12 ODR and Government

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1 Introduction

Much of the discussion linking the terms "ODR" and "government" has been related to governance of the Internet rather than the use of the Internet as a tool for governing. Schultz, for example, argued:

> The common view about the Internet is that we must keep government out of it, that government would kill the Internet through regulation. There is a strong belief that the Internet could do without government … ODR has grown out of two main social fields, the Internet and alternative dispute resolution (ADR). Both fields share one thing: their resistance to government.[1]

Even the frontier, "anything goes" attitude that Internet users have frequently fostered comes into sporadic contact with a need for governing. ICANN (The Internet Corporation for Assigned Names and Numbers)[2] has since 1998 served as the arbiter or ombudsman for disputes between and among those who seek to use Internet addresses for personal, commercial, and government business. In the process, ICANN developed one of the first global ODR programs in its Ombudsman Office as well as an arbitration process for resolving domain name disputes.

But the issue we will discuss in this chapter is not governance of the Internet. The topic at hand is the use of the Internet to govern, and the role that ODR can play in e-government. A good place to start a discussion about the role of ODR in e-government is to define what is meant by the term "e-government". It seems only appropriate to turn to that font of e-knowledge, Wikipedia, for a definition:

> **e-government** (short for electronic government, also known as **e-gov**, **digital government**, **online government**, or **connected government**) is digital interaction between a government and citizens (G2C), government and busi-

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1   T. Schultz, "An Essay on the Role of Government for ODR: Theoretical Considerations about the Future of ODR," Proceedings of the UNECE Forum on ODR 2003, available at <www.odr.info/unece2003>.

2   For information, see <www.icann.org>.

nesses/commerce/e-commerce (G2B), and between government agencies (G2G), Government-to-Religious Movements/Church (G2R), Government-to-Households (G2H). This digital interaction consists of governance, information and communication technology (ICT), business process re-engineering (BPR), and e-citizen at all levels of government (city, state/provence, national, and international).[3]

Regardless of what one thinks of the veracity or accuracy of Wikipedia information, this seems to us a reasonable starting place for a discussion of e-government. The consistent features of e-government that run across definitions and sources are: 1) the use of ICT, and 2) stress on the varied pathways of communication created by government actions – reaching out to the public, the corporate world, and other local, state, and federal government entities.

Our discussion of e-government will be divided into three main sections: What has changed?; What must government (and e-government) do?; and, Where are e-government and ODR going?

Before we begin, we should disclose that our concept of e-government is heavily influenced by both the value structure and the online experiences of the government of the United States, of which we are both citizens, and from which many if not most of our examples will be drawn. We are cognizant of the fact that in many cases neither the values and laws, nor the online experiences of other countries, will match those of the United States. Our intent is to discuss the insertion of ODR technology into government at a general and theoretical level, but we are aware that, at some point, theory must become practice, and that practice must occur in context. We should also point out that several of the chapters in this book address the issue of ODR technology and its relationship to government, either through the courts and legal system, the regulatory system, or through the use of mobile technology to influence political decisions.

2   The Advent of the Internet: What Has Changed?

Jeff Aresty, an early advocate for the development of online justice systems and founder of the InternetBar.Org, has described the traditional legal environment as consisting of People, Places, and Paper.[4] It is as easy to see the same boundaries or elements at work in

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3   <http://en.wikipedia.org/wiki/E-Government>, last accessed in April 2011.
4   J. Aresty, "Online Dispute Resolution (ODR) and the Legal Complex: Lawyers and Technological Change", Proceedings of the 2007 International Forum on Online Dispute Resolution, Hong Kong, December 2007.

governmental systems as it is in legal systems. In an online, virtual governing environment there are significant shifts in the conception of people, and places, and paper. Perhaps the most quaint, and enduring, vision of the nature of citizen interaction with government is drawn, in the United States, from the mythic picture of the Yankee Town Hall Meeting, where citizens could gather as a group and make their thoughts and feelings known to those who were elected to govern. Norman Rockwell even used this iconic environment as the theme for "Freedom of Speech", one of a set of four paintings depicting the basic freedoms offered by American Democracy.[5]

But it has long been impossible to physically gather any significant portion of the public to confront the government, making it necessary to conceive "the people" as a unified, but physically incorporate mass. Long before the Internet existed in its current form, theorists and social critics addressed the idea of creating a "people" for whom the elected could speak. McGee, in an influential 1975 essay, essentially argued that "the people" "are the political and social myths they accept".[6] We have, as nations, become comfortable with this "virtual" notion of the people. As Giridharadas argued:

> Perhaps the biggest idea to gather speed during the last millennium was that we humans might govern ourselves. But no one really meant it. What we really meant in most places was that we would elect people to govern us and sporadically renew or revoke their contracts. It was enough. There was no practicable way to involve all of us, all the time.[7]

That situation, according to some, may be changing.

