
Rulemaking in an Internet Era: Dealing with Bots, Trolls, & “Form Letters”

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The internet has revolutionized many aspects of modern life, including both communication and politics,¹ and in the process has spawned political protest movements around the globe.² During the Arab Spring, protestors in Egypt adeptly used the internet to communicate with each other, coordinate protests, and ultimately topple the regime of President Hosni Mubarak.³ In the US, the internet helped fuel Barack Obama’s 2008 presidential campaign,⁴ Donald Trump’s 2016 presidential campaign,⁵ and is now widely used by candidates in virtually all political races.⁶ In addition, the internet has been used to promote social and political movements all over the world.⁷ As one commentator observed: “What we are finally seeing . . . is a realization of that ideal that Adams and Jefferson and Paine and before him Voltaire and Plato had . . . that ideal of having everybody have a shot at participating in this discussion.”⁸

The internet has also transformed administrative rulemaking by changing the formerly paper-laden “notice-and-comment” rulemaking

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¹ See generally RUSSELL L. WEAVER, FROM GUTENBERG TO THE INTERNET: FREE SPEECH, ADVANCING TECHNOLOGY, AND THE IMPLICATIONS FOR DEMOCRACY (2d ed. 2019).

² See *id.* at 70–84.

³ See *id.* at 75–78.

⁴ See *id.* at 102–04.

⁵ See *id.* at 108–09.

⁶ See *id.* at 95–96.

⁷ See WEAVER, *supra* note 1, at 70–84.

⁸ Liane Hansen & Davar Ardalan, *Looking at the Future of ‘E-Politics,’* NPR (June 29, 2008, 12:01 AM), <http://perma.cc/37X8-3YSM> (quoting Chuck DeFeo, vice president and general manager of Townhall.com).

process into an electronic system (“e-rulemaking”).⁹ During “the past decade, federal agencies have come to use e-rulemaking to inform regulatory processes by making rulemaking materials—including proposed rules, scientific and technical support, and public comments—widely accessible, enabling diverse and effective public participation.”¹⁰ Not only are notices of public rulemakings (“NOPRs”) available online, but individuals may submit online comments, remotely review the comments submitted by others, and electronically respond. When a final rule is issued, it (along with its statement of basis and purpose) is also available online.

Despite all of its benefits and wonders, the internet has a seamy underbelly.¹¹ In the ordinary world outside of the administrative process, the internet has been used to commit crimes, including fraud and distributing child pornography and obscenity.¹² In addition, social media platforms have been besieged by so-called “fake news”—inaccurate or deceptive information.¹³ Some of this fake news is disseminated by “bots”—essentially machines that are programmed to engage in speech.¹⁴ Other fake news is created and disseminated by “trolls”—paid individuals in foreign countries.¹⁵ Trolls, bots, and even ordinary individuals can distort public debates as each attempts to influence public opinion.¹⁶

The administrative process suffers from many of the same problems. Yet unquestionably, e-rulemaking has many potential benefits: it has opened up the administrative process to ordinary people, thereby permitting greater participation, because it has enabled people to electronically submit their comments rather than forcing them to submit comments in paper form. But this strength is also the system’s greatest weakness. If individuals can submit comments from anywhere, perhaps masking their location and identity, foreign trolls and bots have the capacity to unfairly or improperly influence and distort rulemaking

⁹ Jeffrey S. Lubbers, *A Survey of Federal Agency Rulemakers’ Attitudes About E-Rulemaking*, 62 ADMIN. L. REV. 451, 452 (2010); see also Nina A. Mendelson, *Rulemaking, Democracy, and Torrents of E-Mail*, 79 GEO. WASH. L. REV. 1343, 1344–45 (2011); Lauren Moxley, *E-Rulemaking and Democracy*, 68 ADMIN. L. REV. 661, 668–69 (2016).

¹⁰ Moxley, *supra* note 9, at 663.

¹¹ See Katherine Krems, *Crowdsourcing, Kind Of*, 71 FED. COMM. L.J. 63, 78–80 (2018); see also Lubbers, *supra* note 9, at 455–57; Mendelson, *supra* note 9, at 1344–46; Moxley, *supra* note 9, at 664–65.

¹² See WEAVER, *supra* note 1, at 115–16.

¹³ See *id.* at 139–46.

¹⁴ See *id.* at 143; Kurt Wagner, *Bots, Explained: What’s the Point? Or the Business Model?*, VOX (Apr. 11, 2016, 5:00 AM), <http://perma.cc/2QGM-FVYN>.

¹⁵ See WEAVER, *supra* note 1, at 160–61.

¹⁶ See *id.* at 143, 160–61.

proceedings. Although Adams, Jefferson, Paine, Voltaire, and Plato might have envisioned the ideal of allowing “everybody ... a shot at participating” in the discussion, it is not clear that they included bots and trolls within their concept of “everybody.”¹⁷ Moreover, even when comments come from real people, they can come through “form letters” (essentially, electronic comments that organizations urge their followers to copy and submit en masse), which are increasingly flooding e-rulemaking processes.

