
HOW SECURITY THREAT DISCOURSE CAN PRECIPITATE A PRESS CLAUSE DEATH SPIRAL

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ABSTRACT

Consistent with the rationales for the inclusion of the Press Clause in the First Amendment to the U.S. Constitution in 1791, international norms currently presume that an independent news media system is a pivotal element of democracy because broadcasters and news outlets can widely disseminate information to citizens, register alternative views on issues of public concern, and exercise oversight of government officials to reduce the incidence of imprudent, unethical, and illegal acts. These merits of the media are imperative during wartime and perceived national security crises due to the complexities in the sharing of constitutional war powers and the prospect of citizens bearing prolonged sacrifices and cost, but a security-imbued atmosphere of reporting poses distinct challenges to effective media performance. This Article applies a rational choice model to the events surrounding the Iraq War to depict how suboptimal reporting and the interrelated trajectory of public opinion and the tone of media coverage were a function of corporate power, profit motive, and structural characteristics of the media; the Executive's ability to engage in agenda setting, frame official sourcing, and employ institutions of the Executive Branch to curtail critical reporting; and the news media's choices regarding coverage of three essential variables—perceptions of security threats, patriotism for the military and troops, and facilitation of a humanitarian outcome.

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TABLE OF CONTENTS

I.	Introduction	2
II.	Two Wars and Two Perceptions of the Press	5
	A. The Vietnam War	5
	B. The 2003 Iraq War	10
III.	Media Decisionmaking Premises	14
	A. Framer Values and Corporate Media Profitability.....	14
	B. Executive Expectations About the Media's Rational Choice.....	26
	1. A Framework	26
	2. An Equation	30
IV.	Application of Media Portrayals Prior to War	34
	A. The Executive's Agenda Setting	34
	B. Polls	42
	C. Media Interpretations of Discourse.....	47
	1. Media Discretion to Present a Continuum of Diversity.....	48
	2. Premises That Shift Broadcasting Content	54
	a. Executive Interpretation of Media Restraints.....	54
	b. Substantive Content.....	56
	c. Protecting the Corporation	61
	D. Prewar Outcome	63
V.	Aftermath of Invasion	68
	A. The Transition	68
	B. Patriotism.....	73
	C. "Independent" Military Analysts.....	77
	D. False Positive WMD Discoveries.....	86
	E. False Perceptions	97
VI.	Conclusion	104

I. INTRODUCTION

The Framers' aspirations for the Press Clause in the U.S. Constitution were to fortify the independence of publication entities, serve as an autonomous check on government, and support democracy by informing American citizens on the affairs of their government.¹ Commentators

1. *Branzburg v. Hayes*, 408 U.S. 665, 729 (1972) (Stewart, J., dissenting) (stating that the media is obligated to "do far more than merely print public statements or publish

maintain that today's news media frequently fails to provide this check² and instead abets the policy agenda of the government,³ reducing the efficacy of bidirectional influences between government and citizens and making citizen preferences less rational and more amenable to forthcoming policy actions.⁴ This Article emphasizes media industry variables that can foster

prepared handouts" and must not be a "captive mouthpiece of 'newsmakers'"); Michelle Ward Ghetti, *The Terrorist Is a Star!: Regulating Media Coverage of Publicity-Seeking Crimes*, 60 FED. COMM. L.J. 481, 501–02 (2008) (arguing that "freedom to report must be accompanied by the duty to report responsibly"); Leonard W. Levy, *On the Origins of the Free Press Clause*, 32 UCLA L. REV. 177, 182–83, 200–06 (1984) (emphasizing that the Framers' intention with the Bill of Rights was to provide freedom to publish, not license to publish irresponsibly).

2. See TIMOTHY E. COOK, GOVERNING WITH THE NEWS: THE NEWS MEDIA AS A POLITICAL INSTITUTION 179 (1998) (demonstrating that the "presumption that the news media work to check government is simply empirically wrong"); Jonathan Mermin, *Free but Not Independent: The Real First Amendment Issue for the Press*, 39 U.S.F. L. REV. 929, 930–31 (2005) (maintaining that, while "[l]egal academics writing about the media have for the most part taken for granted that the press does function as an independent check on the government," consistent marginalization of viewpoints not already represented within the government means that "the First Amendment ideal of a press independent of the government is not being achieved"); Malla Pollack, *A Listener's Free Speech, A Reader's Copyright*, 35 HOFSTRA L. REV. 1457, 1458 (2007) (opining that the media has abandoned its "traditional watchdog function"); see also Robert M. Entman, *Putting the First Amendment in Its Place: Enhancing American Democracy Through the Press*, 1993 U. CHI. LEGAL F. 61, 76 (1993) ("The commercial market underproduces news that enhances citizens' political interest, knowledge, and sophistication, in large part because the commercial pressure on suppliers is to attract the largest audience possible.").

3. See Mary-Rose Papandrea, *Lapdogs, Watchdogs, and Scapegoats: The Press and National Security Information*, 83 IND. L.J. 233, 248–49 (2008) (writing that the press is "commonly regarded as the 'watchdog' of the government," but historically "the press has just as frequently served as the lapdog of the executive branch"); see also Richard B. Kielbowicz, *The Role of News Leaks in Governance and the Law of Journalists' Confidentiality, 1795-2005*, 43 SAN DIEGO L. REV. 425, 430 (2006) (criticizing journalists' asserted reliance on the press's watchdog role because it "overemphasizes the adversarial nature of press-government relations by discounting the many ways that officials use the media to govern").

4. See, e.g., Robert Bejesky, *Cognitive Foreign Policy: Linking Al-Qaeda and Iraq*, 56 HOW. L.J. 1, 68–82 (2012) [hereinafter Bejesky, *CFP*]; see also David L. Altheide, *The Mass Media, Crime and Terrorism*, 4 J. INT'L CRIM. JUST. 982, 995 (2006) (noting that "news updates from authoritative sources quickly merge with orchestrated propaganda efforts"); Pollack, *supra* note 2, at 1467–70 ("Consider also, for example, the President's successful effort to silence *New York Times*' reports about NSA activities, the attacks on Representative Murtha for rethinking the war in Iraq, the political appointees who tried to silence NASA scientists about global warming, and the Navy's indirect ouster of the

suboptimal citizen preferences during warmaking and within security threat atmospheres.

After a contextualization of the query in Part II, Part III introduces a decisionmaking analysis that is circumscribed by premises that influence the choices of journalists and media organizations. Parts IV and V apply this framework to the invasion of Iraq and explain why the media was unavailing in constraining the Executive even after confirming that false allegations led to war⁵ and after it seemed evident that top officials knew that the evidentiary bases for war were unsubstantiated.⁶ Part VI iterates the

military lawyer who successfully defended Salim Abmed Hamdan's right to due process.") (footnotes omitted).

5. J. M. Spectar, *Beyond the Rubicon: Presidential Leadership, International Law & the Use of Force in the Long Hard Slog*, 22 CONN. J. INT'L L. 47, 87–90 (2006) (emphasizing that the Bush Administration exploited the public's confusion and disregarded contradictory evidence to persuade Congress and the American public that Iraq had weapons of mass destruction and quoting Senator Ted Kennedy who called it "reprehensible" that the "administration distorted, misrepresented and manipulated the intelligence" on Iraq); 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, 286–87 (2005) ("Many have documented this administration's penchant for deliberate misrepresentations on national security—in blunt terms, for lying to the American people about threats at home and abroad.").

6. Louis Fisher, *Lost Constitutional Moorings: Recovering the War Power*, 81 IND. L.J. 1200, 1253 (2006) ("There should be no question that the prewar information was distorted, hyped, and fabricated. The October 2002 [National Intelligence Estimate] prepared by the intelligence community is plain evidence of that, and Bush repeated those false claims in his Cincinnati speech."); Elizabeth Holtzman, *Abuses of Presidential Power: Impeachment as a Remedy*, 62 U. MIAMI L. REV. 213, 218–23 (2008) ("Repeatedly, and in various ways, President Bush suggested that Saddam and al Qaeda were intertwined, connected, working together. . . . Of course, that was not true, and the President knew it wasn't true."); Jeff McMahan, *The Morality of Military Occupation*, 31 LOY. L.A. INT'L & COMP. L. REV. 7, 15 (2009) (acknowledging the "preventive defense" justification raised by the Bush Administration with regard to weapons of mass destruction but emphasizing that "Iraq neither had such weapons nor was on the verge of acquiring them, and key figures in the Bush administration knew at the time that the evidence for a threat from Iraq was negligible"); Spectar, *supra* note 5, at 87 ("The justifications provided for the elective and preemptive war rested on largely flimsy, weak and opportunistic circumstantial evidence."); Press Release, U.S. Senate Select Comm. on Intelligence, Senate Intelligence Committee Unveils Final Phase II Reports on Prewar Iraq Intelligence (June 5, 2008), <http://intelligence.senate.gov/press/record.cfm?id=298775> ("In making the case for war, the Administration repeatedly presented intelligence as fact when in reality it was unsubstantiated, contradicted, or even non-existent. As a result, the American people were led to believe that the threat from Iraq was much greater than actually existed.") (internal quotation marks omitted).

analytical hypotheses developed in Part III and employed in Parts IV and V and emphasizes the future applicability of the query.

II. TWO WARS AND TWO PERCEPTIONS OF THE PRESS

A. *The Vietnam War*

Between 1964 and 1968, more than 500,000 American troops were sent to Vietnam; 58,220 American soldiers were killed, more than 304,000 were wounded, and more than 75,000 were permanently disabled.⁷ Substantial protest against the war grew from the mid-to-late-1960s, and a majority of Americans opposed the war by 1969.⁸ Nonetheless, the Vietnam War escalated against popular sentiment; President Richard Nixon authorized bombing in Cambodia that was arguably beyond the scope of the Gulf of Tonkin Resolution,⁹ and war expenditures climbed from initial estimates of \$10 billion to actual allocations of \$110 billion, which may have had reverberating international ramifications for other countries.¹⁰

7. See PETER IRONS, *WAR POWERS* 187 (2005); CHALMERS JOHNSON, *THE SORROWS OF EMPIRE* 59 (2004); *Statistical Information About Fatal Casualties of the Vietnam War*, NATIONAL ARCHIVES (Aug. 2013), <http://www.archives.gov/research/military/vietnam-war/casualty-statistics.html> (calculating total U.S. fatalities at 58,220).

8. DENNIS CHONG, *COLLECTIVE ACTION AND THE CIVIL RIGHTS MOVEMENT* 204 (1991) (noting that protest against the Vietnam War supplanted the prominence of the civil rights movement in national political discourse); CHARLES DEBENEDETTI & CHARLES CHATFIELD, *AN AMERICAN ORDEAL: THE ANTIWAR MOVEMENT OF THE VIETNAM ERA* 168–202 (1990) (by the late 1960s, “more and more Americans were coming to conclude that their nation was being corrupted” by the Vietnam War); SAMUEL HUNTINGTON, *AMERICAN POLITICS: THE PROMISE OF DISHARMONY* 200 (1981) (noting that “by 1969 a majority of the American public opposed U.S. involvement” in Vietnam).