The tempting, and conceptually astounding, promise of the Internet is that it may be possible to move "the people" from the virtual, mythic realm into a more concrete arena. Perhaps "the people" can become simply "people". For example, an early experiment with online access for public comment and public input was carried out by the United States Department of Agriculture (USDA) when they were developing standards to define "organic" produce. In the past they had held public meetings and accepted public comments via mail, but for the organic standard they opened the comments to submission via an e-mail account. They received what was, at that time, by far the largest number of comments that had ever been received by the USDA during a comment period for a regulatory

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5   Rockwell's The Four Freedoms series was published in the *Saturday Evening Post* on 20 February 1943.
6   M.C. McGee, "In Search of the People: A Rhetorical Alternative", *The Quarterly Journal of Speech*, (1975) Vol. 61, Issue 3, pp. 235-249.
7   A. Giriharadas, "'Athens' on the Net", *The New York Times*, 2009, available at <www.nytimes.com/2009/09/13/weekinreview/13giridharadas.html>.

standard. They received so many comments that the most difficult part of the process was not, as they had assumed, creating a standard that would be acceptable to the widest range of interest groups while protecting the consumer. The most difficult part of the process was figuring out how to handle the volume of comments, first to understand what the comments said, and second to integrate those comments into the report on the final standard. The interests of the "the people" can be used to guide regulatory choices in a rational way. Regulators can argue that "the people" value transparency, accountability, and other goals, and they can generate options for regulation consistent with the "will of the people". But when government goes out to ask a large number of citizens what they think, the very volume of response is likely to overwhelm the decision making process. And, there are other problems with moving from "the people" to open citizen input. The Office of Management and Budget (OMB)'s Office of E-Government and Information Technology website[8] lists legislation going back to the early 1990s and the Clinton administration as relevant to its mission.[9] But in the United States, the current Obama administration, more than any recent administration, has been aggressively working to build e-government into the regulatory structure. As Beth Noveck relates:

> On his first day in office, President Obama issued a "Memorandum for the Heads of Executive Departments and Agencies" calling for the chief technology officer and the Office of Management d Budget to craft an Open Government Directive for greater transparency, participation, and collaboration in every agency.[10]

Noveck, who was one of President Obama's first appointments to the White House Office of Science and Technology Policy (WHOSTP), argues that:

> We have arrived at a moment in time when we can multiply the number and diversity of opportunities for engagement to respond to the complex problems that confront us today.[11]

Riding an optimism about the ability to recast our conception of transparency and citizen involvement, the newly appointed staff launched an ambitious project designed to create

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8   <www.whitehouse.gov/omb/e-gov>.
9   The E-Government Act of 2002, The Government Paperwork Elimination Act of 1998, the Clinger-Cohen Act of 1996, the Federal Acquisition Streamlining Act of 1994 (Title V), and the Government Performance Results Act (GRA) of 1993.
10 B.S. Noveck, *Wiki Government*, Brookings Institution Press 2009, p. xi.
11 Noveck (2009), p. xiii.

a "Citizen's Briefing Book", online input that would be presented to the President like his other daily briefings.

Moving to create new channels of citizen input reveals something that any online commercial enterprise understands and has had to cope with: there are a lot of us, and we do not always follow the rules. There are over 300 million individuals in the US. If just .0033% of them want to add their voices to the chorus, that's over 100,000 voices. And the fact that the White House wanted to hear about the most serious problems facing the new administration did not always mesh with the input provided.

