

# Deterring Fake Public Participation

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## Abstract

Fake public participation is widespread in United States government and in governments all over the world. Since fake public participation undermines true public participation, good government advocates should work to deter it. Fake public participation is a subset of fake democracy and occurs for the same reason: we live in an era when democracy is the only legitimate form of government, so the incentive to fake participation is great. To deter fake public participation, the nature of the problem should be recognized followed by the development of a detailed set of public policy recommendations to address it. Proposals to improve public participation, like the Obama administration's Open Government Directive, should be carefully scrutinized for loopholes allowing fake participation.

**Keywords:** public participation, democracy, Obama, Open Government Directive

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**F**ake public participation is widespread in United States government and in governments all over the world. Since fake public participation undermines true public participation, good government advocates should work to deter it.

Fake participation occurs when governments seek the democratic legitimacy but not the accountability that comes with public participation. Fake participation allows politicians to say, "I gave you an opportunity to speak on this legislation--and you didn't take it."

*The Hitchhiker's Guide to the Galaxy* has several great scenes depicting fake participation. They are funny because, although they are taken to ridiculous extremes, they depict a fundamental truth most of us have experienced firsthand. One of those scenes describes a government official (Mr. Prosser) justifying his surprise appearance to demolish Arthur Dent's house (Adams, 1980, pp. 9-10):

Mr Prosser: "You were quite entitled to make any suggestions or protests at the appropriate time, you know?"

Arthur: "Appropriate time? The first I knew about it was when a workman arrived at my home yesterday."

Mr Prosser: "But Mr. Dent, the plans have been available in the local planning office for the last nine months."

Arthur: "Oh yes, well, as soon as I heard I went straight round to see them, yesterday afternoon. You hadn't exactly gone out of your way to call attention to them, had you? I mean, like actually telling anybody or anything?"

Mr. Prosser: "But the plans were on display..."

Arthur: "On display? I eventually had to go down to the cellar to find them."

Mr Prosser: "That's the display department."

Arthur: "With a flashlight."

Mr Prosser: "Ah, well the lights had probably gone."

Arthur: "So had the stairs."

Mr Prosser: "But look, you found the notice didn't you?"

Arthur: "[Y]es I did. It was on display in the bottom of a locked filing cabinet stuck in a disused lavatory with a sign on the door saying Beware of the Leopard."

## **Fake Participation as a Subset of Fake Democracy**

Fake participation is an element of the much larger and more troublesome phenomenon of fake democracy. The basic logic behind fake democracy is quite simple. In the contemporary world, democratic rule has more public legitimacy than authoritarian rule (Mandelbaum, 2007), so it is generally in the interest of rulers to present themselves as democrats rather than autocrats.

Students of comparative politics have created a large literature on fake democracy, under such labels as “electoral authoritarianism,” “pseudo democracy,” and “façade democracy. For example, Larry Diamond, who directs Stanford University’s Center on Democracy, Development and the Rule of Law, writes that “the term ‘pseudodemocracy’ resonates distinctively with the contemporary era, in which democracy is the only broadly legitimate regime form, and regimes have felt unprecedented pressure (international and domestic) to adopt—or at least to mimic—the democratic form” (Diamond & Plattner, 2009, p. 232). Writes Professor Andreas Schedler, introducing a collection of essays under the title, *Electoral Authoritarianism*: “A large number of political regimes in the contemporary world, ranging from Azerbaijan to Zimbabwe, from Russia to Singapore, from Belarus to Cameroon, from Egypt to Malaysia, have established the institutional facades of democracy, including regular multiparty elections for the chief executive, in order to conceal (and reproduce) the harsh realities of authoritarian governance.” (Schedler, 2006, p. 1)

Fake democracies can be placed on a continuum. At one extreme are countries such as Iran, Russia, and Venezuela whose elected leaders claim to hold free and fair elections but rig them so only one party can win. The public is encouraged to participate—as long as the outcome endorses the ruling regime.

