Comment from Senior Fellow Nina A. Mendelson on *Mass, Computer-Generated, and Fraudulent Comments*

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I support the proposed recommendations in their present form. They result from an extensive public committee process and a great deal of work by the consultants, ACUS staff, and committee members. The recommendations will help agencies to manage mass comments and to address the problems of malattributed and computer-generated comments. But these challenges around rulemaking do not raise identical concerns. Comments from ordinary individuals are unquestionably relevant, useful, and even important to many agency rulemakings. For the reasons below, and because this issue is beyond the coverage of the consultants' report and thus premature to address in this recommendation, the recommendation should contain no language implying that public "views" or mass comments are irrelevant or problematic. Furthermore, the recommendation should remain agnostic on the question of how an agency should best respond to comments from ordinary citizens. ACUS should take these issues up in a future project.

(1) First, we should take care not to imply that the sole function of public comment is "technical," whether that is supplying data or critiquing an agency's scientific or economic analysis. Certainly there are some statutory questions for which public comments communicating views are less relevant. Under the Endangered Species Act, the determination whether an animal species is endangered includes assessment of the state of its habitat and the prospect of its continued existence. Under the statutory framework, public affection for a species is not directly relevant.

But agencies address an enormous array of issues that, by statute, extend far beyond technocratic or scientific questions to cover questions of value.

Nonexclusive examples of such issues that are relevant to agency statutory mandates include:

- How important nearby accessible bathrooms are to maintaining the dignity of those in wheelchairs. (This was at issue in a 2010 Americans with Disabilities Act regulation).
- How to weigh potential uses of public resources. The Bureau of Land Management regularly must make regulatory decisions regarding individual multiple-use public lands, including how to balance recreation and "scenic, scientific and historical values" with resource extraction uses such as timber or mining.
- The presence of public resistance to a particular agency action, as with the Coast Guard's ultimately abandoned decision to set up live-fire zones in the Great Lakes for weapons practice in the early 2000s. Had the agency conducted a more extensive public comment process, it would have detected the substantial public resistance to this use of the shared resource, which (without the benefit of participation) it considered justified and minimally risky.
- Public resistance to a mandate as unduly paternalistic, burdensome, or exclusionary, whether it is ignition interlock, other safety requirements, or the impending issue of a vaccine passport requirement. Justice Rehnquist called out this issue in his dissent in *Motor*

Vehicles Mfg. Assn' v. State Farm Mutual Auto Ins. Though Justice Rehnquist linked it to presidential elections, the point is the relevance of the issue.

- Environmental justice/quality of life matters. In a July 2020 final rule under the National Environmental Policy Act, the Council on Environmental Quality abandoned the regulatory requirement that an agency consider "cumulative" environmental impacts of a proposed federal action. (The statute requires "environmental impact" analysis.) This decision will especially impact low-income communities and communities of color, such as Southwest Detroit, where multiple polluting sources are located in close proximity to one another and to residential neighborhoods. The issue of whether to consider "cumulative" impacts is in no way technical. It is a policy decision whether concerns about environmental quality (and quality of life) in these communities are important enough to justify requiring lengthier environmental analyses. The comment process enables these communities to participate directly to convey the importance of those issues. A public hearing would be understood to serve a similar function, should the agency choose to hold one.

As to all these issues, the agency must balance policy considerations and reach a judgment regarding what decision will be in the public interest--what will best serve public-regarding statutory goals. These judgments encompass both technical and value-laden matters. Because statutes typically require rulemaking agencies to consider a range of factors, not **only** public views, agencies cannot treat large numbers of comments as akin to a plebiscite. But the views and preferences of ordinary citizens are certainly relevant in these settings and are thus appropriately communicated to the agency.

The text of 5 U.S.C. 553(c) is express on this point: "interested persons" are entitled to file "data**, views,** or arguments**."**

(2) The identity of individual commenters may provide critical context. That a comment on the importance of a proposed ADA regulation is from a wheelchair user surely should matter. The same is true for religious group members speaking to how serious an interference a regulation may represent to religious commitments, community members near a natural gas pipeline addressing safety or public notice requirements, or Native American tribal members near public lands speaking to the spiritual values and historical significance of those lands.

(3) A public comment process that is open to ordinary people supports participation in government by otherwise underrepresented individuals, whether they are underrepresented as a result of class, race or ethnicity, gender identity, sexual orientation, or religion. Studies of the public comment process have consistently shown that industry groups and regulated entities, with the resources to pay trained advocates, access to agency meetings, and the ability to exert political pressure, punch above their weight in the public comment process. Implying that agencies can appropriately ignore comments from individuals would simply reinforce this underrepresentation, rather than encouraging broader public engagement.

Moreover, while organized groups can be helpful, agencies cannot and should not assume that group action is sufficient to convey the views of individuals. Again, many interests of individuals—even important interests--are underrepresented in the ordinary course. With respect

to wage employees such as truck drivers, for example, only 10% of U.S. wage workers are currently represented by any union.

Where organized groups do support individual comment submission, their involvement should not be understood to taint participation. Well-funded regulated entities and industry associations regularly hire attorneys to draft their comments. We understand those comments nonetheless to communicate the commenters' views and arguments. We should not assume anything different regarding individual comments even if they incorporate language suggested by groups.

(4) While mass comments may vary in their sophistication and usefulness from rulemaking to rulemaking, that is surely true as well of comments filed by well-funded, well-represented organizations. Further, the presence of mass comments in some rulemakings may well have encouraged computer-generated comments and malattributed comments. But agencies should respond directly to these latter problems following the recommendation. Meanwhile, the appropriate response to mass comments submitted by ordinary individuals is not to deter them but, as paragraphs 11-13 of the recommendation usefully suggest, for agencies to provide clear and visible public information on how to draft a valuable comment.

(5) The most difficult issue is how, exactly, agencies should understand and treat large volumes of comments from individuals that communicate "views" instead of, or in addition to, "data" or situated knowledge, in Cynthia Farina's terminology. As noted, because agencies typically must consider a range of factors in a rulemaking, not only public views, and because of legitimate concerns about overall representativeness, agencies cannot treat comments like a plebiscite. Nonetheless, these comments clearly have value. At the most pragmatic level, large quantities of comments from ordinary citizens can be useful information to an agency regarding the political context for the rule. Agencies do not wish to issue rules that turn out not to be viable or that prompt congressional backlash.

With regard to a rule's substance, public comments can of course provide an agency with new information. Large quantities of public comments also can alert agencies to previously underappreciated and undercommunicated views and can raise agency awareness of potential public resistance. Large comment volumes can serve as a yellow flag to the agency to investigate further, including by reaching out to particular communities or organized groups to assess the extent and basis for the views and their intensity.

What an agency **should** do at a minimum is to acknowledge and offer an answer, even a brief answer, to the comments. The agency might judge that a particular set of public views are appropriately outweighed by other considerations. But an answer will communicate, importantly, that ordinary individuals have been heard in this process. The FCC's responses to large volumes of comments in the net neutrality rulemakings, both Obama and Trump-era, are reasonable examples of such answers.

Ultimately, however, the consultants' report does not tackle the question of just what agency response should be due to these types of comments. We should leave this issue to another day.

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