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SYMPOSIUM PRESENTED BY:
ADMINISTRATIVE CONFERENCE OF THE UNITED STATES
AND
ADMINISTRATIVE LAW REVIEW

"MASS AND FAKE COMMENTS IN AGENCY RULEMAKING"

American University Washington College of Law
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Reported by:
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October 5, 2018

9:35 a.m.

A symposium held at American University
Washington College of Law, 4300 Nebraska Avenue,
N.W., Washington, D.C., before Joe W. Strickland,
a Registered Professional Reporter, Certified
Realtme Reporter, Certified Realtme Captioner
and Notary Public in and for the District of
Columbia.

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5 Administrative Conference of the U.S.

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14 Public Policy and Public Administration
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1 "MASS AND FAKE COMMENTS IN AGENCY RULEMAKING"

2 INTRODUCTORY REMARKS

3 MR. WIENER: Good morning, I am
4 Matthew Wiener, Vice Chairman and Executive
5 Director of the Administrative Conference of
6 the United States, or just ACUS as we are often
7 known. Thank you for joining us this morning.

8 I see from the Agenda that there is
9 either no time allotted for my introductory
10 remarks, or our first speaker and I will have
11 to share 45 minutes. And you will want to hear
12 from him and not me, and so I will be briefer
13 than is usually promised in introductory
14 remarks.

15 For those of you who don't know
16 ACUS, we are a small nonpartisan agency within
17 the Executive Branch. Through our 100 voting
18 members, we offer recommendations to Federal
19 Agencies, the President, Congress, and the
20 Judicial Conference of the United States on how
21 to improve administrative procedure, including
22 rulemaking.

23 Our exclusive concern is procedure.
24 We don't address the merits of any agency
25 rules. We also, among our many other

1 "MASS AND FAKE COMMENTS IN AGENCY RULEMAKING"
2 activities, hold events like today's forum. We
3 do so mainly to provide an opportunity for
4 Federal Agencies to share best practices -- to
5 share information and best practices with each
6 other, and for them to hear, of course,
7 perspectives from outside experts on matters of
8 administrative procedure.

9 Our subject today, for lack of a
10 better term, is "Mass and Fake Comments in the
11 Agency Rulemaking Process." Mass commenting
12 and fake commenting, or maybe fraudulent
13 commenting is better, often raise common issues
14 about the role of public participation in the
15 rulemaking process, and hence our decision to
16 address them both in a single forum. But they
17 are not emphasizing, necessarily, the same
18 phenomena. That is reflected in the
19 organization of today's program.

20 We have divided our speakers into
21 two panels. The first will address mass
22 comments and the second fake comments,
23 so-called.

24 Before we get to the panels though,
25 we will hear keynote remarks from Dominic

1 "MASS AND FAKE COMMENTS IN AGENCY RULEMAKING"
2 Mancini, the Deputy Administrator of the Office
3 of Information and Regulatory Affairs, OIRA,
4 within the Office of Management and Budget. I
5 doubt anyone has a more informed or
6 crosscutting set of views on our topic than Mr.
7 Mancini. We are very pleased and grateful that
8 he has joined us this morning.

9 Finally, I have two disclaimers and
10 a two thank-yous. The disclaimers: First, the
11 views expressed by the panelists today,
12 including those of whom are ACUS members, are
13 not ACUS's views.

14 Second, ACUS takes no position on
15 any particular rulemaking about which you may
16 hear today, and that includes the FCC's net
17 neutrality rule which brought today's topic to
18 public attention, to a large extent at least.

19 Now the thank-yous. I'd like to
20 thank first the law school for hosting this
21 event. We have a lot of friends here at this
22 law school and certainly the best among them is
23 Professor Jeff Lubbers -- I don't know where
24 Jeff is. There is Jeff -- who formally was
25 ACUS's Research Director and now is Special

1 "MASS AND FAKE COMMENTS IN AGENCY RULEMAKING"
2 Counsel at ACUS.

3 Among Law School faculty and staff,
4 I'd like to thank, in particular, Jennifer
5 Dabson and Sharon Wolfe for helping with
6 administrative arrangements today and
7 Professors Andrew Popper and Tony Varona, both
8 panelists, for helping us launch this forum.

9 Second, the Administrative Law
10 Review, for cosponsoring today's forum, Special
11 thanks are owed to Malak Doss, the Review
12 Symposium Editor, and Caroline Raschbaum, the
13 Review's Editor in Chief. Their work reflects
14 the excellence that we have all come to expect
15 from the Administrative Law Review.

16 Third, Frank Massaro, ACUS's
17 Attorney Advisor and ACUS' Research
18 Coordinator, for helping conceive of and give
19 content to and then plan this forum.

20 And fourth and finally, today's
21 speakers and moderators for taking time out of
22 their busy schedules to join us and share their
23 expertise on this important subject.

24 With that, I am pleased to welcome
25 Mr. Mancini to the podium for his keynote

1 "MASS AND FAKE COMMENTS IN AGENCY RULEMAKING"
2 remarks this morning. Dom?

3 (Applause.)

4 KEYNOTE ADDRESS

5 MR. MANCINI: I thank you very much.
6 I'd also like to thank ACUS and American
7 University for hosting this event. I think I
8 am actually in the rare position of not being
9 an expert in anything that I am actually about
10 to talk about. So you will hear a lot more
11 about the law, technology, and policy from the
12 panels. But I will try to very briefly provide
13 a framework and maybe a bit of our thoughts
14 about what is this issue. I think one of the
15 interesting things we will discuss today, and
16 you will hear differing opinions and thoughts
17 about the magnitude and nature of mass
18 commenting and fake commenting, both the
19 current state and the trends in the future.

20 Also I'd like to talk about, in
21 addition to being the Deputy Administrator of
22 OIRA, I am Co-Chair of the Executive Steering
23 Committee for e-Rulemaking. I wanted to talk
24 about e-Rulemaking very quickly. First, to
25 thank them for helping me gather some of the

1 "MASS AND FAKE COMMENTS IN AGENCY RULEMAKING"
2 data for the presentation today, and also to
3 describe it. This will be one of my points.
4 E-Rulemaking is actually 40 agencies now that
5 jointly fund a project management office that
6 is run out of EPA to run the Regulations.gov
7 and e-Rulemaking process.

8 So if you think of this in your
9 head, this is very much an interagency
10 collaboration. Some of the things I say -- I
11 do consider myself perhaps a spokesman for the
12 agency position in a way that maybe OIRA isn't
13 considered that in several other issues. And I
14 would also like to thank, in addition to
15 e-Rulemaking, several members today, including
16 one that will be on one of the panels and also
17 from my office -- I'm going to embarrass her a
18 little bit -- Wendy Liberante is really the
19 expert. She is sitting right there, so if any
20 of you have any more questions about anything
21 to do with e-Rulemaking, ask Wendy, don't ask
22 me.

23 So why don't I start with the
24 presentation of some of the slides that I
25 brought up. If you can go to slide one, first

1 "MASS AND FAKE COMMENTS IN AGENCY RULEMAKING"

2 I wanted to give you a little bit of what we
3 think is the nature and trends in e-Rulemaking.

4 The first slide is the total number
5 of comments, I believe this is noted in
6 rulemaking notices and coming through
7 Regulations.gov. A little bit of clarification
8 here. If this is a one type of mass comment,
9 which is one comment with a PDF, or even one
10 comment that is indicated as mass comment,
11 those will often be counted as one comment in
12 this chart.

13 But as you can see, this is going up
14 a lot. This actually -- maybe this is
15 indicative of something. I think as an
16 objective measure, that in 2017 and 2018,
17 relative to the couple of previous years, the
18 pace of the actual rulemaking has gone down
19 significantly, but the commenting is going up.

20 So to me this is something that is
21 worth diving into a little bit and may be an
22 indication of the changing nature of mass
23 comments as being more customized and looking
24 more like standard comments in our system. And
25 you will also hear later in the panel why this

1 "MASS AND FAKE COMMENTS IN AGENCY RULEMAKING"
2 might be happening.

3 If you could go to slide two. I
4 also wanted to give you a sense of --
5 everything that probably everyone who thinks
6 about rulemaking in the abstract knows this --
7 but how skewed public comment in public
8 rulemaking is. I believe this was pulled by
9 the rule numbers, so these are proposed
10 rulemakings. And as you can see, 33 percent of
11 the proposed rules, which are not the ones that
12 OIRA reviews, but all of them that still the
13 APA applies -- 33 percent of proposed rules
14 don't get a single public comment. 78 percent
15 of the proposals get ten or fewer comments.

16 So if you think about it in your
17 head, this was surprising to me how skewed this
18 was to the larger rulemaking. We all knew
19 that, but how extreme it was.

20 I think you will hear a little
21 bit -- I have read a little bit of the research
22 that might be presented by the second panel,
23 and the scholars have looked at what does it
24 look like for the significant rules. I believe
25 there is a study of EPA rules over the past few

1 "MASS AND FAKE COMMENTS IN AGENCY RULEMAKING"
2 years and it was screened by the number that
3 come in. So if you know the rulemaking
4 process, that significant rules are the ones
5 that OIRA reviews are or subject to comment,
6 and they concluded that about 25 percent -- and
7 EPA is one of the flagship regulators --
8 25 percent of those significant rules were
9 subject to at least one mass comment campaign.
10 And 50 percent of economically significant
11 rules were subject to one mass comment
12 campaign. And the largest rules literally had
13 hundreds of mass comment campaigns.

14 So what I take out of this is for
15 any notable rulemaking the agency should be
16 ready for mass commenting, even though for most
17 of their standard rulemakings this is not an
18 issue. Actually, frankly, public commenting is
19 not going to be driving the decision-making on
20 the small rules.

21 All right. So I wanted to talk a
22 little bit about how the Government currently
23 handles mass commenting. I'm sorry, we slide a
24 little bit into our technical areas of
25 business. This is one of the areas where the

1 "MASS AND FAKE COMMENTS IN AGENCY RULEMAKING"

2 Government has, I think, done pretty well to
3 keep up in the arms race in technology in mass
4 commenting.

5 So first, as we get to the
6 de-duplication tool, but I also wanted to
7 mention -- you will hear more about this --
8 that e-Rulemaking simply has a label in
9 rulemaking for this: Mass comment campaign.
10 And actually some people have looked at that
11 and what you will hear in the future maybe that
12 will become a less useless tool. That is one
13 way that e-rulemaking can track mass comments.
14 Just simply label them as mass comments.

15 But also I want to walk you through
16 a little bit about this de-duplication tool.
17 Again, moving beyond my technical expertise,
18 but this is not just an identified modern
19 version of postcard campaigns. You can also
20 generate and choose what level of matching this
21 tool can identify. This is used in almost all
22 of the large rulemakings.

23 So this particular example has it
24 set at 70 percent. So what that means is if
25 two comments are 70 percent identical, then

1 "MASS AND FAKE COMMENTS IN AGENCY RULEMAKING"
2 they would be so identified as part of a mass
3 comment campaign. If we go to the next slide,
4 I'll show you how that works.

5 Here is one that is 100 percent
6 identical. And the next slide, there is one
7 that I think is about 80 percent identical.
8 The number is a little bit smaller, but I think
9 that is what it said. Here is one that is
10 about 75 percent identical.

11 So if you think about one of the
12 things that may be happening, our theory is
13 that this is really the modern version of a
14 postcard campaign. Many of these comments come
15 in from identified, avid stakeholder
16 organizations. And this is my personal
17 opinion, it is perfectly fine. It is part of
18 rulemaking.

19 These are identified many times as
20 mass comments. As long as they are not taking
21 liberties with their constituency, they are
22 telling them this is actually what we intend to
23 do and here is this draft comment and we have
24 done it this particular way. Would you like to
25 submit it? Yes.

1 "MASS AND FAKE COMMENTS IN AGENCY RULEMAKING"

2 I think this is what the standard
3 mass comments are going to look more and more
4 like in the future. Customizing, changing,
5 choose from these three or four different
6 phrases. But the bottom line is that our
7 current tools can detect this. So maybe we
8 have kept up with the arms race here. But I
9 think that is going to be the question moving
10 forward is what is this going to look like in a
11 few years, or even now? Are there an emerging
12 amount and type of mass comment that are not
13 easily identifiable and handleable in our
14 current tools?

15 So I think that is the good place to
16 start talking about fake comments just a little
17 bit, and then I will maybe take a few
18 questions. I don't want to drone on and take
19 too much time.

20 So one item that also came out in
21 the research that I was reading this week is
22 that in this mass comment campaign, although
23 identified as mass comments in the EPA docket
24 as a study, about 500 of the 1,200 mass comment
25 campaigns did not have an attributable sponsor.

1 "MASS AND FAKE COMMENTS IN AGENCY RULEMAKING"

2 So we don't know where those came from, but
3 they are still identified as mass comments.

4 To me, that sounds like all things
5 equal we are probably less confident in the
6 provenance of these comments. That is one
7 thing to think about, even in the current
8 system. If they are identified as mass
9 comments, the sponsor, the stakeholder. Many
10 of these, they didn't bother saying who they
11 were. But still, that could be one area of
12 concern.

13 Like I mentioned before, a lot of
14 this is just the modern postcard campaign and
15 customization of what might be perfectly
16 legitimate comments.

17 But before I get farther along and
18 take comments, I wanted to provide you the
19 definition of "fake comment" that we have been
20 using -- it is certainly not the only
21 definition -- and walk you through a little bit
22 about the interagency groups thinking about
23 this and what we have done to date. Which is
24 not much from the outside perspective, but we
25 have been thinking a lot from the inside.

1 "MASS AND FAKE COMMENTS IN AGENCY RULEMAKING"

2 So a fake comment, I will read it
3 for you, that we have been using for the
4 purposes of our discussion is: A comment
5 submitted to an agency's rulemaking docket
6 attributed to a person that the Agency, or
7 e-Rulemaking PMO -- that is the rulemaking
8 detective team -- subsequently determines
9 didn't write, submit, or authorize the comment.

10 Now, two things this doesn't say --
11 and again I am looking forward to discussion
12 here to figure out whether we are on the right
13 track or off the track. But two things this
14 doesn't cover are anonymous comments. You
15 might hear more about anonymous comments, but
16 right now there is another in the APA, the
17 Administrative Procedures Act, that says that
18 an agency can't receive an anonymous comment.
19 The agencies have a real concern that if we
20 decided to restrict anonymous comments in the
21 rulemaking process.

22 It also doesn't cover comments that
23 have no author, that look like they are an
24 author. So this is something that they're
25 easily identified if an e-mail is used. And

1 "MASS AND FAKE COMMENTS IN AGENCY RULEMAKING"
2 this is how many of the fake comments have been
3 identified currently. If e-mail is used maybe
4 from a person that subsequently finds out that
5 their e-mail was used and they didn't authorize
6 that particular comment.

7 Either they were part of the mailing
8 list of an organization and were used as a
9 general -- expressed a general concern and that
10 was turned into what looks like an identifiable
11 e-mail from them, but they subsequently said I
12 didn't write this e-mail. Or I think even in
13 one instance in the Military Lending Act
14 restrictions there was one of the groups that
15 used its customer list. It was a customer who
16 was actually identified and he said: Actually
17 I did not like the experience here and I was
18 not a supporter of pulling back on the Military
19 Lending Act restrictions.

20 And maybe an interesting aside, and
21 I don't know if there is correlation here, but
22 one of the people that this happened to in the
23 net neutrality was my predecessor, Kevin
24 Neyland, Deputy Administrator. He contacted me
25 and said "This e-mail was sent on my behalf. I

1 "MASS AND FAKE COMMENTS IN AGENCY RULEMAKING"
2 didn't write this e-mail." He was kind of mad
3 about that. I got an earful.

4 (Laughter.)

5 But maybe we ought to focus our
6 group on someone personally that we knew who
7 supposedly knew the rulemaking process. Maybe
8 people who don't know the rulemaking process as
9 well don't know that this is happening to them.
10 So one of the things that I also think would be
11 interesting to discuss in this forum today
12 would be this issue; I think there are some big
13 questions about that.

14 So let me go over a little bit about
15 what we have done over the past few months and
16 then I would be happy to provide some
17 concluding remarks and take plenty of
18 questions.

19 So we realize that four or five
20 Government agencies by this definition of fake
21 comment had identifiable comments that were
22 called into question. And so they were looking
23 to OIRA for guidance. So we actually hosted a
24 listening session co-hosted with DOJ, we had
25 been talking to about the legal implications of

1 "MASS AND FAKE COMMENTS IN AGENCY RULEMAKING"
2 these comments. I believe that the Bureau of
3 Consumer Financial Protection, the Department
4 of Labor, EPA, and the e-Rulemaking CMO
5 provided talks to that point, talked about what
6 they did.

7 So I would like to summarize what we
8 have done and then I will give some concluding
9 remarks. So I think we realize that many
10 agencies have been receiving one-off notices
11 that with one or two comments there is an
12 issue. So they didn't -- no agency got a
13 notice that said: Oh, these thousands of
14 comments. Maybe we don't have the tools right
15 now to identify thousands of comments that are
16 potentially of concern. But many agencies got
17 one or two one-offs.

18 So they have taken various
19 approaches to this. And I think many of the
20 agencies are frankly concerned under the
21 responsibility to consider notice and comment,
22 so completely ignoring comments is something
23 that agencies can not do. Or that leaving
24 those comments in the docket, but removing its
25 attribution. So treating it as an anonymous

1 "MASS AND FAKE COMMENTS IN AGENCY RULEMAKING"
2 comment, in the event that we receive a comment
3 from a person who subsequently expresses a
4 concern about that.

5 Requesting a subsequent comment from
6 a person saying the original comment was fake.
7 Not a too uncommon thing. The dueling comments
8 in, they are both in the docket there for
9 everyone to see.

10 Or they haven't been able to
11 demonstrate the validity of the comment from
12 the person, so they remove the comment from the
13 public docket. And again we don't have -- one
14 of the issues you are hearing is that we don't
15 have a uniform position end-to-end on how to
16 handle comments and I think a forum like this
17 would really help us think harder about whether
18 we need to have one.

19 So that is the general opinion of
20 the agencies at this point, and I think I will
21 express the expressions of the interagency
22 group: That they do have current tools
23 available to handle the comments they've
24 identified as fake. I showed you one of them
25 before, and also all of these other methods.

