoughts about regulatory legislation going  
19 forward. The people, everybody who's  
20 affected by rule-making should have the  
21 opportunity to participate, and I firmly  
22 believe that. And I think that was the  
23 belief when we came into the internet age in  
24 the early 2000s, and we started moving toward  
25 online commenting.

1 And then in 2004, though, there was a  
2 really great article by (Inaudible) Professor  
3 Beth Novak at the time, and -- and she had  
4 written a little bit of a caveat, which is  
5 increased network affects may not improve the  
6 legitimacy of public participation, for  
7 without the concomitate processes to  
8 coordinate participation, quality input will  
9 be lost. Malicious, irrelevant material will  
10 rise to the surface; information will not  
11 reach those who need it.

12 So we now have these competing views  
13 here, getting comments from individuals who  
14 are affected by regulations, but then, as she  
15 notes, malicious, irrelevant material on the  
16 other hand.

17 And so when -- whenever I talk about  
18 these issues, I want to be very, very clear  
19 that when I say legitimate comments, I think  
20 that individual comments from everyday people  
21 who might have a regulation that affects  
22 their city or have an experience like the  
23 Dreamers, who want to express their feelings  
24 about coming to American and their experience  
25 here in America, I think those, certainly,

1 qualify on the legitimate side. But then  
2 what we have seen I think bears out some of  
3 Professor Novak's 2004 concerns.

4 And -- and as Cary noted, lots of  
5 regulations don't get any comments at all.  
6 Some get 12. That's kind of the norm. But  
7 what we are starting to see more of are some  
8 regulations that are getting millions of  
9 comments.

10 And that would be okay if those are  
11 billions of American wanting to weigh  
12 individually and say, I have a problem with  
13 this regulation, or I think this regulation's  
14 great. But what we have started to see is  
15 that these are not necessarily comments that  
16 are being submitted by individual Americans  
17 with a -- with a sincere thought on a rule-  
18 making. Some of these are comments that are  
19 being submitted by bots.

20 They're submitted by large interest  
21 groups that have membership lists that --  
22 they'll submit the comments from their  
23 membership list without the individual  
24 members knowing that they're being submitted  
25 on their behalf. And that's less, at least,

1 sincere engagement.

2 And then even worse in some cases,  
3 we've seen people having their identities  
4 stolen and comments submitted under those --  
5 under those identities. And so if Joe Smith  
6 has submitted a comment, and it's not --  
7 that's probably a bad name to use given that  
8 -- that would be a -- may be lots of Joe  
9 Smiths out there.

10 But if Joe Smith who lives at 101 Deep  
11 Creek Road submitted a comment and that Joe  
12 Smith said, well, actually I believe the  
13 opposite, and I don't want to have anything  
14 to with this regulation, then we have a  
15 problem.

16 And -- and it's -- it's very unclear  
17 what we need to do about this. We saw this  
18 problem really emerge in the net neutrality  
19 rule-makings, and that's what led to our  
20 interest in this topic at PSI. We saw in the  
21 Restoring Internet Freedom Rule-Making, which  
22 repealed net neutrality, there were 24  
23 million comments submitted.

24 That would mean that every -- it would  
25 be the equivalent of every single citizen of

1 the top -- I think it's 12 cities by  
2 population in the United States submitting a  
3 comment on this. Then peer research found  
4 that about 500,000 of those comments, which  
5 is about the size of Atlanta -- 500,000 were  
6 submitted by bots from Russia. That is a  
7 real problem.

8       So when we talk about data-driven  
9 analysis, which I think Sally and Nina were  
10 talking about, you want to go through and  
11 look at those 24 million comments and analyze  
12 those comments on pro versus con on this  
13 rule-making, which lots and lots of people  
14 did.

15       That would be great, except for those  
16 flags are being thrown up by Russian -- some  
17 of them are being thrown up by Russian bots,  
18 not by American citizens. And do we want to  
19 be taking into account what Russian bots are  
20 saying, like an Atlanta-size city worth of  
21 Russian bots. And I think the headlines from  
22 that time kind of bear out those concerns. A  
23 Slate headline from 2019 stated, A Broken  
24 System Helped FCC Kill Neutrality; It  
25 Afflicts the Whole Government.

1 The Washington Post headline: Fake  
2 Comments Flooded in When the FCC Repealed Net  
3 Neutrality; They May Count Less than You  
4 Think. So these fake comments are really  
5 undermining the system and this trust that we  
6 would hope American citizens could have in  
7 the rule-making process.

8 That was the FCC. The FCC has one of  
9 the more robust systems called the Federal  
10 Document Management System for accepting  
11 comments, and they accept -- they make it a  
12 policy to accept anything the people send, up  
13 to and including I think at one point  
14 executable files that if people then opened  
15 them, it would download a virus onto their --  
16 their computer, also including things like  
17 the entire copy of Les Mis or a whole movie  
18 script that are just abusive comments.

19 These are not -- these are individual  
20 people, and maybe the entire copy of Les Mis  
21 has some relevancy to how they feel about  
22 their government or net neutrality, but most  
23 likely, they were doing it to try to  
24 overwhelm the system.

25 And I'm picking a lot on FCC as I

1 said. Another good example, in December  
2 2019, there's a publication called Tech  
3 Crunch. They wrote an article about how they  
4 submitted 1,001 (inaudible) fake bot  
5 (inaudible) comments that sounded like human  
6 speak to SMS (inaudible) rule-making on  
7 Regulations.gov, and that comprised more than  
8 55 percent of the comments on one rule.

9       And in a follow-up -- so those got  
10 through, no flag. And in a follow-up study,  
11 people -- they had -- average people would  
12 guess which of those were submitted by real  
13 people, and -- versus bots, and they only got  
14 it right about half the time, so it's  
15 basically a coin flip. And so the technology  
16 is good enough that it actually sounds like  
17 people submitting these comments when it's  
18 not.

19       So that comes into the problem of what  
20 do we do about this. And I spend a lot of  
21 time thinking about this and got lots of  
22 comments back on drafts of proposals, and  
23 lots of people had concerns that it would  
24 stifle regular American citizens from  
25 commenting on rule-making or that it would



1 potentially violate the First Amendment. We  
2 don't want to do that. So we took a step  
3 back, and we've been tracking it since then.  
4 We think the agencies have taken some steps  
5 in the right direction.

6 They've instituted ReCAPTCHA on  
7 Regulations.gov, I believe, which reduces the  
8 ability of bots to post comments. They  
9 posted some gatherings to talk about how to  
10 reduce fraudulent comments from -- and -- and  
11 how to improve the system. ACUS has done a  
12 lot of good work on this front, but I think  
13 it would be great to hear views from other  
14 people and see if there are ways that  
15 Congress can -- can help out to bring online  
16 commenting into the modern era.

17 MR. COGLIANESE: Excellent. Thank you  
18 very much, Amanda. And let me build on that  
19 last point and invite members of the audience  
20 here. This is session on public input, so we  
21 value your input. And I want to remind you  
22 to -- you can post your questions in the Q&A  
23 function down at the bottom of your Zoom  
24 scene, and we will try to get through as many  
25 of them as we can.

1 Let me turn to the panel first and see  
2 if anyone has any, you know, responses to  
3 what others have said, you know, any -- are  
4 you inspired to -- to add -- add some more?  
5 So, Sally, let me turn to you first.

6 MS. KATZEN: Well, Thank you, Cary.  
7 And I mostly want to associate myself with  
8 Sabeel's comments. But as background to it,  
9 I want to emphasize that not all agencies are  
10 the same, and not all issues are the same,  
11 which is one of the reasons why, when you  
12 think about legislation, it is very hard  
13 because your mind immediately goes to  
14 outlier, immediately goes to the agency that  
15 this is going to totally mess up or that this  
16 is going to be totally unproductive.

17 And having said that agencies are  
18 different, that leads me to some place that  
19 Sabeel was starting to go, which is the  
20 consulting early on. And that's done, not by  
21 OIRA (phonetic), but by the agencies. And  
22 that's an outreach as they're thinking  
23 through how to craft the notice of proposed  
24 rule-making. What really is the problem?  
25 What really will help solve that problem?

1 And I -- I stress it in those terms that they  
2 need to talk to the regulated beneficiaries.  
3 They need to be proactive in Sabeel's terms.

4 And let there be no mistake, this  
5 isn't favoritism to the disadvantaged, by any  
6 means. Every regulated entities, when it  
7 knows that an agency is working on an NPRM,  
8 goes running into the agency with all their  
9 materials, talking points, and whatever, and  
10 they try to influence how the NPRM will come  
11 out. That's what the regulated entities do.

12 So if we're not getting that kind of  
13 influx from the regulated -- regulatory  
14 beneficiaries, then the agency, I think,  
15 should, in its infinite wisdom, look through  
16 the stakeholder list, look through it's --  
17 it's subscribers, or just go into the  
18 community and -- and talk to people.

19 And what strikes me as frustrating is  
20 that in Executive Order 12866 back in '93 and  
21 then in the Obama executive order, it talks  
22 about early consultation, early as in pre-  
23 drafting of the NPRM. Early consultation  
24 with those who have something to contribute.  
25 I -- I just wanted to kind of push Sabeel's

1 comments a little bit in that direction.

2 MR. COGLIANESE: And so maybe -- maybe  
3 the kind of concerns that Amanda was  
4 expressing, and others have expressed, about  
5 these fake comments or computer-generated  
6 comments in some sense tainting or de-  
7 legitimating, even to -- even to a small  
8 degree the comments that are coming in after  
9 the proposal, maybe what the -- one  
10 implication of this should be to really  
11 emphasize the agencies.

12 That is all the more reason why you  
13 need to do more to go out there and get  
14 genuine feedback and input and, you know, in  
15 the spirit of the Senate and deliberation  
16 actually not just be able to receive a  
17 comment on a one-way basis but engage in some  
18 kind of deliberation with -- with -- with the  
19 folks who are really going to be affected by  
20 this regulation.

21 MS. KATZEN: Yeah, I -- I seriously  
22 doubt the bots will show up at a town  
23 meeting.

24 MR. COGLIANESE: Yeah. So --

25 MS. NEELY: I agree with that, but

1 there is, actually, a really interesting  
2 point about that, and I think we saw it under  
3 the Obama Administration and the Trump  
4 Administration, situations in which agencies  
5 had a pre-conceived notion about how they  
6 wanted to approach a problem, and they would  
7 reach out to people that they would know  
8 would support their particular view and say,  
9 hey, we're going to put out a rule-making;  
10 you should comment on this rule and talk  
11 about how much you support it.

12       So they're lobbying. They're going  
13 out there to lobby, to gen up support among  
14 the public. So I think that's another really  
15 interesting aspect of this, so you have to  
16 make sure that townhall is not just planted  
17 with people who are there to support the  
18 rule-making or -- or oppose the rule-making  
19 but, also, really talk about their genuine  
20 interests.

21       MR. COGLIANESE: Generally open.

22       MS. NEELY: Absolutely.

23       MR. COGLIANESE: Yeah, Nina, you're --  
24 you're next.

25       MS. NEELY: Yeah. So I just want to

1 chime in on a different issue that Amanda  
2 raised, which is the -- I mean, the issue  
3 really is about the integrity of the rule-  
4 making process.

5       And I have to say it, I do think there  
6 are -- we should have concerns about large  
7 numbers of bot comments, large numbers of  
8 fake comments, and I think the New York  
9 Attorney General has a great report on the  
10 most recent net neutrality rule-making and  
11 how many of those comments -- several million  
12 of those comments were tainted in one way or  
13 another.

14       And it's absolutely right that these  
15 rule-makings are rare. They're rare both in  
16 the high volume of comments and in the  
17 presence of large volumes of tainted  
18 comments, so they really aren't typical.

19       But I think we should be concerned  
20 about them because I think what the public  
21 thinks about a process like this is going to  
22 affect the way they see the process more  
23 generally, even if more typical processes are  
24 really not affected by these.

25       So I think that does make it incumbent

1 on the agencies to take more steps to make  
2 sure the process has more integrity. I think  
3 ReCAPTCHA's are great. I think maybe people  
4 could, also, be reminded that it's -- it's  
5 not legal to submit false statements to the  
6 government. They could just be reminded of  
7 that. That might deter some of these  
8 comments. But certainly, that would be a  
9 positive move.

10 My concern about these kinds of  
11 conversations, though, is that it has led  
12 some people to say, we should just stop  
13 discouraging -- stop encouraging individuals  
14 from sending in comments, and I think that  
15 would be a serious problem.

16 So I do want to make sure we don't  
17 cross over and go that far because I  
18 certainly want to associate myself with  
19 Sally's point that regulated entities  
20 typically punch way above their weight in  
21 these processes. They are very, very well  
22 represented, and the people we are not  
23 hearing from are regulatory beneficiaries,  
24 individuals who don't have organizations to  
25 represent them very well or don't have the

1 resources to participate in this process.

2 MR. COGLIANESE: Sabeel?

3 MR. RAHMNA: Yeah, just one last  
4 thought to add. This is a great discussion.  
5 You know, I think on -- on that score,  
6 another dimension of this is, also, it takes  
7 a certain amount of infrastructure, right,  
8 to -- to -- and capacity to pull this off,  
9 both on the part of civil society groups and  
10 on the part of government institutions, as  
11 well, right?

12 There's -- there is an expertise and a  
13 certain amount of, you know, resourcing  
14 that's needed for agencies to be able to do  
15 that kind of effective, proactive engagement.  
16 It's a skill, right, to -- to design those  
17 types of -- whether it's meetings or forums  
18 or input sessions, advisory sessions, what  
19 have you, right, that -- that's a skill, as  
20 well. And I think, you know -- which we want  
21 to see more of that.

22 I think it's, also, helpful to maybe  
23 think about what kinds of skillsets, you  
24 know, talent pools, budgeting other resources  
25 agencies might need and then what types of



1 organizations might we want to see in civil  
2 society to help, you know, bring those folks  
3 who are not, you know, on their own able to -  
4 - to engage in the way that I think everyone  
5 is talking about here on this panel.

6 MR. COGLIANESE: So one of the -- one  
7 of the questions that has come in from the  
8 audience draws a parallel to this (inaudible)  
9 for a pre-proposal process for rules that  
10 might affect small businesses and asks if  
11 that kind of structured -- a structured pre-  
12 proposal process might be appropriate to have  
13 agencies to engage in with a broader set of  
14 the public, not just small businesses.

15 You know, could agencies -- should  
16 agencies be expected in some rule-makings,  
17 perhaps, to develop in advance a list of  
18 draft alternatives and related analyses maybe  
19 to -- to -- you know, this may well require  
20 some resources from Congress to have support  
21 personnel maybe to provide some reimbursement  
22 for travel for -- for members of the public  
23 to participate in these. We do cover travel  
24 and time off for jurors in the civil and  
25 criminal courts. Maybe -- maybe we need to

1 have some kind of funding for engagement with  
2 -- with members of the public in a structured  
3 process like this. What do people think of  
4 that as an idea?

5 MS. NEELY: I've got a quick -- two  
6 quick thoughts on that. One, Senator Portman  
7 has long been a champion of Sally Katzen's  
8 favorite bill, the Regulatory Accountability  
9 Act. It is -- it is probably my favorite  
10 bill. It's probably not Sally's.

11 But that bill does have some -- some  
12 features that I think Sally probably, also,  
13 likes to some degree, including a notice of  
14 initiation of rule-making for some of the  
15 larger rules. And the idea behind that was  
16 to be a -- even NPRMs frequently notices of -  
17 - or ANPRMs, Advanced Notice of Proposed  
18 Rule-Making, can sometimes have this -- the  
19 agency's solution kind of baked into the  
20 problem.

