

**BITS, BYTES, AND BIG BROTHER:
FEDERAL INFORMATION CONTROL
IN THE TECHNOLOGICAL AGE**

By Shannon E. Martin.¹
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Pp. 166. \$52.95 (hard).

Don't let its title fool you; this book does not tell the breaking story of the latest Internet content legislation. In fact, only one chapter deals specifically with computerized data at all. At only 166 pages, including endnotes, bibliography, index, and three appendices, *Bits, Bytes, and Big Brother* ("*Bits*") is a short article masquerading as a hybrid scholarly text/political pamphlet. Its thesis — that Congress's failure to define the term "information" in statutes restricting public access to sensitive or government information allows too much executive branch discretion — is one that merits a more detailed examination than *Bits* affords. In *Bits*, three chapters of fascinating legislative history about statutes which run counter to the broadly construed First Amendment policy of public access to information (p. 2) are unhappily wed to a weak application of 18th and 19th century ethical theories.

While this short work makes a fine initial foray into describing three instances of the "shift, in the de facto making of law that governs information flow, from Congress to the executive branch" (p. 115), its analysis of the corresponding "shift in attention from natural rights to utility" (p. 115) reads like a rough draft, piquing the reader's interest without ever rising above First Amendment platitudes and a general call for legislative action. Martin's self-evident point — that the First Amendment right of public access to information is sacrificed when vague statutes allow the executive branch excessive leeway in restricting information flow — is communicated to the reader by the end of the Introduction. Instead of developing this point, however, Martin's account of the debates surrounding federal public access law and her three case studies, the Foreign Agents Registration Act of 1938,² the Computer Security Act of 1987,³ and the [Gulf War] Pentagon Rules on Media Access (p. 147), are weighed down by superficial analysis,

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2. 22 U.S.C. §§ 611 *et seq.* (1994).

3. Pub. L. No. 100-235, 101 Stat. 1724 (1988) (codified primarily in 40 U.S.C. § 759 (1994)).

elementary "ethical principles" drawn straight from *The Encyclopedia of Philosophy*,⁴ and a weak plea for the legislature to pay closer attention to the ways in which these laws are enforced (p. 115).

Statutes restricting public access to information, the author argues, suffer from a legislative failure to define "information" (p. 29). The government's resulting vacillation between controlling information content and controlling information carriers leads to inconsistent (i.e., ranging from ineffective to hyper-restrictive) enforcement of, and confusing modifications to, these statutes. If legislators were more conscious of the content/carrier distinction when drafting statutes, Martin asserts, the executive branch's enforcement would be less discretionary. The great shortcoming of *Bits* is its failure to show how the legislature's clarification of this distinction would improve the result.

The legislative histories of the Depository Library Program,⁵ which provides for the free availability of most government publications in all congressional districts, and of the Freedom of Information Act ("FOIA")⁶ are evidence of Congress's intent to provide "free and convenient access to government information" (p. 9). But as FOIA requesters can attest, agency footdragging, cost-shifting, and executive information-tightening policies have made "free and convenient" only a memory, or worse, a myth (p. 12). The "original legislative assumption . . . that government is responsible for providing information to citizens about its business" (p. 12) has given way to executive branch directives urging FOIA officers to supply "minimum information" to requests (p. 13), as well as to the efficiency principles behind the Paperwork Reduction Act,⁷ which forces consumers to "go private" for public data.

Martin quickly establishes and outlines this executive antipathy toward "free information" in Chapter 1, providing her a natural opportunity to proceed to an analysis of her three chosen case studies. Instead, the author detours her short work through a largely inconsequential examination of "Definitions of 'Information.'" In Chapter 2, Martin surveys numerous definitions, from the obligatory *Oxford English Dictionary*⁸ to *Black's Law Dictionary*,⁹ bemoaning the failure of most federal statutes to include an adequate definition of "information." Using concepts from information science, she finally derives two distinct definitions of information: "content" and "carrier" (p. 30). "Content"

4. THE ENCYCLOPEDIA OF PHILOSOPHY (Paul Edwards ed., 1967).

5. Depository Library Act of 1962, Pub. L. No. 87-579, 76 Stat. 352 (1962) (codified in scattered sections of 44 U.S.C. (1988)).

6. 5 U.S.C. § 552 (1994).

7. 44 U.S.C. §§ 3501 *et seq.* (1988).

8. 1 THE COMPACT EDITION OF THE OXFORD ENGLISH DICTIONARY 1432 (1971).

9. BLACK'S LAW DICTIONARY 398 (5th ed. abr. 1983).

is the actual content of a message, while "carrier" is the means of expressing and transmitting the message (p. 113). This distinction, the author promises, will be used as a "frame for beginning the discussion of information control at a federal legislative level" (p. 30).