1 "MASS AND FAKE COMMENTS IN AGENCY RULEMAKING"

2 So a lot of themes of that
3 get-together was, of course, comments are not
4 votes. Most the agencies have a lot of
5 experience how to look at comments for their
6 content and not look at numbers and percentages
7 and interested in the rulemaking process. It
8 is information that again, the APA doesn't say
9 that you need to look at every single comment
10 and say 87 percent were positive. And as a
11 matter of fact, we highly discourage that kind
12 of behavior.

13 So as a big caveat, as long as there
14 is a lot of them hanging out there coming in,
15 the agencies do feel they have the current
16 tools available. So I would say concerned, but
17 not overly worried at that conversation a
18 couple of months ago.

19 One thing that did come out, and I
20 also wanted to talk about this, is that we do
21 need, at the agencies, to continue to do work
22 an ongoing technology review -- and I am not
23 the expert to tell you what kind of tools are
24 available -- both at the front end, are there
25 other tools available to maybe look at more

1 "MASS AND FAKE COMMENTS IN AGENCY RULEMAKING"
2 validation, and at the back end identifying
3 processes and comments. And, of course,
4 looking at these tools, interactions long haul,
5 is a very important thing.

6 So I want to express how the
7 Agency says that no one is really enthusiastic
8 about the deployment of tools that will
9 significantly change the current public
10 commenting experience. It's very open right
11 now and I think a lot of agencies think that
12 openness is a virtue of the program. It would
13 be difficult for the agencies, both from a
14 resource point of view and changing the public
15 comment experience point of view, to say
16 graphically validate commenters' -- reporting
17 commenters' comments.

18 So I will give you a sense of the
19 scale of e-Rulemaking. Although there are 40
20 agencies, the budget is about \$8 million a
21 year. And this is a completely interagency
22 stakeholder-funded process. It is really, by
23 government standards, a bit of a shoestring.
24 So that resource question is going to be very
25 important for considering whether we need to

1 "MASS AND FAKE COMMENTS IN AGENCY RULEMAKING"

2 think of actual technical tools going forward.

3 One item, and I also wanted to talk
4 about one thing that rose above the thing we
5 actually considered explicitly to do, rather
6 than considered in general to do, was a CAPTCHA
7 tool. We don't have any plans at this time to
8 deploy. I think there is a very split decision
9 about whether that will be good. I do think
10 there are some concerns that you can purchase
11 solutions to the CAPTCHA tool online. They
12 have something like a 90 percent accuracy rate,
13 and I joke that is much better than I do with
14 the CAPTCHA tool.

15 (Laughter.)

16 So we do think that -- I think the
17 majority, but not unanimous opinion, was that
18 that would make the servers much less
19 convenient to the legitimate users and not
20 deter the ones that were really determined to
21 distort the rulemaking process through fake or
22 somehow artificially generated comments.

23 And also, beyond the scope of this
24 particular discussion, but a lot of the other
25 tools out there did push up against that

1 "MASS AND FAKE COMMENTS IN AGENCY RULEMAKING"
2 changing of experience and resource issues.
3 Again, this is something that we absolutely
4 know that we have to do to keep up.

5 So the final thing that came out of
6 this discussion -- I think you will hear more
7 about, because I am certainly not an expert and
8 I mentioned this before with the number of
9 comments coming up -- how the nature of mass
10 commenting may be changing and may be changing
11 in a way that actually facilitates more
12 artificially generated or fake comments. This
13 would be bots.

14 And so in some of the recent
15 rulemakings -- and this is only a few months
16 old -- they did see a huge uptick in bot
17 traffic that looked like these were customized,
18 individualized, but probably still matches the
19 comments. That is the biggest question in my
20 head we started to see and we need to get our
21 heads around it.

22 So next steps and some conclusions.
23 I will say something about one technology tool
24 that I do think is very important, because
25 these are provisions that we use, people are

1 "MASS AND FAKE COMMENTS IN AGENCY RULEMAKING"
2 looking at, actually, natural language
3 processor. It is one of the emerging
4 artificial intelligence tools that you hear a
5 lot about, how to handle mass amounts of
6 uncurated information.

7 We are not where we need to be yet
8 on that issue in Government. I think this is
9 rapidly emerging as a standard for how to
10 handle large amounts of information. So I
11 would offer that as something that we may need
12 to get our heads around the technology and
13 policy and legal implications of how the
14 deployment of those CAPTCHA tools affects
15 rulemaking process. What does it mean to
16 consider a comment under the APA, when much of
17 the consideration and categorization of
18 comments would be using artificial intelligence
19 tools?

20 We have done in pilot version a few
21 years ago. It actually looked like it was
22 going to be very effective, a couple of
23 rulemakings where we compared the use of the
24 tools versus more of a standard. And I also
25 think that frankly a lot of agencies that

1 "MASS AND FAKE COMMENTS IN AGENCY RULEMAKING"
2 contract out their comment analysis are
3 actually already using these tools and they are
4 paying a lot for them.

5 So I am a big advocate for moving
6 this in-house, thinking hard about as a
7 government and what the use of these tools and
8 the rules and the administration may mean. And
9 so that is something I was really quite focused
10 on.

11 Second, like I mentioned before, I
12 think the issue of anonymity in commenting is a
13 very interesting one. Most agencies accept
14 anonymous comments. Some agencies do have a
15 policy of encouraging, at least, identification
16 on comments, but it is not uniform across the
17 Government. There may be some situations, for
18 example, where anonymous commenting is actually
19 very important. An agency seeking information
20 about legal violations, an individual who can
21 identify legal violations may be in fear of
22 retaliation, for instance.

23 One thing you might think about in
24 this issue of anonymity is, like I said, there
25 seems to be a way, at least now, to identify

1 "MASS AND FAKE COMMENTS IN AGENCY RULEMAKING"

2 mass comment. Maybe we need to think about
3 deploying some of those tools or controls on
4 people who are intending to submit mass
5 comments. Those are already part of
6 rulemaking, such as validation of large mass
7 commenters.

8 As I said, most of these things are
9 tools that are well-known to the agencies and
10 we could probably think about maybe not a
11 blanket decrease in the amount of anonymous
12 comments but a phased decrease. But, again, we
13 are in the very early stages of discussion on
14 this. I think this kind of gathering can
15 actually affect our thinking very much.

16 So last thought concerning next
17 steps, this is absolutely an issue where we
18 don't know what we don't know. I know that is
19 a flippant statement sometimes, but that is
20 absolutely true in this case. Where are these
21 new campaigns and bot traffic coming from? I
22 will be very frank, we don't know if it is
23 coming from kids in Macedonia, Skynet,
24 somewhere in between, some of those actors in
25 the rulemaking process that we have heard about

1 "MASS AND FAKE COMMENTS IN AGENCY RULEMAKING"
2 in other areas that we are concerned about.

3 I do think we don't need to be
4 reactive. We really need to be on this to
5 understand the nature of the incoming flow of
6 public comment rulemaking.

7 Why do we take this seriously?
8 Maybe I don't have to prove this point to this
9 audience, but this is really a matter of the
10 Government's responsiveness to the public.
11 This is a responsibility of the regulatory
12 state to be responsive to concerns raised by
13 anyone interested in regulation or the
14 regulatory policy, the core part of the APA.
15 We want to be transparent about the motivation
16 of any underlying decisions. This lends
17 legitimacy to the regulatory process. That is
18 not a controversial statement, but I wanted to
19 step back a little bit.

20 If we lose control of this
21 responsiveness -- that is the bottom line -- if
22 the signal gets drowned out by the noise in
23 this process, it is real that comments are
24 actively designed to distort the
25 decision-making process, and they're

1 "MASS AND FAKE COMMENTS IN AGENCY RULEMAKING"
2 successful, government decision-making is
3 poorer as a result.

4 So the agencies firmly believe --
5 and I want to be clear that we are not at this
6 point yet and we have the tools necessary to
7 handle the issues that we have uncovered to
8 date. That is very clear "to date." But I
9 urge new developments and I am looking forward
10 to this discussion today.

11 So with that I would love to take
12 questions, or go to the next step in the
13 process, or anything in between. Do we have
14 any process by which we are going to generate
15 the questions? Do we have a mic? A hand went
16 up in the back first.

17 PARTICIPANT: Good morning. I am
18 Martin Franks, I'm the Branch Manager for the
19 IRS office that handles the comments, and I
20 want to make one statement and I also have a
21 question.

22 One thing I think we ought to do
23 realize -- and I agree with what you said
24 earlier -- the public should realize that
25 submission of comments is not a vote. And the

1 "MASS AND FAKE COMMENTS IN AGENCY RULEMAKING"
2 original purpose of the comment was to find out
3 if there were some inconsistencies or issues
4 that had been forgotten or just not properly
5 addressed in the proposed rule. And I think
6 that bears remembering.

7 But here is my question: With the
8 amount of comments that we are now getting, we
9 used to have a process where we would review
10 the comments before posting for personal
11 identifiable information, or for profanity, or
12 if they just really weren't on point to the
13 issue at all.

14 Now with the amount of comments that
15 we are getting, it is really hard to review the
16 comment before we post it. This is -- we don't
17 have the manpower, but there is also the clamor
18 to get those comments posted because people can
19 see on Regulations.gov how many comments have
20 come in and how many are posted and see the
21 disparity.

22 So I guess my question or comment
23 would be could there be a best practices or
24 language that could be posted at FDMS for all
25 the agencies so that people know perhaps that

1 "MASS AND FAKE COMMENTS IN AGENCY RULEMAKING"
2 their comments are not going to be reviewed and
3 to, you know, give them appropriate warning?

4 MR. MANCINI: Well, I will defer on
5 the details of that to the PMO. Some of them
6 are here. But we did hear at our interagency
7 listening session that many agencies do still
8 do that screen. So it might be a sense of an
9 individualized agency basis, but I think many
10 of the agencies made the point at that session
11 that they still screen for profanity or
12 gibberish or code or things like that.

13 That is still there, but I think the
14 general point is a good one. That as we move
15 forward that we may be losing the ability to do
16 that.

17 PARTICIPANT: My name is Judy Conti.
18 I'm the Government Affairs Director at the
19 National Employment Law Project and we
20 participate in a lot of regulatory processes
21 with the Department of Labor.

22 And I wanted to ask a question about
23 mass comments from advocacy organizations,
24 because I have heard directly from many people
25 who have worked in the regulatory process under

1 "MASS AND FAKE COMMENTS IN AGENCY RULEMAKING"
2 at least three, if not four, administrations --
3 so it's not a partisan point of view -- that
4 sign-on letters, for example, don't carry as
5 much weight, a sign-on letter with 200
6 organizations doesn't carry as much weight as
7 say 50 to 75 template comments from different
8 organizations.

9 So what we will often do is put
10 together a two- or three-page document with
11 areas where we recommend customization for an
12 organization based on their constituency, the
13 top points and legal citation with the position
14 that we want and we want them to advance, and
15 recommend that they customize it as much as
16 possible to make it persuasive. But I suspect
17 even with a 70 or 75 percent filter it is
18 probably going to come out as a mass comment.

19 So I wonder is there some sort of
20 standard view among agencies about the value of
21 a sign-on letter as opposed to mass comments
22 from advocacy organizations?

23 If there isn't, I would recommend
24 that maybe that is something that the working
25 group and people in this process consider.

1 "MASS AND FAKE COMMENTS IN AGENCY RULEMAKING"
2 It's certainly one way for like-minded advocacy
3 organizations to weigh in with both a lighter
4 touch from their work, but also then something
5 that doesn't generate mass comments on your
6 end.

7 MR. MANCINI: So I actually don't
8 know whether there is a general opinion in the
9 agencies about the effectiveness about one
10 method versus another. So I would defer to the
11 particular agencies and the Department of
12 Labor. There is nothing legally that says one
13 carries more legal weight than another. I
14 think it is just a matter of trying to get the
15 agencies' attention and that may have been
16 perceived as being more effective in the past.

17 There is -- I also reiterate that it
18 absolutely seems to me like a legitimate and
19 effective way to interact during a rulemaking.
20 There is nothing, absolutely nothing wrong with
21 a customized set of letters that show up in our
22 filters. Show up in the duplication filters of
23 50 percent, that is still a very legitimate
24 public comment that should be considered. It's
25 just a matter of this is something we need to

1 "MASS AND FAKE COMMENTS IN AGENCY RULEMAKING"
2 keep in mind as we -- this becomes more of a
3 deployment of technology to generate the
4 comments and the deployment of technology to
5 process the comments, we need to make sure that
6 is a coordinated reflection of the commenting
7 in the public in the rulemaking process.

8 PARTICIPANT: Chris Giannella from
9 the MITRE Corporation. I have a question about
10 what you were talking about in terms of the
11 applications of natural language processing
12 technology and the APA. I would like to hear
13 your thoughts on that more broadly, but my
14 specific question is could you imagine a level
15 of accuracy that these technologies might be
16 proven to attain such that you could see that
17 comment processing could allow certain comments
18 to not be viewed by people and still be
19 consistent with APA?

20 MR. MANCINI: That is a very
21 interesting question. I will hypothesize that
22 a human eye did not look at the 22 million
23 comments that came in on the FCC net neutrality
24 rule. So in a sense they are already
25 struggling with that. So I think some of this

1 "MASS AND FAKE COMMENTS IN AGENCY RULEMAKING"
2 is happening already.

3 I think this is an area where -- I
4 really don't know the answer to that. I would
5 think that a standard of consideration of
6 comments would definitely include some of these
7 tools. And as I said, maybe eventually the
8 noninclusion of some of these tools that are
9 actually categorizing and capturing comments
10 might be an issue as well. As of now I'm going
11 to hypothesize on the interaction between
12 consideration and legal implication of some of
13 these tools because we are just not there yet.

14 PARTICIPANT: I am David Pritzker,
15 formerly of ACUS. I just want you to clarify,
16 please, is the objective of the de-duplication
17 tool mainly to enable faster processing, not
18 having to read all of the duplications, or is
19 it somehow to discount the validity of these?
20 Exactly what is its purpose?

21 MR. MANCINI: So it is certainly not
22 to discount. However, I would characterize the
23 purpose as to identify and characterize the
24 nature of the comments. As I mentioned before,
25 it is just a piece of information. And I

1 "MASS AND FAKE COMMENTS IN AGENCY RULEMAKING"
2 couldn't even tell you how each agency handles
3 that information. If there is information that
4 says these other comments are 80 percent
5 identical and the weight that that puts in the
6 rulemaking process is really going to be a
7 record-by-record issue.

8 Because sometimes these comments
9 actually have -- I think that may be where some
10 folks are under the impression that the
11 comments can't be substantive. Sometimes they
12 have evidence and cites and results and data.

13 But again, it is a piece of
14 information to help the agencies understand the
15 nature of the public comment. I don't think it
16 has any implications for how much or little
17 they are considered, and it shouldn't.

18 PARTICIPANT: Hi. David Gossett
19 from the FCC.

20 MR. MANCINI: You should be up here.

21 PARTICIPANT: No, thank you. We
22 decline that. I have a question on fake
23 comments in particular and the study that you
24 discussed. In particular, whether in that you
25 saw any unique fake comments in the sense

1 "MASS AND FAKE COMMENTS IN AGENCY RULEMAKING"
2 that -- my sense, my general perception of what
3 has been found is that when there are fake
4 comments or comments that are attributed to
5 someone who claims not to have written them,
6 those are almost entirely mass comments and
7 duplicative of other comments in the
8 rulemaking.

9 MR. MANCINI: That is a good
10 question. That is the general nature of the
11 number of, quote, fake comments that we have
12 found to date. I think one of the things is
13 that they are going to stop looking like that.
14 They are going to start looking much more
15 customized and be harder to identify.

16 And I also, with one caveat, this is
17 a paper I -- I am assuming that some of the
18 authors of the study are going to be on one of
19 the panels, so I would defer to the nature of
20 what they found.

21 MS. FARINA: Hi. Cynthia Farina.
22 This question is prompted by David Pritzker's
23 question. I was in a computer science
24 presentation several years ago when the de-dupe
25 software was first being invented. And at

1 "MASS AND FAKE COMMENTS IN AGENCY RULEMAKING"
2 least the way it was presented at that point
3 was that it was capable of highlighting for
4 agencies the unique qualities of some of these
5 comments so that what an agency would see here
6 is the text. There are a hundred comments that
7 look like this. And then basically the agency
8 person would read that text.

9 Here is the next version with the
10 unique portion highlighted and there were 150
11 of these, and so forth. And so we go through
12 and present to the comment reader the exact
13 text with unique material highlighted, and a
14 count.

15 And although there was a lot of
16 argument in that forum about whether that was
17 minimizing the importance of these comments,
18 what the authors came back with is: No, this
19 lets the agency focus on what the unique
20 elements are in a way that if they actually had
21 to read through all of these things, they might
22 miss.

23 So I'm curious, is that basically
24 the way the de-dupe software that FDMS is
25 offering operates?

1 "MASS AND FAKE COMMENTS IN AGENCY RULEMAKING"

2 MR. MANCINI: Actually, maybe we
3 went through that a little bit quickly. The
4 slide that showed the 79 percent match had the
5 red line of what was -- and what wasn't
6 highlighted was the thing that was matched and
7 the redline was unique, and it was well over
8 75 percent. So, yes, it facilitates exactly
9 that kind of discussion.

10 Question?

11 PARTICIPANT: Hi, Jeff Martin. I'm
12 just wondering about this from the standpoint
13 of the reader of comments on Regulations.gov
14 and sort of the user friendliness of comments
15 on Regulations.gov. It's already pretty hard
16 to hone in on particular comments, because you
17 have to open up files and it's pretty hard to
18 identify which ones you want to look at now.

19 But with the advent of -- that first
20 chart that you showed was really striking about
21 how many comments are coming in now. And I'm
22 wondering if people who produce Regulations.gov
23 are going to be able to also order the comments
24 in some way that you can skip looking at all,
25 you know, these thousand comments because

1 "MASS AND FAKE COMMENTS IN AGENCY RULEMAKING"
2 they're all the same?