This short Article focuses on the problem of “fake comments,” especially those comments submitted by bots, foreign trolls, and form letters. As we shall see, as administrative processes have become ever more available online, bots and trolls have become much more common, as have the submission of massive numbers of form letters submitted by individuals associated with particular interest groups. While there are plenty of other issues that can arise with e-rulemaking,¹⁸ those other issues are beyond the scope of this short Article.

I. The Electronic Revolution in Rulemaking

The Administrative Procedure Act (“APA”) represented a major improvement in the administrative process. For example, it gave “interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments.”¹⁹ Notice-and-comment processes, the vehicle facilitating this participation, impose a three-step process for promulgating new administrative regulations: (1) the administrative agency is required to begin the process by publishing an NOPR informing interested parties about the proposed rulemaking; (2) the agency is required to give the public the opportunity to participate in the rulemaking through the submission of written comments; and (3) the agency is required to publish its final rule, along with a statement of the rule’s basis and purpose, no less than thirty days before the effective date of the rule.²⁰

Notice-and-comment procedures accomplished two primary objectives. First, by recognizing that administrative agencies are not the repository of all wisdom, the notice-and-comment process facilitated the public’s ability to submit comments to “provide[] a democratic check on

¹⁷ Hansen & Ardalan, *supra* note 8.

¹⁸ See generally Cynthia R. Farina et al., *Rulemaking vs. Democracy: Judging and Nudging Public Participation That Counts*, 2 MICH. J. ENVTL. & ADMIN. L. 123 (2012) (questioning whether increased use of technology in notice-and-comment rulemaking diminishes quality of comments).

¹⁹ 5 U.S.C. § 553(c) (2012).

²⁰ *Id.* § 553(b)

unelected technocrats who were otherwise only indirectly accountable to the American people.”²¹ Second, by permitting public comments on proposed regulations, the notice-and-comment process hopefully helped administrative agencies produce a better end product.²²

Of course, when notice-and-comment rulemaking developed, there was no internet. As a result, the rulemaking process played out on paper. An agency would publish its NOPR in print form in the Federal Register. The agency would then receive comments on paper which would be filed at the agency. Those who wished to review the comments were forced to travel to Washington or hire a surrogate to go on their behalf to physically examine the comments. At the conclusion of a successful rulemaking, the agency would publish a written document containing the rule along with a statement of its basis and purpose.

There were numerous problems with the APA’s paper-driven rulemaking process:

In practice . . . the APA’s democratic promises fell short. Until the early 1990s, only Beltway insiders made use of the APA’s procedural constraints on the administrative state. Before the Internet, members of the public could access proposed and final regulations only by viewing paper copies of the Federal Register and Code of Federal Regulations available at select libraries. And rulemaking “dockets”—an umbrella term encompassing all materials related to a rulemaking, including proposed and final rules, public comments, and scientific and technical findings—sat in file cabinets in vast, disorganized docketing rooms in Washington D.C.²³

In recent years, the internet has transformed rulemaking. The Federal Register and the Code of Federal Regulations are now available online.²⁴ In addition, during the administration of President George W. Bush, the government developed its E-Rulemaking Initiative which “digitize[d] materials in a government-wide, centralized online rulemaking management system. . . . [subsequently] the Office of Management and Budget (OMB) prohibited executive agencies from operating ‘duplicative or ancillary’ electronic tools (e-tools) related to rulemaking, reasoning that creating and operating separate systems would waste resources.”²⁵ The initiative was assisted by the creation of Regulations.gov, which “allowed the public to access and comment on executive agencies’ proposed regulations.”²⁶ OMB further revised the platform in 2007 by “introducing an RSS feed, a fast indexed-based commercial search engine with a full-text search capability. . . . [b]y 2008, all executive agencies had adopted

²¹ Moxley, *supra* note 9, at 666.

²² *See id.* at 666–67.

²³ *Id.* at 667.

²⁴ *See id.* at 668.

²⁵ *Id.* at 668–69.

²⁶ *Id.* at 669.

[the Federal Docket Management System, “FDMS”] and eliminated alternative docket and commenting systems.”²⁷ One commentator described Regulations.gov as follows:

Today, Regulations.gov provides all executive agencies with access to rulemaking materials, including relevant scientific and technical findings, along with a simple form to submit comments on proposed regulations. Members of the public can browse an education section describing the regulatory process and the role of public comments in informing regulatory decisions, access a particular rulemaking or regulatory activity by using one of the many search functions available on the homepage, and download XML data sets to conduct their own data analysis. FDMS remains the primary interface point for executive agencies. It has eliminated the need for paper records, though comments submitted via email, fax, or mail must be inputted or digitized.²⁸

In 2011, President Obama issued executive orders which “encouraged” independent agencies “to use Regulations.gov and FDMS to provide access to the rulemaking docket and to provide opportunity for public comment.”²⁹

These internet advances have radically transformed the rulemaking process by converting the paper-laden process into an electronic system. During “the past decade, federal agencies have come to use e-rulemaking to inform regulatory processes by making rulemaking materials—including proposed rules, scientific and technical support, and public comments—widely accessible, enabling diverse and effective public participation.”³⁰ With Regulations.gov, individuals and regulated entities can search online for rulemaking processes that affect them, read about the proposed rulemakings, remotely review the comments submitted by others, and even submit their own comments online.³¹ When a final rule is issued, it (along with the statement of its basis and purpose) are also available online.