21 And the idea would be to say -- to  
22 back that process up even further and say,  
23 here's the problem. Let's go ahead and open  
24 up the floodgates to getting crowd-source  
25 information. So the RAN incorporates that.

1 It, also, has a retrospective review  
2 feature for some of the largest rules. It  
3 would have a comment process associated with  
4 it. And it has a responsive comment period  
5 in it.

6 And that was another reason -- because  
7 I'd worked on that bill for so long, that was  
8 another reason why this problem really  
9 interested me because my thought process was  
10 sort of, we create this responsive comment  
11 period; how do people even go about finding  
12 the comments they need to respond to in order  
13 to have that be a productive process?

14 So and then regarding the funding, one  
15 thing I think the pandemic has -- I wouldn't  
16 dismiss that out of hand, but one thing the  
17 pandemic has shown us is that we are able to  
18 get large groups of people together in a  
19 forum that's not as ideal as being together  
20 here in person, but you could do a townhall  
21 Zoom meeting to talk about a particular  
22 regulation and probably get more  
23 participation, and I think that would open it  
24 up to, say, parents who can't necessarily  
25 drive somewhere or fly somewhere to go

1 participate, but they need to -- they can get  
2 on their Zoom for 30 minutes and have their  
3 voices be heard. So I think that's a --  
4 would be a productive way to add (inaudible)  
5 voices.

6 MR. COGLIANESE: Sally?

7 MS. KATZEN: I -- the questioner was  
8 launching SBREFA (phonetic). I think the  
9 concept of early consultation with those  
10 affected makes sense. I think the model of  
11 SBREFA is totally unproductive. With SBREFA,  
12 very frequently the participants are -- are  
13 selected, much as Amanda was describing how  
14 agencies would talk about their NPRMs and get  
15 selected people to support them. SBREFA is  
16 just rife with pre-packaged participants. So  
17 I don't like the concept. I don't like  
18 the -- the model of SBREFA, and it applies to  
19 all sorts of things where it really was not  
20 the least bit productive.

21 But I do like the concept of asking  
22 agencies to do some things early on, as I  
23 mentioned earlier. And that's why I not only  
24 was intrigued with but supportive of some of  
25 the provisions that Amanda had crafted about

1 early notice. I don't want to drop the later  
2 period, and that is post-comment period when  
3 the agency is looking through what it has  
4 received. The extent to which there is an  
5 absolute reluctance to go out for another  
6 comment period because it's going to take too  
7 long because right now rule-making takes  
8 forever.

9       And so agencies resist that, and I  
10 think one way of thinking about it is to try  
11 to frame the agency post-receipt of comments  
12 period in a way that might enable agencies  
13 to, if not get reply comments but put out  
14 some summaries of comments are things they  
15 heard and does anyone want to expand on that  
16 so that you're -- it's a way of an agency  
17 sort of inviting a second round.

18       Let's not go into the logical  
19 outgrowth problem, and if the rule changes,  
20 there's all these other problems. I don't  
21 want to go there, but I don't think we ought  
22 to be creative about what happens as the  
23 agency itself is summarizing the comments,  
24 which takes a long time. Can some of that  
25 time be used to solicit refinements on the

1 comments received?

2 MR. COGLIANESE: Could agencies be

3 expected in their notice of proposed rule-

4 making -- this would be a very simple

5 thing -- to identify -- be required to

6 identify concretely in some kind of

7 structured form even, the issues or, you

8 know, matters on which the agencies, you

9 know, would find comment to be particularly

10 useful or somehow to frame the notice to the

11 public so that they can know a little better

12 what -- what might be helpful to the agency?

13 That seems to me imminently feasible for

14 agencies to implement and maybe for Congress

15 to require, perhaps. Sabeel or Nina, do you

16 want to comment on these points? Nina?

17 MS. MENDELSON: I can -- I can --

18 MR. RAHMNA: Go ahead, Nina. I'll go

19 after.

20 MS. MENDELSON: Okay. All right.

21 Just quickly, I think agencies are already

22 using these questions to try to frame

23 comments. The OSHA vaccine mandate is also

24 an interim final rule in which the agency has

25 requested answers to, you know, nine -- nine

1 questions. So I think that's great and could  
2 be more systematically used.

3 In terms of the reply period, it is a  
4 big burden on agencies to identify the kinds  
5 of issues on which they'd like more feedback,  
6 but I think it would be extremely useful.

7 If there was, also, a way, if you  
8 will, for commentors to work their way  
9 through the docket and identify, you know, a  
10 particularly-useful comment, a particularly-  
11 problematic comment so that the agency is not  
12 the only one identifying the issues that  
13 might deserve more investigation, I think  
14 that would, also, be useful. But it does  
15 kind of underscore the management challenges,  
16 you know, that Cary alluded to of handling  
17 these large volumes of comments.

18 MR. COGLIANESE: Sabeel?

19 MR. RAHMNA: Yeah, just to -- to build  
20 on these, you know, I think, yeah,  
21 experimentation is always helpful. These --  
22 it's hard to have a one-size-fits-all for the  
23 kinds of -- as, you know, a number of folks  
24 on the conversation have already mentioned,  
25 right, there's lots of different types of

1 agencies, lots of different types of actions,  
2 lots of different types of impacted  
3 communities.

4       So I think experimentation and  
5 tailoring will go a long way, but, you know,  
6 how can we help create sort of that -- that  
7 impetus where that is the default, right, as  
8 opposed to these experiments being the -- the  
9 exception.

10       You know, couple of examples actually  
11 might be -- I do agree with Nina. I do think  
12 agencies are starting to experiment with some  
13 of these sort of post-rule or in-between  
14 rule. Like, let's hear from impacted  
15 communities. So when the -- when the  
16 executive order on advancing equity and  
17 reaching underserved communities came out, as  
18 part of that, a number of agencies -- FEMA,  
19 for example, is one of them -- put out RFIs  
20 just on equity. OMB did one, too.

21       But, you know, FEMA as a -- as an  
22 agency that's directly touching so many  
23 communities actually did a separate RFI  
24 getting public comment on where are ways that  
25 administrative burdens might be reduced,



1 where there -- there might be opportunities  
2 to improve kind of equitable impacts and  
3 outcomes as a way of just thinking more  
4 wholistically about strategy and policy going  
5 forward, right, so not attached to a specific  
6 rule-making yet, but that was sort of a, I  
7 think, notable example or experiment.

8 Department of Interior, similarly, put  
9 out a federal registered notice on the  
10 American the Beautiful Plan on -- on  
11 conservation and wildlife, also sort of  
12 requesting input/feedback from the public  
13 about, you know, how to think about that  
14 issue to operationalize strategies for future  
15 work.

16 And I think those are interesting  
17 nuggets, right, where they're sort of in  
18 between individual actions. They're sort of  
19 high-level, so it's -- to me that's similar  
20 to the kind of upstream, pre-rule-making  
21 phase that we were talking about before where  
22 it's really inviting ideas on how to think  
23 about a set of value judgements and trade-  
24 offs and -- and ideas that could then  
25 eventually become rules, right? And just

1 offer those up as extra examples where I  
2 think given some more -- given some oxygen to  
3 those types of experiments I think could  
4 really be helpful in this work.

5 MR. COGLIANESE: Amanda, did you want  
6 to follow on any of these comments at all?  
7 And I mean, you know, and maybe one thing,  
8 if -- you know, I could, you know, ask if you  
9 would want to comment on. Have you found in  
10 this conversation some suggestions for  
11 legislation yet?

12 Would you -- and maybe even more  
13 pointedly think that Congress could  
14 productively use ACUS Recommendation 2021-1  
15 as a framework for model legislation to  
16 require what I would call more of a  
17 management-based approach to this issue that  
18 is calling upon agencies to develop. And  
19 this could be tailored to their specific  
20 circumstances but to develop some agency plan  
21 and procedures about how to, A, how to  
22 management and -- and be able to sort the  
23 wheat from the chaff, if you will, manage the  
24 public comment process, but maybe, also, to  
25 develop strategies for how they could promote

1 and enhance public participation, whether  
2 through early input processes, better notice  
3 in the proposed rule.

4       These seem to be possibilities, if  
5 agencies had the, you know, sufficient  
6 impetus from legislation, maybe sufficient  
7 resources to help them. Would be probably  
8 modest resources I think necessary. But  
9 anyways, does this seem -- anything in here  
10 seem to respond to your call for suggestions  
11 on -- on new legislation?

12       MS. NEELY: I think so. I think I  
13 have to go back and think through before I  
14 commit to anything here.

15       MR. COGLIANESE: Sure.

16       MS. NEELY: But no, I think ACUS's  
17 work has been really, really valuable on that  
18 front, and it's something that is worth  
19 spending more time on. I like the idea of --  
20 not only because it saves me some work, but  
21 putting some of the work on the agencies to  
22 offer some solutions to the problem.

23       And I think that your observations  
24 that different agencies are different and  
25 different rule-makings are different -- so I

1 think that there might be some creative ways  
2 to deal with it. We are talking in our -- in  
3 our preparation for this panel the other day,  
4 I was noting -- we all agree it's not a  
5 plebiscite, but there was one really  
6 interesting rule-making a few years ago when  
7 the administration decided to try to raise  
8 park fees for the national parks.

9       And -- and at that point, there was --  
10 they were going to triple the park fees. And  
11 at that point, there was this outpouring  
12 families and individuals who said, these are  
13 our national parks, and we can't afford to  
14 take our kids there and -- if you raise the  
15 fees so much.

16       And the administration saw that, and  
17 it really was just a huge -- not necessarily  
18 a plebiscite, but it's maybe more like the  
19 yellow flag on (inaudible), but it -- it --  
20 they really did back down from that and --  
21 and that's a very different rule-making from  
22 a highly-technical, specific kind of rule-  
23 making.

24       So are there -- I'm not even sure how  
25 you would categorize the two different ones

1 or where those lines would be drawn, but I  
2 think it's worth thinking about that, too.

3 MR. COGLIANESE: Let -- let me pick up  
4 on the point about a lot of rule-making being  
5 highly technical. And, you know, we do have  
6 some folks here who spent some time or are  
7 still spending some time at OIRA, which is  
8 often viewed from -- at least from the  
9 outside as the place where the technical  
10 analysis gets a real look-over.

11 And -- and, you know, we do have  
12 Executive Order 12866 which, you know,  
13 incorporates this process for regulatory  
14 impact analysis, benefit cost analysis. Has  
15 this process -- how does this factor into  
16 this discussion?

17 I guess there's a couple of ways I  
18 would invite anybody to comment, but  
19 certainly, Sally and Sabeel, if you'd like  
20 to. One is, you know, what's the role of  
21 public input at OIRA? And -- and is that,  
22 you know, something we should be -- we should  
23 be putting out on the table?

24 Two would be, does cost benefit  
25 analysis crowd out the kind of public

1 engagement -- the value of public engagement  
2 or -- or can it -- or maybe benefit cost  
3 analysis systemizes it. I'm thinking about,  
4 in particular -- Sally, you've talked about  
5 the voices of the regulatory beneficiaries.

6 And in a, say, a contingent valuation  
7 process of serving members of the public to  
8 elicit their preference about certain, you  
9 know, non-market values that are affected by  
10 regulation, it's -- it's a very systematic  
11 way of -- it seems to me -- of engaging what  
12 the public thinks and how it values certain  
13 benefits from regulation.

14 Maybe -- maybe -- maybe benefit cost  
15 analysis is a -- is actually a way -- is  
16 actually a vehicle in some cases of getting a  
17 more systematic representation of public  
18 views on some matters.

19 So anyway, I would invite some -- some  
20 conversation about this connection between,  
21 on the one hand, which seems a technical,  
22 technocratic process of benefit cost analysis  
23 OIRA review and what we're talking about in  
24 terms of democracy, deliberation, public  
25 participation. Sally?

1 MS. KATZEN: Well, there's a piece of  
2 that that I have been enamored of, and that  
3 is, benefit cost analysis or cost benefit  
4 analysis looks at the total sums. What are  
5 the benefits? What are the costs? It  
6 doesn't look at who bears the benefits or who  
7 bears the costs.

8 Some of those are fairly easy to  
9 discern when you look at the issues, but  
10 others are less so. And so you really -- it  
11 seems to be it is very important to be able  
12 to deconstruction, particularly on the  
13 benefit side, how this is going to play in  
14 real life.

15 And the other things is that I -- I  
16 worry -- as I said in my opening comments, I  
17 worry benefit cost analysis goes to an  
18 analysis of the proposed solution. I'm still  
19 stuck on have we correctly identified the  
20 problem and have we correctly identified the  
21 feasibility of the solution in the community  
22 where the problem resides. And I think  
23 unless you de-aggregate or disaggregate or I  
24 don't know what the term is --

25 MR. COGLIANESE: Um-hum.

1 MS. KATZEN: -- that the cost benefit  
2 analysis -- and you run this in addition -- I  
3 think you're going to miss the boat. I think  
4 you're going to make it more formulaic and  
5 more mathematical and less human. Sabeel may  
6 have a different take. I don't know.

7 MR. RAHMNA: No, I -- I love that. I  
8 mean, I think -- so going back a little bit  
9 when we were talking about sort of when  
10 participation is -- might be -- might be  
11 helpful of (inaudible) helpful, right? I  
12 mean, I do think some of these questions  
13 really do need to feed in in that early stage  
14 thinking, right that we were talking about  
15 before, for a lot of the reasons that Sally  
16 just mentioned.

17 And then ideally, right, you have a  
18 set of policies that are tailored or  
19 developed with a fully understanding of what  
20 the problem is and what the range of options  
21 ought to be, right? And then that's what  
22 comes to OIRA, goes out then for public  
23 comment, and so on. You know, obviously,  
24 OIRA has a process that, you know, ACUS folks  
25 are well-familiar with.



1 We welcome input through that process,  
2 but I do think it's a different -- the  
3 policies just have a different state when it  
4 comes here, and -- and it's a different --  
5 the questions that are being asked, the  
6 things that are already sort of in -- in  
7 place versus, you know -- it's just a  
8 different part of the life cycle of, you  
9 know, how a -- how a lobby becomes a reg or  
10 how a reg becomes a policy.

11 So I do think that upstream part is  
12 still really important, and then ideally,  
13 that should flow through what the -- what  
14 agencies have heard from communities and  
15 stakeholders should flow into an impact  
16 analysis and then -- and should be shaping,  
17 you know, the policy choices that are made  
18 and then, you know, be -- be assessed  
19 afterwards, as we talked about, as well.

20 The -- you know, the other thing that  
21 your questions, Cary, makes me think of is, I  
22 do think -- you know, Sally mentioned the  
23 distributional or disaggregating some of the  
24 impacts. I do think that's really important.  
25 And I think as -- as, you know, part of

1 OIRA's role is that coordinating of review  
2 and, you know, has the agency considered all  
3 the various factors and so on.

4 You know, I think it's an interesting  
5 question of how do we help look at this  
6 piece, which is more of process question of  
7 have you engaged as the agency with various  
8 stakeholders and in ways that are sort of  
9 most -- most useful, right?

10 That's -- that's sort of an  
11 interesting question, too, to think about,  
12 you know, how can -- how can the review  
13 process help support, facilitate, you know,  
14 catalyze those types of engagements, as well,  
15 but while, I think, leaving a lot of this  
16 really has to be tailored by the agencies.