> They received 44,000 proposals and 1.4 million votes for those proposals. The results were quietly published, but they were embarrassing – not so much to the administration as to us …. In the middle of two wars and an economic meltdown, the highest-ranking idea was to legalize marijuana, an idea nearly twice as popular as repealing the Bush tax cuts on the wealthy. Legalizing online poker topped the technology ideas, twice as popular as nationwide wi-fi. Revoking the Church of Scientology's tax-exempt status garnered three times more votes than raising funding for childhood cancer.[12]

The obvious conclusion is that the re-conceptualizing of "the people" is going to take some thought, and is going to create unique conflict dynamics in the context of e-government.

If the "people" must be viewed in a new way when engaging in e-government, so must the places in which governing occurs. It is unlikely that we will soon be rid of the grand edifices of government, but citizen use of the Internet to access government services does change the relationship between the citizen and the "place" where government services are rendered.

> The transformation of government with a physical presence that is largely distant to one that is virtual in nature and accessible anywhere at any time is likely to bring a broad spectrum of changes […] Some of the symbols of government […] that are tied to physical spaces will obviously not be present in virtual spaces.[13]

In some cases, the symbols of government that may be rendered obsolete by e-government will be missed. There is something comforting and solid about tall columns and the hushed

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12 Giridharadas (2009).
13 E. Katsh and D. Rainey, "ODR and Government in a Mobile World", in M. Poblet (ed.), *Mobile Technologies for Conflict Management: Online Dispute Resolution, Governance, Participation*, Springer Press 2011, p. 85.

corridors of power. Some will not be missed. It is now possible in most states in the US to renew a driver's license without that ubiquitous symbol of government – the long queue for service.

Those engaged in the pursuit of e-government have been confronted with the same phenomenon driving development of ODR systems in the world of e-commerce. Not only are there a lot of people who may access online systems to give opinions and request service, the opinions and requests can and do come from across what have traditionally been accepted as stable jurisdictional boundaries. E-commerce has addressed this problem by creating "extra-legal" systems that can handle disputants widely dispersed across geographical, national, and legal boundaries. At eBay, the user agreement seeks to place transactions conducted on its marketplace into its own extra-legal system through the consent of the users when they first create an identity on the eBay system.[14] There is underway a project through UNCITRAL, the United Nations Commission on International Trade Law, seeking to create a worldwide extra-legal, and extra-governmental, program to address disputes created through international online commerce.[15]

Obviously the concerns of and the constraints upon government entities are not the same as those for commercial entities, but it is clear that the strongest impulse in response to cross-boundary disputes has been to create systems that augment or by-pass established channels for dispute resolution. Does this mean that we will begin to see extra-governmental systems created to handle disputes or respond to citizen input? One thing does seem clear: one cannot simply take an existing offline forum like the town hall meeting and create an analog of that system online, expecting that the dynamics of the exchange and the outcome of the debate will be similar in all things except volume. When the research team at the University of Massachusetts at Amherst and the National Mediation Board began the first National Science Foundation (NSF) funded research into the impact of online tools on mediation, their impulse was to clearly document the offline mediation process, and to create a strict analog of that process online. They did so, and found that it did not work.[16] Moving to an online environment, even for disputes created in the offline world, changes the dynamics of interaction, and changes the elements of the dispute resolution process. Government will still have the same physical bodies to deal with, and the physical icons of government still will exist, but pulling virtual input from those people into a virtual government space creates new governing issues.

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14   <http://pages.ebay.com/help/policies/user-agreement.html>.
15   <www.uncitral.org/uncitral/commission/working_groups/3Online_Dispute_Resolution.html>.
16   National Science Foundation award #0429297. National Science Foundation, *Process Technology for Achieving Government Online Dispute Resolution*, <www.fastlane.nsf.gov/servlet/showaward?award=0429297>.

Two examples will illustrate the creation of extra-governmental channels. In Sri Lanka, during that country's civil war, a very sophisticated network of online tools was created to monitor actions by the government and the rebels, spread information, create public spaces for discussion, and influence the actions of government.[17] This extra-government network persists after the civil war has ended, and is, in fact, a recasting of the conception of "the people" in Sri Lanka. Famously, in Cairo during the initial stages of the revolution there, social networks became a new means to organize "the people", and when internet access was cut, an alternate channel, text messages, was used to continue to pass information and recruit bodies for protests in Tahrir Square.[18] Obviously, the use of technology to continue building democracy is a separate challenge, and one that is fraught with misuse by those in power who wish to subvert reform, but the ability of technology to radically affect the mobilization of interested citizens has been illustrated amply by the so-called "Arab Spring". The Internet and applications available through the web have become so integrated into reform movements that they are entering into the consciousness of popular culture. For example, the following joke making the rounds on the Internet, from Egypt, distributed in Arabic:

> Two older men were sitting on a curb in Tahrir Square. One said to the other, "what is this Facebook?" The other answered, "an American weapon to bring down tyrants".