3 MR. MANCINI: We're working on it,
4 is probably the best answer to that. We are
5 always working on -- I say we, as the
6 spokesperson for the executive steering
7 committee, there are several efforts underway
8 to make it more user-friendly, including a
9 better way to navigate through the comments.

10 But it may not be -- it depends on
11 how this evolves though. If mass comments
12 remain easily identifiable, and as I said there
13 is a label, mass comment, that is one thing.
14 If they start becoming indistinguishable except
15 through sophisticated analysis from the general
16 comments, it will be more difficult.

17 I think we are almost out of time.
18 I will let the real experts talk.

19 PARTICIPANT: It's really just a
20 process or perhaps procedural question. It's
21 volume. So much volume coming in to reg.gov at
22 once. How often are you experiencing either
23 slowdowns or shutdowns? Because that is
24 something as an agency we are worried whether
25 that affects our comment period.

1 "MASS AND FAKE COMMENTS IN AGENCY RULEMAKING"

2 MR. MANCINI: That is really a
3 professional question for the e-Rulemaking
4 team. I do know that at least once they caused
5 a denial of service attack by overwhelming the
6 comment system. But I'm not sure they are
7 aware how much it affects the system
8 capability. I don't think it has ever been
9 shut down because of the volume of comments
10 though, but I defer to them. Thank you.

11 (Applause.)

12 MR. BULL: First, I'd like to thank
13 Dom Mancini for his very informative comments,
14 which really was an excellent job of framing
15 both of our panels for today, the first on mass
16 comments, which we will jump to now, and the
17 second on fake comments.

18 If you could give us a couple of
19 minutes to set up the first panel, we will jump
20 right in given the limited amount of time we
21 have. Thank you. So if the panelists would
22 come join us in the front, please.

23 PANEL: MASS COMMENTS IN RULEMAKING

24 MR. BULL: Okay. I think we will go
25 ahead and start with the first panel this

1 "MASS AND FAKE COMMENTS IN AGENCY RULEMAKING"
2 morning. This is going to be a panel on the
3 question of mass comments. And we have an
4 excellent group of panelists lined up -- two
5 professors and two practitioners -- which is
6 perfect, because the goal of this panel will be
7 to look at both the practical issues associated
8 with the phenomenon of mass commenting, and
9 also examine some of the theoretical issues
10 that undergird this problem.

11 So what we will be doing this
12 morning, given the limited amount of time we
13 have available, only an hour, is I will kick
14 off the discussion with a question for each of
15 our panelists. They will take a few minutes to
16 respond to that question. And then we will
17 jump into a moderated discussion where we will
18 have additional questions targeted to one of
19 the panelists, but they should all feel free to
20 jump in. We will go for 40 or 45 minutes or so
21 and then open up to you for questions.

22 I will briefly introduce the panel.
23 Our first panelist is Michael Whiting, who is
24 the IT Lead and Operations Manager of the
25 e-Rulemaking Initiative and FOIAOnline at EPA.

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2 Michael is responsible for the
3 operation of three Federal websites, one of
4 which is Regulations.gov, where over 2.5
5 million comments are submitted annually.

6 Our second panelist is Professor
7 Nina Mendelson of the University of Michigan
8 Law School. At Michigan, she teaches and
9 conducts research in administrative law,
10 environmental law, and statutory
11 interpretation. She is also a Senior Fellow of
12 the Administrative Conference of the United
13 States.

14 Our third panelist is Christina
15 McDonald. Christina is the Associate General
16 Counsel for Regulatory Affairs at the Office of
17 General Counsel at the Department of Homeland
18 Security. In that role, Christina advises the
19 General Counsel, Secretary, and other
20 department leaders on legal issues associated
21 with rulemaking at DHS.

22 She is also an adjunct professor
23 here at the Washington College of Law and she
24 is a Government Member of the Administrative
25 Conference of the United States.

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2 And then finally we have Professor
3 Steve Balla, Professor of Political Science,
4 Public Policy, Public Administration and
5 International Affairs at George Washington
6 University.

7 Professor Balla's central focus is
8 on public participation in the policymaking
9 process and he has also been a consultant for
10 the Administrative Conference of the United
11 States.

12 So with that, let me kick it off
13 with a question for our first panelist,
14 Michael. So we have already heard an excellent
15 presentation on some of the various issues
16 associated with mass commenting, in particular
17 regs.gov which Michael runs. So I'm sure
18 basically everybody in the room is quite
19 familiar with regs.gov and the public
20 interface. But people are perhaps less
21 familiar with sort of how it works on the back
22 end, what the underlying technology is.

23 So I am wondering whether Michael
24 could speak to that, and also particularly
25 speak to the features of the system that allow

1 "MASS AND FAKE COMMENTS IN AGENCY RULEMAKING"
2 it to accommodate the large quantities of
3 comments that we are seeing today in many of
4 these rulemakings. Michael?

5 MR. WHITING: Again, Mike Whiting
6 with the e-Rulemaking PMO at the Environmental
7 Protection Agency. So basically, the systems
8 to support the e-Rulemaking process, we have
9 two. The Federal Docket Management System,
10 FDMS, which is at FDMS.gov, and
11 Regulations.gov, which is the public face of
12 the system.

13 FDMS is accessible -- restricted
14 access accessible to Government-approved users.
15 That is the heart of the e-Rulemaking process.
16 That is where all the information is stored in
17 the commenting process.

18 Basically, FDMS receives a daily
19 feed from the Federal Register with all the
20 notices and rules that are coming out. The
21 system automatically posts those in
22 Regulations.gov so they are viewable to the
23 general public. As Mr. Mancini said, we have
24 about 40 partners that support 180
25 organizations within those agencies.

1 "MASS AND FAKE COMMENTS IN AGENCY RULEMAKING"

2 If you are a participating partner,
3 and you have to be a participating partner to
4 use the services of Regulations.gov and
5 FDMS.gov, there will be a "comment now" button
6 on your comment. If you are a nonparticipating
7 user, there are instructions within the comment
8 of how to submit a comment, typically a mailing
9 address or an e-mail address that goes to the
10 agency that is supporting that notice.

11 So once those rules notices are
12 posted, the agency users within FDMS create
13 dockets to support those rules and they
14 determine what information is publicly
15 viewable. Whether that's additional amplifying
16 information that they post to those dockets in
17 support of those notices or it's public
18 comments that come in and are reviewed and
19 deemed publicly viewable and are posted for
20 public viewing.

21 Now, for our group that manages the
22 sites, we just provide the tool. We don't
23 participate in the comment management, comment
24 analysis process at all. That's all by the
25 partner agencies. They determine how they

1 "MASS AND FAKE COMMENTS IN AGENCY RULEMAKING"
2 evaluate all the comments. They determine what
3 is posted publicly. So my group plays no part
4 in the comment analysis role.

5 We receive comments from
6 Regulations.gov via a web forum. We also
7 receive comments through the Federal Register.
8 We have a write API application program and
9 interface where the public can comment on the
10 Federal Register site and those comments are
11 passed directly to our back-end system and
12 processed the same way a web forum comment
13 would be.

14 We also receive bot traffic or
15 server traffic. So basically what has happened
16 with that is another organization has scraped
17 our web page, looked at our forms, and found
18 out what the input blocks are on our form, and
19 they generate a program that provides those
20 inputs. If you want, it's a headless browser
21 where it is a direct server-to-server
22 communication. So comments come in that way.

23 We cannot discern from bot-generated
24 comment or a comment form comment. It is
25 estimated that 50 percent of the bot traffic --

1 "MASS AND FAKE COMMENTS IN AGENCY RULEMAKING"
2 or traffic on the Internet is bot traffic.

3 So I just have one minute. I wanted
4 to say we are regularly contacted by over 170
5 countries every month. We track countrywide.
6 We do not track any origin information per
7 individual comments. I couldn't tell you an IP
8 address, I couldn't tell you where they came
9 from. We don't track that. And that is going
10 into the fake comment discussion down the line.

11 Volumes, we receive 20,000 an hour
12 -- I'm sorry, 30,000 is our maximum that we
13 have seen, and we process over 100,000 comments
14 in a day. With that -- okay.

15 MR. BULL: Thank you, Michael. Our
16 next question is for Professor Mendelson. In
17 2011, you wrote the article "Rulemaking
18 Democracy and Torrents of E-Mail," which is a
19 very apt title for this issue. You highlighted
20 there many of the problems we are seeing
21 recurring and becoming even more salient today.

22 In that article you said very
23 clearly that rulemaking is not a plebiscite, it
24 is not a vote. But you do suggest that the
25 policy views expressed in the comments should

1 "MASS AND FAKE COMMENTS IN AGENCY RULEMAKING"
2 be entitled to some consideration as far as the
3 agencies' decision-making.

4 So I'm wondering if you could
5 elaborate on that position. And also I think
6 this is a fundamental theoretical question,
7 which is rulemaking writ large purely or
8 largely a technocratic exercise or is it partly
9 a democratic exercise?

10 MS. MENDELSON: Thank you for
11 inviting me to participate in this very
12 interesting morning of discussion. As we heard
13 this morning, most agency rulemakings don't
14 draw a lot of public attention. I quickly
15 totalled up the numbers. We are talking about
16 93 percent of rulemakings getting less than a
17 thousand comments.

18 But as you all know, agencies do
19 occasionally draw a great deal of public
20 attention and thousands or millions of
21 comments. Of course, net neutrality has
22 already come up. The statistics we saw earlier
23 this morning showing an uptick in commenting.
24 But even prior to e-Rulemaking, there were
25 rules that drew a lot of attention. In the

1 "MASS AND FAKE COMMENTS IN AGENCY RULEMAKING"
2 mid-90s, over 40,000, the 2003 FCC broadcast
3 media ownership rules drew roughly a million, I
4 think.

5 And then most recently, even rules
6 we might consider lower profile online are
7 drawing hundreds of thousands of comments. A
8 Bureau of Land Management rule reviewing
9 restrictions on oil and gas operators on public
10 lands just drew about 600,000 comments.

11 So I think that is the normative
12 size of this question on the technical side.
13 And the question is what should agencies be
14 doing with these comments in rules that do
15 evoke a high level of public engagement? And I
16 have argued that agencies need to take these
17 comments more seriously than they presently do.
18 Although I do think, perhaps, the sham comment
19 issue could present a significant challenge.

20 So why should agencies take the
21 comments more seriously? First of all the
22 agencies are very often tasked not with just
23 addressing technical questions, but with
24 addressing questions of value. This is not
25 always true. The IRS rules that came up this

1 "MASS AND FAKE COMMENTS IN AGENCY RULEMAKING"

2 morning might be an exception. I think the
3 Endangered Species Act might be an exception.
4 But just consider a couple of quick examples.

5 When EPA sets national ambient air
6 quality standards under the Clean Air Act, it
7 is supposed to the requisite to protect the
8 public health which is adequate, large and
9 inclusive. That is partly a technical question
10 about how dangerous particular air pollutants
11 are, but it's also a question of value. How
12 protective a standard do we need? Where do we
13 want to strike that balance between not
14 protective enough or overly prospective?

15 Or in public lands that are supposed
16 to be managed for multiple uses, which uses
17 should get priority? Should we have more
18 recreation with snowmobiling on public lands,
19 or wildlife habitats, or timbering?

20 Public preference, this seems
21 clearly relevant to the questions that the
22 agency has to answer. And I think one of the
23 reasons why we accept these broad delegations
24 to agencies is that we see agencies as needing
25 to be, and actually being, democratically

1 "MASS AND FAKE COMMENTS IN AGENCY RULEMAKING"
2 responsive to some extent. Whether that is
3 through their political overseers or through
4 perhaps an OIRA review, or through professional
5 accountability, or through direct engagement
6 with the public.

7 So that's one piece of it. Another
8 piece is that the Administrative Procedures Act
9 entitles the public expressly to submit data,
10 views, or arguments in rulemaking, and the
11 agency is supposed to consider the relevant
12 matter presented. And beyond the APA, the
13 public regularly gets invited to submit
14 comments. Regulations.gov right now says,
15 "Submit a comment. Let your voice be heard."
16 So I think the public has an expectation that
17 they can present their views. So there is that
18 side of it.

19 I also think there is value here.
20 Mass comments do offer some potentially very
21 useful information for agencies. First of all,
22 they communicate preferences in a far more
23 concrete and specific context than, say, voting
24 for Member of Congress or voting for the
25 President. It is specific to the issue at

1 "MASS AND FAKE COMMENTS IN AGENCY RULEMAKING"
2 hand.

3 And the agency may hear from more
4 members of the public than it can feasibly
5 consult or engage in public hearings or other
6 settings. And in hearing from the diffuse
7 public, which I think a number of folks in
8 political science and law have documented, they
9 tend to be underrepresented in rulemaking
10 compared to more concentrated business
11 interests.

12 I just want to make two more
13 comments about this. First off, although there
14 are suggestions that public views do matter,
15 and I think that Dominic Mancini mentioned this
16 in his comments along these lines, agencies
17 typically have not taken these expressions of
18 public views very seriously. They tend to be
19 dismissive in their rulemaking documents, or
20 not even mention that they received mass
21 comments.

22 They might say this is not a vote,
23 they might say this is not substantive, or they
24 might say absolutely nothing. And that is my
25 sense on the final rule that was just issued on

1 "MASS AND FAKE COMMENTS IN AGENCY RULEMAKING"
2 oil and gas exploration on Federal lands.
3 There were just a few responses to comments
4 from well operators and no meaningful
5 acknowledgment of the hundreds and thousands of
6 comments received from the general public.

7 So I do think that agencies should
8 not treat comments like a plebiscite, but at
9 least do a better job of acknowledging these
10 views, especially the comments derived that are
11 deemed reliable and if they articulate a
12 position that is different than the path that
13 the agency wants to take.

14 Agencies might say: We heard you,
15 but this is why we are not going to restrict
16 oil and gas operators. In short, there are two
17 big reasons to take mass comments more
18 seriously. One is I think there is value here
19 and the other is just dismissing them only
20 threatens the legitimacy, in my view, of the
21 public participation opportunity in the
22 comments that the Agencies say they are
23 offering.

24 Again, the problem with sham
25 comments is a serious one and one that we

1 "MASS AND FAKE COMMENTS IN AGENCY RULEMAKING"
2 absolutely have to address, I think more than
3 we have so far, for rulemaking to remain a
4 legitimate process. But I know we are going to
5 bring that up later in the discussion.

6 MR. BULL: Wonderful. Thank you.
7 Next question is for Christina. Christina, as
8 an agency official, you have direct experience
9 with the mass commenting phenomenon. So I
10 think it's worth exploring what the mass
11 commenting has looked like at your Agency, and
12 also what have you heard from colleagues in
13 other agencies? And in light of that
14 perspective, how big of a problem is it?

15 MS. MCDONALD: I am happy to be here
16 today to share the agency's perspective. I
17 want to build a little on what Dom talked about
18 a little bit. There are nuances when you use
19 the term mass comment. And I think it kind of
20 came through in the numbers and remarks that
21 Dom made this morning.

22 I think when you talk about mass
23 comments, there is probably what I would say
24 three categories of mass comments. The first
25 is the straightforward notion of just high

1 "MASS AND FAKE COMMENTS IN AGENCY RULEMAKING"
2 volumes of comments. We are getting a lot of
3 comments, they are all unique comments, all
4 from different people. That is not a mass
5 mailing; that is just mass comments because of
6 the high volume.

7 Second is more toward the mass
8 mailing or what I want to call full
9 duplication. That is where you get what Dom
10 referred to as the old postcard campaigns.
11 There you get a lot of identical comments from
12 a lot of people, often initiated by advocacy
13 interest groups.

14 The third category breakdown is the
15 partial duplication that Dom talked about.
16 Again, these come from advocacy or interest
17 groups. And what we see there is the body of
18 the message tends to be the same, but often you
19 will have a background where there is something
20 a little unique where they are telling
21 something about their personal experience or
22 something personal about the situation.

23 So depending on what the type of
24 mass comment is really has practical impact on
25 the agency handling the mass comments. The

1 "MASS AND FAKE COMMENTS IN AGENCY RULEMAKING"
2 high volume of comments is very forward. You
3 get a lot, they're all posted to the docket,
4 they're all there, not a big deal.

5 When you get to the mass mailings
6 and you have all these identical duplications,
7 you face an issue. Do you post all the
8 comments or do you just post maybe a first
9 comment, initial comment, and then note that
10 the rest are mass mailings. Or do you post a
11 representative sample, but not all of them?

12 I will say there is a cost in
13 resources involved getting all the comments in
14 the dockets. If you are getting thousands and
15 millions, there are costs of just posting.
16 People have to look at them and manage them and
17 post them. You have to face that decision.

18 Now, when you get down to practical
19 aspects for the mass mailing in the partial
20 duplication situation, it now gets to be a
21 little gray area. Because you are posting all
22 the comments, I guess it is fine. If you're
23 posting representative samples, it requires a
24 lot more analysis and research and you have to
25 look and see do the nuances in the language

1 "MASS AND FAKE COMMENTS IN AGENCY RULEMAKING"
2 matter.

3 We will see samples; take for
4 example the immigration rule about ABC
5 nonimmigrant visa applicants. They will have a
6 lot of the same but some will write in and say:
7 I'm from country X and my visa is B. I don't
8 know that that information adds a lot, unless
9 you are looking for demographic trends across
10 the comments.

11 But then you look at the Coast Guard
12 rule on anchorage locations, and the person
13 says: I use that. I use it in this way and
14 this is why I boat this way in that location.
15 That comment is very useful, because it is
16 personal experience that is going to help the
17 agency understand the impact of the rule. So
18 it requires a lot of analysis.

19 So I would say how an agency handles
20 them is kind of evolving. These are different
21 comments as technology changes, you get
22 comments in different ways. So we are
23 constantly working to figure that out.

24 I think the other question is how
25 big a problem is it? Obviously, it's a lot

1 "MASS AND FAKE COMMENTS IN AGENCY RULEMAKING"
2 more common. Dom showed that number. I am
3 going to say at DHS we are not the agency that
4 has received the 22 million or the 3 million or
5 the 1 million. That is not our experience at
6 DHS.