17 MR. COGLIANESE: We have just about  
18 two minutes left, and I'd love to get very  
19 quick answers from each of you on a final  
20 question. Actually, it -- it's a final two  
21 questions, but I'm going to package them in  
22 one. And one -- one question is, what are  
23 your thoughts on the potential impact of  
24 Little Sisters on public input and rule-  
25 making?

1 I don't know if anybody here is  
2 prepared to really talk about the Little  
3 Sisters case here, so let me reframe that as,  
4 is there one thing about the administrative  
5 process or administrative law that might --  
6 you might recommend we consider in helping  
7 the public comment process? And the last  
8 question actually is really -- is what is the  
9 one thing you'd like to see to improve the  
10 public comment process?

11 So -- so let me turn that to you as --  
12 as a generic question: one thing you'd like  
13 to see, either on changing administrative law  
14 or maybe changing administrative practice,  
15 that you think could improve public input  
16 into rule-making? Why don't we go in reverse  
17 order, if I could, as to --

18 FEMALE VOICE: All right.

19 MR. COGLIANESE: -- where we started.  
20 So, Amanda, can I put you on the spot for one  
21 closing comment?

22 MS. NEELY: Sure. I think going back  
23 to what Beth Novak has said that there  
24 needs -- I think the -- the key words there  
25 was concomitant, that there's the concomitant

1 balance between creating this new system of  
2 online commenting and, also, having some way  
3 to filter through those comments to make --  
4 to separate the wheat from the chaff.

5       And I think we need to get back to  
6 that fundamental, and so I think increasing  
7 opportunities for people to comment through  
8 something like the Regulatory Accountability  
9 Act with its notice of initiation of rule-  
10 making, responsive comment periods,  
11 retrospective review, and then somehow  
12 combine that with -- I think greater  
13 technological innovation is probably going to  
14 be the answer to some of this.

15       I think we've seen some companies who  
16 are already working on solutions to some of  
17 these problems. And so I think the  
18 legislature will have a place to play in  
19 this, but I think greater technological  
20 innovation to -- to address some of these  
21 problems will be part of the answer. Sorry,  
22 that's a long time.

23       MR. COGLIANESE: Thanks. All right.  
24 Sabeel?

25       MR. RAHMNA: I think I'd just add the

1 point about capacity, right? I think to do  
2 this well and to -- and to do it in a way  
3 that then allows the government to solve  
4 public problems that need to be solved means  
5 you need resources, both for civil societies  
6 and for agencies. And so, you know, this is  
7 all -- these are all great ideas, and we --  
8 agencies need staff. They need resources.  
9 They need the ability --

10 MR. COGLIANESE: Sure.

11 MR. RAHMNA: -- to do this well. And  
12 I'll just pause there.

13 MR. COGLIANESE: Good point. Nina,  
14 you had -- you had indicated and raised your  
15 hand when I mentioned Little Sisters, so if  
16 you want to comment on that, feel free but  
17 very -- very briefly. We're about a minute  
18 over --

19 MS. MENDELSON: Okay.

20 MR. COGLIANESE: -- our appointed  
21 ending time.

22 MS. MENDELSON: I'll just say very  
23 generally and not on -- not on Little  
24 Sisters. I think one thing I've really  
25 learned from this discussion, which I've

1 found so useful and generative, is that in  
2 some areas we just simply don't actually have  
3 enough input yet. We don't have regulatory  
4 beneficiaries in communities weighing in when  
5 it could be useful in lots of regulatory  
6 initiatives.

7 At the same time, we occasionally have  
8 these large volumes of comments coming in,  
9 which do create problems and do demand  
10 resources. And I was actually wondering if  
11 we might consider treating those in a  
12 different category. I put this in the  
13 comments to the panel. It's kind of like the  
14 100-year flood where the agency has the  
15 opportunity to kind of pull a lever and say,  
16 we've got a big problem here.

17 We need back-up; we need back-up to  
18 address these comments in a way that makes  
19 sense, filter the wheat from the chaff and  
20 the life, and so I think building capacity in  
21 both areas is critical.

22 MR. COGLIANESE: Thank you very much.  
23 And, Sally, last word?

24 MS. KATZEN: Little Sisters is a very  
25 disturbing -- very disturbing case. I won't

1 go into it because we don't have time. My  
2 associate and myself, again with Sabeel -- he  
3 talked about resources. There's, also, an  
4 awareness. I mean, civil servants in our  
5 regulatory agencies are there.

6 Every four years there's a prospect of  
7 new leadership moving in a new direction, and  
8 they feel like at some point, the political  
9 leadership is like the Christmas help.  
10 They'll go away, and they'll be new people.  
11 And all they have to do is keep doing what  
12 they're doing. So agency awareness of the  
13 potential good from expanded public  
14 participation would go a long way towards  
15 changing the culture, which is essential,  
16 along with the money.

17 MR. COGLIANESE: So I hope this  
18 conversation has conveyed the -- a bit more  
19 than we've had a chance, perhaps, before to  
20 really dig into thinking about what the value  
21 is of public input.

22 And I think, Sally, your point about  
23 baking that into the culture, to really value  
24 it, to really want to listen. It does take  
25 time, though, and I -- I agree certainly with

1 Sabeel's point, as well, that it -- when  
2 agencies are already taxed, it -- it's easy  
3 to maybe just want to take a short cut and go  
4 with what you've got the limited time and  
5 resources to do, but I hope that all of you  
6 who've attended as -- this event have learned  
7 as much and gained as much from the insight  
8 from the panel members as I have.

9 I want to thank Sally and Nina,  
10 Sabeel, and Amanda for your participation in  
11 this and thank ACUS for organizing this  
12 session. And I will turn it over now to the  
13 next event. Dani?

14 MS. SCHULKIN: Thank you, Cary. Thank  
15 you all. Great. So I want to pass it off  
16 now to our distinguished speaker. We are  
17 pleased to welcome the Honorable Tino Cuellar  
18 to offer remarks on the role of public input  
19 in agency rule-making. And, Tino, Matt has  
20 given the -- done a much better job than I  
21 can at your background and experience here,  
22 and I'm going to just pause it off to you.

23 MR. CUELLAR: Thank you, Dani. It's  
24 great to see you all today virtually. I'm  
25 incredibly delighted that ACUS invited me to



1 do this. one of my favorite agencies, and  
2 it's really great to see so many people I  
3 recognize on this panel. And I admire Cary,  
4 Sally, Nina, and Sabeel and many others.

5 I have been now for several weeks in a  
6 different role than the one I was in for the  
7 last seven years. I was head of the Carnegie  
8 Endowment for International Peace, so in my  
9 day job, I think more than I used to about  
10 U.S. channel relations, about the Middle  
11 East, about nuclear weapons, and security.  
12 But it made me so happy to get this  
13 invitation and to come back my intellectual  
14 home.

15 And as I think you'll see, the brief  
16 remarks I have today will highlight that all  
17 these issues are interconnected in some way.  
18 So let me go back and share with you an  
19 episode that is quite related to what we're  
20 discussing today and really reinforces the  
21 need for some intellectual humility.

22 I started off my career working quite  
23 a bit on issues of public disposition and  
24 rule-making, and I wrote these articles about  
25 how we might rethink the process of getting

1 input and what the data showed us about who  
2 was actually trying to participate in rule-  
3 making.

4 And I was pretty happy with some of  
5 these initial articles, and it was, like, so  
6 many of us would get a start in academia. We  
7 feel particularly enthusiastic when we get a  
8 chance to go to a conference when other  
9 people are talking about these issues.

10 And I remember maybe the second  
11 conference I went to on these issues -- a  
12 fairly small gathering, but a couple of real  
13 extraordinary people were there that I  
14 admire, and one of them was the economist  
15 Roger Noll who's had a lot to say about  
16 regulation over the years.

17 And he was the commentator on one of  
18 my papers on rule-making and public input and  
19 civic juries and all that stuff. And he gets  
20 the chance to speak, and he says, well, you  
21 know, Tino wrote an interesting paper here.  
22 It's kind of interesting (inaudible), but you  
23 know what?

24 Back in the 1970s when Carter  
25 Administration was trying to rethink rule-

1 making and there were all these -- these  
2 circuit cases involving public participation  
3 and limits of the APA, this was exactly the  
4 issue and not much has changed. And that  
5 was, like -- I want to say, like, 2005, and I  
6 felt like that was such a let-down.

7 I kept on waiting for him to say, and  
8 Cuellar has come up with a solution here, and  
9 it's all exciting and interesting and what  
10 great ideas. But no, mostly he was sort of a  
11 bucket of cold water and (inaudible) so, he  
12 said, like, there's some new, interesting  
13 things here, but mostly, we've been pretty  
14 much struggling with this question of how to  
15 get deep, public engagement but not in a way  
16 that paralyzes the process pretty much since  
17 we became self-aware that rule-making was a  
18 thing that required more than just technical,  
19 scientific input. And that's pretty far into  
20 the history of rule-making, if you think  
21 about it.

22 I -- so we're here again, and in some  
23 ways, we are continuing the journey. And I  
24 want to take a few minutes to just kind of  
25 share what I think of as some important

1 contextual factors and maybe a few  
2 implications from them that I hope you'll  
3 find both encouraging but, also, maybe  
4 restating the challenge that we have. So  
5 what I'm thinking about is, first, how all  
6 that we talk about with respect to rule-  
7 making around environment, around protections  
8 for worker health, around infrastructure,  
9 around, you know, electric power, around  
10 public health, all these things really  
11 implicate governance.

12       And they implicate really problems and  
13 opportunities that are playing out really  
14 globally. We're talking about the great  
15 awareness the world has of interconnectedness  
16 (inaudible) global health in a COVID era, the  
17 energy transition that's underway even in  
18 countries that are not as concerned about  
19 climate change as perhaps they should be and  
20 certainly in countries that are concerned,  
21 the dilemmas that those of from Silicon  
22 Valley are constantly encountering, around  
23 how the highly-networked, increasingly  
24 autonomous computing infrastructure around us  
25 is to be governed and occasionally governs

1 us.

2       And then one thing that we might not  
3 attend to quite as much as we might, and that  
4 is rising expectations of attaining or  
5 retaining a degree of prosperity among so  
6 many people in the world, billions of people  
7 living in places like Africa, South Asia  
8 that, you know, a generation or two ago, many  
9 of these people may not have thought that it  
10 was plausible that they might live with  
11 something like a middle-class lifestyle.

12       But billions expect that to this day  
13 now, and certainly, in countries like the  
14 U.S. and in Europe, many who had attained  
15 such lifestyles wonder about the feasibility of  
16 passing it onto their children. So that,  
17 plus these technological disruptions, the  
18 climate crisis, all that is part of our  
19 context.

20       That complicates rule-making, but it,  
21 also, highlights something that ought to give  
22 us pause about too much idealism that our  
23 generation of scholar, professionals will  
24 solve this problem of public input, and that  
25 is that if you look at any country bigger

1 than Denmark -- and, you know, maybe you  
2 could even include Denmark in -- in that -- I  
3 would say, like, no country at scale has  
4 figured out how to govern perfectly, how to  
5 deal with the pressures for change and  
6 continuity, how to avoid the most coercive  
7 and worst consequences, if you're trying to  
8 put down, you know, dissent.

9       This happens in some countries. And  
10 if you're not trying to do that, how to take  
11 the mix of disagreement and idealism and  
12 cynicism and concern that defines so much of  
13 modern governance. That doesn't mean that  
14 everything is paralyzed or doesn't work. But  
15 it does mean that it's not easy to point to a  
16 country of, say, more than 40-50 million  
17 people and say, oh, they've kind of figured  
18 this out; they've gotten it right. They know  
19 exactly how to balance all the competing  
20 demands.

21       We have an incredibly rich and  
22 important constitutional tradition that gives  
23 us powerful resources, like federalism,  
24 separation of powers, a set of agencies, and  
25 a set of expectations and norms of technical

1 competence and input that are -- are really  
2 important resource in navigating all this,  
3 but it's not like we've figured it out  
4 either.

5       So with all this as background,  
6 thinking of us as scholars of the  
7 administrative state in the world's largest  
8 democracy, all of this is relevant to our  
9 work. And we might start to think about the  
10 relevance of these dynamics with a few  
11 premises -- sensible premises that might help  
12 ground our discussion. And I'll mention  
13 three in particular.

14       First, the ideal of public input is  
15 not just a big aspiration in our system.  
16 It's actually part of a process for rendering  
17 regulatory decisions. Certainly rule-making  
18 -- nonarbitrary. That affects how input  
19 happens, why it matters, why agencies take it  
20 seriously, and it means in some sense that  
21 society is forced to internalize the benefits  
22 and the costs of norms we might have about  
23 public input.

24       That is to say, if we come to think of  
25 it as standard that all agency rule-making

1 should have some complex process of digital  
2 deliberation, civic juries, and that becomes  
3 a norm that ends up being sort of a  
4 shibboleth of whether a decision is  
5 nonarbitrary, that is going to have benefits,  
6 as well as costs.

7       It, also, means that changes impacting  
8 the regulatory state can decrease certain  
9 forms of public input. Just to pick  
10 something out of a hat a little bit, a  
11 nondelegation doctrine on steroids might  
12 drastically reduce the extent to which  
13 agencies have the kind of discretion in  
14 playing the joints that ends up allowing them  
15 to have their decisions reinforced in a  
16 meaningful way by public input.

17       Second, you know, having been around  
18 these issues, as many of you have for -- for  
19 many years -- I almost start -- want to start  
20 say decades, which is kind of a scary  
21 thought -- I think it's fair to say that we  
22 who think about these issues tend to be  
23 deeply conflicted about whether input from  
24 the public is mostly valuable as an  
25 instrumental resource for getting better



1 decisions that protect public welfare better  
2 or more faithful to what is in the  
3 legislative provision that's relevant, or if  
4 we think about public input as sort of deeply  
5 valuable for its own reasons, as a marker of  
6 our commitment to a broader kind of  
7 participatory form of democracy.

8 I feel that conflict. I don't think  
9 I've ever transcended that conflict. I think  
10 you can find that conflict in my opinions  
11 from when I was a justice, and it's worth not  
12 assuming it away. I think that conflict is  
13 there for a reason.

14 And I wouldn't want to live in a world  
15 where the only value of public input for our  
16 purposes is that at the margin, more lives  
17 will be saved, but I, also, would not want to  
18 fail to interrogate our methods for public  
19 input with the question like, how's this  
20 going to leave us better off. And I'll  
21 return to that at the end in about 45  
22 seconds.

23 Finally, I think that all the  
24 interesting technologies that we see that are  
25 now pretty standard around us, as well as

1 developing, virtual reality, video  
2 conferencing, AI-enabled comments that maybe  
3 reflect the subtle insights that members of  
4 the public might have but can't fully  
5 articulate, any of that stuff -- I think that  
6 does give us some new, interesting  
7 possibilities.

8       But I think it would be pretty naïve  
9 to the point of recklessness to think that  
10 any of those things are going to absolve us  
11 from -- here in a democracy, at least, that  
12 takes itself seriously, tries to be  
13 intellectually honest -- from core dilemmas  
14 about what we're really trying to do with  
15 public input like, you know, what consumption  
16 of a process do we have? Is it more  
17 technocratic?

18       Do we just want to save more lives?  
19 Or a civic delivery -- do we want to improve  
20 the quality of deliberation, even if we end  
21 up taking more time, spending more resources,  
22 and ending up with a not-as-great rule from a  
23 purely efficiency perspective?

