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E-Rulemaking and the Politicization of the Comment Process

by

Daniel A. Lyons

I. Introduction

E-Rulemaking – the digitization of the notice-and-comment process – was supposed to revolutionize the way federal agencies conduct business. And in a sense it has, though perhaps not in the ways its champions envisioned. While “the move online has not produced a fundamental shift in the nature of notice-and-comment rulemaking,”¹ a small subset of politically-volatile proceedings has bucked this trend. In these proceedings, advocacy groups have harnessed the ease of online submission to create the agency equivalent of get-out-the-vote drives, pushing supporters to file thousands of nearly identical form comments in the hope of effecting change. This movement peaked during the Federal Communications Commission’s 2017 *Restoring Internet Freedom Order* (RIFO) proceeding, which attracted a record-breaking twenty-two-million-plus comments and has spawned satellite litigation about fake names, foreign influence, and the agency’s management of these submissions.²

This “mass comments” dynamic and the controversies regarding the record in the RIFO proceeding misunderstands the purpose of the comment process. From its inception, the administrative process was designed to insulate agency deliberations from politics, at least in part. Although the comment function serves a limited democratic legitimization function, its primary purpose is to provide agencies with the information necessary to improve administrative

decisionmaking. Administrative law has long placed the agency's focus – rightly – on the *quality* of agency comments, not their *quantity* or the *identity* of the commenters. Mass submissions and fake comments have little bearing on the legality of the *Restoring Internet Freedom Order* – but they do showcase some unintended negative consequences of the shift to e-rulemaking.

II. The Hope of E-Rulemaking

As Professor Cass Sunstein has explained, notice-and-comment serves two primary purposes.³ The first is a nod to representative government: agencies are not directly responsible to the electorate, but allowing the public to provide input directly to the agency helps “legitimize the administrative process by increasing accountability and responsiveness.”⁴ The second is to aid the agency's decisionmaking process. Through the comment function, interested parties can make relevant information available to agency decisionmakers trying to divine the optimal solution to a public policy dilemma.⁵

Sunstein, who served as Administrator of the Office of Information and Regulatory Affairs under President Obama, called this information-gathering function the “more important” of the two purposes.⁶ Sunstein grounded his analysis in Friedrich Hayek's observation that knowledge is widely dispersed in society.⁷ Arguing against centralized government planning, Hayek explained that a single government planner simply cannot know enough to properly allocate goods and services in society.⁸ Hayek preferred decentralized markets because the price mechanism reveals widely dispersed information about supply and demand more efficiently than a regulator could – an observation that helped earn him the 1974 Nobel Prize for Economics.⁹

Sunstein recognized that the dispersed knowledge problem plagues administrative decisionmakers but posited that a more active comment process, spurred by the e-rulemaking initiative, could help shrink the knowledge gap.¹⁰ Regulators make decisions based on the best information they have available, but inevitably they risk this information being misleading or incomplete. The notice and comment process allows those who are affected by a proposed agency action to tell the regulator directly what effect it will have, to correct errors in the agency's analysis, and to fill in knowledge gaps before the decision is finalized. Then, better informed with this additional knowledge, the regulator can make a decision from a superior place of knowledge. Sunstein praised e-rulemaking because it increases the visibility of agency proceedings and reduces the cost of reporting information to the regulator, thus improving the regulator's ability to discover and harness dispersed knowledge in pursuit of a regulatory goal.

President Obama, too, praised e-rulemaking because increased participation in the rulemaking process would yield better decisions. As one might expect, the President's Transparency and Open Government Memorandum, issued just after Inauguration Day, acknowledged the democratization benefit of increased participation, proclaiming that “[o]penness will strengthen our democracy.”¹¹ But perhaps less expected was the length with which the memorandum dwelled on the improved-decisionmaking rationale for greater participation:

Public engagement enhances the Government's effectiveness and improves the quality of its decisions. Knowledge is widely dispersed in society, and public officials benefit from having access to that dispersed knowledge. Executive

departments and agencies should offer Americans increased opportunities to participate in policymaking and to provide their Government with the benefits of their collective expertise and information.¹²