7 I went and pulled the numbers from
8 the last 15 years -- DHS was created in 2003 --
9 and I found that the rules with the most public
10 comments that we had in 15 years, our number
11 one rule was a Coast Guard policy letter, not
12 even a rule, a policy letter on Shell gas which
13 was related to fracking. That had 70,000
14 comments.

15 Our second was an immigration rule
16 on temporary employment. That had almost
17 64,000. And a third was another immigration
18 rule, an employment-based visa program, that
19 had almost 20,000.

20 So we are not like some of the other
21 agencies that are receiving massively high
22 volumes of comments. We do have instances
23 where it is still a high volume. If you are
24 the person assigned to read 12,000, or 50,000
25 or 70,000 comments, that does not seem an easy

1 "MASS AND FAKE COMMENTS IN AGENCY RULEMAKING"
2 task.

3 As far as of those high volume
4 comments, in almost all of those instances we
5 tended to have some element of duplication,
6 either partial duplication or full duplication,
7 but it's not always that way. We had in 2016,
8 we had a FEMA rule that only received 3,000
9 public comments, but 85 percent of them were
10 just duplicates. So it doesn't mean you -- you
11 know, we see it in all variations.

12 The one thing we have seen a lot
13 more of in the past couple of years are what I
14 call spam comments. Not calling them fakes or
15 fraud. I don't know what they are. They are
16 spam. These are examples of the type of spam
17 that people have used. You might have a
18 comment with link to an online porn site. You
19 might have comment with one word. Maybe that
20 word is machete.

21 (Laughter.)

22 You might have 96 comments coming
23 into a FACA docket -- FACA, the Federal
24 Advisory Committee Act, about infrastructure
25 protection and -- I'm going to read the first

1 "MASS AND FAKE COMMENTS IN AGENCY RULEMAKING"
2 line.

3 (Reading punctuation and gibberish.)

4 So those are kind of gibberish.

5 There is like lack of punctuation. It might be
6 the English language, and it might be on a
7 topic that you could recognize, but there is no
8 punctuation or capitalization and so it has no
9 relevance to the topic.

10 So we are seeing more of those and
11 trying to figure out how to deal with those.
12 But they are definitely off topic and not at
13 all on the rule. I think with that, I will
14 hand it back to you.

15 MR. BULL: Excellent. Thank you,
16 Christina. And our final initial question is
17 for Steve. So, Steve, you have worked
18 extensively on a wide array of issues
19 associated with e-Rulemaking and some
20 challenges with mass comments, including a
21 recent study of mass comments on an EPA ruling.
22 And I'm wondering if you might elaborate on
23 that study.

24 And also if you could comment on
25 more recent study and whether things have

1 "MASS AND FAKE COMMENTS IN AGENCY RULEMAKING"
2 gotten worse or perhaps better.

3 MR. BALLA: Sure. I want to tell a
4 story about mass commenting campaigns that
5 doesn't involve spam bots or doesn't involve
6 interference or anything like that. What I
7 want to emphasize instead is the ordinariness
8 of mass comment campaigns, at least most mass
9 comment most of the time.

10 So sure, those instances like the
11 net neutrality repeal that generated all of the
12 stuff that I'm not going to talk about, they do
13 raise problematic normative implications
14 obviously. But I think that most mass comment
15 campaigns most of the time are quite a
16 different phenomenon and they don't necessarily
17 carry with them the same negative normative
18 implications.

19 So I'm making these assertions on
20 the basis of the ongoing research that I'm
21 working on on mass comment campaigns as a
22 general phenomenon. And my collaborators and
23 I, Arya Prasad here today, we collected
24 extensive information about mass comment
25 campaigns that have occurred at the EPA over a

1 "MASS AND FAKE COMMENTS IN AGENCY RULEMAKING"
2 five-year period. Limited time, limited scope.
3 One agency.

4 But nevertheless, this perspective
5 gives us a more general view into the
6 occurrence and the nature of mass comment
7 campaigns. I think the vantage point that is
8 different from what we normally see when we pay
9 attention to those front-page, newsworthy mass
10 comment campaigns. Again the net neutrality
11 types.

12 I think given the distinctiveness of
13 all of the other mass comment campaigns that
14 occurred, there is value in bringing this
15 additional perspective to what we might already
16 think we know about the phenomenon.

17 How for starters, how frequent are
18 mass comment campaigns? Well, we looked at all
19 EPA rules that were sent to OIRA for review
20 during a five-year period. So these were the
21 big economic and political regulations. Twenty
22 to 25 percent of these rules experienced at
23 least one mass comment campaign. So these are
24 a regular occurrence at the EPA. Again, that
25 might not be the case at other agencies.

1 "MASS AND FAKE COMMENTS IN AGENCY RULEMAKING"

2 How big are the campaigns? I think
3 this is an important distinction. Again, mass
4 comment campaigns are not defined by their
5 quantity per se, but rather by the fact that
6 there are sets of duplicate and near-identical
7 comments. Actually, most of the mass comment
8 campaigns that occur at EPA are relatively
9 small in scope. That is the vast majority are
10 less than a thousand. Many are way less than a
11 thousand comments. Many are quite small
12 mobilizations, if you will.

13 It is only very, very occasionally
14 that the EPA receives mass comment campaigns
15 that move into that territory of hundreds of
16 thousands or millions of comments. That
17 doesn't describe most campaigns most of the
18 time.

19 Now, what is similar is that the
20 mass comment campaigns tend to be short, sweet,
21 and to the point, the comments themselves.
22 They articulate a directional viewpoint for or
23 against the rule. Somewhat surprisingly, what
24 we found is that most of the campaigns don't
25 just say "I love this rule" or "I hate this

1 "MASS AND FAKE COMMENTS IN AGENCY RULEMAKING"
2 rule." They do generate some information that
3 might in some way shape or form be relevant.

4 So a mass comment campaign on a
5 clean power plan might cite a Natural Resources
6 Defense Council survey that demonstrates how
7 popular this rule is among some Americans.

8 So I think there is typically some
9 substance in these campaigns when thinking
10 about Nina's comments about paying attention to
11 this form of public participation.

12 These are directional statements of
13 support or opposition. Who is doing it? In
14 the cases that we looked at, and this is more
15 than a thousand mass comment campaigns, turns
16 out that most of them are generated by
17 environmental advocacy organizations and
18 related progressive type groups, that is to say
19 the affected industries. In the rules that we
20 looked at that is typically the ag sector,
21 energy. They are much less active in doing
22 this type of mobilization and sponsoring
23 campaigns, although that is not to say that
24 they don't do it. They certainly are active in
25 this form of participation.

1 "MASS AND FAKE COMMENTS IN AGENCY RULEMAKING"

2 So why do we see these varying
3 levels of participation across different types
4 of organizations? Well, one might, of course,
5 be the nature -- the fact that some
6 organizations are mass membership groups and
7 others are industry advocacy organizations.
8 Well, we are in the process of interviewing all
9 of these types of organizations to get a sense
10 for what are your motivations for doing this
11 and what are your expectations about what you
12 are going to get out of it? So stay tuned. We
13 are in the process of doing those interviews.

14 And we are also digging into the
15 question of do these campaigns matter? Do they
16 -- are they in any way associated with the
17 substance of the final regulations? Now you
18 can imagine this is super difficult to do in a
19 systematic empirical way, but we are in the
20 midst of trying to suss that out a bit.

21 So I will wrap up reminding
22 everybody that mass comment campaigns, at least
23 in certain contexts, are a very common
24 occurrence in rulemaking. And I think that
25 given that, it is important to separate out

1 "MASS AND FAKE COMMENTS IN AGENCY RULEMAKING"
2 these run-of-the-mill campaigns from those
3 occasional front-page, headline-grabbing
4 campaigns. I think these are essentially two
5 different phenomena. And I think we need to
6 treat them as different phenomena. And if we
7 eventually want to get to their normative
8 implications, I think the run-of-the-mill
9 campaigns may have very different normative
10 implications for rulemaking in American
11 democracy than those FCC net neutrality type
12 campaigns. Thank you.

13 MR. BULL: Thank you. Before we get
14 into the moderated discussion, I wanted to see
15 if any of the panelists wanted to react to
16 anything that the other panelists said.

17 MS. MCDONALD: I know that we are
18 getting almost talking a lot about mass and
19 numbers. But I want to just say from the
20 agency perspective what we like is really the
21 quality of the comment that matters. It's not
22 numbers, it's quality. It's data, information,
23 specifics. That is what matters and that is
24 what helps to inform the rule and create a
25 better rulemaking process.

1 "MASS AND FAKE COMMENTS IN AGENCY RULEMAKING"

2 So I want to be sure that we don't
3 get too far in the numbers and don't forget
4 what is really important to the agencies. We
5 would much rather have one 20-page comment that
6 identifies all of the issues and the problems,
7 everything, rather than 25,000 form letters.
8 That's my point.

9 MS. MENDELSON: I just have a quick
10 question for Steve. You said at the very end
11 of your comments that there are two categories
12 of mass comments in rulemaking, the net
13 neutrality 22 million comments is in a
14 different category from the 25 percent of EPA
15 rules where you see thousands of comments, but
16 not millions.

17 What is your view on what the
18 normative figure should be there on the
19 categories?

20 MR. BALLA: I think it is those
21 largest ones that tend to raise the most
22 obvious questions that will motivate the second
23 panel, that is the fake or fraudulent or spam
24 comments.

25 So specifically in the FCC case we

1 "MASS AND FAKE COMMENTS IN AGENCY RULEMAKING"
2 know that there were spam bots. Now that is
3 not to say that we can't have that phenomenon
4 occurring in smaller bits and pieces. But we
5 are not seeing much, if any, evidence of that
6 in the run-of-the-mill mass comment campaigns
7 at EPA.

8 So I think that that fake piece is
9 potentially a big separator. So it's not just
10 the numbers per se, but it's that additional
11 characteristics.

12 MR. BULL: Wonderful. Let me start
13 out with a technical question. This will be
14 primarily directed to Mike and Christina, but
15 Steve and Nina should feel free to weigh in, as
16 well.

17 Dom, in his opening remarks, spoke
18 of problems associated with bots and Christina
19 mentioned this as well. And from Christina's
20 comments, currently some of these are not too
21 sophisticated; it is obvious that this is a
22 machine-generated comment. But as the
23 algorithms become more sophisticated over time,
24 seems like we might run into an issue where it
25 might be too difficult to distinguish a

1 "MASS AND FAKE COMMENTS IN AGENCY RULEMAKING"
2 machine-generated comment from a
3 human-generated comment.

4 So I'm interested, I guess, sort of
5 from my perspective whether there are any
6 technological solutions to this problem, would
7 the metadata or anything else allow us to
8 distinguish these sorts of comments?

9 And then Christina's thoughts if
10 this were to become much more prevalent, how
11 big of a problem it would be for the agencies?

12 MR. WHITING: I'm going to start by
13 digressing a little bit from the question.
14 When answering the bot traffic, the question
15 the FDA had was availability. We offer our
16 hearings in our SLA agreements 99.5 percent
17 availability of our system and we've met that
18 for the last 12 months. So with all the bot
19 traffic, it hasn't taken us down.

20 The biggest problem for us with bot
21 is back-end services. It overloads the
22 back-end services. It's kind of like drinking
23 from a fire hose. Everybody has bandwidth now.
24 All the bot traffic we have seen is cloud
25 generated and it's all been U.S. cloud

1 "MASS AND FAKE COMMENTS IN AGENCY RULEMAKING"
2 generated.

3 So what we do -- we had, I guess the
4 prime directive for us is nothing that
5 interferes with public comment traffic for John
6 Q. Public who wants to put in a comment that
7 says, "I don't want this regulation." So
8 whatever we do for that bot traffic, it can't
9 affect that person.

10 So we do a lot of technical things
11 that monitor traffic. And when things reach
12 limits, we start to block traffic for a time
13 limit. So if you look at our traffic flow for
14 bot traffic, it's a sine curve. A buildup to a
15 certain level and then we will cut them off.
16 And then we open it up again and it comes
17 through. So that is kind of how we are dealing
18 with bot traffic.

19 Another quick story here. One of
20 our partner agencies recently had a rule that
21 received over 500,000 comments. And they were
22 our 100,000 comment-a-day rule. We attributed
23 over 400,000 comments of those to bot traffic.
24 And this was a pretty smart bot. And we were
25 playing whack-a-mole. And we were doing this,

1 "MASS AND FAKE COMMENTS IN AGENCY RULEMAKING"
2 they were changing that traffic, their
3 commenting.

4 So it was from a cloud, a local
5 cloud in D.C. And we got to the point where we
6 had to block the traffic. And then that's a
7 final step. And lo and behold, our Help Desk
8 got a phone call and they said, "You're
9 blocking our traffic."

10 (Laughter.)

11 "So we're trying to send comments in
12 and we can't." And we said, "Well, you're
13 interfering with our availability. It was such
14 a volume that it was interfering with our
15 service." And they went back and they said,
16 "Oh, we found a bad setting on our server and
17 we didn't mean to send that many comments at a
18 time. We apologize."

19 (Laughter.)

20 And we turned them back on and then
21 they played nicer and we accepted their
22 comments.

23 MS. MCDONALD: I think from the
24 practical aspect for an agency, obviously
25 receiving a massive volume of comments that is

1 "MASS AND FAKE COMMENTS IN AGENCY RULEMAKING"
2 a drain on agency resources. You need to
3 assign staff to work for them. Staff has to
4 look at them and get them into the docket, and
5 then staff has to read them and go through
6 them. So when you take a lot of staff to do
7 that, you are taking staff away from other
8 missions of the agency, whatever the mission
9 is.

10 The other practical reality is you
11 actually slow the promulgation of the rule.
12 And I guess whether that is a good or bad thing
13 depends on your perspective on the rule. But
14 at minimum, you are slowing down rules that
15 Congress has said that the agency needs to do
16 -- the reality is that it is being slowed down.
17 And there is a cost implication, because in
18 many cases agencies hire contractors to deal
19 with these large comments to get through them.

20 So if you get to the point where
21 there are so many comments, it is diminishing
22 our resources and it is challenging to figure
23 out what to do with them.

24 MR. BULL: My next question is
25 theoretical and therefore primarily for Steve

1 "MASS AND FAKE COMMENTS IN AGENCY RULEMAKING"
2 and Nina, but Christina and Mike should feel
3 free to jump in as well.

4 We all seem to be in agreement that
5 rulemaking is not a plebiscite; however, the
6 content of mass comments particularly may be of
7 some relevance to the agency.

8 I'd like to put in a point briefly
9 for a project that we are doing at ACUS and
10 sort of get your reactions to some of the
11 things we are considering there. So we are
12 currently working on a project relating to a
13 range of mechanisms for public input in the
14 rulemaking process. In fact, we have our
15 Committee Chair, Cary Coglianese, with us here
16 today, as well as our consultants, Glen
17 Staszewski and Michael Sant'Ambrogio.

18 And like Glen and Michael have
19 pointed out in the report, there are a variety
20 of other approaches besides pure notice and
21 comment for obtaining public input. In
22 addition to rulemaking, there is the use of
23 advisory committees or town hall forums or
24 listening sessions.

25 So I'm interested in your thoughts

1 "MASS AND FAKE COMMENTS IN AGENCY RULEMAKING"
2 on whether or not these mechanisms first of all
3 how do they add in contributing public input in
4 the agency. And secondly, if the agencies were
5 to make wider use of these things, would this
6 perhaps alleviate some need in the public to
7 participate in the mass comment campaigns?

8 MS. MENDELSON: So this is a very
9 important project that ACUS is doing. You have
10 great consultants. What I think is important
11 to recognize that the goal of this is engaging
12 the public at large. And one of the reasons
13 for engaging the public at large is because
14 there has been a phenomenon in that direction
15 in rulemaking. The agencies are hearing much
16 more both from those comments in rulemaking and
17 informal contacts from well-organized,
18 well-funded groups and hearing a little bit
19 less from the public at large.

20 As to the relative benefit of all of
21 these mechanisms, I guess what I will say about
22 it is I think these are great mechanisms that
23 the report is proposing because they allow for
24 engagement of the public in more dialogue. The
25 public gets to learn more about what the agency

1 "MASS AND FAKE COMMENTS IN AGENCY RULEMAKING"
2 is doing in the rule. People who are attending
3 these town hall meetings get to participate in
4 discussion; I think those are valuable forms of
5 input for the agency.

6 But they are still relatively costly
7 for the ordinary person to get to. They have
8 to get to the town hall meeting or meeting of
9 an advisory committee. One of those great
10 things about those kinds of meetings is that,
11 if you happen to know about it, it is fairly
12 easy to participate. You do have to invest in
13 learning about the system. You don't have to
14 type up a comment. You don't have to prepare a
15 comment. It is not cheap talk, but it is more
16 available to more people than I think these
17 more targeted mechanism kinds of communication
18 are. So it is still worth preserving it at
19 this point.

20 MR. BALLA: If there is one thing I
21 have learned in two decades of doing research
22 on public participation in the rulemaking
23 process is that, try as we might to kill the
24 notice and comment process, as much as we might
25 be talking over these decades about all of the

1 "MASS AND FAKE COMMENTS IN AGENCY RULEMAKING"
2 various problems that rise up in this process,
3 we can't kill the thing. It is remarkably
4 resilient.

5 If you think about the fact that --
6 I mean it really doesn't date just back to
7 1946, but at some level it dates back to 1946.
8 And if you think about how much society has
9 changed and technology has changed and
10 expectations about government has changed, and
11 yet this is still the linchpin of government
12 outreach and citizen participation.

13 My view has been for quite a while
14 that these alternative approaches, like
15 regulatory negotiation, advisory comments, town
16 halls, public hearings, and so forth, is that
17 they are niche techniques, that they seem to be
18 of value in particular kinds of circumstances.

19 We presumably, for example, don't
20 want to negotiate a rule that really brings --
21 that is really about fundamental value choices
22 where people are just going to be yelling at
23 one another from across the aisle. They tend
24 to be more relevant for context where we are
25 deciding about levels and there can be

1 "MASS AND FAKE COMMENTS IN AGENCY RULEMAKING"
2 compromise and so forth.