The move to an electronic rulemaking system is potentially transformative. In the pre-internet era, the notice-and-comment process was not entirely effective. The hope is that e-rulemaking will enable administrative agencies to cut costs, enhance the deliberative process, and democratize the regulatory process with increased citizen participation.³² As Professor Jeffrey Lubbers has noted, “[t]he main touted benefits from e-rulemaking, of course, are increased opportunities for information dissemination, public participation, and governmental transparency,

²⁷ Moxley, *supra* note 9, at 669.

²⁸ *Id.* at 670.

²⁹ *Id.* at 672.

³⁰ *Id.* at 663.

³¹ *Site Data*, REGULATIONS.GOV, <http://perma.cc/FS97-GVFS>.

³² *See Id.*

along with better outcomes and greater trust in government.”³³ He goes on to note that:

Commenters can now e-mail their comments to the agency with just a keystroke and agencies can post all comments on their websites for everyone in cyberspace to read and react to. The days of having to travel to Washington to physically visit a dusty records repository are over. Possibilities abound for enhancing the entire notice-and-comment process.³⁴

As Professor Lubbers has also emphasized, electronic systems allow agencies to do a number of new tasks as part of their rulemaking processes:

Automatic notices can be generated by request to individuals who have requested them. Notices can be made word-searchable, and alternative or revised drafts can be posted with the changes clearly designated. Moreover, related studies, required draft regulatory analyses, and other information can be linked to the notices to provide easier public access. The comment process can also be made much more “user-friendly” and responsive to agency needs through the use of request-for-comments forms, the segmentation of proposed rules for comments, and opportunities to file reply comments—even producing “threads” of comments on particular issues. And the final stage of rulemaking can be enhanced through new publication techniques, such as linking all other related regulatory documents and final regulatory analyses, and grouping comments and the agency’s response.³⁵

Lubbers argues that e-rulemaking has the potential for even further advances (so far undeveloped), including “‘deliberative dialogue[s],’ online chat rooms, or electronic negotiated rulemaking concerning proposed regulations.”³⁶

Many view the advent of e-rulemaking as being very democratizing and permitting greater citizen participation in the rulemaking process:

The participatory goal of the transformation of rulemaking is ultimately to make it possible for participants to participate in real time with other stakeholders in a rulemaking process (an idealized “chat room”) that will allow a more rational, interactive, and less adversarial path to an optimum final rule. And as information-filtering technologies (à la Google) become more sophisticated and allow more tailoring for individualized needs, commenters will also be able to zero in on their particular interests and contribute more targeted comments.³⁷

Or, as another commentator glowingly observed: “The vast technological advances of the 1980s and 1990s thus breathed new meaning into the democratic accountability and information-enhancing promises motivating the original enactment in the APA.”³⁸

³³ Lubbers, *supra* note 9, at 452–53.

³⁴ *Id.* at 453.

³⁵ *Id.* at 453–54.

³⁶ *Id.* at 454.

³⁷ *Id.* at 455.

³⁸ Moxley, *supra* note 9, at 667–68.

One of the hoped for benefits of e-rulemaking is that agencies will be able to engage in more informed decision-making. As one commentator noted:

E-rulemaking allows technocrats drafting highly consequential regulations to harness the widely dispersed information power of the American people. It enables regulators to consider a broader array of facts and diversity of experiences in formulating regulations. Under the epistemic view, the goal of e-rulemaking “is emphatically not to conduct an opinion poll, to take some kind of political temperature, to see how much applause a proposal is able to attract, to defuse public opposition,” but rather “the goal is overwhelmingly substantive, in a sense even Hayekian—to fill gaps in knowledge and to see what might have been overlooked.”³⁹

Yet another commentator added:

E-rulemaking may reduce the imbalance in participation somewhat, because it reduces the cost both of identifying proposed agency rules and of submitting comments, compared with monitoring the *Federal Register* and filing paper comments. One scholar has suggested, however, that for rulemakings that are already high visibility, e-rulemaking may simply increase the size of the “bounce” in public participation, rather than the range of interests represented. In any event, reducing the imbalance in public participation has already occupied the attention of some commentators.⁴⁰

Despite the promise of e-rulemaking, it is not clear that the internet has shifted the process decisively in favor of ordinary individuals. There are a variety of problems. “First, many agency rules—particularly high-profile, more controversial rules—are perceived to be pretty well finalized at the notice of proposed rulemaking stage” because NOPRs “must give full public notice of all critical matters contemplated for a final rule.”⁴¹ Since “[a]ny rule change in response to comments that is beyond a ‘logical outgrowth’ of the contents of the proposed rule either makes the rule vulnerable to judicial invalidation or requires a new round of notice and comment,” agencies have incentives “to identify and resolve as many critical issues as possible prior to the issuance of the notice of proposed rulemaking.”⁴² As a result:

[O]nly the most technical comments, such as those that might result in technical changes or slight adjustments to the overall standard selected by the agency, are likely to get attention during the comment period [while] [v]alues-focused comments aimed at the overall approach of the rule are likely to be slighted.⁴³

Another problem is that the rulemaking process may be slanted in favor of regulated entities.⁴⁴ Although everyone has the right to participate

³⁹ *Id.* at 664.