At the other extreme are liberal democracies such as the United States, U.K., and Canada, which have genuine multiparty competition, free speech, and free assembly (Freedom House, 2009). Citizens of these countries don’t fear being thrown into prison and tortured for expressing thoughts critical of those in power. Nevertheless, fake participation is widespread. It turns out that there are many ways for political elites to bias public participation without resorting to the techniques of physical intimidation and gross corruption employed by authoritarian regimes.

## Major Categories of Fake Public Participation

Venues for fake public participation can be divided into the civic and governmental. Campaign events are an example of the civic; the meetings of formal public bodies are an example of the governmental.

Venues for fake participation can be further divided into high stakes and low stakes. High stakes participation includes highly publicized and recorded activities. An example of high stakes participation is a televised national political party convention. An example of low stakes participation is a public official's informal, unrecorded chat with constituents at a local diner.

The pressure to engage in fake participation increases as the stakes increase. For example, at a high stakes national party convention, the delegates elected to participate are carefully screened upon entering the convention hall for unauthorized signage. The presidential candidates control this participation because they don't want delegates to hold up off-message signs that might be shown on national TV.

Similarly, presidential candidates often carefully stack participants invited to high profile local campaign events that might be picked up on TV. In theory, attendance will be open; in practice, opponents will be marginalized. For example, to create a supportive audience, a candidate's campaign will give known supporters private advance notice of the candidate's appearance. They may also choose supporters based on their race, gender, age, and other visible characteristics. Supporters will occupy the best locations near the candidate, and supporters with the most politically useful demographics will be closest to the candidate.

As a matter of public policy, little can or should be done about non-governmental fake participation. If public officials in their private capacities want to foster fake participation, they should have that privilege in a free society, although it would be nice if the press and other opinion leaders occasionally exposed it.

But the same standard should not apply to government-sponsored fake participation, which is taxpayer funded and already heavily regulated by laws mandating genuine government openness. Examples of such laws at the federal level include the Administrative Procedures Act and the Freedom of Information Act; at the local level, examples include open meeting and public record acts.

Opportunities for fake public participation appear to be greatest at the local level of government because at the national level there is often little pretense that participation is open.

At a Congressional hearing, for example, it is understood that members of Congress, usually via the committee chair's and ranking minority member's staff, invite the witnesses to testify. At a local hearing, in contrast, public officials may claim that the microphone is open to anyone who wants to speak on a first-come, first-serve basis. However, through selective public notice, behind-the-scenes mobilization, and subtle intimidation, the audience may be as carefully managed as that of a modern presidential campaign stop.

Even at a Congressional hearing, the degree of official control may not be apparent to the public. The public, for example, may not know that the witnesses at a particular hearing had to submit their testimony ahead of time to have it vetted by Congressional staff. This type of prior screening serves to both muzzle witnesses and make Congressional hearings into a sort of professional wrestling match, where the proceedings appear spontaneous but have actually been carefully rigged ahead of time.

Lastly, a crucial distinction is between controversial and non-controversial public participation. It is hard to overemphasize the importance of this distinction because most fatally flawed right-to-know legislation and studies of compliance with such legislation fail to make it. Most government information, such as the popular genealogical information made available by the National Archives, is minimally controversial, so governments have relatively little resistance to releasing it. Thus, if you study compliance with right-to-know laws taken together, they will always tend to reveal high rates of compliance. The key question, however, is rates of compliance for disclosing the most politically sensitive information (Snider, 1999, 2001a, 2005, 2009c). Here the rates of compliance are often dismal.

An important recent example of such flawed legislation is the Obama administration's Open Government Directive (Orszag, 2009). The flaw here is that federal agencies can be in compliance with the Directive's mandate to release "high-value information" without disclosing the most democratically useful information.

Right-to-know compliance surveys regularly issued by various local and federal press associations also tend to suffer from lack of a clear distinction between what is and is not highly politically sensitive information. For example, in the last survey conducted in 2009, the Society of Professional Journalists, American Society of Newspaper Editors, and National Freedom of Information Coalition surveyed access to death certificates, complaints against business, disciplinary actions against attorneys, gas pump overcharge records, and hospital inspection

reports (ASNE, NFOIC, & SPJ, 2009). Access to such information may result in highly profitable consumer stories (often called “news-you-can-use”), but is far less politically sensitive information than, say, access to public employee compensation data (Snider, 2008) and recordings of sensitive meetings of public bodies (Snider, 1999, 2009c).