III. The Mass Comment Phenomenon

The government predicted that the shift to electronic comment filing would increase public participation by 600 percent.¹³ But this turned out to be wildly optimistic, as the average proceeding saw no significant increase in civic participation. Professor Cary Coglianese hypothesizes that while barriers to commenting are reduced by electronic filing, potential commenters remain deterred by the high technical knowledge necessary to understand and comment intelligently in an agency proceeding.¹⁴ Moreover, the same information technology forces that reduce the cost of commenting have reduced the cost of myriad other activities that most people find a more entertaining use of their time.¹⁵ It turns out that no matter how easy it is to find, the FCC's 47-page proposed rule regarding unlicensed use of the 6 GHz band just does not hold the average citizen's attention the way *Game of Thrones* does.

But while the vast majority of the thousands of annual rulemaking proceedings saw no appreciable uptick in public participation, one subset of rulemakings stand out as important exceptions. Occasionally, an agency will engage in a high-profile rulemaking proceeding on a politically volatile topic. In such cases, advocacy groups have developed sophisticated methods of organizing thousands of supporters to file substantially identical form comments supporting or opposing the rule. The FCC was an early recipient of this treatment, when a trio of advocacy groups campaigned against a 2003 change to media ownership rules,¹⁶ generating a then-record one million comments, most of which the agency described as “brief comments and form letters from individual citizens.”¹⁷ A similar campaign during the tail end of the Bush Administration generated over 670,000 comments regarding the designation of the polar bear as a threatened species due to the effect of climate change on the bear's habitat – the first time that climate change was considered as a factor.¹⁸

Perhaps the most high-profile instances of the mass comment phenomenon came in the FCC's net neutrality proceedings. A then-record 4 million comments were filed regarding the agency's 2015 *Open Internet Order* – sparked by both advocacy group-driven comment drives and by comedian John Oliver, who capped a 13-minute viral segment on net neutrality by comparing the comment process to an Internet comment thread and inviting viewers to “channel that anger, that badly-spelled bile...and focus your indiscriminate rage” in the form of an FCC comment – generating a spike in activity that briefly overwhelmed the agency's servers.¹⁹ But even this unprecedented level of public participation was dwarfed by the 22 million (or more) comments filed in the 2017 *Restoring Internet Freedom* proceeding that, in effect, repealed the 2015 rules that had imposed common carriage obligations on Internet service providers.²⁰

The sheer magnitude of these mass comments has led some to question the legitimacy of the *Restoring Internet Freedom Order*. Critics derided the Commission for failing to give sufficient weight to mass comments opposing the order, particularly those that “were only stating opinion” rather than offering legal argument.²¹ In her dissenting statement, Commissioner Jessica Rosenworcel noted that two million comments might feature stolen identities, and 500,000 came

from Russian addresses, which she argued evinces a “corrupt process.”²² Several states requested that the FCC delay its final vote on the order pending investigation into these concerns, though the request was denied.²³ Last month, the *New York Times* sued the FCC to gain access to internal agency records in an effort to investigate some of these claims.²⁴

But the law is clear that the controversy over the agency’s handling of mass comments has little effect on the legality of its order. Agency rulemaking is not an electoral function in which “the majority of commenters prevail by the sheer weight of numbers,”²⁵ meaning that an agency “has no obligation to take the approach advocated by the largest number of commenters.”²⁶ In fact, the agency need not pay any attention at all to brief comments amounting to little more than the commenter’s “vote” on an issue, especially if that comment is nearly identical to thousands already in the record. Based on judicial precedent, the Commission is required only to “respond in a reasoned manner to those comments that raise significant problems”²⁷ for the agency’s proposed course of action. It “need not address every comment” filed in a proceeding, particularly if the comment is substantively identical to thousands already in the record.²⁸

This case law is consistent with Sunstein’s view that the primary purpose of the comment process is to provide the agency with the information needed to make a decision. The “significant problems” threshold stems from the court’s desire to assure itself that “major issues of policy were ventilated”²⁹ before the agency made its final decision. In other words, judicial review values comments that inform the agency by bringing important facts or arguments to its attention. A brief comment such as “I support net neutrality” does not provide any new information or otherwise improve the agency’s decisionmaking process. As a result, such comments are of little relevance to the agency, as are ancillary questions such as how many similar comments were filed, whether the commenter’s identity is accurate, or whether a bulk filing of similar comments purporting to be filed by American citizens were instead generated by Russian hackers. Simply put, none of these questions bears on the agency’s ultimate mission: to use information gleaned from the comments to help make the optimal policy choice on an issue.