9. *Nixon Defends Secret Bombing of Cambodia in 1969*, 31 CONG. Q. WKLY. REP., No. 34, 1973, at 229. The Senate and the House had already voted to cut funding for operations in Laos and Cambodia and subsequently broadened the prohibition against the use of appropriated funds for these operations. See *Special Foreign Assistance Act of 1971*, Pub. L. No. 91-652, §§ 7–8, 84 Stat. 1942, 1943; 119 CONG. REC. 21,173 (1973) (House vote approving amendment providing that no funds “may be expended to support directly or indirectly combat activities in, over or from off the shores of Cambodia or in or over Laos”).

10. Robert Bejesky, *Currency Cooperation and Sovereign Financial Obligations*, 24 FLA. J. INT’L L. 91, 153 n.414 (2012) (citing ARTHUR OKUN, *THE POLITICAL ECONOMY OF PROSPERITY* 62–74 (1970)); *see id.* at 106 (“In 1971, claiming that Vietnam War expenditures were bankrupting the United States, President Nixon failed to convert dollars into gold and disrupted the original IMF agreement.”) (footnote omitted).

Rather than encouraging debate with balanced coverage, for several years the American media emphasized patriotism and a vital American interest in winning the Vietnam War.¹¹ Lawrence W. Lichty's investigations found that prior to 1966, prowar voices outnumbered antiwar voices nine to one on news broadcasts, talk shows, and documentaries.¹² During these early years, protests against the Vietnam War were portrayed in the mainstream media as "communist-controlled,"¹³ and President Nixon used this contention to justify illegal spying on Americans—which chilled dissent inside the United States even further.¹⁴

After the Tet Offensive, there was a gradual transition in the news that began to present more opposition to the Vietnam War,¹⁵ and by 1970 the

11. JOHN R. MACARTHUR, *SECOND FRONT: CENSORSHIP AND PROPAGANDA IN THE 1991 GULF WAR*, at xi–xii (2d ed. 2004) (stating that when the Vietnam War began, the media parroted back "the official government line that the war was vital to American interests, that the enemy was on the verge of collapse, that our strategy and tactics were effective, and that each year would end in victory"); *see also id.* at xxv–xxxiii (noting that, because the media failed "to halt the tidal wave of disinformation before the [2003] Iraq war," the public's expectations and the factual realities of the war "collided in a way not seen in America since the fall of Saigon in 1975").

12. Lawrence W. Lichty, *The War We Watched on Television: A Study on Progress*, AM. FILM INST. REP., Winter 1973, at 29, 31–33 ("Through 1972 on the regularly scheduled press conference programs—'Issues and Answers,' 'Face the Nation' and 'Meet the Press'—many more guests appeared who supported the war than opposed it."); *see MACARTHUR, supra* note 11, at 132–34.

13. DEBENEDETTI & CHATFIELD, *supra* note 8, at 204–05, 208–09 ("On the eve of the March on the Pentagon, Secretary of State Rusk announced that the White House had secret evidence that the antiwar movement was communist-controlled.").

14. *See* Robert Bejesky, *From Marginalizing Economic Discourse with Security Threats to Approbating Corporate Lobbies and Campaign Contributions*, 12 CONN. PUB. INT. L.J. 1, 29–30 (2012) [hereinafter Bejesky, *Security Threats*]; Richard Falk, *Responsible Scholarship in "Dark Times,"* 7 UCLA J. ISLAMIC & NEAR E. L. 1, 1–2 (2008) (noting academics' reluctance to oppose the Vietnam War openly even when "more and more [university faculty] were privately opposed to" it). Hence, even though the Second Red Scare (commonly associated with McCarthyism) had ended, the ideological core of the dissent and the antipathy toward it was similar to earlier eras: advocating war to combat the spread of anticommunist thought was orthodox, while antiwar or left-wing dissent was targeted, stymied, and even persecuted into the 1970s—which gave rise to a plethora of First Amendment challenges. *See Kleindienst v. Mandel*, 408 U.S. 753, 756–59 (1972); *Keyishian v. Bd. of Regents*, 385 U.S. 589, 591–92 (1967); *Barenblatt v. United States*, 360 U.S. 109, 113–14 (1959); *Sweezy v. New Hampshire*, 354 U.S. 234, 235–38 (1957); *Dennis v. United States*, 341 U.S. 494, 497–98 (1951); *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 125–29 (1951).

15. NOAM CHOMSKY, *AMERICAN POWER AND THE NEW MANDARINS* 10 (1969) ("It

number of war critics on television finally surpassed the number of prowar voices.¹⁶ Vietnam War violence in news reports had previously been portrayed as distant puffs of smoke against an unseen enemy, but television coverage during the spring offensives in 1972 showed suffering and destruction.¹⁷

It seems that the media presumed its Press Clause role was to amplify the perceived sentiments of the American populace, which it believed was prowar in the early years and shifted to opposition in later years.¹⁸ Yet the media can craft and perpetuate those perceptions, which become markedly unsettling when considering the context that initiated the Vietnam War: Congress authorized military action against North Vietnam after an alleged attack on U.S. Navy vessels in the Gulf of Tonkin;¹⁹ but that attack never happened, and the Johnson Administration provided false information to Congress and the American people as a pretext for war.²⁰ In a statement to

is deplorable, but nonetheless true, that what has changed American public opinion and the domestic political picture is not the efforts of the ‘peace movement’—still less the declarations of any political spokesmen—but rather the Vietnamese resistance, which simply will not yield to American force.”); MACARTHUR, *supra* note 11, at 136 (noting that Professor Daniel Hallin’s studies found that editorial comments by television journalists and pundits were four to one in favor of the war in Vietnam before the Tet Offensive but were two to one against the war afterward).

16. MACARTHUR, *supra* note 11, at 136.

17. MICHAEL S. SWEENEY, THE MILITARY AND THE PRESS: AN UNEASY TRUCE 144 (2006) (“Words could be nudged in a variety of ways by editors in America, but images resisted reinvention. One of the more controversial television reports, filed by Morley Safer of CBS, captured a U.S. Marine torching a South Vietnamese village with a cigarette lighter. . . . The Johnson administration tried to smear Safer as a communist and his report as a staged event, but CBS stood by the story.”); *see also* CHOMSKY, *supra* note 15 (“I suppose this is the first time in history that a nation has so openly and publicly exhibited its own war crimes.”).

18. *See* MACARTHUR, *supra* note 11, at 136. As Max Frankel, the executive editor of the *New York Times*, explained quite candidly,

As protest moved from left groups, the anti-war groups, into the pulpits, into the Senate—with Fulbright, Gruening, and others—as it became a majority opinion, it naturally picked up coverage. And then naturally the tone of the coverage changed. Because we’re an Establishment institution, and whenever your natural community changes its opinion, then naturally you will too.

TODD GITLIN, THE WHOLE WORLD IS WATCHING: MASS MEDIA IN THE MAKING AND UNMAKING OF THE NEW LEFT 205 (1980).

19. Gulf of Tonkin Resolution, Pub. L. No. 88-408, 78 Stat. 384 (1964).

20. IRONS, *supra* note 7 (“Four years after Congress gave President Johnson a blank

Congress on March 8, 1968, Senator J. William Fulbright remarked, “Insofar as the consent of this body is said to derive from the Gulf of Tonkin Resolution, it can only be said that the resolution, like any other contract based on misrepresentation, in my opinion, is null and void.”²¹ The Gulf of Tonkin Resolution was repealed in January 1971,²² but the Vietnam War continued with Americans divided between those who staunchly supported U.S. troops fighting communism in Asia²³ and those who opposed American involvement and maintained that Vietnam possessed a right of self-determination after its sustained liberation movement successfully ended French colonial rule.²⁴ Continuing U.S. engagement in military operations in

check for the Vietnam War, the stated justification turned out to be fraudulent.”); Lori Fisler Damrosch, *War and Uncertainty*, 114 YALE L.J. 1405, 1409 (2005) (noting that Senator Fulbright, who had voted for the Gulf of Tonkin Resolution, later declared that the Johnson Administration “had misrepresented the facts of the alleged incidents”); Fisher, *supra* note 6, at 1210 (noting that President Lyndon Johnson prioritized his own political fortunes and promoted U.S. involvement by “deception, misrepresentation, distortion, gross understatements, and outright lies”); *see also* JAMES BAMFORD, *BODY OF SECRETS* 299 (2001) (stating that “the ‘hard evidence’ on which many people based their votes for the war never really existed”).

21. JOHN GALLOWAY, *THE GULF OF TONKIN RESOLUTION* 134 (1970) (internal quotation marks omitted); *see also* JOHN HART ELY, *WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH* 17–20 (1993) (discussing Senator Fulbright’s remarks and the argument for nullifying the Gulf of Tonkin Resolution). Although Congress was misled into authorizing the war, it cannot evade responsibility for acting without further investigation of the alleged attacks; “only Congress has the responsibility to determine whether to accede to the President’s request for urgent authority or whether to pause for further investigation into such facts as may be material to its own consideration of the request.” Damrosch, *supra* note 20 (citing ELY, *supra*, at 20).

22. *See* Act of Jan. 12, 1971, Pub. L. No. 91-672, § 12, 84 Stat. 2053, 2055 (repealing the Gulf of Tonkin Resolution); Bruce Ackerman & Oona Hathaway, *Limited War and the Constitution: Iraq and the Crisis of Presidential Legality*, 109 MICH. L. REV. 447, 485 n.168 (2011) (“President Nixon signed the act into law, along with the termination of the resolution. But he did not acknowledge that the termination had any effect on the continued persecution of the war.”).

23. Mermin, *supra* note 2, at 955 (noting that the Washington consensus, driven by the Executive Branch, was “that the United States was fighting ‘Communist aggression’ in Vietnam, rather than an indigenous revolutionary movement”); John E. Mueller, *Trends in Popular Support for the Wars in Korea and Vietnam*, 65 AM. POL. SCI. REV. 358, 362–65 (1971); *cf.* BAMFORD, *supra* note 20, at 330–31 (recounting how Pentagon officials “resorted to deceit” to “convince the public that they were winning when they were really losing”).

24. DANIEL C. HALLIN, *THE “UNCENSORED WAR”: THE MEDIA AND VIETNAM* 207–08 (1986) (“For certain parts of the American public,” the later years of the Vietnam

Cambodia in 1970—as troops were beginning to be withdrawn from Vietnam—led Congress to prohibit U.S. involvement in Indochina in 1973 and to pass the War Powers Resolution “to limit [the President’s] ability to commit the armed forces to military action.”²⁵

Shortly after the end of the Vietnam War and in the midst of the revelations of President Nixon’s wrongdoing, television news anchor Walter Cronkite stated, “Most newsmen . . . come to feel very little allegiance to the established order. I think they’re inclined to side with humanity rather than with authority and institutions.”²⁶ Similarly, Theodore H. White, a leading journalist during the 1970s, stated that “[t]he national media have put themselves into the role of permanent critical opposition to any government” that fails to solve national problems immediately, and consequently “no government will satisfy them.”²⁷ Justice Potter Stewart applauded the press for its role in the investigation and conversation that led to Nixon’s resignation and called it “a fourth institution outside the Government as an additional check on the three official branches.”²⁸ Not everyone agreed. After Nixon’s resignation and a succession of other scandals that placed respect for U.S. government institutions at an abysmal low point in 1976,²⁹ Harvard Professor Samuel Huntington believed that

War led to “a questioning of the benevolence of American power: many came to see Vietnam not merely as a ‘tragic miscalculation,’ but as an aggressive war motivated by power”); see M. Cherif Bassiouni, *The New Wars and the Crisis of Compliance with the Law of Armed Conflict by Non-State Actors*, 98 J. CRIM. L. & CRIMINOLOGY 711, 744 (2008) (describing the Vietnam War as an example of conflict where “the goal of insurgent groups is the removal of foreign occupying forces from the indigenous territory with a view to achieving independence”).