24       And in particular, I think one of the  
25 ways in which these technological mechanisms

1 for new forms of public input will not solve  
2 our problem -- and here I'm going to channel  
3 my inner Sally Katzen a little -- is, you  
4 know, there's this deeper question of what  
5 relationship do we want to create between  
6 human and machine decision-making. There are  
7 many answers that question, but I don't think  
8 some straight-forward use of any technology  
9 that's on the horizon right now is going to  
10 make that, like, a really simply, straight-  
11 forward problem.

12       So just to close, ultimately, I think  
13 the world will be well-served by an American  
14 approach to public input in rule-making that  
15 is innovative, that is not satisfied, that  
16 remains a little hungry, that is ambitious,  
17 but is, also, humble and aware of the trade-  
18 offs involved.

19       And that means we got to take  
20 seriously that if we're going to strike a  
21 reasonable balance, we have to acknowledge  
22 that the goal is not only to get robust  
23 public input but, also, to get sensible  
24 policies implemented. And we have to do that  
25 in a day that only has 24 hours, which I



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

**FORUM ON ENHANCING PUBLIC INPUT IN  
Agency Rulemaking**

**Panel 2: Supplementing the Notice-and-Comment  
Process**

December 1, 2021

TRANSCRIPT  
(Not Reviewed for Errors)

**Remarks**

Cass R. Sunstein, Senior Counselor, Department of Homeland Security; Robert Walmsley University Professor, Harvard Law School; Former Administrator, Office of Information and Regulatory Affairs

**Panelists**

Boris Bershteyn, Partner, Skadden, Arps, Slate, Meagher & Flom LLP; Former General Counsel, Office of Management and Budget, and former Acting Administrator, Office of Information and Regulatory Affairs

John D. Graham, Professor, Indiana University O'Neill School of Public and Environmental Affairs; Former Administrator, Office of Information and Regulatory Affairs

Bijal Shah, Associate Professor of Law, Arizona State University Sandra Day O' Connor College of Law

**Moderator**

Sally Katzen, Professor of Practice and Distinguished Scholar in Residence, New York University School of Law; Former Administrator, Office of Information and Regulatory Affairs.

1 think makes it really tricky and means that  
2 the most thoughtful, subtle, effective  
3 policy-makers in this area are going to be  
4 pretty tragic in their perspective. They  
5 won't be satisfied with what we have now.  
6 They'll look at just reams and reams of  
7 comments and feel like that's definitely not  
8 enough. But they want to get a rule done at  
9 some point and want to make sure it saves  
10 lives.

11 MS. SCHULLKIN: Thank you. Thank you  
12 so much, Tino. I think we all strive to  
13 channel our inner Sally Katzens. So with  
14 that, we are going to switch to our next  
15 panel. Thank you so much.

16 MR. CUELLAR: My pleasure. Thank you  
17 so much.

18 MS. SCHULKIN: So we're transitioning  
19 to our second panel now, which will be  
20 moderated by Kate Shaw, who is a professor of  
21 law at Cardozo Law School and co-director of  
22 the Floersheimer Center for Constitutional  
23 Democracy. She is, also, a public member of  
24 ACUS.

25 So we'll have a couple folks come in.

1 I see Kate. Great. Hi, Kate. I'm going to  
2 pass it over to you to get started for this  
3 second panel.

4 MS. SHAW: Terrific. Okay, so thanks  
5 so much, Dani. And it was great to catch the  
6 end of Tino's remarks. I was unfortunately  
7 not able to hear the full presentation, but  
8 as Dani said, good afternoon, everyone. My  
9 name is Kate Shaw. I'm a professor at  
10 Cardozo Law School. I teach and write about  
11 constitutional law, administrative law on  
12 various topics in those areas.

13 And I am a public member of ACUS, and  
14 it is a real pleasure to be moderating this  
15 panel today on specific ways agencies might  
16 enhance public participation in the rule-  
17 making process, you know, including things  
18 like new devices, new technologies, new  
19 tools. I am joined by a terrific panel with  
20 expertise that is both practical -- so  
21 perspectives from inside agencies and active  
22 participants sort of from outside but with  
23 the regulatory process -- and, also, real  
24 scholarly expertise.

25 So let me start by introducing our

1 panelists, and then we will dive in the panel  
2 which we are hoping to structure kind of more  
3 of a conversation than a series of  
4 presentations.

5       So let me start with Reeve Bull who's  
6 a research director of ACUS. He has worked  
7 on projects related to international  
8 regulatory cooperation, the use of science by  
9 administrative agencies, presidential review  
10 of agency rule-making, cost benefit analysis,  
11 government contractor ethics in rule-making,  
12 among many, many other topics.

13       He's, also, an elected member of the  
14 American Law Institute and sits on the  
15 council of the ABA's Administrative Law and  
16 Regulatory Practice section and serves as  
17 vice chair of that section's rule-making  
18 committee.

19       Next, I'll introduce Dr. Dewayne  
20 Goldman, who is the Senior Advisor for Racial  
21 Equity to the Secretary of Agriculture. He  
22 has served for the past year as Executive  
23 Director of the National Black Grower's  
24 Council, the NBGC, a Washington-D.C.-based  
25 organization that advocates to improve the

1 efficiency, productivity, and sustainability  
2 of Black row-crop farmers. He's got more  
3 than 30 years of experience in the  
4 agricultural sector and was, also, a farmer  
5 in southeastern Arkansas. Before joining  
6 NGBC, he helped to form the organization and  
7 served as its initial advisor.

8 I will next introduce Eduardo  
9 Martinez, who is an Assistant Professor of  
10 Philosophy at the University of Cincinnati  
11 where he studies democratic theory, touching  
12 on political representation, civic education,  
13 civic virtue, and the role of identity in  
14 democratic decision-making.

15 He explores social and political  
16 philosophy informed by empirical research in  
17 the social sciences. And of particular  
18 interest to us here today, he recently  
19 published the article, Realizing the Value of  
20 Public Input: Mini Public Consultation on  
21 Agency Rule-Making.

22 And finally, I'll introduce Karianne  
23 Jones, who's Senior Counsel at Democracy  
24 Forward. At Democracy Forward, she  
25 represents municipalities, non-profits, and



1 individuals in litigation involving all  
2 facets of the Administrative Procedure Act  
3 and related statutes. She's argued cases  
4 before the D.C. Circuit, the 8th Circuit,  
5 and, you know, worked on lots of other  
6 motions and other practice in various U.S.  
7 District Courts.

8       Okay, so that's our august panel. Let  
9 me make a few introductory remarks, and then  
10 I will bring folks in. So we're not writing  
11 on a blank slate in this conversation, right?  
12 Again, as I was only able to just join now,  
13 but a panel earlier today discussed different  
14 forms of public input in crafting agency  
15 rules and a series of earlier panels that  
16 ACUS has convened over the course of the past  
17 month have tackled various dimensions of ways  
18 agencies can better engage with under-served  
19 communities in the regulatory process, just  
20 kind of broadly. And I don't want to be  
21 unduly duplicative, but I, also, don't want  
22 to assume that our whole audience here will  
23 have been able to join all of those earlier  
24 panels.

25       So maybe before we dive into kind of

1 what actual, specific ways and what actual,  
2 specific tools agencies might use to  
3 supplement their notice and comment  
4 processes, maybe we could ask -- I could ask  
5 a couple of our panelist to basically give us  
6 a little bit of the general landscape.

7 That is, you know, maybe you could  
8 speak a bit to what typically -- what  
9 communities are typically under-represented  
10 in agency processes, maybe rule-making  
11 processes in particular, since that's our  
12 topic today, why it is important for agencies  
13 to work to engage under-representative --  
14 under-represented communities in those  
15 process.

16 And so maybe, Dewayne, I can ask you  
17 to sort of start us on that kind of broader  
18 framing question. And then I'll bring in  
19 others, and then we'll sort of shift to more  
20 kind of concrete discussion of, you know,  
21 tools and methods agencies might utilize.

22 MR. GOLDMON: Thank you, Kate. And  
23 hello, everyone. Interesting question, and  
24 I -- I've spent a long time thinking about  
25 it, and I have to think back to a time when I

1 was dependent on a certain decision to be  
2 made but wasn't a part of the decision-making  
3 process. And that can be a frustrating  
4 experience. And we later found out that such  
5 experiences as that, they actually have a  
6 cost.

7       So discrimination, racism, bias,  
8 intended or unintended, they have cost.  
9 Studies have been done and shown the  
10 staggering, you know -- staggering cost over  
11 20-year periods. Somewhere above \$18-20  
12 trillion would be the cost of not including  
13 everyone in processes that require everyone  
14 to be -- to be represented.

15       More personally, you know, I had --  
16 I -- I spent some time in our Government  
17 Affairs Group when I was with -- with  
18 Monsanto Company. And it was interesting to  
19 look at it from the perspective of those that  
20 had been left out of the decision-making  
21 process.

22       And the common saying -- when you're  
23 talking about government affairs or advocacy  
24 or representing different groups, the common  
25 saying is that if you're not at the table,

1 you're on the menu. And whether that's  
2 intentional or unintentional, if your views,  
3 your opinion, your experience are not  
4 represented around the table when decisions  
5 are being made, oftentimes, those people that  
6 are not there -- and -- and it may not be  
7 intentional, but the people that are not  
8 there are not represented.

9       And so you end up with a larger and  
10 larger group of under-represented interests  
11 and under-represented people. And we have --  
12 we have to think about that. How -- how do  
13 you intentionally go out and solicit the  
14 input -- and I would say the informed input  
15 from those that have been left out.

16       And in a lot of cases, it can be  
17 difficult because if you've not been in on  
18 the discussions or on the development of the  
19 policy in the first place, the amendments to  
20 that policy don't mean as much. As so we  
21 really have to take a step back and look at,  
22 one, how can we bring people up to speed  
23 who've been left out of the process, and two,  
24 equally important is how can we factor that  
25 into changes, amendments that need to be made

1 to existing policy to make them truly more  
2 inclusive?

3 MS. SHAW: That's a great start.

4 Thank you so much. And maybe, Eduardo, can I  
5 ask you to come in now and just -- you know,  
6 you've written about the kind of moral and  
7 epistemic value of public input and  
8 participation in agency processes. Can you  
9 talk us through sort of -- from your academic  
10 perspective sort of what the values at stake  
11 are?

12 MR. MARTINEZ: Thank you. And thank  
13 you so much to Kate for moderating this  
14 panel, and thank you to ACUS for the  
15 opportunity to participate. So yeah, the way  
16 I read some of the academic literature on the  
17 value of public input on agency rule-making  
18 is you might think about some of the values  
19 being epistemic in nature -- that's having to  
20 do with information and knowledge -- and some  
21 being moral, having to do with this kind of  
22 moral values that we seek to instantiate in  
23 our decision-making processes.

24 So on the epistemic side, you might  
25 think that public input helps us to advance

1 the aggregation so we can take lots of  
2 information that's distributed throughout  
3 society -- different people have different  
4 jobs, different experiences, different  
5 perspectives, and those all might help us to  
6 figure out what the likely effects are of a  
7 particular proposed rule or figure out what  
8 the problems are that need to be solved.

9       So aggregating can be epistemically  
10 useful. You, also, might think having lots  
11 of different perspective there on the  
12 decision-making process can help to  
13 contribute to justification. So we can show  
14 how a rule is not just arbitrary but is  
15 actually justified in light of lots of  
16 different perspective of stakeholders that  
17 might be affected by it.

18       On the moral side, you might, also,  
19 think there's a kind of robust right that's  
20 defended there or kind of right to be heard  
21 or expression of civic respect that citizen  
22 aren't just subjects to be ruled. They,  
23 also, have a kind of respect as an  
24 (inaudible). They're (inaudible) to be  
25 responded to in the rule-making process.

1 And lastly, we might think government  
2 more generally, policy-making more generally  
3 should be accountable to citizens' interests.  
4 And so that public input might help policy  
5 makers, agency officials to understand the  
6 interests that are stake and be able to  
7 respond to them and to advance them when they  
8 engage in rule-making.

9 And you might worry about some of the  
10 aspects of the status quo if they can't  
11 instantiate those if you have differential  
12 responsiveness to proposed rules,  
13 differential impacts on who's able to take  
14 part in processes. They might not feel  
15 civically respect, their interests may not be  
16 represented, like Dewayne mentioned, and the  
17 information they have, which is very  
18 valuable, may not bear on the decision-making  
19 process.

20 MS. SHAW: So that's terrific. Maybe  
21 I'll segue now to you, Reeve, and just ask  
22 you to talk -- maybe we could sort of -- you  
23 could bridge -- we're talking, obviously, in  
24 kind of broad terms about goals and values  
25 here, and so I'd love to hear kind of your

1 take on the value of public participation.  
2 And then maybe we could use -- you could --  
3 you could use the remarks to pivot a little  
4 bit to kind of start to identify some of the  
5 challenges and limitations in the existing  
6 system, which you're obviously extremely  
7 familiar with.

8 MR. BULL: Wonderful. Thank you,  
9 Kate. And first of all, I'll just  
10 (inaudible) sort of the obligatory  
11 disclaimers at the outset that -- that I'm  
12 speaking in my own capacity, (inaudible) drop  
13 on ACUS recommendations, I'm not speaking on  
14 behalf of the conference or its members.

15 So yeah, excellent question. And on  
16 the first point, I think I'd really like to  
17 associate myself with both Dewayne and  
18 Eduardo's remarks. I think that -- that lays  
19 it out very, very nicely. I think if you  
20 look at the scholarship on the notice and  
21 comment process, generally, there are sort of  
22 two overarching goals (inaudible) that  
23 agencies are trying to achieve.

24 One is to achieve a technically-  
25 sophisticated rule, a rule that takes into



1 account the dispersed information from  
2 members of the public that can be value in  
3 terms of ensuring that the agency is getting  
4 it right.

5       And then many have argued that  
6 there's, also, a democratic aspect of -- of  
7 the process, as well, that it's a way for the  
8 agency to hear from members of the public and  
9 to achieve legitimacy that way. And I think  
10 that achieving broad and representative input  
11 is very, very valuable with respect to both  
12 of those aspects.

13       You know, with respect to the  
14 democratic aspect, I think it's obvious. You  
15 know, I think certainly it goes into  
16 legitimacy of the agency's processes. It,  
17 also, goes to ensuring that, you know, if the  
18 agency is trying to sort of channel public  
19 opinion in some way, then it should ensure  
20 that it is getting an accurate picture of  
21 public opinion. And the only way of  
22 achieving that is to ensure that it's getting  
23 representative set of inputs.

24       But I think it's, also -- and I think  
25 both Dewayne and -- and Eduardo touched on

1 this -- is quite relevant on the technical  
2 side, as well. On our first panel, for  
3 instance -- I think it was Nina Mendelson who  
4 gave the example of a rule where the agency  
5 was proposing tripling the fees for national  
6 park admission.

7       And the agency got a very, very  
8 negative reaction to that, and, you know, so  
9 that's actually relevant to sort of how the  
10 rule is going to be, you know, implemented,  
11 whether or not people will support the rule.  
12 And so it can be technically relevant on that  
13 front, as well, as to sort of how the rule  
14 will -- will operate in practice.

15       Pivoting then to sort of, you know,  
16 how the -- the current system serves those  
17 goals, I -- I think that -- and -- and we can  
18 get into more detail sort of later as to sort  
19 of some possible supplements, but -- but at  
20 the moment, I think it's fair to say that  
21 notice and comment is really the preeminent  
22 mechanism for receiving input from the  
23 public.

24       There're a handful of supplements that  
25 currently exist that we can discuss, as

1 well as possible supplements we might  
2 discuss. But in the vast majority of rules,  
3 notice and comment is really -- if there's  
4 any mechanism for soliciting public input,  
5 depending on whether or not it qualifies for  
6 an exception, notice and comment will really  
7 be the exclusive mechanism that the agency is  
8 using.