Just as the nature of people and places will change, and has changed, so will the nature of the documents created by citizen interaction with government change – governments will have to rethink paper. Two obvious problems in the shift from paper to virtual documents as part of governing are problems with which, again, legal and commercial systems have been struggling for some time: authenticity and identity. If I, as a citizen, go to a physical location controlled by a government agency, fill out a paper form, sign it, and produce some acceptable evidence that I am who I say I am, that document will stand legally as proof of my intent, the government's intent, and the fact that we both endorsed it. If I go online, fill out a web-based form, and submit it through an online application, there is, based on the standards of people/places/paper government, sufficient question about whether I am the person who filled out and signed the form, whether the form in question is the one I filled out, and whether the form exists in the same state that it was in when I signed it. This poses a set of questions, all of which can be answered, but nonetheless questions that attach to efforts to take government online. For the citizen, the question is,

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17   <http://groundviews.org>.
18   Interestingly, at the same time, ISPs were being forced to send text messages originating with the Mubarak regime <www.ft.com/cms/s/0/4bf01300-2fc2-11e0-91f8-00144feabdc0.html#axzz1PAJpkcWm>.

"how do I find the government function that I need, and how do I know I have acceptably concluded my duty as a citizen?" For the government, the questions are, "how do I know who you are?" (proof of identity), "how do I know you signed this form?" (document control), and "how to I hold on to this record and make sure it's available in the future?" (archiving and document/records management).

3   What Must Government (and e-Government) Do?

For many years it has been the practice of professionals in dispute resolution (or conflict resolution, or conflict intervention, or conflict management, or alternative dispute resolution – or whatever we chose to call our field) to think of the role of ADR as defined by the actions of a third party, maintaining a neutral stance, and striving for resolution of specific disputes or conflicts.[19] This is changing. Almost twenty years ago, Sara Cobb and Janet Rifkin began a discussion of neutrality as a "folk concept" within the dispute resolution field, a sort of moral imperative that, regardless of its impact was assumed to be desirable. Cobb and Rifkin's recasting of the conception of neutrality was followed some years later by Bernie Mayer's *Beyond Neutrality*, and he has added to the assault on orthodoxy by arguing in *Staying With Conflict* that resolution is not always the best or most appropriate goal.[20]

If it were ever the case that questioning neutrality as a stance or resolution as a goal was considered radical, how much more radical must it be to think of the presence and influence of a technological "Fourth Party" with goals beyond resolution of specific disputes and functions beyond neutral mediation? And yet, the "Fourth Party", ODR technology, is with us, and is being used in ways that continue to expand the borders of our conception of dispute resolution as a field, and of online dispute resolution as part of that field.[21]

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19 Of course not all practitioners have subscribed to these limitations. Transformative mediation, for example, explicitly rejects the notion of resolution as a goal. However, neutrality and resolution, and the other standards of the "North American Model" of mediation have had a significant impact on the development of the field, and they have supplied the language which we have commonly used to describe what we do as conflict interveners.

20 See J. Rifkin, J. Millen, and S. Cobb, "Toward a New Discourse for Mediation: A Critique of Neutrality", *Mediation Quarterly* (1991) 9(2), pp. 151-163; S. Cobb and J. Rifkin, "Practice and Paradox: Deconstructing Neutrality in Mediation," *Law and Social Inquiry*, (1991) Vol. 16/1, pp. 25-63; B. Mayer *Beyond Neutrality: Confronting the Crisis in Conflict Resolution*, John Wiley and Sons 2004; B. Mayer, *Staying With Conflict: A Strategic Approach to Ongoing Disputes*, John Wiley and Sons 2009.

21 Use of the term "Fourth Party" to refer to ODR technology was coined by Ethan Katsh and Janet Rifkin in *Online Dispute Resolution: Resolving Conflicts in Cyberspace*, Jossey-Bass 2001.