25. HUNTINGTON, *supra* note 8.

26. DOUGLASS CATER & RICHARD ADLER, *TELEVISION AS A SOCIAL FORCE: NEW APPROACHES TO TV CRITICISM* 123 (1975) (quoting *Interview with Walter Cronkite: A Candid Conversation with America’s Most Trusted Newsman*, PLAYBOY, June 1973, at 76); see HUNTINGTON, *supra* note 8, at 218.

27. HUNTINGTON, *supra* note 8, at 218.

28. Potter Stewart, “*Or of the Press*,” 21 HASTINGS L.J. 631, 634 (1975); see also Anthony L. Fargo, *The Year of Leaking Dangerously: Shadowy Sources, Jailed Journalists, and the Uncertain Future of the Federal Journalist’s Privilege*, 14 WM. & MARY BILL RTS. J. 1063, 1078 (2006) (citing Stewart, *supra*, at 631) (“Justice Stewart, in a law school speech shortly after President Nixon resigned in the wake of Watergate, argued that the press had performed exactly the function the Framers intended in exposing the scandal.”).

29. Polls revealed that between 1966 and 1976, American confidence in the Executive Branch dropped from 41 percent to 11 percent, for Congress from 42 percent

trust could be rebuilt in government institutions only if “media giants like *The Washington Post* [would] stop undermining the credibility of American institutions” and “again redefine their role, this time from an adversarial one to a supportive one.”³⁰ But the investigative and critical tenacity that was such an essential part of eventual mainstream opposition to the Vietnam War and had become a defining characteristic of American news media was noticeably absent in the run-up to the 2003 Iraq War.

B. *The 2003 Iraq War*

On March 19, 2013—the 10-year anniversary of the start of the Iraq War—CBS Nightly News explained that the Iraq War resulted in 4,488 U.S. military deaths, 134,000 Iraqi civilian deaths, and cost American taxpayers \$2.2 trillion.³¹ On April 9, 2013, 10 years after Saddam Hussein’s statue was torn down, CBS News reported on a recent poll that indicated a majority of Americans regretted the decision to go to war, emphasized opposing viewpoints about the efficacy of the invasion, and noted that the debate over the Iraq War is still ongoing.³² Americans eventually updated their opinions

to nine percent, for the U.S. military from 62 percent to 23 percent, and for leaders of major American companies from 55 percent to 16 percent. HUNTINGTON, *supra* note 8, at 175 (citing Louis Harris, Press Release, Harris Survey, Confidence in Leadership Down Again (Mar. 22, 1976)); *see also* Vincent Blasi, *The Checking Value in First Amendment Theory*, 2 AM. B. FOUND. RES. J. 521, 540 & n.80 (1977) (“Watergate and the revelations about the FBI have damaged American society By ‘damage to society’ I mean such phenomena as the undermining of the sense of community that stems from the sharing of ideals and standards, and of the sense of security that stems from the perception that one is not totally at the mercy of alien forces.”) (footnotes omitted).

30. HUNTINGTON, *supra* note 8, at 218–19.

31. *CBS Evening News*, at 17:35–45 (CBS television broadcast Mar. 19, 2013), available at <http://www.cbsnews.com/videos/3-19-student-saves-lives-by-calling-911-on-potential-gunner-pope-francis-lists-priorities-during-installation/>; *see generally* JOSEPH E. STIGLITZ & LINDA J. BILMES, *THE THREE TRILLION DOLLAR WAR: THE TRUE COST OF THE IRAQ CONFLICT*, at x (2008) (“We estimate that the total budgetary and economic cost to the United States will turn out to be around \$3 trillion, with the cost to the rest of the world perhaps doubling that number again.”); *cf.* Robert Bejesky, *Politico-International Law*, 57 LOY. L. REV. 29, 84–91 (2011) [*hereinafter Bejesky, Politico*] (presenting a chronology of how the Bush Administration avoided discussing the expenses of the Iraq War and its negative ramifications for the American economy).

32. *CBS Evening News*, at 18:09–20:53 (CBS television broadcast Apr. 9, 2013) (news clip on file with author), available at <http://www.cbsnews.com/videos/4-9-sandy-ho-oh-families-lobby-congress-bee-populations-in-freefall/>; *see also* Andrew Dugan, *On 10th Anniversary, 53% in U.S. See Iraq War as a Mistake*, GALLUP (Mar. 18, 2013), <http://>

about the war. The vast majority of the international community condemned the attack,³³ and regularly conducted polls over the following years confirmed that between 75 and 90 percent of Iraqis opposed continuing U.S. occupation.³⁴ In 2009, President George W. Bush departed office with the lowest presidential approval ratings for an outgoing president since Gallup began conducting public opinion polling more than 75 years ago; his abysmal 22 percent approval rating was largely due to Americans’ “[a]ssessments of Mr. Bush’s handling of two critical issues—the war in Iraq and the economy.”³⁵

But the manner in which CBS News discussed the reasons for the invasion in retrospect was discomforting. Both commemorative telecasts asserted that the reason for the war was to remove Saddam Hussein, and both failed to allude to the Bush Administration’s insistent use of incorrect intelligence about security threats from chemical and biological weapons stocks and from nuclear weapons programs.³⁶ In reality, Congress only

www.gallup.com/poll/161399/10th-anniversary-iraq-war-mistake.aspx.

33. See Robert Bejesky, *Weapon Inspections Lessons Learned: Evidentiary Presumptions and Burdens of Proof*, 38 SYRACUSE J. INT’L L. & COM. 295, 342–44 (2011) [hereinafter Bejesky, *Weapon Inspections*] (“Either 10% or less of the populations in 33 out of 41 countries favored ‘unilateral military action against Iraq.’ All other countries, except the U.S., had poll results at or below 20%.” (quoting *Iraq 2003 Survey Results*, GALLUP INT’L (2003), available at [http://usatoday30.usatoday.com/news/world/2003-02-14-eu-survey.htm](http://web.archive.org/web/20110720050127/http://www.gallup-international.com/ContentFiles/survey.asp?id=10)); <i>Many Europeans Oppose War in Iraq</i>, USA TODAY (May 20, 2005), available at <a href=)); see also Bejesky, *Weapon Inspections*, *supra*, at 348–50 (discussing international leaders’ intense condemnation of the decision to invade Iraq).

34. Bejesky, *Politico*, *supra* note 31, at 102–07 (“An August 2007 ABC-BBC poll revealed that seventy-nine percent opposed ‘the presence of coalition forces in Iraq,’ which was a percentage that had always been high but steadily appreciated when the same question was asked in 2004, 2005, and 2006.” (citing *Iraq Poll September 2007*, BBC-ABC, available at http://news.bbc.co.uk/2/shared/bsp/hi/pdfs/10_09_07_iraqpoll.pdf)).

35. *Bush’s Final Approval Rating: 22 Percent*, CBS News (Jan. 16, 2009), <http://www.cbsnews.com/news/bushs-final-approval-rating-22-percent/>.

36. See *CBS Evening News*, *supra* note 32, at 20:18 (confronting Marine Sergeant Ed Chin, who draped the American flag over the statue of Saddam Hussein in the iconic photo taken 10 years earlier, with an Iraqi bystander’s opinion that the United States should not have invaded Iraq; summarizing his reply as “Saddam was a tyrant and had to go”); *CBS Evening News*, *supra* note 31, at 17:46 (asserting that the events that led to U.S. occupation of Iraq “might have been different if U.S. forces succeeded in taking out Saddam Hussein the very first night”).

granted an authorization to use force because Iraq had allegedly accumulated this arsenal of prohibited weapons.³⁷ Congress did not condition use of force on the need to displace a foreign government, nor did it expressly authorize the President to force regime change.³⁸ Professors Bruce Ackerman and Oona Hathaway correctly emphasized that the Authorization for Use of Military Force (AUMF) was a limited authorization to use force conditioned on there being an actual imminent threat—and when the White House began offering additional rationalizations after the war, particularly justifications relating to humanitarian intervention, “such talk was blatantly inconsistent with the plain language of the 2002 resolution.”³⁹ Accordingly, when ABC News surveyed senators who had voted for the October 2002 AUMF Against Iraq five years later, more than half of them noted that they would have reversed their voting positions in hindsight—the resolution would have been rejected if Congress had known there were no weapons of mass destruction or if the liberation of the Iraqi people through regime change was the only reason offered to justify the AUMF.⁴⁰

The Center for International and Security Studies at Maryland published a study on news coverage of chemical, biological, and nuclear

37. See H.R.J. Res. 114, 107th Cong. § 1 (2002) (“Whereas Iraq’s demonstrated capability and willingness to use weapons of mass destruction, the risk that the current Iraqi regime will either employ those weapons to launch a surprise attack against the United States or its Armed Forces or provide them to international terrorists who would do so, and the extreme magnitude of harm that would result to the United States and its citizens from such an attack, combine to justify action by the United States to defend itself.”).

38. See *id.* §§ 2, 3(a).

39. Ackerman & Hathaway, *supra* note 22, at 464 (“Coalition forces began the search for the weapons of mass destruction that provided the rationale for the preemptive war. They found nothing. . . . The administration responded to its acute political embarrassment by proliferating new rationales for the invasion. By late 2003, high-ranking officials were invoking humanitarian and regional security as justifications.”); *see also* Bejesky, *Weapon Inspections*, *supra* note 33, at 350–69.

40. See Robert Bejesky, *Intelligence Information and Judicial Evidentiary Standards*, 44 CREIGHTON L. REV. 811, 816–17 (2011) [hereinafter Bejesky, *Intelligence Information*] (citing Jake Tapper, *Senate Regrets the Vote to Enter Iraq*, ABC NEWS (Jan. 5, 2007), <http://abcnews.go.com/GMA/Politics/story?id=2771519>) (“Twenty-eight of the 77 senators who voted to authorize the war in Iraq indicated, many for the first time, that they would not vote the same way with the benefit of hindsight. Six others indicated that, in retrospect, the intelligence was so wrong the matter would not have passed the Senate, or would not have even come up for a vote.”).

weapons and found that the media exaggerated the threat posed by Iraq and accepted the Bush Administration's allegations uncritically, which reflected "a symbiotic relationship between policymakers and the press."⁴¹ Media watch group Fairness & Accuracy in Reporting (FAIR) surveyed hundreds of news stories and press commentary dating from September 1, 2002, to May 31, 2003, and reported that while a few independent journalists were willing to challenge the White House's allegations about weapons of mass destruction, "their warnings were ignored by the bulk of the corporate press."⁴² The *New York Times* acknowledged failures in challenging reasons for war and the allegations of threats,⁴³ and the *Washington Post* admitted that coverage was "strikingly one-sided at times" and that "[Bush] Administration assertions were on the front page" while claims challenging the Administration were buried in the newspaper "on A18 on Sunday or

41. SUSAN D. MOELLER, CTR. FOR INT'L AND SEC. STUDIES AT MD., MEDIA COVERAGE OF WEAPONS OF MASS DESTRUCTION 5 (2004), available at http://www.ciss.m.umd.edu/papers/files/wmdstudy_full.pdf; *see id.* at 3 ("Many stories stenographically reported the incumbent administration's perspective on WMD, giving too little critical examination of the way officials framed the events, issues, threats, and policy options.").

