

**PUBLIC DIPLOMACY OR PROPAGANDA? TARGETED
MESSAGES AND TARDY CORRECTIONS TO UNVERIFIED
REPORTING**

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I. INTRODUCTION

Having rapidly risen to the spotlight, public diplomacy is being labeled by scholars as a new field of international relations.¹ Although it is natural for a government to frame issues of public concern,² attempt to “shape international rules that are consistent with its interests and values,” and persuade perceptions so that foreign policy “actions . . . appear legitimate in the eyes of others,”³ controversy has arisen. The “spirited debates . . . among analysts and practitioners” over how to interpret public diplomacy might best be epitomized by Professor Bruce Gregory’s inquiry: whether the term “public diplomacy is code for propaganda.”⁴ Indeed, if recipients view the state purveyor’s message favorably, crafted discourse designed to influence international relations may be labeled public diplomacy.⁵ Alternatively, a government that more clearly engages in a

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¹ See Bruce Gregory, *Public Diplomacy: Sunrise of an Academic Field*, ANNALS AM. ACAD. POL. & SOC. SCI., March 2008, at 274, 274–75 (noting that the term public diplomacy was adopted in the 1970s and now sees widespread use throughout the world).

² See Michael T. Wawrzycki, *Language, Morals, and Conceptual Frameworks in Dispute Resolution: Establishing, Employing, and Managing the Logos*, 8 CARDOZO J. CONFLICT RESOL. 209, 215 (2006) (explaining that framing “allows one to manipulate the choice alternatives another has in its discourse, and therefore enables the framer to influence how others think and to obtain their consent without ever even giving the impression that one is attempting to be persuasive”).

³ JOSEPH NYE, SOFT POWER 10–11 (2004).

⁴ Gregory, *supra* note 1, at 275.

⁵ See *id.* (noting that the term public diplomacy was adopted to avoid the negative connotations of the term “propaganda”).

“deliberate and systematic attempt to shape perceptions, manipulate cognitions, and direct behavior to achieve a response” from the recipient may be “propagandizing.”⁶ This article considers definitional particulars by examining the accuracy of a government’s message and the identified target audience.

First, clearly false government messages should not be regarded as public diplomacy because they violate principles of comity and trust in international relations.⁷ However, there is a deeper and frequently overlooked consideration. If a government employs self-interested advocacy on an issue of public concern, but data underlying the advocacy are ultimately false and remain uncorrected until the issue becomes stale,⁸ perhaps the negative cognitive impact on recipients during this interim period should also disqualify the discourse from being called public diplomacy. One might even deduce gradations in the sender-government’s false statements by applying tort law taxonomy. For example, fraud occurs when statements are known to be untrue; misrepresentations involve concealing material facts that would have made the discourse false; and negligent misrepresentations are statements made in careless disregard of their accuracy or without reasonable grounds for believing the representations to be true.⁹

Second, while a government may specify a target audience and label the message, thereby tacitly identifying the type of dissemination and intent for that message, the target audience is no longer isolated with today’s global media.¹⁰ Information diffusion may even obviate differentiation between foreign and domestic audiences. Cursorily, enumerating a target recipient may inject a biasing heuristic that permits

⁶ GARTH S. JOWETT & VICTORIA O’DONNELL, *PROPAGANDA & PERSUASION* 7 (5th ed. 2011) (emphasis removed).

⁷ *Nuclear Tests (Austl. v. Fr.)*, Judgment, 1974 I.C.J. 253, ¶ 46 (Dec. 20) (“One of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith. Trust and confidence are inherent in international co-operation . . .”).

⁸ See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1050 (2d ed. 1988) (noting that when the government delays publication of important stories, it deprives the stories of their timely news value.).

⁹ CAL CIV. CODE § 1710; RESTATEMENT (SECOND) OF TORTS § 551 (1976); *Gagne v. Bertran*, 275 P.2d 15, 20 (Cal. 1954).

¹⁰ John H. Johns, *Foreign Policy, National Security, and Nation Building*, 6 REGENT J. INT’L L. 313, 359 (2008).

overlooking or extenuating attributes of the message that might otherwise be unacceptable for “unintended” target audiences. What may be called public diplomacy for a foreign audience, and presented as a message that the nation champions may in fact be controversial, unsubstantiated, or polarizing. Likewise, a message relayed to the domestic audience may portray rather unified foreign approval when the message is polemical.

Given that this new field of international relations seemingly arose in conjunction with, if not substantially due to, the invasion and occupation of Iraq,¹¹ this article categorizes post-invasion information examples to substantiate the tardy correction hypothesis and the multiple-recipient distinction. The research distinguishes among government statements provided by media from within the United States, from Iraq but disseminated to Americans, and from Iraq but intended for Iraqi and foreign audiences. The analysis is further sub-categorized by substantive message—namely that one of the following possible reasons for invasion was met: (1) that Iraq possessed weapons of mass destruction (WMDs) in violation of United Nations (U.N.) Security Council resolutions; (2) that Iraq had ties to al-Qaeda,¹² or (3) that Iraqis required liberation from Sadaam Hussein’s regime.¹³

II. SHAPING AMERICAN PERCEPTIONS

A. *Instilling Patriotism*

Prior to the invasion of Iraq, the Administration of President George W. Bush routed the course for military action against Iraq by imbuing the media with several months of security threats.¹⁴ The nation later learned that Iraq neither had WMDs nor had connections to al-Qaeda, and that allegations were carelessly made.¹⁵ Even as allegations were presented,

¹¹ See Gregory, *supra* note 1, at 284 (noting that terrorism and the Iraq War have been driving current research on government, media, and public relationships).

¹² Because the name “al-Qaeda” has been translated from Arabic to English by various sources, it is spelled differently among the many translations. This article refers to “al-Qaeda”; however, other acceptable spellings include: “al Qaeda,” “al-Qaida,” “al-Qa’ida,” and “Al Qaeda.” These alternates are maintained when quoted from other sources referenced in this article. All variations refer to the same group.

¹³ Robert Bejesky, *Weapon Inspections Lessons Learned: Evidentiary Presumptions and Burdens of Proof*, 38 SYRACUSE J. INT’L L. & COM. 295, 304–12, 358, 360 (2011).

¹⁴ Robert Bejesky, *Intelligence Information and Judicial Evidentiary Standards*, 44 CREIGHTON L. REV. 811, 855–56 (2011).

¹⁵ *Id.* at 858–63.

they contradicted the findings of U.N. inspectors who searched the country for several years in the 1990s and again for four months immediately preceding the 2003 invasion of Iraq.¹⁶ Audiences increasingly realized the depth of inaccuracies as time passed.¹⁷

In 2008, after the Senate Select Committee on Intelligence (SSCI) completed its five-year investigation, Vice Chairman Jay Rockefeller remarked: “In making the case for war, the [A]dministration repeatedly presented intelligence as fact when in reality it was unsubstantiated, contradicted or even non-existent. . . . [In linking al-Qaeda to Iraq,] [s]adly, the Bush Administration led the nation into war under false pretenses.”¹⁸ In 2008, the Center for Public Integrity assembled a database of 935 “patently false” statements and hundreds of additional misleading statements made by President Bush, Secretary of State Colin Powell, Secretary of Defense Donald Rumsfeld, Vice President Dick Cheney, National Security Advisor Condoleezza Rice, Undersecretary of Defense Paul Wolfowitz, and Press Secretaries Ari Fleischer and Scott McClellan about alleged Iraqi WMDs and alleged Iraqi ties to al-Qaeda.¹⁹ Reflecting a near-diurnal pattern, the false statements appeared in 532 separate speeches, interviews, briefings, and testimony over a two-year period starting in September 2001.²⁰

In examining this period surrounding the attack, it seems that one reason for sluggish and less critical critiques of the distance between allegation and fact is that pre-war threat declarations were downplayed and

¹⁶ Bejesky, *supra* note 13, at 315–34.

¹⁷ *See id.* at 334–37, 342.

¹⁸ Press Release, Senate Select Comm. on Intelligence, Senate Intelligence Committee Unveils Final Phase II Reports on Prewar Iraq Intelligence (June 5, 2008), available at <http://intelligence.senate.gov/press/record.cfm?id=298775>; Walter Pincus, *Records Could Shed Light on Iraq Group*, WASH. POST, June 9, 2008, at A15; Joby Warrick & Walter Pincus, *Bush Inflated Threat from Iraq’s Banned Weapons, Report Says*, WASH. POST, June 6, 2008, at A3, available at <http://www.washingtonpost.com/wp-dyn/content/article/2008/06/05/AR2008060501523.html>.

¹⁹ Charles Lewis & Mark Reading-Smith, *False Pretenses*, THE CENTER FOR PUBLIC INTEGRITY (Jan. 23, 2008, 12:00 AM), <http://projects.publicintegrity.org/WarCard/>. *See also Study: “False Pretenses” Led US to War*, CBS NEWS (Feb. 11, 2009, 3:33 PM), <http://www.cbsnews.com/stories/2008/01/23/national/main3741706.shtml>; *Study: Bush, Aides Made 935 False Statements in Run-up to War*, CNN (Jan. 24, 2008, 1:26 GMT), <http://edition.cnn.com/2008/POLITICS/01/23/bush.iraq/>.

²⁰ Lewis & Reading-Smith, *supra* note 19.

transplanted by a new justification for invasion. The invasion was labeled “Operation Iraqi Freedom”²¹ instead of a more precisely-defined name that was consistent with the espoused mission, such as “Operation WMD Disarmament.”²² The reason for war was supplanted by “liberation.”²³ One month after the invasion, ABC News reported:

[S]ome Bush [A]dministration officials now privately acknowledge the White House had another reason for war—a global show of American power and democracy. . . . Officials inside government and advisers outside told ABC News the [A]dministration emphasized the danger of Saddam’s weapons to gain the legal justification for war from the [U.N.] and to stress the danger at home to Americans.²⁴

“[A] global show of American power and democracy” is not a legal basis for action, and it was not what Americans, Congress, the Security Council, or foreigners were told.²⁵ “Liberation” was a speechcraft-transplant.²⁶ Massachusetts Institute of Technology Emeritus Linguistics Professor Noam Chomsky identifies this situation as a typical rhetorical stratagem that dismisses conditions that occasion war and the previously-

²¹ Bejesky, *supra* note 13, at 361.

²² *Id.*

²³ Robert Bejesky, *Politico-International Law*, 57 *LOY. L. REV.* 29, 102–06 (2011).

²⁴ John Cochran, *Officials: 9/11 Was Main Reason for War*, ABC NEWS (Apr. 25, 2003), <http://abcnews.go.com/Nightline/story?id=128467&page=1>; Bejesky, *supra* note 13, at 360–62 (explaining bait-and-switch progression). PBS anchor Jim Lehrer later remarked: “The word occupation . . . was never mentioned in the run-up to the war. It was liberation. This was a war of liberation, not a war of occupation. So as a consequence, those of us in journalism never even looked at the issue of occupation.” *Hardball with Chris Matthews, Interview with Jim Lehrer*, MSNBC (May 12, 2004), <http://msnbc.msn.com/id/4969709/>. Some pre-invasion statements addressed “liberation,” but overwhelming emphasis was on alleged WMD possession. Bejesky, *supra* note 23, at 102–07. In defending the media’s performance, Tom Brokaw remarked that there was a “drumbeat” because “the president says we’re going to war, there’s the danger of the mushroom cloud.” Liz Cox Barrett, *Pre-Iraq War Coverage: “Pretty Good Job” or “Embarrassing?”*, *COLUM. JOURNALISM REV.* (May 29, 2008, 9:59 AM), http://www.cjr.org/the_kicker/preiraq_war_coverage_pretty_go.php.

²⁵ Cochran, *supra* note 24.

²⁶ Bejesky, *supra* note 13, at 361.

stated mission by focusing on dialogue that rallies the populace with patriotism.²⁷ Ostensibly, patriotic discourse would best support the Bush Administration politically.²⁸ Perhaps this would become sufficiently dominant to deter congresspersons from chastising the President for displacing the originally-espoused mission if those politicians felt angst over potentially losing constituent support for not appearing to tenaciously support the troops.²⁹ Yet the military's mission was unclear. Congress authorized soldiers to be deployed into combat only to "protect the national security of the United States" and enforce "all relevant . . . Security Council resolutions regarding Iraq."³⁰ Chomsky emphasizes how critical substantive inquiries can be dismissed by shifting attention:

Support our troops. Who can be against that? . . . The issue was, do you support our policy? But you don't want people to think about the issue. That's the whole point of good propaganda. You want to create a slogan that

²⁷ DOUGLAS RUSHKOFF, COERCION: WHY WE LISTEN TO WHAT "THEY" SAY 162 (1999) (citing NOAM CHOMSKY, MEDIA CONTROL: THE SPECTACULAR ACHIEVEMENTS OF PROPAGANDA 26 (1991)).

²⁸ The story presumably shifted attention from WMD charges and invoked societal sentiments of patriotism, POW empathy, and support for the troops. See *infra* notes 32–45 and accompanying text. Republicans have an advantage of linking war with patriotic sentiments of the United States being a highly positive democracy. Note, *War, Schemas, and Legitimation: Analyzing the National Discourage About War*, 119 HARV. L. REV. 2099, 2112–13 (2006). Moreover, there may be a "rally-around-the-flag" effect. Humphrey Taylor, *Successful War Lifts Many (Republican) Boats and Their Ratings Surge*, HARRIS INTERACTIVE, 1–3 (Apr. 18, 2003), available at <http://www.harrisinteractive.com/vault/Harris-Interactive-Poll-Research-Successful-War-Lifts-Many-Republican-Boats-and-Their-Ratings-Surge-2003-04.pdf>. See also Marvin Ammori, *A Shadow Government: Private Regulation, Free Speech, and Lessons from the Sinclair Blogstorm*, 12 MICH. TELECOMM. L. REV. 1, 11–12 (2005) (indicating that there was a potentially-strong bias in the mainstream media that favored Bush against Kerry in the 2004 presidential election).

²⁹ *Mitchell v. Laird*, 488 F.2d 611, 615 (D.C. Cir. 1973) ("A [c]ongressman wholly opposed to the war's commencement and continuation might vote for the military appropriations and . . . [even] draft measures because he was unwilling to abandon without support men already fighting.").

³⁰ Authorization for Use of Military Force Against Iraq Resolution of 2002, H.R.J. Res. 114, 107th Cong. § 3(b) (2002); Letter from George W. Bush, President, to Congress (Mar. 18, 2003), available at <http://georgewbush-whitehouse.archives.gov/news/releases/2003/03/20030319-1.html> (acknowledging authorization terms).

nobody's going to be against, and everybody's going to be for. Nobody knows what it means because it doesn't mean anything. . . . So you have people arguing about support for the troops? "Of course, I don't *not* support them." Then you've won.³¹

The U.S. media compliantly affixed attention on that slogan, focused on operations of U.S. soldiers, and instilled perceptions of liberation. During the 2003 invasion, as with the 1991 Gulf War, the media produced graphics of soldiers dashing across monitors, synthesized music, and offered patriotic themes to excite and inspire.³² In a book abounding with examples of propaganda, Shelton Rampton and John Stauber observe that "[t]he images that most Americans will remember from the war will likely be the toppling of Saddam Hussein's statue, the rescue of American prisoners of war, and the soldiers' joyful homecoming reunions with their families."³³ Of these images receiving substantial media attention, the toppling of the statue seemed spontaneous and Iraqi-initiated, but was actually prodded by the U.S. military summoning people by loudspeaker to assist.³⁴

The Jessica Lynch rescue operation was the pinnacle of inspirational soldier stories. In their textbook, *Propaganda and Persuasion*, Professors Garth Jowett and Victoria O'Donnell wrote that the Jessica Lynch POW rescue story is an excellent example of how the American "public's cognitions were manipulated" by a false story that relied on patriotism in

³¹ RUSHKOFF, *supra* note 27, at 162 (citing CHOMSKY, *supra* note 27).

³² JOHN R. MACARTHUR, *SECOND FRONT: CENSORSHIP AND PROPAGANDA IN THE 1991 GULF WAR* 85, 101–06 (2d ed. 2004).

³³ SHELTON RAMPTON & JOHN STAUBER, *WEAPONS OF MASS DECEPTION: THE USES OF PROPAGANDA IN BUSH'S WAR ON IRAQ* 201 (2003). Other images include Bush's "Mission Accomplished speech" and the claim that "[w]e've removed an ally of al Qaeda." *President George W. Bush, President Bush Announces Major Combat Operations in Iraq Have Ended*, WHITE HOUSE (May 1, 2003), <http://georgewbush-whitehouse.archives.gov/news/releases/2003/05/20030501-15.html>. This assertion was never confirmed by any official government investigations. Bejesky, *supra* note 14, at 856, 858–59. The Pentagon sought to suppress military members from expressing opinions about the reconstruction in Iraq. Gregory P. Magarian, *The First Amendment, the Public-Private Distinction, and Nongovernmental Suppression of Wartime Political Debate*, 73 *GEO. WASH. L. REV.* 101, 116 (2004).

³⁴ David Zucchino, *Army Stage-Managed Fall of Hussein Statue*, *L.A. TIMES*, July 3, 2004, at A28, available at <http://articles.latimes.com/2004/jul/03/nation/na-statue3>.

subsequent media releases to forge perceptions.³⁵ Just days into the invasion, a Pentagon spokesperson announced the rescue offensive and provided video clips because officials “did have the opportunity to have a combat camera crew with the assault force” to rescue Lynch from that “location of danger.”³⁶ Networks immediately developed animations and magnified the offensive,³⁷ and Secretary of Defense Rumsfeld praised the “brilliant and courageous” operation to rescue her from an edifice that was falsely called a “hospital.”³⁸ Other unnamed Pentagon officials added that “Special Operations forces found what looked like a ‘prototype’ Iraqi torture chamber in the hospital’s basement,” that Lynch fought fiercely until she ran out of bullets because she did not want to be taken alive, and that the hospital receiving her acknowledged that she had been stabbed and had two bullet wounds.³⁹

Four years later, Lynch testified before Congress and affirmed that the hype was untrue: “I am still confused as to why they chose to lie and tried

³⁵ JOWETT & O’DONNELL, *supra* note 6, at 12.

³⁶ News Release, U.S. Central Command, Transcript of 4/2 Centcom Brief (Apr. 2, 2003), *available at* <http://www.globalsecurity.org/wmd/library/news/iraq/2003/iraq-030402-centcom10.htm>.

³⁷ Glen Greenwald, *The Pat Tillman and Jessica Lynch Frauds*, SALON (Apr. 25, 2007, 12:21 PM), http://www.salon.com/news/opinion/glenn_greenwald/2007/04/25/tillman_lynch.

³⁸ *DoD News Briefing—Secretary Rumsfeld and Gen. Myers*, U.S. DEP’T OF DEF. (Apr. 3, 2003, 12:45 PM), <http://www.defense.gov/transcripts/transcript.aspx?transcriptid=2244>.

³⁹ Susan Schmidt & Vernon Loeb, *She Was Fighting to the Death*, WASH. POST, Apr. 3, 2003, at A1, *available at* <http://post-gazette.com/nation/20030403rescuenatp3.asp>; *Report: Lynch was Shot, Stabbed in Fierce Struggle with Iraqi Captors*, FOX NEWS (Apr. 3, 2003), <http://www.foxnews.com/story/0,2933,82923,00.html>; *Misleading Information from the Battlefield: Hearing Before the H. Comm. on Oversight and Government Reform*, 110th Cong. 23 (2007) [hereinafter *Misleading Information*] (Jessica Lynch testifying that the media kept repeating the story of the “little girl Rambo”); *AIM Report: The Media War over Private Lynch*, ACCURACY IN THE MEDIA (Aug. 27, 2003, 12:24 PM), <http://www.aim.org/aim-report/aim-report-the-media-war-over-private-lynch/> (sources providing the sensationalized accounts were “unnamed” U.S. officials). When the BBC asked a Pentagon spokesperson about firefights, he responded: “I think that I will leave that story to be told in great detail when the time is right.” *War Spin*, BBC, at 00.08.51 (May 18, 2003), <http://news.bbc.co.uk/nol/shared/spl/hi/programmes/correspondent/transcripts/18.5.031.txt>. When asked about her injuries, he stated: “[w]ell I’m not going to get into the specific injuries that she received.” *Id.* at 00.09.03.

to make me a legend [T]he American people don't need to be told elaborate lies."⁴⁰ Lynch confirmed that she was not in a gun battle, shot, stabbed, or held hostage, but was injured in a truck accident and was being treated at an Iraqi hospital.⁴¹ During the investigation, Henry Waxman, then Chairman of the House Oversight and Government Reform Committee, referencing the stories involving Jessica Lynch and other accounts, stated: "It wasn't misleading information. We have false information that was put out to the American people, stories that were fabricated and made up."⁴²

There were also two competing perceptions of the rescue operation. When the story broke, a Pentagon spokesperson explained that "[t]here was not a fire-fight inside the building . . . but there were fire-fights outside of the building, getting in and getting out."⁴³ Alternatively, BBC interviewed the hospital's doctors who contended that U.S. soldiers were followed by cameras to make "[a] big dramatic show."⁴⁴ Hospital staff called it "[l]ike a film of Hollywood, they cry . . . ' [g]o, go, go!' with guns and blanks, without bullets. . . . Why do this? There is no military, no soldiers in the hospital."⁴⁵

⁴⁰ *Misleading Information*, *supra* note 39, at 23. It is not clear if Lynch is attributing the word "lies" to Pentagon officials who sourced the story, or the media that relied on it. *60 Minutes* excerpt (on file with author) (noting that it was the Pentagon that created the story of Lynch being a "war hero" and provided a Pentagon explanation that officials confused Lynch with another soldier).

⁴¹ *Misleading Information*, *supra* note 39, at 22.

⁴² *Id.* at 113.

⁴³ News Release, *supra* note 36.

⁴⁴ Keith Richburg, *Iraqis Say Lynch Raid Faced No Resistance*, WASH. POST, Apr. 15, 2003, at A17 (no Iraqi soldiers were on the premises but U.S. soldiers broke down doors, pointed guns, and handcuffed patients); Magarian, *supra* note 33, at 120 ("[T]he BBC suggested the Army had exaggerated the episode deliberately to fabricate a heroic myth").

⁴⁵ *War Spin*, *supra* note 39, at 00.06.49–00.07.03; *Misleading Information*, *supra* note 39, at 22 (Lynch explaining that the hospital staff "even tried unsuccessfully at one point to return me to Americans"); Patrick Rogers, *Jessica Lynch's Rescue: What Really Happened?*, PEOPLE (June 16, 2003), <http://www.people.com/people/archive/article/0,,20140325,00.html> (hospital staffers took her to "a U.S. checkpoint outside town, but turned back when GIs opened fire on them"). A doctor stated: "'You do realize that you could have just knocked on the door and we would have wheeled Jessica down to you, don't you?'" Barry Lando, *Saving Pvt. Lynch: The Made-for-TV Movie*, SALON (May 16, 2003, 8:10 PM), http://www.salon.com/news/feature/2003/05/16/pvt_lynch/print.html.

B. Independent Military Analysts

1. The Program

In 1973, as scandal was systematically erupting for the Nixon Administration,⁴⁶ the esteemed investigative journalist I.F. Stone opined: “In the job of covering a capital, there are really certain basic assumptions you have to operate on. The first is that every government is run by liars, and nothing they say should be believed. That is a prima-facie assumption unless proven to the contrary.”⁴⁷ Critical government officials also recognized the unfolding lack of public trust during the Nixon Administration. Former Chief of Staff H.R. Halderman was recorded in a June 1971 discussion about the Pentagon Papers case:

[Donald] Rumsfeld was making this point this morning . . . [Y]ou can't trust the government; you can't believe what they say; and you can't rely on their judgment. . . . [The] implicit infallibility of presidents . . . is badly hurt by this, because it shows that people do things the president wants to do even though it's wrong.⁴⁸

Of course, the Pentagon Papers litigation involved whether the *New York Times* could disclose classified volumes about the Vietnam War.⁴⁹ Thirty years later, Department of Defense (DOD) rules required the Office of the Assistant Secretary of Defense for Public Affairs to ensure “a free flow of news and information to the news media.”⁵⁰ A reporter asked Secretary of Defense Donald Rumsfeld whether a Pentagon spokesperson would provide inaccurate information to the press, and Rumsfeld responded: “[N]o, I cannot imagine a situation. I don't recall that I've ever lied to the press. I don't intend to . . . And [the recently appointed

⁴⁶ Robert Bejesky, *National Security Information Flow: From Source to Reporter's Privilege*, 24 ST. THOMAS L. REV. (forthcoming 2011–2012) (manuscript at 20–21).

⁴⁷ I.F. Stone, *Cinema: Maniacal Zest*, TIME (Dec. 3, 1973), <http://www.time.com/time/magazine/article/0,9171,908238,00.html>.

⁴⁸ Seth F. Kreimer, *Rays of Sunlight in a Shadow “War”*: FOIA, the Abuses of Anti-Terrorism, and the Strategy of Transparency, 11 LEWIS & CLARK L. REV. 1141, 1220 (2007).

⁴⁹ See *N.Y. Times Co. v. United States*, 403 U.S. 713, 714 (1971).

⁵⁰ U.S. DEP'T OF DEF., DIRECTIVE NO. 5122.5, at 2 (2000).

Secretary of Defense for Public Affairs] Torie [Clarke] won't do it."⁵¹ Clarke later stated: "It is in my interest for the American people to get as much appropriate news and information about this [Iraq] war as possible. If we keep them informed, if we keep them educated, they will stay with us."⁵²

In 2008, the *New York Times* published the results of an investigation drawn from 8,000 pages of "e-mail messages, transcripts and records describing years of private briefings" that were obtained by suing the DOD in a Freedom of Information Act action.⁵³ This action was over the DOD's relationship with the military analysts who frequented television networks to provide support for the invasion and occupation of Iraq.⁵⁴ The article explains:

By early 2002, detailed planning for a possible Iraq invasion was under way, yet an obstacle loomed. Many Americans, polls showed, were uneasy about invading a country with no clear connection to the Sept. 11 attacks. Pentagon and White House officials believed the military analysts could play a crucial role in helping overcome this resistance.

⁵¹ *DoD News Briefing—Secretary Rumsfeld*, U.S. DEP'T OF DEF. (Sept. 25, 2001, 12:18 PM), <http://www.defense.gov/transcripts/transcript.aspx?transcriptid=1929>.

⁵² Christiaan Highsmith, *The Liberty-Speech Framework: Resolving the Tension Between Foreign Affairs Power and First Amendment Freedoms*, 88 B.U.L. REV. 745, 774 (2008).

⁵³ David Barstow, *Behind TV Analysts, Pentagon's Hidden Hand: Courting Ex-Officers Tied to Military Contractors*, N.Y. TIMES, Apr. 20, 2008, at A1, available at <http://www.nytimes.com/2008/04/20/us/20generals.html?pagewanted=all>.

⁵⁴ *Id.*; Letter from Daniel I. Gordon, Acting Gen. Counsel, U.S. Gov't Accountability Office, to Nancy Pelosi, Speaker of the U.S. House of Representatives, at 4 n.7 (July 21, 2009), available at <http://www.gao.gov/decisions/appro/316443.pdf>; John Cushman, *A Nation at War: Military Commentators; Iraq War Keeps General Busy, Even the Ones Who Have Retired*, N.Y. TIMES, Mar. 25, 2003, at B15, available at <http://www.nytimes.com/2003/03/25/us/nation-war-military-commentators-iraq-war-keeps-generals-busy-even-ones-who-have.html> ("[A] whole constellation of retired one-, two-, three- and four-star generals . . . can be seen night and day across the television firmament . . ."); Robin A. Arzon, *Exploring Iraq War News Coverage and a New Form of Censorship in Violation of the Quickly Evaporation Public Interest Requirement and Public Right to Receive Information*, 12 VILL. SPORTS & ENT. L.J. 327, 350–51 (2005) (coverage was dominated by government and Pentagon commentary).

Torie Clarke, the former public relations executive who oversaw the Pentagon's dealings with the analysts as assistant secretary of defense for public affairs, had come to her job with distinct ideas about achieving what she called "information dominance." In a spin-saturated news culture, she argued, opinion is swayed most by voices perceived as authoritative and utterly independent.