In order for ODR to make sense in the context of e-government, it also is necessary to expand the notion of what functions ODR is to include functions that help manage conflict that is not resolvable, help facilitate communication in a wide variety of contexts, and help develop and sustain trust in governmental entities and activities. So, supplying information to potential disputants, managing communication and information in the face of potential conflict, and creating trust in organizations and institutions must be seen as legitimate goals and functions of ODR, in addition to the resolution of specific conflicts or disputes.

Part of the reason for this is that, as discussed elsewhere in this book, the whole field of Dispute Systems Design (DSD) is likely to become both more important and more complex as attempts are made to prevent and avoid disputes in addition to resolving them. DSD is premised upon an understanding of patterns and origins of disputes and using that information to change institutional structures in ways that will reduce levels of disputes. Avoiding disputes is more efficient than resolving them but understanding whether there are patterns that can be changed requires data about those patterns. All information technologies, including ODR, collect or are capable of collecting and processing data as the technology is used. This may conflict with some established dispute resolution practices, *e.g.* confidentiality, but pressure to make such changes can be expected to be part of e-government initiatives.

4   Where are e-Government and ODR Going?

This chapter is being written in the Spring of 2011, and it is unclear how the various revolutions in the Middle East will turn out. Even when not successful, these were upheavals in which technology played a role of some importance. There may be some debate as to the degree of influence of Facebook and other social media but it seems clear to us that by providing communications channels that did not exist before, they played a role in helping groups to organize and to identify and express grievances. Looking forward, it is also clear to us that all governments will, to different degrees, be challenged to adapt and respond to individual and group grievances and demands that are now easier to communicate to governments and to express publicly. Government is not an uninvolved spectator to the "conflict is a growth industry" condition in which there are expectations of both rapid and meaningful responses to problems. Indeed, ODR is likely to be an important vehicle for providing redress at a distance in an efficient and effective manner.

Social media that currently have over six hundred million registered users worldwide have been very effective in facilitating expressions of dissatisfaction and the assertion of grievances. A "Facebook revolution" is plausible because Facebook makes it possible to

form groups even when the members of the groups have only a single common interest. Conflict is a growth industry partly because the formation of groups is also a growth industry. Groups that are formed on the basis of weak connections, however, are likely to be effective in demanding change but much less useful, perhaps even an obstacle, to building consensus about large and complex problems. As noted earlier, governments that ask for new ideas need to be well prepared to respond quickly in a constructive manner to proposals for change. New technologies in this context need to be a means to building consensus upon shared values and democratic principles. This is likely a task for something other than Facebook-type software that is based on the lowest common denominator relationship.

Over time, the pressure on governments of all kinds to interact with citizens in novel ways will increase and the pressure for the mode of interaction to be fair and appropriate can also be expected to increase. Dispute resolution, it should be remembered, is important not simply to resolve disputes. It also serves to promote trust in the institutions involved in governing and resolving disputes. In the US, the current dispute resolution infrastructure in government is almost fifteen years old and was established by an Executive Order issued by President Clinton in 1996. Executive Order 12988 states that "claims should be resolved through informal discussions, negotiations, and settlements rather than through utilization of any formal court proceeding".[22] This shift was intended to provide a dispute resolution approach that, when compared to litigation, was less adversarial, more flexible, quicker and less costly. The goal was to be less reliant on lawyers presenting arguments to judges and more reliant on parties working out problems in face to face settings. An interagency working group was established to implement this, ultimately resulting in alternative dispute resolution (ADR) offices being established in over eighty departments and agencies.

During the last fifteen years, as ADR and its emphasis on face to face mediation have been taking hold in the federal government, the private sector has been developing and experimenting with online dispute resolution (ODR). What the private sector has come to understand and what government agencies still largely do not understand is that the Internet can be a valuable communications infrastructure for dispute resolution processes. All forms of dispute resolution revolve around communication and information processing. For the Internet to be adapted to serve the needs of dispute resolution is no different conceptually from adapting the Internet to serve the needs of any other information intensive process, such as online banking, online auctions, online education, etc. Indeed, banks, credit bureaus and other online entities, in addition to eBay, often provide links on their home pages to dispute resolution solutions.

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22   <www.justice.gov/adr/EO12988.pdf>.

