

ADMINISTRATIVE TRUTH: COMMENTS ON CORTEZ'S
INFORMATION MISCHIEF

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INTRODUCTION

This short essay responds to Professor Nathan Cortez's argument describing an emerging "information policy" describing the practices of President Donald J. Trump's executive administration (the "Trump Administration") regarding the development, release, and management of official information. Professor Cortez argues that viewed holistically, this information policy suggests a shift toward the use of information practices by administrative agencies for purposes other than "neutral principles" and rather focusing on a "more cynical [use] of government information."¹

Professor Cortez appears to be arguing that political motivations are driving the Trump Administration to engage in practices which result in the censorship, manipulation, and deletion of government data, the reframing of associated terminology to alter the fundamental message and conclu-

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1. Nathan Cortez, *Information Mischief under the Trump Administration*, 94 CHI-KENT L. REV. 315, 315–16 (2019).

sions, and the “weaponization” of transparency to engage in viewpoint-specific exclusion of information.²

This argument may be well-founded, and the Trump Administration certainly has been criticized widely for the relationship between its public statements and widespread media interpretation of the facts underlying those statements.³ A critical element implied in Cortez’s argument, however, is the idea that there is some ability to identify “neutral” information as a doctrinal matter. Drawing upon the work of Professors James Grimmelmann, Frank Pasquale, and others in the context of questioning the “neutrality” of Internet search engines, this essay argues that while Cortez’s argument likely is correct, any doctrinal response must carefully consider the slippery slope of attempting to define “neutrality” as a first step towards defining “truth.”

I. DEFINING NEUTRALITY

Developing doctrine to analyze the degree to which an agency or administration engages in information mischief, or “more cynical uses of information,”⁴ requires defining what we mean by “neutral” information. It is certainly true that some information policies may be demonstrable as having improper intent, however new doctrine need not be developed to analyze such cases. Existing law⁵ and judicial doctrine⁶ would almost certainly consider such motive to be arbitrary and capricious and not supported by substantial evidence, invalidating such actions for all agencies subject to judicial review under the Administrative Procedure Act (APA) or similar statutes. To the extent gaps exist in coverage, political pressure likely would provide redress.

Thus the more complicated and challenging cases result from circumstances where intent is not provable, but cynical or other improper motives are highly likely. These cases are particularly problematic because they

2. The net effect, Cortez argues, of this last category is to preclude the use of certain classes of “legitimate science” where the underlying data either cannot be released (due to research protocol or legal restrictions) or is not available (as a function of the normal scientific process). *Id.* at 336–37.

3. Glenn Kessler et al., *President Trump has made over 9,014 false or misleading claims over 773 days*, WASH. POST (March 4, 2019), https://www.washingtonpost.com/politics/2019/03/04/president-trump-has-made-false-or-misleading-claims-over-days/?noredirect=on&utm_term=.78bea65-940ad [<https://perma.cc/MA9W-LA7L>].

4. Cortez, *supra* note 1.

5. *See generally* 5 U.S.C. § 706 (2012).

6. *See generally* *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971); *Kimm v. Dep’t of the Treasury*, 61 F.3d 888 (Fed. Cir. 1995).

require distinguishing between circumstances where improper motives are in play (e.g., those which would fail the tests of APA § 706) and those which are purely political, if perhaps considered unwise by many technical experts (e.g., promoting the increased use of fossil fuels). In the cases of censorship, manipulation, and deletion of government data, making this distinction requires having an understanding of what is “neutral” in the context of government-provided information.⁷

The question of defining neutrality is complex. In theory, one might argue that it is the role of agencies charged by Congress with developing “expert” information to do so without political motive or bias,⁸ using widely-accepted and verifiable scientific processes, and reporting scientifically-valid results regardless of the implications or conclusions those results support. This is a fine idea in principle, but breaks down substantially in practice.

A. The Mythical Infallibility of “Wide Acceptance”

First, not all scientific endeavors have “widely-accepted” or (at the time of reporting) verifiable processes. New areas of research, for example, by definition cannot have “wide acceptance.” Verifiability *may* be possible in newer areas of research, however verification—particularly of high-cost or unique empirical experiments—may not be possible in the time frames administrative procedures would contemplate prior to publication by agency authorities.

