

Comment from Special Counsel Andrew Emery on *Mass, Computer-Generated, and Fraudulent Comments*  
April 28, 2021

I am submitting this comment because I will not be available to attend most of tomorrow's meeting. I really enjoyed reading the report and recommendations and the conversations at the last meeting. In particular, I appreciated that the most concrete recommendations were in line with recommendations my father and I made in an article we wrote for the Administrative Law Section's Administrative and Regulatory Law News in 2005 (<https://www.regulationwriters.com/library/ModestProposal31AdminFall2005.pdf>). What inspired our article in 2005 was that the focus of the technology experts at the time was on issues and problems that had existed almost back to 1946. The technology experts were consumed with the notion that they had just discovered these issues and problems. Today the substantive issues are the same, just with greater potential to be amplified by better technology.

I appreciate that the draft report and recommendation provide good background on longstanding issues in rulemaking. My concern is that the documents might just encourage agencies to chase the latest shiny light instead of focusing on improving notice and comment rulemaking. As was discussed in the April 10, 2021, symposium at Washington College of Law, co-sponsored by the ABA's Administrative Law Section, "Rise of AI in Federal Agencies," the term AI is just a rebranding of a series of technologies and analytical tools. AI is popular because it sounds so exciting and cutting edge, even though conversations about the underlying technologies and tools would garner far less an audience. As such, pursuit of AI may inspire folks inside and outside the government to invest, spend, and draw energy, regardless of whether they fully understand the problem they are being asked to address or the true significance and volume of the problem. Focusing on the substance of analyzing and responding to public comments in rulemaking under the APA is not the least bit exciting or interesting to most of the population and so, not surprisingly, gets little attention.

This is not to suggest I am a luddite or that I am not also enthusiastic about AI, ML, etc. To the contrary, my company has spent the last several years developing our own technology to help us perform comments analyses for our agency clients and the gains in efficiency and effectiveness have been dramatic. My point is simply a concern, perhaps unfounded, that the recommendations give the impression that agency resources need to be shifted to address the concerns targeted by the report and as a result, notice and comment rulemaking will be improved. The focus of the report is worst case scenarios, and the recommendations are merely to encourage agencies to take some actions, so the worst-case scenario does not happen to them. Except for efforts on de-duplication and the last few recommendations, this recommendation is not about improving notice and comment as it exists in most agencies most of the time. As was stated in the last meeting, as well as in our 2005 article, this is akin to an arms race, so we should be cautious not to encourage escalating the arms race at the expense of improving notice and comment.

Andrew Emery