3 Although these are niche techniques
4 that have their place in the process, and I
5 think, try as we may, have over the last couple
6 of decades to increase their prevalence in the
7 process, I don't see them as anything more than
8 niche techniques. Which is not to say they are
9 not important and valuable in those particular
10 circumstances. But I think that, by and large,
11 notice and comment still serves as a useful
12 backdrop for general consultation and
13 participation.

14 MR. BULL: Excellent. So I think we
15 have about a little over 15 minutes remaining
16 10 or 15 minutes. So with that, let me open it
17 up. I will stand here so I can see better and
18 take any questions from the audience.

19 PARTICIPANT: A question regarding
20 the online comment. Does it flag citations as
21 being similar and presumably mass?

22 MS. MCDONALD: When you say
23 citations, give us a sense of what you are
24 meaning.

25 PARTICIPANT: Supposing of 10,000

1 "MASS AND FAKE COMMENTS IN AGENCY RULEMAKING"
2 comments, 300 of them cite part of the USC or
3 CFR. Would that result in them be categorized
4 as mass comments?

5 MR. WHITING: A couple of things.
6 It would depend on the setting of the
7 de-duplication. It's customizable. Typically
8 partners set that at 70 percent and some set it
9 at 100 percent. But at 70 percent, if that
10 citation made up 70 percent of the comments,
11 then it would be flagged as de-dupe. If it is
12 not, then it would not, unless the other
13 verbiage in the comment was identical.

14 MR. BULL: Yes, Cynthia?

15 MS. FARINA: This is a question for
16 Steve. Steve, I know some of the early work on
17 looking at mass comment campaigns, like Stu
18 Shulman's work, found that there was an
19 appreciable number of commenters, real
20 commenters, who sort of followed the Chicago
21 school -- you know, vote early and often --
22 submitted a lot of comments in the same
23 campaign.

24 Are you looking, or are you able to
25 look, at how much of that sort of duplication

1 "MASS AND FAKE COMMENTS IN AGENCY RULEMAKING"
2 there is in this?

3 MR. BALLA: Thanks, Cynthia. No,
4 we're not. Because the way EPA is reporting
5 out the mass comment campaigns on
6 Regulations.gov is by posting one
7 representative comment. And so we're able to
8 see that representative comment, as well as
9 information about sponsoring organization, if
10 EPA has been able to identify that sponsor, and
11 also the number of comments in that campaign.

12 So what we're working off of right
13 now is what is publicly available on
14 Regulations.gov, that is a question that we
15 have not been able to dig into. But, of
16 course, it is an important one going back to
17 work. Absolutely.

18 PARTICIPANT: I'm Roxanne Rothschild
19 with the NLRB and I have a question for
20 Mr. Whiting. Mr. Mancini had said in his
21 comments that they don't do CAPTCHA for
22 concerns that this might make it more difficult
23 for people to put in comments. I wonder if you
24 could comment any further on that, what the
25 analysis might have been.

1 "MASS AND FAKE COMMENTS IN AGENCY RULEMAKING"

2 I say it because we recently did a
3 request for information where we gathered the
4 comments on our own website, as opposed to
5 Regulations.gov, and we used CAPTCHA because we
6 didn't want our website to crash. So I'm
7 wondering what the thought is behind that.

8 MR. WHITING: CAPTCHA would be a
9 fundamental change in the way the site is
10 presented. So at the PMO, that is not a
11 decision we would make. And it was presented
12 to -- in our governing structure there is an
13 Advisory Board and an Executive Committee. And
14 the CAPTCHA possibly was presented to both
15 boards and went to agency vote and the vote was
16 not to implement CAPTCHA.

17 PARTICIPANT: Hi, my name is Adaku
18 Onyeka-Crawford and I'm from the National
19 Women's Law Center. Professor Mendelson, you
20 talked about the policy reasons why these mass
21 comments should be considered fully. That they
22 have value and that also they undergird the
23 legitimacy of the final rule.

24 This is a question to anybody, but I
25 would also like to hear what are the legal

1 "MASS AND FAKE COMMENTS IN AGENCY RULEMAKING"
2 obligations for agencies to take these comments
3 seriously possibly to avoid a lawsuit or other
4 possible litigation.

5 MS. MENDELSON: This is a great
6 question, and I see Dom Mancini paying close
7 attention. So you undoubtedly know that the
8 APA says that agencies are supposed to consider
9 relevant matters presented. And there's
10 actually been some appellate court rulings that
11 have interpreted the APA to say what that
12 really means is that the agencies do need to
13 respond to significant comments.

14 As far as I know, there has not been
15 a fairly clear, square ruling by the courts
16 about whether that means that mass comments,
17 per se, deserve a specific response. As far as
18 I know, that has not been litigated quite in
19 that way. It could be. It's possible. I take
20 very seriously Cynthia's comment that what is
21 really of value to the agency is a 20-page very
22 substantive comment. But I am still, you know,
23 of the view that the mass comments still have
24 some value and at least deserve an answer. But
25 we don't have a clear answer just yet.

1 "MASS AND FAKE COMMENTS IN AGENCY RULEMAKING"

2 MR. BALLA: Could I just add
3 something? As the political scientist on the
4 panel, I can't speak to the legal side of it,
5 but just in terms of the political side of this
6 my view of the rulemaking process has always
7 been, of course, it's a fundamentally
8 administrative legal process defined by statute
9 and court rulings and so forth. But it is of
10 course also inherently a political process. It
11 is occurring within the overarching framework
12 of the United States political system. It is
13 being supervised by Congress and the White
14 House.

15 So certainly, I would think, even
16 though there might be questions about the legal
17 standing of particular types of comments, the
18 political importance is a separate but also I
19 think relevant question when thinking about how
20 to approach mass comments.

21 And so I just want to add that sort
22 of reminder that we are dealing with a process
23 that is literally a legal administrative
24 process, but also occurs in this larger context
25 where value decisions are being adjudicated.

1 "MASS AND FAKE COMMENTS IN AGENCY RULEMAKING"

2 MS. MENDELSON: Let me just make one
3 additional comment, if I may. Steven I think
4 that is an excellent point. And that is that
5 at least some rulemakings, the contents of mass
6 comments are really relevant. Not all of them,
7 but some of them, many of them.

8 And I give you the example of
9 multiple uses on public lands where an agency
10 has to choose which of these are going to
11 receive a preference. In that setting, where
12 it actually talks in terms of maximizing the
13 value of resources for the public, what the
14 public's views are clearly seems relevant to
15 the questions that need to be answered and that
16 is important.

17 MS. MCDONALD: Could I just add that
18 what we do at the DHS when we get these mass
19 comments, we read them all. Because
20 obviously -- let's put aside the spam comments,
21 but to the extent they are relevant to the
22 rule, we are reading them all, as we do all of
23 rules. We read all the comments, summarize all
24 the comments and -- the relevant comments.

25 PARTICIPANT: My question is

1 "MASS AND FAKE COMMENTS IN AGENCY RULEMAKING"
2 directed to Michael. It's a cyber security
3 related question. When people upload comments
4 they can attach files. And my question
5 concerns the possibility of having malware
6 embedded in those and whether that is a common
7 practice for that sort of thing to be done.

8 MR. WHITING: We restrict the file
9 types that we receive, nothing executable. And
10 everything that comes in that way is virus
11 scanned before it goes into the system.

12 PARTICIPANT: Hi, I'm Herald Speiser
13 at the Nuclear Regulatory Commission. I had a
14 question, I hope it's not off topic. But I've
15 been picking up that some agencies, because of
16 the volume of their comments received, are
17 doing postings maybe to Regulations.gov without
18 being able to review all of them. And there
19 has been some discussion about profanity or
20 unrelated topics that you would want to screen
21 for.

22 My question is about copyright. We
23 sometimes receive comments that have
24 attachments or full articles that may be
25 copyrighted they want to use to support their

1 "MASS AND FAKE COMMENTS IN AGENCY RULEMAKING"
2 comments. By Regulations.gov reposting it, are
3 we violating anything?

4 We also have an internal agency
5 management records system that we publish to,
6 as well. How do we protect from violating
7 copyright law?

8 MR. WHITING: Where I've seeing that
9 from a PMO standpoint is that is brought up
10 when somebody who has the copyright or somebody
11 else notices and then brings that up. Then it
12 is up to the agency to how they handle that,
13 remove it. But that's beyond my purview to
14 think about that.

15 MS. MCDONALD: I would say at DHS we
16 try to be conscious of that. So if someone,
17 for example, adds an ANSI, they have to include
18 the ANSI standard with the comment. We are not
19 going to -- we may not put the ANSI standard
20 with the comment. We might make reference to
21 the fact that it was selected and they have to
22 go get it. But we are very aware of that, yes.

23 There are several categories of
24 information, not just confidential business
25 information. In our case, we have protected

1 "MASS AND FAKE COMMENTS IN AGENCY RULEMAKING"
2 classes of information and other categories
3 like that too. We are very cognizant and kind
4 of have to take that on a case-by-case basis.

5 MR. BULL: A couple more questions.
6 Michael first, and then Dom you had a question.

7 MR. HERZ: Hi, Michael Herz, Cardozo
8 Law School. First, just a comment. It is so
9 interesting to hear a whole new perspective on
10 the old age-old problem of agency CAPTCHA.

11 (Laughter.)

12 But my question is for Nina, and
13 it's just a question a little bit on what you
14 said about judicial review and recent
15 decision-making, arbitrary and capricious. My
16 recollection of your article was that you said
17 that failure to engage with mass comments would
18 not be judicially reviewable. And that seems
19 inconsistent with what you just said now.

20 And so, A, you clearly think it
21 isn't, so explain that. And B, supposing an
22 agency did exactly what you want and said:
23 Look, everyone seems to want snowmobiles, or
24 everyone seems to want grizzly bears, so that's
25 what we are going with. Do you think a court

1 "MASS AND FAKE COMMENTS IN AGENCY RULEMAKING"
2 would say okay, that's fine, or would they say
3 that is not reasonable?

4 MS. MENDELSON: These are great
5 questions. First off on what I argued back in
6 2011 and 2012 was that courts could be very
7 deferential. That ultimately when we are
8 talking about an agency engaging with public
9 views, we are talking about an agency engaging
10 in a deliberative process with the public.

11 And so I do think that courts should
12 be effective when mass comments are completely
13 ignored, and I believe that's what I tried to
14 say at that time. But once an agency actually
15 shows that it is engaging and is reviewing
16 them, then a court should step back and be
17 extremely deferential. But I also want to
18 thank you for reading my articles.

19 (Laughter.)

20 MR. HERZ: Not just reading them,
21 but recommending them.

22 MR. MANCINI: Thanks. A comment and
23 a question. The comment, and maybe I'll have
24 Christina verify this. You talk about what is
25 important in the rulemaking process. When OIRA

1 "MASS AND FAKE COMMENTS IN AGENCY RULEMAKING"
2 reviews final rules, that is absolutely an
3 important part of our rulemaking review to see
4 whether they used lots of public comments. So
5 I don't know if you are nodding your head to
6 say yes?

7 MS. MCDONALD: Yes.

8 (Laughter.)

9 MR. MANCINI: That is something that
10 is very important to OIRA and kind of the
11 Executive Order, as well, the APA. And often
12 the nature of the comment review, will be:
13 Well, we could look at Regulations.gov just as
14 the other ones. Depending on the enthusiasm of
15 the desk officers, a couple of them that are
16 here today, that actually serves a purpose.

17 But we feel like regardless of the
18 legal stance of some of these, we will look to
19 see what the public comments were ourselves and
20 ask maybe hard questions about that during
21 review.

22 My question was to Steven maybe
23 talking about what is in the future. You maybe
24 have looked at mass comment campaigns more than
25 any single other person here. Have you seen

1 "MASS AND FAKE COMMENTS IN AGENCY RULEMAKING"
2 any change in the nature of the characteristics
3 of the mass comments over the past few years to
4 where there may be more or less content or
5 style or anything of that nature?

6 MR. BALLA: Sure. I think the
7 biggest difference is in the bounce, the size
8 of the bounce of these mass comment campaigns.
9 What I mean by that is if you look at the
10 overall distribution of comments and you showed
11 that chart in your remarks about how most of
12 the rulemakings get very few if any comments,
13 there is just this little tail of distribution
14 where all the action is that we are talking
15 about.

16 That's always been the case. It was
17 the case in the early years of rulemaking. It
18 was the case in the old paper-based days of
19 rulemaking. I think what we are seeing is the
20 increase in the size of the bounce.

21 So the right-hand tail of that
22 distribution is a small, small fraction of the
23 overall rulemaking body. But whereas in the
24 old days we might have been impressed with
25 50,000 postcards from truckers, now what we are

1 "MASS AND FAKE COMMENTS IN AGENCY RULEMAKING"
2 seeing is: Well, 50,000? Who cares? Right?
3 It is now 500,000 or 5 million, or 20-plus
4 million.

5 So I think the size of that bounce
6 is certainly increasing in recent years and
7 that is a big difference.

8 And, of course, the other difference
9 is the spam bot element of it, the fraudulent
10 piece of it. Maybe we were naive in not
11 worrying about that in the old days. But back
12 even before we had e-Rulemaking, I was
13 certainly turning lots of pages in reading
14 rooms and agency dockets and I wasn't impressed
15 in the sense I wasn't finding any evidence of
16 fraudulent comments.

17 What I was seeing was, you know
18 looking at, I don't know, a Medicare physician
19 payment regulation and lots of people being
20 mobilized by their doctor to submit a comment.
21 And that seems to me to be legitimate, fair use
22 of participation.

23 And so maybe I was being naive at
24 the time, but I don't think so. I really do
25 think there is a sea change as we move from

1 "MASS AND FAKE COMMENTS IN AGENCY RULEMAKING"
2 just looking at pure numbers to digging into
3 the body of comments themselves and finding the
4 fraudulent and spam piece of that
5 participation. Thank you.

6 MR. BULL: Wonderful. So I think we
7 are unfortunately out of time. But please join
8 me in thanking our panelists.

9 (Applause.)

10 MR. VARONA: My name is Tony Varona
11 and I'm Vice Dean and on the faculty here at
12 American University Washington College of Law
13 where I teach, among other things,
14 administrative law, public law, media law,
15 et cetera.

16 It is my honor to serve as the
17 moderator for the second panel. First,
18 however, I wanted to really thank everybody who
19 worked so hard in putting together this very
20 important symposium which, as I have been
21 talking to some new friends, has really hit a
22 nerve. This is a standing-room only audience
23 and a really wonderful testament to how
24 creative and how topical and reflective of
25 current events the planning team was for this

1 "MASS AND FAKE COMMENTS IN AGENCY RULEMAKING"
2 conference.

3 So if I could have a round of
4 applause from Malak and Frank.

5 (Applause.)

6 Malak and Frank really do make me
7 very proud. They represent how our students
8 here at AUWCL, and our alums, really are at the
9 core of the study, the questioning, and the
10 challenging, and the improvements of public law
11 problems and challenges that we are facing. So
12 I'm very happy to see that they are doing such
13 a wonderful job.

14 Throughout this panel, we will be
15 using the hashtag #rulemakingforum. I will be
16 moderating here as I do the moderating for this
17 panel. Because there are about 240 of you and
18 we are only going to have 15 minutes of Q&A at
19 the end, if you have questions, if you have
20 comments, if you have reactions throughout the
21 panel, please Tweet them, please public
22 Facebook-post them, to that hashtag. So
23 #rulemakingforum -- one word,
24 #rulemakingforum -- and I will work them in to
25 my moderating remarks.

1 "MASS AND FAKE COMMENTS IN AGENCY RULEMAKING"

2 PANEL: THE RISE OF FAKE COMMENTS IN RULEMAKING

3 MR. VARONA: This is a very
4 important panel on the rise of fake comments in
5 rulemaking. The U.S., as we just discussed
6 from the first panel and certainly this entire
7 event, has really acknowledged the reality that
8 the U.S.'s rulemaking system is really the envy
9 of much of the world. We have a system that is
10 truly deliberative.

11 By law, agencies are supposed to
12 take into account what it is that regulatees
13 and private citizens have to say. They have to
14 read. They have to listen. They have to show
15 that they have done those things and they have
16 to take those ideas that are offered in these
17 rounds into account.

18 So when there are problems with the
19 system, as there are with this issue of fake
20 comments, we have to take note, we really have
21 listen and figure out what to do to fix that
22 problem. And so our speakers today for this
23 panel could not be more of a dream team. In
24 alphabetical order I will tell you a little bit
25 about them.

1 "MASS AND FAKE COMMENTS IN AGENCY RULEMAKING"

2 Cary Coglianese is the Edward Shils
3 Professor of Law and Professor of Political
4 Science at the University of Pennsylvania Law
5 School, and the Director of the Penn Program on
6 Regulation. He serves as the Penn Program on
7 Regulation Director and has served as the Law
8 School's Deputy Dean for Academic Affairs. He
9 specialized in the study of regulation and
10 regulatory processes with an emphasis on the
11 role of public participation in policy-making.

12 Cynthia Farina is the William
13 McRoberts Research Professor in Administration
14 of the Law at Cornell Law School. From 2015 to
15 2017, she was a principal researcher in the
16 Cornell E-Rulemaking Initiative, a
17 cross-disciplinary project aimed at using
18 technology to improve management of and public
19 access to the regulatory policymaking process.
20 She is a lifetime Fellow of the American Bar
21 Association of Section of Administrative Law
22 and Regulatory Practice.

23 Edward Felten is the Robert E. Kahn
24 Professor of Computer Science and Public
25 Affairs at Princeton. He is the Founding

1 "MASS AND FAKE COMMENTS IN AGENCY RULEMAKING"
2 Director of Princeton's Center for Information
3 Technology Policy. His research interests
4 include computer security and privacy,
5 especially relating to media and consumer
6 product, and technology law and policy.

7 Much of his work is at the interface
8 between these two areas, public policy aimed to
9 protect security and privacy, while security
10 and privacy technologies define the landscape
11 in which policy decisions are made.

12 Michael Herz is the Arthur Kaplan
13 Professor of Law at Cardozo School of Law
14 teaching and writing primarily in the areas of
15 Ad law, Environmental, and Constitutional law.
16 Professor Herz is a Senior Fellow at the
17 Administrative Conference of the United States
18 and a Former Chair of the ABA Section of
19 Administrative Law and Regulatory Practice.