Moreover, there are good reasons why the law should not require agencies to take note of mass comments filed for or against a proposed rule. First, the comment pool does not reflect a statistically significant random sample of the population at large.³⁰ Often, it merely reflects the strength of a particular alliance of advocacy groups to organize its followers in pursuit of a political objective. Moreover, the fact that a commenter chose to file a short statement of support tells the agency little about the depth of the commenter’s opinion, or how reasoned and informed the commenter’s thought process was when arriving at a conclusion.

Does the comment “I support net neutrality” reflect the commenter’s detailed examination of the arguments for and against common carriage treatment of broadband networks, taking into account the risks of anticompetitive harm and the impact that additional regulation might have on competition and innovation? Or was it a knee-jerk reaction against the cable company? Absent context, the agency cannot determine how much weight to give a comment because it cannot discern whether the commenter’s position reflects a reasoned consideration of the issue.

Finally, giving weight to mass comments can prompt a “rulemaking arms race” between advocacy groups,³¹ leading to questions about the veracity of the submissions. A Pew Research

Center study of the *Restoring Internet Freedom* docket concluded that 57% of the 22 million comments used either duplicate or temporary email addresses; on multiple occasions during the comment period 75,000 or more comments were submitted simultaneously; and that thousands of submissions were filed by duplicate names, including commenters named “The Internet” (7470 submissions), John Smith (3,997 submissions) and MyNameJeff (2,167 submissions).³²

But if administrative law (rightly) does not acknowledge that quantity is a quality all its own, why do advocacy groups expend such efforts to generate mass comments? One purpose may be to signal other branches of government. As Stuart Benjamin noted regarding the media ownership proceeding, “[t]he leaders of the opposition...had no expectation that these comments would affect the FCC. Instead, they saw them as an opportunity to place in the record arguments and data that they could invoke in the inevitable judicial challenge to the FCC's actions, as well as an opportunity to engage in political mobilization that might influence Congress to reverse the media ownership rules after the FCC had issued them.”³³

Another rationale may be empire-building: By associating with a high-profile political issue, an advocacy group can gain attention and name recognition. This additional attention can then translate into bigger mailing lists, more members, and fundraising opportunities. As I have discussed in a previous *FSF Perspectives* article, advocacy groups continue to focus on net neutrality even six months after the *Restoring Internet Freedom Order* has taken effect, in part because it is an issue that mobilizes the base and has proven a successful fundraising engine.³⁴

IV. The Harm Caused by Mass Comments

One could argue that, while mass comments generate little value to the agency deliberative process, they are ultimately benign. After all, the law allows agencies safely to ignore value-laden comments with little or no explanatory value, even if submitted *en masse*. And by allowing members of the public to submit such comments, agencies at least maintain a façade of public accountability.

But this argument ignores the real dollars-and-cents costs that massive submissions place on agencies. These include the transaction cost of simply processing these comments in a way that separates out the wheat from the chaff. Mass comments delayed the polar bear rule,³⁵ as the Fish and Wildlife Service engaged an academic team to group and separate mass comments from more substantive submissions.³⁶ John Oliver’s priming of the net neutrality docket caused the FCC’s servers to crash, prompting the need for greater investment in storage and computing power and potentially blocking comments that could not be filed while the server was down.³⁷ Agencies also face the need to review comments for non-substantive reasons, such as to confirm that they do not expose personal information such as Social Security Numbers, copyrighted material, or trade secrets, before making the record available to the public.