9       And, you know, I think the first panel  
10 touched on some interesting points there, as  
11 well. In many rules, the agency doesn't get  
12 any comments and probably most rules, they  
13 get a relatively small number of comments. I  
14 think Cary Coglianese pointed to 12 as the  
15 medium number of comments that agencies  
16 receive.

17       But in a handful -- and it's a very,  
18 very small percentage, but in a handful of  
19 rules, agencies get a massive number of  
20 comments, hundreds of thousands of comments,  
21 millions of comments. And I think their  
22 concerns on both aspects, you know, that  
23 we've discussed, both technocratically and  
24 democratically, as to whether or not the  
25 notice and comment process is sort of really

1 achieving these two goals.

2       So on the technocratic front, you  
3 know, as we saw in the first panel and as I  
4 think both Dewayne and Eduardo alluded to,  
5 you tend to get the same people, you know,  
6 involved in the process. It's usually well-  
7 connected -- whether industry or NGOs, you  
8 know, the same participants usually, you  
9 know, show up.

10       In the majority of rules, they get a  
11 small number of comments, whereas in these  
12 large rules that produce a massive response,  
13 obviously you're getting a much larger number  
14 of inputs from a much larger number of  
15 people. But there's some real concerns as to  
16 how representative it is.

17       You know, the FCC net neutrality rule-  
18 making is a good example. There was  
19 something like 24 million comments received,  
20 but a huge number of them were from bots from  
21 computers that were actually generating  
22 comments or mass-comment campaigns, which may  
23 not necessarily be representative of the  
24 general public.

25       So I think if you look at the, you

1 know, existing system, I think probably in  
2 most cases it does a reasonable job on the  
3 technocratic front in terms of getting, you  
4 know, technical input. But it could almost  
5 certainly be improved.

6 And then with respect to these mass  
7 response rules, I think there's some major  
8 concerns as to whether or not, you know, the  
9 input that the agency was receiving is  
10 representative and is ensuring that all  
11 interested parties do have an opportunity to  
12 weigh in. So let me stop there.

13 MS. SHAW: Okay, that's great, and  
14 there's obviously lots to follow up on in  
15 what you said, Reeve. But maybe, Karianne,  
16 let me bring you in here. And I do think  
17 we'll -- we'll talk about ways to address,  
18 you know, sort of low and excessively high in  
19 the mass-comment sort of domain levels of  
20 participation, and then, you know, questions  
21 both of, I think, technocratic and  
22 democratic, you know, goals and -- and  
23 shortfalls.

24 But -- but maybe, you know, in terms  
25 of -- so we've referenced sort of the usual

1 suspects who participate in a lot of rule-  
2 making processes. From your vantage point,  
3 having represented, you know, interested  
4 parties, right, seeking to file sometimes  
5 long comments in response to proposed rules,  
6 sort of what do you see? What voices are  
7 represented, under-represented, sort of what  
8 distortions and kind of distributional  
9 affects have you seen in your work with  
10 respect to agency notice and comment  
11 processes?

12 MS. JONES: Yeah, so it's a good  
13 question. So I think, you know, you  
14 definitely -- the -- some of the kinds of  
15 voices that are being under-represented  
16 include, you know, individuals who are  
17 receiving benefits when agencies are trying  
18 to change, you know, aspects of the benefit  
19 programs.

20 You don't see legal aid societies,  
21 your legal aid organizations getting  
22 involved. I think there's a real gap is sort  
23 of the workers' rights and criminal justice  
24 spaces. And academics, actually, I think  
25 there's a real gap in terms of agencies

1 hearing from subject matter experts.

2 And, you know, I think there's a lot  
3 of reasons for this, and some of them I'm  
4 sure we'll talk about more. But I think part  
5 of the issue is that, you know, agencies need  
6 to be doing a better job of reaching people  
7 where they are.

8 Not everyone in the United States is  
9 necessarily reading the Federal Register  
10 every day. And so a lot of times, you know,  
11 in my work, I'll reach out to a constituency  
12 or an organization that I think would have  
13 really good data and really good information  
14 to provide to an agency in a rule-making, and  
15 they've never heard of the opportunity or  
16 they -- they heard that it was coming, but  
17 they hadn't actually, you know, realized that  
18 the rule had come out or whatever the case  
19 might be.

20 So I think, you know, trying to figure  
21 out a way to better communicate to the  
22 public, thinking a little bit Oregon broadly  
23 about what kinds of comments would be useful  
24 and who might have that important  
25 information, you know, will be helpful for

1 agencies as they think about how to do these  
2 outreach campaigns in order to get some of  
3 these voices who just aren't -- you know, as  
4 (inaudible) said, it's -- it's the people who  
5 are connected, who have established  
6 regulatory, you know, practices who know how  
7 to write these big, substantive comments, but  
8 they're not always the people who have the  
9 most relevant data or at least not all of the  
10 relevant data that could be useful.

11 MS. SHAW: Okay. So maybe that's --  
12 maybe I'll pivot to you, Dewayne, on that  
13 point. So could you talk a little bit from  
14 your vantage point in agriculture sort of  
15 what -- what sort of public and stakeholder  
16 outreach and engagement is ongoing, just in  
17 terms of, again, getting the current  
18 landscape?

19 MR. GOLDMON: Thank you. And I want  
20 to start by reiterating Karianne's comment  
21 about reaching people where they are. When I  
22 take that comment in light of the earlier  
23 comment that I made about people not being  
24 represented before, that -- that becomes even  
25 more important because we -- we -- if we keep



1 doing things the same way, we going to keep  
2 reaching the same audience. And so we have  
3 to look at where people other, otherwise you  
4 find yourself kind of preaching to the choir  
5 and the people that need the message the most  
6 are not -- are not getting or not able to  
7 implement the process.

8 But you asked me about things that are  
9 going on in USDA, and it's a good example. I  
10 mean, if you look at one of the pivotal  
11 mandates of the Biden-Harris Administration,  
12 it was to have the country take a deep and  
13 serious look at racial justice and equity, so  
14 much so that an executive order essentially  
15 on day one where the President gave his  
16 cabinet-level appointees, one of which is my  
17 boss, a little bit of latitude as to how they  
18 accomplish that objective.

19 And the position that I serve in is a  
20 new position, the Senior Advisor for Racial  
21 Justice and Equity. It's a new position, and  
22 so we're challenged to do exactly what you  
23 talked about. How do we engage folks that we  
24 need to engage with to make sure that our  
25 programs, our services are more just and

1 equitable?

2       And so if we focus on those that have  
3 benefited from our services the most, you  
4 going to just perpetuate the discrepancy. So  
5 what we -- we've done -- and -- and I'll say  
6 as a -- as a farmer, as a practitioner, and  
7 later in my career, as kind of an advocate,  
8 I've gotten a little more comfortable  
9 speaking up for the needs of those that  
10 really were not represented.

11       But now, I see the whole department  
12 really assisting in that effort to reach  
13 people kind of where they are, so it's not  
14 that we go out to the usual list of folks  
15 that are there in the -- in the larger  
16 meetings or folks that are well-connected and  
17 are looking at the internet and getting  
18 updates, but where are those -- how do you  
19 access those people that have been left out  
20 of the process?

21       And there's a number of things that --  
22 that we've engaged in, and this is a work in  
23 progress. So, you know, we have a pretty  
24 good database of the farmers that we are  
25 obligated to serve, farmers, ranchers,

1 landowners, et cetera, Roll America. We have  
2 a pretty good database. If you look at -- if  
3 you look at our -- at our stats and our, you  
4 know, statistic from the National Acts  
5 Statistics Service, there's some indicators  
6 in there that says that USDA, you know,  
7 perhaps you need to be more intentional about  
8 how you reach some of these audiences.

9 In addition to that, another  
10 complicating factor is because I services  
11 have not reached them equitable, guess what?  
12 They're not very familiar with us, they don't  
13 really trust us, and they have not been able  
14 to connect the dot from a piece of  
15 legislation or policy being developed to a  
16 tangible benefit on their operation.

17 So what we're doing is going to those  
18 people that are a little bit (inaudible)  
19 sometimes, but we're talking about the  
20 programs, we're talking about the  
21 discrepancies, and we're soliciting input  
22 from them on how we improve this process.  
23 And that looks a little different depending  
24 on what part of the country you're in.

25 So in some case, we are directly

1 reaching out. We have a lot of community-  
2 based organization. And these community-  
3 based organizations are oftentimes tied to  
4 universities and particularly some of our  
5 minority-serving institutions that have  
6 actually better relationships with our  
7 customers, so we are working through them to  
8 build a kind of rapport that would give those  
9 customers a little bit more of a comfort  
10 level in telling us how our programs don't  
11 work. And we have to do that in full view.

12 We, also, have to weigh that against  
13 the folks that we're continuing to serve  
14 because this is not about -- this is not  
15 about pitting one group against the other as  
16 much as it is about improving services to all  
17 of our customers.

18 So we need to continue to do good  
19 servicing for -- for the people that it's  
20 worked for but have listening sessions that  
21 will hopefully get those under-served  
22 customers to a level of candid that allows  
23 them to share with us some pretty detailed  
24 information about how it doesn't work. And I  
25 need to tell you, you -- we need to be humble

1 in listening because all the information that  
2 we gather is not necessarily pleasant  
3 information, but it is the reality. And if  
4 there's a disparity there, there's a  
5 discrepancy there, we have to address the  
6 discrepancies and disparities in a realistic  
7 way.

8       And so -- but reaching out to those  
9 customers, relying on third-party people that  
10 have better relationships, and -- and doing  
11 what I would call real listening sessions. A  
12 lot of times we take a listening session as  
13 an opportunity to tell our customers the  
14 options we have, the programs we have, and  
15 how they are supposed to work.

16       But the flip side of that is really  
17 closing that one mouth you have and opening  
18 those two ears to hear from them as to how  
19 those programs actually work on their  
20 operations, and that's the part that can be,  
21 one, pretty informative but, two, pretty  
22 humbling at the same time.

23       MS. SHAW: Can I ask a quick follow-  
24 up, Dewayne? So -- so you referenced  
25 Executive Order 13985, the advancing racial

1 equity and, you know, support for under-  
2 served communities throughout the federal  
3 government and, you know, discretion  
4 (inaudible) agency as in terms of how to  
5 implement, so you mentioned your position was  
6 created pursuant to that executive order.

7       So it's all -- it's very helpful to  
8 hear. Are the kind of listening session and  
9 sort of work with community-based  
10 organizations and, also, to kind of work  
11 directly with some -- both growers and  
12 customers, it sounds like -- and maybe you're  
13 using those terms interchangeably; I wasn't  
14 totally sure -- is that all relatively new  
15 work and work that has been sort of stood up  
16 pursuant to this new executive order?

17       MR. GOLDMON: It's not new, Kate. And  
18 that's a good question. It's not new,  
19 necessarily. But -- but I think what we're  
20 trying to do is take a new approach. So the  
21 listening session -- and I've -- you know,  
22 every year I had the pleasure of serving  
23 three term on an advisory committee for  
24 minority farmers. And in that process, we  
25 had very public-facing listening session, and

1 people come there with legitimate complaints.  
2 And after a while, you get to a point where -  
3 - I've heard this before, but to a customer  
4 who's never had access to a committee or  
5 group, you've it before, but you haven't  
6 heard it from them.

7 And so when you're in the position to  
8 take those recommendations or criticism and  
9 convert that to a better delivery, you find  
10 yourself in the position of trying to kind of  
11 consolidate and -- and develop policy that  
12 can address the multiple concerns for people  
13 because at the core, a lot of them tend to be  
14 fairly related: poor customer service,  
15 complexity of programs and the like,  
16 distrust.

17 When you look at the core causes of  
18 some of these criticism and focus on policy  
19 that can overcome that, it allows you to kind  
20 of bracket things that can result in  
21 improvements, but it all ties back to -- and  
22 I know in this -- this -- this discussion  
23 we're talking about rule-making, but it all  
24 comes back to rule-making and how can we take  
25 that input and develop and write rules that

1 are more inclusive.

2 MS. SHAW: Great. And that's a great  
3 pivot. So -- so maybe, yeah. So let's shift  
4 to sort of to -- to think a little bit maybe  
5 more specifically about the rule-making  
6 process.

7 And Reeve, do you want to talk a  
8 little bit -- you know, we've sort of laid  
9 the groundwork, and you've written about, you  
10 know, a number of kind of specific proposal  
11 for democratizing and technocratizing the  
12 notice and comment process. I invite you to,  
13 you know, maybe identify a few and sort of  
14 talk through both the problems being address  
15 and -- and the solutions you have opened up,  
16 and then maybe I'll bring in Eduardo and  
17 Karianne.

18 MR. BULL: Wonderful. Yeah, thanks,  
19 Kate. Excellent question. So -- so yeah, I  
20 can sort of maybe give a quick preview of  
21 sort of, yeah, some of the things, sort of  
22 the framework, you know, in which I've tried  
23 to lay it out and sort of some of the ideas  
24 that I put forward, and then, you know,  
25 agencies have, also, in some instances



1 actually put in place.

2       So yeah, you're exactly right. Sort  
3 of to me, the way I look at it is sort of how  
4 do you enhance both the technical input that  
5 the agencies are getting, as -- as well as  
6 the democratic input that agencies are  
7 getting, all while being mindful of the fact  
8 -- and this is something that, you know, we  
9 at ACUS hear from the agencies all the time -  
10 - that this takes resources, you know, and it  
11 takes time, it takes money, it takes agency  
12 staff time.

13       And you know, for every additional  
14 mechanism that the agency puts in place, you  
15 know, in a zero-some world, that's something  
16 that they may not, you know, otherwise be  
17 able to spend their time on. So I think to  
18 me that's why it's sort of the most important  
19 question to ask at the outset is sort of what  
20 is the agency trying to achieve with a  
21 particular rule?

22       And for some of them, you know, it's  
23 highly technical if it's something that, you  
24 know, is a pure question of scientific  
25 knowledge or something like that, you know,

1 obviously they're still going to go through  
2 the notice and comment process. But to the  
3 extent that they're looking to supplement the  
4 notice and comment process, they may want to  
5 focus on things that are really much more  
6 focus -- or more geared to get that sort of  
7 technical input.

8       So for instance, Dewayne mentioned  
9 advisory committees as one possibility. You  
10 know, the agency under the Federal Advisory  
11 Committee Act can convene an advisory  
12 committee of technical experts, and they can  
13 then get that, you know, that technical  
14 information.

15       And another possibility that's sort  
16 of, you know, still in its infancy, but  
17 agencies have increasingly looked at  
18 potentially use of AI, artificial  
19 intelligence, to either deploy it on their  
20 own or -- or, you know, as stakeholders  
21 might -- might use, you know, algorithms to  
22 produce -- you know, identify relevant  
23 information that they can then submit to the  
24 agency. That may enhance the agency's  
25 ability to get technical information intel

1 but make the rule as sophisticated as  
2 possible.

3       On the democratic front, you know,  
4 again, it's going to vary a lot depending on  
5 the rule, you know. But for some rules it  
6 may actually be very, very relevant, you  
7 know, how the public might react to the  
8 particular rule or what course of action the  
9 people think the agency should be  
10 undertaking.

11       You know, as we all know, that's how  
12 most people perceive the notice and comment  
13 process. When you get these mass-comment  
14 responses, the vast, vast majority of them  
15 are saying something either to the effect of,  
16 I support this rule, or I don't support this  
17 rule, or simply offering their own personal  
18 reactions to the rule, as opposed to saying,  
19 you know -- providing technical information  
20 or even saying, this rule would affect me in  
21 the following ways.