42. *Iraq and the Media: A Critical Timeline*, FAIRNESS & ACCURACY IN REPORTING (Mar. 19, 2007), <http://fair.org/take-action/media-advisories/iraq-and-the-media/> [hereinafter FAIR] (compiling examples emphasizing that the media often presumed that classified intelligence was correct and ridiculed those questioning the Bush Administration's allegations); *cf.* Bejesky, *Politico*, *supra* note 31, at 71–78 (noting "palpable dissent from inside the agencies required to execute the administration's policy" on Iraq and summarizing possible reasons why "it seems that the invasion proceeded without a significant countervailing bureaucratic influence").

43. Editorial, *The Times and Iraq*, N.Y. TIMES, May 26, 2004, at A10, available at http://www.nytimes.com/2004/05/26/international/middleeast/26FTE_NOTE.html (reporting that an internal investigation "found a number of instances of coverage that was not as rigorous as it should have been" and that controversial Bush Administration allegations were "allowed to stand unchallenged"); *see also* Rick Mercier, *Why the Media Owe You an Apology on Iraq*, THE FREE-LANCE STAR (Mar. 28, 2004), <http://www.bulatlat.com/news/4-10/4-10-readermercher.html> (apologizing on behalf of the American news media for letting "unsubstantiated claims" from the Bush White House drive media coverage, for dismissing "experts who disputed White House charges against Iraq," and for letting "a band of self-serving Iraqi defectors make fools of us"); Tony Jenkins, Remarks by the President of the United Nations Correspondence Association for 2004 (May 3, 2004), available at <http://www.un.org/en/events/pressfreedomday/2004/unca.shtml> (noting that John Burns, bureau chief for the *New York Times*, remarked at a conference on March 18, 2004, "We failed the American public by being insufficiently critical about elements of the administration's plan to go to war") (internal quotation marks omitted).

A24 on Monday.”⁴⁴ One commentator recognized parallels with the *Washington Post*’s former chief diplomatic correspondent’s critique of Nixon Administration rhetoric regarding the Vietnam War: “When a President hornswoogles, or bamboozles [the media,] the greatest default rests with those being misled for their failure to fulfill their obligation to the public interest as counterweights in the American system.”⁴⁵ Just as the media failed to expose the false informational basis that led to the Vietnam War, the media failed to cut through the government propaganda and expose the unreliability of the information underlying the Bush Administration’s case for the illegal attack on Iraq.⁴⁶ The remainder of this Article provides an analytical explanation for this deficit.

III. MEDIA DECISIONMAKING PREMISES

A. *Framer Values and Corporate Media Profitability*

This Article presents a model for media decisionmaking in Part III.B that addresses the core of the issue: the prospect of incompatibility between the Framers’ intentions for the press—to disseminate information on vital

44. Howard Kurtz, *The Post on WMDs: An Inside Story; Prewar Articles Questioning Threat Often Didn’t Make Front Page*, WASH. POST, Aug. 12, 2004, at A01, available at <http://www.washingtonpost.com/wp-dyn/articles/A58127-2004Aug11.html> (internal quotation mark omitted); Michael Massing, *Now They Tell Us*, N.Y. TIMES REV. BOOKS, Feb. 26, 2004, <http://www.nybooks.com/articles/archives/2004/feb/26/now-they-tell-us/> (citing rare prewar challenges in articles by Joby Warrick, Walter Pincus, and Dana Milbank and noting that these articles were placed on pages A29, A18, A17, and A13—while prowar coverage was frequently displayed prominently on the front page).

45. Mermin, *supra* note 2, at 957 (quoting Murrey Marder, *What Happens When Journalists Don’t Probe?*, NIEMAN REP., Summer 2003, at 73, 74) (alteration in original) (internal quotation marks omitted).

46. See Altheide, *supra* note 4; Mermin, *supra* note 2, at 955; Leslie Gielow Jacobs, *Bush, Obama and Beyond: Observations on the Prospect of Fact Checking Executive Department Threat Claims Before the Use of Force*, 26 CONST. COMMENT. 433, 453–54 (2010) (stating that the media embraced the government’s threat claims, advocated for the Iraq War, and stimulated patriotism rather than “effectively fact check[ing] the Bush Administration’s threat claims before the use of force”); *see also* MOELLER, *supra* note 41, at 12 (“President George W. Bush’s administration has been particularly successful at shaping the message on the designated ‘Big Story’ of Iraq through its declaration of an Iraqi-WMD-terrorism association—an association so provocative that it has usurped much of the space and time for WMD stories in the media. . . . The failure of the media to insist on a differentiation allowed the calculated muddle to become the accepted wisdom.”).

political issues—and contemporary media considerations that accentuate maximizing shareholder value by generating corporate profit. These two goals can be in discord if garnering profit by appealing to viewership does not impart accuracy in the news or substance indispensable to fulfilling public needs and expectations for the First Amendment’s Press Clause.⁴⁷

The Framers’ mission is clearly designated in records conveying American revulsion with British ultimatums and the Crown’s control over institutions of public knowledge⁴⁸ and reflects the Framers’ understanding that the press was instrumental in goading revolution.⁴⁹ Members of the Constitutional Congress emphasized that a free press promoted “ready communication of thoughts between subjects, and its consequential promotion of union among them, whereby oppressive offices are shamed or intimidated, into more honourable and just modes of conducting affairs.”⁵⁰

After attaining independence, the Framers adopted the First Amendment, which states that “Congress shall make no law . . . abridging the freedom of speech, or of the press,”⁵¹ which became a fundamental right

47. See, e.g., LEO BOGART, COMMERCIAL CULTURE: THE MEDIA SYSTEM AND THE PUBLIC INTEREST 176–83 (1995) (“Journalists must capture interest and attention and at the same time convey essential facts. What is important is not always interesting.”).

48. 1 ANNALS OF CONG. 453 (1789) (Joseph Gales ed., 1834) (stating that “freedom of the press and rights of conscience, those choicest privileges of the people, are unguarded in the British constitution”).

For centuries before our Revolution, the press in England had been licensed, censored, and bedeviled by prosecutions for seditious libel. The British Crown knew that a free press was not just a neutral vehicle for the balanced discussion of diverse ideas. Instead, the free press meant organized, expert scrutiny of government. The press was a conspiracy of the intellect, with the courage of numbers. This formidable check on official power was what the British Crown had feared—and what the American Founders decided to risk.

Stewart, *supra* note 28.

49. SWEENEY, *supra* note 17, at 8–11 (“The press, exulting in its freedom to criticize the British government, helped win America’s freedom. It is no surprise, then, that the leaders of the new country recognized the power of the press in shaping public debate.”).

50. Henry Middleton, President, Cont’l Cong., Address to the Inhabitants of Quebec (1774), reprinted in 1 BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 223 (Leon Friedman et al. eds., 1971).

51. U.S. CONST. amend. I; Arthur E. Wilmarth, Jr., *The Original Purpose of the Bill of Rights: James Madison and the Founders’ Search for a Workable Balance Between Federal and State Power*, 26 AM. CRIM. L. REV. 1261, 1261–63 (1989) (explaining that the Bill of Rights was intended to defend citizens and states against expansion of federal

applied to the states through the Fourteenth Amendment.⁵² Even ideologically adverse Framers concurred on the essential feature of the freedom of the press as a means of checking government,⁵³ and Thomas Jefferson spoke of favoring “newspapers without government” over “government without newspapers.”⁵⁴ Similarly, centuries later, Justice Hugo Black emphasized the First Amendment’s role in abolishing “[t]he

power and that “Madison in particular believed that the states could effectively resist federal encroachments by organizing public protests”).

52. *De Jonge v. Oregon*, 299 U.S. 353, 364 (1937) (“Freedom of speech and of the press are fundamental rights which are safeguarded by the due process clause of the Fourteenth Amendment of the Federal Constitution.”); *Gitlow v. New York*, 268 U.S. 652, 666 (1925) (“For present purposes we may and do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and ‘liberties’ protected by the due process clause of the Fourteenth Amendment from impairment by the States.”); G. Edward White, *The First Amendment Comes of Age: The Emergence of Free Speech in Twentieth-Century America*, 95 MICH. L. REV. 299, 329–30 (1997) (recounting that in the late 1930s, the Court began to hold that “First Amendment rights were in a different category from other constitutional liberties and deserved greater constitutional protection than police power analysis afforded them”); cf. David M. Rabban, *The First Amendment in Its Forgotten Years*, 90 YALE L.J. 514, 591–94 (1981) (discussing the evolution of the Court’s First Amendment jurisprudence during the 1920s as “Justices Holmes and Brandeis, beginning with their dissent in *Abrams [v. United States]*, developed a theory of First Amendment interpretation” that recognized “the relationship between free speech and democratic government”).

53. David A. Anderson, *The Origins of the Press Clause*, 30 UCLA L. REV. 455, 467 (1983) (noting that when the Constitution was first drafted without a Bill of Rights, “of all the omitted guarantees, few were decried more than the lack of a provision ensuring freedom of the press”); *id.* at 473 (quoting Virginia Ratifying Convention (1788), *in* 2 BERNARD SCHWARTZ, *THE BILL OF RIGHTS: A DOCUMENTARY HISTORY* 762, 842 (Leon Friedman et al. eds., 1971)) (noting that the Virginia ratifying convention adopted language from Pennsylvania’s state constitution, rather than from its own, and proposed a press clause stating “[t]hat the people have a right to freedom of speech, and of writing and publishing their sentiments; that the freedom of the press is one of the greatest bulwarks of liberty and ought not to be violated”) (internal quotation marks omitted).

54. Timothy A. Canova, *Campaign Finance, Iron Triangles & the Decline of American Political Discourse*, 12 NEXUS 57, 78–79 (2007) (quoting Letter from Thomas Jefferson to Colonel Edward Carrington (Jan. 16, 1787), *in* 11 THE PAPERS OF THOMAS JEFFERSON 49 (Julian P. Boyd ed., 1950)); *see also* JEFFERY A. SMITH, *WAR AND PRESS FREEDOM: THE PROBLEM OF PREROGATIVE POWER* 28 (1999) (quoting Letter from Thomas Jefferson to Adamantios Coray (Oct. 31, 1823), *in* 15 THE WRITINGS OF THOMAS JEFFERSON 489 (Andrew A. Lipscomb & Albert E. Bergh eds., 1905)) (“A free press . . . [.] Thomas Jefferson said, brings public officials before the ‘tribunal of public opinion’ and thereby ‘produces reform peaceably, which must otherwise be done by revolution.’”).