And so even before Sept. 11, she built a system within the Pentagon to recruit "key influentials."⁵⁵

The "Pentagon recruited more than 75 retired officers The largest contingent was affiliated with FOX News, followed by NBC and CNN."⁵⁶ *Media Matters* found that just twenty of the named military analysts appeared or were quoted on ABC, CBS, NBC, CNN, FOX, MSNBC, CNBC, and NPR more than 4,500 times.⁵⁷ Professor Colman McCarthy wrote:

That news divisions of NBC, ABC, CBS, CNN and Fox sanction this domination by militarists is a further assault on what the public deserves: independent, balanced and

⁵⁵ Barstow, *supra* note 53.

In the fall and winter leading up to the invasion, the Pentagon armed its analysts with talking points portraying Iraq as an urgent threat. The basic case became a familiar mantra: Iraq possessed chemical and biological weapons, was developing nuclear weapons, and might one day slip some to Al Qaeda; an invasion would be . . . relatively quick and inexpensive

Id.

⁵⁶ *Id.* CNN news executive Eason Jordan remarked that the "military generals turned war analysts . . . had all been vetted and approved by the U.S. [G]overnment." Norman Solomon, *War Made Less Easy: Media Execs Back Pedalling Support for War*, PACIFIC FREE PRESS (Aug. 17, 2007), <http://www.pacificfreepress.com/news/1/1548-war-made-less-easy-media-execs-back-peddalling-support-for-war.html>.

⁵⁷ *Military Analysts Named in Times Exposé Appeared or Were Quoted More than 4,500 Times on Broadcast Nets, Cables, NPR*, MEDIA MATTERS FOR AM. (May 13, 2008, 8:25 AM), <http://mediamatters.org/research/200805130001>; Glenn Greenwald, *Joe Galloway Blasts Pentagon and Larry Di Rita on 'Military Analyst' Claims*, SALON (May 15, 2008, 10:29 AM), http://www.salon.com/news/opinion/glenn_greenwald/2008/05/15/analysts/index.html.

impartial journalism. The tube is a parade ground for military men—all well-groomed white males—saluting the ethic that war is rational, that bombing and shooting is the way to win peace, and . . . that their uniformed pals in Iraq were there to free people.⁵⁸

A Pentagon spokesperson affirmed: “The intent and purpose of this is nothing other than an earnest attempt to inform the American people.”⁵⁹ However, many analysts “expressed regret for participating in what they regarded as an effort to dupe the American public with propaganda dressed as independent military analysis.”⁶⁰ Former Green Beret Robert Bevelacqua, an analyst for FOX News, attended a pre-war briefing on Iraq’s purported stockpiles of illicit weapons and was alarmed when he was told, “We don’t have any hard evidence.”⁶¹ Retired Army Lieutenant Colonel Robert L. Maginnis “concluded that the analysts were being ‘manipulated’ to convey a false sense of certainty about the evidence of the weapons.”⁶² Army Major General John Batiste, who was not a participant but was later dismissed by CBS apparently for voicing a comprehensive anti-Bush message,⁶³ called the program a “deliberate attempt on the part

⁵⁸ Colman McCarthy, *Militarists Rule on TV News*, NAT’L CATH. REP. (Apr. 25, 2003), http://natcath.org/NCR_Online/archives2/2003b/042503/042503v.htm. See also Sophie Clavier & Laurent El Ghaoui, *Marketing War Policies: The Role of the Media in Constructing Legitimacy*, 19 KAN. J.L. PUB. POL’Y 212, 225 (2010) (“[U]nlike their foreign counterparts, the [U.S.] networks proved an effective ‘conduit for Bush [A]dministration and Pentagon propaganda.’”).

⁵⁹ Barstow, *supra* note 53.

⁶⁰ *Id.* “Clearly, DOD attempted to favorably influence public opinion with respect to the Administration’s war policies” by using retired military analysts. Gordon, *supra* note 54, at 2. “[T]heir evident sympathies with the current commanders, not to mention their respect for the military and immersion in its doctrines, sometimes seem to immunize them to the self-imposed skepticism of the news organizations that now employ them.” Cushman, *supra* note 54.

⁶¹ Barstow, *supra* note 53.

⁶² *Id.* “Kenneth Allard, a former NBC military analyst . . . said that the campaign was a ‘sophisticated information operation.’” *Id.*

⁶³ “*Somebody Had to Speak Out. If Not Me, Who?*”—Maj. Gen. John Batiste Fired by CBS News for Anti-Iraq War ‘Advocacy’, DEMOCRACY NOW! (May 25, 2007), http://www.democracynow.org/2007/5/25/somebody_had_to_speak_out_if (noting criticism of Bush Administration’s “failed strategy” and atrocities by U.S. security firms).

of the [A]dministration to shape public opinion.”⁶⁴ Retired Lieutenant Colonel Sam Gardiner remarked: “The most profound and the most painful [problem] is their disdain of the Pentagon for democracy. I mean, think about it. What we have seen, this is a part of the campaign. They don’t believe in democracy.”⁶⁵

A Pentagon spokesperson defended the operation by maintaining that the “program constantly included critics of the [A]dministration.”⁶⁶ However, a comprehensive Pentagon program memorandum stated that the intention was to “develop a core group from within our media analyst list of those that we can count on to carry our water.”⁶⁷ Another document called military analysts “message force multipliers” and “surrogates” who could be relied upon to relay the Bush Administration’s “themes and messages” to Americans “in the form of their own opinions.”⁶⁸ The *New York Times* uncovered that the Pentagon paid Omnitec Solutions “hundreds of thousands of dollars to scour databases for any trace of the analysts” and

⁶⁴ David Folkenflik, *Pentagon Used Military Analysts to Deliver Message*, NPR (May 1, 2008), <http://www.npr.org/templates/story/story.php?storyId=90111757>. Alternately, David Heyward, former President of CBS News from 1996 to 2005, called it a “deliberate attempt to deceive the public.” *Id.*

⁶⁵ *Pentagon’s Pundits: A Look at the Defense Department’s Propaganda Program*, DEMOCRACY NOW! (Apr. 22, 2008), http://www.democracynow.org/2008/4/22/pentagons_pundits_a_look_at_the.

⁶⁶ Glenn Greenwald, *Larry Di Rita’s Responses to Questions About the ‘Military Analyst’ Program*, SALON (May 12, 2008, 10:46 AM), http://www.salon.com/news/opinion/glenn_greenwald/2008/05/12/di_rita.

⁶⁷ Glenn Greenwald, *How the Military Analyst Program Controlled News Coverage: In the Pentagon’s Own Words*, SALON (May 10, 2008, 7:48 AM), http://www.salon.com/news/opinion/glenn_greenwald/2008/05/10/analysts/index.html.

⁶⁸ Rosa L. DeLauro, *DeLauro, Dingell Call for FCC Investigation of Pentagon Propaganda Program*, CONGRESSWOMAN ROSA L. DELAURO (May 6, 2008), <http://delauro.house.gov/release.cfm?id=566>. This letter states that the authors were “concerned that the military analysts may have violated . . . 47 U.S.C. § 50[8], which among other things, prohibits those involved with preparing program matter intended for broadcast from accepting valuable consideration for including particular matter in a program without discourse.” *Id.* *Editorial Note:* It appears that due to an earlier renumbering of the codified sections, the authors of this letter inadvertently referred to 47 U.S.C. § 507 when in fact 47 U.S.C. § 508 is the section governing disclosure of payments to individuals connected with broadcasts. All subsequent references have been changed for accuracy.

monitor the analysts' news media appearances.⁶⁹ "Omnitec evaluated their appearances using the same tools as corporate branding experts. . . . In interviews, several analysts reacted with dismay when told they were described as reliable 'surrogates' in Pentagon documents."⁷⁰ Some participants were ostensibly fired for being critical.⁷¹

Another version of dissent within the military developed before the *New York Times* story broke. In 2006, several generals, former military analysts, and other officials began to criticize Secretary of Defense Rumsfeld in the media, periodicals, and books for implementing unavailing occupation plans,⁷² failing to establish law and order, disbanding the Iraqi military, permitting alleged torture, and failing to quell insurgencies.⁷³ Critics often espoused variations of more appropriate

⁶⁹ Barstow, *supra* note 53.

⁷⁰ *Id.* See also Gordon, *supra* note 54, at 10 ("DOD's contract with Omnitec, Inc. . . . does not violate the publicity or propaganda prohibition.").

⁷¹ Barstow, *supra* note 53 (quoting Retired Marine Col. William V. Cowan who believed he was "precipitously fired from the analysts group" for relaying negative information in a television appearance). "[T]he same small group of retired military officers [were] masquerading as independent analysts who explicitly sought to be told what to say, and were told what to say." Greenwald, *supra* note 66 (emphasis omitted). Program directives explicitly stated to only employ enthusiasts, and "to weed out the less reliably friendly analysts" so that "they become the key go to guys for the networks." *Id.* "[I]f this wasn't an example of an illegal, systematic 'domestic propaganda campaign' by the Pentagon, then nothing is." Glenn Greenwald, *CNN, the Pentagon's "Military Analyst Program" and Gitmo*, SALON (May 9, 2008, 5:43 AM), http://www.salon.com/news/opinion/glenn_greenwald/2008/05/09/cnn_abc/print.html.

⁷² *PBS NewsHour: Generals Speak Out on Iraq* (PBS radio broadcast Apr. 13, 2006), available at http://www.pbs.org/newshour/bb/military/jan-june06/iraq_4-13.html; David S. Cloud & Eric Schmitt, *More Generals Call for Rumsfeld's Resignation*, N.Y. TIMES, Apr. 14, 2006, at A1, available at <http://www.nytimes.com/2006/04/14/washington/14military.html>.

⁷³ Jide Nzelibe, *A Positive Theory of the War-Powers Constitution*, 91 IOWA L. REV. 993, 1010 (2006) (noting that dissent grew from more public information on the objectives and costs of the war); *Hardball with Chris Matthews* (MSNBC television broadcast Sept. 27, 2006), available at <http://www.msnbc.msn.com/id/15045586> (cogitating why only retired generals will criticize the president); Thom Shanker, *U.S. General Says Iraq Could Slide into a Civil War*, N.Y. TIMES, Aug. 4, 2006, at A1, available at <http://www.nytimes.com/2006/08/04/world/middleeast/04rumsfeld.html?oref=slogin>; Bruce W. Jentleson, *The Pretty Prudent Public: Post Post-Vietnam American Opinion on the Use of* (continued)

military strategy,⁷⁴ including by emphasizing that more troops should have been deployed to Iraq.⁷⁵ Criticism frequently accentuated weaknesses in invasion and occupation policymaking not to challenge the bases for a military presence in Iraq, but to implement plans and action that were insufficiently aggressive and comprehensive.⁷⁶

Alternatively, a coinciding version of dissent advocated a departure from Iraq,⁷⁷ the position that was evidently instrumental in producing enough victories for Democrats in the November 2006 congressional elections to attain control over the House of Representatives and Senate for the first time in twelve years.⁷⁸ Appraising the views of the U.S. military's rank and file, a 2006 Zogby/Le Moyne College Poll conducted a survey of troops serving in Iraq and found that 72% favored withdrawal within the

Military Force, 36 INT'L STUD. Q. 49, 50–53 (1992) (noting generally that wartime dissent may emerge from high casualties, failing to curb insurgencies, and other negative perceptions).

⁷⁴ *PBS NewsHour: Rumsfeld Defends Himself as Criticism from Generals Mount*, (PBS radio broadcast Apr. 18, 2006), available at http://www.pbs.org/newshour/bb/military/jan-june06/rumsfeld_4-18.html; Editorial, *The Generals' Revolt*, WASH. POST, Apr. 18, 2006, at A18, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/04/17/AR2006041701261.html>; Cloud & Schmitt, *supra* note 72.

⁷⁵ Julian Borger, *Knives Come Out for Rumsfeld as the Generals Fight Back*, THE GUARDIAN (Mar. 30, 2003, 8:39 PM), <http://www.guardian.co.uk/world/2003/mar/31/iraq.usa1>. This was similar to the question of using a massive force or a cheaper invasion force that has more maneuverability and flexibility. MICHAEL R. GORDON & GENERAL BERNARD E. TRAINOR, *COBRA II: THE INSIDE STORY OF THE INVASION AND OCCUPATION OF IRAQ 4–5* (2006). Iraq is the size of California, the United States has a massive high-tech military, and there was minimal resistance during the invasion. *Id.*

⁷⁶ See GORDON & TRAINOR, *supra* note 75, at 4–5.

⁷⁷ *Democrats Want Iraq Pullout to Begin Quickly*, CNN (June 19, 2006), http://articles.cnn.com/2006-06-19/politics/iraq.pullout_1_iraqi-dependency-iraqi-political-leaders-iraq-pullout?_s=PM:POLITICS; Eric Schmitt, *Uproar in House as Parties Clash on Iraq Pullout*, N.Y. TIMES (Nov. 19, 2005), <http://www.nytimes.com/2005/11/19/national/19military.html> (congressional hearings sought withdrawal from Iraq).

⁷⁸ Christian R. Grose & Bruce I. Oppenheimer, *The Iraq War, Partisanship, and Candidate Attributes: Explaining Variation in Partisan Swing in the 2006 U.S. House Elections*, 32 LEG. STUD. QUART. 531, 531, (2007); David Kirkpatrick & Adam Nagourney, *In an Election Year, a Shift in Public Opinion on the War*, N.Y. TIMES, Mar. 7, 2006, at A12, available at <http://www.nytimes.com/2006/03/27/politics/27war.html?pagewanted=print>.

coming year.⁷⁹ The withdrawal position did not prevail, but instead the “Generals’ Revolt” matured into advocacy for Rumsfeld to resign.⁸⁰ Rumsfeld did resign on November 8, 2006, one day after the election.⁸¹ A few months later, with Democrats controlling Congress, legislation was offered to completely withdraw troops within six months.⁸² However, the President vetoed the legislation, contending it was an unconstitutional infringement on the Commander-in-Chief power⁸³ and pursued a “troop surge” strategy.⁸⁴

This alternative “troop surge” position predominantly sought to rectify deficits in an occupation that was inherently dependent on the continuing validity of the supplanted “liberation” justification for invasion, rather than addressing the accuracy of prewar allegations of WMD security threats.⁸⁵

⁷⁹ Zogby Poll, *U.S. Troops in Iraq: 72% Say End War in 2006*, ZOGBY (Feb. 28, 2006), <http://www.ibopezogby.com/news/2006/02/28/us-troops-in-iraq-72-say-end-war-in-2006/>.

⁸⁰ One source noted:

Rumsfeld has lost credibility with the uniformed leadership, with the troops, with Congress and with the public at large. . . . His strategy has failed, and his ability to lead is compromised. And although the blame for our failures in Iraq rest with the secretary, it will be the troops who bear its brunt.

Army Time: ‘Time for Rumsfeld to Go’, CNN (Nov. 4, 2006), http://articles.cnn.com/2006-11-04/politics/rumsfeld.departure_1_marine-corps-times-army-times-air-force-times?_s=PM:POLITICS.

⁸¹ *Rumsfeld Stepping Down*, MSNBC (Nov. 8, 2006, 5:39 PM), <http://www.msnbc.msn.com/id/15622266/ns/politics/t/rumsfeld-stepping-down/>.

⁸² See H.R. 1591, 110th Cong. (2007).

⁸³ H.R. Doc. No. 110-31 (Veto Message from the President), at 1 (2007), *available at* <http://www.senate.gov/reference/Legislation/Vetoes/BushGW.htm>. See also John Norton Moore, *Do We Have an Imperial Congress?*, 43 U. MIAMI L. REV. 139, 145–46 (1988) (“A series of attorney general opinions, and the concept of unconstitutional conditions, refute the notion that the appropriations power can be a valid basis for broad congressional claims of absolute plenary authority.”).

⁸⁴ Jane O’Brien, *Doubt Cast on US Iraq ‘Surge’ Strategy*, BBC (May 30, 2007), <http://news.bbc.co.uk/2/hi/6706481.stm>.

⁸⁵ See *supra* notes 23–24, 72–76. Another highly publicized revolt emerged in 2007 with a “blistering attack on U.S. generals, saying they have botched the war in Iraq and misled Congress about the situation there.” Thomas E. Ricks, *Army Officer Accuses Generals of ‘Intellectual and Moral Failures’*, WASH. POST, Apr. 27, 2007, at A4, *available* (continued)

Meanwhile, the later dissent from military analysts, who provided appearances that may have swayed public opinion and led to the invasion, would be crucial to examining whether there was independent, rational, and informed public assent for invasion based on the pre-war reasons for attack.⁸⁶ The analysts' pre-war advocacy can be interpreted in two general ways. It can either be interpreted as an operation that was serendipitously favorable to Bush Administration preferences,⁸⁷ or it can be viewed as a policymaker-initiated program that was savvy in employing surrogate advocates who could appear detached from the White House and Pentagon.⁸⁸ The Bush Administration represented that the former occurred because officials denied knowledge of a concerted Pentagon propaganda effort.⁸⁹

Support for the latter interpretation can be found in former Secretary of the Treasury Paul O'Neill's startling 2004 interview on *60 Minutes* and in other publications.⁹⁰ O'Neill stated that Secretary of Defense Rumsfeld was an enthusiastic supporter of the President who, at White House National Security Council meetings in January and February 2001, was

at http://www.washingtonpost.com/wp-dyn/content/article/2007/04/26/AR2007042602230_pf.html. This was based largely on the claim that U.S. forces were ordered to depart with general counterinsurgency theory by being "isolated from the Iraqi people and focused on capturing or killing insurgents." Lt. Col. Paul Yingling, *A Failure in Generalship*, ARMED FORCE J. (May 2007), <http://www.armedforcesjournal.com/2007/05/2635198>. The general theme with the 2006 "Generals' Revolt" and later criticism bypass questions of U.S. military presence in Iraq, and instead focus on how occupation details could be more adeptly handled.

⁸⁶ See *supra* notes 60–71.

⁸⁷ See Greenwald, *supra* note 57.

⁸⁸ See Greenwald, *supra* note 66.

⁸⁹ White House Press Secretary Dana Perino defended the military analyst program by stating that "DOD has made a decision, they've decided to stop this program." Dennis J. Kucinich, *Articles of Impeachment of President George W. Bush*, art. I, CONGRESSMAN DENNIS J. KUCINICH (June 10, 2008), <http://kucinich.house.gov/news/DocumentSingle.aspx?DocumentID=93581>. Perino further added that "one of the things that we try to do in the administration is get information out to a variety of people." *Id.* Washington Post reporter Dan Froomkin remarked: "As for White House involvement . . . There's no hard evidence thus far . . . [I]t's hard to imagine they weren't plugged in to some extent." Greenwald, *supra* note 57.

⁹⁰ Bejesky, *supra* note 23, at 62–65.

doling out tasks intended to displace the Iraqi government.⁹¹ Likewise, the *New York Times* investigation revealed that Rumsfeld's authorization to hire Clarke and recruit "key influentials" preceded 9/11.⁹² A *Washington Post* article concluded that the "degree of behind-the-scenes manipulation—including regular briefings by then-Defense Secretary Donald Rumsfeld and other officials—is striking, as is the lack of disclosure by the networks of some of these government and business connections."⁹³ Rumsfeld personally coddled the analysts,⁹⁴ but at the same time Clarke's new office and initiative were intentionally separated from the Pentagon's official press office so that military "analysts would instead be catered to by a small group of political appointees."⁹⁵ Military

⁹¹ *Id.*; Robert Bejesky, *Geopolitics, Oil Law Reform, and Commodity Market Expectations*, 63 OKLA. L. REV. 193, 216, 223–24 (2011) (White House planning to capture Iraqi oil fields began as early as March 2001).

⁹² Greenwald, *supra* note 66 (noting that this is "one small sliver of the Pentagon's overall media management effort, which, in turn is but one small sliver of the administration's efforts to manipulate public opinion"); Barstow, *supra* note 53.

⁹³ Howard Kurtz, *Retired Officers, Still Doing the Pentagon's Work on TV?*, WASH. POST, Apr. 21, 2008, at C7, available at http://www.washingtonpost.com/wp-dyn/content/article/2008/04/20/AR2008042002131_pf.html. If this is true, an investigation should probe the business dealings of military analysts and the success of those business interests in being awarded Pentagon contracts. This was a core concern in the DeLauro and Dingell letter to the FCC. See DeLauro, *supra* note 68 and accompanying text.

⁹⁴ Barstow, *supra* note 53.

From their earliest sessions with the military analysts, Mr. Rumsfeld and his aides spoke as if they were all part of the same team.

In interviews, participants described a powerfully seductive environment—the uniformed escorts to Mr. Rumsfeld's private conference room, the best government china laid out, the embossed name cards, the blizzard of PowerPoints, the solicitations of advice and counsel, the appeals to duty and country, the warm thank you notes from the secretary himself.

Id. Analysts were "wooded in hundreds of private briefings with senior military leaders, including officials with significant influence over contracting and budget matters" and "briefed by officials from the White House, State Department and Justice Department," including Mr. Cheney, Alberto R. Gonzales and Stephen J. Hadley." *Id.*

⁹⁵ Barstow, *supra* note 53.

analysts “were instructed not to quote their briefers directly or otherwise describe their contacts with the Pentagon.”⁹⁶

2. Congressional Objections

Members of Congress denounced the military analyst program. During the 2008 presidential campaign, Senator Hillary Clinton was concerned about the “credibility and trust at the Pentagon.”⁹⁷ Senator Obama was “‘deeply disturbed’ that the [Bush] [A]dministration ‘sought to manipulate the public’s trust’ and [said] the program ‘deserve[d] further investigation to determine if laws or ethical standards were violated.’”⁹⁸ Senator John Kerry remarked that a thorough investigation was needed into “‘whether Americans’ tax dollars were being used to cultivate talking heads to sell the [A]dministration’s Iraq policy’” was necessary.⁹⁹ Two months after the program was revealed, Congressman Dennis Kucinich offered Articles of Impeachment, and Article I involved using secret propaganda to “manufacture a false case for war against Iraq.”¹⁰⁰ As one piece of evidence, Kucinich stated: “The Department of Defense (DOD) has engaged in a years-long domestic propaganda campaign to promote the invasion and occupation of Iraq. This secret program was defended by the White House.”¹⁰¹

House Democrats Rosa DeLauro and John Dingell wrote a letter to Federal Communication Commission (FCC) Chairman Kevin J. Martin and contended that the Pentagon’s program was “unethical and perhaps illegal.”¹⁰² Among their concerns were that analysts did not represent that

⁹⁶ *Id.*

⁹⁷ *Obama, Clinton Respond to Pentagon Analyst Story, McCain and Networks Remain Silent*, HUFFINGTON POST (Apr. 28, 2008, 1:54 PM), http://www.huffingtonpost.com/2008/04/28/obama-clinton-respond-to_n_98999.html.

⁹⁸ *Id.*

⁹⁹ Michael Calderone & Avi Zenilman, ‘Deafening’ Silence on Analyst Story, POLITICO (May 8, 2008, 11:19 AM), <http://www.politico.com/news/stories/0508/10204.html>. In an interview, Congressman John Murtha blamed Rumsfeld for “distort[ing] everything” and using the military as a credibility shield. Matt Corley, *Murtha: The Military Has Been ‘Dishonored’ by the ‘Untruths’ of the Pentagon’s Propaganda Program*, THINK PROGRESS (May 1, 2008, 8:45 PM), <http://thinkprogress.org/politics/2008/05/01/22638/murtha-pentagon-propaganda/> (citing video interview with Congressman Frank Murtha).

¹⁰⁰ Kucinich, *supra* note 89, at art I.

¹⁰¹ *Id.*

¹⁰² DeLauro, *supra* note 68.

they were being directed by Pentagon officials, which could be a “covert propaganda campaign.”¹⁰³ DeLauro and Dingell requested an investigation into “whether the analysts and the networks [were] potentially equally culpable pursuant to the sponsorship identification” laws.¹⁰⁴ The “military analysts may have violated . . . 47 U.S.C. § 50[8], which, among other things, prohibits those involved with preparing program matter intended for broadcast from accepting valuable consideration for including particular matter in a program without disclosure.”¹⁰⁵ The *New York Times* discovered that “[m]ost of the analysts have ties to military contractors vested in the very war policies they are asked to assess on air. Those business relationships are hardly ever disclosed to the viewers, and sometimes not even to the networks themselves.”¹⁰⁶

¹⁰³ *Id.*

When seemingly objective television commentators are in fact highly motivated to promote the agenda of a government agency, a gross violation of the public trust occurs. The American people should never be subject to a covert propaganda campaign but rather should be clearly notified of who is sponsoring what they are watching.

Id.

¹⁰⁴ *Id.* (citing the Communications Act of 1934 and rules of the FCC).

¹⁰⁵ *Id.*

¹⁰⁶ Barstow, *supra* note 53. “The group was heavily represented by men involved in the business of helping companies win military contracts. Several held senior positions with contractors that gave them direct responsibility for winning new Pentagon business.” *Id.* In July 2007, CNN ended its relationship with retired Army General James Marks for working at a senior management position at McNeil Technologies, while also securing billions of dollars in Iraq-related military and intelligence contracts. *Id.*; Kurtz, *supra* note 93 (citing a list of analysts and their relations with defense contractors). Citing biographies of analysts, and contending that military analysts were biased and had “ideological or financial stakes in the war. Many hold paid advisory board and executive positions at defense companies and serve as advisers for groups that promoted an invasion of Iraq.” Daniel Benaim, Priyanka Motaparthy & Vishesh Kumar, *TV’s Conflicted Experts*, THE NATION (Apr. 21, 2003), <http://www.thenation.com/article/tvs-conflicted-experts>. Potential conflicts of interest seem relevant in the DeLauro and Dingell reference to the U.S. Code. DeLauro, *supra* note 68. “[W]e believe that legitimate questions were raised by Members of Congress and the press regarding the intersection of DOD’s public affairs activities and the possibility of compromised procurements” Gordon, *supra* note 54, at 11.

Forty-one members of Congress wrote a similar letter to Pentagon Inspector General Claude M. Kicklighter, stating, “[The] propaganda campaign aimed at deliberately misleading the American public should have been *disclosed* long ago by your office.”¹⁰⁷ This seems to assume that the Pentagon could legitimately partake in taxpayer-financed activities that could delude Americans and skew informed public opinion on a key political issue, but that Congress must be apprised.¹⁰⁸ If the congressional inquiries correctly identified the program as propaganda, publicizing the program’s existence would have foiled the purpose because propaganda’s intention is to embellish, dispense favorable twists on information, or even misrepresent without the public knowing that it is not objective information.¹⁰⁹ If laws had been more carefully observed, congressional objections over violating public trust would probably have been preempted.¹¹⁰ However, over one year later, the U.S. Government

¹⁰⁷ Rosa L. DeLauro, *Presses DOD Inspector General on Propaganda Program*, CONGRESSWOMAN ROSA L. DELAURO (May 2, 2008), <http://www.house.gov/frank/DoD%20IG%20Propaganda%20Letter%20FINAL.pdf>. (emphasis added) (noting the program was “unethical, and potentially illegal”); Gordon, *supra* note 54, at 11 (disagreeing, by noting that “we conclude that these activities did not violate the publicity or propaganda prohibition.”)

¹⁰⁸ There is no basis for the White House or Secretary of Defense to authorize those operations. See, e.g., Sudha Setty, *The President’s Question Time: Power, Information, and the Executive Credibility Gap*, 17 CORNELL L.J. PUB. POL’Y 247, 291–92 (2008). The Constitution provides that Congress has the authority to declare war and affirms that the size, organization, regulation, and appropriations for the military are congressional powers. U.S. Const. art VIII, § 8; *Chappell v. Wallace*, 462 U.S. 296, 301 (1983) (Congress has the right to regulate and establish “the framework of the Military Establishment”).

¹⁰⁹ Propaganda historically was defined as the “dissemination of biased ideas and opinions, often through the use of lies and deception,” but the definition seems to have been toned down to a more mild “suggestion” or “influence” by “manipulation of symbols and the psychology of the individual.” ANTHONY PRATKANIS & ELLIOT ARONSON, *AGE OF PROPAGANDA: EVERYDAY USE AND ABUSE OF PERSUASION* 11 (2001).