22       Oftentimes, it's just a mere  
23 expression of an opinion. You know, and it  
24 can be debated as to the extent to which  
25 agencies should, you know, take just pure

1 opinion into account. But if they do, then I  
2 think it's critical important that they  
3 ensure that they're getting a representative  
4 view from the public. And the notice and  
5 comment process is, frankly, not a good way  
6 of achieving that. It's widely  
7 unrepresentative.

8       So as a consequence, you know, a few  
9 of the things I've looked at that might  
10 supplement notice and comment, you could do  
11 an opinion poll, potentially. Of course,  
12 they're legal issues associated with that,  
13 possibly. The Paperwork Reduction Act may  
14 constrain the -- the agency's ability just to  
15 do a pure opinion poll.

16       Another thing that I've spent some  
17 time writing on is a citizen advisory  
18 committee, where the agency actually gets a  
19 demo -- demographically-represented group of  
20 people, like provide them briefing materials,  
21 and then they, you know, debate the issues  
22 and actually come up with some recommendation  
23 to the agency that the agency doesn't have to  
24 take into account or doesn't have to follow,  
25 necessarily.

1 But the agency might want to consider  
2 that if they -- they want to get a sense of  
3 how the public -- a demographically-  
4 represented group of the public would react  
5 to a particular proposal.

6 And then there are things that are  
7 much more basic that would just be sort of  
8 supplements to notice and comment, trying to  
9 use, you know, social media or other  
10 innovative methods.

11 You know, perhaps instead of requiring  
12 somebody to file a full comment, you could  
13 have people like comments or dislike  
14 comments, you know, make it easier to sort of  
15 meet people where they are and sort of  
16 simplify the process in a way that hopefully  
17 would lead to a broader and more extensive  
18 set of participant in the process.

19 So those are some the ideas, you know,  
20 I put forward. I'm sure there are plenty of  
21 others, but I think, you know, there are a  
22 variety of different ways agencies can  
23 supplement the process, but I think it's  
24 critical that they sort of first ask what are  
25 we trying to achieve, and then tailor the

1 method accordingly.

2 MS. SHAW: Yeah, I'm sure those -- all  
3 really interesting, and I think there's lots  
4 to follow up on, so we'll have some  
5 opportunity for cross-talk momentarily. But  
6 maybe, Eduardo, maybe I could bring you in  
7 because you've, also -- so Reeve has laid out  
8 in various writings a number of these  
9 proposals, the citizen advisory committees,  
10 that -- that I think the public opinion poll  
11 is such an interesting proposal.

12 I gather because you're worried about  
13 the Paperwork Reduction Act, there would need  
14 to be a statutory fix in order to clearly  
15 establish the legal authority for agencies to  
16 conduct such polls.

17 But to the extent that, you know,  
18 there's, like, comments are sort of weighed  
19 in, like, a, you know, plebiscite-type  
20 fashion, there -- it's a terrible way to  
21 actually gauge public opinion, and you've  
22 made that point very effectively.

23 But that doesn't mean that there --  
24 that agencies should just abandon, right, the  
25 effort to essentially gauge public opinion in

1 these processes, and I do think that thinking  
2 creatively about better ways to actually  
3 elicit genuinely-representative views from  
4 the public is a really important project.  
5 But yeah, so, Eduardo, do you -- do you want  
6 to jump in and talk about some of the  
7 proposals that you've offered?

8 MR. MARTINEZ: Yeah, thanks. So yeah,  
9 I think building on Dewayne's emphasis on  
10 kind of the depth of engagement and Reeve's  
11 helpful kind of laying out a different --  
12 different opportunities, I'm also worried  
13 about the lack of representativeness in  
14 notice and comment process.

15 And I think -- in democratic theory,  
16 often there's a concern with not just looking  
17 at mere public opinion but thinking about  
18 public opinion, public reasoning under  
19 particular, perhaps a health conditions. So  
20 some democratic (inaudible) are interested in  
21 something along the lines of what Reeve  
22 talked about with citizen advisory panel but  
23 what's sometimes called mini publics.

24 So it's group of citizen, often a  
25 representative sample, coming together, like

1 Reeve mentioned, looking at briefing  
2 materials, but you're often focused not just  
3 on kind of snap judgments or what the public  
4 opinion currently would be for especially  
5 salient issues, but taking the time to  
6 discuss with people with different  
7 perspectives, sometimes talking to experts,  
8 and seeing what the, either looking for  
9 consensus, looking for rapport, or different  
10 perspective or even polling the group before  
11 and after to see how those perspectives  
12 change and look at the particular reasons  
13 that are given and not just the kind of up or  
14 down vote that you might get from certain  
15 kind of mass comments or from a plebiscite.  
16 And I'm particularly optimistic about that as  
17 a supplement to the notice and comment  
18 process.

19 I also think it might even substitute  
20 in some cases for -- when you have salient  
21 issues that get lots and lots of mass  
22 comments because they're not especially  
23 conducive to the kinds of engagement of  
24 reasoning and justification that seem  
25 especially both epistemically and morally



1 valuable, that you just can't get that from a  
2 straight judgment about whether you support a  
3 rule.

4       So these cases might supplement  
5 getting a more representative sample for  
6 rules that aren't getting a lot of salience,  
7 and then in cases where they are especially  
8 publicly salient, perhaps our more manageable  
9 and more in-depth form of engagement with  
10 public input that perhaps better represents  
11 citizens interest rather than just a straight  
12 initial response from a public opinion poll.

13       MS. SHAW: And, Karianne, I want to  
14 bring you in. I'm not sure if you -- based  
15 on your sort of work with agencies and with  
16 client, if you have reactions as to sort of  
17 whether -- you know, whether in your  
18 experience agencies are -- if you've worked  
19 with agencies that have -- that have, you  
20 know, tried any of these supplemental or --  
21 or sort of methods of supplementing ordinary  
22 notice and comment processes, or -- or if  
23 you, also, you know, sort of have ideas. It  
24 sounds like you have yourself sort of gone  
25 out and generated public engagement, but from

1 the agency end, sort of, you know, what other  
2 tools or mechanisms should agencies be using?

3 MS. JONES: Yeah. So I mean, I think  
4 everything that Reeve and Eduardo said would  
5 make a lot of sense to me and I think are  
6 great ideas. I think, you know, first and  
7 foremost, GSA needs to fix Regulations.gov.

8 As some of you may know, the Democracy  
9 Forward's filed a comment on that -- on that  
10 issue, and right now that's, you know, the  
11 main way that you are -- answer sometimes the  
12 only way that you can submit a comment on a  
13 proposed rule, and it is just incredibly  
14 inaccessible and unintuitive. You can't  
15 search by docket number. You can't search by  
16 the name of the rules sometimes.

17 So, you know, I just think, you know,  
18 just really getting down to brass tacks, I  
19 think all of these ideas are really great,  
20 but also, we need to fix the tools that  
21 currently do exist to get public input. And  
22 so one of the ways to do that is through, you  
23 know, fixing the Regulations.gov website.

24 But I also really wanted to sort of  
25 build on what Reeve was saying about just

1 making it easier for people to comment. I  
2 think a lot of times, they're organizations -  
3 - and again, I'll go back to, like, legal aid  
4 organizations -- that could have really  
5 beneficial information about how a change to  
6 a program is going to affect communities.  
7 But they are resource-strapped. They don't  
8 necessarily have the ability to file these  
9 big comments.

10 So think of -- you know, thinking  
11 creatively about ways that agencies can,  
12 through the notice and comment process, reach  
13 out to those organizations and say, look, you  
14 don't have to give me a 20-page comment.  
15 Just, you know, answer these -- answer these  
16 questions; here's a survey. Here -- you  
17 know, how many clients have you had that have  
18 experienced this problem?

19 You know, making really targeted  
20 questions to that you're not asking -- so  
21 that the burden is lowered or is lessened,  
22 and therefore, you're able to get more people  
23 involved.

24 MS. SHAW: Really helpful. And I know  
25 I have to confess, Kari, and I know you guys

1 submitted, like, a 70-page or something  
2 comment about Regulations.gov. And I'd  
3 actually be curious to hear more because I  
4 did not have a chance to make it all the way  
5 through it, and I'm sure that folks in the  
6 audience haven't, either.

7 Just, like, what -- what -- what's --  
8 what specific -- it seems like this should be  
9 fixable; like, should be doable. And sort of  
10 what -- can you talk a little bit more about  
11 the problems and the sort of potential and  
12 the solutions that you identify because,  
13 like, this has to be the very -- like, one of  
14 the very first steps, it seems like.

15 MS. JONES: Right, right. And I think  
16 it really is fixable. I mean, so what we  
17 talk about that in the letter is that, you  
18 know, the agency really needs to go back into  
19 Regulations.gov and redesign it with the user  
20 experience in mind. A lot of the changes --  
21 and this -- these changes were -- you know,  
22 happened when the -- the website was sort of  
23 updated.

24 There was a new version that came out  
25 in the last year or so. And a lot of

1 functionality just went away with that. So  
2 you can no longer mass download or bulk  
3 download comments. You can't see -- where  
4 you used to be able to do that. It's harder  
5 to find the comments. The comments aren't --  
6 you know, they aren't where you think they  
7 would be.

8       You can't necessarily go through and  
9 search -- search, you know, the hundred --  
10 potentially hundreds and thousands of  
11 comments by, you know, the author, or  
12 sometimes the agencies, you know, use title  
13 and author differently, so it's hard to  
14 figure out, you know, which of the comments  
15 you're really looking for. Again, docket  
16 numbers.

17       You can't search by docket numbers, so  
18 if you, you know, see something in the  
19 Federal Register and you try to go find the  
20 docket for it, you know, because of the way  
21 that the search allows for -- or doesn't  
22 allow for use of special characters, because  
23 you can't search with partial docket numbers  
24 and sometimes that's all you get from the  
25 Federal Register, it just makes it very hard

1 to find these things.

2       So yeah, those are just some examples  
3 of ways the functionality and the use of  
4 Regulations.gov has just gotten significantly  
5 worse with this new version. And I  
6 completely agree with you. I think it's  
7 something that, you know, has to be step one.  
8 Like, we have to fix the tool we have, as  
9 well as, you know, think about all these  
10 other, you know, amazing ideas for engaging  
11 the public.

12       MS. SHAW: So I want to mention now  
13 that we'll take -- happy to take questions if  
14 people want to start populating the Q&A now,  
15 and then we can just get to them as we get to  
16 them. But I meant to say that earlier, and  
17 so I will say it now to folks tuning in.

18       So may -- maybe mass comments we've  
19 sort of now referenced a few times and, you  
20 know, it seems -- as, Reeve, your opening  
21 remarks noticed -- you know, we have a very  
22 low participation problem or maybe it's not a  
23 problem; maybe it's, you know, appropriate,  
24 but a low participation level sometimes a  
25 problem.

1 Certainly, you know, the under-  
2 representation of voices and groups is a  
3 problem. But then, we have this small subset  
4 of rules that does generate -- Reeve, you of  
5 course mentioned the very, you know, famous  
6 example, the FCC, both net neutrality rule  
7 and then recission as generating millions of  
8 these mass comments.

9 And that's obviously something you  
10 have worked on both with your ACUS hat on and  
11 without your ACUS hat on, so I don't want  
12 to -- you know, I'm not trying to put the  
13 ACUS hat on you. But I -- I think it's a  
14 really -- it's -- it's obviously an important  
15 dimension of the discussion of, you know,  
16 reforming agency notice and comment  
17 processes.

18 So do you want to talk a little bit  
19 sort of at more length about kind of the  
20 problem and some potential solutions that  
21 you've kind of thought about and written  
22 about, Reeve?

23 MR. BULL: Absolutely, absolutely. So  
24 yeah, and -- and to sort of briefly, you  
25 know, describe our findings in that -- in

1 that report that led to ACUS Recommendation  
2 2021-1.

3 So, you know, we surveyed a pretty  
4 extensive number of agencies and, also, spoke  
5 with stakeholders and people who participate  
6 in the notice and comment process. And the  
7 overall take on the agency's part was, at  
8 least with respect to the mass comment issue,  
9 that, first, you know, as you noted Kate,  
10 it's very, very rare that agencies will get a  
11 mass comment response.

12 You're talking about a less than 1  
13 percent as a general matter the rules that  
14 they issue in any given year receive  
15 thousands of comments. And certainly, you  
16 know, these outliers like net neutrality  
17 where you have millions of comments are --  
18 are exceedingly rare.

19 And the agency's reaction, at least  
20 for the time being, was it's not that big of  
21 a problem because the agencies do, in fact,  
22 have now software that allows them to go in  
23 and analyze the docket, and it actually tells  
24 them if they get comments that are identical  
25 or nearly identical to each other, which is



1 very common in these mass comment cases where  
2 a public interest group or an individual will  
3 encourage people to submit exactly the same  
4 text or very identical text to the agency.

5       These programs can go and basically  
6 say, okay, this rule is -- this comment is  
7 100 percent identical or it's 95 percent  
8 identical, and it makes it a whole lot easier  
9 to process. So, you know, even if the agency  
10 is getting a hundred -- hundreds of thousands  
11 of comments, oftentimes 80-90 percent are  
12 identical, and therefore, they can just sort  
13 of screen those out.

14       So at least with respect to, yeah,  
15 where we currently stand, it -- it's not  
16 necessarily that big of an issue, at least in  
17 terms of the process of the comments. Where  
18 it is a larger issue, I think as sort of what  
19 we've been discussing, which is that not only  
20 do we have these concerned about  
21 representativeness generally, but I think  
22 this sort of exacerbates the concerns in the  
23 case of these, you know, comment rules  
24 because you would have every reason to  
25 believe that the comments you are getting are

1 not representative, that it's actually some  
2 entity that's encouraging, you know,  
3 individual people to file thousands or, you  
4 know, hundreds of thousands of iterative  
5 comments saying the same thing. So that's  
6 one potential concern.

7       The other concern that's really I  
8 think further sort of, you know, underscores  
9 the potential legitimacy problem is that  
10 anymore, the comments are not actually  
11 generated by actual human beings. It's  
12 become very common that people write  
13 algorithms that in some cases just generate  
14 comments and submit them anonymously to  
15 agencies or troubling still, in some cases  
16 these algorithms will generate comments, and  
17 then they'll misappropriate identities.

18       They'll actually go on the internet  
19 and find people's names and say the comment  
20 is coming from somebody who's not, in fact,  
21 submitting that comment. And the New York  
22 Attorney General did an extensive study of  
23 the -- the repeal of net neutrality to showed  
24 millions of the comments received actually  
25 fell into that bucket. They were generated

1 by an algorithm, and in some cases, people's  
2 identities were misappropriated.

3       So at least at present, that's sort of  
4 the major concern in the mass comments space  
5 is that the -- the comments are not  
6 representative, they may not necessarily even  
7 correspond to individual people, and they  
8 give the agency, you know, perhaps a skewed  
9 picture of what public opinion actually is.

10       Of course, moving forward I think it  
11 becomes an even bigger problem because in  
12 most cases from what we understood from the  
13 agencies, at least in the past when a bot  
14 generated a comment, it was usually pretty  
15 obvious that it was a bot comment. The  
16 syntax was off, and, you know, it was fairly  
17 clear a human didn't generate it.

18       But increasingly, these algorithms  
19 have become sophisticated enough that at  
20 least in a handful of cases, the bot-  
21 generated comments are undistinguishable from  
22 human-generated comments. And without  
23 additional investigation, the agency may, in  
24 fact, think that it's an actual person  
25 that's -- that's filing the comment.