### **The Political Logic Favoring Fake Public Participation**

The techniques local public officials use to bias public participation in their own favor are quite varied. However, the underlying principle behind what they do is quite simple and a matter of common sense: control public participation so that unfavorable public participation information becomes more costly for the general public to access than favorable public participation information.

Consider the following common dilemma. A public official wants to implement a particular public policy. The official recognizes that providing for public comment on it would add to its democratic legitimacy; indeed, the law may mandate that he provide an opportunity for public comment before his proposed policy can become law. On the other hand, he sees no political gain in holding a public hearing that might mobilize opposition. Thus, he wants to limit unfavorable public participation as much as possible while nevertheless being able to tell potential future opponents: “you had the chance to participate before we made this decision.” This is the political logic illustrated so vividly in the anecdote from *The Hitchiker’s Guide to the Galaxy*. Five widely used techniques to bias participation in this manner are:

#### **1) Don’t publicize the meeting to potential opponents.**

In practice, this will probably mean poorly promoting the meeting to everyone. For example, Congress mandates that local governments must conduct a public needs assessment before allocating money raised from local cable and telco TV providers for public media such as public, education, and government (PEG) access TV and Internet fiber networks (I-NETs) connecting government buildings. Total United States expenditures on such services may exceed \$1 billion per year. To comply with the “public” part of the needs assessment, a local government may hold two public hearings. But there is a huge difference between being public and being meaningfully public.

In Anne Arundel County, Maryland (population 510,000) where I live, public officials viewed the \$16 million allocated for PEG access and I-NETs as a way to fund many of their own

pet projects. I repeatedly asked the County's public telecommunications officer and his superior to notify me when the two public hearings were scheduled for a particular date. I was a recognized expert on this subject and had many ideas on how these funds could be best spent (e.g., see Snider, 2009b). Instead, county officials fulfilled the letter of Maryland's Open Meetings Act by placing a classified ad in the local newspaper before each of the two special public meetings. Not surprisingly, I missed the obscure ads (despite reading the local newspaper every day) and only a handful of citizens showed up, most of which weren't even interested in the use of the \$16 million; they wanted to complain about their cable bill.

### **2) Schedule the meeting at an inconvenient time or place.**

Many otherwise civically minded people cannot justify driving an hour to a downtown public meeting location, searching and paying for a parking space, and then passing through security—all to attend a public meeting. Moreover, very few people can justify taking time off from work to attend a public meeting during regular work hours. Yet it may be in such public meetings where most of the most controversial issues are discussed. In Anne Arundel County, for example, the so-called “public” work sessions of the County Council are held under such conditions. Unless the written minutes of the meetings are detailed (which they are not), the meetings are televised and made accessible online (which they are not; no meetings are webcast and only two meetings a month are televised), or local reporters diligently attend and report on the meetings (which they do not), public participation is effectively precluded.

### **3) Stack citizen representatives on public bodies.**

Many public bodies created by public officials have citizen representatives. Public officials often create these public bodies in part to deal with potentially controversial decisions. After those decisions are made, the public official is able to deflect criticism of the policy to the public body, which is presented as having democratic legitimacy. Unfortunately, citizen representatives on these bodies often aren't as representative of the public as their role would suggest. For example, while in theory the public body may be expected to be open minded to various alternatives, in practice the public official may have a hidden preferred policy and exclude likely critics of that policy. Similarly, special interest groups may be given a veto power on the selection of citizen representatives. And if one or more of the citizen representatives does dissent, there may be no easily accessible public record of either the dissent or the reasons given for the dissent. Anne Arundel County's local school system, for example, has countless

committees with parent representatives to deal with such subjects as school calendars, course schedules, and math, health, and literature curriculums. But the details about who these parent representatives are and how they participate are virtually hidden. What school system parents are told and expected to trust without verification is that their views are being represented on these committees.