⁴⁰ Mendelson, *supra* note 9, at 1359.

⁴¹ *Id.* at 1368.

⁴² *Id.*

⁴³ *Id.* at 1368–69.

⁴⁴ *Id.* at 1357.

in rulemaking processes, it “takes resources to uncover the existence of a rulemaking, to understand the issues at stake, and to prepare persuasive comments.”⁴⁵ As one commentator noted:

In the setting of health, safety, and environmental regulation, for example, regulated entities (consider automobile manufacturers and operators of coal-fired electric utilities) tend to be more concentrated, while regulatory beneficiaries (consider drivers and tap water drinkers) tend to be more diffuse and thus more often underrepresented. . . . In addition, regulated entities possess greater control of certain types of information, such as cost and feasibility, that may be especially valuable to agencies. That may prompt agencies to be particularly attentive to regulated entity comments. Regulated entities also may be better able than regulatory beneficiaries to deluge agencies with information, distracting them from comments submitted by other groups.⁴⁶

However, those issues (and other problems with the e-rulemaking process) are discussed more fully elsewhere.⁴⁷ This Article focuses on one aspect of the process: the influence of bots, trolls, and “form letters” on agency rulemaking processes.

II. The Perils of E-Rulemaking

The major drawback of e-rulemaking stems from its major strength: the fact that it inherently makes it easy for everyone to participate in the administrative process. When NOPR comments were submitted in paper form and the number of comments submitted was relatively low,⁴⁸ those comments were generally viewed “as a useful gauge of public opinion, a political temperature check that can and should impact the rules an agency ultimately adopts.”⁴⁹ Moreover, when a rulemaking process resulted in only “a few dozen comments, each comment [could] be [thoroughly] reviewed and considered by [the] agency staff in a [relatively] short period of time.”⁵⁰

With the advent of the internet, the number of comments submitted has risen dramatically, often creeping into the hundreds of thousands,⁵¹

⁴⁵ *Id.* at 1357–58.

⁴⁶ Mendelson, *supra* note 9, at 1358.

⁴⁷ See generally Farina et al., *supra* note 18; see also PETER L. STRAUSS ET AL., GELLHORN & BYSE’S ADMINISTRATIVE LAW CASES AND COMMENTS 534–46 (11th ed. 2011).

⁴⁸ See Moxley, *supra* note 9, at 667 (“Three studies analyzing participation across multiple agencies in 1989, 1992–1994, and 1996, found that the median number of comments submitted for each rule was twenty-five, twelve, and thirty-three, respectively. In a study of fourteen rulemakings from 1996, the greatest number of comments submitted on a single rulemaking was 2,250.”).

⁴⁹ *Id.* at 663–64.

⁵⁰ Krems, *supra* note 11, at 78.

⁵¹ See Mendelson, *supra* note 9, at 1345 (“Levels of participation in rulemaking are very occasionally startling. The Fish and Wildlife Service’s rulemaking on whether to list the polar bear as

sometimes in the millions.⁵² When the Federal Communications Commission (“FCC”) conducted a rulemaking on net neutrality in 2014, it received some 3.9 million comments.⁵³ That number was dwarfed by the number of comments received (23 million) when the FCC requested public comments on whether to repeal the net neutrality requirement.⁵⁴ As an FCC spokesman stated, there is an obvious “tension between having an open process where it’s easy to comment and preventing questionable comments from being filed, and, generally speaking, this agency has erred on the side of openness.”⁵⁵

Of course, an open process can include fake comments which can “impact[] the process’s legitimacy, with illegitimate comments overwhelming those that are legitimate.”⁵⁶ Today, not only are there fake comments to contend with, but so-called “bots” can be programmed to participate in public debates and rulemaking processes.⁵⁷ Outside the administrative process, bots have become commonplace in ordinary communication. At one point, “YouTube had as much traffic from bots masquerading as people as it did from real human visitors.”⁵⁸ In the administrative process, when the FCC requested public comments on whether to repeal its net neutrality requirement, it received 23 million public comments.⁵⁹ When the comments were analyzed by a machine learning engineer, the analysis revealed all sorts of problems. “[A]t least 1.3 million comments were submitted under a stolen or misused identities,” with more than 445,000 of these comments coming from Russian or German email accounts.⁶⁰ Moreover, many comments were submitted by bots which were detectable because they submitted duplicate comments differentiated only by the substitution of a synonym for a particular word.⁶¹

a threatened species under the Endangered Species Act attracted approximately 670,000 comments, including roughly 43,000 letters and postcards and 627,000 e-mails.”)