¹¹⁰ A few statements of dissent may not curb practices. “This brazenness is the result of allowing our high government officials to break the law and lie continuously with total impunity. There is no limit on their willingness to engage in behavior of this sort, because they remain secure that there will never be any consequences.” Greenwald, *supra* note 66. For example, President Nixon became embittered in scandal in 1974 due to increasing public understanding of falsities and suppressing dissent about the Vietnam War. See Lori Fisler Damrosch, *War and Uncertainty*, 114 YALE L.J. 1405, 1409 (2005); Hon. Elizabeth
(continued)

Accountability Office (GAO) (an office established by Congress as an independent federal agency responsible for oversight),¹¹¹ produced a report in response to the congressional inquiries, stating that laws were not violated.¹¹²

Assuring government accountability to the populace is a foundational principle in the text of the Constitution, framer debates, and American jurisprudence.¹¹³ The dangers of reducing accountability are particularly apparent when government obscures its role by promoting messages that “mask[] its identity as speaker,” or “communicat[e] in a non-transparent manner . . . [to] make its favored positions appear more popular than they really are” to achieve greater persuasion.¹¹⁴ This was the case with the

Holtzman, *Abuses of Presidential Power: Impeachment as a Remedy*, 62 U. MIAMI L. REV. 213, 214 (2008). This is one instance in which greater responsibility might have been demanded. The Bush Administration may have learned from precedent. In fact, the Bush Administration was caught multiple times with the Office of Strategic Influence, the February 2006 Congressional General Accounting Office investigation, the Pentagon Inspector General Report, the al-Zarqawi PSYOP revelations, and the *New York Times* revelations of the Pentagon’s military analysts. See Parts II.B–C; IV.A–D.

¹¹¹ *About GAO*, U.S. GOV’T ACCOUNTABILITY OFFICE, <http://www.gao.gov/about/index.html> (last visited Apr. 8, 2012).

¹¹² Gordon, *supra* note 54, at 11; Jeremy Berkowitz, Comment, *Raising the Iron Curtain on Twitter: Why the United States Must Revise the Smith-Mundt Act to Improve Public Diplomacy*, 18 COMM.LAW CONSP. 269, 299–301 (2009) (calling the military analyst program the “most egregious example of the Bush Administration implementing propaganda techniques” and noting how the Pentagon was absolved of wrongdoing and the media outlets that hosted the analysts simply ignored the investigations).

¹¹³ Gia B. Lee, *Persuasion, Transparency, and Government Speech*, 56 HASTINGS L.J. 983, 1016–18 (2005); Bejesky, *supra* note 23, at 30; Robert Bejesky, *Press Clause Aspirations and the Iraq War*, 48 WILLAMETTE L. REV. 343, 344–47 (2012).

¹¹⁴ Lee, *supra* note 113, at 990, 1009, 1012–13. See also Ellen P. Goodman, *Stealth Marketing and Editorial Integrity*, 85 TEX. L. REV. 83, 84 (2006) (“[P]ropagandists [use the media] to urge belief . . . [and by] masking their identities and promotional intent, they market by stealth.”); Jonathan S. Adelstein, Comm’r, Fed. Comm’n, Speech before the U.S. Senate Committee on Commerce, Science, and Transportation (May 12, 2005), available at 2005 FCC LEXIS 3142, at 3 (FCC Commissioner emphasized in a speech to the Senate Committee that “consumers have a right to know who is trying to persuade them.”).

Pentagon's independent analyst program, but congressional objections also raise questions of media complicity, unreasonable naïveté, or both.¹¹⁵

C. Video News Releases

1. Anonymous Communications and VNRs

Another species of covert government promotion is disseminated by media professionals possessing an elevated knowledge that the government is providing biased and anonymous communications—the Video News Release (VNR). With VNRs, publicists and public relations firms provide networks with “canned” news that is designed to be indistinguishable from news produced by television stations.¹¹⁶ “Prepackaged” news decreases investigative expenses and presumably increases profitability¹¹⁷ because producers provide VNR clips gratuitously to networks.¹¹⁸ This oft-used but controversial practice¹¹⁹ became a hot topic for the White House and Pentagon.¹²⁰

¹¹⁵ Glenn Greenwald, a constitutional law attorney, was particularly critical that media networks remained ignorant for nearly six years without noticing a problem and then remained silent when the investigation was released: “[T]hese news outlets misleadingly shoveled government propaganda down the throats of their viewers on matters of war and terrorism and they don’t feel the least bit obliged to answer for what they did or knew about any of it.” Glenn Greenwald, *Major Revelation: U.S. Media Deceitfully Disseminates Government Propaganda*, SALON (Apr. 20, 2008, 8:14 AM), http://www.salon.com/news/opinion/glenn_greenwald/2008/04/20/nyt/index.html. “False and misleading reports are increasingly common, but the press oligarchs often protest that they unintentionally reported them, after themselves being fooled.” Hannibal Travis, *Postmodern Censorship of Pacifist Content on Television and the Internet*, 25 NOTRE DAME J.L. ETHICS & PUB POL’Y 47, 62 (2011).

¹¹⁶ Antonella Aloma Castro, Comment, *Truth in Broadcasting Act: Can It Move the Media Away from Indoctrinating and Back to Informing?*, 27 LOY. L.A. ENT. L. REV. 127, 127 (2007).

¹¹⁷ Janel Alania, *The “News” from the Feed Looks like News Indeed: On Video News Releases, The FCC, and the Shortage of Truth in the Truth in Broadcasting Act of 2005*, 24 CARDOZO ARTS & ENT. L.J. 229, 234 (2006); Jeffrey Peabody, Note, *When the Flock Ignores the Shepherd—Corralling the Undisclosed Use of Video News Releases*, 60 FED. COMM. L.J. 577, 581 (2008).

¹¹⁸ Peabody, *supra* note 117, at 579.

¹¹⁹ *Id.* at 578. Hill and Knowlton V.P. George Glazer called VNRs “as much a public relations fixture as the print news release.” Alania, *supra* note 117, at 249. Some companies produce a thousand VNRs a year that are distributed to hundreds of media
(continued)

The GAO released a series of reports that itemized how the Bush Administration spent U.S. taxpayer funds for what “may constitute improper ‘covert propaganda.’”¹²¹ A January 2006 report indicated that from 2003 to 2005, the Bush Administration spent \$1.62 billion on contracts with the following groups: advertising agencies (\$1.4 billion), public relations firms (\$197 million), and media organizations (\$15 million).¹²² The Administration provided “[p]repackaged news stories . . . intended to be indistinguishable from news segments broadcast to the public by independent television news organizations.”¹²³ Repackaged news included segments that were produced to develop favorable perceptions about the Iraq War and occupation.¹²⁴ The White

affiliates. David Barstow & Robin Stein, *Under Bush, a New Age of Prepackaged News*, N.Y. TIMES, Mar. 13, 2005, at A34, available at <http://query.nytimes.com/gst/abstract.html?res=F50914FC3E580C708DDDA0894DD404482&pagewanted=all>.

¹²⁰ U.S. GOV'T ACCOUNTABILITY OFFICE, B-304272, PREPACKAGED NEWS STORIES 2 (2005), available at 2005 U.S. Comp. Gen. LEXIS 29; Peabody, *supra* note 117, at 578; Setty, *supra* note 108, at 258; Lyriisa Barnett Lidsky, *Nobody's Fools: The Rational Audience as First Amendment Ideal*, 2010 U. ILL. L. REV. 799, 848 (2010); Robert Pear, *U.S. Videos, for TV News, Come Under Scrutiny*, N.Y. TIMES, Mar. 15, 2004, at A1, available at <http://www.nytimes.com/2004/03/15/us/us-videos-for-tv-news-come-under-scrutiny.html?pagewanted=all&src=pm>; Barstow & Stein, *supra* note 119.

¹²¹ Barstow & Stein, *supra* note 119. See also Jonathan D. Varat, *Deception and the First Amendment: A Central, Complex, and Somewhat Curious Relationship*, 53 UCLA L. REV. 1107, 1134 (2006) (explaining that news “made to appear as products of independent journalists are certainly deceptive”); Peabody, *supra* note 117, at 581–82.

¹²² U.S. GOV'T ACCOUNTABILITY OFFICE, GAO ACTIVITIES AND FINANCIAL OBLIGATIONS FOR SEVEN FEDERAL DEPARTMENTS 2–3 (2006), available at <http://www.gao.gov/highlights/d06305high.pdf>.

¹²³ U.S. GOV'T ACCOUNTABILITY OFFICE, VIDEO NEWS RELEASES: UNATTRIBUTED PREPACKAGED NEWS STORIES VIOLATE PUBLICITY OR PROPAGANDA PROHIBITION 1 (2005), available at <http://www.gao.gov/products/GAO-05-643T>. See also Castro, *supra* note 116, at 127; Marion Just & Tom Rosenstiel, *All the News That's Fed*, N.Y. TIMES, Mar. 26, 2005, at A13, available at <http://www.nytimes.com/2005/03/26/opinion/26just.html>.

¹²⁴ VNRs were also made for combating drug use, and advocating Medicare reform and family planning. Michael J. Ushkow, *Judicial Supervision of Campaign Information: A Proposal to Stop the Dangerous Erosion of Madison Design for Actual Representation*, 34 HOFSTRA L. REV. 263, 307 (2005); Robert H. Wood, *Lining the Pockets of Publicists with Federal Funds: The Prohibition Against Use of Agency Appropriations for Publicity and Propaganda*, 7 LOY. J. PUB. INT. L. 133 (2006); Lee, *supra* note 113, at 984, 987; Castro, (continued)

House employed public relations firms and directed the newly-created Office of Global Communications to fund media organizations and advertising agencies.¹²⁵ Perhaps somewhat consistent with its traditional use of propaganda,¹²⁶ the *New York Times* referenced the Pentagon:

[A]dministration tactics . . . subverted traditional journalism. Federal agencies, for example, have paid columnists to write favorably about the [A]dministration. They have distributed to local TV stations hundreds of fake news segments with fawning accounts of [A]dministration accomplishments. The Pentagon itself has made covert payments to Iraqi newspapers to publish coalition propaganda.¹²⁷

2. *Applicable Laws and Rights*

Because polls reveal that citizens are overwhelmingly opposed to anonymous communications,¹²⁸ legal frameworks should restrict the use of

supra note 116, at 127. See also David D. Kirkpatrick, *T.V. Host Says U.S. Paid Him to Back Policy*, N.Y. TIMES, Jan. 8, 2005, at A1 (noting that Armstrong Williams was paid nearly a quarter of a million dollars by the Department of Education to advocate favorably for the No Child Left Behind Act); Howard Kurtz, *Writer Backing Bush Plan Had Gotten Federal Contract*, WASH. POST, Jan. 26, 2006, at C1 (noting that syndicated columnist Maggie Gallagher was paid \$21,500 by the Department of Health and Human Services to promote an initiative to strengthen families).

¹²⁵ GREG GRANDIN, *EMPIRE'S WORKSHOP: LATIN AMERICA, THE UNITED STATES, AND THE RISE OF THE NEW IMPERIALISM* 229 (2006); RAMPTON & STAUBER, *supra* note 33, at 38; Martha Brant, *West Wing Story: Ladies and Gentlemen . . . the Band*, NEWSWEEK (Sept. 18, 2002), <http://www.newsweek.com/2002/09/17/west-wing-story-ladies-and-gentlemen-the-band.html>; James Bamford, *The Man Who Sold the War*, ROLLING STONE, Dec. 1, 2005, at 53, 61, available at <http://ics.leeds.ac.uk/papers/vp01.cfm?outfit=pmt&requesttimeout=500&folder=2053&paper=3010>.

¹²⁶ See J. WILLIAM FULBRIGHT, *THE PENTAGON PROPAGANDA MACHINE* 17, 22, 25 (1970); Richard Delgado, *The Language of the Arms Race: Should the People Limit Government Speech?*, 64 B.U. L. REV. 961, 990 (1984) (“[T]he Pentagon probably spends more money spreading its message than all opposing private speakers combined. In addition, the government can count on the publicity efforts of defense contractors, whose viewpoints generally coincide with its own.”).

¹²⁷ Barstow, *supra* note 53.

¹²⁸ Alania, *supra* note 117, at 252–53. In a 2005 poll, 71% of the public, 89% Fortune 1000 Company executives, and 70% of congressional staffers believed that “government
(continued)

VNRs. Incumbent governments should not expend public resources for self-promotion to attain re-election.¹²⁹ Professor David Cole wrote: “If government were given free rein to direct its substantial resources toward propagating its point of view, the [F]irst [A]mendment’s interrelated goals of a robust public debate, an autonomous citizenry, and informed self-government would be significantly compromised.”¹³⁰ University of California President Mark Yudof explained that “laws and practices that permit massive government communications activities may as effectively silence private speakers as a regime of censorship.”¹³¹ Government subsidies to the media must be content neutral,¹³² sponsorship disclosure laws restrict anonymous communications,¹³³ and the Supreme Court has

should require TV news shows to state the sources for . . . stories,” and similarly high percentages in these three categories also believed that public relations specialists “sometimes take advantage of the media to present misleading information that is favorable to their clients.” *Id.*

¹²⁹ THOMAS I. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 699 (1970); Daniel J.H. Greenwood, *Essential Speech: Why Corporate Speech Is Not Free*, 83 IOWA L. REV. 995, 1062 (1998); Robert D. Kamenshine, *The First Amendment’s Implied Political Establishment Clause*, 67 CALIF. L. REV. 1104, 1110 (1979).

¹³⁰ David Cole, *Beyond Unconstitutional Conditions: Charting Spheres of Neutrality in Government-Funded Speech*, 67 N.Y.U. L. REV. 675, 704 (1992). In 1779, Thomas Jefferson wrote: “To compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhors is sinful and tyrannical.” 146 CONG. REC. H11072 (daily ed. June 15, 2000) (statement of Rep. Tancredo) (internal citations omitted).

¹³¹ Mark G. Yudof, *When Governments Speak: Toward a Theory of Government Expression and the First Amendment*, 57 TEX. L. REV. 863, 897 (1979).

¹³² *Arkansas Writers’ Project, Inc. v. Ragland*, 481 U.S. 221, 233 (1987); *Hannegan v. Esquire*, 327 U.S. 146, 152, 158 (1946).

¹³³ 47 U.S.C. § 317(a) (2006); 47 C.F.R. §§ 73.1212(a), 76.1615 (2011) (similar rules apply to cable television system operators). Governing statutes are included in the Communications Act of 1934. Section 317(a)(1) provides:

All matter broadcast by any radio station for which any money, service, or other valuable consideration is directly or indirectly paid, or promised to or charged or accepted by, the station so broadcasting . . . shall, at the time the same is so broadcast, be announced as paid for or furnished . . . by such person.

47 U.S.C. § 317(a)(1). Rules apply to station employees, who are required to inform the station, which then derivatively requires the station to inform the receiver of the broadcast of the sponsorship. 47 U.S.C. § 508(a) (2006). The rules require that “when payment has

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declared laws unconstitutional that have permitted the government to communicate anonymously.¹³⁴ It is illegal for an organization or advertiser in the private sector to compensate broadcasters for featuring material without identifying the sponsor,¹³⁵ and these practices may even invoke bribery law.¹³⁶ Likewise, if a government funds media entities in consideration for broadcasting anonymous, self-interested messages, the media entity may be violating industry ethical standards.¹³⁷

The GAO explained that the Consolidated Appropriations Act prohibits “using appropriations (a) to produce or distribute ‘covert propaganda,’ (b) for purposes of self-aggrandizement, and (c) for purely partisan purposes,”¹³⁸ and concluded that many of the Bush Administration’s VNRs were illegal “covert propaganda.”¹³⁹ Further, the

been received or promised to a broadcast licensee or cable operator,” the “station or cable system must disclose that fact and identify who paid or promised to provide the consideration.” Request for Comments on the Use of Video News Releases by Broadcast Licensees and Cable Operators, 70 Fed. Reg. 24,791, 24,792 (May 11, 2005).

¹³⁴ Lee, *supra* note 113, at 1023–24.

¹³⁵ Goodman, *supra* note 114, at 84 (citing 47 U.S.C. §§ 317(a), 508(g) (2006)).

¹³⁶ *Id.* at 127. “Appropriated funds may not be used to pay a publicity expert unless specifically appropriated for that purpose.” 5 U.S.C. § 3107 (2011).

¹³⁷ The Radio-Television News Directors Association ethics principle states that “[n]ews managers and producers should clearly disclose the origin of information and label all material provided by corporate or other non-editorial sources.” *Guidelines for Use of Non-Editorial Video and Audio*, RADIO-TELEVISION NEWS DIRECTORS ASSOCIATION, http://www.rtnda.org/pages/media_items/guidelines-for-use-of-non-editorial-video-and-audio250.php (last visited Apr. 9, 2012)). *But see* Peabody, *supra* note 117, at 589 (noting the alternative belief that mandatory sponsorship rules could amount to compelled speech and require revealing anonymous sources).

¹³⁸ U.S. GOV’T ACCOUNTABILITY OFFICE, B-305368, DEPARTMENT OF EDUCATION—CONTRACT TO OBTAIN SERVICES OF ARMSTRONG WILLIAMS 6 (2005), *available at* <http://www.gpo.gov/fdsys/pkg/GAOREPORTS-B-305368/pdf/GAOREPORTS-B-305368.pdf>.

¹³⁹ Setty, *supra* note 108, at 254 (quoting U.S. GOV’T ACCOUNTABILITY OFFICE, B-303495, OFFICE OF NATIONAL DRUG CONTROL POLICY—VIDEO NEWS RELEASE 2 (2005), *available at* <http://www.gao.gov/decisions/appro/303495.pdf>); Peabody, *supra* note 117, at 582. The GAO serves a “purely advisory role” and its “legal opinions do not have any weight as precedent.” Jodie Morse, *Managing the News: The History of the Constitutionality of the Government Spin Machine*, 81 N.Y.U. L. REV. 843, 859 (2006). Bush’s Justice Department claimed such spending allocations were permissible. Barstow & (continued)

Antideficiency Act states: “An officer or employee of the United States Government . . . may not make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation.”¹⁴⁰ In *United States v. MacCollom*,¹⁴¹ Justice Rehnquist explained: “The established rule is that the expenditure of public funds is proper only when authorized by Congress, not that public funds may be expended unless prohibited by Congress.”¹⁴² Congress never allocated funds for propaganda operations. Although the Bush Administration allocated taxpayer resources for self-interested advocacy and for what critics called no-bid “war profiteering” in Iraq and Afghanistan,¹⁴³ the GAO also pointed out a rather abysmal Administration response to funding ““needed goods and services”” to the suffering people in Mississippi and Louisiana after Hurricane Katrina in 2005.¹⁴⁴ Likewise, in a report dedicated to controversial and potentially unconstitutional

Stein, *supra* note 119; DEPT. OF HEALTH & HUMAN SERVS, OFFICE OF GEN. COUNSEL, EXPENDITURE OF APPROPRIATED FUNDS FOR INFORMATIONAL VIDEO NEWS RELEASES (2004), available at <http://www.justice.gov/olc/opfinal.htm> (noting that the Department of Health and Human Services VNRs could ““help TV stations and their audiences understand the basic provisions of the new Medicare law”” even though VNRs admittedly present information in a “biased or selective manner in order to advocate a particular view”).

¹⁴⁰ The Antideficiency Act, 31 U.S.C. § 1341(a)(1)(A) (2006).

¹⁴¹ 426 U.S. 317 (1976).

¹⁴² *Id.* at 321.

¹⁴³ Major Kevin J. Wilkinson, *More Effective Procurement Response to Disasters: Maximizing the Extraordinary Flexibilities of IDIQ Contracting*, 59 A.F. L. REV. 231, 240 (2007); ANTHONY ARNOVE, IRAQ: THE LOGIC OF WITHDRAWAL 78 (2006); Laura A. Dickinson, *Government for Hire: Privatizing Foreign Affairs and Accountability Under International Law*, 47 WM. & MARY L. REV. 135, 139 (2005).

¹⁴⁴ Wilkinson, *supra* note 143, at 240–41, 244–47; George Anastaplo, *September 11th, a Citizen’s Responses (Continued)*, 4 LOY. INT’L L. REV. 135, 144 (2006) (noting that the Bush Administration exhibited a lack of competence in responding to Hurricane Katrina).

signing statements,¹⁴⁵ the GAO identified provisions in appropriations legislation that Bush refused to carry out.¹⁴⁶

On January 7, 2005, congressional Democrats wrote a letter to the President and demanded that he “publicly renounce the use of covert propaganda to influence public opinion.”¹⁴⁷ Other letters followed and Bush acknowledged the complaints, “disavowed such practices,” and denied knowledge of contracts with columnists.¹⁴⁸ Targeted specifically at government-sponsored VNRs,¹⁴⁹ the Truth in Broadcasting Act of 2005 was introduced to legally require the government to acknowledge that it is the source of news and to ensure that segments are “conspicuously identified” by broadcasters when the U.S. Government is providing the information.¹⁵⁰ Arguably, many existing laws would already prohibit the government from using VNRs, but legislative initiatives apparently sought to have no interpretive leeway in defining the targeted applicability.

¹⁴⁵ AM. BAR ASS'N, REPORT OF THE TASK FORCE ON PRESIDENTIAL SIGNING STATEMENTS AND THE SEPARATION OF POWERS DOCTRINE 22 (2006), available at <http://www.americanbar.org/content/dam/aba/migrated/leadership/2006/annual/dailyjournal/20060823144113.authcheckdam.pdf> (“To sign a bill and refuse to enforce some of its provisions because of constitutional qualms is tantamount to exercising the line-item veto power held unconstitutional by the Supreme Court in *Clinton v. New York* . . .”).

¹⁴⁶ U.S. GOV'T ACCOUNTABILITY OFFICE, B-308603, PRESIDENTIAL SIGNING STATEMENTS ACCOMPANYING THE FISCAL YEAR 2006 APPROPRIATIONS ACTS 9–12 (2007), available at <http://www.gao.gov/decisions/appro/308603.pdf>.

¹⁴⁷ Wood, *supra* note 124, at 134 (quoting Letter from Nancy Pelosi, Democratic Leader et al., to President George Bush (Jan. 7, 2005), available at <http://web.archive.org/web/20060126231023/http://www.democrats.reform.house.gov/Documents/20050107164459-75786.pdf>).

¹⁴⁸ *Id.* at 137 (quoting, in part, Maura Reynolds, *President Calls for End to Tax-Funded PR for His Policies*, L.A. TIMES, Jan. 27, 2005, at A20, available at <http://articles.latimes.com/2005/jan/27/nation/na-armstrong27>).

¹⁴⁹ *Prepackaged News Stories: Hearing on S. 967 Before the S. Comm. on Comm., Science, and Transp.*, 109th Cong. 2, (2005) (statement of Senator Frank Lautenberg), available at <http://www.gpo.gov/fdsys/pkg/CHRG-109shrg61937/pdf/CHRG-109shrg61937.pdf> (“The purpose of the bill . . . is simple and straightforward. It would stop the Government from producing covert propaganda.”).

¹⁵⁰ Prepackaged News Story Announcement Act of 2005, S. 967, 109th Cong. (2005); *S. 967: Prepackaged News Story Announcement Act of 2005*, GOVTRACK.US, <http://www.govtrack.us/congress/bill.xpd?bill=s109-967> (last visited Apr. 9, 2012).

D. Concluding Points

Systematic publicity programs may have influenced public perceptions after the invasion of Iraq and may have been instrumental in supplanting the security threat justifications that were dispensed to the domestic audience by the later emphasis on “liberating Iraqis.”¹⁵¹ Focusing on patriotic support for troops and tendering advocacy from what appeared to be detached sources such as the Pentagon’s independent military analysts and VNRs might have persuaded public perceptions covertly.¹⁵² If there is a transnational information impact, several years of anonymous and controversial domestic-level communications might have also prevented foreign audiences from being fully apprised of the context of messages that they received, often under the label of public diplomacy.¹⁵³ If there is this reciprocal news impact, then perhaps informed international opinions do not adequately and timely register before the U.S. domestic audience. The next section considers another angle of the tardy correction hypothesis—how the WMD charges did not entirely disappear, but gradually crumbled during occupation and were eventually treated as incidental error.¹⁵⁴ Media reports of WMDs were sourced from inside Iraq, and mistaken reporting perpetuated inaccurate American public perceptions.¹⁵⁵

III. PORTRAYAL OF EVENTS INSIDE IRAQ

A. Embedded Reporters

Rather than following the no-access policy employed due to national security concerns during the invasion of Afghanistan,¹⁵⁶ the Pentagon

¹⁵¹ Bejesky, *supra* note 23, at 102–06. *See also supra* Part II.A.

¹⁵² *See supra* Part II.A.

¹⁵³ *See supra* Part II.A.; *infra* Part IV.A.

¹⁵⁴ The media seemed rather unconcerned about how and why troops invaded, but generally accepted the change in mission. Bejesky, *supra* note 113, at 357–63.

¹⁵⁵ *See infra* Parts III.B–E.

¹⁵⁶ CHALMERS JOHNSON, *THE SORROWS OF EMPIRE: MILITARISM, SECRECY, AND THE END OF THE REPUBLIC* 13 (2004); Karen Sinai, *Shock and Awe: Does the First Amendment Protect a Media Right of Access to Military Operations*, 22 *CARDOZO ARTS & ENT. L.J.* 179, 179–80, 192–93 (2004). Victoria Clarke, the Assistant Secretary of Defense (Public Affairs), remarked that restrictions on journalists in Afghanistan were ““a reflection of the often confusing and shifting nature of a very unconventional war.”” *Id.* at 179–80.

implemented an embedded reporter program for the invasion of Iraq.¹⁵⁷ The Pentagon “allocate[d] embed slots to media organizations,” selected approximately seven hundred reporters to travel and live with U.S. soldiers, and provided all accommodations and protective equipment for embeds.¹⁵⁸ The program’s stated mission was to shape global perceptions by “tell[ing] the factual story—good or bad—before others see the media with disinformation and distortions.”¹⁵⁹ Hence, officials predicted that unprincipled sources would distort news accounts, which required countering those falsities to accurately inform a global target audience. However, as a U.S. Government action raising constitutional concerns, Elana Zeide explains: “[D]espite the embed program’s media-friendly stance, its limitations on press access and substantive coverage implicate important First Amendment concerns about governmental distortion of the news.”¹⁶⁰ Journalists and news agencies agreed that the embed system biased reporting.¹⁶¹

¹⁵⁷ U.S. DEP’T OF DEF., PUBLIC AFFAIRS GUIDANCE (PAG) ON EMBEDDING MEDIA DURING POSSIBLE FUTURE OPERATIONS/DEPLOYMENTS IN THE U.S. CENTRAL COMMANDS (CENTCOM) AREA OF RESPONSIBILITY (AOR) paras. 1–2.A (2003), available at <http://www.defense.gov/news/Feb2003/d20030228pag.pdf>.

¹⁵⁸ *Id.* at paras. 2.A-2.C, 3.A, 5.C; JOHNSON, *supra* note 156, at 115 (noting that a pool of six hundred embedded reporters was carefully chosen); David A. Anderson, *Freedom of the Press in Wartime*, 77 U. COLO. L. REV. 49, 57 (2006).

¹⁵⁹ U.S. DEP’T OF DEF., *supra* note 157, at para. 2A.

¹⁶⁰ Elana J. Zeide, *In Bed with the Military: First Amendment Implications of Embedded Journalism*, 80 N.Y.U. L. REV. 1309, 1310 (2005). The First Amendment should mandate the government to permit unbiased coverage of a war. “There is little doubt that the military views press coverage as a tool that can be used to shape public opinion.” Anderson, *supra* note 158, at 50. Since Vietnam, media ability to ensure accountability has further degenerated with media corporate conglomerations and the “government-chosen ‘embedded’ journalists.” Eric K. Yamamoto, *White (House) Lies: Why the Public Must Compel the Courts to Hold the President Accountable for National Security Abuses*, 68 LAW & CONTEMP. PROBS. 285, 297 (2005).

¹⁶¹ Travis, *supra* note 115, at 60. Stanley Cloud, *Time’s* Washington Bureau Chief, explained that “membership in that pool gave the Pentagon the opening to allow them to control everything we did in the Gulf War.” MACARTHUR, *supra* note 32, at 9. Howell Raines of *The New York Times* stated: “As for the various stipulations on what can be reported, this can only be interpreted as an effort to impose rigid censorship. . . . By combining these categories of reportable information with the requirement for a ‘security review,’ you have created a system of censorship unlike anything in recent combat history.”