Second, scientific communities frequently disagree—and at times end up disproving previously “widely-held” beliefs. For example, during most of the twentieth century, the concept of cognitive capacity was measured

7. A similar analysis likely applies to the reframing of associated terminology to alter the fundamental message and conclusions, and the “weaponization” of transparency to engage in viewpoint-specific exclusion of information, however these cases may also involve circumstances which turn on factors other than the purported “neutrality” of information.

8. Except to the limited extent such political motive is expressly authorized as part of Congress’ delegation of power, or inheres in the nature of the delegated authority (e.g., Congressional authorizations or structuring of military command authority, which involves a Constitutionally-specific sharing of power between the Legislature and the Executive). *See, e.g.*, National Security Act of 1947, Pub. L. No. 80-253, 61 Stat. 495 (codified as amended at 50 U.S.C.) (renaming the “Department of War” to the “Department of the Army,” creating the Department of the Air Force, and merging these with the Department of the Navy into a single new Cabinet-level entity known as the “Department of Defense,” yet retaining the President’s Commander-in-Chief authority); *see also* Goldwater-Nichols Department of Defense Reorganization Act of 1986, Pub. L. No. 93-433, 100 Stat. 992 (codified as amended at 50 U.S.C.) (reorganizing the chain-of-command which previously ran from the President to the Chiefs of the individual Armed Services instead to run from the President, through the Secretary of Defense, to the heads of “combatant commands” which were statutorily-created command units representing multi-service operations based on geography or military function).

primarily through an individual's Intelligence Quotient (IQ), which was "known" to be generally immutable over that person's lifetime.⁹ Substantial portions of U.S. law, including an individual's status as legally competent¹⁰ and whether or not they could be involuntarily institutionalized were based on these assumptions. More recent research in neuroscience has disproven the immutability of IQ,¹¹ and furthermore demonstrated that cognitive capacity is a complex interaction of a number of factors, many (if not most) of which are not captured by the IQ measurement.¹² Does that make the twentieth century full of "information mischief"? Was such information published by the state-level departments of health or the federal Department of Health and Human Services¹³ facially not "neutral"? Certainly not. It simply identifies such information as having been developed during, and representing the best understanding of, an earlier stage of scientific endeavor.

B. The Myth of Unbiased Science

Substantial and robust debates exist regarding whether science can be conducted in an "unbiased" fashion from a legal or regulatory perspective.¹⁴ This essay does not engage directly on that point. Rather, it focuses on the question of whether it is possible to develop an information policy designed to ensure, or at least strongly promote, unbiased or neutral dissemination of information by government agencies. Since the agency's role in *dissemination* focuses on the question of selection (among existing work), analogy to the question of neutrality in Internet search may be informative.

9. See e.g., Henry D. Schlinger, *The Myth of Intelligence*, 53 PSYCHOL. REC. 15 (2003); see also Donald Simpson, *Phrenology and the Neurosciences: Contributions of F.J. Gall and J.G. Spurzheim*, 75 AUSTL. & N.Z. J. SURGERY 475 (2005) (demonstrating the pseudoscientific nature of phrenology). Cf. FRANÇOIS JOSEPH GALL, ON THE ORIGIN OF THE MORAL QUALITIES AND INTELLECTUAL FACULTIES OF MAN (Winslow Lewis trans., 1835) (1822).

10. See, e.g., FLA. STAT. § 921.137(1) (2013); *Cherry v. State*, 959 So. 2d 702, 711–13 (Fla. 2007) (construing FLA. STAT. § 921.137 to bar any person with an IQ over 70 from offering evidence of intellectual disability).

11. See generally Lisa S. Blackwell et al., *Intelligence as a Malleable Construct*, in HANDBOOK OF INTELLIGENCE 263–82 (Sam Goldstein et al. eds., 2015).

12. *Id.*; see also *supra* note 9.

13. At some relevant times for this analysis, formerly the Department of Health, Education, and Welfare.

14. See generally Gabriel Eckstein & Amy Hardberger, *Scientific, Legal, and Ethical Foundations for Texas Water Law*, in ESSENTIALS OF TEXAS WATER RESOURCES 5 (2009) (discussing "The Value of Water" and "The Ethics of Water" in the context of water use law and policymaking).