⁵² See *id.* (“In its 2003 rulemaking on media ownership rules, permitting more consolidation of broadcast ownership in a particular market, the [FCC] received over one million comments, 99.9% of which were opposed to the rules.”).

⁵³ See Moxley, *supra* note 9, at 662.

⁵⁴ See Jason Tashea, *No Comment*, 104 A.B.A. J. 33, 33 (2018).

⁵⁵ Krems, *supra* note 11, at 73.

⁵⁶ *Id.*

⁵⁷ See *id.* at 66.

⁵⁸ Michael H. Keller, *The Flourishing Business of Fake YouTube Views*, N.Y. TIMES (Aug. 11, 2018), <http://perma.cc/YG82-78YQ>.

⁵⁹ Tashea, *supra* note 54, at 33.

⁶⁰ *Id.*

⁶¹ See Brian X. Chen, *The Internet Trolls Have Won. Sorry, There’s Not Much You Can Do.*, N.Y. TIMES, (Aug. 8, 2018), <http://perma.cc/52XK-GYPD>.

There is also reason to believe that foreign “trolls” (essentially, foreign individuals who pose as Americans) have attempted to interfere in rulemaking processes. Outside the administrative process, there is ample evidence that Russian trolls tried to interfere in the 2016 presidential campaign in an effort that was coordinated through the Russian Internet Research Agency (“IRA”).⁶² The IRA purportedly created literally “hundreds of fake accounts and pages on social media,”⁶³ and spent large amounts on advertising on social media.⁶⁴ Some election observers believe that Facebook and Facebook Advertisements constituted the IRA’s favored platform, and that it used Facebook to organize protest rallies beginning in 2016.⁶⁵ However, the IRA also allegedly used Twitter, PayPal, and YouTube.⁶⁶

During the 2016 presidential campaign, trolls weighed in on controversial issues.⁶⁷ They purportedly worked twelve hour shifts, sent out thousands of messages, and prepared content for US social media.⁶⁸ Each troll was expected to produce at least eighty comments and to have at least twenty “shares” per day.⁶⁹ Once a troll created a post, he would forward it to one of a “countless” number of fake accounts in an effort to facilitate “page views.”⁷⁰ Although some Clinton supporters believe that the Russian efforts tipped the election,⁷¹ it is not clear how much impact these posts had on the US electorate.⁷² There were plenty of problems with

⁶² See Deepa Seetharaman & Robert McMillan, *Fake Facebook Accounts Latched On to Real U.S. Protest Groups*, WALL ST. J. (Aug. 2, 2018), <http://perma.cc/2UH4-V4FG>.

⁶³ *Id.*

⁶⁴ See Kenneth Osgood, *The C.I.A.’s Fake News Campaign*, N.Y. TIMES (Oct. 13, 2017), <http://perma.cc/3GCD-2DYF>.

⁶⁵ See Sheera Frenkel & Katie Benner, *To Stir Discord in 2016, Russians Turned Most Often to Facebook*, N.Y. TIMES (Feb. 17, 2018), <http://perma.cc/PCE8-QX8F>.

⁶⁶ *Id.*

⁶⁷ See Tom McCarthy, *How Russia Used Social Media to Divide Americans*, GUARDIAN (Oct. 14, 2017, 9:47), <http://perma.cc/5D8Q-ZBN3>; see also Mike Isaac, *For Social Media, an Election Day Test*, N.Y. TIMES, Nov. 12, 2018, at B3, PROQUEST CENT., Doc. No. 2131761661; Anton Troianovski, *A Former Russian Troll Speaks: ‘It Was Like Being in Orwell’s World’*, WASH. POST (Feb. 17, 2018), <http://perma.cc/5S7Q-MPQG>.

⁶⁸ See Neil Macfarquhar, *Inside Russia’s Troll Factory: Turning Out Fake Content at a Breakneck Pace*, N.Y. TIMES, Feb. 19, 2018, at A11, PROQUEST CENT., Doc. No. 2002909451.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ See Jonathan Martin & Maggie Haberman, *Moscow’s Hand Swirled in U.S., but Whether It Tipped Election is Unclear*, N.Y. TIMES, Feb. 19, 2018, at A11, PROQUEST CENT., Doc. No. 2002908735 (Clinton’s campaign communications director alleged that “Russia succeeded in weakening [Clinton] enough so that the Comey letter could knock her off”).