(continued)

Some program restrictions seem reasonable to protect journalists and mission secrecy, such as those that prohibited embeds from departing from assigned units and prevented publication of classified information.¹⁶² However, the issue of prior restraints on speech is raised by the implementation and broadness of the rules. The program permitted “military officials significant discretion” in choosing pools, assigned reporters to units, restricted what they could view, provided sourcing, required screening reviews, and maintained authority to freely dismiss noncompliant journalists.¹⁶³ Embedded reporters traveled with the military, were funded by the military, and relied on soldiers for necessities and security;¹⁶⁴ all of which might be inconsistent with Supreme Court requirements that government subsidies be neutral and not have a “coercive effect” on information.¹⁶⁵ The benefits, in combination with

Id. at 31. A *New York Times* editor wrote about the interaction between the media and the Pentagon: “They managed us completely. If it were an athletic contest, the score would be 100 to 1.” Anderson, *supra* note 158, at 55. Jack Nelson, *Los Angeles Times* Bureau Chief, stated: “[B]asically speaking, the press was a captive in this war.” MACARTHUR, *supra* note 32, at 188. Another embed noted: “I wasn’t reporting the truth . . . I was reporting the marine grunt truth—which had also become my truth.” Zeide, *supra* note 160, at 1322. The approach “suggests that the military, in the twenty years since the Vietnam War, has fashioned a comprehensive strategy to manipulate the media’s coverage of military affairs.” Matthew J. Jacobs, *Assessing the Constitutionality of Press Restrictions on the Persian Gulf War*, 44 STAN. L. REV. 675, 675 (1992).

¹⁶² Journalists were restricted from traveling in their own vehicles, departing from the group while in an embedded status, and reporting without a review of “sensitive information.” U.S. DEP’T OF DEF., *supra* note 157, at paras. 2.A, 2.C.1, 6.A.1–2; RAMPTON & STAUBER, *supra* note 33, at 185; Robert Jensen, *The Military’s Media*, THE PROGRESSIVE, May 2003, at 23.

¹⁶³ Zeide, *supra* note 160, at 1328–29.

¹⁶⁴ *Id.* at 1309; Anderson, *supra* note 158, at 57. There may be eagerness to participate in the foreign adventure, fear of offending military hosts, and desire to build camaraderie with soldiers. Zeide, *supra* note 160, at 1322.

¹⁶⁵ CHRIS AYERS, WAR REPORTING FOR COWARDS 12–13 (2005) (noting that embedded reporters were biased); Yamamoto, *supra* note 160, at 297 (noting that since Vietnam, media ability to ensure accountability has further degenerated with media corporate conglomerations and the “government-chosen ‘embedded’ journalists.”). See also *supra* note 132.

control, may even conflict with journalism's ethical standards that seek to prevent biased reporting and avoid conflicts of interest.¹⁶⁶

Even more subtle is that the program implanted an impression of openness¹⁶⁷ at the same time that military officials fully controlled the context of reporting; honestly, mistakenly, or intentionally presented false portrayals; implemented psychological operations (PSYOPs) and propaganda operations; and ushered reporters to unverified chemical and biological weapons (BW) discoveries.¹⁶⁸ Then, when the invasion stage concluded (after relatively minor combat and insurgencies began, perhaps partly due to a high percentage of Iraqis disliking occupation),¹⁶⁹ the embed program dissolved.¹⁷⁰ The Pentagon then implemented deeper involvement in controlling the Iraqi media.¹⁷¹

The Bush Administration's preselected embedded reporter model was effectively his father's 1991 Gulf War model,¹⁷² which had already been recognized as a system of bias and censorship that overtly identified the intent to control coverage.¹⁷³ The *New York Times* reported that the

¹⁶⁶ WEAPONS OF MASS DECEPTION (Cinema Libre Studio 2004) (interviewing journalists who noted that embedded reporters were dependent on soldiers for protection, necessities, and transportation, which may violate journalism ethics principles that restrict reporters from receiving anything of value from the sources that they cover).

¹⁶⁷ Zeide, *supra* note 160, at 1315.

¹⁶⁸ See generally Parts II.A, III.B, IV.

¹⁶⁹ Bejesky, *supra* note 23, at 105. See also John Alan Cohan, *Necessity, Political Violence and Terrorism*, 35 STETSON L. REV. 974-75 (2006).

¹⁷⁰ RAMPTON & STAUBER, *supra* note 33, at 186; Jason Deans, *Journalists Quit Embedded Roles*, THE GUARDIAN (Apr. 11, 2003, 9:33 AM), <http://www.guardian.co.uk/media/2003/apr/11/pressandpublishing.broadcasting>.

¹⁷¹ See *infra* Part IV.B. The Pentagon also strictly denied access to facilities, such as Abu Ghraib, where torture took place. Anderson, *supra* note 158, at 58-59, 62 ("Press access to the detention facilities might not have prevented all of the deaths, injuries, and abuses, but it surely would have made it harder for the military to dissemble.").

¹⁷² See MACARTHUR, *supra* note 32, at 8-9; Arzon, *supra* note 54, at 333-34 (similarities with invasion of Grenada); Jacobs, *supra* note 161, at 689.

¹⁷³ Anderson, *supra* note 158, at 54-55 (noting that military analysts always accompanied reporters, escorted pool members to preselected locations, detained those who strayed from authorized locations, retained a right to censor reporting, denied interviews to critical reporters, and "assured that reporters would hear nothing from military personnel who questioned official versions of events"). There was a "prepublication review, in which members of the armed services screened news stories before publication" and "[t]he
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military operations for the Gulf War “began with a decision by the Administration’s most senior officials, including President [George H.W.] Bush, to manage the information flow in a way that supported the operation’s political goals and avoided the perceived mistakes in Vietnam.”¹⁷⁴ General Norman Schwarzkopf and then-Secretary of Defense Dick Cheney possessed a near monopoly power on war information, and implemented periodic news blackouts.¹⁷⁵ John MacArthur, whose book chronicles the media censorship during the Gulf War, explains that the U.S. corporate media organizations identified the system of information control and “made polite requests, held informal meetings, and sent respectful letters, but they voiced no strong objection.”¹⁷⁶ The media anecdotally and informally complained, but officially objected by appealing only five of 820 censored reports of sensitive information.¹⁷⁷ The Center for Constitutional Rights and smaller media organizations sued the Pentagon for the “severity of the censorship,” but no media conglomerates joined in the court action, and the case was dismissed.¹⁷⁸

military instituted a system of press pools that allowed it to control both where reporters [traveled] and to whom reporters spoke.” Jacobs, *supra* note 161, at 677. See also John E. Smith, Note, *Front the Front Lines to the Front Page: Media Access to War in the Persian Gulf and Beyond*, 26 COLUM J.L. & SOC. PROBS. 291, 291–92, 301–04 (1993) (noting the extensive and multifaceted approach of controlled media coverage). Some journalists who strayed outside the pool were arrested and those who wrote favorable stories were rewarded. Jacobs, *supra* note 161, at 677, 690–91. Journalists acknowledged the censorship. See *supra* notes 157–160.

¹⁷⁴ MACARTHUR, *supra* note 32, at 7.

¹⁷⁵ Anderson, *supra* note 158, at 50.

¹⁷⁶ MACARTHUR, *supra* note 32, at 8.

¹⁷⁷ Jacobs, *supra* note 161, at 687.

¹⁷⁸ *Nation Magazine v. U.S. Dep’t of Def.*, 762 F. Supp. 1558, 1561–62 (S.D.N.Y. 1991); MACARTHUR, *supra* note 32, at xvi, 35; Sinai, *supra* note 156, at 194–96 (“[I]n all attempts, the plaintiffs’ claims were dismissed either because the controversy was moot, or because the court was reluctant to adjudicate claims with national security implications”); *Unseen Pictures, Untold Stories: How the U.S. Press Has Sanitized the War in Iraq*, DEMOCRACY NOW! (May 24, 2005), http://www.democracynow.org/2005/5/24/unseen_pictures_untold_stories_how_the (“Pacifica, along with independent publications, sued the Pentagon over the press restrictions during the Gulf War. We couldn’t get the major newspapers to join us.”).

Perhaps objection to the embed system was perceived as futile because the Supreme Court has upheld the press's right to report on the classified military operations of a war on only one occasion—in 1971 with the publication of the Pentagon Papers.¹⁷⁹ Other challenges in federal court have failed,¹⁸⁰ ostensibly because there is enhanced government discretion under conditions of military secrecy during war, and because the media has neither an elevated First Amendment right to access beyond public access to government information,¹⁸¹ nor a right to accompany the military into battle.¹⁸² Embed participation was viewed as a privilege, rather than a right, and embeds could have been dismissed for failing to comply with the rules.¹⁸³ Professor Hannibal Travis explained: “Reporters venturing outside the escort system were actively pursued and arrested, spending most of their time on evasion, not reporting.”¹⁸⁴ Consequently, one interpretation is that without First Amendment rights, the media may be able to waive full access, and granted an alternative and perhaps greater, access to government information by participating in the embed program than it could otherwise legally attain.¹⁸⁵ This is logical; however, journalist access interests are generally premised on professional reporting obligations to the public.¹⁸⁶ Waiving into a system to obtain heightened

¹⁷⁹ Anderson, *supra* note 158, at 50; Bejesky, *supra* note 46, at 49–55 (stating that wartime reporting should be distinguished from the right to report news that is sourced from classified information outside of war and when there are no potential Espionage Act violations, in which case there does seem to be a right to report).

¹⁸⁰ *Flynt v. Rumsfeld*, 180 F. Supp. 2d 174, 177 (D.D.C. 2003), *rev'd*, 355 F.3d 697 (D.C. Cir. 2004); *JB Pictures, Inc. v. U.S. Dep't of Def.*, 86 F.3d 236, 242 (D.C. Cir. 1996); *Nation Magazine*, 762 F. Supp. at 1575.

¹⁸¹ *Pell v. Procunier*, 417 U.S. 817, 834 (1974); *Branzburg v. Hayes*, 408 U.S. 665, 684 (1972).

¹⁸² *Flynt*, 355 F.3d at 702–05 (holding that there is no “right to travel *with* military units into combat . . . essentially what is currently known as ‘embedding’”), *cert. denied*, 125 S. Ct. 313 (2004); Sinai, *supra* note 156, at 197–98.

¹⁸³ U.S. DEP'T OF DEF., *supra* note 157, at paras. 3.A, 3.A1, 3.C, 3.M, 4; Anderson, *supra* note 158, at 85, 94 (nothing that there was no per se “right to access,” and the Pentagon set the rules and standards and considered access “an act of grace”).

¹⁸⁴ Travis, *supra* note 115, at 60.

¹⁸⁵ See William A. Wilcox, Jr., *Security Review of Media Reports on Military Operations: A Response to Professor Lee*, 26 HARV. J.L. PUB. POL'Y 355, 361 (2003).

¹⁸⁶ Randall D. Eliason, *Leakers, Bloggers, and Fourth Estate Inmates: The Misguided Pursuit of a Reporter's Privilege*, 24 CARDOZO ARTS & ENT. L.J. 385, 444 (2006) (noting
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access on behalf of Americans with structured conditions that can involve a danger of offering distorted portrayals may not be necessarily be preferable to no access. Nonetheless, this is precisely what happened. In 1992, the American Society of Newspaper Editors and cable, broadcast, and television executives accepted the Pentagon's offer to permit access to report on future military conflicts so long as the media and print organizations accepted the Pentagon's regulations.¹⁸⁷ The head of the Reporters Committee for Freedom of the Press maintained that in accepting these terms, the media was "writing [its] own death warrant."¹⁸⁸

B. Reports of WMDs

With embedded reporters accompanying the military, a tone being stirred by patriotic emotion and inspiring theme music, real-time images being relayed to networks in the United States, and independent military analysts providing commentary about operations from within network studios, everything seemed open for the public.¹⁸⁹ Also, the original reason for attack remained during this invasion stage. Four days into the war, Secretary of Defense Rumsfeld remarked on *Face the Nation* about the lingering danger of a devastating WMD attack: "[W]e've seen intelligence reports over months, over many months, that they have chemical and biological weapons, and that they have dispersed them, and that they are weaponized, and that, in one case at least, that the command in control arrangements have been established."¹⁹⁰ Intelligence also indicated "that orders have been issued" for commanders to use those weapons.¹⁹¹ Even with high-tech surveillance capabilities that might adequately forewarn,¹⁹²

that "institutions do not have civil rights"); Bejesky, *supra* note 113, at 343–47, 363–70, 378–81.

¹⁸⁷ Travis, *supra* note 115, at 60.

¹⁸⁸ *Id.* (internal quotation marks omitted).

¹⁸⁹ See *supra* Parts II.B, III.A.

¹⁹⁰ *Face the Nation: Secretary Rumsfeld Interview* (CBS television broadcast Mar. 22, 2003), transcript available at <http://www.defense.gov/transcripts/transcript.aspx?transcriptid=2098>.

¹⁹¹ *Id.* See also Bejesky, *supra* note 13, at 338 n.213 (stating that Bush administration officials repeatedly made the claim to the public).

¹⁹² ARNOVE, *supra* note 143, at 11 ("[T]he United States had for years flown planes and drones over Iraq, surveying every inch of its territory . . ."); Dr. Hans Blix, *An Update on Inspections to the Security Council*, UNITED NATIONS (Jan. 27, 2003), <http://www.un.org/Depts/unmovic/Bx27.htm> (noting that three months of pre-war inspections utilized state of
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there was the danger of surprise.¹⁹³ The U.S. military needed to discover and disarm the weapons; this mission unfolded with U.S. military officials escorting embedded journalists to locations to report alleged chemical and BW discoveries.¹⁹⁴

News agencies broke WMD discovery stories, while other outlets repeated the finds. On March 23, 2003, four days into the war, several networks reported that unidentified “U.S. officials . . . believe that they have captured a chemical weapons plant [in Nasarijah] and perhaps more important, the commanding general of that facility. One U.S. official said he is a potential “gold mine” about the weapons Saddam Hussein says he doesn’t have.”¹⁹⁵ *NBC Nightly News* reported: “This huge chemical complex . . . was constructed of sand-casted walls, in other words, meant to camouflage its appearance to blend in with the desert. Once inside, the soldiers found huge amounts of chemicals”¹⁹⁶ Days later the British military purportedly found protective chemical suits, training materials, and the nerve gas antidote atropine, near Basra, and the U.S. military spokesperson announced that chemical protection suits and decontamination equipment were found near Nasiriyah.¹⁹⁷ These discoveries were later described as items used for “defensive purposes” and dropped.¹⁹⁸

the art monitoring and equipment and high-altitude U-2 surveillance aircraft). Pentagon officials remarked that a large number of Predator Drones were removed from Afghanistan in early 2002 and were being used in surveillance missions over Iraq. Barton Gellman & Dafna Linzer, *Afghanistan, Iraq: Two Wars Collide*, WASH. POST, Oct. 22, 2004, at A1 available at http://www.washingtonpost.com/wp-dyn/articles/A52673-2004Oct21.html?nav=rss_politics/elections/2004 (noting that “high-tech surveillance equipment and other assets . . . surge[d] toward Iraq through 2002 and early 2003,” including “Predator and Global Hawk drone aircraft”).

¹⁹³ See Gellman & Linzer, *supra* note 192.

¹⁹⁴ See *Face the Nation*, *supra* note 190; *supra* Part III.A.

¹⁹⁵ *Iraq and the Media: A Critical Timeline*, FAIRNESS & ACCURACY IN REPORTING (Mar. 19, 2007), http://www.fair.org/index.php?page=3062&printer_friendly=1 [hereinafter FAIR].

¹⁹⁶ *Id.* (“They apparently found no chemical weapons themselves, and now military officials here at the Pentagon say they have yet to determine exactly what these chemicals are or how they could have been used in weapons.”).

¹⁹⁷ *Weapons of Mass Destruction*, SHADES OF BLACK (Aug. 1, 2003), <http://www.shadesofblack.co.uk/weapons-of-mass-destruction>.

¹⁹⁸ *Id.*

April, 2003 was also a busy month of false-positive reports. On April 6, fourteen barrels of chemicals were discovered; military officials believed the barrels contained the nerve agents sarin and tabun, but later tests confirmed that the barrels contained pesticides.¹⁹⁹ On April 7, NPR announced that an army unit discovered “20 BM-21 medium-range rockets with warheads containing sarin nerve and mustard gas” and U.S. intelligence analyses showed the chemicals were “not just trace elements.”²⁰⁰ On April 8, CNN broadcasted video of soldiers in gas masks using detection equipment on barrels at a military facility near Karbala.²⁰¹ Anonymous Pentagon sources stated that “preliminary field tests on substances found at the site suggest[ed that] they contain[ed] several banned chemical weapons, including deadly nerve agents and blister agents,” and an embedded journalist reported that “he and several soldiers were decontaminated after some of the soldiers felt ill while searching the compound.”²⁰² On April 10, FOX announced: “U.S. Marines may have found weapons-grade plutonium in a massive underground facility discovered beneath Iraq’s Al Tuwaitha nuclear complex.”²⁰³ U.S. defense officials confirmed that “preliminary tests conducted on the material have indicated that it may be weapons-grade plutonium.”²⁰⁴ The story was later debunked.²⁰⁵ On April 26, *ABC World News Tonight* provided an exclusive report:

¹⁹⁹ Blair: *We Will Find Iraq’s Weapons*, SKY NEWS HD (Apr. 8, 2003, 7:50 PM), <http://news.sky.com/home/article/12283299>.

²⁰⁰ FAIR, *supra* note 195; Derek Rose, *Poison Missiles Are Found by G.i.s.*, NYDAILYNEWS.COM (Apr. 8, 2003), http://articles.nydailynews.com/2003-04-08/news/18229593_1_mustard-gas-sarin-nerve-agents.

²⁰¹ *Tests Show Barrels Contain Chemical Agents: US Officials*, THE SYDNEY MORNING HERALD (Apr. 8, 2003), <http://www.smh.com.au/articles/2003/04/08/1049567645646.html>.

²⁰² *Preliminary Tests Show Chemical Weapons at Iraqi Site*, FOX NEWS (Apr. 7, 2003), <http://www.foxnews.com/story/0,2933,83449,00.html>.

²⁰³ *Weapons-Grade Plutonium Possibly Found at Iraqi Nuke Complex*, FOX NEWS (Apr. 11, 2003), <http://www.foxnews.com/story/0,2933,83821,00.html>. Chief Warrant Officer Darrin Flick remarked that “the rad detector went off the charts” with the “many drums, of highly radioactive material.” *Id.* “Former Iraqi scientist Gazi George told Fox News Friday that the material ‘definitely’ could have been planned for use in nuclear weapons or dirty bombs.” *Id.*

²⁰⁴ *Id.*

²⁰⁵ FAIR, *supra* note 195.

‘U.S. troops discover chemical agents, missiles and what could be a mobile laboratory in Iraq.’ . . . Army soldiers have found ‘14 55-gallon drums, at least a dozen missiles and 150 gas masks’ testing positive for chemical weapons, including a nerve agent and a blistering agent. . . . an Army lieutenant ‘says the tests have an accuracy of 98 percent.’²⁰⁶

Secretary of Defense Rumsfeld affirmed that announcements had to be treated with caution because “[a]lmost all first reports turn out to be wrong.”²⁰⁷ The Secretary of Defense could have curtailed premature announcements by requiring verification prior to reporting.²⁰⁸ After all, military officials led embeds to discovery locations since journalists could be dismissed for straying from their assigned military units, military officials were sourcing discovery news, and the military approved embed reporting.²⁰⁹ Nevertheless, none of the discovery stories were verified²¹⁰ and sentiments of desperation sounded when CBS announced a “Possible Nuke Program Find in Iraq.”²¹¹ An Iraqi scientist named Mahdi Shukur Obeidi provided “parts and documents from Saddam Hussein’s nuclear

²⁰⁶ *Id.* On April 27, 2003, *ABC World News Sunday* reported: “‘For the second day in a row, some of the preliminary tests have come back positive for chemical agents.’” *Id.* On April 28, 2003, the *New York Times* discounted announcements and stated “‘that there are no chemical weapons at a site where American troops said they had found chemical agents and mobile labs.’” *Id.*

²⁰⁷ Donald Macintyre, *Missile Cache May Be Regime’s Elusive Chemical Weapons, Claim US Sources*, *THE INDEPENDENT* (Apr. 8, 2003), <http://www.independent.co.uk/news/world/middle-east/missile-cache-may-be-regimes-elusive-chemical-weapons-claim-us-sources-593792.html>.

²⁰⁸ See U.S. DEP’T OF DEF., *supra* note 157, at para. 4 (requiring media to adhere to established ground rules to participate in embed).

²⁰⁹ See *supra* Part III.A.

²¹⁰ See *infra* Part III.D. On May 30, 2003, Marine Lt. Gen. James Conway explained: “We’ve been to virtually every ammo supply point . . . but they’re simply not there.” Robert Sheer, *How Their Big Lie Came to Be*, *L.A. TIMES* (June 3, 2003), <http://articles.latimes.com/2003/jun/03/opinion/oe-scheer3>. Some media releases evolved into discovering materials that “potentially could be used to produce weapons.” NOAM CHOMSKY, *HEGEMONY OR SURVIVAL: AMERICA’S QUEST FOR GLOBAL DOMINANCE* 13 (2003). Fertilizers and everyday substances can be dangerous, but they are not WMDs.

²¹¹ *Possible Nuke Program Find in Iraq*, CBS News (June 27, 2003), <http://www.cbsnews.com/stories/2003/06/27/iraq/main560695.shtml>.

weapons program from over 12 years ago, a U.S. intelligence official said,” which Obeidi “buried in his garden at his Baghdad home.”²¹²

Additionally, concomitant with the succession of breaking stories, Bush Administration officials continued to reiterate that their pre-invasion allegations of WMDs would be confirmed.²¹³ Two days into the war, Press Secretary Ari Fleischer provided an adequate representation of the sentiment at the time when he stated:

[T]here is no question that we have evidence and information that Iraq has [WMDs], biological and chemical particularly. This was the reason that the President felt so strongly that we needed to take military action to disarm Saddam Hussein, since he would not do it himself. . . . [A]ll this will be made clear in the course of the operation, for whatever duration it takes.²¹⁴

²¹² *Id.* Obeidi later stated that he never made allegations about the Iraqi government intending to have a nuclear weapons program since 1991 and that CIA interrogators crafted the story. Barton Gellman, *Search in Iraq Fails to Find Nuclear Threat*, WASH. POST, Oct. 26, 2003, at A1, available at <http://www.washingtonpost.com/ac2/wp-dyn/A17707-2003Oct25>.

²¹³ *Weapons of Mass Destruction: Who Said What When*, COUNTERPUNCH (May 29, 2003), <http://www.counterpunch.org/wmd05292003.html> [hereinafter *Weapons of Mass Destruction*]. On April 10, 2003, Ari Fleischer, summarized: “I think you have always heard, and will continue to hear from officials, a measure of high confidence that, indeed, the [WMDs] will be found.” *Id.* See also *A History of Lies: WMD, Who Said What and When*, INFORMATION CLEARING HOUSE, <http://www.informationclearinghouse.info/article4882.htm> (last visited Apr. 9, 2012) (containing a sample of twenty-four statements by officials on and after March 21, 2003).

²¹⁴ *Press Briefing by Ari Fleischer*, WHITE HOUSE (Mar. 21, 2003, 2:31 PM), <http://georgewbush-whitehouse.archives.gov/news/releases/2003/03/20030321-9.html>. See also *President Discusses Beginning of Operation Iraqi Freedom*, WHITE HOUSE (Mar. 22, 2003), <http://georgewbush-whitehouse.archives.gov/news/releases/2003/03/20030322.html> (“[O]ur mission is clear, to disarm Iraq of [WMDs], to end Saddam Hussein’s support for terrorism, and to free the Iraqi people.”); Flashpoints USA with Bryan Gumbel and Gwen Ifill, *Post-9/11 Timeline*, PBS, http://www.pbs.org/flashpointusa/20040629/infocus/topic_01/timeline_jan2003.html (last visited Apr. 9, 2012) (General Tommy Franks remarking: “There is no doubt that the regime of Saddam Hussein possesses [WMDs]. As this operation continues, those weapons will be identified, found, along with the people who have produced them and who guard them.”); Don Van Natta Jr. & David Johnston, *U.S.*
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Despite assurances that there was detailed and specific evidence of WMDs, within days of the invasion, officials provided widely varying accounts on the geographical locations and number of sites where WMDs could have been stored, and eventually seemed puzzled over what the military needed to un-shroud. When George Stephanopoulos thought it was curious that WMDs had not been discovered, Secretary of Defense Rumsfeld responded: “We know where they are. They are in the area around Tikrit and Baghdad and east, west, south and north somewhat.”²¹⁵ Officials stated that there were between three dozen and three thousand possible locations to search.²¹⁶ With no conclusive discoveries, rhetoric eventually evolved into a need to find evidence of programs that Iraq either possessed at some point or conjecturally wanted.²¹⁷ When asked about the

Search for Illegal Arms Narrowed to About 36 Sites, N.Y. TIMES, Apr. 14, 2003, at B4, available at <http://www.nytimes.com/2003/04/14/world/nation-war-banned-weapons-us-search-for-illegal-arms-narrowed-about-36-sites.html?pagewanted=all&src=pm>. Fleischer remarked that WMDs “[are] what this war was about and is about. And we have high confidence it will be found.” *Id.*

²¹⁵ *This Week with George Stephanopoulos* (ABC television broadcast Mar. 30, 2003), transcript available at <http://www.defense.gov/transcripts/transcript.aspx?transcriptid=2185>. General Tommy Franks was asked if Iraqis were “leading you toward [WMDs],” and his response was “absolutely.” *Transcript: Gen. Tommy Franks on Fox News Sunday*, FOX NEWS (Apr. 13, 2003), <http://www.foxnews.com/story/0,2933,84055,00.html>.

²¹⁶ Victoria Clarke stated that the administration knows of “a number of sites,” but she refused to give an estimate when asked whether there were “More than 10? Less than a hundred?” Mike Allen & Dana Milbank, *Question of the Day: Dogs Administration Officials: Where Are Iraq’s Weapons of Mass Destruction?*, WASH. POST, Mar. 23, 2003, at A27, available at <http://www.washingtonpost.com/ac2/wp-dyn?pagename=article&node=&contentId=A12217-2003Mar22>. General Tommy Franks had “absolute confidence” that WMDs would be found “in one of the 2,000 or 3,000 sites we already know about” or in another location. *Transcript: Gen. Tommy Franks on Fox News Sunday*, *supra* note 215; Van Natta & Johnston, *supra* note 214 (noting three dozen suspect locations).

²¹⁷ On May 4, 2003, Powell stated: “I am confident that we will *find evidence* that makes it clear he had [WMDs].” *Weapons of Mass Destruction*, *supra* note 213 (emphasis added). On May 6, 2003, Bush stated: “I’m not surprised if we begin to uncover the weapons program of Saddam Hussein—because he had a weapons program.” *Id.* Rumsfeld was asked at a Pentagon press conference about the way he “painted a picture of extensive stocks” of WMDs, and he responded that he never said “extensive.” Eric Rosenberg, *Rumsfeld Retreats, Disclaims Earlier Rhetoric*, HEARST NEWSPAPERS, Nov. 9, 2003, available at <http://www.ocala.com/apps/pbcs.dll/article?p=all&tc=pgall&AID=%>
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allegation that Iraq would provide these weapons to al-Qaeda, Bush remarked: “[W]e’ve been there for 90 days since the cessation of major military operations. . . . [I]t’s going to take time for us to gather the evidence and analyze the mounds of evidence, literally, the miles of documents that we have uncovered.”²¹⁸ Rather than discovering weapons to confirm a breach of Security Council resolutions for possessing prohibited weapons or proving a legitimate need to use self-defense due to imminent danger from weapons able to be deployed within minutes,²¹⁹ paper trails indicating nefarious intentions and alleged links to al-Qaeda were apparently the WMD.²²⁰

C. “*CURVE BALL*” and Mobile Biological Weapons Labs

There was one abiding discovery. Nearly two months into the invasion, *NBC Nightly News* reported that the discovery of “[a] mobile lab capable of manufacturing anthrax or botulism from the back of a truck, with equipment manufactured as late as 2003” “may [have been] the most significant WMD finding[] of the war.”²²¹ Days later, the *New York Times* reported: “United States intelligence agencies have concluded that two mysterious trailers found in Iraq were mobile units to produce germs for weapons, but they have found neither biological agents nor evidence that the equipment was used to make such arms, according to senior [A]dministration officials. . . . ‘What we know is that it is equipped to do that.’”²²² A “senior official” stated that “[t]he experts who have crawled

2F20031109%2FNEWS%2F211090375%2F1003. Rumsfeld testified on two consecutive days to Congress in September 2002 that Iraq “has at this moment stockpiles of chemical and biological weapons” and he made the claim thereafter. *Id.*

²¹⁸ *President Bush Discusses Top Priorities for the U.S.*, WHITE HOUSE (July 30, 2003, 10:33 AM), <http://georgewbush-whitehouse.archives.gov/news/releases/2003/07/20030730-1.html>.