Government’s power to censor the press” so that the press be “forever free to censure the Government,” “expose deception,” and “inform the people”—and if the government’s case for war was based on deception, it was “paramount among the responsibilities of a free press . . . to prevent any part of the government from deceiving the people and sending them off to distant lands to die of foreign fevers and foreign shot and shell.”⁵⁵

The First Amendment freedom of speech right is premised on the distrust of government power and the need to restrain it⁵⁶ in order to ensure a well-functioning democratic order.⁵⁷ Advocates for the freedom of the press seek to promote political dialogue,⁵⁸ subdue “atavistic tendencies of the state,”⁵⁹ provide a system of citizen activists and institutions that functions as a government watchdog,⁶⁰ and police the powerful.⁶¹ The media plays a “special and constitutionally recognized role of . . . informing and educating the public, offering criticism, and providing a forum for discussion

55. N.Y. Times Co. v. United States, 403 U.S. 713, 717 (1971) (Black, J., concurring).

56. FREDERICK SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY 86 (1982) (“Freedom of speech is based in large part on a distrust of the ability of government to make the necessary distinctions, a distrust of governmental determinations of truth and falsity, an appreciation of the fallibility of political leaders, and a somewhat deeper distrust of governmental power in a more general sense.”); Blasi, *supra* note 29, at 603.

57. Cass R. Sunstein, *Television and the Public Interest*, 88 CALIF. L. REV. 499, 501 (2000) (arguing that the news media should “promote the American aspiration to deliberative democracy” by working toward ensuring that Americans “are informed about public issues and able to make judgments on the basis of reasons”).

58. Melville B. Nimmer, *Introduction—Is Freedom of the Press a Redundancy: What Does it Add to Freedom of Speech?*, 26 HASTINGS L.J. 639, 653–54 (1975) (arguing that “generally speech via the press is much more significant as a contribution to the democratic dialogue than is speech through nonmedia channels”).

59. LEE C. BOLLINGER, IMAGES OF A FREE PRESS 20 (1991).

60. TIMOTHY W. GLEASON, THE WATCHDOG CONCEPT 110 (1990) (“The concept of the citizen watchdog is a powerful component of freedom of the press in the United States.”); Blasi, *supra* note 29, at 622 (citing *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241, 259–60 (1974)) (noting that Justice Byron White “stressed the role of the press as a watchdog over government”); Blake D. Morant, *The Endemic Reality of Media Ethics and Self-Restraint*, 19 NOTRE DAME J.L. ETHICS & PUB. POL’Y 595, 595–97 (2005) (arguing that “scrutiny of governmental operations contributes to the media’s characterization as ‘the fourth estate’”).

61. DAVID L. PROTESS ET AL., THE JOURNALISM OF OUTRAGE: INVESTIGATIVE REPORTING AND AGENDA BUILDING IN AMERICA 54, 249–54 (1991) (demonstrating that “new muckrakers can powerfully influence the agendas of citizens and policy makers”); Stewart, *supra* note 28, at 631, 634.

and debate.”⁶² Justice Stewart referred to “the critical role of an independent press”⁶³ as a mechanism that creates “an additional check on the three official branches,” warranting the continued use of the common label “the Fourth Estate.”⁶⁴ The importance of a discerning press to maintaining healthy institutions of democracy⁶⁵ and to producing government accountability and transparency is transnational.⁶⁶

A system with an abundant number of decentralized media outlets that are not controlled by parent company owners would presumably incorporate independent decisions on the content of media stories, more variance in portrayals and opinion, more reporting that takes advantage of opportunities to expose government abuse and corruption, and more voices

62. *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 781 (1978) (citing *Mills v. Alabama*, 384 U.S. 214, 219 (1966)).

63. *Branzburg v. Hayes*, 408 U.S. 665, 725 (1972) (Stewart, J., dissenting); *see also* *Leathers v. Medlock*, 499 U.S. 439, 447 (1991) (holding that the “press plays a unique role as a check on government abuse”); *Sheppard v. Maxwell*, 384 U.S. 333, 350 (1966) (stating that the press “guards against the miscarriage of justice” by placing officials under “extensive public scrutiny”); *Times-Picayune v. United States*, 345 U.S. 594, 602 (1953) (affirming that “[a] vigorous and dauntless press” is necessary for “vigilantly scrutinizing the official conduct of those who administer the state” and placing a “check on arbitrary action or abuse”); *Near v. Minnesota*, 283 U.S. 697, 719–20 (1931) (holding that an independent press can expose government “malfeasance and corruption”).

64. Stewart, *supra* note 28; *see also* LEONARD W. LEVY, *EMERGENCE OF A FREE PRESS* xii (1985) (“Freedom of the press also meant that the press had achieved a special status as an unofficial fourth branch of government, ‘the Fourth Estate,’ whose function was to check the three official branches by exposing misdeeds and policies contrary to the public interest.”); Ghetti, *supra* note 1, at 502.

65. Press Release, United Nations Democracy Fund, Secretary-General Sees Free Press an Essential Feature of Democracy (Apr. 23, 2007), *available at* <https://web.archive.org/web/20080307180812/http://www.un.org/democracyfund/XNewsSGFreePress.htm>; *see* C. Edwin Baker, *The Independent Significance of the Press Clause Under Existing Law*, 35 HOFSTRA L. REV. 955, 956 (2007) (“A ubiquitous understanding of the constitutional guarantee of press freedom is that it aims to protect a Fourth Estate or, more expansively, to protect media entities because of their instrumental contribution to democracy and a free society.”).

66. *See* Emily Berman, *Democratizing the Media*, 35 FLA. ST. U. L. REV. 817, 824–25 (2008); Angel Luis Olivera Soto, *Prior Restraints in Venezuela's Social Responsibility on Radio and Television Act: Are They Justified?*, 40 GEO. WASH. INT'L L. REV. 401, 413–15 (2008) (“The modern tendency around the world has been to decrease limitations on the freedom of expression and to allow a greater flow of ideas.”); *see also* Frances H. Foster, *Information and the Problem of Democracy: The Russian Experience*, 44 AM. J. COMP. L. 243, 248–53 (1996) (surveying post-Cold War Russian scholarship that articulates similar principles).

demanding responsibility for transgressions and unacceptable conduct.⁶⁷ However, with the multiplication of cable news outlets during the 1980s⁶⁸ and media consolidation through mergers and acquisitions, the number of dominant media corporations dwindled to the current alignment in which five corporations control the most powerful and influential U.S. media sources.⁶⁹ Collectively, AOL Time Warner, Disney, General Electric, News Corp, and Viacom own stations that reach 70 percent of the prime time television viewers, and six cable television corporations account for a staggering 80 percent of all cable subscribers.⁷⁰

67. C. Edwin Baker, *Media Concentration, Giving Up on Democracy*, 54 FLA. L. REV. 839, 906–07 (2002); Commc'n and Media Comm'n of Iraq, *Policy Recommendations Concerning Broadcasting in Iraq*, 25 CARDOZO ARTS & ENT. L.J. 23, 66 (2007) (recognizing that “[o]ne way of encouraging pluralism would be to restrict cross-media ownership . . . [and] limit the number of broadcast licenses one entity can own”); *see Yamamoto, supra* note 5, at 297 & n.62 (noting that, after “the Federal Communications Commission relaxed its rules enabling more ‘cross-ownership’ of media outlets in a single market” in 2003, “[m]any formerly independent media outlets are now controlled by mega-media corporations”).

68. *See* William A. Wines & Terence J. Lau, *Can You Hear Me Now?—Corporate Censorship and its Troubling Implication for the First Amendment*, 55 DEPAUL L. REV. 119, 160 (2005) (citing Mark S. Fowler & Daniel L. Brenner, *A Marketplace Approach to Broadcast Regulation*, 60 TEX. L. REV. 207, 221 (1982)) (discussing Federal Communications Commission (FCC) Chairman Mark Fowler’s arguments “for total deregulation of the broadcast media,” in which he asserted “that scarcity was no longer a problem given the number of new cable channels and other new technology for disseminating information”).

69. *Id.* (summarizing research showing that “in 1983, fifty corporations controlled most American media; by 1997, only ten corporations controlled almost everything we saw, heard, and read”; and by 2005, “the number of corporations that dominate[d] virtually all broadcast and print media in the United States [was] down to five”); *see also* BEN H. BAGDIKIAN, THE MEDIA MONOPOLY 18–26 (3d ed. 1990) (demonstrating that 23 “major national and multinational corporations that now control most of [U.S. news] media,” and their “[i]nterlocked boards of directors” can create “enormously complicated potential conflicts of interest” when large corporations “make serious efforts to influence the news” and “own most of the news media they wish to influence”); *see generally* Baker, *supra* note 67, at 855–72 (surveying “existing media specific concentration policies” and examining “how concentration policy has evolved over time”).

70. Gregory P. Magarian, *The First Amendment, the Public-Private Distinction, and Nongovernmental Suppression of Wartime Political Debate*, 73 GEO. WASH. L. REV. 101, 164 (2004) (citing David D. Kirkpatrick, *From Some Boardrooms, Nostalgia for Regulation*, N.Y. TIMES, June 2, 2003, at C9, available at <http://www.nytimes.com/2003/06/02/business/from-some-boardrooms-nostalgia-for-regulation.html>); *see also* Hannibal Travis, *The FCC’s New Theory of the First Amendment*, 51 SANTA CLARA L.

Scholars maintain that the corporate consolidation era bred a certain degree of position homogeneity in the news⁷¹ and a derivative chilling effect on public officials, academics, journalists, and researchers who offered views that challenged the established media.⁷² The business interests that own and manage corporate media have access to superior financial resources that they can deploy to counter public interests,⁷³ which undermines democracy.⁷⁴

REV. 417, 433 (2011) (“Five media conglomerates gained control of most television broadcast facilities and imposed a stultifying homogenization on editorial content and endorsements of political candidates for public office.”).

71. BAGDIKIAN, *supra* note 69, at 222 (emphasizing that the “deepen[ing] . . . problem of excessively concentrated control” in which “each owner controls even more formidable communications power” is accompanied by “a growing uniformity of content”); Magarian, *supra* note 70, at 165 (“Concentration of ownership of major media outlets reduces the diversity and originality of information the media presents.”); Hannibal Travis, *Postmodern Censorship of Pacifist Content on Television and the Internet*, 25 NOTRE DAME J.L. ETHICS & PUB. POL’Y 47, 63 (2011) (“Private ownership and control help prevent the uninhibited reporting and opinion-formation that might prevail were journalists and commentators allowed to be autonomous freelancers.”); David Barstow & Robin Stein, *Under Bush, a New Age of Prepackaged TV News*, N.Y. TIMES (Mar. 13, 2005), <http://www.nytimes.com/2005/03/13/politics/13covert.html> (stating that CNN distributes video news releases—“most commissioned by major corporations”—to 750 affiliate stations in the United States and Canada).

72. Travis, *supra* note 70, at 430 (discussing the “chilling effect” of corporate news media ownership “on the journalists, public officials, academic researchers, book authors, and human rights activists who were denied access to the public airwaves to cover public issues or express views opposed by corporate broadcasters”) (internal quotation marks omitted); *see also* BAGDIKIAN, *supra* note 69, at xix (“Modern technology and American economics have quietly created a new kind of central authority over information—the national and multinational corporation.”).