#### **4) Signal the futility of participating to those most likely to participate.**

As a general rule, citizens won't waste their time participating in a political activity if they feel they have no chance of success. This is why, for example, candidates for political office almost always publicly overrate their chances of success to donors, volunteers, and the press. Nevertheless, countless public meetings are held on issues that civically minded citizens know are primarily for show. In a generally upbeat report on prospects for local civic participation, *National Civic Review* editor Mike McGrath damns the traditional public meeting in remarkably blunt language: "Too often the decision has already been made, or its outcome is a foregone conclusion, and the 'hearing,' if you could call it that, is little more than a public ritual" (McGrath, 2009, p. 17; see also Renn & Webler, 1995, p. 24). Good ways for public officials to signal to the handful of civically minded citizens that public input is for show is not to ask obvious follow-up questions, not to record it, not make it accessible online, not refer to it when publicly justifying their decision (probably providing no justification at all), and acting contrary to the gist of the public input.

#### **5) Intimidate potential opponents by forcing them to reveal their identities.**

Forcing citizens to access public records and attend public meetings face-to-face can serve to intimidate them, thus preventing their participation. As the famous German sociologist Max Weber observed close to a hundred years ago, an eternal rule of thumb for public officials is that those who seek information generally do so to critique rather than praise their work (Weber, Gerth, & Mills, 1946, p. 233). So if a citizen seeks particular information, a political agenda can be inferred. In other words, just as a dog's presence by a door can signal with a high likelihood that it wants to go out, a citizen's presence at a small public meeting can signal a critical public policy position—one that the citizen might want to keep private. For example, suppose a citizen is dependent on a local city councilor's goodwill and is thus fearful of taking any action the councilor might perceive as hostile. Unless the citizen can do so anonymously, he will not want

to exercise his right as a citizen to request a copy of that elected official's conflict of interest disclosure forms, the printed public meeting minutes including that councilor's votes, or a copy of a videotape where the councilor made what in retrospect was a politically unpopular statement. Similarly, he will not want to attend a public meeting where the city councilor has discreetly taken an unpopular position in support of a special interest.

In Anne Arundel County, none of this information gathering can be done anonymously. For example, I must file a public records request with the County Council's office to find out how my county councilor votes, pay approximately \$400 to find out how my county councilor voted over his last term (25 cents/page for written minutes), and face the inquisitive stares and questions of the County Council's staff as I gather the information. Access to video records of the same proceedings, to the extent they exist (most public meetings are not televised and, for those that are, there is no legal requirement to keep video records), would cost me many thousands more. And for access to conflict-of-interest information kept by the County's ethics office, I must sign my name and contact information to a document, which is then automatically sent to any public official possibly implicated by the request (Snider, 2005).

## **Public Policy Recommendations**

To deter fake public meeting participation, public officials' ability to bias participation in their own favor should be reduced. Steps to do this include the following:

### **1) Don't mandate public participation that can be easily faked.**

An example would be satisfying a public notice legal requirement by taking out an ad in a local newspaper. Public officials and newspapers love such laws. Public officials can claim the democratic legitimacy of providing for public participation without really doing so. Meanwhile, newspapers (usually the local monopoly newspaper) may get exclusive access to potential news and a significant and reliable source of revenue at premium rates for the least desirable parts of the newspaper. The big losers in this sweetheart deal are the public and democratic accountability. A reasonable argument can be made for publicly subsidizing newspapers (e.g., through a sales tax exemption), but this is one subsidy that, in my opinion, is not only grossly inefficient but also harmful to democracy.

A far better approach to public notice would be to require all public bodies to post public notices to the Internet in an open, structured, machine-readable format that independent Internet

aggregators can access. These independent aggregators should include both authoritative centralized government compliance databases and private aggregators such as Google, Yahoo, and Bing. Citizens should be able to sign up to receive email or other notification of any type of public meeting that interests them.

## **2) Enhance prospective public participation.**

Prospective public participation is what people usually mean when they refer to public participation. It means participation before public officials have made a decision regarding a particular issue. When members of the public receive notice of a public meeting, watch it live in person or online, or comment as an official part of the meeting, they are engaging in prospective participation. Improved public meeting notice (as described above), high fidelity televised access to public meetings, and well integrated and easily searchable public meeting text (including roll call votes) and video are all examples of policies that can enhance prospective public participation.

