

**REMARKS OF  
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“BRINGING THE PUBLIC BACK IN: CAN THE COMMENT PROCESS BE FIXED?”  
NEW AMERICA  
WASHINGTON, DC  
MAY 9, 2018**

Good afternoon. Thank you to New America for holding this discussion about bringing the public back in—because we all deserve a voice in the decisions made in Washington. This conversation is necessary. It’s also timely. In fact, it’s Open Government Week. Open Government Week presents us with the opportunity to ask questions about how citizens can play a role in government decision making.

So in that spirit, let me begin with a question of my own. Here it goes: What do Senator Jeff Merkley of Oregon, deceased actress Patty Duke, a 13-year old from northern New York and a 96-year-old veteran from southern California have in common?

The answer is not obvious. But it’s important. You see, each of these individuals appears to have filed comments in the net neutrality record at the Federal Communications Commission. You remember the net neutrality proceeding late last year at the FCC. It got a lot of attention, and rightly so. Before my colleagues made what I think is the misguided decision to roll back net neutrality, the agency sought comment on this issue from stakeholders nationwide. And so it appears that a Senator, a dearly departed actress, a teenager from New York and a nonagenarian from California went online, submitted their names and addresses, and typed out their innermost thoughts about internet regulatory policy. But appearances can be deceiving. In fact, each of these individuals—along with two million others—had their identities stolen and used to file fake comments in the FCC record.

These fake comments were by no means the only unnerving thing in the FCC net neutrality docket. The agency received about half a million comments that came in from Russian e-mail addresses. It received nearly eight million comments from e-mail domains associated with FakeMailGenerator.com that had all but identical wording. A million more comments were submitted using mail-merge techniques designed to falsely make them appear like unique submissions.

Something here is not right—and what is wrong is not confined to the FCC. Because fake comments and stolen identities are pouring into proceedings across Washington. They’ve been uncovered at the Department of Labor, the Consumer Financial Protection Bureau, the Federal Energy Regulatory Commission, and the Securities and Exchange Commission. James Grimaldi—who is here with us today—is the journalist who documented so much of this fraud in the administrative state in the pages of *The Wall Street Journal*.

The Administrative Procedure Act is a law from 1946. It sets up the basic framework for rulemaking—at the FCC and agencies like it across Washington. Under this law, when a government agency proposes new policies, it has a duty to give the public an opportunity to

voice their opinion. After considering these public comments, agencies can proceed with their proposed policies and adopt final rules along with a general statement of basis and purpose.

This structure has served us well for decades. It's been the solid foundation for every agency that seeks public input for its decisions. Over time, when we have identified deficiencies in this framework, we have made adjustments. As a result, in 1980 the Regulatory Flexibility Act amended the Administrative Procedure Act to ensure agencies consider the impact of proposed rules on small business. Plus, other laws—like the Paperwork Reduction Act and Unfunded Mandates Reform Act—have changed this framework to respond to new concerns.

But what we are facing now does not reflect what has come before. Because it is apparent the civic infrastructure we have for accepting public comment in the rulemaking process is not built for the digital age. As the Administrative Conference of the United States acknowledges, while the basic framework for rulemaking from 1946 has stayed the same, “the technological landscape has evolved dramatically.”

Let's call that an understatement. Though this problem may seem small in the scheme of things, the impact is big. Administrative decisions made in Washington affect so much of our day-to-day life. They involve everything from internet openness to retirement planning to the availability of loans and the energy sources that power our homes and businesses. So much of the decision making that affects our future takes place in the administrative state.

The American public deserves a fair shot at participating in these decisions. Expert agencies are duty bound to hear from everyone, not just those who can afford to pay for expert lawyers and lobbyists. The framework from the Administrative Procedure Act is designed to serve the public—by seeking their input—but increasingly they are getting shut out. Our agency internet systems are ill-equipped to handle the mass automation and fraud that already is corrupting channels for public comment. It's only going to get worse. The mechanization and weaponization of the comment-filing process has only just begun.

We need to something about it. Because ensuring the public has a say in what happens in Washington matters. Because trust in public institutions matters. A few months ago Edelman released its annual Trust Barometer and reported that only a third of Americans trust the government—a 14 percentage point decline from last year.

Fixing that decline is worth the effort. We can start with finding ways that give all Americans—no matter who they are or where they live—a fighting chance at making Washington listen to what they think.

We can't give in to the easy cynicism that results when our public channels are flooded with comments from dead people, stolen identities, batches of bogus filings, and commentary that originated from Russian e-mail addresses. We can't let this deluge of fake filings further delegitimize Washington decisions and erode public trust.

No one said digital age democracy was going to be easy. But we've got to brace ourselves and strengthen our civic infrastructure to withstand what is underway. This is true at

regulatory agencies—and across our political landscape. Because if you look for them you will find uneasy parallels between the flood of fake comments in regulatory proceedings and the barrage of posts on social media that was part of a conspicuous campaign to influence our last election. There is a concerted effort to exploit our openness. It deserves a concerted response.

This has yet to happen. At the FCC, for instance, the two million individuals who had their names stolen and misused in the net neutrality docket have been advised to file another statement to that effect in the public record. Let me put this as gently as I can—this is not a scalable solution.

Meanwhile, the agency has refused to work with state authorities that have found that their residents have had their identities stolen. This is not right. For starters, it is at odds with the spirit of cooperative federalism. But more critically, the theft of identities like this is often a violation of state law. For the record, it's also a violation of federal law. Section 1001 of Title 18 makes it a felony for any person to “knowingly or willfully” make “any materially false, fictitious, or fraudulent statement or representation” in matters before the federal government. That makes the unwillingness of our regulators in Washington to address the fraud we already know exists especially chilling.

We should be asking how did this happen? Who orchestrated it? Who paid for it? We should be investigating—and the Department of Justice and Federal Bureau of Investigation should be involved. We are looking at a systemic effort to corrupt the process by which the public participates in some of the biggest decisions being made in Washington. If we want to build the civic infrastructure to withstand this assault we need to both understand its origins and take out the rogues who are stealing identities, cheating the public, and destroying our trust.

While we build this civic infrastructure, we can take steps to improve the rulemaking process. Every agency should perform its own internal investigation. Every agency should heed the advice of the Government Accountability Office—which is right now reviewing the “extent and pervasiveness of fraud and the misuse of American identities during the federal rulemaking process.” Every agency should consider simple security measures—like CAPTCHA or two-factor authentication—that can enhance security without decreasing public participation. And every agency can do something old-fashioned: they can hold public hearings.

But the truth is we need to get started. Because that's what is necessary to bring the public back in—and that's what democracy in the digital age requires.

Thank you.