Martin deploys the content/carrier dichotomy in her discussion of the first of her three case studies, the Foreign Agents Registration Act ("FARA"). Enacted in 1938 to "requir[e] public disclosure by persons engaging in propaganda activities . . . for . . . foreign governments . . . and other foreign principals" (p. 37), the FARA has been enforced sporadically and inconsistently over its fifty-year history. As 1930s and 40s concerns about political overthrow gave way to "concerns about economic distress thought to be caused by [U.S.] government insiders who represent foreign interests" (p. 36), loose drafting and numerous exemptions allowed the executive branch wide discretion in the Act's enforcement. This led to the remarkable characterization of Canadian acid rain awareness films as political propaganda (pp. 42-43) and gave rise to a "clear split . . . between the intentions of the executive branch and those of the legislative branch" (p. 41). The author argues that this phenomenon resulted from executive exploitation of the Act's initial failure to distinguish between information content and carriers. As a result, a statute meant to control certain kinds of suspect speech has been used by the executive branch to curb disfavored speakers.

Similar issues have arisen with respect to the Computer Security Act ("CSA"), which in the name of national security denies public access to "sensitive" government-held information stored in computer databases (pp. 59, 62). In practice, however, the legislature's attempt to protect certain information content may be used to prevent access to one kind of information carrier: all government computer database records (p. 66), including unclassified records which might have otherwise been available under the FOIA. Thus, although the congressional intent behind the CSA was "to take the power of information control in federal civilian agencies away from the executive branch" (p. 61), in its application, the CSA allows wide executive discretion to undercut this aim. Again, legislative fuzziness regarding the content/carrier dichotomy emerges as the culprit. Piecing together congressional testimony, Martin examines the "violation of fundamental rights" (p. 61) that may result from reading the CSA to mandate "protecting the system rather than guarding particular information content" (p. 65).

Like the preceding two chapters, Chapter 5's topic, "The Pentagon Rules on Media Access," merits treatment in a volume of its own. Yet in only twelve pages, *Bits* recounts the history of the rules which allowed the Defense Department to corral the journalists who covered Operations Desert Shield and Desert Storm. Martin again argues that information content (i.e., news of the conflict) was restricted by controlling its

carriers (i.e., journalists). By now the point is all too clear: by restricting "information" without specifying which subclass it means to cover, Congress allows the executive branch to withhold information according to its mode of expression, instead of whether its content is "sensitive."

Having finished her examination of the three case studies in sloppy legislative drafting, Martin is now left to find an affirmative solution to this problem in her chapter entitled "Principles of Ethical Reasoning." However, the discussion leaps almost out of nowhere, introducing novel elements into what had previously been a cycle of reiteration. In this chapter, the author acknowledges that "conflicting benefits and harms of access and control are difficult to weigh" (p. 85), but nevertheless constructs a scale for assessing information flow using theories from Kant, Mill, and First Amendment analysts.

This chapter begins with a rather cursory exposition of Immanuel Kant's deontological or duty-driven theory of ethics, and the teleological utilitarianism of John Stuart Mill.¹⁰ Briefly, deontological ethics posits that "at least some acts are morally obligatory regardless of their consequences" for humanity (p. 87). In contrast, teleological ethics endorses conduct that produces consequences which people desire. Martin then compares the two concepts to "positive, value promoting theories and negative, government restricting theories" (p. 89) about the First Amendment. She examines the three pieces of legislation in light of these principles, considering the duties motivating legislative action (the deontology) and the consequences of such action (the teleology), first observing that the FARA merits a utilitarian critique, because it reduces individual happiness, but nevertheless has received deontological support (if the body politic agrees that the reason for requiring "foreign agent" registration is right) (p. 92). Similarly, the CSA represents a debate between national security motives (deontology) and negative public consequences of restricted information access (teleology) (p. 94). Martin's characterization of the Pentagon Media Rules is weaker, focusing on the government's deontological concerns "for the general welfare of the country" (p. 95), while noting that little attention was given to the teleological result of limiting citizens' right to information (p. 95). After all this, Martin arrives at the unsurprising observation that both deontological and teleological reasoning are mixed in First Amendment jurisprudence (pp. 101-02), which is concerned both with government's duties and the results of its actions. But, according to the author's analysis, the Founders intended the First Amendment to protect citizens' natural rights to information, a deontological goal (pp. 99-100).

10. Primary sources are not cited for these ethical theories; instead, the author encourages curious readers to delve further into THE ENCYCLOPEDIA OF PHILOSOPHY, *supra* note 4.

Thus, she argues, the First Amendment's protection of information carriers can serve as a means for achieving the desired access to content (p. 108).

Even though *Bits* promised that the final chapter would suggest "a policy for information control in the technological age in which the modern United States now finds itself" (p. 80), it ends by merely noting that "legislators must take proactive steps toward shaping an information policy that suits a technological age" (p. 116). Yet how this tension between information content and carrier is to be resolved is left solely to the reader's imagination.

Bits, Bytes, and Big Brother initially shows potential for taking a fresh approach to crucial issues of public access to information. Unfortunately, even its best sections are too brief and its analysis unfinished. The statutes included in the appendix do make good reading, however. After reaching its halfway mark, forewarned readers of *Bits* will want to skip its superficial analysis and turn straight to the appendices — or better yet, shelve the book and look up the statutes online.

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