73. This fits within Ronald Reagan’s definition of an “iron triangle”: it is a classic example of “a stable but narrow network, alliance, or coalition of public and private sector interests that cooperate to control an area of public policy.” W. LAWRENCE NEUMAN, POWER, STATE & SOCIETY: AN INTRODUCTION TO POLITICAL SOCIOLOGY 477 (2005); *see also* BAGDIKIAN, *supra* note 69, at xx (“More than any other single private source and often more than any governmental source, the fifty dominant media corporations can set the national agenda.”); ROBERT MCCHESNEY, CORPORATE MEDIA AND THE THREAT TO DEMOCRACY 6–7 (1997) (arguing that concentrated corporate control over commercial news media “permits the business and commercial interests that actually rule U.S. society to have inordinate influence over media content”).

74. *See* DEAN ALGER, MEGAMEDIA: HOW GIANT CORPORATIONS DOMINATE MASS MEDIA, DISTORT COMPETITION, AND ENDANGER DEMOCRACY 20 (1998) (“If a few megamedia corporations control most of the major print, broadcast, cable, and other media that most of the public relies on as their *main sources* of information, opinion, and creative expression, then this fundamental pillar of democracy is likely to be seriously weakened.”); ROBERT W. MCCHESNEY, RICH MEDIA, POOR DEMOCRACY:

Professors Edward S. Herman and Noam Chomsky contend that the American news media, in practice, serves “to inculcate and defend the economic, social, and political agenda of privileged groups that dominate the domestic society and the state.”⁷⁵ Professor Laurence Tribe explains that “when the wealthy have more access to the most potent media of communication than the poor,” it is questionable whether the “‘free trade in ideas’ is likely to generate truth.”⁷⁶ Professor Daniel C. Hallin writes that

COMMUNICATION POLITICS IN DUBIOUS TIMES 6 (1999) (arguing that “the nature of our corporate commercial media system has dire implications for our politics and broader culture”).

75. EDWARD S. HERMAN & NOAM CHOMSKY, MANUFACTURING CONSENT: THE POLITICAL ECONOMY OF THE MASS MEDIA 298 (1988); *see also* DAVID BROCK, THE REPUBLICAN NOISE MACHINE: RIGHT-WING MEDIA AND HOW IT CORRUPTS DEMOCRACY 10–11 (2004) (arguing that “a deliberate, well-financed, and expressly acknowledged communications and deregulatory plan was pursued by the right wing for more than thirty years—in close coordination with Republican Party leaders—to subvert and subsume journalism and reshape the national consciousness through the media, with the intention of skewing American politics sharply to the right”); Monroe E. Price, *The Market for Loyalties: Electronic Media and the Global Competition for Allegiances*, 104 YALE L.J. 667, 694 (1994) (specifying that the “most important way in which law impacts the market for loyalties is not through the explicit actions of Congress and the FCC, but through the tolerance and protection of the status quo,” which is privileged access for groups that “have more favorable access to writers and producers than others—a consequence of wealth, ideology, or the familiar networks of neighborhood and class”); Travis, *supra* note 70, at 420, 431–33 (noting that during a period “characterized as a ‘dark age’ of deregulation and conglomerate control” from 1987 through 2005, “the FCC tolerated blatant discrimination against minority political or ethnic viewpoints, as well as long-term campaigns to reduce competition in media content by merging corporate owners”). The American news media also frequently ignores international criticism of the U.S. government. *See, e.g.*, Joel R. Paul, *The Rule of Law is Not for Everyone*, 24 BERKELEY J. INT'L L. 1046, 1056–58 (2006) (reviewing PHILLIPE SANDS, LAWLESS WORLD (2005)) (giving the example of three cases where the International Court of Justice (ICJ) sought to prevent the execution of prisoners in the United States; “*The Wall Street Journal*, *The Los Angeles Times*, *The Chicago Tribune* and *The New York Times* all failed to report the three ICJ decisions against the United States,” while “foreign news sources prominently reported all three ICJ decisions criticizing the United States”).

76. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 786 (2d ed. 1988); *see also* Douglas M. McLeod, *Derelict of Duty: The American News Media, Terrorism, and the War in Iraq*, 93 MARQ. L. REV. 113, 115 (2009) (“Rather than amplify the voices and perspectives of the disenfranchised groups and citizens who need amplification most, the media often serve those who need it least.”); Cass R. Sunstein, *Free Speech Now*, 59 U. CHI. L. REV. 255, 256 (1992) (“Even when the words [of First Amendment challenges] remain the same, they mean something very different when they are uttered by a minority struggling against repressive measures, and when expressed by a group that has

“[m]odern news organizations clearly possess enormous power: they control the society’s major channels of political communication,” even though “they are privately owned and have virtually no direct accountability” to anyone other than their shareholders.⁷⁷ Dr. Saby Ghoshray explains the impact that corporate media conglomerates exert a disproportionate influence over the political process by engineering public perceptions that resonate with their own values.⁷⁸

In light of the Framers’ express assumptions that the press has certain

attained power and then uses ideas that were once weapons of emancipation as instruments for keeping the power and wealth they have obtained.” (quoting JOHN DEWEY, *The Future of Liberalism*, in 11 LATER WORKS 291 (1987)); Travis, *supra* note 71, at 61 (citing BRIAN MARTIN, INFORMATION LIBERATION 7, 84–86 (1998)) (arguing that television news is filtered by “small cliques of owners and managers” who “dictate which facts and opinions should be allowed on the air (or wire)’’); *see generally* C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH 250–71 (1989) (discussing “the tension between recognizing the press clause’s guarantee of institutional integrity and independence (press freedom) and recognizing the permissibility, if not the constitutional necessity, of structural intervention by government to promote that freedom in the face of threats from private economic interests”).

77. HALLIN, *supra* note 24, at 67; *see* CHARLES REICH, OPPOSING THE SYSTEM 37 (1995) (stating that there is a general lack of political accountability when corporations “make and enforce their own laws” and “supersede the democratic process”); Mermin, *supra* note 2, at 952 (quoting HALLIN, *supra* note 24, at 68); Eric Alterman, *Think Again: Boston 2004: The Media’s Missed Opportunity*, CTR. FOR AM. PROGRESS (Aug. 5, 2004), <http://www.americanprogress.org/issues/media/news/2004/08/05/973/think-again-boston-2004-the-medias-missed-opportunity/> (observing that the news media’s “lack of democratic accountability adds an element of hearsay and abstraction to the political process that is funneled down through the fabric of our society, distorting the message and creating a confused political climate in which voters are left with the spin, but without the facts”).

78. Saby Ghoshray, *Illuminating the Shadows of Constitutional Space While Tracing the Contours of Presidential War Power*, 39 LOY. U. CHI. L.J. 295, 325 (2008) (“Why are corporations so influential in shaping Congress’ power? This is because the modern day legislative process is based on the ability of the would-be legislature to sway the public in subscribing to certain political beliefs. It is also because of the power of the media, which is controlled by corporate conglomerates and is therefore part of a political process whereby the corporate will is transplanted into the minds of the public.”); *see also* Lawrence R. Jacobs & Benjamin I. Page, *Who Influences U.S. Foreign Policy?*, 99 AM. POL. SCI. REV. 107, 120–21 (2005) (analyzing survey data collected from 1974 through 2002 and concluding “that internationally oriented business leaders exercise strong, consistent, and perhaps lopsided influence on the makers of U.S. foreign policy” while “public opinion—the aggregate foreign policy preferences of ordinary citizens—was repeatedly estimated by our [statistical modelling] to have little or no significant effect on government officials”).

essential obligations in a democracy and contemporary findings that the news media has a profound impact on public opinion, the media ostensibly should facilitate norms of democracy,⁷⁹ represent diverse sectors of society,⁸⁰ support pluralism,⁸¹ and reflect opposing views on political and social issues⁸² in a way that includes marginalized voices.⁸³ This view of the role of the news media envisions news production and dissemination as a quasi-political

79. See *TBS, Inc. v. FCC*, 520 U.S. 180, 227 (1997) (Breyer, J., concurring in part) (citing *Whitney v. California*, 274 U. S. 357, 375–76 (1927) (Brandeis, J., concurring)) (emphasizing that federal communications policy “seeks to facilitate the public discussion and informed deliberation, which, as Justice Brandeis pointed out many years ago, democratic government presupposes and the First Amendment seeks to achieve”); *see also Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 411 (2000) (Thomas, J., dissenting) (quoting James Madison, *Report on the Resolutions, in 6 WRITINGS OF JAMES MADISON* 397, 397 (G. Hunt ed., 1906)) (stating that meaningful participation in public affairs “depends on the knowledge of the comparative merits and demerits of the candidates for public trust”).

80. See CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* 21–22 (1993) (emphasizing that “a broad spectrum of opinion must be represented, that people must be allowed to hear sharply divergent views, and that it is important to find . . . challenges to the conventional wisdom from a variety of different perspectives” in the news media).

81. See Berman, *supra* note 66, at 832 (arguing that “an ideal press” in a democracy “must be pluralist” in order “to carry out its functions of facilitating the effective exercise of free expression”).

82. *FCC v. League of Women Voters*, 468 U.S. 364, 382 (1984) (“Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.” (quoting *Thornhill v. Alabama*, 310 U.S. 88, 102 (1940))) (internal quotation mark omitted); R. Randall Rainey, *The Public’s Interest in Public Affairs Discourse, Democratic Governance, and Fairness in Broadcasting: A Critical Review of the Public Interest Duties of the Electronic Media*, 82 GEO. L.J. 269, 331–32 (1994) (proposing that “[t]o serve the decisionmaking of the electorate,” FCC policies and enforcement should prioritize “making available all relevant and material information necessary for the formation of prudent judgments”).

83. David Cole, *Beyond Unconstitutional Conditions: Charting Spheres of Neutrality in Government-Funded Speech*, 67 N.Y.U. L. REV. 675, 703–04 (1992) (arguing that public broadcasting “is an important mechanism for counteracting the effects of economic inequality on public debate” because it “support[s] speech that cannot obtain support in the private marketplace”); Lee C. Bollinger, *The Sedition of Free Speech*, 81 MICH. L. REV. 867, 874 (1983) (reviewing MARK G. YUDOF, *WHEN GOVERNMENT SPEAKS: POLITICS, LAW, AND GOVERNMENT EXPRESSION IN AMERICA* (1982)) (arguing that “lack of income and education surely limits the effectiveness of political communication” for marginalized cross sections of society).

institution that produces “public goods” for democracy⁸⁴ and owes its foremost loyalty to citizens.⁸⁵ If the media fails to provide that public good (perhaps because the owners and managers who control dominant media outlets do not realize the magnitude of the public need or their role in satiating it), it fails to apprise citizens of the affairs of government,⁸⁶ as a

84. Gregory P. Magarian, *Regulating Political Parties Under a “Public Rights” First Amendment*, 44 WM. & MARY L. REV. 1939, 1985–87 (2003) (articulating the public rights theory that “welcomes government action to ensure substantive expressive freedom in appropriate circumstances” where citizens’ access to information and communication channels is functionally impeded by other actors; “because the public rights theory is concerned with the substantive vitality of public discourse, courts should evaluate asserted threats to and protections of expressive freedom based on their actual effects on the system of free expression,” rather than based on a formalistic rule that government should never intervene); *see* Office of Commc’n of the United Church of Christ v. FCC, 359 F.2d 994, 1003 (D.C. Cir. 1966) (“A broadcaster seeks and is granted the free and exclusive use of a limited and valuable part of the public domain; when he accepts that franchise it is burdened by enforceable public obligations.”); *see also* Ellen P. Goodman, *Media Policy Out of the Box: Content Abundance, Attention Scarcity, and the Failures of Digital Markets*, 19 BERKELEY TECH. L.J. 1389, 1416 (2004) (“A cable operator or broadcaster is simultaneously a commercial operation and a political institution.”); Magarian, *supra* note 70, at 117 (“One feature of the public rights theory that has enjoyed substantial currency in the legal mainstream is the idea that the press—print and electronic—has a special capacity, and thus a special responsibility, to inform the public about arguable failings by the government and to provide information necessary for political debate.”).

