Comment from Senior Fellow Nina A. Mendelson on *Mass, Computer-Generated, and Fraudulent Comments*
Apr. 28, 2021

Thank you for the opportunity to comment on the draft recommendation in advance of the April 29, 2021, committee meeting. The draft makes valuable recommendations to agencies especially on the handling of malattributed and computer-generated comments. My submission focuses on mass comments.

At the outset, I agree with other commenters on the following. First, large-scale public participation in rulemakings, which can include all three of the phenomena analyzed in the recommendation, is relatively rare. Second, whatever one's views on how agencies should respond to mass comments, agencies must be very clear with the public about what they view as a useful comment, following paragraph 4 in the draft recommendation.

With respect to large-scale rulemaking participation, I recognize a range of views on exactly how agencies should handle large volumes of comments from ordinary citizens. The draft recommendation does not yet tackle that issue, and it may be premature given the coverage of the consultants' report.

But for the reasons below, and because it is beyond the coverage of the consultants' report, it is critical that the recommendation include no statements suggesting that mass comments are not useful, relevant, or even important.

Certainly there are some statutory questions for which mass comments communicating views seem less relevant. The determination whether an animal species is endangered, for example, includes assessment of the state of its habitat and the prospect of its continued existence. 16 U.S.C. 1533. 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.

Several (nonexclusive) examples of such issues that are relevant to agency statutory mandates:

- 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, "scenic, scientific and historical values" with resource extraction uses such as timber or mining.
- The presence of public resistance to proposed 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 it 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 *State Farm* dissent. Though 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, CEQ abandoned the regulatory requirement that an agency consider "cumulative" environmental impacts of a proposed 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 – and many more, including net neutrality policies, developed by the FCC under a "public interest" statutory standard – the agency must balance policy considerations and reach a judgment regarding what is in the public interest--what best serves public-regarding statutory goals. These judgments encompass both technical and value-laden matters. The views and preferences of ordinary citizens are at least relevant 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 commenters may provide critical context to their views. That a comment on the importance of a proposed ADA regulation is from a wheelchair user surely should matter. Same point for religious group members speaking to how serious an interference a regulation may be with their religious commitments, community members near a natural gas pipeline addressing safety or public notice requirements, or Native American tribe members near public lands speaking to spiritual values and historical meaning of those lands.

(3) A public comment process that is open to ordinary citizens supports participation in government by otherwise underrepresented individuals, whether they are underrepresented as a result of class, race or ethnicity, gender, sexual preference, 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 ordinary citizens would simply reinforce this underrepresentation.

Moreover, while organized groups can be helpful, agencies cannot and should not assume that such groups are sufficient to convey the viewpoints of ordinary people. Again, many such interests of ordinary citizens—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.

Conversely, the involvement of groups 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. (See note below on line 23.)

(4) Although mass comments may vary in value from rulemaking to rulemaking, we should not encourage agencies to exclude them out of hand. (See note on line 123 of the draft recommendation below.) They may vary in sophistication and usefulness, though that is surely true as well of comments filed by well-funded, well-represented organizations. In this regard, the recommendation usefully suggests that agencies should provide clearer advice to commenters 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 ordinary citizens that communicate "views" instead of, or in addition to, "data" or situated knowledge, in Cynthia Farina's terminology. Because of legitimate concerns about overall representativeness, and because agencies typically must consider a range of factors, not **only** public views, agencies cannot treat large numbers of comments as akin to a plebiscite.

Nonetheless, they 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, large quantities of public comments 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 of 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 that ordinary citizens have been heard in this process. The FCC's response to large volumes of comments in the net neutrality rulemakings, both Obama and Trump-era, are reasonable examples of doing so.

Ultimately, however, the consultants' report does not tackle the question of just what response should be due to large volumes of comments, and it is reasonable to leave it to another day. At

most, this particular recommendation should remain agnostic on the question of how an agency should best respond to large volumes of comments from ordinary citizens.

Specific comments on draft recommendation circulated April 27, 2021

Paragraph beginning line 23. This paragraph contains some language that could give rise to confusion. The challenge presented by "mass comments" is not that that many of them may be identical or be facilitated by a single organization – indeed, this may ease the agency's ability to process them – but the sheer volume of comments. In addition, the use of the word "orchestrating the submission" implies (without basis) that the commenters may not understand or endorse the language they submit and has a pejorative tone.

I propose the following minor language adjustments. "**While in theory, individuals could submit very large numbers of unique comments in a particular rulemaking of great interest,** a mass comment campaign **often** is characterized by members of the public **submitting** a large number of identical or nearly identical comments. Some of the challenges involving mass comment campaigns stem from agencies' having to process large numbers of comments.**[language deleted]** Mass comment campaigns may also make it more difficult for agencies to digest and analyze the overall content of comments."

Line 66: "perhaps because they do not **typically** receive" would be more accurate given uncertainty about future rulemaking.

Line 98. Paragraph 4 usefully encourages agencies to guide prospective commenters to the most useful form of comments. But line 98 uses the term **substantive**. It's not altogether clear what is meant in this context – perhaps "technical"? However, the APA entitles individual comenters to file **data, views, or arguments,** and the caselaw requires agencies to respond to any significant and relevant issue raised in a comment. *E.g., United States v. Nova Scotia Products*, 568 F.2d 240 (2d Cir. 1977). It might be more useful and appropriate to say **relevant** at this point.

Line 123. "mass," should be deleted from this line. Given that "interested persons" are entitled to comment "data, views, or arguments" under 5 USC 553, the recommendation should not imply that an agency could categorically exclude **mass** comments from the docket. Such exclusions indeed could violate the APA. From the agency's standpoint, the significance of large quantities of comments may sometimes be contestable, but they very often won't be irrelevant.

Nina A. Mendelson