⁷² See *id.* (noting further “the nation’s intelligence agencies say they do not have any way to calculate whether the Russian effort swung the election”).

the Clinton campaign, including Clinton's general unpopularity.⁷³ As one commentator observed regarding the posts, "the audience seemed to grow more jaded and paid less attention to what they wrote."⁷⁴

There is also reason to believe that bots and trolls attempted to influence the FCC's decision regarding whether to repeal net neutrality. An FCC spokesman indicated that "7.5 million comments filed in favor of net neutrality regulations . . . seemed to come from over 40,000 distinct email addresses," but they "were, in reality 'all generated by a single fake email generator website.'"⁷⁵ In addition, "400,000 comments supporting net neutrality regulations originated from a Russian address."⁷⁶

Beyond bot and troll participation in the FCC rulemaking, many outside groups have adopted the practice of creating so-called "form letters" and encouraging their members and supporters to submit copies of these as part of rulemaking processes. In the initial net neutrality rulemaking, after a comedian encouraged listeners to submit comments to the FCC supporting the net neutrality principle, the FCC received nearly 10,000 public comments the next day and a total of 78,000 comments over the next five days.⁷⁷ In addition, American Commitment, an organization dedicated to protecting the "free-market Internet," promoted a "bulk submission of anti-net neutrality comments" which led to more than "half of the 1.67 million comments made available by the FCC from the reply comment period."⁷⁸ In fact, American Commitment was simply one of many groups (twenty in all) that attempted to organize campaigns that would lead to comments on the NOPR. Sixty percent of the comments received were form letters following a template established by an organization or group, although some had personalized comments or notes.⁷⁹

In other rulemakings, the percentage of form letter comments has been as high as ninety percent.⁸⁰ In some instances, individuals have submitted "multiple form letters, postcards, or e-mails to an agency, each with identical or near-identical text."⁸¹ The comments are often submitted

⁷³ See Mark Murray, *12 Days that Stunned a Nation: How Hillary Clinton Lost*, NBC NEWS (Aug. 23, 2017), <http://perma.cc/UT3W-BZ3C>.

⁷⁴ Macfarquhar, *supra* note 68.

⁷⁵ Krems, *supra* note 11, at 72.

⁷⁶ *Id.*

⁷⁷ See Moxley, *supra* note 9, at 681–82.

⁷⁸ *Id.* at 682.

⁷⁹ See *id.* at 684.

⁸⁰ See *id.* at 684–85.

⁸¹ Mendelson, *supra* note 9, at 1361.

through electronic portals using pre-prepared suggested text.⁸² In the initial net neutrality rulemaking, “[t]he number of comments opposing net neutrality skyrocketed [by] 60% in the reply period,” undoubtedly attributable to “[t]he American Commitment’s form letter writing campaign.”⁸³ It was apparent that American Commitment had prompted the submission of these form letters because the comments “used one of thirty variant rationales that were inserted between the second and third paragraph of the submission.”⁸⁴ Nevertheless, “the weight of the comments remained substantially the same as the first round, with over 85% in favor of net neutrality, approximately 14% unclear, and less than 1% opposed to net neutrality.”⁸⁵

Of course, administrative agencies like the FCC face the difficulty of how to manage these many comments. The initial FCC rulemaking, during which the net neutrality standard was adopted, involved approximately 3.9 million comments, and the repeal involved approximately 23 million comments. Even when a rulemaking does not involve a hot button topic like net neutrality, administrative agencies can receive an extraordinary number of comments: “the US Department of Agriculture received over 40,000 comments” on its effort to promulgate organic food standards and more than 1.6 million comments on another rulemaking.⁸⁶ The FCC’s rule promulgation on media ownership generated more than a million comments,⁸⁷ and “the [US] Fish and Wildlife Services received more than 640,000 e-mail comments on whether to list the polar bear as a threatened species.”⁸⁸

There are differing perspectives regarding how administrative agencies can or should cope with such a large volume of comments. The FCC has taken the position that it “need not consider all comments submitted and instead can just focus on comments that contain legal arguments.”⁸⁹ In regard to the net neutrality rulemaking, an “FCC Spokesman . . . explained that the FCC [simply] does not have the resources to analyze every comment.”⁹⁰ Interestingly, although the FCC Chairman stated that “the agency would not consider comments submitted under obviously fake names,” the agency did not take steps “to

⁸² *See id.*

⁸³ *See Moxley, supra note 9, at 685.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ Mendelson, *supra note 9, at 1361.*

⁸⁷ *See id.*

⁸⁸ *Id.*

⁸⁹ Krem, *supra note 11, at 79.*

⁹⁰ *Id. at 72.*

remove or discount ... fake and fraudulent comments.”⁹¹ One commentator speculated that the likely explanation for this failure is the fact that the Commission simply “do[es] not have the staff or time to search and analyze the comments submitted.”⁹²

Nevertheless, it is clear that the volume of comments is prompting change. As one commentator stated, “[t]he old model of careful individual consideration is inapplicable. Unavoidably the agency will start to do what, for example, members of Congress do: avoid the subtleties and keep a running tally with the grossest sort of division—basically ‘for’ or ‘against.’”⁹³ However, the evidence suggests that administrative decisionmakers do not simply tally up the comments, and declare a “winning position” based on that tally.⁹⁴ Such an approach would be undesirable for a variety of reasons. First, those who comment on NOPRs are “not necessarily representative of the populace,” and therefore their comments should not be treated “like an opinion poll.”⁹⁵ Indeed, even when an agency receives a high volume of comments from particular interest groups, those views may not represent the public’s views, but instead may “represent just the views of those groups’ members, not others, and perhaps might even be slanted towards the interests of relatively wealthy individuals, who have readier access to the Internet.”⁹⁶ Moreover, treating the comment process like an opinion poll is arguably inconsistent with “the very purpose of modern administrative agencies,” which are generally viewed as “institutions of experts seeking to bring expertise to bear to enhance the general welfare of an increasingly complex society.”⁹⁷