²¹⁹ Bejesky, *supra* note 13, at 311–41.

²²⁰ *Id.* at 316–17.

²²¹ FAIR, *supra* note 195. On May 11, 2003, NBC introduced the discovery: “There is new evidence tonight that Saddam Hussein’s regime was capable of building [WMDs]. . . [M]ilitary sources contend [the discovery] is very close to that elusive smoking gun.” *Id.*

²²² Judith Miller & William J. Broad, *U.S. Analysts Link Iraq Labs to Germ Arms*, N.Y. TIMES, May 21, 2003, at A1, available at <http://www.nytimes.com/2003/05/21/world/aftereffects-germ-weapons-us-analysts-link-iraq-labs-to-germ-arms.html>.

over this again and again can come up with no other plausible legitimate use”²²³

Because the trailers could have been the mysterious truck depicted in cartoon sketches by Secretary of State Colin Powell at the U.N.,²²⁴ Bush, while in Poland, proudly retorted critics who maintained that there was no justification for the war, by announcing that “[w]e found the [WMDs].”²²⁵ In fact, referencing the trailer discovery became the persistent response from top Bush Administration officials to diffuse criticism over WMD allegations; they persistently maintained that one of the pre-invasion WMD allegations was accurate.²²⁶ Alternatively, British investigators confirmed

²²³ *Id.*

²²⁴ Former U.N. Weapons Inspector Scott Ritter reminded that Powell “didn’t put up photographs [of mobile labs]. He put up artist renditions of these facilities. Why? Because we have no proof they exist.” UNCOVERED: THE WHOLE TRUTH ABOUT THE IRAQ WAR (Cinema Libre Studio 2003). Powell remarked: “They were cartoons, artist’s renderings, because we had never seen one of these things.” *Secretary of State Powell Discusses President’s Trip to Africa*, WHITE HOUSE (July 10, 2003), <http://georgewbush-whitehouse.archives.gov/news/releases/2003/07/20030710-5.html>.

²²⁵ *Interview of the President by TVP, Poland*, WHITE HOUSE (May 29, 2003), <http://georgewbush-whitehouse.archives.gov/g8/interview5.html>.

²²⁶ *CNN’s Ensor Offered Defense of Bush’s May 2003 Bioweapons Claims that Not Even the White House Has Asserted*, MEDIA MATTERS (Apr. 13, 2006, 3:59 PM), <http://mediamatters.org/research/200604130009> (listing nine statements by Rice, Powell, Bush, and Cheney); *Secretary of State Powell Discusses President’s Trip to Africa*, *supra* note 224. Powell remarked: “And I would put before you Exhibit A, the mobile biological labs that we have found.” *Transcript: Colin Powell Talks WMD on Fox News Sunday*, FOX NEWS (June 9, 2003), <http://www.foxnews.com/story/0,2933,88863,00.html>. Rumsfeld remarked: “mobile biological laboratories . . . are now in our custody and they seem to look very much like precisely what Colin Powell said would exist.” U.S. DEP’T OF DEF., *Secretary Rumsfeld Interview with WNYM-TV* (May 27, 2003), <http://www.defense.gov/transcripts/transcript.aspx?transcriptid=2670>. Rice remarked: “We have found, in Iraq, biological weapons laboratories that look precisely like what Secretary Powell described in his Feb. 5th report to the [U.N.]” Greg Miller, *U.S. Offers Details on Iraqi Rigs*, L.A. TIMES, May 29, 2003, at A8, <http://articles.latimes.com/2003/may/29/world/fg-cia29>. Bush retorted: “You remember when Colin Powell stood up in front of the world, and he said, Iraq has got laboratories, mobile labs to build biological weapons.” *Interview of the President by TVP, Poland*, *supra* note 225. Cheney remarked: “We had intelligence reporting before the war that there were at least seven of these mobile labs . . . [w]e’ve, since the war, found two of them.” Meet the Press, *Transcript for Sept.* (continued)

that they were not BW mobile labs, and other experts disputed the claim.²²⁷ The Iraq Survey Group (ISG), a team tasked with searching for WMDs in Iraq for eighteen months after the invasion, inspected the trailers shortly after they were discovered and purportedly concluded that they were not BW labs.²²⁸ However, that conclusion was allegedly silenced.²²⁹ The

14, MSNBC (Sept. 14, 2003), <http://msnbc.msn.com/id/3080244/>. Cheney stated: “We’ve found a couple of semi-trailers at this point. . . . I would deem that conclusive evidence, if you will, that he did in fact have programs for [WMDs].” Greg Miller, *Cheney is Adamant on Iraq ‘Evidence’*, L.A. TIMES, Jan. 23, 2004, at A1, available at <http://articles.latimes.com/2004/jan/23/world/fg-cheney23>.

²²⁷ SEN. SELECT COMM. ON INTELLIGENCE, 109TH CONG., POSTWAR FINDINGS ABOUT IRAQ’S WMD PROGRAMS AND LINKS TO TERRORISM AND HOW THEY COMPARE WITH PREWAR ASSESSMENTS 36 (2006), available at <http://intelligence.senate.gov/phaseiiaccuracy.pdf>; PETER IRONS, WAR POWERS 238 (2005); *Trailers Not for WMD but for Weather Balloons*, SYDNEY MORNING HERALD (June 24, 2003), <http://www.smh.com.au/articles/2003/06/23/1056220546779.html> (noting that the U.S. military has the same type of equipment on a fleet of Humvees). A British BW expert explained: “You could not even use them for making biological weapons.” Peter Beaumont, Antony Barnett & Gaby Hinsliff, *Iraqi Mobile Labs Nothing to Do with Germ Warfare, Report Finds*, THE GUARDIAN (June 15, 2003), <http://www.guardian.co.uk/world/2003/jun/15/iraq>; Peter Beaumont & Antony Barnett, *Blow to Blair over ‘Mobile Labs,’* THE GUARDIAN (June 8, 2003), <http://www.guardian.co.uk/world/2003/jun/08/iraq.foreignpolicy> (“[C]hemical weapons experts, engineers, chemists and military systems experts . . . say the layout and equipment found on the trailers is entirely inconsistent with the vehicles being mobile labs.”); Judith Miller & William J. Broad, *Some Analysts of Iraq Trailers Reject Germ Use*, N.Y. TIMES, June 7, 2003, at A1, available at <http://www.nytimes.com/2003/06/07/world/some-analysts-of-iraq-trailers-reject-germ-use.html> (citing experts who explained why the trailers could not have had such a BW purpose).

²²⁸ To congressional committees, ISG head David Kay reported that “technical limitations would prevent any of these processes [BW production] from being ideally suited to these trailers.” See David Kay, Iraq Survey Group, Statement on the Interim Progress Report on the Activities of the Iraq Survey Group before the House Permanent Select Committee on Intelligence, the House Committee on Appropriations, Subcommittee on Defense, and the Senate Select Committee on Intelligence (Oct. 2, 2003), available at https://www.cia.gov/news-information/speeches-testimony/2003/david_kay_10022003.html.

Several weeks after Kay provided his update to Congress, he “flew back to CIA headquarters” and “told Tenet that Curveball was a liar and he was convinced Iraq had no mobile labs or other illicit weapons.” Bob Drogin & John Goetz, *How the U.S. Fell Under the Spell of ‘Curve Ball,’* L.A. TIMES, Nov. 20, 2005, at (continued)

ISG's final report, published over a year later, concluded: "In spite of exhaustive investigation, ISG found no evidence that Iraq possessed, or was developing BW agent production systems mounted on road vehicles or railway wagons."²³⁰ Three years later and long after the issue was germane, the *Washington Post* discussed more detail surrounding the discovery of the "two small trailers":

On May 29, 2003 . . . [Bush] declared "We have found the [WMDs]."

The claim, repeated by top [A]dministration officials for months afterward, was hailed at the time as a vindication of the decision to go to war. But even as Bush spoke, U.S. intelligence officials possessed powerful evidence that it was not true.

A secret fact-finding mission to Iraq—not made public until now—had already concluded that the trailers had nothing to do with biological weapons. Leaders of the Pentagon-sponsored mission transmitted their unanimous findings to Washington in a field report on May 27, 2003, two days before the president's statement.

The three-page field report and a 122-page final report three weeks later were stamped "secret" and shelved. Meanwhile, for nearly a year, [A]dministration and

A1, available at <http://www.latimes.com/news/nationworld/iraq/complete/la-na-curveball20nov20,0,5362808,full.story>. British officer Hamish Killip explained: "We were in hysterics over this" trailer. *Id.*

²²⁹ Rod Barton, a highly-regarded Australian ISG officer, claimed that ISG findings were silenced and that he felt "complicit in deceit." *Ex-Inspector: Politics Quashed Facts*, CBS NEWS (May 13, 2006), <http://www.cbsnews.com/stories/2006/05/13/iraq/main1616509.shtml>. A "CIA officer told him it was not 'politically not possible' to report that the White House claims were untrue." *Id.* If this is true, it would explain Kay's ostensible change in position. See Kay, *supra* note 228.

²³⁰ 1 SPECIAL ADVISOR TO THE DCI, COMPREHENSIVE REPORT ON IRAQ'S WMD, Biological 3 (2004), available at https://www.cia.gov/library/reports/general-reports-1/iraq_wmd_2004/Comp_Report_Key_Findings.pdf.

intelligence officials continued to publicly assert that the trailers were weapons factories.²³¹

The Defense Intelligence Agency (DIA) sponsored a 122-page report that itemized why the trailers were not BW labs,²³² but the White House stamped “Top Secret” on this document.²³³ Officials publicly released a six-page document from the Central Intelligence Agency (CIA) and DIA, dated one day after the 122-page, non-incriminating DIA-sponsored report, and designated it a “white paper.”²³⁴ White papers are generally so named to provide a stronger connotation of officialdom as authoritative “statements of [g]overnment policy.”²³⁵ This CIA/DIA white paper concluded that the trailers were “strong[] evidence . . . that Iraq was hiding a biological warfare program.”²³⁶ More disturbing is that top Bush Administration officials kept repeating this false claim as a response to critics after they had chosen to classify the exculpatory document and declassify the incriminating report.²³⁷ The SSCI investigation traced the original claim to the one “principle” source, code-named “CURVE BALL.”²³⁸ The white paper affirmed that “[t]he source recognized pictures

²³¹ Joby Warrick, *Lacking Biolabs, Trailers Carried Case for War*, WASH. POST, Apr. 12, 2006, at A1, available at http://www.washingtonpost.com/wp-dyn/content/article/2006/04/11/AR2006041101888_pf.html.

²³² *Id.*

²³³ *Id.*

²³⁴ CENTRAL INTELLIGENCE AGENCY & DEFENSE INTELLIGENCE AGENCY, IRAQI MOBILE BIOLOGICAL WARFARE AGENT PRODUCTION PLANTS (2003), available at https://www.cia.gov/library/reports/general-reports-1/iraqi_mobile_plants/Iraqi%20Bio%20Warfare.pdf [hereinafter CIA/DIA BIOLOGICAL].

²³⁵ *About Official Documents*, THE NAT'L ARCHIVES, <http://www.official-documents.gov.uk/menu/about.htm> (last visited Apr. 10, 2012).

²³⁶ CIA/DIA BIOLOGICAL, *supra* note 234, at 1–2 (noting that “[t]he design, equipment, and layout of the trailer found in late April is strikingly similar to descriptions provided by . . . a chemical engineer that managed one of the mobile plants” and who also provided a “majority of our information on Iraq’s mobile program”). Pages one to three involve prewar assessments about the trailer and how the source described how such equipment was used, making reference to the source’s descriptions twelve times as the basis for its own conclusions. *Id.* at 1–3. Pages four and five explain why legitimate uses of the equipment are unlikely, and page six is blank. *Id.* at 4–6.

²³⁷ *See supra* notes 225–26, 231–34.

²³⁸ SEN. SELECT COMM. ON INTELLIGENCE, 108TH CONG., REPORT ON THE U.S. INTELLIGENCE COMMUNITY’S PREWAR ASSESSMENTS ON IRAQ 23, 26, 34 (2004) (noting that
(continued)

of this trailer, among photographs of unrelated equipment, as a mobile BW production plant similar to the one that he managed.”²³⁹

While CURVE BALL’s identity remains anonymous,²⁴⁰ detail about his apparent background later emerged. CURVE BALL purportedly was a native Iraqi engineer in his late twenties, who traveled to Germany in November 1999 and requested political asylum because he embezzled money from the government and feared returning to Iraq.²⁴¹ After being transferred to a refugee center, CURVE BALL informed German intelligence officers that he designed laboratory equipment for trucks that could function as BW laboratories, and he provided the names of seven sites where laboratories might be hidden.²⁴² German intelligence agents apparently told U.S. officials that they “could not verify the things he

CURVE BALL was “the key source of the prewar mobile trailer reporting,” but the “Intelligence Community did not have direct access to him”). A former senior CIA official claimed: “If they had not had Curve Ball they would have probably found something else. ‘Cause there was a great determination to do it. But going to war in Iraq, under the circumstances we did, Curve Ball was the absolutely essential case.” *Faulty Intel Source “Curve Ball” Revealed*, CBS NEWS (Nov. 4, 2007, 3:57 PM), http://www.cbsnews.com/2102-18560_162-3440577.html?tag=contentMain;contentBody.

²³⁹ CIA/DIA BIOLOGICAL, *supra* note 234, at 2.

²⁴⁰ “60 Minutes spent two years, and traveled to nine countries, trying to solve the mystery” of CURVE BALL but it still had no interview or even current pictures. *Faulty Intel Source “Curve Ball” Revealed*, *supra* note 238. The segment identified a man named “Rafid Ahmed Alwan,” showed some images, and traced a biography that involved a 1993 Baghdad wedding, a theft of electronics equipment from a Baghdad television production company, a home cosmetics business, a November 1999 asylum application in Germany, and shifting claims about Iraqi facilities. *Id.*

²⁴¹ Drogin & Goetz, *supra* note 228.

²⁴² SEN. SELECT COMM. ON INTELLIGENCE, *supra* note 238, at 144–45; Drogin & Goetz, *supra* note 228. *60 Minutes* explains how on February 5, 2003, Secretary Powell showed drawings of mobile trucks and made a declaration:

On Feb. 5, 2003 Powell told the world that Saddam Hussein had mobile biological weapons. The source: Curve Ball. “The source was an eyewitness, an Iraqi chemical engineer, who supervised one of these facilities. He actually was present during biological agent production runs. He was also at the site when an accident occurred in 1998. Twelve technicians died from exposure to biological agents,” Powell said.

Faulty Intel Source “Curve Ball” Revealed, *supra* note 238.

said,²⁴³ and some officials went further and called him “psychologically [un]stable,” unreliable,²⁴⁴ and not credible.²⁴⁵ The American Intelligence Community (IC) did not have access to CURVE BALL and was unable to verify the allegations contained in German intelligence reports.²⁴⁶ Another logical weakness was that CURVE BALL left Iraq in 1999 and did not return, but three years later his allegations were being exploited by the

²⁴³ Drogin & Goetz, *supra* note 228. In December, 2002 and within days of CIA Director Tenet calling the WMDs case a “slam dunk,” Tenet wanted German intelligence “to let Curve Ball appear on television.” *Faulty Intel Source “Curve Ball” Revealed*, *supra* note 238. The head of German intelligence, Dr. August Hanning, denied Tenet’s request remarking that “attempts to verify the information have been unsuccessful.” *Id.* The CIA’s former central group chief, Margaret Henoch, explained that at a December 2002 CIA meeting, she stated: “I don’t know who this guy is. There’s no proof that he is who he is. There’s no proof that any of this ever happened . . . I just don’t think we should trust this.” *Id.*

²⁴⁴ Drogin & Goetz, *supra* note 228.

²⁴⁵ SEN. SELECT COMM. ON INTELLIGENCE, *supra* note 227, at 30–31, 36 (noting the anonymous CURVE BALL was determined to be a fabricator); Warrick, *supra* note 231 (noting that other Iraqi witnesses disputed CURVE BALL’s claims). British intelligence reports concluded that officers are “not convinced that Curveball is a wholly reliable source” because “elements of [his] behavior strike us as typical of . . . fabricators.” Drogin & Goetz, *supra* note 228; Bejesky, *supra* note 14, at 837–40. Former CIA officer Vincent Cannistraro remarked that “[t]he C.I.A. is positive” that Aras Habib, the Iraqi National Congress “intelligence chief,” “arranged for Curveball to be presented to the Germans.” Jane Mayer, *The Manipulator*, NEW YORKER (June 7, 2004), http://www.newyorker.com/archive/2004/06/07/040607fa_fact?currentPage=all. The *60 Minutes* segment noted the irony of the anonymous witness being called CURVE BALL and that “his information became the pillar of the case Colin Powell made to the [U.N.] before the war.” *Faulty Intel Source “Curve Ball” Revealed*, *supra* note 238. The expression “curve ball” means to “throw one off course or direction.” The SSCI’s investigation indicates that the IC had been referring to him as CURVE BALL well before the invasion. SEN. SELECT COMM. ON INTELLIGENCE, *supra* note 238, at 155.

²⁴⁶ The SSCI remarked that the “Defense HUMINT Service (DHS) demonstrated serious lapses in its handling of . . . CURVE BALL . . . The DHS had primary responsibility for handling the Intelligence Community’s interaction with the [redacted] debriefers that were handling CURVE BALL, but the DHS officers that were involved in CURVE BALL’s case limited themselves to a largely administrative role, translating and passing along reports [redacted].” SEN. SELECT COMM. ON INTELLIGENCE, *supra* note 238, at 23, 26.

Bush Administration as the basis of immediate threat claims.²⁴⁷ One year after the announced discovery of the trailers, the CIA acknowledged: “[I]nvestigations since the war in Iraq and debriefings of the key source indicate he lied about his access to a mobile BW production project.”²⁴⁸ The CIA and DIA then issued a joint congressional notification in June 2004, noting that CURVE BALL was assessed to have fabricated his claimed access of a mobile BW production project and that his reporting had been recalled.²⁴⁹

Because CURVE BALL fabricated his story and never had access to any BW project, the foundation of the cartoon sketches exhibited to the Security Council and the CIA white paper was vacuous.²⁵⁰ Yet, the trailers that CURVE BALL described were supposedly discovered. As Powell announced: “One element that I presented at that time, these biological vans, all I could show was a cartoon drawing of these vans, and everybody

²⁴⁷ Bejesky, *supra* note 14, at 837–40.

²⁴⁸ SEN. SELECT COMM. ON INTELLIGENCE, *supra* note 227, at 37–38.

²⁴⁹ *Id.* at 34–38. Powell stated:

One item I showed was cartoons of the mobile biological van
[W]e had never seen one of these things, but we had good sourcing on it, excellent sourcing on it . . . so we made those pictures. . . . And I think that’s a pretty good indication that we were not cooking the books.

Secretary of State Powell Discusses President’s Trip to Africa, supra note 224. Larry Wilkerson, Powell’s chief of staff, explained that the CIA “presented it in a very dynamic, dramatic, we know this is accurate, way . . . Yes, the source was very credible” *Faulty Intel Source “Curve Ball” Revealed, supra* note 238. Prior to Colin Powell’s speech, veteran CIA officer Tyler Drumheller called the claims about CURVE BALL “a whopper” by an “Iraqi defector suspected of being mentally unstable and a liar.” Joby Warrick, *Warnings on WMD ‘Fabricator’ Were Ignored, Ex-CIA Aide Says*, WASH. POST, June 25, 2006, at A1, available at http://www.washingtonpost.com/wp-dyn/content/article/2006/06/24/AR2006062401081_pf.html. He “crossed out the whole paragraph,” but “[a] few days later, the lines were back in the speech.” *Id.* The CIA eventually “acknowledged that Curveball was a con artist who drove a taxi in Iraq and spun his engineering knowledge into a fantastic but plausible tale about secret bioweapons factories on wheels.” *Id.*

²⁵⁰ Bejesky, *supra* note 14, at 838–40.

said, are the vans really there? And, voila, the vans showed up a few months later. We found them.”²⁵¹

D. Iraq Survey Group

For over a decade prior to the 2003 invasion, U.N. teams conducted inspections to ensure that Iraq was not developing prohibited weapons.²⁵² Inspections ceased in 1999, and U.N. inspectors believed that Iraq had been successfully disarmed.²⁵³ In October 2002, the IC produced the National Intelligence Estimate (NIE), which espoused new allegations about Iraq developing prohibited weapons.²⁵⁴ The U.N. inspection role ceased after the invasion, and responsibility for on-site inspections shifted to a CIA- and Pentagon-organized ISG, which consisted of approximately 1,400 American, British, and Australian arms experts.²⁵⁵

On October 2, 2003, David Kay, a CIA official and the first head of the ISG, provided a three-month update to the SSCI about potential weapons discoveries in Iraq and affirmed that further investigation was required.²⁵⁶ He explained that the team was still in the “collection and analysis mode,” that it was “far too early to reach any definitive conclusions,” and that they had “not yet found stocks of weapons.”²⁵⁷ Kay gave reasons for the possible lack of discoveries, including: investigations may have been hindered by high-level compartmentalization of prohibited programs, materials and documents could have been dispersed and destroyed, government offices might have been looted, individuals may have fled the country with materials, and Iraqis may have been afraid to talk.²⁵⁸ After these caveats, Kay made many strong statements:

We have discovered dozens of WMD-related program activities and significant amounts of equipment that Iraq

²⁵¹ CNN Late Edition with Wolf Blitzer, *Interview with Colin Powell; Roberts Discusses Search for Saddam Hussein; Lapid, Shaath Talk About Road Map*, CNN (June 8, 2003), <http://edition.cnn.com/TRANSCRIPTS/0306/08/le.00.html>.

²⁵² Bejesky, *supra* note 13, at 301–03.

²⁵³ *Id.*

²⁵⁴ Bejesky, *supra* note 14, at 815–16.

²⁵⁵ Bob Drogin, *New Hunt for Iraqi Arms Resembles Old*, L.A. TIMES (June 18, 2003), <http://articles.latimes.com/2003/jun/18/world/fg-iraqweapons18>.

²⁵⁶ Kay, *supra* note 228.

²⁵⁷ *Id.*

²⁵⁸ *Id.*

concealed from the [U.N.] during the inspections that began in late 2002 . . .

[Concealment efforts include a] clandestine network of laboratories and safehouses within the Iraqi Intelligence Service that contained equipment subject to [U.N.] monitoring and suitable for continuing CBW research . . . [r]eference strains of biological organisms concealed in a scientist's home . . . [n]ew research on BW-applicable agents, Brucella and Congo Crimean Hemorrhagic Fever (CCHF), and continuing work on ricin and aflatoxin were not declared to the [U.N.] [There were] [d]ocuments and equipment, hidden in scientists' homes, that would have been useful in resuming uranium enrichment by centrifuge and electromagnetic isotope separation (EMIS) [There is a] line of UAVs [unmanned aerial vehicles] not fully declared at an undeclared production facility and an admission that they had tested one of their declared UAVs out to a range of 500 km, 350 km beyond the permissible limit.

. . . [There is] [c]ontinuing covert capability to manufacture fuel propellant useful only for prohibited SCUD variant missiles, . . . [p]lans and advanced design work for new long-range missiles with ranges up to at least 1000 km—well beyond the 150 km range limit imposed by the [U.N.] [There were also] clandestine attempts between late-1999 and 2002 to obtain from North Korea technology related to 1,300 km range ballistic missiles—probably the No Dong—300 km range anti-ship cruise missiles, and other prohibited military equipment.²⁵⁹

These introductory statements did suggest that there were weapons programs that would be prohibited under Security Council resolutions. However, Kay's latter descriptive detail indicated that prefatory statements were predominantly signaling investigative leads that required confirmation.²⁶⁰ For example, "[d]etainees and co-operative sources"

²⁵⁹ *Id.*

²⁶⁰ For example, for all categories—BW, CW, nuclear, missile, and UAV—there was speculation that unidentifiable material, such as what remained after being destroyed by looting, coalition bombing, or otherwise, could have yielded evidence of wrongdoing. *Id.*

provided data about planning and designs for several types of prohibited missile programs,²⁶¹ but the final ISG report stated that “none of these systems progressed to production and only reportedly passed the design phase.”²⁶² For nuclear weapon programs, Kay explained that witnesses believed Hussein was “firmly committed to acquiring nuclear weapons,”²⁶³ however the final ISG report confirmed that Iraq “ended the nuclear program in 1991 following the Gulf War[, and] ISG found no evidence to suggest concerted efforts to restart the program.”²⁶⁴ On possible BW programs, Kay referenced witnesses who explained that Iraq “played a prominent role in sponsoring students for overseas graduate studies in the biological sciences,” and that scientists discussed that there was “overt work with nonpathogenic organisms serving as surrogates for prohibited investigation with pathogenic agents.”²⁶⁵ The ISG’s final report concluded “that in 1991 and 1992, Iraq appears to have destroyed its undeclared stocks of BW weapons” and there was no evidence of later BW production.²⁶⁶ On chemical weapons (CW) allegations, Kay referenced witnesses who claimed that “Iraq explored the possibility of CW production in recent years,” and that Hussein asked a “senior military official in either 2001 or 2002 how long it would take to produce new chemical agent and weapons.”²⁶⁷ The ISG final report concluded that “Iraq unilaterally destroyed its undeclared chemical weapons stockpile in 1991. There are no credible indications that Baghdad resumed production of chemical munitions thereafter.”²⁶⁸

Kay furnished a thorough portrayal of possible leads and provided caveats, but the most incriminating line in his testimony was the following: “We have discovered dozens of WMD-related program activities.”²⁶⁹ Even

²⁶¹ *Id.*

²⁶² SPECIAL ADVISOR TO THE DCI, *supra* note 230, at Delivery Systems 1–2.

²⁶³ Kay, *supra* note 228. Kay explained that “documentary evidence of this has not been found . . . Despite evidence of Saddam’s continued ambition to acquire nuclear weapons, to date we have not uncovered evidence that Iraq undertook significant post-1998 steps to actually build nuclear weapons or produce fissile material.” *Id.*

²⁶⁴ SPECIAL ADVISOR TO THE DCI, *supra* note 230, at Nuclear 1.

²⁶⁵ Kay, *supra* note 228.

²⁶⁶ SPECIAL ADVISOR TO THE DCI, *supra* note 230, at Biological 1–2.

²⁶⁷ Kay, *supra* note 228 (“[M]ultiple sources with varied access and reliability have told ISG that Iraq did not have a large, ongoing, centrally controlled CW program after 1991.”).

²⁶⁸ SPECIAL ADVISOR TO THE DCI, *supra* note 230, at Chemical 1.

²⁶⁹ Kay, *supra* note 228.

with four months to review the entire testimonial, Bush's January 2004 State of the Union Address quite obviously skipped through the twenty-one-page document, located the most incriminating line, and took that line out of context to provide his prefatory contextual statement: "Already, the Kay Report identified dozens of [WMD]-related program activities and significant amounts of equipment that Iraq concealed from the [U.N.]. Had we failed to act, the dictator's weapons of mass destruction programs would continue to this day."²⁷⁰ Reflecting on the misrepresentations, Kay stated: "I resigned essentially one day after the State of the Union address. I thought the politicians should have been far more cautious about what they were saying. He [Bush] should have said, in my view, 'we were wrong.' He didn't."²⁷¹ Kay summarized his eight month investigation by explaining:

I wanted to call them and ask them [Bush Administration officials] if they'd tell me exactly where they were since they seemed to be more sure about their [WMDs] existence than those of us who were searching. . . . All the Iraqis we were talking to, despite the fact that I had billions of dollars I could have rewarded them with . . . no Iraqi had a story that said they had weapons.²⁷²

²⁷⁰ *State of the Union Address*, WHITE HOUSE (Jan. 20, 2004), <http://georgewbush-whitehouse.archives.gov/news/releases/2004/01/20040120-7.html>. Similarly, two days after the State of the Union Address Cheney stated that the "jury is still out" on finding WMDs, but he reverted to something comfortable: "It's going to take some additional considerable period of time in order to look in all of the cubby holes and ammo dups in Iraq where you might expect to find something like that." Juan Williams, *Cheney: U.S. to Continue Search for Iraqi WMD* (NPR radio broadcast Jan. 22, 2004), available at <http://www.npr.org/templates/story/story.php?storyId=1610113>.