20 And finally, Matthew Miner is the
21 Deputy Assistant Attorney General in the
22 Criminal Division of the Department of Justice
23 where he oversees the work of the Fraud Section
24 and the Appellate Section. Prior to rejoining
25 the DOJ earlier this year, Matt was a Partner

1 "MASS AND FAKE COMMENTS IN AGENCY RULEMAKING"
2 in the D.C. office of and international law
3 firm where he practiced in the firm's White
4 Collar Litigation and Government Investigations
5 Group, and served as co-chair of the firm's
6 Washington, D.C. Government Relations and
7 Counseling practice.

8 I am just giving you highlights of
9 their bios. They have had truly illustrious
10 careers and I encourage you to Google to learn
11 about all of our speakers.

12 So what we were thinking about doing
13 is having a bit of a roundtable discussion,
14 rather than a talking heads panel. And we have
15 agreed on a number of questions that we we'll
16 be tossing around, including the questions sent
17 to me by that hashtag, #rulemakingforum. Don't
18 forget.

19 So the first question that we are
20 going to tackle is this one: What exactly do
21 we mean by "fake comment" and what specifically
22 are the harms that they cause to the integrity
23 and value of the rulemaking process? Let's
24 spend three to five minutes talking about that.
25 Shall we get started here?

1 "MASS AND FAKE COMMENTS IN AGENCY RULEMAKING"

2 MR. FELTEN: Sure. So I think I
3 would follow the definition that Dom gave
4 earlier this morning, which is that the fake
5 comments problem is about people posting
6 comments in the name of someone who they are
7 not.

8 And the harms that that can cause, I
9 think, are at least two different types. One
10 is to create the illusion that there are more
11 people saying something than there really are.
12 That by posting fake comments, someone could
13 pretend to be a large number of people, when
14 they are, in fact, only a small number of
15 people.

16 And second, a person by claiming a
17 false identity could claim some type of
18 authority or knowledge that they don't, in
19 fact, have. So if the identity of a commenter
20 is important to evaluate the credibility of
21 their comment, whether they have knowledge or
22 expertise that is relevant, a false claim of
23 having that knowledge or expertise by virtue of
24 impersonation also could lead an agency to put
25 more weight on a comment than it deserves.

1 "MASS AND FAKE COMMENTS IN AGENCY RULEMAKING"

2 MS. FARINA: First, I want to
3 suggest that there are actually a couple of
4 other types of harm that we should be worried
5 about. Probably more, actually. One is the
6 harm for a named individual who has a comment
7 publicly attributed to them that they may or
8 may not agree with the content of.

9 The second is the harm in terms of
10 public perception of legitimacy of the process,
11 which probably does rest on a misunderstanding
12 that this is like ballot box stuffing. But it
13 is a real harm that we should worry about.

14 But picking up on Ed's point, I
15 think there are two situations in which this
16 might indicate that the identity of the
17 commenter matters to the value of the comment.
18 One is the situation Ed mentioned where what
19 the individual says seems to depend on
20 knowledge they have because of where they are
21 situated. Christina McDonald talked about an
22 example. I'm a rancher on the river and this
23 is how I use the river and this is what this
24 rule would do to me.

25 The other is the case that it is

1 "MASS AND FAKE COMMENTS IN AGENCY RULEMAKING"
2 little more majoritarian. Let's say the agency
3 is trying to design a label, a product label as
4 a warning, or a financial form to make sure,
5 and they are looking at different design
6 possibilities. And they put a couple of them
7 out there and they get 300 self-identified
8 consumers who say, "I like version A" and 500
9 who say "I like version B."

10 In both of those kinds of situations
11 it looks like the value of the comment may
12 depend on the person being who they say they
13 are. I'm going to suggest that there is an
14 optic in that. First of all, it is not who
15 they are. You don't care whether it's Cynthia
16 Farina or Michael Herz. You care that we're
17 consumers and not manufacturers, or that we are
18 ranchers. Right?

19 Figuring out who somebody is in the
20 real world is actually more difficult, though I
21 defer to Ed, than figuring out whether they are
22 that person.

23 The other problem with this is
24 notice and comment is a self-selected process.
25 No self-selected process can reliably produce a

1 "MASS AND FAKE COMMENTS IN AGENCY RULEMAKING"
2 representative sample of information. That
3 doesn't matter whether you are talking about
4 conventional comments or online comments. It
5 doesn't matter whether you are talking about 20
6 comments or 2 million comments.

7 What I want to suggest, and it a
8 theme of my remarks today, what agencies have
9 to be worried about is verifying information,
10 not identity. And that's probably something
11 you're already doing. But I think we shouldn't
12 get, you know, too caught up in the identity
13 problem.

14 MR. VARONA: Great. Michael?

15 MR. HERZ: So I am not sure I have
16 anything to add about specific harms. I think
17 those are the harms. But to elaborate slightly
18 by saying -- I want to push back a little bit
19 against this term, "fake comments," altogether.
20 In a certain sense, how is a comment fake?
21 It's a comment. It really is. There it is.
22 It has some words. It states a view. It
23 expresses a position. It communicates some
24 information. As far as we know, that is
25 consistent with the views of some person or

1 "MASS AND FAKE COMMENTS IN AGENCY RULEMAKING"
2 entity who is behind the comment; right? It's
3 a real comment.

4 A true fake comment, and maybe this
5 happens, the clever thing would be to submit a
6 really terrible comment endorsing the position
7 of your opponent. That would be a fake
8 comment.

9 (Laughter.)

10 And that may happen. Maybe after
11 I've mentioned it, it's going to happen lots.
12 But I don't think it happens and I don't think
13 it's, you know, probably not that meaningful if
14 it does. But that's a "fake comment."

15 These are real comments; they have
16 the wrong names attached to them. As Cynthia
17 suggests, in many instances the name is really
18 irrelevant. It's the substance of the comment.
19 And to the extent the names are relevant, a
20 pseudonymous comment is actually exactly the
21 same as an anonymous comment. It's a comment
22 submitted without a name at all that is
23 evaluated on the basis of the strength of the
24 substance, information, argument, contained
25 within the comment.

1 "MASS AND FAKE COMMENTS IN AGENCY RULEMAKING"

2 This has come up a couple of times
3 already, anonymous comments -- if really this
4 was a giant problem, we already would be
5 prohibiting anonymous comments. The fact that
6 we don't, in general -- and there are divided
7 views about this and ACUS totally punted on
8 this question in a recommendation a few years
9 ago and said every agency should figure it out
10 for themselves, but should have clear views and
11 have a clear policy, but ACUS didn't share or
12 even hint what the policy might be.

13 But in general, smaller agencies
14 allow them. And the fact that they do, and I
15 could corroborate that, to me suggests that
16 pseudonymous comments, which are not actually
17 that different than their effects, are not
18 quite the calamity that they are claimed to be.

19 MR. COGLIANESE: So I think maybe
20 you're right, Michael, that "fake" is the wrong
21 word. Maybe what we should be talking about is
22 inauthentic comments. And I like that word,
23 because really what I want to do is suggest
24 that there are four problems, each of which
25 begin with the letter I, like inauthentic, that

1 "MASS AND FAKE COMMENTS IN AGENCY RULEMAKING"
2 are at issue here. And Cynthia touched on this
3 a bit.

4 Let me just tell you what I think
5 the four I's are: Information, inferences,
6 identities and integrity. So let me take those
7 each briefly in turn.

8 Cynthia touched on the information
9 just a bit, but I want to highlight that is a
10 real concern that could come up with
11 inauthentic comments. That people just make up
12 data, make up information that doesn't really
13 exist, and if that's relied upon by the agency,
14 that's a problem.

15 Fake inferences, the second I,
16 inferences. To the extent that a large number
17 of comments come in that are inauthentic, they
18 may create an inference for the agency about a
19 certain kind of implementation problem for a
20 rule.

21 I will just give you an example
22 going back to a pre-Internet era. The
23 Department of Transportation learned that when
24 they were adopting the passive restraint rule
25 that required things like automatic seatbelts,

1 "MASS AND FAKE COMMENTS IN AGENCY RULEMAKING"
2 that a lot of people just cut those seatbelts
3 off or disabled the devices. And a lot of the
4 safety benefits, then, from having them were
5 smaller than would be estimated if you assumed
6 a full compliance rate.

7 And so one could imagine similar
8 context today; other rules where there are
9 inferences about how a rule will be
10 implemented, how it will be complied with,
11 based upon the volume of comments that come in.
12 If those comments are inauthentic, then the
13 wrong inferences could be drawn.

14 The third I is identities, which has
15 already been mentioned. And part of the
16 problem is certainly related to the problem of
17 inferences. If one is taking the comment as
18 more credible because it's identified with
19 someone who is a rancher, let's say, and you
20 think he is identified as a rancher, but is
21 really not, that would be a wrong in inference
22 from a false or inauthentic identity.

23 And I think there is also a concern
24 about privacy here. Whether it is a legal
25 concern or simply a policy or moral concern,

1 "MASS AND FAKE COMMENTS IN AGENCY RULEMAKING"
2 much the same with the question about copyright
3 earlier where agencies, if they are posting
4 copyrighted material, are in some sense
5 complicit in a violation of Copyright law. If
6 someone has submitted an inauthentic comment
7 that uses, falsely, someone else's identity,
8 and maybe their personal e-mail address, their
9 actual mailing address or phone number, other
10 personally identifiable information, that is a
11 privacy violation, then, if the Federal
12 Government posts that up on the Internet for
13 everyone to see.

14 Lastly, I'll just say integrity. I
15 think it is hard to estimate and calculate. It
16 maybe that, Michael, you're right, that this
17 isn't so prevalent of a concern about the
18 inauthenticity of comments that it has created
19 an integrity problem. But I do think there is
20 something that is lost once one realized that
21 there is a lot of falsity going on in comments.

22 And I will just speak from one
23 personal experience. I had a class once, very
24 last class. I was teaching at Harvard a class
25 in professional ethics, no less, and the

1 "MASS AND FAKE COMMENTS IN AGENCY RULEMAKING"
2 students decided to play a game of Bingo. And
3 they had to be able to be recognized and say
4 some kind of phrase in the course of their
5 comment in class. And suddenly somebody raises
6 his hand and says "Bingo," they've actually
7 won, because each phrases that students had
8 said were there.

9 And I will say that personally, when
10 this happened and I realized that the ruse,
11 that this conversation we had been having for
12 the last 45 minutes had actually been
13 manipulated so that students could game the
14 Bingo board, left me really not only
15 disappointed in the students --

16 (Laughter.)

17 MR. HERZ: You left Harvard then and
18 there.

19 MR. COGLIANESE: That's right. I am
20 now at the University of Pennsylvania and it
21 has never happened.

22 (Laughter.)

23 But it does -- right, exactly. They
24 are much more clever perhaps. But anyway, I do
25 think that that's something we should be aware

1 "MASS AND FAKE COMMENTS IN AGENCY RULEMAKING"
2 of. And I think agencies, which may already
3 have so much on their plate that it may be
4 easy, sometimes too easy, to discount the
5 public participation process, I would worry
6 that officials would not get cynical about the
7 public participation, public engagement
8 process, because of the prevalence of
9 inauthenticity.

10 MR. VARONA: Thank you, Cary.
11 Matthew?

12 MR. MINER: So, Cary, it is
13 interesting that you mentioned that about the
14 Bingo. I know we were talking earlier that we
15 went to the same law school and there the
16 professor's comments were the ones that were
17 put on the back of tee shirts. So the students
18 comments really didn't matter. I don't know if
19 you want the professor comments necessarily to
20 go on tee shirts at the end of the semester.

21 So being here from the Department of
22 Justice and the Criminal Division I want to
23 make a couple of higher-level points, because
24 when you comment on what is a fake comment or
25 inauthentic comment in that context, it

1 "MASS AND FAKE COMMENTS IN AGENCY RULEMAKING"
2 matters. And I don't want to leave any
3 impressions from the comments that I make today
4 that might be exaggerated in one way or
5 another, or misunderstood.

6 The Department of Justice, of
7 course, wants to support the integrity and
8 operation of Federal Agency rulemaking. But we
9 also want to foster as much as possible robust
10 comment activity in connection with rulemaking,
11 and the First Amendment clearly matters.

12 So nothing that the Department does
13 in this space in terms of looking at any sort
14 of false information, identity theft,
15 obstruction activity, should at any point be
16 intended or viewed in any way to chill
17 legitimate First Amendment activity in the
18 comment process. I think that is key.

19 I also want to make clear that
20 whatever my comments are, they are not speaking
21 as to any individual case or investigation as
22 well, whether it exists or not.

23 But in terms of the fake or
24 inauthentic comment piece and how that impacts
25 the rulemaking process, our perspective is a

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2 little bit different. As you evaluate whether
3 there was criminal activity in violation of
4 Federal law, you're looking at a different set
5 of issues beyond whether something is
6 inauthentic, whether it has a particular impact
7 on the rulemaking process, whether anonymity
8 should be used or is allowed, or if someone is
9 simply using the name Joe Smith because they
10 want to maintain anonymity.

11 From a criminal law perspective,
12 mens rea matters. Knowledge, intent. The
13 statutes that would be impacted or be used in
14 any prosecution have elements of intent or
15 willfulness. The Federal False Statement
16 statute requires willfulness and materiality.
17 In terms of obstruction, activity in connection
18 with any agency or administrative process,
19 whether rulemaking or an investigation, there
20 has to be intent in connection with that.

21 And so an inadvertent use of
22 information, something that might happen to be
23 incorrect, something that was not intentional
24 or was isolated, is not going to be of interest
25 to the Department of Justice.

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2 But with regard to anything that
3 would be intentional, willful, large scale,
4 certainly intended to target identities that
5 were obtained through means that involve
6 hacking efforts or other things that would
7 impact the statutes that are on the books, as
8 well as the Federal False Statements statute,
9 we will look to those if our agency partners do
10 come forward, the FBI and others, and identify
11 cases. But it has to meet a threshold. So we
12 are not interested in policing the range of
13 comments that come in as to whether they are
14 accurate or whether they might be one thing or
15 another.

16 This really goes to the bottom line
17 of the last thing the Department of Justice
18 wants to do is in any way inhibit or chill the
19 First Amendment protected comment activity in
20 rulemaking.

21 MR. VARONA: Thank you, Matthew. So
22 Matthew has opened up the door, after we
23 discussed what fake comments are, to what some
24 of the fixes could be. Before we delve a
25 little bit more deeply into regulatory and

1 "MASS AND FAKE COMMENTS IN AGENCY RULEMAKING"
2 other responses to this problem, I wanted to
3 share two excellent questions that were posted
4 to the hashtag. One by Ann Holly. Ann, raise
5 your hand, please.

6 MR. HERZ: She is no longer
7 anonymous.

8 MR. VARONA: How do we maintain
9 public faith --

10 MR. HERZ: That may or may not be
11 Ann Holly.

12 (Laughter.)

13 MR. VARONA: How do we maintain
14 public faith in the rulemaking process when
15 mass comments may have value, but there seems
16 to be an increase in the public assuming mass
17 comments are fake comments?

18 So this is a very nice way of
19 connecting the two panels. How do we preserve
20 public faith should be something that we keep
21 in mind as we continue to talk about this
22 problem.

23 The other excellent question is from
24 a student of mine, Eric Emanuelson. Eric,
25 raise your hand. Eric is right there. He asks

1 "MASS AND FAKE COMMENTS IN AGENCY RULEMAKING"
2 this: Whether they are called fake,
3 inauthentic, or otherwise, aren't we talking
4 about fraudulent comments that appropriate a
5 real or made-up identity to promote a
6 viewpoint? And if so, why is this fraud not a
7 big deal?

8 So let's keep that in mind, too.
9 Since we have now a sense as to the harm that
10 is caused by fake comments and what they are,
11 what measures have already been taken by
12 agencies to identify and cull out fake
13 comments? How effective and extensive have
14 those measures been? And let's also keep these
15 two questions in mind about public faith in the
16 process and how fraud figures in. Shall we
17 start again from here? Ed?

18 MR. FELTEN: Sure. So Let me talk a
19 little bit about what one might do technically
20 to try to address these issues. And I think
21 there are a couple of different strands in
22 those questions. One is about how you deal
23 with the possibility of bots that submit large
24 numbers of comments, perhaps fake, perhaps just
25 barely not fake, let's say.

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2 And there is a cat-and-mouse game
3 that goes on between services and the operators
4 of bots which we see in the social media world
5 and in other areas where essentially bots are
6 detected by looking for certain patterns, by
7 looking for large numbers of inputs that come
8 from a small number of IP addresses in a burst
9 and have some similarities between them.

10 But ultimately it's a cat-and-mouse
11 game between those who are operating the bots
12 and those we want to detect. As the detectors
13 get better, the operators of the bot vary their
14 behavior, they vary the content, they spread
15 out their activity over time, and they spread
16 it out over different IP addresses and
17 locations and it might become more difficult to
18 deal with it. But it is a battle that is
19 probably worth fighting to at least put some
20 uncertainty into the bot operators' minds about
21 whether their strategies will succeed.

22 The second strand here is around
23 impersonation and what you can do about
24 identity impersonation. And clearly, one thing
25 you can do is just say: Hey, if you want to

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2 submit a comment and without putting a name or
3 claimed identity on it, we will accept that as
4 an anonymous comment. But if you want to claim
5 identity, you might say, then you need to
6 provide some evidence.

7 And here now you are talking about
8 the several technical methods available to you
9 that are used by the big online services, the
10 Facebooks and Googles of the world, to try to
11 authenticate identity.

12 So they rely on things like
13 passwords. Sometimes accounts are linked to
14 real-world identity via something like a mobile
15 phone account. It's not too difficult to
16 verify that someone had access to a particular
17 mobile phone and the identity of the owner of
18 that phone is known or knowable. So there are
19 means that can be used like that.

20 And then finally, even those can
21 have limited effectiveness in practice. And so
22 the online services rely to a large extent on
23 machine-learning-based approaches where they
24 look at a lot of the signals that are available
25 to them to try to detect activity or user

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2 sessions that are more likely to be -- that
3 look funny, that are more likely to involve
4 impersonation.