85. *See* BILL KOVACH & TOM ROSENSTEIL, *THE ELEMENTS OF JOURNALISM* 51–52 (2001); *see also* GLEASON, *supra* note 60, at 7 (opining that the media’s watchdog function “is based on the press’s function as an institution serving a collective good,” and that “[o]nly the speech that benefits the collective good is worthy of protection”); Robin A. Arzon, Comment, *Exploring Iraq War News Coverage and a New Form of Censorship in Violation of the Quickly Evaporating Public Interest Requirement and Public Right to Receive Information*, 12 VILL. SPORTS & ENT. L.J. 327, 327 (2005) (contending that the media violates public interest with self-censored and biased news reporting).

86. The Supreme Court has, to a certain degree, affirmed that the First Amendment encompasses “listener rights” to access information that enables meaningful political discourse. *See* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 575–80 (1980) (“The [public’s] right of access . . . may be seen as assured by the amalgam of the First Amendment guarantees of speech and press, and their affinity to the right of assembly is not without relevance.”); Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390 (1969) (“[T]he people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment.”); Lamont v. Postmaster Gen., 381 U.S. 301, 308 (1965) (Brennan, J., concurring) (“It is true that the First Amendment contains no specific guarantee of access to publications. However, the protection of the Bill of Rights goes beyond the specific guarantees to protect from congressional abridgment those equally fundamental

result, citizens' involvement cannot properly check abuses of power,⁸⁷ and citizens cannot properly exercise their constitutional rights.⁸⁸ Employing this observation—that aspirations for the media may conflict with profitability motives⁸⁹—Part III.B. sets forth a decisionmaking analysis to probe the President's expectations about media performance.

personal rights necessary to make the express guarantees fully meaningful.”); *see also* THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 631–33 (1970) (arguing that the First Amendment requires the government to take affirmative steps “to maintain the basic conditions that a system of freedom of expression requires in order, not just to exist, but to flourish”).

87. *See* Blasi, *supra* note 29, at 554–67 (arguing that “the particular problem of misconduct by government officials . . . is so antithetical to the entire political arrangement, is so harmful to individual people, and also is so likely to occur, that its prevention and containment is a goal that takes precedence over all other goals of the political system”); *see also* ORWELL ROLLS IN HIS GRAVE, at 13:30–14:01 (Sag Harbor-Basement Pictures 2003) (Professor McChesney, author of RICH MEDIA, POOR DEMOCRACY, *supra* note 74 explains that “a self-governing society, a democratic society” requires a media that “keeps track of people in power and people who want to be in power.”).

88. *See* Alterman, *supra* note 77 (“A healthy and functioning democracy must rely on the free flow of information between citizens in the public sphere, and our representative system can only truly fulfill its promise when the media takes seriously its responsibility as the primary facilitator of this exchange.”); *see also* KOVACH & ROSENSTEIL, *supra* note 85, at 12 (“The primary purpose of journalism is to provide citizens with the information they need to be free and self-governing.”).

89. *See* Travis, *supra* note 71, at 63–64; Bill Moyers Journal: Buying the War (PBS television broadcast Apr. 25, 2007), transcript available at <http://www.pbs.org/moyers/journal/btw/transcript1.html> (quoting former CBS anchor Dan Rather’s explanation that the network news media’s failure to examine the Bush Administration’s allegations regarding Iraq more critically was partly due to the reality that news networks “[have] become huge, international conglomerates. They have big needs, legislative needs, repertory needs in Washington. Nobody has to send you a memo to tell you that that’s the case.”); *see also* WMD: WEAPONS OF MASS DECEPTION (Globalvision 2004), at 18:59–20:10, available at <http://www.youtube.com/watch?v=hFkqtxTJPoU> (John R. MacArthur, publisher of Harper’s, explaining that the lack of diligence regarding reporting on Iraq was due “mostly [to] owners who don’t care about journalism.”); *id.* at 1:30:24–:54 (Jeff Chester, Director of the Center for Digital Democracy, opining that news media corporations’ self-interest incentivizes them to forge symbiotic relationships with policymakers and propagate White House preferences because “[y]ou don’t go in and report critically on an administration that you hope will give you billions and billions of dollars in new policies.”).

B. Executive Expectations About the Media's Rational Choice

1. A Framework

The President has a privileged institutional stature as the dominant figure in American political life⁹⁰ and can initiate agenda setting, direct news coverage, craft news content, and mobilize public opinion.⁹¹ But suppose there is a continuum representing the degree to which the media either checks the government or promotes the government's agenda. At one extreme, if the rationale for the Executive's agenda is weak and if media entities critically evaluate that rationale and require the government to substantiate allegations supporting its favored policies, a President proffering a poor reason for action could experience dissipated credibility and confront impediments to promoting broader policy agendas in the future.⁹² At the other extreme, the media may perfunctorily grant credibility to the President's message, decline to investigate or verify the factual foundation of the Executive Branch's positions, disregard alternative and dissenting voices, and serve as a "mouthpiece" for the government.⁹³ If the

90. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 653–54 (1952) (Jackson, J., concurring) (stating that the President has a "prestige as head of state" and "access to the public mind through modern means of communication" that allows the President to exert leverage "upon those who are supposed to check and balance his power which often cancels their effectiveness"); cf. Fisher, *supra* note 6, at 1226 ("The media furthers the agenda of the executive branch by taking administration statements at face value and distributing them without independent analysis to the public.").

91. See Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1, 37 (1984) ("The expansion of governmental powers and the creation of a bureaucracy possessing vast quantities of information and expertise have made the government, rather than individual citizens, the most pervasive participant in the marketplace [of ideas]."); Lyrissa Barnett Lidsky, *Nobody's Fools: The Rational Audience as First Amendment Ideal*, 2010 U. ILL. L. REV. 799, 847 (2010) (discussing how the Executive Branch "manipulates citizen preferences through its role in setting the agenda of political discourse in the United States"); Mermin, *supra* note 2, at 951 (discussing government officials' "presumptive credibility" in journalists' eyes and the reality "that the vast majority of [mainstream journalists'] coverage is based on what government officials tell them").

92. See, e.g., McLeod, *supra* note 76, at 137 (summarizing his argument that the news media should endorse a particular view or assertion "only when warranted in light of preponderance of evidence, regardless of the status of the parties involved with respect to the existing power structure").

93. See Kurtz, *supra* note 44 (quoting Karen DeYoung, former managing editor at the *Washington Post*, who notes that reporters "are inevitably the mouthpiece for whatever administration is in power" if they "report what the president said" without

media does not check the Executive Branch's message, it could act in concert with the Executive's agenda setting,⁹⁴ shape political discussions on current events,⁹⁵ suppress dissent and disconfirming information,⁹⁶ and crystallize uniformity in public opinion in the Executive's preferred direction.⁹⁷ This

critical examination or further investigation).

94. See Molly J. Walker Wilson, *Behavioral Decision Theory and Implications for the Supreme Court's Campaign Finance Jurisprudence*, 31 CARDozo L. REV. 679, 682 (2010) (noting that priming, “[a]lso known as ‘agenda-setting,’” can be used to lead citizens “to consider particular issues to be particularly important by presenting these issues repeatedly in a variety of formats”); Wayne Wanta et al., *Agenda Setting and International News: Media Influence on Public Perceptions of Foreign Nations*, 81 JOURNALISM & MASS COMM. Q. 364, 367 (2004) (“Agenda setting has been the focus of hundreds of systematic studies, the vast majority of which have found support for the idea that the public learns the relative importance of issues from the amount of coverage given to the issues in the news media.”); see also Lutz Erbring et al., *Front-Page News and Real World Cues: A New Look at Agenda-Setting by the Media*, 24 AM. J. POL. SCI. 16, 45 (1980) (proposing that “media coverage interacts with the audience’s pre-existing sensitivities” and “serves as a trigger stimulus” that can “produce changes in issue concerns”).

95. See, e.g., Zachary D. Streit, *Panel Report: Investigative Journalism and National Security*, 5 CARDozo PUB. L. POL’Y & ETHICS J. 75, 79 (2006) (quoting panelist Scott Armstrong, a former *Washington Post* national security correspondent, who recognized the problem and remarked, “It’s a bad idea when major newspapers that set national agendas in other ways and report on national issues themselves become advocates” (internal quotation marks omitted)); Yamamoto, *supra* note 5, at 297 n.62 (citing Oliver Burkeman, *Bush Backer Sponsoring Pro-War Rallies*, GUARDIAN UNLIMITED (Mar. 25, 2003), <http://www.theguardian.com/world/2003/mar/26/usa.iraq>) (noting that “[m]ass media conglomerate Clear Channel, which owns 1,200 radio stations, funded and organized pro-war rallies” across the country before the 2003 invasion of Iraq).

96. See, e.g., Fisher, *supra* note 6, at 1229–30 (discussing the *Washington Post*’s “front-page stories that highlighted [Bush] administration rhetoric that justified war” and asking: “Why did those stories, which could have been written by the White House, displace stories that questioned and analyzed the administration’s facts and statements?”); cf. Papandrea, *supra* note 3, at 257–61 (“History demonstrates that, if anything, the press has often been too willing to engage in self-censorship in times of war.”).

97. See, e.g., ROBERT ENTMAN, PROJECTIONS OF POWER: FRAMING NEWS, PUBLIC OPINION, AND U.S. FOREIGN POLICY 155 (2004) (noting that, because debate surrounding the 2003 invasion of Iraq was “restricted mostly to arguing over ‘war soon’ and ‘work through the U.N.’”—and not whether any invasion should occur to begin with—it was inevitable that “limits on the counterframe would leave American audiences scant cognitive or emotional basis for anything but a rally around the president once hostilities commenced”); MACARTHUR, *supra* note 11, at xiv (“With a compliant news system there is little or no effective information free of government beliefs, so official failures go uncorrected, faulty strategies continue, incompetents remain in

subpart will offer a structure for assessing the President's anticipation of the media response on an issue involving a purported national security threat and where it might fall along that continuum. Several premises will structure the forthcoming analysis.

First, while the modern media news product purportedly performs a quasi-public function as an indispensable democratic institution, media conglomerates are publicly traded companies that receive most of their income from advertising revenues, as opposed to subscription sales.⁹⁸ This means that players in the mass media industry are inherently self-interested and are driven by very specific profit-maximizing motives. Citizens are constantly selecting their preferred presentation of news, and news media entities are constantly competing with each other for viewership to increase individual payoffs.⁹⁹ Profitability is dependent on relative viewership, which might pit programming and editorial decisions against the informational needs of the electorate in a democracy.¹⁰⁰ A 2004 Pew Center survey of 547 media executives and journalists in the United States revealed that 66 percent in the national-level news media industry and 57 percent in local news reporting believed that consternation over profitability "negatively affect[s] the quality of their work-product."¹⁰¹ This framework treats that

leadership, and there is growing likelihood of public demoralization . . .").