Professor James Grimmelmann highlights the challenge of determining the role of Internet search engines:

To understand Google, there are worse places to look than the *New York Times* editorial pages. Not because the *Times* has some special insight into this search colossus, but rather precisely because it does not. In 2009 and 2013, the *Times* published a pair of mirror-image op-eds, one each for and against the company, presenting the toughest allegations against it and the broadest defense of its actions. Each of them expresses something like the conventional wisdom about Google. And in the contrast between them can be seen something of why it is so hard to know just what to do about search engines. [Grimmelmann proceeds to describe these two op-eds, and how they present “diametrically opposed theories of what a search engine is.”]¹⁵

The reasons for this tension, Grimmelmann argues, are inherent in the nature of the debate at the time surrounding Internet search—one can equally view search engines’ then-monopolistic role as imposing a duty of neutrality, but also can view that same role as a core element of protected First Amendment activity not only as to viewpoint-based speech, but in the context of playing a Press-like role.¹⁶ This argument bears structural similarity (albeit with different First Amendment implications) to the concept of demanding that agencies disseminate “neutral” information—some selection is required, and should agencies play the role of “editors” (which would imply policy choices) or the role of mere neutral “conduits” (which would imply greater neutrality but likely not produce functionally-useful summary information).¹⁷

An answer to this debate, even if one exists,¹⁸ is unfortunately of little help in the information policy context. First, and perhaps obviously, the

15. James Grimmelmann, *Speech Engines*, 98 MINN. L. REV. 868, 869–71 (2014).

16. *Id.* at 870–71.

17. For further information regarding the selective “editor” vs. neutral “conduit” debate, see Adam Raff, Opinion, *Search, but You May Not Find*, N.Y. TIMES, Dec. 28, 2009, at A27; Jennifer A. Chandler, *A Right to Reach an Audience: An Approach to Intermediary Bias on the Internet*, 35 HOFSTRA L. REV. 1095 (2007); Frank Pasquale, *Rankings, Reductionism, and Responsibility*, 54 CLEV. ST. L. REV. 115 (2006) (neutral/passive conduit); Bruce D. Brown & Alan B. Davidson, Opinion, *Is Google Like Gas or Like Steel?*, N.Y. TIMES, Jan. 4, 2013, at A17; Eric Goldman, *Search Engine Bias and the Demise of Search Engine Utopianism*, 8 YALE J.L. & TECH. 188 (2006); Eugene Volokh & Donald M. Falk, *Google First Amendment Protection for Search Engine Search Results*, 8 J.L. ECON. & POL’Y 883 (2012) (selective “editor”).

18. Grimmelmann does propose a very fascinating answer to this, the concept of the “searcher” (or user) as playing a “third” role in the speech equation. However, this is not present in the context of government agency publication, since the decisions what and how to publish—i.e., what would comprise an administration’s information policy—do not *individually* account for the express preferences of the polity, nor could they. Aggregate preferences, to the extent national elections even capture such, are an unusable proxy for any given agency or topic.

First Amendment analysis is fundamentally different (and likely not applicable) in the context of government information policy. Second, the role of agencies often is not only to curate, analyze, and report information, but also to *create* scientific and technical information in the first instance. The latter role—one generally not present with Internet search engines¹⁹—makes any *answer* from the Internet search debate likely unhelpful.

What this debate does contribute is a framing for understanding that the concept of a “neutral” information policy is likely difficult to achieve. If it is impossible for scholars to agree (and even Google to decide!)²⁰ whether Internet search functions can be objective, then how can an executive branch agency in which inheres at least *some* political discretion claim that it is capable of acting “neutrally”? The quest for neutrality in government information policy seems incompatible with the delegation of power to administrative agencies and the inherent bias in humans.²¹ Rather, a more fruitful line of inquiry appears to be one which probes the concept of whether or not information can be *trusted* to represent what it claims to represent.