1 So at least at present, I think those  
2 are the main issues that agencies are  
3 grappling with in the mass comment space.

4 MS. SHAW: Dewayne, can I bring you  
5 back in? So, you know, your opening -- or --  
6 or maybe the second answer that you gave  
7 was -- was -- you know, just gave a very  
8 textured sort of picture of the active way  
9 that USDA is -- is looking to do outreach and  
10 engagement.

11 In terms of the notice and comment  
12 process specifically, you said it does sort  
13 of tie back to notice and comment. I -- I  
14 wondered if I could get you to sort of say  
15 more about how -- you know, it sounds like  
16 there's been these sort of dialogues, right?  
17 They're listening sessions, but they're,  
18 also, talking sessions.

19 And so you're educating about  
20 programs, and also, taking sometimes  
21 critical -- critical feedback about programs.  
22 You know, is that -- is that, also, happening  
23 in conjunction with actual open -- open rule-  
24 makings? Or can you just talk about sort of  
25 notice and comment kind of process at USDA

1 and how, if at all, the implementation of the  
2 Equity Executive Order is specifically  
3 happening, or there might be, you know,  
4 future plans for that to kind of happen with  
5 respect to notice and comment processes?

6 MR. GOLDMON: Sure. Let me -- let  
7 me -- let me kind of frame this, and I'll try  
8 and be brief. In the executive order that  
9 President Biden signed, it -- it mentioned an  
10 equity commission. And this equity  
11 commission would be expected to provide the  
12 kind of pertinent information and  
13 recommendations that could get us in a better  
14 position. I started March 1, okay, in  
15 this -- in this current position.

16 And so immediately, you know -- and  
17 there was already work underway, but when I  
18 started, we immediately started looking at  
19 kind of a cross-departmental effort as to  
20 where we were from a racial justice and  
21 equity standpoint. A critical part of that  
22 was in late July, we engaged in some  
23 listening sessions, if you will, those  
24 listening sessions we talked about.

25 But in order to do that, we had to do

1 an RFI, a request for information. So we  
2 really -- we were really using that  
3 information to formulate how we would do  
4 these listening sessions, and all this is  
5 building up to information that we could  
6 share with the equity commission to get us to  
7 a better point. But I was not experienced in  
8 that process.

9       So the RFI, the request for  
10 information, was pretty eye-opening for me  
11 because it announced to the general public  
12 that this is the kind of information we're  
13 looking for, and this is our intended use of  
14 this information. So we engage with over  
15 probably -- probably close to a thousand  
16 people, farmers, ranchers, rural community  
17 people.

18       But by having signal the intent of  
19 what we were doing, I think it helped the  
20 customers prepare for information that they  
21 wanted to share with us. And as you can  
22 imagine, when -- when you're doing a  
23 listening session, a few comments are, yeah,  
24 you're doing a great job; keep it up, et  
25 cetera.

1 That's not the majority. The majority  
2 of the comments are dealing with frustrations  
3 and omissions and gaps that need to be  
4 addressed. And so -- but by going through  
5 that process, it really opened up my eyes up  
6 to -- and we're talking about notification.  
7 It really opened my eyes up to the importance  
8 of this full process of, you know, announcing  
9 the opportunity, preparing -- the folks we're  
10 trying to help, preparing them to give us --  
11 provide us information that can help us in  
12 the journey.

13 We're still synthesizing some of that  
14 information. Hopefully we'll have that done,  
15 you know, by the end of the year, but we're  
16 still synthesizing some of the information,  
17 trying to really figure out how we can take  
18 this and -- and -- and convert it -- you  
19 know, transition it into active rules,  
20 regulations that -- that can help us.

21 But that -- that process has been --  
22 has been fairly interesting, and I -- and I  
23 think the other thing that it did -- we heard  
24 a lot of comments that we've engaged in these  
25 kinds of exercises before.

1 But the difference this time was  
2 because you have kind of laid out a spectrum  
3 of things that will happen with this  
4 information, I think that given us an  
5 opportunity -- it gave the department an  
6 opportunity to kind of restart.

7 I'll -- I'll share with you some  
8 information, give you an opportunity to  
9 process, use that information for  
10 improvements, and the important part is, you  
11 know, I expect that they're going to hold us  
12 accountable because -- as they should  
13 because, you know, that was part of the deal  
14 in the first -- in the first place was to --  
15 to get information, hold us accountable, work  
16 with us as we develop solutions.

17 MS. SHAW: Maybe I'll pose a general  
18 question about the kind of role -- sort of  
19 the role of law here. So just, like, are  
20 there either legal constraints or, you know,  
21 legal -- so the executive order that Dewayne,  
22 you know -- we -- we referenced a couple of  
23 times seems like it set in motion a  
24 meaningful process that -- that actually, you  
25 know, could increase, you know, engagement



1 and participation, at least, you know, at  
2 this agency, and obviously, there are  
3 parallel processes playing out in other  
4 agencies.

5 I'm curious, and I'm not sure -- you  
6 know, this is quite an open-ended question,  
7 so anybody should feel free to jump in, but,  
8 you know, thinking about trying to, you  
9 know -- I just sort of -- obviously, there  
10 are kind of -- you know, there's a legal  
11 framework within which agencies operate.

12 Certainly, notice and comment is a  
13 floor. Notice and comment has its own sort  
14 of, you know, legal requirements attached to  
15 it, right? Agencies have to, right? This is  
16 a body of law that says agencies have to not  
17 only, you know, provide an opportunity for  
18 public participation but consider comments.  
19 Not totally clear sort of what, how, you  
20 know, all -- the sort of the specific legal  
21 requirements are.

22 But I guess, anyway, I'll -- I'll  
23 throw up a somewhat inchoate -- or throw out  
24 a somewhat inchoate question about whether  
25 the law -- and again, the executive order

1 is -- is now out there sort of with a  
2 different kind of legal directive there, but  
3 whether the law constrains or should be  
4 reconsidered in terms of what it requires of  
5 agencies and whether there are limits it  
6 places on agencies that kind of end their  
7 ability to kind of generate the optimal level  
8 of public and, you know, broadly  
9 representative public participating in, you  
10 know, rule-making processes or regulatory  
11 processes kind of more broadly? I'll call on  
12 someone if I have to, but I thought I might  
13 just be a little bit more open-ended with  
14 this one.

15 MR. GOLDMON: Well, let me -- let me  
16 jump in first before the experts weigh in.  
17 And I should have said, Kate, if -- if I  
18 don't mention the Office of General Counsel  
19 and the importance of doing this within the  
20 prescribed rules or regulations, I'll get my  
21 hands slapped. And so that's an important  
22 part of this process.

23 But if we look closely at the  
24 executive order, I mean, let's take a step  
25 back to my earlier comment about being on the

1 outside and not being in the room when the  
2 rules and regulations were made. And --  
3 so -- and -- and -- and my interruption of  
4 the executive order is, it requires us -- and  
5 -- and to do this legally, but it, also,  
6 requires us to identify those things that  
7 might require a change in the rule or, in  
8 this case, or a change in the law because if  
9 the -- if the -- if the law was written not  
10 fully considering everyone that it should  
11 have served, then we have to consider the  
12 fact that the law itself could be flawed.  
13 And that has to be part of this process.

14 Now, the other side of that is, if the  
15 law is flawed, it does not allow USDA, in  
16 this case, to make the needed change. The  
17 first thing we've got to do is -- we -- we  
18 don't have the latitude of breaking the law.  
19 We do have the responsibility to inform those  
20 who make the laws that this law is  
21 fundamentally flawed and needs to be changed.  
22 And I think that has to be part of this  
23 process.

24 MR. BULL: I'm, also, happy to weigh  
25 in. I think those are all fantastic points.

1 And, yeah, I think there are sort of -- there  
2 are sort of two, I guess, key legal  
3 considerations here. And I think that to  
4 some extent, the law is relevantly sparse,  
5 you know, in this area, and I think that's  
6 sort of partly explains these phenomena that  
7 we're seeing.

8       So the first good question is what do  
9 agencies have to do? What are they legally  
10 required to do, as far as public input is  
11 concerned? And in the vast majority of  
12 cases, notice and comment is the only legal  
13 requirement. Unless an exception is -- is  
14 satisfied, then the agency has to go through  
15 the notice and comment process.

16       There are a handful of instances where  
17 that's supplemental, so the one that's  
18 immediately coming to my mind is SBREFA that  
19 requires agencies -- a handful of agencies,  
20 EPA, OSIA, and the CFBB -- to obtain early  
21 public input before they actually do issue a  
22 notice of proposed rule-making.

23       The executive order that Dewayne  
24 mentioned, obviously, imposes additional  
25 requirements on agencies. And then there are

1 a handful of statutes and executive orders in  
2 some instances might require some sort of  
3 supplement to the notice and comment process.  
4 But as a general matter, those are relatively  
5 rare. In most cases, the vast majority of  
6 cases, the agencies will be able to satisfy  
7 their obligation just by going through the  
8 notice and comment process.

9 And I think the second question is,  
10 then, what are the agencies required to do  
11 with the input that they receive? And I  
12 think that one's even less clear still. I  
13 mean, the standard that's been articulated in  
14 the case law, Kate, as you had mentioned --  
15 or actually, the Statute 553C requires that  
16 the agencies consider that the relevant  
17 matter presented in the comments, and then  
18 the agencies are required to respond to  
19 significant comments that they receive.

20 And I think to some extent, this sort  
21 of explains sort of the incentive problem  
22 here because sort of the more input that the  
23 agencies get, then the more that they have to  
24 respond to as part of the process. So to  
25 some extent, it doesn't necessarily benefit

1 them to sort of, you know, go beyond, you  
2 know, the floor that the law has created.

3 And I think that that's probably the  
4 key challenge here is sort of trying to  
5 create an incentive structure as such that  
6 the agencies find it beneficial to actually  
7 go out and, you know, solicit this additional  
8 input and then make appropriate consideration  
9 of it.

10 And I think there's a real tension  
11 between, on the one hand, giving the agencies  
12 the flexibility they need in order to design  
13 the process in a way that makes it useful.  
14 And then, on the other hand, making sure that  
15 the agencies have the proper incentives in  
16 place to, you know, engage in this type of  
17 supplemental outreach that -- that could be  
18 valuable.

19 MS. SHAW: (Inaudible) I'm happy to --  
20 to take it maybe from either view. And I  
21 guess, you know, if -- if you don't have  
22 anything sort of immediately spring to mind,  
23 Reeve, a follow-up questions is, right, so --  
24 so that -- that, you know -- that was a great  
25 response and very much kind of anticipated

1 this -- this question.

2 Well, you know, if -- if there is this  
3 incentive problem, like, you know that there  
4 are, you know, maybe good governance and  
5 moral and, now, through this executive order,  
6 like, you know, actual, you know, legal  
7 reasons to actually solicit broad input, but  
8 there is this kind of counter force, which is  
9 there is -- you know, resources are limited,  
10 and sort of more comments require responding  
11 to more comments.

12 And, you know, maybe there is no sort  
13 of easy legal fix that would better align  
14 incentives in the way that you are  
15 describing, but I don't know if there are --  
16 if -- if we think that -- that there is --  
17 you know, if additional executive -- you  
18 know, additional either, you know, White  
19 House directive guidance, additional  
20 executive order -- I'm not sure -- I mean,  
21 you know, it -- I'm not sure that a fix to  
22 the APA is required here, but I guess I don't  
23 know whether -- whether we think there is a  
24 way that if law in some ways working at -- or  
25 some legal obligations are working at some

1 cross purposes to kind of broader  
2 participatory moves by agencies, whether we  
3 should consider, you know, legal fixes or  
4 additional -- additional hard law to respond,  
5 or whether this is actually something where  
6 sort of less law is better.

7 It gives agencies kind of more  
8 flexibility and the ability to kind of be  
9 dynamic and responsive and is just about, you  
10 know, creating the right processes at the  
11 agency level, rather than enshrining much of  
12 this in additional kind of hard law.

13 MR. BULL: So I think that frames it  
14 perfectly. And, you know, I think -- I think  
15 it's a very challenging question, and I think  
16 it sort of -- it varies from case-to-case.  
17 You know, like, I can certainly see -- and  
18 again, I'm speaking on my own part here  
19 rather than ACUS, but, you know, I can  
20 certainly see instances where -- and there  
21 have been bills that have been, you know,  
22 considered that maybe in (inaudible) cases  
23 would say require something like an ANPRM.

24 You know, before the agency actually  
25 gets to, you know, formulating a rule, they



1 would actually have to issue a pre-notice of  
2 proposed rule-making document and obtain the  
3 public input and -- and I think in many  
4 cases, that could be quite valuable because,  
5 you know, when the agency has actually  
6 reached an NPRM, it's often decided, you  
7 know, what course of action it wants to take.  
8 And so getting the input upstream while the  
9 agency is still considering how it might want  
10 to act or how it might want to proceed, I  
11 think it could be very, very valuable in  
12 terms of shaping those rules.

13       So certainly, in certain instances, I  
14 think it might make sense, actually, to have  
15 a requirement in place, you know, whether it  
16 be statutory or whether the agency itself  
17 might want to, as part of its regulatory  
18 corpus, provide that in certain types of  
19 rules, you know, they will pre-commit to, you  
20 know, engaging in, you know, early outreach  
21 or a particular type of outreach.

22       But then in other cases, you know,  
23 that may overly proceduralize the process.  
24 It may be excessive, and it may simply  
25 slow -- slow the process down such that the

1 agency is -- is pre-committing to do  
2 something where, you know, the benefits may  
3 not necessarily outweigh the costs.

4       So I think it has to be very case-  
5 specific, very agency-specific, and then very  
6 program-specific within the individual  
7 agencies. And at least for my part, I think  
8 at least in certain instances, there might be  
9 some value in pre-committing, at least in  
10 terms of certain types of rules to engage in  
11 certain types of supplemental outreach that  
12 could actually, you know, greatly improve the  
13 quality of the rules that agencies are  
14 producing.

15       MS. SHAW: Yeah, Eduardo, please go  
16 ahead if you got some --

17       MR. MARTINEZ: Yeah, just to follow  
18 up, I think Reeve helpfully laid out that the  
19 trade-off is complex. I'm not sure I have an  
20 all-things-considered answer, but I wanted to  
21 stress the point that he made about the  
22 incentive agencies have to -- when they get  
23 to the notice already kind of feel like they  
24 have a rule pretty close to final form, and  
25 it's a lot harder to change.

1 And that, I think, connects to some of  
2 the issues we started the discussion with  
3 that amplify some of the differential  
4 responsiveness toward regulated entities  
5 and -- and groups that have the resources and  
6 expertise to contribute, you know, well-  
7 resourced, well-laid-out research comments,  
8 and so they're going to have a greater say in  
9 the process.

10 So if we want to respond to this  
11 concern about a lack of representativeness or  
12 unrepresented voices in rule-making, we,  
13 also, might need to think about input before  
14 we even get to the proposal stage, before  
15 notice and comment process. Another reason  
16 to think that that's important is just  
17 citizens, stakeholders are really creative,  
18 and that's something that's really valuable.

19 That's one of the reason that  
20 democracy can be valuable. We want to be  
21 able to harness that creativity, and agencies  
22 have lots of expertise stored in them. But  
23 it's, also, not always obvious which  
24 stakeholders are going to have something  
25 important to say about a particular rule.

