

University of Colorado Law School

Colorado Law Scholarly Commons

Articles

Colorado Law Faculty Scholarship

2019

The Uses and Abuses of the Government's Tools of Information Control

Helen Norton

University of Colorado Law School

Follow this and additional works at: <https://scholar.law.colorado.edu/faculty-articles>



Part of the [Administrative Law Commons](#), [Internet Law Commons](#), [Law and Politics Commons](#), and the [President/Executive Department Commons](#)

Citation Information

Helen Norton, The Uses and Abuses of the Government's Tools of Information Control, JOTWELL, Oct. 7, 2019 (reviewing Nathan Cortez, Information Mischief Under the Trump Administration, 94 Chi.-Kent L. Rev. 315 (2019)), <https://conlaw.jotwell.com/the-uses-and-abuses-of-the-governments-tools-of-information-control/>, available at <https://scholar.law.colorado.edu/articles/1242/>.

Copyright Statement

Copyright protected. Use of materials from this collection beyond the exceptions provided for in the Fair Use and Educational Use clauses of the U.S. Copyright Law may violate federal law. Permission to publish or reproduce is required.

This Article is brought to you for free and open access by the Colorado Law Faculty Scholarship at Colorado Law Scholarly Commons. It has been accepted for inclusion in Articles by an authorized administrator of Colorado Law Scholarly Commons. For more information, please contact lauren.seney@colorado.edu.

The Uses and Abuses of the Government's Tools of Information Control

Author : Helen Norton

Date : October 7, 2019

Nathan Cortez, [Information Mischief Under the Trump Administration](#), 94 *Chi.-Kent L. Rev.* 315 (2019).

The government enjoys enormous capacities to collect, publish, and disseminate a vast array of data. In a healthy democracy, we hope and expect that the government will share that information to inform, encourage, and inspire the public's debate and dialogue. Indeed, as [Jack Balkin](#) suggests, democratic states should aspire to be "[information gourmets, information philanthropists, and information decentralizers](#)." Too often, however, the government instead skews or stifles the public's discourse by manipulating data or by denying access to it.

[Nathan Cortez](#) adds to our understanding of these dangers by describing the government's instruments of information control—what he calls "information mischief"—along with their uses and abuses. More specifically, Cortez identifies these tools to include stripping certain online data, terms, and topics from the public domain; abandoning data collection in key areas; censoring scientists and other data experts employed by the government; and invoking transparency as a pretext for declining to cite and rely on sound science (Cortez describes this as "weaponizing transparency").

Distinguishing the government's "information that purports to be truthful and objective" from the government's "messaging that we expect to [be] more subjective," Cortez focuses on the former. The government's "[i]nformation that purports to be objective and truthful," Cortez asserts, "should endeavor to be both." To this end, Cortez has called upon government agencies to understand themselves as data "stewards"—in other words, "as sentinel[s] that help maximize the quality of data inputs and outputs via tailored procedures." In earlier work, [Regulation by Database](#), Cortez recommends a range of practices through which the government can ensure that its databases are "reliable, useful, and fair."

To illustrate what *not* to do, Cortez documents examples aplenty of the Trump Administration's information mischief. The federal [Occupational Safety and Health Administration](#) (OSHA) no longer publicizes its enforcement sanctions, information that past administrations had highlighted to expose and deter violations of workplace health and safety law. In 2017, the [U.S. Department of Agriculture](#) (USDA) removed online public data about inspections and potential violations of the [Animal Welfare Act](#); the department re-posted many of these records after a 2018 congressional report "directed the USDA to restore the data, noting that its removal had violated previous directions from Congress." And, as Cortez further explains, the Trump Administration stopped publishing documents that shed light, in different ways, on who has access to government power: the ethics waivers granted for lobbyists appointed to federal positions as well as the White House visitor log. These are just a few of many illustrations.

As I've explored [elsewhere](#), the government sometimes seeks to [manufacture doubt](#) about factual assertions it perceives as inconsistent with its policy or partisan preferences through its expressive choices that include falsehoods and misrepresentations as well as attacks on individuals and institutions that challenge its preferred narrative. But the government's speech of this type is even more dangerous when accompanied by its efforts to control the information available to the public in the ways that concern Cortez. Consider, as a recent example, Trump's unsubstantiated claim that Alabama "would most likely be hit (much) harder than anticipated" by Hurricane Dorian, followed by [reports](#) of the Administration's directives to [National Oceanic and Atmospheric Administration](#) meteorological experts not to contradict the President's assertions.

To be sure, the Trump Administration is by no means the first to engage in information mischief—although its efforts in this regard may be different in degree and perhaps in kind from those of previous administrations. Nor is it likely to be the last. [Robert Lopresti](#) recounts one of many examples in his book [When Women Didn't Count](#): in 2004 the [Bureau of Labor Statistics](#) “became involved in a controversy related to what some interpreted as a deliberate attempt by [George W. Bush](#)’s administration to conceal information of which it disapproved” when it announced its plan to halt the collection of data about women’s participation in major industries. And although Cortez applauds the [Obama](#) Administration for adopting coherent information policies that emphasized a commitment to transparency, he also notes that Administration’s oft-criticized resistance to FOIA requests.

What can we do to curtail the government’s abuses of its tools of information control? Cortez sketches a range of options. He wonders about administrative law possibilities like hard look review under the [Administrative Procedure Act](#) : “If the agency’s record can be undermined by evidence of information mischief, it might invite courts to invalidate the agency’s efforts—or at least trigger more searching review.” He flags the federal [Information Quality Act](#) that, among other things, allows aggrieved parties “to seek and obtain correction of information maintained and disseminated” by government agencies. Also helpful is the [Whistleblower Protection Act](#), amended in 2012 to protect government employees’ disclosures about “any effort to distort, misrepresent, or suppress research, analysis, or technical information.” Perhaps more promising, in Cortez’s view, are nonlegal tools. Some are internal to the government, like robust agency policies and norms for principled information control practices. Others are external, like third parties archiving, and thus protecting, data.

Cortez’s paper demonstrates the continuing need for careful study of, and attention to, the government’s information policy—which he understands to mean an administration’s formal policies, as well as its discretionary decisions, about whether, when, and how to collect and disseminate information. And although Cortez’s work sounds primarily in administrative law, it also informs constitutional law by documenting threats to the informed public opinion necessary to a healthy constitutional democracy. As Cortez concludes: “It is unclear the extent to which legal and nonlegal tools can provide meaningful constraints on an executive interested in exploiting its power over information. The most powerful tool may be to fight information with information, drawing attention to these practices and archiving important information.”

Cite as: Helen Norton, *The Uses and Abuses of the Government’s Tools of Information Control*, JOTWELL (October 7, 2019) (reviewing Nathan Cortez, *Information Mischief Under the Trump Administration*, 94 **Chi.-Kent L. Rev.** 315 (2019)), <https://conlaw.jotwell.com/the-uses-and-abuses-of-the-governments-tools-of-information-control/>.