5 And here is the big problem from the
6 comment process, is that those services have
7 access to so much more information about what
8 users are doing.

9 So for example, if I were to use my
10 Facebook account from here, it might look odd
11 that I am accessing the service from
12 Washington, D.C., when I'm known to live in New
13 Jersey. But Facebook probably knows that I was
14 using Amtrak WiFi this morning, whereas
15 Regulations.gov, I am almost certain, does not
16 know that.

17 MS. FARINA: My reaction to the
18 whole fake comment phenomenon, which I have to
19 say is largely like pinkeye. It really looks
20 awful, but it is actually not that serious.

21 (Laughter.)

22 And it's not because I think public
23 integrity or public perception is not a problem
24 -- I think it is a very serious problem. We're
25 not talking about that. My experience rooted

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2 in the ten years of research that I was part of
3 at Cornell, a multidisciplinary group that
4 included computer information science, worked
5 with real Federal agencies on real rulemaking
6 on a platform that we developed that some of
7 you know called Regulation Room, the sole
8 purpose of which was to try to bring into the
9 rulemaking process the kinds of people we saw
10 who did not participate or did not participate
11 effectively.

12 So we were out there looking for the
13 ranchers, and the consumers who had medical
14 debt, and the small trucking companies.
15 Basically the people who oftentimes not only
16 have a great stake in the rulemaking, but have
17 like a situated knowledge that the Agency might
18 find helpful.

19 We were very careful about what we
20 asked people to provide when they came on to
21 our site. We did not ask for a name. We did
22 ask for an e-mail, because human subjects
23 regulations required us to send the terms and
24 conditions of this research. But you know how
25 easy it is to create an e-mail; right?

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2 We always try to ask a brief survey
3 before people start. And what we wanted to
4 know, precisely because a lot of times the
5 value of the comment seemed to depend on the
6 kind of person who was making it, was are you a
7 consumer? Are you a small businessperson? Are
8 you this? Are you that? It was always
9 characteristics that seemed related to the kind
10 of problem and information the agencies effect.

11 And I will tell you people were
12 extraordinarily unwilling to provide that kind
13 of information. You know, it's not a surprise
14 to you to say there is an enormous amount of
15 distrust about government agencies. We were
16 really clear that we weren't an agency. But
17 even so, we couldn't get people to willingly
18 and accurately -- because that's the other
19 thing, sometimes we get a name and we
20 double-check and we find out that this person
21 that had medical bills was actually a creditor
22 or credit agency.

23 So my concern, and I am really glad
24 to hear Michael say it seems to be the
25 direction that the Department of Justice is

1 "MASS AND FAKE COMMENTS IN AGENCY RULEMAKING"
2 going -- is the more we try to pin commenters
3 down on who exactly they are out in the real
4 world, we will have a disproportionate effect
5 of dampening exactly the kind of comments we
6 are trying to get into the system.

7 It is not going to be the
8 sophisticated key players who don't want to
9 provide this information. They are providing
10 it already. The agency knows who you are. It
11 is going to be anyone new to the process. And
12 so that's why in my mind I want to think really
13 hard about how much harm is really imposed.
14 The public perception of this is I think a
15 serious harm.

16 I think the only way we ultimately
17 get to that -- well, two ways. One of the ways
18 is we have got to educate the public better
19 that this is not a plebiscite. We all say that
20 in this room. But we know that even very
21 well-educated people don't know that or don't
22 believe that. This is not a ballot box
23 stuffing. It is very different.

24 The other thing we have to do is we
25 have to think about the incentives that are

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2 creating this behavior in the first place. And
3 I'm not sure we understand so well yet what the
4 incentives are behind the people who are doing
5 fake comment.

6 If it's to affect the process, the
7 outcome, then more education about the process
8 ought to change the set of incentives; right?
9 If it really needs to get out there, this
10 doesn't help. This doesn't help.

11 If it's something more, you know it
12 is to undermine the legitimacy of the
13 regulatory process, then I think we have got a
14 bigger problem. But I think we should be
15 looking at least in part at why is this
16 happening? What is motivating this behavior?
17 And see if we can shift those incentives,
18 rather than looking primarily at let's make Big
19 Brother ask for more information about people
20 so they know; right? What is Ed doing on
21 Amtrak? That is what these people are afraid
22 of.

23 MR. VARONA: Prior to passing the
24 baton on to Michael, I thought I would
25 highlight Capri in the audience. Capri just

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2 reinforced one of Cynthia's points she shared
3 by offering this: If the implication is that
4 the comment is fake because the identity of the
5 person writing it is an imposter, wouldn't this
6 exclude nonexperts from commenting on rules?
7 Why does the identity matter as much and/or
8 more than the substance?

9 So, Michael?

10 MR. HERZ: And I can't really answer
11 Tony's question from a technical point of view.
12 I leave that to Ed and others. But from a
13 lawyerly point of view with an eye on this
14 fraud question, the question really comes down
15 to -- and I want to hear more from Matt on all
16 of this -- is any of this against the law? Is
17 it illegal? Is it fraud or identity theft?
18 Does it violate the APA?

19 When the FCC was being not that
20 helpful to Attorney General Schneiderman, they
21 said, "You haven't even told us what law you
22 think has been broken," and he said, "Criminal
23 impersonation. It's a State law."

24 You know, I don't want to go into
25 detail on any of these, but all of them have

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2 some properties to actually identifying that it
3 is a violation of law. To just say fraud,
4 traditional fraud, false statement of material
5 facts he knew was false with the intent to
6 deceive on which there was justifiable reliance
7 that caused injury. In general, injury is
8 meant some tangible harm.

9 I think there is serious question
10 whether these are false statements of material
11 facts. That's what we've been talking about.
12 Does it matter? And that is relevant to 1001
13 also, materiality. I don't have a firm view,
14 but it's arguable it's not material. That is
15 the point some of us have been suggesting.

16 Justifiable reliance that you need
17 for fraud? No hint, I think. You know, in
18 your opening remarks you said that the problem
19 we were worried about is distorting the
20 rulemaking process. I think that was your
21 phrase, distortion. And distortion, that would
22 be reliance; right?

23 And when we talk about what are the
24 harms, what we are ultimately worried about is
25 that the outcome is changed illegitimately.

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2 And I don't think that has been shown yet.

3 Certainly, it didn't happen in the FCC. There
4 is no hint that the FCC was moved one way or
5 the other by these millions of comments. They
6 were irrelevant to the process, to the outcome.

7 I don't think you can show
8 justifiable reliance and for the same reason
9 it's maybe hard to show injury. If it didn't
10 affect the outcome, how do you show injury?

11 There is very serious legal --
12 approaching this as a lawyer, proving fraud
13 here is hard to do. 1001 has the materiality
14 question, certain questions you intend and
15 injury under the criminal impersonation laws,
16 as well. All of the large agencies have been
17 talking about what is the injury translates to
18 very precise legal questions under all these
19 statutes and the answers are not at all clear.

20 The last thing, of course, is the
21 APA; right? When the FCC stuff hit the
22 newspapers there was a lot of people saying in
23 the newspaper this violates the APA. And it
24 wasn't always fully fleshed out. If you look
25 at the petitions for review that were filed,

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2 that is a just a two-pager, the actual
3 petition, they all said: This violates the
4 APA.

5 If you brief the briefs in the
6 challenges to the net neutrality review --
7 repeal, and I haven't looked at all of them,
8 but it is my belief that none of them make an
9 APA argument. That a bunch of very smart
10 lawyers have looked at this and decided it is
11 just not an argument on the APA.

12 Remember, the APA argument has to be
13 not that filing a fake, inauthentic, my word
14 was going to be manufactured -- which captures
15 the inauthentic factor -- comment can't violate
16 the APA. But the APA applies to the agency,
17 not the filer. It has to be something that the
18 agency did in handling those comments that
19 would be APA violation and that is a little
20 tricky concern.

21 So the fact that it's not illegal
22 doesn't mean that it is fine at all. There are
23 lots of legal things that are appalling and
24 problematic. But viewing this from a lawyer's
25 perspective it is not at all clear that there

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2 is a crime. And I would love to hear anything
3 that Matt has to say.

4 MR. COGLIANESE: So before we get to
5 the crime, I was just going to take a policy
6 analytic framework here. Much like we are
7 focusing on regulations and a regulation should
8 be designed to address a particular identified
9 problem, I think if we are going to think about
10 solutions in this context, we need to make sure
11 we identify exactly what the problem is.

12 And I think if you go through the
13 four I's that I presented and the problem of
14 fake or inauthentic information, it's not a new
15 problem. Agencies always have to be mindful
16 about what information they are getting in
17 through the comment process. Can they trust
18 it? They should be probing it, testing it, not
19 just simply accepting it at face value.

20 So that is not a new problem. In
21 some ways it is probably not even a very
22 serious problem in this context, when most of
23 the inauthentic comments, as I think was
24 suggested this morning, tend to also be ones
25 that are short, spam-like, postcard-like.

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2 There is not a lot of information in there. So
3 it is not as if we yet have reached a point
4 where there are 300 pages of really detailed
5 cost and benefit data that are inauthentic.

6 The same thing I think is true with
7 the false or inauthentic inferences. Cynthia
8 is exactly right. This is not a plebiscite, so
9 most agencies aren't drawing, or shouldn't at
10 least be drawing a tremendous inference based
11 upon the number of these brief comments.

12 As I suggested on occasion, and of
13 course I had to go back to an example from the
14 1970s to find one where maybe there would be a
15 valid inference to be drawn from even a large
16 volume of comments about implementation and
17 compliance. But even in those kind of cases,
18 agencies -- it's kind of an old problem -- they
19 need to rely on something more than just the
20 comments, really make sure it's credible.

21 The real problems do come down to
22 the fake identities, and in particular the
23 privacy concerns. I was struck, Cynthia, with
24 your comment about people didn't want to
25 volunteer whether they were even a consumer or

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2 not. And what that tells me is that when
3 someone falsely assumes someone else's identity
4 and puts that into the record, that is
5 something that we ought to be taking very
6 seriously.

7 If people don't even voluntarily
8 want to give up whether they're a consumer or
9 not, we shouldn't have agencies spreading out
10 personal information.

11 By the way, this is not just limited
12 to the context of rulemaking. Obviously the
13 display of these comments on Regulations.gov
14 does matter. But there is a story in the
15 papers about some fake constituent letters that
16 are being sent in Missouri of late, just a
17 story in the last week. And maybe because
18 legislators do try to draw inferences about the
19 volume of comments, that is where the bigger
20 problem would be.

21 Lastly, this is about solutions. I
22 don't understand what the resistance is to
23 using CAPTCHA, and maybe we could have a
24 discussion about that. But it seems to me that
25 we shouldn't necessarily be saying: Oh, gee,

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2 will there be any barrier to public
3 participation? But look at this against the
4 alternative which years ago would be having to
5 write a letter, seal it in an envelope, and put
6 it in the mailbox. Against that, how hard is
7 CAPTCHA?

8 And if a lot of the fake comments
9 come in from bots, then it would seem to me if
10 CAPTCHA is effective, that that could be a very
11 sensible and easy solution for when this
12 arises.

13 MR. MINER: I don't want to
14 disappoint, given that you have a little bit of
15 a billet here, but I probably will. But the
16 question was does any of this violate the law
17 in sort of a broad question? And if you think
18 about that, there is the "this," and what is
19 the "this," and the facts that are tied to
20 that, as well as the law. And whether we are
21 talking about the Federal False Statement
22 statute, or whether you're talking about the
23 obstruction statute that relates to Federal
24 Agency proceedings, whether you are talking
25 about aggravated identity theft, each of these

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2 statutes -- and Michael is exactly right --
3 they have elements. They have elements that
4 deal with mens rea, they have elements that
5 deal with materiality, and the facts would have
6 to align.

7 And I'm not going to go through the
8 particulars of any specific rulemaking and the
9 comment activity there, because I don't think
10 it's appropriate to do so. But can I imagine a
11 set of facts that would align to violate one or
12 more of those statutes if you had a certain
13 type of activity? Absolutely. And that would
14 certainly be the kind of activity that we would
15 want to see, I think, targeted and prosecuted.

16 But in order to prosecute such
17 activity, not only do have to have facts that
18 align with the facts of the statute but you
19 have to be able to prove those facts beyond a
20 reasonable doubt to a jury. And there has to
21 be a level of harm in connection with that to
22 the process such that you -- as you consider
23 the chilling effect on comment activity, is it
24 appropriate for criminal prosecution? So there
25 is discretion on the front edge that would have

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2 to go into that decision-making.

3 But having said that, I can sit here
4 and think through some fact scenarios that
5 would, but they would be certainly fairly
6 extreme and criminal in nature.

7 MS. FARINA: I wondered if we could
8 interact a little bit. I know that probably
9 it's frustrating for Justice to sit out there
10 and say don't do this, don't do that.

11 Specifically on the issue of comments being
12 filed in my name, it is not one that I filed.
13 Whether I agree with the substance or not, I
14 don't want it there because I might fear
15 occupational repercussions or reputational
16 repercussions.

17 I thought this morning the policy of
18 agencies to delete the name that is attached to
19 that comment if they are told, "That wasn't my
20 comment" seems to me exactly right. Because
21 like Michael said, the comment is the comment.
22 If it contains a valid helpful point, if
23 doesn't matter whether it was bot or, you know,
24 the New Yorker dog; right? You know that
25 cartoon on the Internet, nobody knows your dog?

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2 It doesn't matter where it came from. But the
3 substance of the comment can stay there. But
4 yes, get rid of that name, that attribution.

5 That is one of the reasons why a lot
6 of agencies allow anonymous comments; right?
7 Because they want to take away that fear that
8 people have. That doesn't mean that when what
9 we ought to do is try to use a lot of
10 technology to figure out in the first place
11 whether those comments actually belong to the
12 people that they are attributed to.

13 If we could do that in an
14 unobtrusive way that wouldn't make people more
15 distrustful, that is good. But we would have
16 to take that cost very seriously, I think. It
17 doesn't mean there is nothing that the agency
18 can do, though, if it's brought to their
19 attention.

20 MR. FELTEN: So I want to go to one
21 aspect of the question, which is why does an
22 agency even care who the commenter is? And in
23 many cases a comment might have the same impact
24 or same effect if it comes in or is labeled as
25 anonymous. But there are some cases where a

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2 commenter claims by virtue of their identity
3 that they have experience or expertise that is
4 especially relevant to the subject matter of
5 the comment. And then I think we really do
6 care whether they are who they claim to be and
7 whether they do, in fact, have that expertise
8 or experience.

9 And so one way to formulate that is
10 to start by asking is there a claim based on
11 identity that is part of the comment or not?
12 And if not, then maybe we don't need to know
13 and we don't need -- and the public has less of
14 an interest in knowing who the commenter is.

15 I also want to talk about the method
16 for disputing a comment which is put in falsely
17 in your name. And, of course, it's important
18 that you as an individual can protect yourself
19 against a false comment that is filed in your
20 name. But at the same time, it's very common
21 in online forums where there is a way to file a
22 dispute or flag something as being
23 inappropriate or wrong. If those flagging
24 mechanisms get misused and it becomes a form of
25 censorship for someone to file deliberately a

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2 fake dispute, and so one needs to be careful
3 not to make the dispute mechanism too powerful.

4 And this is where I would think I
5 would concur with what Cynthia said, that a
6 mechanism that said if someone disputes an
7 identity, maybe just take the identity label
8 off. Because that is a relatively mild step to
9 take that, in most cases, won't really harm the
10 commenter if it is, in fact, a legitimate
11 comment in a fake dispute.

12 MR. VARONA: Funny you should say
13 that, Ed, because a pseudonymous commenter just
14 posted to the hashtag sayings this: In light
15 of concerns discussed, is there an argument for
16 agencies accepting only anonymous comments and
17 declining to solicit or accept any identifying
18 info?

19 Professor Nina Mendelson also
20 posted -- she is not the pseudonymous
21 commenter, by the way -- when we are talking
22 about a comment providing an agency with
23 situated knowledge, isn't the genuine identity
24 a good proxy for genuine information and
25 wouldn't it permit the agency to contact the

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2 commenter, as I believe agencies have done in
3 some instances?

4 Professor Mendelson has an
5 additional question, and then we will open it
6 up for more dialogue for just a few minutes,
7 and then we will want your live questions to be
8 asked.

9 So that second question from
10 Professor Mendelson is this: For a highly
11 vulnerable rulemaking, those where the risks of
12 problems seem significant or comment levels are
13 high and where the public is watching closely,
14 should agencies invest the resources in
15 ensuring the comments are what they purport to
16 be? CAPTCHAs, e-mail verification, all with
17 advance notice of the public, of course.

18 So two things: Cost/benefit, which
19 Cynthia has really wonderfully laid out for us
20 and certainly shared more, and pseudonymous
21 anonymous comment values. So why don't we
22 start with Matthew and then come this way.

23 MR. MINER: Well, with regard to the
24 process improvements and whether there should
25 be -- whether you are talking about on the

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2 anonymous side or different ways of capturing
3 the information -- I don't want to speak to it
4 just because I don't want any of our agency
5 partners to call saying: Why is the Department
6 of Justice weighing in on our practices? There
7 is an administrative rulemaking dialogue
8 process for that.

9 MR. COGLIANESE: I think the
10 question is the right one. In fact, I want to
11 suggest that these are not costless issues for
12 agencies. And the fact that we may have
13 comments that are generated by canine
14 commenters, let's say, I think that's a real
15 concern just from a resource standpoint,
16 especially if these are voluminous comments.

17 Even as a member of public to try to
18 weigh through a docket on Regulations.gov when
19 there are millions of these -- an easy fix for
20 that, by the way, would be just to flag the
21 size of the file. So if I am going and I want
22 to look at the significant comments, maybe that
23 is a crude approximation, that page length
24 could get me somewhere, or at least I could
25 start there. I can't really sort through right

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2 now all of these.

3 So I think there are costs
4 associated with this. I, again, haven't heard
5 any reason why at least starting with CAPTCHA
6 wouldn't be a bad idea.