1 One kind of illustrative example I can  
2 think of is Cornell research on experimental  
3 online tools. They were looking at, I  
4 believe, a DOT post rule about runway  
5 procedures, and to their surprise, they found  
6 a lot of stakeholders with food allergies had  
7 a lot to say about a proposed rule.

8 That might not have been obvious to  
9 transportation experts, civil engineers,  
10 those working in aviation, but it's something  
11 that was really helpful in thinking about the  
12 final product, and also, might be something  
13 that those individuals have thoughts on how  
14 to solve the issue at stake. And so  
15 harnessing that creativity, that dispersed  
16 information can be really valuable all before  
17 we even get to the notice and comment  
18 process.

19 MS. SHAW: Karianne, do you want to  
20 jump in here? I mean, just in terms of if we  
21 were to shift -- and I think, Reeve, I take  
22 the point that this is, you know -- this is  
23 not something that we would want necessarily  
24 to -- to mandate in an across-the-board way,  
25 but that -- that agencies would be well-

1 served in some instances by soliciting  
2 actively, you know, input and participation  
3 prior to actually crafting a proposed rule.  
4 Reactions to that?  
5 And also, you know, overcoming -- you  
6 know, how -- how, I  
7 guess -- thoughts or ideas -- not to put you  
8 on the spot, but sort of how agencies can do  
9 a better job of actually reaching out to kind  
10 of the right stakeholders in order to elicit  
11 the kinds of, you know, creative,  
12 interesting, important solutions that Eduardo  
13 just identified.

14 MS. JONES: Yeah, well, I think I  
15 agree with Reeve and Eduardo that I think  
16 that there are times when getting that input  
17 before a proposed rule makes a lot of sense,  
18 you know, the agency can't deviate too much  
19 from the proposal or it has to open notice  
20 and comment again, so, you know, the  
21 incentives are off to do a lot of changing at  
22 that point, so I totally agree with -- with  
23 all of those points.

24 In terms of how to -- you know, how to  
25 reach the right communities, I think, you

1 know, it's a lot of things Dewayne's talked  
2 about and Reeve's talked about and Eduardo,  
3 you know, thinking about citizen advisory  
4 committees or just more advisory committees  
5 in general, thinking about, you know,  
6 listening sessions, engaging with community  
7 organizations, making sure that you're cross-  
8 posting, you know, opportunities for comment  
9 in multiple places and -- and posting them in  
10 places where people actually go to look and  
11 to -- to see, you know, in -- in whether it's  
12 blogs or what -- whatever the case might be  
13 on social media. I don't know. You know, so  
14 just really trying to be better at  
15 communicating to the various constituencies.

16 And then, also, I think, you know --  
17 and I really liked Dewayne's point about this  
18 earlier. I think trying to give folks a  
19 sense, in some way, that their information is  
20 valuable and is going to be used to do  
21 something good or, you know, to -- that it is  
22 going to be constructive, that it's not just  
23 going to be ignored. I think that, you know,  
24 trying to figure out a way to set that stage  
25 is a really important part of making sure

1 that people feel empowered and feel like they  
2 want to make themselves heard.

3 MS. SHAW: What about resource  
4 barriers to participation? So there are  
5 these kind of, you know, information and  
6 knowledge barriers that we have now talked  
7 about a number times. And I -- and I think,  
8 you know, probably in a moment in which --  
9 I'm not sure, Dewayne, if the listening  
10 sessions you're describing have been in  
11 person or, you know, on -- on Zoom.

12 Since -- if you've only been there  
13 since March, I imagine a lot of it has been  
14 on Zoom. But -- but maybe they've been in  
15 person, too. But I think either -- you know,  
16 so maybe the resource constraints of kind of  
17 travel and time and -- and those sorts of  
18 things are lessened if we're talking about,  
19 you know, participation via Zoom.

20 But -- but I guess, you know, what --  
21 are -- are there ways agencies need to be  
22 mindful of and could, you know, respond to  
23 the potential resource disparities? Again,  
24 the big ones, I think, are, you know, big,  
25 you know, organized regulated entities are

1 just going to have the resources to track  
2 proposed rules and to get together, you know,  
3 very professional, long responses.  
4 And so that, you know, sort of  
5 stipulated that there's been a problem in  
6 figure out how to counter it or to, you know,  
7 provide for broader input is something we've  
8 been talking about. But I'm, also, curious  
9 about kind of just general obstacle --  
10 obstacles to participating in agency  
11 processes that -- that are, you know, kind of  
12 brass-tacks sort of resource limitations.  
13 Dewayne, have you found the people -- that --  
14 that -- is that a problem in sort of getting  
15 -- getting participation in the -- the sort  
16 of outreach work you're doing?  
17 MR. GOLDMON: Yes, it is. I was  
18 trying to give my colleagues, hoping they  
19 would jump in. But I -- I -- I -- when you  
20 were asking the question, I thought about  
21 several resource concerns. And yes, all of  
22 these things that we're talking about, we're  
23 just getting to a point where we can actually  
24 go back into the offices and have face-to-  
25 face interactions.



1 And I was telling some folks, you  
2 know, in 2020, I spent the year pretty much  
3 alone. And I spent this year pretty much in  
4 a remote environment. I'm wondering if I  
5 have -- still have the social skills to even  
6 function in a -- in an actual law office  
7 setting, but I look forward to it.

8 So yeah, the -- the logistics around  
9 getting people together can be a resource.  
10 And when you're talking about communities  
11 where you have different levels of engagement  
12 with, you know, social media, internet-based,  
13 web-based activities, that information access  
14 to technology can be a serious resource  
15 concern.

16 But there're other ones I think we've  
17 experienced: trust, whether or not the people  
18 we are trying to reach fundamentally trust,  
19 not only the process but kind of the outcome,  
20 if they understand what we're trying to do  
21 and trust the logistics that we already  
22 talked about.

23 And -- and then a serious one is the  
24 urgency of the fix. I mean, if -- if -- if  
25 I'm talking about flood-relief resources in

1 the middle of a drought, there's probably a  
2 disconnect, you know? But if it's raining  
3 and raining and raining and the waters are  
4 rising, I'm going to have a more captive  
5 audience.

6 And so at USDA, I'm fortunately -- we  
7 have some disparities that put us in -- not  
8 necessarily a panic situation, but certainly  
9 an urgent situation. It's urgent that we get  
10 this right in order to sustain a diverse set  
11 of customers in world agriculture. And that  
12 create -- that sets the stage. But it can,  
13 also, be a concern, too, because people have  
14 to balance taking away from their operation  
15 to participate and the benefit, which brings  
16 us back to the relevance and importance of  
17 trying to get this right.

18 But those are some of the resources  
19 concerns that -- that we've been able to work  
20 through or had -- had to work through and  
21 really relying on, in a lot of cases, relying  
22 on some third-party people to help us either  
23 collate customers in a -- in a point where  
24 they can, you know, get access to reliable  
25 internet service or even just collate people

1 to have a captive audience to engage in  
2 meaningful conversation.

3 MS. SHAW: All right. Well, so we're  
4 reaching the end of our time. Maybe I'll  
5 invite folks if you want to take another  
6 minute or two. You've all, you know, worked  
7 and thought a lot about these issues.

8 Maybe I could just invite you to make  
9 -- if there are things that we haven't  
10 touched on that involve, again, either sort  
11 of dynamics or specific proposals that kind  
12 of are important ones to leave folks with or  
13 just any concluding remarks with respect to  
14 kind of what agencies are doing or should be  
15 doing, you know, to -- to achieve broader  
16 kind of participation and input in  
17 supplementing the notice and comment  
18 processes.

19 I will turn it over -- maybe -- maybe,  
20 Reeve, I don't want to put you on the spot,  
21 but maybe I'll have you wrap first, and then  
22 we'll just sort of go through the group,  
23 unless -- because I don't see any questions  
24 in the Q&A, so I'll just give you all the  
25 last kind of minute or two a piece.

1 MR. BULL: Wonderful. Thanks, Kate.

2 So I'd actually like to build on something  
3 that Dewayne just said. I think there's an  
4 excellent point as to the sort of different  
5 types of, you know, potential resource  
6 constraints. And I think it sort of goes to,  
7 you know, kind of the fundamental question  
8 we're discussing here.

9 So I think, you know, as a general  
10 matter, the agency should try to make the  
11 process of participating as -- as simple and  
12 as straight-forward as possible, but there  
13 are sort of limits to what they can do. And  
14 I think that, you know, goes to sort of the  
15 technocratic and democratic thing that we  
16 discussed at the outset, that, you know, for  
17 certain types of rules that are highly  
18 technical, the agency should ensure that the,  
19 you know, the rule, the MPRN is written in  
20 plain language, and it's accessible as  
21 possible.

22 But there may be instances, you know,  
23 like -- let's just make up an example -- if  
24 it has to do with arsenic content to drinking  
25 water or something like that. You know, at

1 least me as a, you know, stakeholder, I  
2 wouldn't have a whole lot relevant to say to  
3 that. I don't really have much expertise in  
4 that space, and I think that'll be true of  
5 the vast, vast majority of stakeholders.  
6 It's probably only going to be, you know,  
7 scientists or groups that have, you know,  
8 extensive expertise on that topic who are  
9 going to be in a position where, at least on  
10 the technical issues, they can easily weigh  
11 in.

12 But for other types of rules, you  
13 know, I think that the public's reaction, and  
14 in some case, the public's opinion as to, you  
15 know, how the agency should be proceeding is  
16 highly relevant.

17 And I think, you know, we've talked  
18 about different possible supplements today,  
19 and I think those are all very, very  
20 valuable, but I think another important  
21 aspect of the discussion is there are things  
22 that agencies can do with the systems that  
23 they currently have to try to, you know, make  
24 it was broad and as accessible as possible.

25 So, you know, for example, Karianne

1 talked about Regs.gov and sort of, you know,  
2 making it as user-friendly and as straight-  
3 forward as possible so that people can log  
4 on, and they can understand the process,  
5 understand how they're -- you know, what  
6 they're supposed to do in order to  
7 participate.

8       There were a handful of  
9 recommendations we at ACUS made in connection  
10 with the mass comments recommendation, where  
11 at the very least, the agency should provide  
12 some explanation of, you know, what each rule  
13 is and what they're looking for, the type of  
14 input that they're looking for. And I think  
15 that makes it a lot easier for members of the  
16 public to actually understand, you know, how  
17 they can be helpful, what type of information  
18 they can provide to the agency.

19       And then there are a handful of  
20 supplements, as well, that are really  
21 relatively straight-forward, you know,  
22 putting it up on social media, you know,  
23 being as transparent and as open as possible  
24 as to what the agency is doing and try to  
25 maximize its footprint in terms of the people

1 it's reaching.

2       And at least resource-wise, I think  
3 these are much less burdensome than, you  
4 know, some of the supplements that we've  
5 discussed, though I think in a handful of  
6 cases, the supplements can actually be very,  
7 very valuable in terms of getting the type of  
8 informed public input that could be useful to  
9 the agency.

10       So I think the most important thing,  
11 at least from my perspective, is the agency  
12 sort of take it on a rule-by-rule basis and  
13 decide, you know, what they're looking for  
14 and how do they maximize the probability of  
15 getting that sort of input.

16       MS. SHAW: Great. Thanks, Reeve.

17 Eduardo, do you want to go next?

18       MR. MARTINEZ: Yeah, sure. Thanks so  
19 much for this (inaudible) -- should start  
20 with kind of making sure existing tools are  
21 working as best they can, take the low-  
22 hanging fruit and increasing transparency and  
23 accountability can go a long way. I guess  
24 something to add to that as we kind of take  
25 the next step thinking in the medium term is

1 just, we want to be able to lower those  
2 barriers to participation but, also, preserve  
3 the kind of robust engagement that we've all  
4 talked about as being really important.

5 And especially, when we move to the  
6 online sphere, people are going to have lots  
7 of habits that aren't especially conducive to  
8 really robust engagement, informed  
9 discussion. And that ends up imposing a  
10 further burden on us all.

11 So we have to balance lowering the  
12 individual barrier to getting involved with,  
13 also, not imposing too big of a collective  
14 burden on all of us because we all just can't  
15 spend the whole day (inaudible) regulations  
16 and responding to them, and that's going to  
17 require some degree of targeting or some  
18 creativity in how we think about public input  
19 to -- to balance those two goals.

20 MS. SHAW: Great, thank you.

21 Karianne, do you want to go next?

22 MS. JONES: Sure. Yeah, no, I echo  
23 everything that's been said. And I -- I --  
24 but I do want to sort of emphasize that I  
25 think, you know, one things that agencies



1 could be doing better now is thinking more  
2 broadly and creatively about whose voices  
3 matter, whose voices will be useful, and  
4 really trying to, you know, look beyond the  
5 industry, look beyond the regulated party to  
6 who -- who's going to be affected by the  
7 various rule-makings they're engaging in and  
8 trying to reach those communities in all the  
9 ways we've been discussing and what Reeve and  
10 Eduardo just said, you know, using current  
11 tools, using additional tools, but really,  
12 you know, thinking about the constituency  
13 from a broader perspective.

14 MS. SHAW: Great. And, Dewayne,  
15 you'll have the last word.

16 MR. GOLDMON: Feel like I've talked  
17 enough. No, just -- just -- just great  
18 (inaudible), great comments. The only thing  
19 that I would emphasize, I guess, would be a  
20 good self-evaluation with -- with the central  
21 question being who is -- is -- and if we look  
22 at our current rules and regulations and our  
23 ability to reach our customers, however you  
24 define those, who is not being adequately  
25 represented here and how do we solicit their

1 input on how we improve this process?

2 I mean, just -- just taking on that  
3 mantra, I think. I do it on a regular basis  
4 now, and it's just something that -- that  
5 kind of changes the way you shift so that  
6 there's more inclusive -- not necessarily  
7 urgent, but -- but more inclusive to think  
8 really seriously about how you solicit input  
9 from those that should be represented who  
10 have been left out of the process.

11 MS. SHAW: We are at -- we are at  
12 time, but I see one quick question from Jim  
13 Tozey (phonetic), which I want to -- if --  
14 if -- if anyone wants to speak to this, it's  
15 actually an interesting question. What are  
16 the federal agencies going to do to support  
17 Democracy Forward proposal regarding  
18 Regs.gov?

19 I don't know if anybody -- anyway, I  
20 take that, obviously, as a strong  
21 endorsement, Karianne, of -- of the proposal.  
22 But does anybody have a sense of whether  
23 there's likely to be any sort of agency  
24 support for that proposal?

25 MS. JONES: Well, I can just say --

1 and I've not been the person engaged most  
2 directly on this, so I can't give a whole lot  
3 of detail, but I do know that GSA has done  
4 some listening sessions of sorts in response  
5 to the letter and is -- is at least in some  
6 thinking about reviewing the process.

7 I don't know exactly how far along  
8 those conversations have gone or -- or what  
9 will come from them, but I do think the  
10 agency is -- is, you know, taking seriously  
11 the complaints that we raised.

12 MS. SHAW: Great. Okay. Well, thanks  
13 for that and thanks for the question, Jim.  
14 Okay, Reeve, Eduardo, Karianne, Dewayne,  
15 thank you so much for a really excellent  
16 discussion. That concludes our panel and  
17 today's forum. Thank you, again, to the  
18 panelist, and thank you all for joining.

19 MR. GOLDMON: See everyone.

20 (End of Audio Recording.)

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CERTIFICATE

I, Wendy Sawyer, do hereby certify that I was authorized to and transcribed the foregoing recorded proceedings and that the transcript is a true record, to the best of my ability.

DATED this 14th day of January, 2022.

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WENDY SAWYER, CDLT