Some have expressed optimism regarding administrative agencies’ ability to cope with rulemakings involving a high volume of comments. Following the initial net neutrality rulemaking, which involved millions of comments, one FCC Commissioner (Jessica Rosenworcel) wrote glowingly about the process:

This is a big deal. What is also a big deal is 4 million voices. Four million Americans wrote this agency to make known their ideas, thoughts, and deeply-held opinions about Internet openness. They lit up our phone lines, clogged our e-mail in-boxes, and jammed our

⁹¹ *Id.*

⁹² *Id.*

⁹³ Lubbers, *supra* note 9, at 456.

⁹⁴ See Mendelson, *supra* note 9, at 1374.

⁹⁵ Moxley, *supra* note 9, at 696.

⁹⁶ Mendelson, *supra* note 9, at 1376.

⁹⁷ Moxley, *supra* note 9, at 696–97.

online comment system. That might be messy, but whatever our disagreements on network neutrality are, I hope we can agree that's democracy in action.⁹⁸

One commentator agreed, noting that:

[A] detailed review of the net neutrality rulemaking suggests that Commissioner Rosenworcel's optimism about the democratic capacity of e-rulemaking finds its roots in actual governance. E-rulemaking has given the American public a voice in the highly technical, highly consequential regulatory process, breathing new life into the democratic promises of the notice-and-comment process that for decades languished in crowded docket rooms in Washington.⁹⁹

That commentator went on to argue that the “net neutrality rulemaking illustrates how the internet has enabled the participatory postulate of notice-and-comment rulemaking, long relegated to the realm of democratic potential, to become a democratic reality.”¹⁰⁰ She points to the fact that “the FCC’s changes to [its] proposed rules [reflected] the themes expressed in the public comments.”¹⁰¹ In her view, “[t]he net neutrality case study demonstrates that mass comments, while value-laden rather than technical, can meaningfully impact final regulations—in particular in independent agencies like the FCC, which are subject to less rigorous empirical cost-benefit analysis requirements.”¹⁰²

Others are not so sanguine regarding the ability of administrative agencies to meaningfully handle and evaluate a large volume of comments, especially when they involve “value judgments.” Interestingly, FCC Commissioner Rosenworcel was less glowing regarding the 2017 rulemaking repealing net neutrality, noting that the FCC found that “half a million of the fake comments originated from Russian email addresses,” and arguing that “these comments ‘call[] into question’ the entire notice-and-comment process.”¹⁰³ She concluded that “[i]t is essential that we come up with ways to manage the integrity of that process in the digital age.”¹⁰⁴ She even “urged her colleagues . . . to delay the” repeal vote, claiming that “[i]t is clear that our process for serving the public interest is broken.”¹⁰⁵ When the FCC went ahead with the vote as scheduled, she declared that the FCC had shown “sheer contempt’ for public input and the comment process.”¹⁰⁶

⁹⁸ Press Release, Fed. Comm. Comm’n, FCC Adopts Strong, Sustainable Rules to Protect the Open Internet (Feb. 26, 2015), <http://perma.cc/7T3N-V6R4>.

⁹⁹ Moxley, *supra* note 9, at 698–99.

¹⁰⁰ *Id.* at 699.

¹⁰¹ *Id.* at 695.

¹⁰² *Id.*

¹⁰³ Krems, *supra* note 11, at 71–72.

¹⁰⁴ *Id.* at 72.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

Some have argued that, when agencies receive such large numbers of comments, they tend to place more emphasis on comments that are “technical and sophisticated,” whether submitted by individuals or by organized groups, although the evidence suggests that organized groups are more likely to submit “sophisticated comments.”¹⁰⁷ Such comments receive greater agency attention even if they did “not always mention the range of concerns raised by comments from the lay public.”¹⁰⁸ Agencies also seem to be “fairly resistant to significantly engaging value-focused comments.”¹⁰⁹ When agencies receive a large quantity of comments, they frequently “seem unmoved” by the volume, and often deal with “multiple postings briefly and with little real engagement.”¹¹⁰ Indeed, “[f]orm letters, postcards, or e-mails . . . are ‘sometimes derided by agency staff.’”¹¹¹ One commentator observed:

Very frequently, a notice of final rule will note the filing of large numbers of public comments, but will pass over those comments lightly, saving detailed responses for more sophisticated or technical comments. . . . rulemaking documents only occasionally acknowledge the number of lay comments and the sentiments they express; they very rarely appear to give them any significant weight.¹¹²

In addition, “resource constraints may impede agencies from fully considering the thousands of public comments they may receive in some rulemakings.”¹¹³

To the extent that a rulemaking implicates not only science and technical questions, but also “value-laden” issues, “agency officials appear to be discounting these value-laden comments, even when they are numerous.”¹¹⁴ If that is true, then it “undermine[s] the potential of public rulemaking to serve as a source of democratic accountability.”¹¹⁵

There are contrary views. As one commentator noted, in the case of the FCC NOPR on net neutrality, the agency did determine that a majority of comments favored the idea of an “open Internet.”¹¹⁶ In addition, independent “non-form letter[s] . . . overwhelmingly” supported the concept of net neutrality.¹¹⁷ Many comments focused on the importance

¹⁰⁷ Mendelson, *supra* note 9, at 1362.