7 MR. HERZ: Well, the situated
8 knowledge question is for Cynthia. The second
9 pseudonymous question, like Cary, I think yeah,
10 that's exactly the right question. One wants
11 to balance these things. On CAPTCHA, my
12 understanding is, A, it doesn't work as well as
13 it used to. And B, particularly for people who
14 have disabilities, it's a genuine barrier. And
15 those are the two concerns. You lose -- you
16 just are closing it down to some people who are
17 totally legitimate. But it is a technical
18 question. Maybe ask someone else.

19 MS. FARINA: Just briefly on the
20 CAPTCHA, this gets back to my point that I
21 think we need to understand better what is
22 incentivizing these fake comment campaigns. If
23 the incentives are high enough, these people
24 will find a way around CAPTCHA. So there is
25 nothing that is going to be foolproof.

1 "MASS AND FAKE COMMENTS IN AGENCY RULEMAKING"

2 The situated knowledge point is one
3 that has troubled me a lot. That is really how
4 regulation groups sort of stake their claim to
5 be adding value to the process. We are trying
6 to find the people who, because of their
7 on-the-ground experience, can add to what the
8 agency may know about the facts or ambiguities
9 or enforcement problems or all sorts of things.

10 And that does seem to turn -- and
11 again, I want to emphasize it does not turn on
12 the actual named identity of the person. It
13 turns on the fact that there is a kind of
14 person that they say they are. And that is
15 even harder to figure out than identity.
16 Right? You can't do it automatically.

17 But I think it would be a mistake
18 for us to associate this problem of how do we
19 know that the comment -- that the information
20 is useful because we are not sure of the
21 comment customer? That is not really and
22 specifically a fake comment problem.

23 And I want to come back to the point
24 that the notice and comment process contains no
25 validation in itself that the information you

1 "MASS AND FAKE COMMENTS IN AGENCY RULEMAKING"
2 get is accurate, complete, or representative.
3 So in my example of the two, you know, labels
4 or the two forms, you could get 100 percent
5 verification that those 800 people really are
6 who they say they are and they are consumers.
7 But you could not from that, only that, validly
8 infer that you know now what the typical
9 consumer or most lenders, borrowers, would
10 think. You've got to do additional work;
11 right? You have to have carefully constructed
12 focus groups or your surveys.

13 So I was a rancher -- I don't need
14 to tell you. Maybe we don't want to say
15 commenters lie, but commenters present
16 information strategically; right? Their view
17 of the world tends to fit what their preferred
18 regulatory outcome is. But if you had a
19 100 percent verified rancher, you don't know
20 that that experience is typical. So you're
21 always, and I think that is what you are doing
22 now, you're always looking at experts, trade
23 associations, and other kinds of information
24 that comes in. You're verifying the
25 information.

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2 So, you know, I again come back to I
3 don't think the resources that we have devoted
4 to this problem, and the potential chilling
5 effect it could have on exactly the kind of
6 commenters we are trying to bring into the
7 process, really outweigh the harm that comes
8 from this, with the exception that I think we
9 have to do something about the public
10 perception and legitimacy problem. But none of
11 the solutions we are talking about deal with
12 that.

13 MR. FELTEN: Let me speak to the
14 issue of CAPTCHAs and other sorts of imperfect
15 but maybe useful defense strategies, such as
16 redelimiting comments from particular IP
17 addresses, or IP address ranges, or other
18 things like that. None of these are foolproof.
19 They can all be defeated by sufficiently
20 motivated adversaries.

21 But they can do a lot of good at the
22 margin by raising the cost for an adversary and
23 creating uncertainty for them, so that their
24 cost-benefit calculation might change.

25 In terms of what is the negative

1 "MASS AND FAKE COMMENTS IN AGENCY RULEMAKING"
2 impact, the impact on legitimate commenters of
3 particular technologies like this, that is an
4 empirical question and I don't want to
5 pontificate about that from here. But it is a
6 question that has to be answered with facts.

7 But I do think we should not dismiss
8 methods if they are imperfect, but do change
9 the economics for the attacker, which I think
10 many of these things do. And that is why they
11 are used widely in industrial settings that are
12 similar to the sorts of technical tradeoffs
13 that we take here.

14 MR. VARONA: Thank you, Ed. Thank
15 you very much for using the live hashtag back
16 channel, but now it's time for your live
17 questions. We have 10 minutes. Please raise
18 your hand and a staff member will go to you
19 with a mic.

20 PARTICIPANT: Hi, I'm Jamie Connor.
21 I'm a man about town, I guess. This discussion
22 has been very helpful in helping me think
23 through where the problems could be. But it
24 does seem to me in some situations this
25 situated knowledge issue actually could be a

1 "MASS AND FAKE COMMENTS IN AGENCY RULEMAKING"
2 significant problem. And most examples that
3 I'm coming up tend to be more State or local
4 government. But for example, D.C. just had a
5 big debate whether they should require tipped
6 employees to be paid minimum wage at a higher
7 rate. And you could imagine a whole lot of
8 people saying, "I'm a waiter and boy, I hate
9 this thing because you are going to cut my
10 income." Or people saying, "Well, I'm a
11 regular customer of payday lenders and I love
12 that I can give cold hard cash for my car
13 title." Or somebody saying, "I used to have an
14 independent trucking company, but your hours of
15 service rules made me go out of business."

16 And those could be phony and if
17 there is collusion between them and the
18 association for the industry that has that
19 perspective, I could see how that actually
20 could end up skewing an outcome. And it's
21 pretty labor intensive to start calling, if you
22 don't have phone numbers, just Fred's Trucking,
23 Minnetonka, Minnesota. Was there ever really
24 such a business? Who knows?

25 MR. VARONA: Two more questions.

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2 MR. BALLA: Steve Balla from George
3 Washington University. I want to raise an
4 issue that has come up repeatedly across both
5 the panels. So we keep coming back to this
6 point that rulemaking is not a plebiscite. So
7 I want to make an observation and ask a
8 question of the panelists.

9 The question is: Given that, how do
10 we solve the problem? And my observation is
11 that I don't think better civics education is
12 the solution. There's a middleman, so to
13 speak, between the agency and the commenters
14 who might think that this is a plebiscite, and
15 those are the associations and organizations
16 that are sponsoring this kind of mass
17 mobilization.

18 And in interviews with those
19 organizations we're finding that oftentimes
20 their main motivation may not be to have an
21 impact on the rulemaking process, but they see
22 this as a cheap way to identify people who
23 share their organization's point of view that
24 then serves as a gateway to deeper
25 participation.

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2 So the Sierra Club might see, oh,
3 you are willing to submit and be part of our
4 mass comment campaign. Now let's see if you
5 are willing to host a meeting at your house at
6 some later point in time.

7 So we can do civics education all
8 day and all night, but that is not going to
9 change the incentives that the organizations
10 that are in the middle of this process are
11 feeling and the way in which they are using
12 this process in the context of rulemaking.

13 So just a question: What do we do,
14 if not civics education?

15 MR. VARONA: Great question. A
16 question from the wings? Back there and then
17 we will go to the panel to wrap up.

18 PARTICIPANT: Dave Oscar, Small
19 Business Administration. I am a little bit
20 concerned by the idea that we can resolve some
21 of the fake comment issue by simply striking
22 the name and identifying them as anonymous.
23 Because it would seem that it gives the fake
24 comment the same credence as an anonymous
25 comment. That if we are in a situation where

1 "MASS AND FAKE COMMENTS IN AGENCY RULEMAKING"
2 the premise of the comment starts with a
3 falsehood, do we want to treat it in the same
4 way as someone who is at least commenting and
5 saying I don't want to be identified?

6 So is it justifiable for an agency,
7 from an APA point of view, to ignore a fake
8 comment and all the information that may be
9 contained in it based on the idea that it was
10 submitted under the premise of a falsehood?

11 MR. VARONA: Excellent questions.
12 Situated knowledge, comment manipulation and
13 civics, and the legality of all of this. Great
14 questions. Wonderful buffet. Eight minutes.

15 (Laughter.)

16 MR. FELTEN: Let me jump in very
17 quickly on that last question. One way to deal
18 with this scenario is to say when someone
19 submits a comment, they would perhaps by
20 default be anonymous. Not even claim an
21 identity, so they wouldn't be claiming falsely,
22 but are given an option of making a claim that
23 will be verified to some level.

24 So you could just say I am a person,
25 this is the information I want to provide. Or

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2 you could say I am this person and the agency
3 would check it. And leave it in the hands of
4 the commenter to decide whether they want their
5 identity to be verified and therefore get the
6 ability to rely on their identity as part of
7 the argument of their comment.

8 MS. FARINA: So Jamie, on the fake
9 comment -- or the situated knowledge, I think
10 the answer is the agency has to cross-check the
11 information. And it doesn't -- that generally
12 seems to be what agencies do; right? They have
13 a lot of forms of input. If information
14 becomes important enough that it really is
15 crucial to the rulemaking, you've got to
16 cross-check it.

17 This is a great idea, if it would
18 work and maybe this would help with that. But
19 I still don't think it changes the problem that
20 you don't -- you can't rely on the information
21 that you get in the comment process without any
22 sort of double-checking.

23 It hard for to me to say, but that
24 is a great point, Steve. And that is why we
25 haven't been able to stop mass commenting and

1 "MASS AND FAKE COMMENTS IN AGENCY RULEMAKING"
2 we are not going to stop mass commenting
3 because incentives there on the part of the
4 organizations have, at least if not solely, to
5 affect the outcome. There are many
6 important -- and there has been studies on
7 this -- they are ways to raise money, it's ways
8 to increase membership, it's ways to impress
9 donors and foundations you could deliver a lot
10 of comments. Those are really different kinds
11 of incentives to shift. Fake comments
12 though -- no one will lie with mass comments;
13 right? That's part of what was said this
14 morning.

15 So what we have to understand better
16 I think through the same kind of research that
17 you are doing, we have to try to figure out who
18 to talk to, it's what is the motivation to
19 submit these things? And then we can get to
20 how we change it. And I will let Michael
21 answer the last question.

22 MR. HERZ: A couple of quick
23 comments. One of the thing that all three of
24 these questions pointed out is the reason we're
25 here having this is because of questions of

1 "MASS AND FAKE COMMENTS IN AGENCY RULEMAKING"
2 scale. Every issue we've talked about predated
3 e-Rulemaking. It was always possible to send
4 in something saying you were who you were not
5 and I'm sure it happened. It must have
6 happened. And the agencies had to deal with
7 that.

8 What has changed is just the volume;
9 right? So it's a volume question. But nothing
10 -- it's a quantity issue. The quality of the
11 issue where the problem is has always been with
12 us.

13 Secondly, there is -- and Steve's
14 point is just a fantastic point and I don't
15 know why I have focused on it with regard to
16 the effectiveness of mass comments. The thing
17 you're trying to figure out. One of the things
18 I always say is, Well, I don't know that they
19 make much difference and Stu Schulman did a
20 study where they say they don't make a
21 difference. But all these sophisticated
22 interest groups seem to think it matters, so
23 that makes me think they do make a difference
24 because they are inside players and they know
25 what they're doing. And now you have given an

1 "MASS AND FAKE COMMENTS IN AGENCY RULEMAKING"
2 alternate explanation, and maybe they just
3 really don't matter. This is really an
4 important issue to find out.

5 (Laughter.)

6 This question of is pulling the name
7 off sufficient and turning a pseudonymous
8 comment into an anonymous comment, A, I think
9 it is. What it does mean is an anonymous
10 comment is going to carry less weight than a
11 signed comment for this issue. And to the
12 extent the agency is going to do the work
13 Cynthia just said they're going to have to do,
14 to the extent they are not verifiable, I am not
15 convinced. I don't know who put this in.
16 There is no reason to believe it. If it is
17 verifiable, it's verifiable and so on.

18 But there are no getting around the
19 fact that a name will often, not always, but
20 often lend weight to a comment. That's where
21 that started.

22 The final point there is we keep
23 talking about false names, but really we should
24 think in terms of identifying information.
25 There are 325 million people in the country and

1 "MASS AND FAKE COMMENTS IN AGENCY RULEMAKING"
2 if someone says I'm John Smith, not every John
3 Smith is going to stand up and say, "Oh, my
4 God, you stole my identity. I don't believe
5 that." There are not that many Cary
6 Coglianeses, but most people have a name that a
7 bunch of other people have.

8 It can't just be the name. Even if
9 it is phony, you haven't hurt other people with
10 that name unless there is more identifying
11 information. That goes to the incentive to the
12 agency of how much information you going to
13 have. Once you get a street address or maybe
14 even e-mail address, that is something
15 different. Or a claimed job position, that is
16 something different. If someone says Barack
17 Obama, that is very specific. We all know who
18 they are talking about.

19 MR. COGLIANESE: I was just going to
20 offer maybe a rosy comment here at the end and
21 challenge Steve a little bit as to whether the
22 problem that he identified is really, after
23 all, a problem.

24 Here we have such a robust
25 democratic culture in America that a part of

1 "MASS AND FAKE COMMENTS IN AGENCY RULEMAKING"
2 the governmental process that legally and
3 operationally is not a plebiscite, everybody
4 nevertheless still thinks of it that way
5 because of the strength of our democratic
6 culture. It is so strong even that people want
7 to fake comment to try to win an imaginary
8 majority competition that doesn't exist, but
9 nevertheless is so deeply rooted in our
10 culture.

11 MR. HERZ: You could say the same
12 thing about Russia.

13 MR. MINER: A lot of these questions
14 and examples go to issues of intent and
15 materiality, which as you sort of walk through
16 what is the intent of the process. If the
17 intent is one that has no criminal illegality
18 attached to it, then that is not anything we
19 are going to be interested in. But as to
20 materiality, some of the points, an easy
21 walkthrough: How it will influence the process
22 and is it designed to do so? Obviously, those
23 are factors that go into those sort of fraud
24 determinations. But it is not that easy to
25 always establish that.

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2 MR. VARONA: Now you see why this is
3 a dream panel to moderate and work with. So
4 please join me in thanking them.

5 (Applause.)

6 MR. VARONA: Now we will hear from
7 Professor Popper.

8 CLOSING REMARKS

9 MR. POPPER: Lunch is out in the
10 lobby. There is an evaluation form. It is
11 critically important that you fill it out. We
12 ask that you do.

13 I was asked to make closing remarks
14 on a program I did not see.

15 (Laughter.)

16 Consider the possibilities. I can
17 pretend I know what was said. I was teaching
18 Torts and dealing with attorney malpractice
19 this morning. Consider the possibilities
20 there, as well.

21 But what I did see both before I
22 left this morning, the first half-hour and the
23 last half-hour while I was here, was inspiring
24 beyond measure. I think on behalf of the Dean
25 and the faculty and the professional staff and

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2 students of the Law School we are honored by
3 the program that you have put together.

4 As Cary said, we have identity
5 issues. There is only one of this -- and you
6 could have any number -- but there is only one
7 Administrative Law Review and it is here at
8 American University. And I hope that you
9 understand that between that Law Review and
10 ACUS, something very special has happened this
11 morning.

12 And I certainly understand that and
13 I am going to be asking a lot of my students to
14 help me get a handle on what has been said,
15 because I do look at rulemaking a little bit
16 different. No, it isn't a plebiscite, but it
17 is a direct system of participation and
18 engagement. It is part of our democratic
19 order. It is unlike anything else anywhere.

20 And the fact that the volume has
21 increased, the pace, the range, the number,
22 because of technology makes that challenge of
23 democracy only greater. I love that.

24 Yeah, fake reports, fake comments,
25 fake news, fake identity, anonymous or not

1 "MASS AND FAKE COMMENTS IN AGENCY RULEMAKING"
2 anonymous, my response to that is not "so
3 what," my response is more "of course." Of
4 course.

5 We live in a moment where a couple
6 of days ago we had indictments against seven
7 people from Russia who were trying to invade
8 our system one way or another across the
9 planet. We are open, however. We are open for
10 business in terms of information. We are open
11 for business in terms of regulation. We have
12 stayed open for business. And this set of
13 problems is an attempt to make more powerful,
14 more accurate a process that is the envy, I
15 think, of the regulatory universe.

16 I don't have such a dim view of it.
17 I have a high view of where we stand as a legal
18 order. I think this program is really a
19 testament to that.

20 You, both the speakers and the
21 audience, you're the keepers of our legal
22 heritage. You're it. I've got news for you,
23 it's not Congress. Congress is on life support
24 at the moment. And it may well not be the
25 Courts or the White House. It's you as

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2 lawyers. It is the dignity with which we
3 proceed.

4 And I say this to my students and my
5 colleagues who are lawyers as well: It's the
6 importance we give to a program like this to
7 the ideas that are set forward. We are the
8 stewards. We are the guardians. We are the
9 ones who are responsible as shepherd for the
10 legal system, for our Constitution, and our
11 laws, and the quality of what goes into the
12 rulemaking process.

13 And I would take pride -- if I can
14 leave you with one thing, I would take pride in
15 what you do. Pride that you care enough to be
16 out here on a Friday morning to worry about
17 fake news and fake comments in rulemakings that
18 are not plebiscites where the comments maybe
19 can be ignored, but we worry a lot about the
20 legitimacy of those comments.

21 And so with that, and again on
22 behalf of the entire institution, the Law
23 School, and ACUS, and especially on behalf of
24 the Administrative Law Review, I want to thank
25 you for coming and ask you please in some form

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2 of orderly way to go out in the hall, get some
3 food, and come back in here. This room is full
4 of the people that you as lawyers want to hire.

5 (Laughter.)

6 MR. POPPER: And they're here with
7 their business cards and resumes and they're
8 ready to go. And if we can continue this
9 tradition of our law school linking this
10 profession and linking in this city, then this
11 entire event has been worth every moment and
12 every cent.

13 I wish you well. Have a good lunch
14 and I will see you all back in here in a few
15 minutes. Thank you.

16 (Applause.)

17 (The Symposium was adjourned at
18 12:43 p.m.)

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1 "MASS AND FAKE COMMENTS IN AGENCY RULEMAKING"

2 CERTIFICATE OF NOTARY PUBLIC

3 I, JOE W. STRICKLAND, RPR, CRR, CRC, the
4 officer before whom the foregoing symposium was
5 taken, do hereby certify that the testimony
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7 by me in stenotypy and thereafter reduced to
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13 symposium; and, furthermore, that I am not a
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