## **3) Enhance retrospective public participation.**

Retrospective public participation refers to access to prospective public participation data after public officials have made a decision regarding the issue subject to prospective public participation. This type of data allows the public to assess whether public officials, given information readily available to them at the time of decision, made the best decision.

Both prospective and retrospective participation are types of democratic accountability. The accountability information that counts in a democracy is the information that the public possesses when they enter the polls. By its nature, only relatively small groups of elites engage in prospective accountability, but the entire voting populace may engage in retrospective accountability. Retrospective accountability also benefits from 20-20 hindsight, which is the most efficient information about a decision that a voter can have.

Despite their differences, prospective and retrospective public participation are integrally related. Enhanced prospective participation provides a record for retrospective participation. And enhanced retrospective participation increases the political cost—often greatly—when public officials ignore the information generated via prospective participation. This forces public officials to take prospective participation much more seriously.

It is thus surprising to discover that the public participation system is currently overwhelmingly geared to prospective participation. Only a small fraction of formal participation

is recorded and stored leading up to the next election. Even more striking, only a tiny fraction of that is made available online in an accessible manner. These are all problems that, in our YouTube Age, could be easily solved (Snider, 1995, 2003). But the political will to solve them appears to be sorely missing (Snider, 2001b, 2005, 2009c).

#### **4) Enhance access to public participation metadata.**

Public participation metadata relates to information about the procedures of prospective and retrospective participation. As part of a web-based public meeting record, for example, such metadata include: all official steps to publicize a meeting, including how much was spent, who spent it, where it was spent, emails sent to the press, notice given to lobbyists, and notice given to public employees; the nature of the recordings of the participation, including how long they will be stored, where they will be stored, how accessible they will be (e.g., will search engines be blocked from accessing them), whether they can subsequently be edited, and, if edited, whether any notice to that effect will be placed in the public record and be as easily accessible as the edits; the exact method used for selecting public speakers, such as a copy of a blank signup sheet, when it is posted, where it is posted, and the relationship between the order of names on the signup sheet and participation rights (e.g., first-come, first-serve); and the guidelines for submitting written comments to the public record and making them accessible, including the duration, location, and accessibility of the stored record.

#### **5) Federalize local public participation standards.**

Public bodies that receive money from the federal government should be required to follow minimal due process requirements concerning public participation. If the public relies on the more than 80,000 local government bodies to deter fake participation, it may take many decades for significant progress to be made. If the federal government solves the problem, it could be addressed in a single stroke (Snider, 2009a). The federal government has already instituted many policies to ensure that local governments that receive federal funds are accountable for the use of those funds. For example, local contractors that receive federal stimulus dollars via state and local governments must provide detailed accounting to the federal government's Recovery Accountability and Transparency Board; local school districts that receive federal funds must provide the U.S. Department of Education with detailed comparative data about student achievement; and local transportation departments that receive federal funds must subject themselves to the U.S. Department of Transportation's safety standards and inspections. An even

closer precedent for such a participation requirement are the many federal statutes and regulations that mandate that certain local contracts and expenditures, such as for PEG access, only be allowed after local public notice is given. But, as we have seen, if an obscure newspaper classified ad is allowed to meet this requirement, it may be worse than having no requirement at all. Such federal rules are desperately in need of modernization—a goal that should become a key part of the Obama administration’s Open Government Directive.

### **Conclusion**

Fake public participation, like fake democracy, can be highly stable. Just as fake democracies can thrive for decades on end, one should not assume some inevitable transition from fake to real participation. But history also reveals that an attentive and mobilized public can successfully demand reform.

To deter fake public participation, the first step is to recognize the nature of the problem, including where the problem is most severe. The second step is to develop a detailed set of public policy recommendations to address the problem. Fortunately, many new information technologies can help remedy the problem. But without an attentive and mobilized public willing to punish public officials who engage in fake participation, even the most advanced technologies won’t make a difference.

Like the struggle to preserve and enhance democracy, the struggle to eliminate fake public participation must be ongoing. Proposals to improve public participation, like the Obama administration’s Open Government Directive, should be carefully scrutinized for loopholes allowing fake participation.

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