Mass comments also interfere with the comment function’s purpose of yielding better-informed decisions. Sunstein is right that, by reducing the cost of submitting comments, e-rulemaking increases the likelihood that the agency will include in its record dispersed information that it would never have discovered in an offline paper-based comment process. But the acquisition of this additional information is meaningless if it is buried by a mountain of repetitive, low-value

comments. As the size of the haystack grows, it becomes harder and harder to find the needle. Filtering and sorting software can help reduce these search costs (as search engines help with the analogous problem of finding key facts among a seemingly limitless amount of information online), but this could raise concerns about sorting errors and biases in the sorting algorithms.

Perhaps counterintuitively, mass comments can also undermine the comment process's legitimization function. As noted above, while the agency must review comments, it is under no obligation to engage non-substantive comments or to credit quantity over quality. In the short run, this effectively allows the agency to have its cake and eat it too – to allow unlimited filing of comments to create a façade of democratic participation in the rulemaking process, without actually needing to alter the decisionmaking process in response to particular submissions. But if mass comment drives become more common, the public is likely to recognize that the lobbying of the agency through the comment process is hollow and ineffectual. This realization will harm the sense of public participation that e-rulemaking seeks to capture as a method of increasing its democratic legitimacy.

The politicization of the comment process also poses a more fundamental risk of harm to agency legitimacy. Once advocacy groups mobilize public opinion to pressure an agency, it is hard to confine the forces thus unleashed into the proper channels. During the 2014 net neutrality proceeding, net neutrality supporters at one point physically blockaded Chairman Tom Wheeler's driveway, prohibiting him from getting to work ostensibly until he agreed to their demands.³⁸

During the 2017 proceeding, Chairman Ajit Pai faced even more ominous threats: protestors filled social media with vicious, racist, and pornographic remarks,³⁹ they harassed his family and children at home, and they repeatedly posted his home address on social media.⁴⁰ The Commission vote to approve the *Restoring Internet Freedom Order* was delayed by several minutes while the room in which the Commissioners were deliberating was cleared due to a credible threat;⁴¹ and after the vote, Chairman Pai canceled a scheduled appearance at a national electronics trade show because of death threats.⁴² These incidents are a foreseeable consequence of mass comment drives, and not only interfere with the agency's ability to carry out its responsibilities, but also undermine the public's overall perception of the agency.

V. Conclusion

The rise of administrative law was driven, in part, by the notion that some policy questions are too technical and too important to be left to politics. For some early architects of the administrative state, politics was a dirty, haphazard process that got in the way of intelligent, rational policymaking. One of the chief appeals of the agency structure was its (partial) insulation from politics, freeing agency decisionmakers to analyze important policy questions dispassionately without undue influence from a sometimes-fickle populace.

The transformation of the rulemaking comment process into a political battleground akin to those accompanying congressional votes undermines this technocratic image. To an extent, perhaps, this politicization of rulemaking is an inevitable result of Congress's tendency to delegate important policy decisions to agencies rather than deciding them itself via legislation. And in this

sense, agencies should (and likely must) make room for interested members of the public to register their views via the comment process. But they should be slow to embrace the political limelight provided by mass comment drives. They can do this by clarifying that informative comments filed by experts are more likely to garner the agency's attention than short, form-like expressions of one's opinion. Otherwise, the mass comment phenomenon has the potential to undermine the benefits of e-rulemaking and eviscerate the insulation from politics that made agencies so attractive as an alternative source of policy analysis and decisionmaking.

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¹ MICHAEL HERZ, USING SOCIAL MEDIA IN RULEMAKING: POSSIBILITIES AND BARRIERS, FINAL REPORT TO THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES 2 (Nov. 21, 2013).

² See, e.g., Jon Reid, *New York Times Sues FCC for Net Neutrality Records*, Bloomberg, Sept. 20, 2018, available at <https://www.bna.com/new-york-times-n73014482696/>; see also Restoring Internet Freedom Order, 33 FCC Rcd. 311, 356 (2018) (hereafter "RIFO") (statement of Commissioner Rosenworcel, dissenting) (cataloguing number of comments and concern about the public record).

³ See Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 447 (1987).

⁴ Cass R. Sunstein, *Democratizing Regulation*, Digitally, Democracy Journal No. 34 (Fall 2014), available at <https://democracyjournal.org/magazine/34/democratizing-regulation-digitally/>

⁵ Id.