Efficiency and convenience are the most immediately apparent benefits of ODR. The standard mediation process consists of a series of interactive steps in which mediators work to build trust, identify interests, list issues, brainstorm options, evaluate proposals and draft agreements. Software can be employed to allow some of these tasks to be completed at a distance, thus reducing travel costs and allowing participation whenever convenient. There has, however, been no inter-agency collaboration in identifying or sharing software for some of the stages in mediation. There is, therefore, a critical need for research that can make dispute resolution interactions between citizens and agencies more convenient, outlines some best practices in the use of such applications, and indicates how their use might be evaluated.

Increasing efficiency and convenience for citizens and agencies in interacting with each other can provide immediate and, in many cases, measurable benefits. Software aimed at these goals often replaces a discrete communication task that previously required a physical meeting. For example, the National Mediation Board now conducts some grievance arbitration sessions online, using web video and audio in conjunction with a screen sharing application that allows participants and arbitrators in separate locations to see and hear each other, and share the same documents they would share if the session were held face-to-face. The panel of arbitrators will soon be able to use a single text editing application to create and approve final arbitration awards without ever having to meet in person throughout the entire hearing/award process.

The goal of improving the quality of outcomes or interactions between mediators and the parties is different in that it is the intelligence and information processing capabilities of computers connected to the network that will generally provide solutions. Software, for example, can help guide parties to be more creative and flexible by experimenting with simulations and other tools. Other software will have the goal of helping parties identify results that are more beneficial to each side than a simple compromise would be. Software can possess sufficient intelligence either to interact directly with the parties or to provide new tools to mediators who are interacting with the parties.

The likely impact of expanded use of technology in dispute resolution, if it follows the experience of the introduction of ICT in other contexts, is that new ideas will surface about options that were never before possible. Currently, for example, the mediation process generates information about the conflict and the parties that is used by the mediator to help fashion an agreement. The general practice, at that point, in order to satisfy promises of confidentiality, is to destroy all the information except whether the dispute has been resolved successfully. This is a loss of valuable information and something that is not necessary if technology can separate and preserve data about the conflict from data about

the parties. Put another way, an ICT framework can capture data about patterns of cases without interfering with promises of confidentiality in individual cases and, for some agencies, this can provide guidance about how to use resources in new ways.

One of us has been assisting the US Office of Government Information Services (OGIS), a new agency established in 2009 to mediate Freedom of Information Act disputes. There were over 600,000 FOIA requests filed in 2008 and the expectation was that OGIS would have a very large caseload and need an ODR system to respond to them. It is still too early to reach definitive conclusions but large numbers of disputes have not yet surfaced. The reason for this appears to be that many disputes can be anticipated and prevented by providing better information and more efficient communications channels for requesters to learn what is happening with their request. In other words, a technology-based communications framework can provide more frequent updates and feedback for requesters and reduce the number of complaints that result more from anger and frustration than from disagreement over a decision.

When new online technology is created for any process, the initial impulse is to create online mirror images of the "live" or offline process. After a period of adjustment, creativity and process evolution begin to take place, and things that were not possible without online technology begin to become part of the normal way of doing business. To a great extent, development of ODR tools, for government and for all ADR venues, has been focused on enhancing old ADR methods and bringing efficiency to them through the use of technology. The ongoing discussion about the role of ODR within the larger ADR community is one that generates lively discussion among ADR students and practitioners. There is a continuing debate about whether ADR (*alternative* dispute resolution) is the right name for the field at all, given the fact that by far the majority of disputes are handled by the "alternative" and not by the "normal" channel litigation. There is also a lively discussion about whether ODR technology is now so embedded in the ADR world that there should be no distinction between technology-assisted dispute resolution and non-technology-assisted dispute resolution – it is all ADR, but some of it uses technology.

Regardless of the position one takes in the ADR/ODR discussions, it is important to recognize that the very existence of online tools to enhance government transparency, access by citizens to government policy debates, delivery of government services, and redress of citizen grievances, is going to transform the traditional roles and responsibilities of government agencies. Eventually, ODR technology may change the very nature of government and government dispute resolution, but until then, technology has a very solid place in the present, delivering services and resolving disputes within government agencies, disputes

between government agencies and citizens, and disputes among private sector organizations seeking government resolution assistance.