II. TRUTH VS. TRUST

The concept of “administrative truth” is difficult to achieve as a doctrinal matter because of the inherent uncertainties of scientific and technical knowledge development. Trust in administrative information, however, is a much more achievable goal. It appears from Cortez’s analysis that at least the existing legal constraints on “information mischief” are designed to achieve this goal.²² As he correctly notes, however, “statutes leave many

19. Google has substantially developed its information generation capacities (often self-describing that as the core competency of the company as being not in “search,” but rather in “information services”), however those functions do not bear on the analysis referenced in the Internet search neutrality debates.

20. Grimmelmann, *supra* note 15, at 871–72 (“Indeed, not even Google itself can keep straight whether it is an objective conduit or a *subjective editor*. In 2006, responding to a search-bias lawsuit . . . Google[] [] explained that ‘[it] is constantly evaluating Web sites for standards and quality, which is entirely *subjective*.’ But in 2012, Google faced a defamation lawsuit [asserting that a public figure was associated with prostitution via search results, and responded claiming]: autocomplete suggestions are ‘the algorithmic result of *several objective factors*, including the popularity of search terms.’” (emphasis added)).

21. There exists a robust scientific and scholarly literature surrounding the concepts of inherent and implicit bias. The author takes no position on the merits of this debate, however notes that, at the very least, its existence suggests the conclusion that unconscious human bias is not *doctrinally* eliminable in this particular context of administrative agency decision-making.

22. See Cortez, *supra* note 1, at 339–45.

important executive information activities untouched.”²³ Instead, Cortez argues, other mechanisms such as non-legal mechanisms like agency “norms” and third-party “monitors” can fill in these statutory gaps.²⁴

Cortez’s argument here is compelling. The limitations inherent in developing doctrinal “truth” evaluation mechanisms, discussed in Part I, counsel that any such approach is likely ineffective and raises the Orwellian specter of government-driven truth.²⁵ By contrast, developing doctrinal measures to ensure trust, and to provide protection to those who report violations of such trust,²⁶ legal doctrine can create a foundation for *evaluating* whether information mischief may be occurring.

That evaluation, however, cannot be performed by the government itself. Doing so necessarily raises the concerns articulated here and in Professor Cortez’s analysis. Agency norms may provide some additional support to a trust-oriented statutory baseline, however as Cortez notes, “many longstanding government norms have been disregarded by the Trump administration[,] . . . [and] [n]orms . . . can be powerful constraints on behavior, *but are at risk of eroding if not observed.*”²⁷

What remains, and what this essay argues is the most critical component, is third-party action. A baseline framework facilitating external evaluation of information disseminated by government agencies is a powerful tool for evaluating the nature and character of an administration’s information policy. While the combination of the difficulties in defining truth, combined with the executive supervision aspects of separation of powers may necessarily result in much discretion regarding information policy being reserved by the presidency, the Framers did not leave us without tools to address this. The protections inherent in the First Amendment’s Press Clause are far from accidental. While the Press Clause has not received as much attention in recent decades,²⁸ in an era of information mischief, that protection may well need to be revisited as an essential protection against the type of “cynical” information polices Cortez warns of.

23. *Id.* at 345.

24. *Id.* at 345–48.

25. GEORGE ORWELL, 1984 (Signet Classic 1950) (1949).

26. E.g., whistleblower protections, *see* Cortez, *supra* note 1, at 344; *see also* 18 U.S.C. § 6001–6005 (2012).

27. *Id.* at 346 (emphasis added).

28. *See generally* Sonja R. West, *Favoring the Press*, 106 CALIF. L. REV. 91 (2018).

CONCLUSION

The concept of information mischief, and the many alleged misrepresentations by President Trump's administration may encourage policymakers to argue for stricter controls on the quality and process of distribution of government information. To be sure, if the misrepresentations by the Trump Administration are as substantial as claimed, this presents a substantial risk to the role of administrative agencies. But an equally substantial risk—one potentially core to the function of representative democracy—would result from overreaction.

Truth cannot be defined by legal doctrine. Trust, however, can be encouraged by doctrinal foundations and promoted by the preservation and facilitation of third-party activities—most notably by the Press. Readers of Professor Cortez's article and this essay should think carefully through how to balance the competing interests of avoiding "government truth" while still promoting trust in government, and look to what statutory and administrative mechanisms can be implemented to facilitate the work of third-party entities in checking activities which may constitute information mischief while preserving those policy functions delegated to the Executive either by the Constitution or by the Congress.