¹⁰⁸ Mariano-Florentino Cuéllar, *Rethinking Regulatory Democracy*, 57 ADMIN. L. REV. 411, 414 (2005).

¹⁰⁹ Mendelson, *supra* note 9, at 1362.

¹¹⁰ *Id.* at 1363.

¹¹¹ *Id.* (quoting Cuéllar, *supra* note 108, at 421–22).

¹¹² *Id.* at 1363–64.

¹¹³ *Id.* at 1371.

¹¹⁴ *Id.* at 1346.

¹¹⁵ Mendelson, *supra* note 9, at 1346.

¹¹⁶ Moxley, *supra* note 9, at 683.

¹¹⁷ *Id.* at 684.

of “[e]galitarianism and fairness” and fully “two-thirds of the public comments ‘objected to the idea of paid priority for Internet’” access.¹¹⁸ Half of the commentators viewed “Internet access as an essential freedom, and half addressed [the] potential negative economic [effects] of ending net neutrality.”¹¹⁹ In response to the comments, “[t]he FCC made public XML datasets of over 800,000 public comments, making it possible for independent members of the public to conduct empirical analyses.”¹²⁰

Conclusion

The movement towards e-rulemaking has opened up the administrative rulemaking process in ways previously unfathomable. The old paper-driven process has largely been replaced by e-rulemaking processes which enable individuals to find NOPRs, submit comments, and read the final results online. In some respects, e-rulemaking has reinvented the rulemaking process, enabling ordinary individuals to more actively participate and hopefully resulting in a more thoughtful and reasoned administrative process.

Yet the effectiveness of the e-rulemaking process has been undercut by the potential for “bots” and “trolls” to try to influence the outcome of administrative rulemakings. Moreover, the process is sometimes overwhelmed by the sheer quantity of comments submitted. Some rulemakings have attracted millions of comments, with one attracting 23 million. This dramatic increase in the number of comments is no doubt attributable in part to bots and trolls. However, it is also attributable to the fact that organizations now create “form letters” and urge their members and subscribers to electronically submit them as part of notice-and-comment processes.

It is unclear how agencies can or should cope with such a high volume of comments. One commentator expressed concern regarding whether agencies are capable of finding “significant comments amid so many mass-solicited, one-line, fake, and fraudulent comments.”¹²¹ Thus, although “mass commenting” might be regarded as “a sign of a well-functioning democracy,” there is a risk of “anarchy” because agencies simply “do not have the staff or resources to sort through and consider millions upon millions of comments on a single proceeding.”¹²² Moreover, when agencies receive so many comments, it can be an almost impossible

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.* at 683.

¹²¹ Krems, *supra* note 11, at 82.

¹²² *Id.*

task “to determine which are real and which are fake or fraudulent.”¹²³ The mere fact that there is “a real address attached to a comment does not mean it is real,” and “just because a comment has a fake email or address attached to it or has no email or address attached to it does not mean the comment is necessarily fake.”¹²⁴

Whether there is a solution to the bots and trolls problem is unclear. Perhaps artificial intelligence could be used to separate real comments from fake comments. However, some suggest that the creation of such a system “would be costly, and [that] the public may have” doubts regarding whether computer programs can effectively “sort[] through comments submitted to agency sites.”¹²⁵ Another proposed solution involves using the Completely Automated Public Turing Test To Tell Computers and Humans Apart system (“CAPTCHA”), a system that distinguishes human beings from bots.¹²⁶ Although CAPTCHA is currently capable of coping with today’s bots, it is not clear that it will be as effective as technology changes and improves.¹²⁷ In addition, CAPTCHAs can be “hard to read and disproportionately disadvantage people with disabilities.”¹²⁸ Further, CAPTCHA might not be as effective in dealing with foreign trolls or form letter comments. A third solution is the government’s creation of an authentication process which “confirms [that] comments are submitted by real people,” and accomplishes that objective “by requiring real email addresses to be submitted with each comment.”¹²⁹ The difficulty with this approach is that individual email addresses might be available to those who search the record, and individuals might be reluctant to submit comments if they know that their email addresses will be publicly available.¹³⁰ A fourth solution, suggested by one commentator, is for agencies to charge a forty-nine cent administrative fee (essentially, the price of a postage stamp) for electronic submission of comments.¹³¹ This minimal charge might be sufficient to deter bots and trolls from submitting comments en masse, and might even deter some form letter comments.

¹²³ *Id.* at 78.

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *See id.* at 80.

¹²⁷ *See* Krems, *supra* note 11, at 80.

¹²⁸ *Id.*

¹²⁹ *Id.* at 81.

¹³⁰ *See id.*

¹³¹ *See id.* at 82.