⁶ Id.

⁷ Id.

⁸ See Friedrich Hayek, *The Use of Knowledge in Society*, 35 AM. ECON. REV. 519 (1945).

⁹ Press Release, ECONOMICS PRIZE FOR WORKS IN ECONOMICS THEORY AND INTER-DISCIPLINARY RESEARCH, Oct 9, 1974, available at https://www.nobelprize.org/nobel_prizes/economic-sciences/laureates/1974/press.html

¹⁰ Sunstein, supra note 4.

¹¹ Memorandum, *Transparency and Open Government*, 74 Fed. Reg. 4685 (Jan. 21, 2009).

¹² Id.

¹³ Office of Mgmt. & Budget, E-GOVERNMENT STRATEGY 32 (Feb, 27, 2002), available at

<https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/assets/OMB/inforeg/egovstrategy.pdf>

¹⁴ Cary Coglianese, *Citizen Participation in Rulemaking: Past, Present, and Future*, 55 DUKE L.J. 943, 943 (2006).

¹⁵ Id. at 943-944.

¹⁶ David Teather, *Advertising Campaign Against Murdoch as US Media Ownership Laws Face Relaxation*, The Guardian, May 29, 2003, available at <https://www.theguardian.com/world/2003/may/30/usa.rupertmurdoch>.

¹⁷ In re 2002 Biennial Reg. Review--Review of the Comm'n's Broad. Ownership Rules & Other Rules Adopted Pursuant to Sec. 202 of the Telecomm. Act of 1996, 18 F.C.C. Rcd. 13620, 13624 (2003).

¹⁸ Endangered and Threatened Wildlife and Plants; Determination of Threatened Status for the Polar Bear (*Ursus maritimus*) Throughout Its Range, Final Rule, 73 Fed. Reg. 28,212-01, 28,235 (May 15, 2008) (hereafter "Polar Bear Rule").

¹⁹ See Elise Hu, *John Oliver Helps Rally 45,000 Net Neutrality Comments to FCC*, National Public Radio All Tech Considered, June 3, 2014, available at <https://www.npr.org/sections/alltechconsidered/2014/06/03/318458496/john-oliver-helps-rally-45-000-net-neutrality-comments-to-fcc>

²⁰ In re Restoring Internet Freedom, Final Rule, 33 FCC Rcd. 311, 318 (2018).

²¹ See, e.g., Jacob Kastrenakes, *FCC Ignored Your Net Neutrality Comment, Unless You Made a 'Serious' Legal Argument*, The Verge, Nov. 22, 2017, available at <https://www.theverge.com/2017/11/22/16689838/fcc-net-neutrality-comments-were-largely-ignored>.

²² RIFO, supra note 2, at 356 (statement of Commissioner Rosenworcel, dissenting).

²³ Id.

²⁴ Reid, supra note 2.

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- ²⁵ Natural Res. Def. Council, Inc. v. EPA, 822 F.2d 104, 122 n.17 (D.C. Cir. 1987).
- ²⁶ U.S. Cellular Corp. v. FCC, 254 F.3d 78, 87 (D.C. Cir. 2001).
- ²⁷ Id.
- ²⁸ Sprint Corp. v. FCC, 331 F.3d 952, 960 (D.C. Cir. 2003).
- ²⁹ Auto Parts & Accessories Ass'n v. Boyd, 407 F.2d 330, 338 (D.C. Cir. 1968).
- ³⁰ See Cynthia R. Farina et al, *Rulemaking vs. Democracy: Judging and Nudging Public Participation that Counts*, 2 MICH. J. ENVTL. & ADMIN. L. 123 (2012).
- ³¹ Fred Emory & Andrew Emery, *A Modest Proposal: Improve E-Rulemaking by Improving Comments*, 21 ADMIN. & REG. L. NEWS NO. 1, 2002, at 1, 8-9.
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- ³⁴ See Daniel A. Lyons, *The Congressional Review Act and the Toxic Politics of Net Neutrality*, PERSPECTIVES FROM FSF SCHOLARS, Vol. 13, No. 22 (2018).
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