²⁷¹ THE WORLD ACCORDING TO BUSH (CBC News 2004); *Report Concludes No WMD in Iraq*, BBC (Oct. 7, 2004), <http://news.bbc.co.uk/2/hi/3718150.stm> ("David Kay, quit in January 2004 stating WMD would not be found in Iraq.").

²⁷² THE WORLD ACCORDING TO BUSH, *supra* note 271. Kay returned to Congress and explained: "It turns out that we were all wrong . . . and that is most disturbing," but there were still "hundreds of cases, based on both documents, physical evidence and the testimony of Iraqis" of failing to declare prohibited programs. *Transcript: David Kay at Senate Hearing*, CNN (Jan. 29, 2004), <http://edition.cnn.com/2004/US/01/28/kay.transcript/>. He also maintained that programs are difficult to prove because Iraqis excel at looting, "[t]he result is—document destruction." *Id.*

After eighteen months of searching, the ISG's one thousand-page *Duefler Report* was published and recounted enormous detail about thirty years of weapons programs.²⁷³ However, the only relevant conclusion was that Iraq "did not possess stockpiles of illicit weapons at the time of the U.S. invasion in March 2003 and had not begun any program to produce them."²⁷⁴

E. Populace Perceptions

With embedded reporters providing premature weapon discoveries, Bush Administration officials making unsubstantiated statements that WMDs had been found, and the ISG inspection team offering moderately ambiguous updates,²⁷⁵ misperceptions abounded. In a May 2003 poll, the Program on International Policy Attitudes (PIPA) at the University of Maryland found that 34% of Americans believed WMDs had been discovered after the invasion and 22% believed Iraqi forces had used them on U.S. troops.²⁷⁶ Americans remembered the reasons espoused for the attack, but they also began to assimilate the "liberation" rationale. When pollsters asked which reasons were most emphasized by the Bush Administration as justifications for invasion, respondents cited possession

²⁷³ CHARLES DUEFLER, IRAQ SURVEY GROUP, COMPREHENSIVE REVISED REPORT WITH ADDENDUMS ON IRAQ'S WEAPONS OF MASS DESTRUCTION (2004), available at <http://www.gpoaccess.gov/duelfer/index.html>.

²⁷⁴ *Report: No WMD Stockpiles in Iraq*, CNN (Oct. 7, 2004), http://articles.cnn.com/2004-10-06/world/iraq.wmd.report_1_nuclear-weapons-charles-duelfer-iraq-s-wmd?_s=PM:WORLD; Julian Borger, *There Were No Weapons of Mass Destruction in Iraq*, GUARDIAN (Oct. 7, 2004, 10:28 PM), <http://www.guardian.co.uk/world/2004/oct/07/usa.iraq1>; Julian Borger, *Iraq Had No WMD: The Final Verdict*, GUARDIAN (Sept. 18, 2004, 6:35 AM), <http://www.guardian.co.uk/world/2004/sep/18/iraq.iraq1>. Bush continued to maintain that "Hussein had the capability of making weapons," while the Duelfer report "finds no evidence of a capability." *Id.*

²⁷⁵ See *supra* Parts III.B, III.D.

²⁷⁶ PROGRAM ON INTERNATIONAL POLICY ATTITUDES, THE PIPA/KNOWLEDGE NETWORKS POLL: AMERICANS ON IRAQ WAR AND FINDING WMD 1, 4 (2003), available at http://www.pipa.org/OnlineReports/Iraq/IraqFindWMD_May03/IraqFindWMD%20May03%20quaire.pdf [hereinafter PIPA] (noting that 57% of respondents believed Iraq had WMDs before the war); HARRIS INTERACTIVE, THE HARRIS POLL #79: IRAQ, 9/11, AL QAEDA AND WEAPONS OF MASS DESTRUCTION: WHAT THE PUBLIC BELIEVES NOW, ACCORDING TO LATEST HARRIS POLL (2004) (on file with author) ("38 percent believe[d] that Iraq had [WMDs] when the U.S. invaded.").

of WMDs (60%), connections to al-Qaeda (19%), and oppression by Hussein (20%).²⁷⁷

The percentage of Americans believing that Bush Administration officials “deliberately misled” to mold conditions for war rose from 37% in June 2003, to 45% in June 2004, to 51% in June 2005, and finally to 53% in January 2006.²⁷⁸ Although the Bush Administration provided six months of pre-invasion guarantees about WMDs, the importance of security threat allegations as a reason for attack fizzled and was supplanted by a mission of “liberating Iraqis” during occupation.²⁷⁹ In a sense, searching for WMDs became an incident to invasion because Hussein’s regime was no longer in power and could not use any of these weapons even if they did exist. Moreover, it is important to recall that pre-invasion Security Council discussions were exclusively devoted to disagreements over alleged WMD violations,²⁸⁰ and there were no discussions of overthrowing the government.²⁸¹ The Security Council never authorized a use of force for the 2003 attack against Iraq,²⁸² and using military force to foster regime change was and is illegal under international law and incompatible with core U.N. Charter rules.²⁸³ Not everyone seemed to comprehend that rhetoric shifted akin to a bait-and-switch tactic. In a 2005 Veterans Day speech, Bush emphasized: “[I]t is deeply irresponsible to rewrite the history of how that [Iraq] war began. Some Democrats and

²⁷⁷ PIPA, *supra* note 276, at 3. Respondents interpreted the most important reason for going to war—Iraq possessing WMDs (24%), Iraqi linkage to al-Qaeda (42%), and Saddam Hussein being an oppressive dictator (32%). *Id.*

²⁷⁸ Lydia Saad, *Many Americans Say History Will Judge Iraq War a “Failure”*, GALLUP (Mar. 20, 2008), <http://www.gallup.com/poll/105217/Many-Americans-Say-History-Will-Judge-Iraq-War-Failure.aspx>.

²⁷⁹ HARRIS INTERACTIVE, *supra* note 276 (“76 percent believe that Iraqis are better off now than they were under Saddam Hussein” and “63 percent believe that Iraq . . . was a serious threat to U.S. security.”); Zogby Poll, *supra* note 79 (“Ninety-three percent said that removing [WMDs] is not a reason for U.S. troops being there Instead, that initial rationale went by the wayside and, in the minds of 68% of the troop’s, the real mission became to remove Saddam Hussein. . . . [S]mall percentages see the mission there as securing oil supplies (11%) or to provide long-term bases for [U.S.] troops in the region (6%)”). *See also supra* Part II.A.

²⁸⁰ *See* Bejesky, *supra* note 13, 311–17, 337 n.208, 344–50.

²⁸¹ *See id.* at 311–17.

²⁸² *Id.* at 344–50.

²⁸³ U.N. Charter art. 2 para. 4.

anti-war critics are now claiming we manipulated the intelligence and misled the American people about why we went to war.”²⁸⁴

After making this cognitively lax claim, Bush changed the subject and stated that “[t]he stakes in the global war on terror are too high, and the national interest is too important, for politicians to throw out false charges. These baseless attacks send the wrong signal to our troops and to an enemy that is questioning America’s will.”²⁸⁵ Intimating “America’s will” and U.S. soldier preferences was unnecessarily suggestive. ABC News surveyed congresspersons who had voted for the October 2002 authorization and discovered that a substantial percentage reversed their positions in hindsight, and confirmed that the resolution would have been rejected with more accurate information about WMDs and the alleged security threat.²⁸⁶ Largely due to the Iraq War, the American public awarded Bush with the lowest approval rating for a departing president since Gallup began measuring approval ratings more than seventy years ago.²⁸⁷

One week after the 2005 Veterans Day speech and amid protests and congressional advocacy for U.S. troops to be withdrawn from Iraq, Bush

²⁸⁴ *President Commemorates Veterans Day, Discusses War on Terror*, WHITE HOUSE, (Nov. 11, 2005), <http://georgewbush-whitehouse.archives.gov/news/releases/2005/11/20051111-1.html> [hereinafter *President Commemorates Veterans Day*]. Similarly, Cheney called protests that reminded of the “facts” espoused— a “revisionism of the most corrupt and shameless variety.” Elisabeth Bumiller, *Cheney Sees ‘Shameless’ Revisionism on War*, N.Y. TIMES, Nov. 22, 2005, at A1, available at <http://www.nytimes.com/2005/11/22/politics/22cheney.html>.

²⁸⁵ *President Commemorates Veterans Day*, *supra* note 284. Cheney added that the troops were being subjected to “these cynical and pernicious falsehoods day in and day out” by individuals claiming that “they were sent into battle for a lie.” Dan Froomkin, *Cheney Unleashed*, WASH. POST (Nov. 17, 2005), http://www.washingtonpost.com/wp-dyn/content/blog/2005/11/17/BL2005111700875_pf.html. Senator Ted Stevens stated: “Now the attempt is to undermine the people [troops] standing abroad by repeatedly calling [Bush] a liar.” Charles Babington, *Hawkish Democrats Joins Call for Pullouts*, WASH. POST, Nov. 18, 2005, at A1, available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/11/17/AR2005111700794.html>.

²⁸⁶ Jake Tapper, *Senate Regrets the Vote to Enter Iraq*, ABC NEWS (Jan. 5, 2007), <http://abcnews.go.com/GMA/Politics/story?id=2771519&page=1>.

²⁸⁷ *Bush’s Final Approval Rating: 22 Percent*, CBS NEWS (Feb. 11, 2009, 1:45 PM), http://www.cbsnews.com/stories/2009/01/16/opinion/polls/main4728399_page2.shtml?tag+contentMain;contentBody.

remarked: “I expect there to be criticism. But when Democrats say that I deliberately misled the Congress and the people, that’s irresponsible. They looked at the same intelligence I did, and they voted—many of them voted—to support the decision I made.”²⁸⁸ They did not “look” at the intelligence. Rather, “Americans were led to war based on a targeted marketing campaign that revealed only information that supported the need for war and none that contradicted it.”²⁸⁹ In January 2004, nine months after the war began, Vice President Cheney referenced the October 2002 NIE and stated: “We’ve since declassified the front six pages of it so the basic findings are there. They’re public for anybody who wants to look at it.”²⁹⁰ In 2008, the SSCI completed its five-year review of the pre-war intelligence, and the Chairman explained:

[The president has the] prerogative to classify information . . . [and] can declassify unilaterally and with ease. The Administration exploited this declassification authority in the lead up to the war and disclosed intelligence at a time and in a manner of its choosing with impunity, knowing that others attempting to disclose additional details that might provide balance or improve accuracy would be prevented from doing so under the threat of prosecution. This unlevel playing field allowed senior officials to disclose and discuss sensitive intelligence reports when it supported the Administration’s policy objectives and keep out of the public discourse information which did not.²⁹¹

²⁸⁸ Babington, *supra* note 285.

²⁸⁹ Eric Lane, Frederick A.O. Schwarz, Jr. & Emily Berman, *Too Big a Canon in the President’s Arsenal: Another Look at United States v. Nixon*, 17 GEO. MASON L. REV. 737, 769 (2010); Robert Bejesky, *Political Penumbras of Taxes and War Powers for the 2012 Election*, 14(1) LOY. J. PUB. INT. L. (forthcoming 2012) (manuscript at 15–49) (recounting how Bush pushed the authorization to use force through Congress based on national security jeopardy and thwarted congressional demands to end occupation).

²⁹⁰ Williams, *supra* note 270.

²⁹¹ SEN. SELECT COMM. ON INTELLIGENCE, 110TH CONG., REPORT ON WHETHER PUBLIC STATEMENTS REGARDING IRAQ BY U.S. GOVERNMENT OFFICIALS WERE SUBSTANTIATED BY INTELLIGENCE INFORMATION 92 (2008), available at <http://intelligence.senate.gov/080605/phase2a.pdf>; SEN. SELECT COMM. ON INTELLIGENCE, *supra* note 238, at 457 (emphasizing that there was selective declassification); Bejesky, *supra* note 13, at 306 n.56, 307 n.57–58
(continued)

As for Bush's statements about the will of the troops, a *Zogby* poll taken less than four months after Bush's 2005 Veterans Day speech stated: "72% of American troops serving in Iraq think the U.S. should exit the country within the next year, and more than one in four say the troops should leave immediately."²⁹² Recruitment and reenlistment were at a thirty-year low,²⁹³ and many soldiers raised conscientious objector status claims because of the Iraq War.²⁹⁴ Between the "run-up to the Iraq War in 2002" and August 2007, "20,000 service members who [went] AWOL (absent without official leave) ha[d] been classified as deserters" and 405 soldiers applied for conscientious objector status. One-hundred seventy-nine of those requests were granted.²⁹⁵

(discussing significant executive authority over the national security apparatus and attendant penalties for unauthorized disclosure); Mary-Rose Papandrea, *Lapdogs, Watchdogs, and Scapegoats: The Press and National Security Information*, 83 IND. L.J. 233, 233 (2008) ("The executive branch possesses virtually unbridled authority to keep national security information from the public"); Christina E. Wells, *Information Control in Times of Crisis: The Tools of Repression*, 30 OHIO N.U.L. REV. 451, 460 (2004) ("Even after FOIA, then, public access to 'national security' information has depended largely on the good will of the President.").

²⁹² *Zogby Poll*, *supra* note 79.

²⁹³ ARNOVE, *supra* note 143, at 92–95; IN THE NAME OF DEMOCRACY: AMERICAN WAR CRIMES IN IRAQ AND BEYOND 209–42 (Jeremy Brecher, Jill Cutler & Brendan Smith eds., 2005); Robert N. Strassfeld, "Lose in Vietnam, Bring the Boys Home," 82 N.C. L. REV. 1891, 1903–04 (2004); Eric Schmitt, *Marines Miss January Goal for Recruits*, N.Y. TIMES, Feb. 3, 2005, at A12, available at <http://www.nytimes.com/2005/02/03/politics/03marines.html>; Eric Schmitt, *Guard Reports Serious Drops in Enlistment*, N.Y. TIMES, Dec. 17, 2004, at A32, available at http://query.nytimes.com/gst/abstract.html?res=F00B13FF3E540C748DDDAB0994DC404482&fta=y&archive:article_related. In 2006, the percentage of West Point graduates who left the military at the end of their five-year obligation rose to 44%, which was the largest percentage in thirty years. Fred Kaplan, *Challenging the Generals*, N.Y. TIMES MAG., Aug. 26, 2007, at 34, 37.

²⁹⁴ MATTHEW GUTTMAN & CATHERINE LUTZ, BREAKING RANKS: IRAQ VETERANS SPEAK OUT AGAINST THE WAR 75–76 (2010); Brecher, Cutler & Smith, *supra* note 293, at 11; JAMES CARROLL, CRUSADE: CHRONICLES OF AN UNJUST WAR 215 (2004); Captain Robert E. Murdough, "I Won't Participate in an Illegal War": *Military Objectors, the Nuremberg Defense, and the Obligation to Refuse Orders*, 2010 ARMY LAW. 4, 4 (2010).

²⁹⁵ NOW, *A Closer Look: Conscientious Objection*, PBS (Aug. 24, 2007), <http://www.pbs.org/now/shows/334/conscientious-objection.html>.

At the same time U.S. soldier support seemed to be diminishing, the number of high-priced,²⁹⁶ private contractors used in Iraq steadily escalated.²⁹⁷ Polls of U.S. soldiers also registered confusion over the reason for the invasion. In a 2006 poll, 85% of U.S. soldiers believed they were there “mainly ‘to retaliate for Saddam’s role in the 9/11 attacks’” and “77% said they also believe[d] the main or a major reason for the war was to ‘stop Saddam from protecting al Qaeda in Iraq.’”²⁹⁸ Official government investigations concluded that both of these beliefs were false.²⁹⁹ In direct reference to the pre-war allegations made by the Bush Administration about Iraq, Harvard Emeritus Professor Stanley Hoffman remarked that “if you repeat a lie often enough, people swallow it.”³⁰⁰

In early October 2003, PIPA tested three misperceptions and found that 48% of Americans believed that links between al-Qaeda and Iraq had been found, 22% thought that WMDs were discovered, and 25% believed that world public opinion favored the invasion of Iraq.³⁰¹ When combined,

²⁹⁶ CONG. BUDGET OFFICE, CONTRACTORS’ SUPPORT OF U.S. OPERATIONS IN IRAQ 14 (2008), available at <http://www.cbo.gov/ftpdocs/96xx/doc9688/08-12-IraqContractors.pdf> (noting that private contractors make several times more than soldiers); Andrew Finkelman, *Suing the Hired Guns: An Analysis of Two Federal Defenses to Tort Lawsuits Against Military Contractors*, 34 BROOK. J. INT’L L. 395, 442–43 (2009); Michael N. Schmitt, *Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees*, 5 CHI. J. INT’L L. 511, 515 (2005).

²⁹⁷ T. Christian Miller, *Contractors Outnumber Troops in Iraq*, L.A. TIMES, July 4, 2007, at A1, available at <http://articles.latimes.com/2007/jul/04/nation/na-private4> (noting that 180,000 private civilian and military contractors were in Iraq at that time); Renae Merle, *Census Counts 100,000 Contractors in Iraq*, WASH. POST, Dec. 5, 2006, at D1; Jon D. Michaels, *Beyond Accountability: The Constitutional, Democratic, and Strategic Problems with Privatizing War*, 82 WASH. U.L. Q. 1001, 1004 (2004) (noting that there were 20,000 private military contractors in mid-2004).

²⁹⁸ Zogby Poll, *supra* note 79; Hannibal Travis, *The FCC’s New Theory of the First Amendment*, 51 SANTA CLARA L. REV. 417, 497 (2011) (“A Roper poll in 2006 revealed that eighty-five percent of U.S. troops in Iraq thought that *al Qaeda* was some form of branch, agency, or ally of the Iraqi government topped in the 2003 war.”).

²⁹⁹ See *infra* Part IV.C.

³⁰⁰ THE WORLD ACCORDING TO BUSH, *supra* note 271.

³⁰¹ PROGRAM ON INTERNATIONAL POLICY ATTITUDES, THE PIPA/KNOWLEDGE NETWORKS POLL: STUDY FINDS WIDESPREAD MISPERCEPTIONS ON IRAQ HIGHLY RELATED TO SUPPORT FOR WAR I (2003), available at http://www.pipa.org/OnlineReports/Iraq/IraqMedia_Oct03/IraqMedia_Oct03_pr.pdf.

60% of respondents held at least one misperception,³⁰² but there were chasms among the percentages of Americans holding misperceptions and the respondents' primary sources of information. FOX News viewers were the most misinformed, while those relying on NPR and PBS had a much lower percentage of misperceptions:³⁰³

	FOX	CBS	ABC	NBC	CNN	Print Sources	NPR/PBS
None of the three misperceptions	20%	30%	39%	45%	45%	53%	77%
One or more misperception(s)	80%	71%	61%	55%	55%	47%	23%

Differences across networks were likely due to the combination of viewers selecting their prime source of information based on personal ideological inclinations (consistency theory)³⁰⁴ and the fact that networks do cater to an audience's comfort zone.³⁰⁵ Some referred to the preponderant bias in post-war coverage as "the Fox effect," which caused other networks to avoid being perceived as "less patriotic" than FOX.³⁰⁶ Christiane Amanpour, CNN's chief war correspondent, complained that CNN "muzzled" the war coverage due to "intimidat[ion] by the

³⁰² *Id.* PIPA also concluded: "While it would seem that misperceptions are derived from a failure to pay attention to the news, in fact, overall, those who pay greater attention to the news are no less likely to have misperceptions." *Id.* at 2.

³⁰³ *Id.* at 2; Blake D. Morant, *The Endemic Reality of Media Ethics and Self-Restraint*, 19 NOTRE DAME J.L. ETHICS & PUB. POL'Y 595, 606 (2005) (noting that 32% believed CNN was the most credible news source and 25% believed FOX News was the most credible; and FOX News (25%) had a larger audience than CNN (22%)).

³⁰⁴ JOWETT & O'DONNELL, *supra* note 6, at 177-79; Morant, *supra* note 303, at 607-09.

³⁰⁵ Blake D. Morant, *The Inescapable Intersection of Credibility, Audience and Profit in Broadcast Media's Coverage of Elections*, 24 ST. JOHN'S J.L. COMM. 479, 491-92 (2009); Joan Konner, *Eye on the Media: Media's Patriotism Provides a Shield for Bush*, NEWSDAY, Jan. 9, 2002, at A31 (noting that Columbia University journalism professor calls "Fox News, a blatantly biased, conservative news service").

³⁰⁶ WEAPONS OF MASS DECEPTION, *supra* note 166. Walter Isaacson, former CEO of CNN, remarked: "we were caught between this patriotic fervor and a competitor [FOX News] who was using that to their advantage . . . they were pushing the fact that CNN was too liberal that we were sort of vaguely anti-American." Bill Moyers Journal, *Buying the War*, PBS (Apr. 25, 2007), <http://www.pbs.org/moyers/journal/btw/transcript1.html>.

[A]dministration and by its foot soldiers at Fox News,” which led to “disinformation at the highest levels.”³⁰⁷

Polls conducted during the 2004 Bush-Kerry presidential election cycle also seemed to be heavily influenced by political preferences rather than verified facts. Eighty-nine percent of Bush supporters, but only 39% of Kerry supporters agreed with the following statement: “History will give the U.S. credit for bringing freedom and democracy to Iraq.”³⁰⁸ Ninety-two percent of Bush supporters, but only 30% of Kerry supporters believed that “Iraq, under Saddam Hussein, was a serious threat to U.S. security.”³⁰⁹ Fifty-eight percent of Bush supporters, but only 16% of Kerry voters agreed with the following statement: “Iraq had [WMDs] when the U.S. invaded.”³¹⁰ A later poll similarly found that among the respondents who

³⁰⁷ Magarian, *supra* note 33, at 119–20. See also KATHLEEN TAYLOR, BRAINWASHING: THE SCIENCE OF THOUGHT CONTROL 226 (2004) (noting that the national media foment “pressures to simplify, standardize, and agree with popular opinion”). Amanpour remarked:

I think the press self-muzzled. I’m sorry to say, but certainly television and, perhaps, to a certain extent, my station was intimidated by the [A]dministration and its foot soldiers at Fox News. And it did, in fact, put a climate of fear and self-censorship, in my view, in terms of the kind of broadcast work we did. . . . It’s a question of being rigorous. It’s really a question of really asking the question. All of the entire body politic in my view, whether it’s the [A]dministration, the intelligence, the journalists, whoever, did not ask enough questions, for instance, about [WMDs]. I mean, it looks like this was disinformation at the highest levels.

Peter Johnson, *Amanpour: CNN Practiced Self-Censorship*, USA TODAY, Sept. 14, 2003, at 4D, available at http://www.usatoday.com/life/columnist/mediamix/2003-09-14-medi-mix_x.htm.

³⁰⁸ HARRIS INTERACTIVE, *supra* note 276. See also Clay Calvert & Robert D. Richards, *Challenging the Wisdom of Solomon: The First Amendment and Military Recruitment on Campus*, 13 WM. & MARY BILL OF RTS. J. 205, 239 (2004) (depicting how polls can drastically change with dominant temporary events; during the time that Hussein was captured, for Democrats, 56% (Dec. 2003) and 42% (Jan. 2004) supported the invasion; but for Republicans, 60% (Dec. 2003) and 66% (Jan. 2004) supported the invasion).

³⁰⁹ HARRIS INTERACTIVE, *supra* note 276.

³¹⁰ *Id.* Another poll found that 49% believed that Iraq possessed WMDs in October 2004, and 41% believed Iraq possessed WMDs in March 2006. Douglas M. McLeod, *Derelict of Duty: The American News Media, Terrorism, and the War in Iraq*, 93 MARQ. L. REV. 113, 135–36 (2009).

believed that “Iraq had WMD prior to the war,” 85% felt that going to war was the correct decision; but among those who believed that “Iraq had no WMD activities,” 95% maintained that going to war was the wrong decision.³¹¹ The effect of ideological penchants in light of ambiguity, false reporting, and incorrectly interpreted information may be a cognitive filter to justify voting decisions because Iraq was the dominant issue in the November 2004 presidential elections.³¹² Democrats even presented a timeline for withdrawing troops from Iraq during the election cycle.³¹³ The final ISG report was released a month before the vote and confirmed that there were no WMDs, but Bush supporters were nearly four times more likely to believe that “Iraq had [WMDs] when the U.S. invaded.”³¹⁴ The results also seem consistent with the abundant body of literature which has found that individuals do not behave rationally in determining vote choice.³¹⁵

IV. PORTRAYALS TO IRAQIS

A. *Public Diplomacy, Propaganda, and PSYOPs*

Government messages delivered to the domestic populace also circulates to foreign audiences.³¹⁶ A government cannot simply refashion the factual bases of current event communications for intended audiences. Media conglomerates have international operations, share stories with foreign affiliates, and acquire news releases produced in domestic fora;³¹⁷ and information diffusion across foreign borders is the status quo due to

³¹¹ *Most Americans Believe Bush Administration Is Still Saying Iraq Had Major WMD Program*, WORLD PUBLIC OPINION (Apr. 13, 2006), <http://www.worldpublicopinion.org/pipa/articles/brunitedstatescanadara/188.php> [hereinafter WPO].

³¹² *Bush Mocks Kerry over Views on Iraq War*, USA TODAY (Aug. 10, 2004, 7:42 PM), http://www.usatoday.com/news/politicselections/nation/2004-08-10-bush-campaign_x.htm.

³¹³ *Id.*; Brian C. Mooney, *In an Exercise in Nuance, Democrats Back a Platform*, BOSTON GLOBE, July 11, 2004, at A11, available at http://www.boston.com/news/nation/articles/2004/07/11/in_an_exercise_in_nuance_democrats_back_a_platform/. See also *supra* notes 77–78.

³¹⁴ HARRIS INTERACTIVE, *supra* note 276.

³¹⁵ Molly J. Walker Wilson, *Behavioral Decision Theory and Implications for the Supreme Court's Campaign Finance Jurisprudence*, 31 CARDOZO L. REV. 679, 681, 689 (2010).

³¹⁶ See WEAPONS OF MASS DECEPTION, *supra* note 166.

³¹⁷ See *id.*

increased transnational linkages and the Internet.³¹⁸ On the other hand, as indicated by the surge of academic interest in public diplomacy, some government discourse is frequently identified as intended for foreign audiences.³¹⁹ However, information designed for foreign audiences can also flow back to the domestic public.³²⁰ As a preface to exploring examples to substantiate this point, it seems reasonable to revisit definitional particulars.

Public diplomacy is “a government’s process of communication with foreign publics in an attempt to bring about understanding for its nation’s ideas and ideals, its institutions and culture, as well as its national goals and policies.”³²¹ Propaganda is “the deliberate and systematic attempt to shape perceptions, manipulate cognitions, and direct behavior to achieve a response that furthers the desired intent of the propagandist or to achieve a response that furthers the desired intent of the propagandist.”³²² Just as the domestic level was fraught with disagreement over whether White House promotional activities were illegal propaganda or permissible means of informing the American public,³²³ scholars have also disagreed over whether messages intended for foreign audiences should be labeled public diplomacy or propaganda.³²⁴ Identifying the intended target, the

³¹⁸ Gifford Malone, *Managing Public Diplomacy*, 8 WASH. Q. 199, 208 (1985), available at <http://www.tandfonline.com/doi/abs/10.1080/01636608509450301>.

³¹⁹ *Id.*

³²⁰ See WEAPONS OF MASS DECEPTION, *supra* note 166.

³²¹ H. HOWARD FREDERICK, *GLOBAL COMMUNICATION AND INTERNATIONAL RELATIONS* 229 (1993). Propaganda is “a group of strategies and tactics designed to achieve the ideological, political, or military objectives of the sponsoring organization (typically a government or political movement) through exploitation of a target audience’s cultural-psychological attributes and its communication system.” C. SIMPSON, *SCIENCE OF COERCION: COMMUNICATION RESEARCH AND PSYCHOLOGICAL WARFARE 1945–1960*, at 11 (1994). Public diplomacy is “direct communication with foreign peoples, with the aim of affecting their thinking and, ultimately, that of their governments.” Malone, *supra* note 318, at 199.

³²² JOWETT & O’DONNELL, *supra* note 6, at 7 (emphasis omitted).

³²³ See *supra* Parts II.B–C; III.A.

³²⁴ See Eytan Gilboa, *Searching for a Theory of Public Diplomacy*, 616 ANNALS AM. ACAD. POL. & SOC. SCI., Mar. 2008, at 55, 56 (“[M]any scholars and professionals have confused public diplomacy with propaganda, public relations (PR), international public relations (IPR), psychological warfare, and public affairs.”). “The ‘new public diplomacy’ can be characterized as a blurring of traditional distinctions between international and
(continued)

justification for the message, the degree to which veracity should be shaded, and the mechanisms of dissemination may beget the discord.

For example, the attack against Iraq lacked U.N. approval, but less than one-fourth of U.N. members granted diplomatic assent to the war, even as polls revealed stark contrast between diplomatic assent and foreign populace preferences within assenting countries.³²⁵ In a Gallup Poll conducted during the pre-war U.N. diplomacy, thirty-three out of forty-one countries surveyed had populace assent percentages of 10% or lower for unilateral action against Iraq and the other eight countries surveyed (except for the United States) had approval percentages of less than 20%.³²⁶ Meanwhile, the allegations supplied to foreign audiences about security threats from Iraq in diplomatic fora were hidden by the Bush Administration's control over the national security apparatus at the domestic level.³²⁷ Nonetheless, foreign political agents granted diplomatic approval, while officials in some assenting countries admitted that the United States wielded diplomatic pressure and promised financial benefits for granting assent.³²⁸ Moreover, the United States provided approximately 90% of both military troops for invasion and the Coalition Provisional Authority (CPA) personnel during occupation.³²⁹ Although the math and surrounding circumstances suggested otherwise, the message that

domestic information activities, between public and traditional diplomacy and between cultural diplomacy, marketing and news management." Rhiannon Vickers, *The New Public Diplomacy: Britain and Canada Compared*, 6 BRIT. J. POL. & INT'L AFF. 182, 191 (2004). See also NANCY E. SNOW, PROPAGANDA, INC: SELLING AMERICA'S CULTURE TO THE WORLD 14 (1998).

³²⁵ Bejesky, *supra* note 13, at 345.

³²⁶ Gallup Int'l, Iraq 2003 Survey Results (on file with author).

³²⁷ Bejesky, *supra* note 14, at 875–82; Bejesky, *supra* note 13, at 306–07.

³²⁸ Andrew F. Cooper, *Stretching the Model of "Coalitions of the Willing,"* THE CENTRE FOR INT'L GOVERNANCE AND INNOVATION, 3, 6 (Oct. 2005), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=857444 (suggesting that "burden sharing" makes illegal action appear legal); Bejesky, *supra* note 13, at 344–50.

³²⁹ U.S. GOV'T ACCOUNTABILITY OFFICE, REBUILDING IRAQ: RESOURCES, SECURITY, GOVERNANCE, ESSENTIAL SERVICE AND OVERSIGHT ISSUES 37–39 (2004), available at <http://www.gao.gov/new.items/d04902r.pdf> (noting that the "composition of [CPA] personnel remained consistent," and an "average of 13 percent were detailees from other coalition countries"); Margaret E. McGuinness, *Multilateralism and War: A Taxonomy of Institutional Functions*, 51 VILL. L. REV. 149, 167–70 (2006) (noting that over 90% of "coalition" troops during the invasion were from the United States).

the Bush Administration delivered back to Americans was that the invasion of Iraq proceeded as a “coalition.”³³⁰

In addition to the rhetoric that flowed from the White House’s anonymous, detached, and self-interested operations to foreign audiences to mold public opinion found with the VNRs, neoconservative advocates, public relations firms, lobby groups, and military analysts, and the Pentagon’s control over embedded journalists,³³¹ the Bush Administration also constituted ad hoc government sub-agencies with explicit international operations. For example, the Office of Strategic Influence (OSI) was established shortly after 9/11, funded with a multi-million dollar budget, and missioned to influence foreign governments.³³² In February 2002, the *New York Times* wrote:

[T]he new office has begun circulating classified proposals calling for aggressive campaigns that use not only the foreign media and the Internet, but also covert operations. . . . One of the office’s proposals calls for planting items with foreign media organization through outside concerns that might not have obvious ties to the Pentagon General Worden envisions a broad mission ranging from “black” campaigns that use disinformation and other covert activities to “white” public affairs that

³³⁰ *State of the Union Address*, *supra* note 270 (“There is a difference, however, between leading a coalition of many nations, and submitting to the objections of a few.”); Charles Tiefer, *The Iraq Debacle: The Rise and Fall of Procurement-Aided Unilateralism as a Paradigm of Foreign War*, 29 U. PA. J. INT’L L. 1, 2 (2007) (“[It was] a unilateral war in the absence of international and local support.”).

³³¹ Operations also set apriorisms that discredited opposing messages. One example is the White House’s *Apparatus of Lies: Saddam’s Disinformation and Propaganda 1990–2003*, which was a “collection on the use of propaganda by Saddam Hussein and his regime.” OFFICE OF GLOBAL COMMUNICATIONS, WHITE HOUSE, <http://georgewbush-whitehouse.archives.gov/ogc/text/aboutogc.html> (last visited May 6, 2012); OFFICE OF GLOBAL COMMUNICATIONS, WHITE HOUSE, APPARATUS OF LIES: SADDAM’S DISINFORMATION AND PROPAGANDA 1990–2003 (2003), available at <http://georgewbush-whitehouse.archives.gov/ogc/apparatus/printer.html>; Bejesky, *supra* note 23, at 62–64 (noting that Iraqi National Congress, the Committee for the Liberation of Iraq, and other lobby groups were operating with White House assistance). See also *supra* Part II.C.

³³² *Rumsfeld Addresses Strategic Influence Criticism*, U.S. DEP’T OF DEF. (Feb. 20, 2002), <http://www.defense.gov/releases/release.aspx?releaseid=3244> (Rumsfeld acknowledging that the OSI was formed in November 2001); Lee, *supra* note 113, at 1008.

rely on truthful news releases” It goes from the blackest of black programs to the whitest of white,” a senior Pentagon official said. Another proposal involves sending journalists, civic leaders and foreign leaders e-mail messages that promote American views or attack unfriendly governments.³³³

Secretary of Defense Rumsfeld addressed criticism about the OSI and stated:

Government officials, the Department of Defense, this secretary and the people that work with me tell the American people and the people of the world the truth. And to the extent anyone says anything that at any time proves to have been not accurate, they correct it at the earliest possible opportunity.³³⁴

Despite Rumsfeld’s sincerity, questions arose over the OSI’s mission and legality. Barely a week after the program was revealed, Rumsfeld explained that the OSI was being closed down because of negative attacks and claims that the office was spreading misinformation.³³⁵ Then, it was announced that the White House would create a new “permanent office of global diplomacy,” entirely separate from the OSI, to disseminate U.S. values to foreign audiences.³³⁶ Several months later, in December 2002, the *New York Times* explained the details of a “secret propaganda mission”: “The Defense Department is considering issuing a secret

³³³ James Dao & Eric Schmitt, *A Nation Challenged: Hearts and Minds; Pentagon Readies Efforts to Sway Sentiment Abroad*, N.Y. TIMES, Feb. 19, 2002, at A1, available at <http://www.nytimes.com/2002/02/19/world/nation-challenged-hearts-minds-pentagon-readies-efforts-sway-sentiment-abroad.html?pagewanted=all&src=pm>.

³³⁴ *Rumsfeld Addresses Strategic Influence Criticism*, *supra* note 332.

³³⁵ James Schmitt & James Dao, *A Nation Challenged: Hearts and Minds; A ‘Damaged’ Information Office Is Declared Closed by Rumsfeld*, N.Y. TIMES, Feb. 27, 2002, at A1, available at <http://www.nytimes.com/2002/02/27/world/nation-challenged-hearts-minds-damaged-information-office-declared-closed.html> (noting that Rumsfeld remarked: “The office has clearly been so damaged that it is pretty clear to me that it could not function effectively”).

³³⁶ Elizabeth Becker & James Dao, *A Nation Challenged: Hearts and Minds; Bush Will Keep Wartime Operation Promoting America*, N.Y. TIMES, Feb. 20, 2002, at A11, available at <http://www.nytimes.com/2002/02/20/world/nation-challenged-hearts-minds-bush-will-keep-wartime-operation-promoting.html?pagewanted=print&src=pm>.

directive to the American military to conduct covert operations aimed at influencing public opinion and policy makers in friendly and neutral countries³³⁷ Shelton Rampton, co-author of the book *Weapons of Mass Deception*, remarked:

All of these plans fall within the framework of a “propaganda model” of communication, whose strategies and assumptions are fundamentally contrary to a democratic model. Some scholars refer to propaganda as a “hypodermic approach” to communication, in which the communicator’s objective is to “inject” his ideas into the minds of a “target population.” This is quite different from the democratic model, which views communications as a dialogue between presumed equals. The goal of the propaganda model is simply to achieve efficient indoctrination, and it therefore tends to regard the assumptions of the democratic model as inconvenient obstacles to efficient communication.³³⁸

A second type of dissemination crafted for foreign recipients is named for its use against combatants. PSYOPs, or psychological operations, are intended to influence the perceptions, emotions, and decision-making of the adversary during conflict.³³⁹ PSYOPs can be a component of national security and a tactical means of minimizing loss of life, such as in the case

³³⁷ Thom Shanker & Eric Schmitt, *Threats and Responses: Fight Against Terrorism; Pentagon May Push Propaganda in Allied Nations*, N.Y. TIMES, Dec. 16, 2002, at A1, available at <http://www.nytimes.com/2002/12/16/world/threats-responses-fight-against-terrorism-pentagon-may-push-propaganda-allied.html?pagewanted=all&src=pm> (focusing on negative foreign sentiment about the “war on terrorism” as a reason for the publicity initiative). At this time, foreign approval was seemingly dropping in conjunction with what was unfolding with Iraq. Bejesky, *supra* note 13, at 342–43.

³³⁸ Shelton Rampton, *Weapons of Mass Deception*, PR WATCH (2003), <http://www.prwatch.org/prwissues/2003Q1/wmd.html> (“Joshua Green noted that ‘the Bush administration is a frequent consumer of polls, though it takes extraordinary measures to appear that it isn’t . . . Policies are chosen beforehand, polls [are] used to spin them.’”).

³³⁹ JOINT CHIEFS OF STAFF, JOINT PUB. 3-53, DOCTRINE FOR JOINT PSYCHOLOGICAL OPERATIONS I-1 (2003), available at http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB177/02_psyop-jp-3-53.pdf.

of dropping leaflets to Iraqi soldiers to encourage them to surrender.³⁴⁰ Another dissemination that possibly induced surrender was the Pentagon's video release to the global networks of the destructive capability of the Massive Ordnance Air Blast Bomb (MOAB) to intimidate Iraq less than two weeks before the war.³⁴¹ MOAB is a 21,000-pound, bus-sized bomb that flattens everything within its blast circumference.³⁴² The target was the Iraqi military and the intention was to encourage surrender,³⁴³ but there may also be a danger of comingling information with other audiences. Geneva Protocol I states: "Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited."³⁴⁴

B. Institutionalizing a New Media System Inside Iraq

The Pentagon and CPA employed a derivative of public diplomacy inside the Iraqi media system. However, these operations differed from broadly-construed public diplomacy because the promotional content had defined intent, a more localized recipient, and a deeper impact on the target population's political affairs.³⁴⁵ Pentagon officials recognized the need to capture and control the local media and influence the civilian population before the invasion, as evinced by the January 2003 Pentagon white paper, entitled "Rapid Reaction Media Team Concept" (RRMT).³⁴⁶ Because there were only a few newspapers and radio and television stations, and

³⁴⁰ *Id.* at I-14; Peter J. Smyczek, *Regulating the Battlefield of the Future: The Legal Limitations on the Conduct of Psychological Operations (PSYOP) Under International Law*, 57 A.F. L. REV. 209, 211 (2005).

³⁴¹ David Moniz, *U.S. Test Bomb Meant to Intimidate*, USA TODAY (Mar. 11, 2003, 2:16 PM), http://www.usatoday.com/news/world/iraq/2003-03-11-us-bomb-test_x.htm; Barbara Starr, *US Tests Massive Bomb*, CNN (Mar. 11, 2003), <http://edition.cnn.com/2003/US/03/11/sprj.irq.moab/index.html>.

³⁴² Moniz, *supra* note 341; Starr, *supra* note 341.

³⁴³ Starr, *supra* note 341.

³⁴⁴ The 1977 Protocols Additional to the Geneva Conventions, art. 51(2), Dec. 12, 1977, 16 I.L.M. 1391.

³⁴⁵ See U.S. DEP'T OF DEF., "RAPID REACTION MEDIA TEAM" CONCEPT 1 (2003), available at http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB219/iraq_media_01.pdf.

³⁴⁶ *Id.*

they were managed by the Iraqi government,³⁴⁷ the Pentagon sought to reduce the adversary's means of disseminating an alternative message inside the zone of combat.³⁴⁸ RRMT's mission was to quickly disassemble Iraq's current media system after an invasion and dispatch U.S. and U.K. experts to implement what was called the "Free Media" network to inform "about USG [United States Government]/coalition intent and operation," provide messages of de-Baathification, broadcast war crimes of Hussein's regime, and relay U.S.-sponsored versions of "history telling."³⁴⁹

Then, under occupation, Iraq's mass communication system was disassembled and reconstituted in a series of stages that ranged between heightening speech rights and quelling provocative discourse. CPA Order 1 removed thousands of former Baathist officials from government positions because of political affiliation,³⁵⁰ which also doffed regime loyalists and pre-existing bias from the media. CPA Order 7 afforded citizens with elevated speech rights by suspending enforcement of criminal laws for political offenses and by extending due process rights to the criminally accused.³⁵¹ However, rules were also adopted to curtail speech that could lead to violence.³⁵² CPA Order 14 prohibited the media from

³⁴⁷ Ibrahim Al-Marashi, Symposium, *The Dynamics of Iraq's Media: Ethno-Sectarian Violence, Political Islam, Public Advocacy, and Globalization*, 25 CARDOZO ARTS & ENT. L.J. 95, 96 (2007).

³⁴⁸ See U.S. DEP'T OF DEF., *supra* note 345.

³⁴⁹ U.S. DEP'T OF DEF., *supra* note 345; Jim Lobe, *Iraq's Own Pentagon (News) Papers*, ASIA TIMES ONLINE (May 11, 2007), http://www.atimes.com/atimes/Middle_East/IE11Ak02.html. The approach seems similar to the one British and U.S. media started nearly a century ago of using propaganda and distractions to foster consent. JOWETT & O'DONNELL, *supra* note 6, at 169, 172, 298; Noam Chomsky, *The Sixty-Second Cleveland-Marshall Fund Lecture: "Consent Without Consent": Reflections on the Theory and Practice of Democracy*, 44 CLEV. ST. L. REV. 415, 424 (1996).

³⁵⁰ COALITION PROVISIONAL AUTHORITY, ORDER NUMBER 1, DE-BA'ATHIFICATION OF IRAQI SOCIETY 1 (2003), available at http://www.iraqcoalition.org/regulations/20030516_CPAORD_1_De-Ba_athification_of_Iraqi_Society_.pdf.

³⁵¹ COALITION PROVISIONAL AUTHORITY, ORDER NUMBER 7, PENAL CODE § 2 (2003), available at http://www.iraqcoalition.org/regulations/20030610_CPAORD_7_Penal_Code.pdf (nullifying sections 200 and 225 of Iraqi Penal Code).

³⁵² The CPA criminalized actions that could "incite violence against forces occupying Iraq." David Rohde, *Iraqis Were Set to Vote, but U.S. Wielded a Veto*, N.Y. TIMES, June 19, 2003, at A6, available at <http://www.nytimes.com/2003/06/19/international/worldspecial/19NAJA.html>. This could have placed protest movements in jeopardy. *Id.* (continued)

disseminating information that would pose “a significant and immediate threat to public order” and also “authorize[d] on-site inspection of Iraqi media organizations, without notice, in order to ascertain compliance.”³⁵³ Authorities apparently conducted raids and closed media outlets critical of the occupation.³⁵⁴

Later orders institutionalized a new mass media system. CPA Order 65 established an Iraqi Communications and Media Commission (NCMC) to license and regulate all forms of media, but also included potentially controversial³⁵⁵ guiding provisions stressing that the media industry required private capital to prosper.³⁵⁶ The NCMC adopted provisions to promote freedom of expression and also emphasized the need to regulate speech “that may incite . . . violence,” discourse that “carrie[d] a clear and immediate risk of causing public harm,” and speech that involved “unwarranted criticism of the prime minister.”³⁵⁷ This balance was codified in Article 38 of the Iraqi Constitution, which protects “[t]he freedom of the press, printing, advertisement, media, and publication” as long as it “does not violate public order and morality.”³⁵⁸

Another question is whether the Pentagon deployed a Long Range Acoustic Device to deliver a 150 decibel ear splitting sound to control protests. Adam Blenford, *Cruise Lines Turn to Sonic Weapon*, BBC (Nov. 8, 2005, 8:31 PM), <http://news.bbc.co.uk/2/hi/africa/4418748.stm> (stating that the weapon was used in Iraq for crowd control).

³⁵³ COALITION PROVISION AUTHORITY, ORDER 14, PROHIBITED MEDIA ACTIVITY § 3, (2003), available at http://www.iraqcoalition.org/regulations/20030610_CPAORD_14_Prohibited_Media_Activity.pdf.

³⁵⁴ Brenner A. Allen, *A Cause of Action Against Private Contractors and the U.S. Government for Freedom of Speech Violations in Iraq*, 31 N.C.J. INT'L L. & COM. REG. 535, 548–50 (2005).

³⁵⁵ Attracting private capital to economically prosper may not be a favorable way to identify a successful media industry if the system is driven by wealth or resembles the United States' corporate conglomerate media system. Bejesky, *supra* note 113, at 371–82.

³⁵⁶ COALITION PROVISION AUTHORITY, ORDER 65, IRAQI COMMUNICATIONS AND MEDIA COMMISSION 1–2 (2004), available at http://www.iraqcoalition.org/regulations/20040320_CPAORD65.pdf; Monroe E. Price, Douglas Griffin & Ibrahim Al-Marashi, *Communication and Media Commission of Iraq, Policy Recommendations Concerning Broadcasting in Iraq*, 25 CARDOZO ARTS & ENT. L.J. 23, 31 (2007).

³⁵⁷ Allen, *supra* note 354, at 543–45.

³⁵⁸ IRAQI CONSTITUTION, art. 38, available at http://www.uniraq.org/documents/iraqi_constitution.pdf.

Alternatively, many levied criticism at the manner in which the occupation implemented media operations and maintained that the bias shifted so substantially to pro-occupation that self-determination was undermined.³⁵⁹ Effectively, institutions may have appeared neutral on paper to protect freedom of expression, but the mode of control and application of rules may not have been content-neutral.³⁶⁰ For example, inconsistency between populace preferences and occupation desires seemed evident by the way in which representatives from the U.S. Department of State and other U.S. agencies often accompanied Iraqi officials to press conferences,³⁶¹ which conveyed a sense of unity. Yet polls conducted from 2004 to 2009 revealed that approximately 80% of Iraqis were opposed to continuing occupation.³⁶²

Ostensibly to confront opposition, the Pentagon operated media outlets, paid Iraqis to publish pro-occupation discourse, hired U.S. public relations firms to write positive articles about the U.S. presence in Iraq, and presented articles as unbiased news accounts from independent journalists.³⁶³ The Pentagon's Psychological Operations Division was

³⁵⁹ Occupation forces controlled the Iraqi media in a biased manner. Allen, *supra* note 354, at 538 (“Dissident newspapers have been closed, and American-sponsored propaganda is attempting to drown out opposition within the country.”). The station would typically refer to the overwhelmingly U.S. military presence as “Coalition” and “Multi-national forces” and opposition as “terrorists.” Al-Marashi, *supra* note 347, at 106–07. The occupation’s media dominance may have offended Iraqis. MARC LYNCH, VOICES OF THE NEW ARAB PUBLIC: IRAQ, AL-JAZEERA, AND MIDDLE EAST POLITICS TODAY 216–17, 250–51 (2006); Allen, *supra* note 354, at 547.

³⁶⁰ Although the First Amendment may carry some of the most extensive free speech protections in the world, “it is disappointing that when acting outside the domestic sphere, the U.S. [G]overnment [Bush Administration] takes no such care to protect the principles of freedom of expression.” Allen, *supra* note 354, at 536.

³⁶¹ LYNCH, *supra* note 359, at 250.

³⁶² Bejesky, *supra* note 23, at 104–05.

³⁶³ Paul von Zielbauer, *Iraqi Journalists Add Laws to Their List of Dangers*, N.Y. TIMES, Sept. 29, 2006, at A12, available at <http://www.nytimes.com/2006/09/29/world/middleeast/29media.html>; Mark Mazzetti, *Pentagon Audit Clears Propaganda Effort*, N.Y. TIMES, Oct. 10, 2006, at A12, available at <http://www.nytimes.com/2006/10/20/washington/20lincoln.html?oref=slogin>; Mark Mazzetti & Borzou Daragahi, *U.S. Military Covertly Pays to Run Stories in Iraqi Press*, L.A. TIMES, at A1, Nov. 30, 2005, available at <http://articles.latimes.com/print/2005/nov/30/world/fg-infowar30>. One such newspaper that was publishing the articles, Al Mutamar, was run by Iraqi exile Ahmad Chalabi’s associate
(continued)

running the Iraqi Media Network and broadcasting from “thirty television and radio transmitters, three broadcast studios and twelve bureaus throughout the country.”³⁶⁴ The Pentagon used the al-Iraqiyya satellite channel for “American propaganda”³⁶⁵ and broadcasted a radio station called “Voice of Freedom” that played Arab music and presented the Iraqi government’s mission.³⁶⁶ The new Iraqi government was also criticized for operating under a set of laws that criminalized speech that “ridicules the government or its officials.”³⁶⁷ Bremmer Allen wrote:

Unconstitutional behavior in the international sphere by the American government and by American corporations should be actionable in American courts, regardless of whether the behavior targets Iraqis or Americans. Since the American invasion of Iraq began in March 2003, the American government and private contractors have denied Iraqis the same freedom of the press that their American counterparts enjoy.³⁶⁸

Luay Baldawi, who stated: “The paper’s policy is to publish everything, especially if it praises causes we believe in. . . . Every thing that supports America we will publish.” Mazzetti & Daragahi, *supra*. The U.S. military put out a bid for a “\$20 million public relations contract that call[ed] for extensive monitoring of U.S. and Middle Eastern media in an effort to promote more positive coverage of news from Iraq.” Walter Pincus, *Positive Press on Iraq Is Aim of U.S. Contract*, WASH. POST, at A20, Aug. 31, 2006, available at http://www.washingtonpost.com/wp-dyn/content/article/2006/08/30/AR2006083003011_pf.html. The CIA was apparently also involved in running deceptive radio station operations that were portrayed as Iraqi stations. Smyczek, *supra* note 340, at 223–24.

³⁶⁴ Allen, *supra* note 354, at 546–47.

³⁶⁵ Al-Marashi, *supra* note 347, at 106.

³⁶⁶ Robert F. Worth, *Sides in Falluja Fight for Hearts and Minds*, N.Y. TIMES, Nov. 17, 2004, at A12, available at <http://www.nytimes.com/2004/11/17/international/middleeast/17psyops.html?pagewanted=print&position=>.

³⁶⁷ von Zielbauer, *supra* note 363. Paragraph 226 of the Iraqi penal code makes “anyone who ‘publicly insults’ the government or public officials subject to up to seven years in prison.” *Id.* In addition to the criminal sanctions imposed on journalists who insult a public official, CPA Order 14 prohibited the media from disseminating information that would incite violence or civil disorder. Cheryl D. Kluwe, Comment, *Free to Follow the Rules: A Glimpse at the Role of the Iraqi Media, Past, Present, and Future*, 18 J. TRANSNAT’L L. & POL’Y 109, 123–24 (2008).

³⁶⁸ Allen, *supra* note 354, at 536.

A Pentagon official remarked: “Here we are trying to create the principles of democracy in Iraq. Every speech we give in that country is about democracy. And we’re breaking all the first principles of democracy when we’re doing it.”³⁶⁹ In October 2006, the Pentagon’s Inspector General’s audit concluded that the “American military propaganda campaign that planted favorable news articles in the Iraqi news did not violate laws or Pentagon regulations,” but the problem was that “officers ‘did not retain adequate documentation to verify expenditures.’”³⁷⁰ This was another tardy investigation. It took three years after the invasion to publicly reveal greater depth of operations to Iraqis and to U.S. citizens, while American taxpayers financed the operations just as they funded other Bush Administration self-promotion discourse.³⁷¹ A few months earlier, Secretary of Defense Rumsfeld remarked about Pentagon media operations:

What complicates the ability to respond quickly is that, unlike our enemies, which propagate lies with impunity with no penalty whatsoever, our government does not have the luxury of relying on other sources for information—anonymous or otherwise. Our government has to be the source, and we tell the truth. . . . [T]he U.S. military command, working closely with the Iraqi government and the U.S. embassy, has sought nontraditional means to provide accurate information to the Iraqi people in the face of aggressive campaign of disinformation.³⁷²

This justification for propagating crafted messages in the Iraqi media relied on the assumption that Pentagon initiatives were imperative to

³⁶⁹ Mazzetti & Daragahi, *supra* note 363.

³⁷⁰ Mazzetti, *supra* note 363. The article further stated: “By law, only intelligence operatives, not the military, are authorized to carry out covert actions, and the government is authorized to deny publicly any knowledge of these activities.” *Id.* In other words, by this interpretation, American taxpayers fund propaganda operations and government units carry out those operations without responsibility being assessed. That is plausible deniability.

³⁷¹ See *supra* Parts II.B–C.

³⁷² Donald Rumsfeld, Secretary, U.S. Dep’t of Def., *New Realities in the Media Age: A Conversation with Donald Rumsfeld* (Feb. 17, 2006), available at <http://www.cfr.org/publication/9900/>.

countering opposition to a benign and favorable occupation.³⁷³ Using preemptive restrictions on speech or presenting bias accounts to thwart violent dissent could be justified. On the other hand, implementing biased control inside media operations may have endangered the rights of political and peaceful dissent, for which there is no justification to use deception to counter opposition. This Pentagon justification for using biased and distorted communications to preempt perpetrators of violence ostensibly commingled with the allegation that Hussein's regime was harboring al-Qaeda members. Unfortunately, the allegation was another excellent example of an inadequately grounded belief infiltrating foreign and domestic audience consciousness.

C. Polls and Mysterious Sourcing for News Accounts

Professor Jide Nzelibe explained: "President Bush informed the American public in 2002 that Saddam Hussein was linked to the terrorists who conducted the September 11 attacks."³⁷⁴ In an October 2004 Harris Poll, 62% believed "Hussein had strong links to al-Qaeda," 41% believed that "Hussein helped plan and support the [9/11] hijackers," and 37% believed that "several of the hijackers . . . were Iraqis."³⁷⁵ As with the WMDs charges, the Bush Administration casted allegations of links between al-Qaeda and Hussein's regime as ironclad fact and the allegations crumbled.

In 2004, the 9/11 Commission concluded there was "no 'collaborative relationship' between Iraq and al Qaeda."³⁷⁶ In 2006, the SSCI affirmed that there was no substantial evidence to support Iraqi connections to 9/11 or al-Qaeda either before or after the invasion of Iraq.³⁷⁷ In 2007, former CIA Director George Tenet affirmed: "We could never verify that there was any Iraqi authority, direction, connection and control, complicity with

³⁷³ See U.S. DEP'T OF DEF., *supra* note 345.

³⁷⁴ Jide Nzelibe, *Are Congressionally Authorized Wars Perverse?*, 59 STAN. L. REV. 907, 927 (2007).

³⁷⁵ HARRIS INTERACTIVE, *supra* note 276.

³⁷⁶ Walter Pincus & Dana Milbank, *Al Qaeda-Hussein Link Is Dismissed*, WASH. POST, June 17, 2004, at A1, available at <http://www.washingtonpost.com/wp-dyn/articles/A47812-2004Jun16.html>.

³⁷⁷ SEN. SELECT COMM. ON INTELLIGENCE, *supra* note 227, at 105–13.

al-Qaeda for 9/11 or any operational act against America, period.”³⁷⁸ In 2008, the Pentagon released its “first and only study” looking into alleged ties between Hussein’s regime and al-Qaeda, which examined 600,000 Iraqi documents seized during the occupation and used interrogations of former Iraqi leaders, and also found that Hussein’s Iraq and al-Qaeda were not linked.³⁷⁹ ABC News remarked that the study was “the first official acknowledgment from the U.S. military that there [was] no evidence Saddam had ties to Al Qaeda.”³⁸⁰ In 2008, the SSCI Chair concluded:

[The Bush Administration] used the 9/11 attacks by al Qa’ida as justification for overthrowing Saddam Hussein. To accomplish this, top Administration officials made repeated statements that falsely linked Iraq and al Qa’ida as a single threat and insinuated that Iraq played a role in 9/11. Sadly, the Bush Administration led the nation into war under false pretenses.³⁸¹

These conclusions from official investigations follow the tardy correction pattern in that they gradually aggregated and ostensibly became stronger over five years. The Bush Administration was leaving office, but the damage to informed populace belief was already done. During this interim period, a growing percentage of Americans believed that the Bush Administration’s allegations of links to al-Qaeda were misleading.³⁸² In

³⁷⁸ 60 Minutes: *At the Center of the Storm: Interview with George Tenet* (CBS television broadcast Apr. 29, 2007), available at <http://cbsnews.com/video/watch/?id=2739673n&tag=related;photovideo>.

³⁷⁹ Mike Mount, *Hussein’s Iraq and al Qaeda Not Linked, Pentagon Says*, CNN (Mar. 13, 2008), http://articles.cnn.com/2008-03-13/us/alqaeda.saddam_1_qaeda-targets-of-iraqi-state-iraqi-state-terror-operations?_s=PM:US; Warren P. Strobel, *Exhaustive Review Finds No Link Between Saddam and al Qaida*, McCLATCHY NEWS (Mar. 10, 2008, 7:39 PM), <http://www.mcclatchydc.com/2008/03/10/29959/exhaustive-review-finds-no-link.html>.

³⁸⁰ William Kristol, *Gunsmoke: Why Is the Bush Administration Silent on the New Pentagon Report?*, WEEKLY STANDARD (Mar. 24, 2008), <http://www.weeklystandard.com/Content/Public/Articles/000/000/014/881yegar.asp> (acknowledging the ABC quote and other headlines in mainstream news sources that referenced the “no link” finding and citing alleged al-Qaeda associations with other groups or shared-ideology, and apparent Iraqi support for terrorism generally).

³⁸¹ Press Release, *supra* note 18; Warrick & Pincus, *supra* note 18.

³⁸² In June 2003, 36% believed Bush Administration allegations about links to al-Qaeda and WMDs were “misleading” and in June 2004, 51% believed they were misleading.
(continued)

2006, a World Public Opinion Organization poll report stated: “A majority of Republicans (62%) even believe that clear evidence has been found proving that Iraq was working with al-Qaeda. . . . Seventy-three percent of Democrats believe that such evidence has not been found”³⁸³

Continuing confusion may have been due to allegations of al-Qaeda members migrating to Iraq to foment violence during occupation³⁸⁴ and allegations that questionable documents postulating links between Hussein and al-Qaeda were discovered and broadcasted in the global media.³⁸⁵ Others hypothesized that unregulated intelligence operatives were providing propaganda to journalists as “subtle and non-violent tactics” to address terror groups.³⁸⁶ If this allegation and the intended target audience were accurate, the sourcing was a form of PSYOP, but the stories were also translated into English for American news. Based on an overview of Nick Davis’s book, *Flat Earth News*, the *London Independent* wrote:

So, who exactly is producing fiction for the media? Who wrote the Zarqawi letters? Who created the fantasy story about Osama bin Laden using a network of subterranean bases in Afghanistan, complete with offices, dormitories, arms depots, electricity and ventilation systems? . . . Some of this comes from freelance political agitators. . . . And

HARRIS INTERACTIVE, UNLIKE 9/11 COMMISSION, LARGE MAJORITY OF PUBLIC POLLED RECENTLY STILL BELIEVED SADDAM HUSSEIN WAS SUPPORTING AL QAEDA (2004), available at <http://www2.pnnewswire.com/cgi-bin/stories.pl?ACCT=104&STORY=/www/story/06-17-2004/0002195629&EDATE=>.

³⁸³ WPO, *supra* note 311.

³⁸⁴ Michael Isikoff, *Terror Watch: Dubious Link Between Atta and Saddam*, NEWSWEEK (Dec. 16, 2003, 7:00 PM), <http://www.thedailybeast.com/newsweek/2003/12/16/terror-watch-dubious-link-between-atta-and-saddam.html> (noting that Hassan Mneimneh, co-director of an Iraqi exile research group that was reviewing documents, admitted: “‘There’s an active document trade taking place . . . You have fraudulent documents that are being fabricated and sold’ for hundreds of dollars a piece.”).

³⁸⁵ GEORGE TENET, AT THE CENTER OF THE STORM 356 (2007). For example, one mysterious forged memo found in an Iraqi government facility claimed that 9/11 hijacker Atta had participated in training exercises in Baghdad and that al-Qaeda “arranged for a shipment [of uranium] from Niger to reach Iraq by way of Libya and Syria.” Isikoff, *supra* note 384. See also *How the Spooks Took over the News*, THE INDEPENDENT, Feb. 11, 2008, <http://www.independent.co.uk/news/media/how-the-spooks-took-over-the-news-780672.html>.

³⁸⁶ *How the Spooks Took over the News*, *supra* note 385.

notoriously it was Iraqi exiles who supplied the global media with a dirty stream of disinformation about Saddam Hussein. But clearly a great deal of this carries the fingerprints of officialdom. . . . Since October 2006, every brigade, division and corps in the [U.S.] military [in Iraq] has had its own “psyop” element producing output for local media.³⁸⁷

D. Abu Musab al-Zarqawi

The foremost reason the Bush Administration provided for invading Iraq based on alleged connections to al-Qaeda was that insurgent Abu Musab al-Zarqawi departed Afghanistan and went to Iraq.³⁸⁸ In his U.N. Security Council address, Secretary of State Powell alleged Zarqawi built a poison factory in Kurdish-controlled Northern Iraq, but no chemical weapons were later discovered in Iraq.³⁸⁹ Powell spoke of a link between Zarqawi and an alleged chemical weapons plot in London, but reports later affirmed that there was no plot and the *Washington Post* called the claim “a ‘false positive’ allegation kept secret for two years.”³⁹⁰ Nonetheless, during the first two years of the occupation, Zarqawi’s persona morphed,³⁹¹ and he was blamed for numerous bombings and insurgent attacks.³⁹²

³⁸⁷ *Id.*

³⁸⁸ Bejesky, *supra* note 14, at 867–68.

³⁸⁹ *Id.* at 870–72.

³⁹⁰ *Id.* at 872.

³⁹¹ Rumsfeld called him the “leading terrorist in Iraq and one of three senior al-Qaeda leaders worldwide.” Karen DeYoung & Walter Pincus, *Zarqawi Helped U.S. Argument that al-Qaeda Network Was in Iraq*, WASH. POST (June 10, 2006), http://www.washingtonpost.com/wp-dyn/content/article/2006/06/09/AR2006060901578_pf.html; Peter Grier & Faye Bowers, *Iraq’s bin Laden? Zarqawi’s Rise*, CHRISTIAN SCIENCE MONITOR (May 14, 2004), <http://www.csmonitor.com/2004/0514/p03s01-usfp.html> (“the brutal new star of Islamic terrorism”); *Bush: al-Zarqawi Death a ‘Severe Blow,’* MSNBC (June 8, 2006), http://www.msnbc.msn.com/id/13197560/ns/world_news-mideastn_africa/ (noting that Rumsfeld remarked: “Arguably over the last several years, no single person on this planet has had the blood of more innocent men, women and children on his hands than Zarqawi”).

³⁹² DeYoung & Pincus, *supra* note 391 (Maj. Gen. Rick Lynch remarking that “more than 90 percent of the suicide bombers in Iraq were carried out by terrorist forces recruited and trained by Zarqawi”); *Terror Strikes Blamed on al-Zarqawi in Iraq*, MSNBC (May 4, 2005, 3:50 PM), http://www.msnbc.msn.com/id/5437742/ns/world_news-

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Evidentiary links between Zarqawi and al-Qaeda followed after the invasion. In January 2004, a militant was captured and was carrying a seventeen-page letter purportedly written by Zarqawi.³⁹³ American officials accentuated that the discoveries evidenced that al-Qaeda members were moving to Iraq.³⁹⁴ Bush remarked about the capture: “[L]ast week we made further progress in making America more secure when a fellow named Hasan Ghul was captured in Iraq. . . . Ghul . . . reported directly to Khalid Shaikh Mohammed, who was the mastermind of the September the 11th attacks.”³⁹⁵ The seventeen-page letter was written in Arabic, purportedly by Zarqawi, and explained that U.S. forces could be defeated by starting a sectarian civil war inside Iraq.³⁹⁶ There was also an e-mail

hunt_for_al_qaida/t/terror-strikes-blamed-al-zarqawi-iraq/ (listing over thirty-five bombings and writing that “U.S. intelligence officials believe that Ayman al-Zarqawi . . . has orchestrated the vast majority of terror attacks . . . since the invasion in March 2003”); Ellen Knickmeyer & Jonathan Finer, *Insurgent Leader Al-Zarqawi Killed in Iraq*, WASH. POST (June 8, 2006), http://www.washingtonpost.com/wp-dyn/content/article/2006/06/08/AR2006060800114_pf.html. On the day Zarqawi was killed, a *Washington Post* article’s opening sentence read: “June 8—Abu Musab al-Zarqawi, the mastermind behind hundreds of bombings, kidnappings and beheadings in Iraq, was killed” *Id.*

³⁹³ Dexter Filkins, *The Struggle for Iraq: Intelligence; U.S. Says Files Seek Qaeda Aid in Iraq Conflict*, N.Y. TIMES, Feb. 9, 2004, at A1, available at <http://www.nytimes.com/2004/02/09/world/the-struggle-for-iraq-intelligence-us-says-files-seek-qaeda-aid-in-iraq-conflict.html>.

³⁹⁴ *U.S. Links Zarqawi to Iraq Attacks*, CNN (Jan. 29, 2004), http://articles.cnn.com/2004-01-29/world/sprj.nirq.main_1_qaeda-iraq-attacks-abu-musab-zarqawi?_s=PM:WORLD (General Ricardo Sanchez stated: “The capture of Ghul is pretty strong proof that al Qaeda is trying to gain a foothold here [in Iraq] to continue their murderous campaigns.”); *George Tenet 9/11 Written Statement*, MSNBC (Mar. 24, 2004, 4:24 PM), http://www.msnbc.msn.com/id/4592866/ns/us_news-security/t/george-tenet-written-statement/ (noting that CIA Director Tenet provided in a written statement that Ghul had been “sent to case Iraq for an expanded al-Qa’ida presence there.”).

³⁹⁵ *President Bush Calls for Medical Liability Reform*, WHITE HOUSE (Jan. 26, 2004), <http://georgewbush-whitehouse.archives.gov/news/releases/2004/01/20040126-3.html>.

³⁹⁶ *Presenter: Coalition Provisional Authority Briefing*, U.S. DEP’T OF DEF. (Feb. 12, 2004, 9:00 AM), <http://www.defense.gov/transcripts/transcript.aspx?transcriptid=2066> (describing that General Mark Kimmit responded with the following at a press conference: “We have intelligence and we have evidence which links Zarqawi to . . . [insurgent] attacks, and in his letter himself he admits that he participated in 25 major operations here within
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exchange. Bush cited: “Zarqawi’s the best evidence of connection to al-Qaida affiliates and al-Qaida. He’s the person who’s still killing. He’s the person, remember the e-mail exchange between al-Qaeda leadership and he himself about how to disrupt the progress toward freedom.”³⁹⁷

Another connection between Iraq and al-Qaeda was announced when an anonymous Taliban captive, called Zabihullah, explained that “[h]e personally heard the account from . . . a top-ranking Qaeda member known as Abdul Hadi al-Iraqi, at a meeting last December [2004] in western Pakistan.”³⁹⁸ Al-Iraqi was reportedly a former major in the Iraqi Army, but he apparently joined bin Laden’s group and was traveling between Afghanistan and Iraq.³⁹⁹ *Newsweek* wrote:

Al-Iraqi needed all the poise and charm he could muster for his mission to the insurgents. By the time he reached Iraq, in late 2003, Zarqawi had built a fearsome team of resistance fighters. The Jordanian [Zarqawi] considered himself to be the obvious choice for Al Qaeda’s top man in Iraq. He was livid at the news that bin Laden had chosen al-Iraqi for the job. “I’m already here!” Zarqawi told al-Iraqi. “So why is the sheik sending someone else?” . . . Zarqawi had “a terrifying face,” al-Iraqi recalled later. But the envoy said he knew at once that Zarqawi was exactly what Al Qaeda needed. “There is no doubt that he is the best man to lead foreign and Iraqi insurgents in Iraq,” al-Iraqi told bin Laden when he got back to the caves, according to Zabihullah’s account.⁴⁰⁰

Later news releases casted doubt on the degree to which Zarqawi was leading insurgent forces. The *Washington Post* reported on internal military documents, including those prepared for Army General George W. Casey, the top U.S. commander in Iraq, and revealed that the Pentagon

the country. We believe that the letter is further confirmation of some of the evidence that has been gathered”); Filkins, *supra* note 393.

³⁹⁷ Warren P. Strobel, Jonathan S. Landay & John Walcott, *Fresh CIA Analysis: No Evidence Saddam Colluded with al-Qaida*, THE SEATTLE TIMES, Oct. 5, 2004, at A9, available at http://seattletimes.nwsource.com/html/nationworld/2002054248_intell105.html.

³⁹⁸ Sami Yousafzai & Ron Moreau, *Terror Broker*, NEWSWEEK (Apr. 11, 2005, 8:00 PM), <http://www.thedailybeast.com/newsweek/2005/04/10/terror-broker.html>.

³⁹⁹ *Id.*

⁴⁰⁰ *Id.*

commenced a “propaganda campaign,” which “some military intelligence officials believe may have overstated his [Zarqawi’s] importance and helped the Bush [A]dministration tie the war to the organization responsible for the Sept. 11, 2001, attacks.”⁴⁰¹ This article, produced just two months before Zarqawi was reportedly killed in an airstrike,⁴⁰² explained:

The U.S. military is conducting a propaganda campaign to magnify the role of the leader of al-Qaeda in Iraq, according to internal military documents and officers familiar with the program. . . . The documents state that the U.S. campaign aims to turn Iraqis against Abu Musab al-Zarqawi, a Jordanian, by playing on their perceived dislike of foreigners. . . . For the past two years, U.S. military leaders have been using Iraqi media and other outlets in Baghdad to publicize Zarqawi’s role in the insurgency. . . . Although Zarqawi and other foreign insurgents in Iraq have conducted deadly bombing attacks, they remain “a very small part of the actual numbers,” Col. Derek Harvey, who served as a military intelligence officer in Iraq and then was one of the top officers handling Iraq intelligence issues on the staff of the Joint Chiefs of Staff. . . . Harvey said, “Our own focus on Zarqawi has enlarged his caricature, if you will—made him more important than he really is, in some ways. The long-term threat is not Zarqawi or religious extremists, but these former regime types and their friends”⁴⁰³

⁴⁰¹ Thomas E. Ricks, *Military Plays up Role of Zarqawi*, WASH. POST, Apr. 10, 2006, at A1, available at http://www.washingtonpost.com/wp-dyn/content/article/2006/04/09/AR2006040900890_pf.html.

⁴⁰² Knickmeyer & Finer, *supra* note 392.

⁴⁰³ Ricks, *supra* note 401; *How the Spooks Took over the News*, *supra* note 385 (listing several Bush Administration statements that connected Zarqawi to Hussein’s regime, and noting: “[c]ourtesy of post-war Senate intelligence inquiries; evidence disclosed in several European trials; and the courageous work of a handful of journalists . . . we now know that every single one of those statements was entirely false”); Grier & Bowers, *supra* note 391 (“Some experts believe the [U.S.] may be exaggerating Zarqawi’s role in Iraq in an attempt to more closely link the [U.S.] presence there with a war on terrorism.”).

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The impression the Bush Administration delivered to the U.S. media was that Zarqawi was the key al-Qaeda link to Iraq and that he was running a massive insurgency operation against U.S. soldiers, which then gave reason for continuing occupation.⁴⁰⁴ Because official investigations

Abu Musab al-Zarqawi . . . is “more myth than man,” according to American military intelligence agents in Iraq.

Several sources said the importance of Zarqawi, blamed for many of the most spectacular acts of violence in Iraq, has been exaggerated by flawed intelligence and the Bush [A]dministration’s desire to find “a villain” for the post-invasion mayhem.

[U.S.] military intelligence agents in Iraq have revealed a series of botched and often tawdry dealings with unreliable sources who, in the words of one source, “told us what we wanted to hear.”

“We were basically paying up to \$10,000 a time to opportunists, criminals and chancers who passed off fiction and supposition about Zarqawi as cast-iron fact, making him out as the linchpin of just about every attack in Iraq,” the agent said.

“Back home this stuff was gratefully received and formed the basis of policy decisions. We needed a villain, someone identifiable for the public to latch on to, and we got one.”

Adam Blomfield, *How US Fuelled Myth of Zarqawi the Mastermind*, THE TELEGRAPH, Oct. 4, 2004, at 14, available at <http://www.telegraph.co.uk/news/worldnews/middleeast/iraq/1473309/How-US-fuelled-myth-of-Zarqawi-the-mastermind.html>.

⁴⁰⁴ A June 2006 *Washington Post* article explained the past three years of revelations about Zarqawi: “Zarqawi’s presence in Iraq was cited as proof that the uprising was fomented by al-Qaeda backed ‘foreign fighters’ . . . Zarqawi was always a useful source of propaganda for the administration.” DeYoung & Pincus, *supra* note 391; U.S. DEP’T OF DEF., *supra* note 396. Jill Carroll noted the logic:

[A] few months ago President Bush was saying there’s no firm evidence of a link between al Qaeda and Saddam Hussein here in the country. And now we’re seeing this letter here and Abu Musaab Zarqawi is trying to recruit people and terrorist sorts of operations here . . . [I]t seems the war has fostered al Qaeda’s presence here.

Id.

confirmed that there were no al-Qaeda links to Hussein's regime,⁴⁰⁵ purported al-Qaeda member migration to Iraq during occupation could not conceivably justify the invasion. As for accentuating Zarqawi's role, Brigadier General Mark Kimmit, who was the military's chief spokesperson when the Zarqawi PSYOP program began, stated that "[t]here was no attempt to manipulate the press," but Pentagon documents did "explicitly list the 'U.S. Home Audience' as one of the targets of a broader propaganda campaign."⁴⁰⁶ The Zarqawi PSYOP was apparently intended for Iraqis, but there may have been information diffusion into the U.S. news media.

V. CONCLUSION

Virtually all of the information that set the course for invasion of Iraq was inaccurate,⁴⁰⁷ but tangential post-invasion reporting shifted issues and prolonged ambiguity on pre-invasion claims. From this perspective, the psychology doctrine of "consistency theory" seemingly supports that citizens may cognitively interpret ambiguous information to reaffirm pre-existing beliefs and political inclinations.⁴⁰⁸ If faulty perceptions linger for any reason, including because the incumbent government has the dominant ability to generate news accounts,⁴⁰⁹ perhaps rational public choice can be undermined or election cycles can be compromised. Ultimately, public perceptions were updated after there was no longer a right to deliver that dominant message. Bush left office with one of the lowest approval ratings in American history at 22%.⁴¹⁰ This low rating was due predominantly to the Iraq War and poor economic conditions.⁴¹¹

The depth of mistaken information about Iraq was revealed years later in investigations and news accounts. Instead of sufficing as inconveniences just prior to the Bush Administration exiting office, would more prompt and exhaustive investigations and critical reporting have shifted the domestic political landscape? Some examples of factually-

⁴⁰⁵ See *supra* Part IV.C

⁴⁰⁶ Ricks, *supra* note 401.

⁴⁰⁷ Bejesky, *supra* note 14, at 875–82.

⁴⁰⁸ See JOWETT & O'DONNELL, *supra* note 6, at 177–79; LIBERTY BOUND (Blue Moose Films 2004) (Historian Howard Zinn) ("So, you have a combination of government control, media complicity, and you have a public that is uninformed."); *supra* Part III.E.

⁴⁰⁹ Bejesky, *supra* note 113, at 348–63, 370–71, 388–92.

⁴¹⁰ *Bush's Final Approval Rating: 22 Percent*, *supra* note 287.

⁴¹¹ *Id.*

flawed media portrayals to the American public include the Jessica Lynch story and the content from the Pentagon's independent military analyst program. Lynch testified before Congress four years later that the media accounts were hyped and the military analyst program was not revealed until 2008 with the *New York Times* lawsuit.⁴¹² Bush Administration VNRs were anonymous government communications ultimately funded by U.S. taxpayers.⁴¹³ Other examples of U.S. Administrations providing crafted or false information during or after major military conflict are found during WWI to confront American dissent, the post-WWI Red Scare, WWII to keep patriotism high, the post-WWII McCarthyite Red Scare, the Vietnam War, Ronald Reagan's Cold War threat elaboration, and the 1991 Gulf War.⁴¹⁴ Although these programs seem to be confidently conducted as government entitlements, do they have a constitutional basis?

Inaccurate post-invasion portrayals of events inside Iraq related back to the two primary claims espoused for invasion—that Iraq possessed WMDs that violated Security Council resolutions, formed an immediate security threat, or both; and that al-Qaeda members were present in Iraq. First, the embedded reporter's program was a conscientious effort to control the context of reporting, but at the same time the program provided a perception of openness. With mistaken WMD discovery reports, a high percentage of Americans continued to perceive that WMDs had been found in Iraq even though that was not the case.⁴¹⁵ Second, while official investigations concluded that there was no relationship between Hussein's regime and al-Qaeda, meaning that the claim could not have logically justified the invasion, the Bush Administration, Pentagon, and media portrayed that al-Qaeda members were migrating to Iraq to disrupt benign occupation. Moreover, it is questionable to what extent Zarqawi was a

⁴¹² See *supra* Parts II.A–B.

⁴¹³ See *supra* Part II.C.

⁴¹⁴ Travis, *supra* note 115, at 48 n.4, 56–59; Robert Bejesky, *From Marginalizing Economic Discourse with Security Threats to Approbating Corporate Lobbies and Campaign Contributions*, 12(1) CONN. PUB. INT. L.J. (forthcoming 2012) (manuscript at 5–38); Robert Bejesky, *Currency Cooperation and Sovereign Financial Obligations*, 24 FLA. J. INT'L L. 91, 132–37 (2012) (listing government records of U.S. military support for coups and non-democratic governments in Latin America). Unpalatable U.S. foreign policy in foreign countries has been frequently overlooked and replaced by patriotic and benevolent heuristics.

⁴¹⁵ See *supra* Part III.E.

cause of discontent and violence among Iraqis.⁴¹⁶ The third post-invasion justification for attack was that citizens would be “liberated” by overthrowing Hussein’s regime. This Bush Administration’s rhetoric was never raised before the Security Council and Iraqis expressed uncanny ambivalence to continuing occupation.⁴¹⁷ A free media is elemental for registering informed populace preferences, which would ostensibly also be probative to the concept of “liberation.” Disassembling the former media system would undo existing bias, but commentators explained that the occupation reconstituted and implemented the media with a pro-occupation bias.⁴¹⁸

Information and claims naturally flow across sovereign borders even though specific audiences are identified. The Bush Administration formed agencies, such as the OSI and the Office of Global Diplomacy, and their messages were generally labeled public diplomacy. Yet today’s public diplomacy should be appropriately contextualized with its origins. The Voice of America (VOA) news service was started in 1942 “to explain and support American foreign policy and promote U.S. national interests.”⁴¹⁹ Similar to restrictions appearing first in the Smith-Mundt Act of 1948, 22 USC § 1461-1A provides that “no program material prepared by the United States Information Agency shall be distributed within the United States.”⁴²⁰ When the ban was enacted, congresspersons quite plainly remarked that permitting U.S. domestic access might indoctrinate

⁴¹⁶ Bejesky, *supra* note 23, at 104–05 (citing polls from 2004 to 2009 indicating that 71% or more of the Iraqi people were opposed to occupation). *See also supra* Part IV.D (aggrandizing Zarqawi’s role as an acknowledged PSYOP).

⁴¹⁷ Bejesky, *supra* note 23, at 102–06.

⁴¹⁸ *See supra* Part IV.B.

⁴¹⁹ JOWETT & O’DONNELL, *supra* note 6, at 28. *See also* S.J. PARRY-GILES, THE RHETORICAL PRESIDENCY, PROPAGANDA, AND THE COLD WAR: 1945–1955, at 191 (2002); Susan L. Gough, *The Evolution of Strategic Influence*, STRATEGIC RESEARCH PROJECT 29–30 (U.S. Army War College 2000).

⁴²⁰ 22 U.S.C. § 1461(a); BRYAN HILL, THE SMITH-MUNDT ACT OF 1948: COMMENTS, CRITIQUES, AND THE WAY FORWARD 1–2 (2007); Nancy Snow, *The Smith-Mundt Act of 1948*, 10 PEACE REV. 619, 619 (1998). *See also* Charles F. Gormly, *The United States Information Agency Domestic Dissemination Ban: Arguments for Repeal*, 9 ADMIN. L.J. AM. U. 191, 192 (1995); Allen W. Palmer & Edward L. Carter, *The Smith-Mundt Act’s Ban on Domestic Propaganda: An Analysis of the Cold War Statute Limiting Access to Public Diplomacy*, 11 COMM. L. & POL’Y 1, 9–10 (2006).

Americans.⁴²¹ This domestic access restriction on U.S. Government broadcasts to foreign audiences was heavily criticized. Wanting to know what foreigners were being exposed to, plaintiffs brought First Amendment and Freedom of Information Act challenges through the 1980s, but they were largely unsuccessful.⁴²² In 1985, and at a time when amendments to the Smith-Mundt Act were being proposed, Senator Zorinsky explained that “[t]he American taxpayer certainly does not need or want his tax dollars used to support U.S. Government propaganda directed at him or her.”⁴²³ The archaic Smith-Mundt Act is still law.⁴²⁴

There was a clear separation between information delivered to the domestic and international audiences. The domestic audience is supposed to be subject to debate and not to biased messages intended for foreign audiences, while it was apparently legitimate to propagandize foreign populations. Moreover, to sanitize these operations, during the 1970s, U.S. officials stopped calling the foreign information “propaganda” and coined the term public diplomacy.⁴²⁵ This term is not novel, but with global information diffusion and greater difficulty in containing the message for target audiences, the term is being reinvented.

⁴²¹ HILL, *supra* note 420, at 2; Snow, *supra* note 420, at 619.

⁴²² See Palmer & Carter, *supra* note 420, at 15–21 (listing chronology of court cases from the 1960s to present day); Gormly, *supra* note 420, at 198–200. After litigation in January 1990, “members of the public [were permitted] to take notes but not to make verbatim copies, either by hand or mechanically.” *Id.* at 198 (citing U.S. Information Agency, Announcement No. 16, Domestic Dissemination (1990)).

⁴²³ *Gartner v. U.S. Info. Agency*, 726 F. Supp. 1183, 1186 n.2 (S.D. Iowa 1989) (citing 131 CONG. REC. 14,945 (daily ed. June 7, 1985) (statement of Sen. Zorinsky)).

⁴²⁴ See THE REPORT ON THE SMITH-MUNDT SYMPOSIUM OF JANUARY 13, 2009, at 7 (2009), available at http://mountainrunner.us/files/s-m/Smith-Mundt_Symposium_Final_Report.pdf; HILL, *supra* note 420, at 3.

⁴²⁵ Gregory, *supra* note 1, at 275.