98. BAGDIKIAN, *supra* note 69, at 134–51 (cataloguing media corporations' increasing dependence on advertising revenues); Buzz Portune, *Media Relationships in the Post 9-11 World—Have Changes Impacted Newsgathering and Reporter Privilege?*, 32 OHIO N.U. L. REV. 529, 532 (2006) ("In print journalism, advertising usually (and preferably) exceeds the overall revenue generated from subscription and casual sales. In electronic journalism, advertising dollars comprise most, if not all, of the revenue generated by media operations.").

99. See ALGER, *supra* note 74, at 160–62, 173–79 (collecting examples of the "general patterns in the constant squeeze of newsroom resources and the effort to give newscasts more attention-grabbing stories that appeal to the viewers' supposedly short attention spans and don't tax the brain too much").

100. See BAGDIKIAN, *supra* note 69, at 202 ("[News media outlets] react to overnight program ratings with something approaching nervous breakdowns because one percentage point in ratings can mean a difference of \$30 million profit a year. The result of this manic concern is to design programming that will serve the split second of attention-getting rather than humanistic substance that will stay with the viewer; the ratings race serves the advertiser's needs, not the audience's."); Owen W. Fiss, *Why the State?*, 100 HARV. L. REV. 781, 788 (1987) ("[T]he market brings [pressure] to bear on editorial and programming decisions . . . that might have a great deal to do with profitability . . . but little to do with the democratic needs of the electorate.").

101. Morant, *supra* note 60, at 626 (citing Bill Kovach et al., *A Crisis of Confidence: A Commentary on the Findings*, in PEW RESEARCH CTR. FOR THE PEOPLE & THE PRESS

reality as a given and assumes that news media conglomerates will continue to seek to maximize viewership in order to maximize profits—and will check the Executive’s agenda only when doing so is consonant with those interests.

Second, this framework assumes that the Executive will act rationally with expert knowledge of media operations and with knowledge of the fact that the media’s secondary objective (to oversee and check the Executive) interacts with the pressures endemic to market competition in pursuit of its primary objective (maximizing viewership and profits).¹⁰² This framework posits that, if the Executive understands that the media’s profitability interest will dominate, perhaps the Executive can predict specific conditions in which the possibility of close scrutiny might recede.

Third, security threat allegations are premised on varying levels of public and classified information.¹⁰³ This framework assumes that both the news media and the Executive recognize the Executive’s substantial control over the details of data within the national security apparatus that can form the basis and content of news releases.¹⁰⁴

Within this framework, when news media entities report on an

& PROJECT FOR EXCELLENCE IN JOURNALISM, HOW JOURNALISTS SEE JOURNALISTS IN 2004, at 27, 28 (2004), available at <http://www.people-press.org/files/legacy-pdf/214.pdf>); see also Blake D. Morant, *The Inescapable Intersection of Credibility, Audience, and Profit in Broadcast Media’s Coverage of Elections*, 24 ST. JOHN’S J. LEGAL COMMENT. 479, 482 (2009) (“The actions of unabashedly free broadcast media can mutate to frenzy, particularly when the industry focuses on sensationalism to advance private interests associated with pecuniary gain.”).

102. For the Executive, this resembles a perfect information game. See generally Jan Mycielski, *Games with Perfect Information*, in 1 HANDBOOK OF GAME THEORY 41, 42 (Robert Aumann & Sergiu Hart eds., 1992) (“Perfect information means that at each time only one of the players moves, that the game depends only on their choices, they remember the past, and in principle they know all possible futures of the game.”).

103. See generally Robert Bejesky, *National Security Information Flow: From Source to Reporter’s Privilege*, 24 ST. THOMAS L. REV. 399, 400–01 (2012) [hereinafter Bejesky, *Information Flow*] (discussing the Executive’s control over national security information and noting “national security estimates, deriv[ed] from classified information, can have poignant and widespread societal impact when provided to policy makers and the public”).

104. In this sense, for the media, this framework represents an imperfect information game. See generally Andrew Gilpin & Thomas Sandholm, *Lossless Abstraction of Imperfect Information Games*, 54 J. ACM, Sept. 2007, at 1, 2 (“The differentiating feature of games of imperfect information, such as poker, is that they are not fully observable: when it is an agent’s turn to move, she does not have access to all of the information about the world.”).

Executive's allegations that a particular state—the "Target"—presents a security threat, they face a series of choices regarding what positions to take on the allegations and how to present their coverage. Appealing to and reinforcing existing citizen perceptions breeds viewership,¹⁰⁵ but media entities could also decide to transgress the existing news media industry median position—whether that position is consistent or inconsistent with the Executive's preferred policy agenda. Media entities could also later choose to modify the tone of reporting and the extent that diversity in news coverage is provided. If the predominant societal perception adopts the Executive's allegations about the Target, skeptical or inquisitive portrayals may either increase viewership or alienate citizens. Several variables constitute the median societal perception.

2. An Equation

The following equation represents the utility—the gain or loss in absolute terms—a media entity could experience by choosing not to present a dissenting viewpoint and instead presenting uncritical reporting of the Executive's assertions about the Target: $U(v) = \lambda (r_1 + n_{a1}) - [(1 - \lambda)(c_1 + f_n)]$. The variable λ represents the expected likelihood that the Executive's allegations about the threat purportedly presented by the Target are true; $(1 - \lambda)$ represents the expected likelihood that the Executive's allegations are false and that the Target presents no threat. Thus, to decide how to portray the Executive's asserted position on a security threat, the media must decide how likely it is that the Target actually presents a threat and decide whether the projected gains from reinforcing viewers' emotive perceptions of the asserted threat (r_1) and their own beliefs that action is required to obvert the threat (n_{a1}) outweigh the need to hedge against the possibility of current (c_1) and future (f_n) losses if that threat is exaggerated.

Assume $r_1 = (\sigma_{t1} + \Pi_{t1} + \pi_{t1})/3$, where r_1 is general sentiment toward military action, constituted by forms of emotion, including patriotism (σ), fear, or negative sentiment from a perceived threat to national security (Π), and morality or humanitarian justice (π). These are prevalent emotions in wartime and security atmospheres and were prevalent during the post-9/11

105. See PHILIP G. ZIMBARDO & MICHAEL R. LEIPPE, THE PSYCHOLOGY OF ATTITUDE CHANGE AND SOCIAL INFLUENCE 130–34 (1991) (discussing research showing that most news media consumers are "most eager to hear the commentary of similar others—representatives of our political party or those who share our political philosophy").

period—and generally corresponded with diplomatic and legal motives for using force against Iraq.¹⁰⁶ Segments of the populace may be moved to different degrees by events or stories implicating each indicator of emotion.¹⁰⁷ Moreover, interactivity between media industry players' choices and changes in the r_1 variable over time in repeated play may develop as a result of "polarization: repeated exposure to stimuli people already like causes them to rate those stimuli even more positively, whereas repeated exposure to initially disliked stimuli leads to even more negative ratings."¹⁰⁸

In this equation, n_{a1} is the media entity's perception of the utility gained from preemptive military action that prevents the Target from attacking first. Let c_1 be the current period loss for reporting that conforms to dominant perceptions when this viewpoint is inaccurate, and let f_n be the future disutility and lost viewership for reporting that is shown to be inaccurate in retrospect. Hence, conformity could result in a current or future period disutility from viewer resentment for unreliable depictions or imbalanced coverage.

The expected time horizons for proving or disproving λ and the populace reaction may influence utility calculations. It is possible that, if r_1 is sufficiently large, dissenting could yield a significant immediate loss for departing from the industry equilibrium; alternatively, if c_1 is sufficiently large, taking the risk of dissenting could garner a positive payoff by reaping sufficient outlier viewership. Once λ is proved or disproved, viewer reflections on past reporting in the future period (f_n) update actual utility. However, λ may only be conclusively proved or disproved in the event of discoveries during an invasion of the Target, an admission of wrongdoing by the Target, indisputable intelligence reports indicating that the Target possesses threatening weapons or plans to launch an attack, or an

106. Cf. Bejesky, *Politico*, *supra* note 31, at 100–01 (quoting Ian S. Lustick, *Fractured Fairy Tale: The War on Terror and the Emperor's New Clothes*, 16 MINN. J. INT'L L. 335, 335–36 (2007)) (noting that "between October 2002 and October 2005, Pentagon officials 'gave 562 speeches with some version of the word 'terror' in their titles' and five years after 9/11, 74% of the public was still concerned about a major terrorist attack and 35% were worried that an attack would harm them personally"); *see generally id.* at 91–95; Bejesky, *CFP*, *supra* note 4, at 42–60, 68–82.

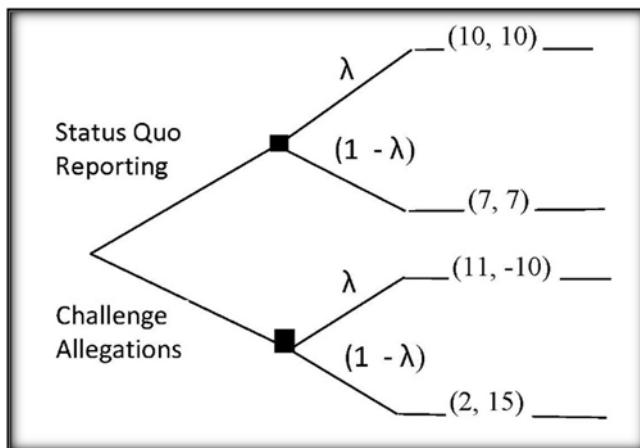
107. See Erbring et al., *supra* note 94, at 46 ("[T]he media help shape our notions of what is important beyond the reach of our direct experience. But the effect is not automatic. People have different notions of what is important to them, and they tune in and out accordingly.").

108. ZIMBARDO & LEIPPE, *supra* note 105, at 171 (emphasis removed).

unequivocal statement by an international regulatory body (such as a United Nations weapons inspection team). But short of an event that might disprove or substantially discredit λ , substantial portions of the population will probably presume that λ is true.¹⁰⁹ Consequently, media entities' perceptions of c_1 and r_1 , as reflections of current viewers' preferences, are apt to be the most cogent factors bearing on media decisionmaking.¹¹⁰

Hypothetical utility outcomes for media entity decisions—to choose status quo or critical investigative reporting—based on the equation, can be summarized more succinctly in the following decision tree:

Figure 1: Hypothetical Media Entity Payoffs for Challenging the Status Quo



The first value in each parenthetical pair is the utility (or payoff) for the news media industry as a whole, and the second value is the utility for the individual decisionmaking media entity. A media organization that departs from the status quo could be praised or scorned for its reporting in retrospect, depending on the truth of the Executive's allegations. If a media outlet chooses status quo reporting and the threat does exist (meaning λ is true), the payoff is 10 for the media entity because it shares in the industry

109. See, e.g., Bejesky, *Information Flow*, *supra* note 103, at 408 (noting that the Bush Administration manipulated public discourse by “declassifying data and estimates that were ultimately false, and keeping classified the details that made allegations specious”).

110. The disutility from a false λ should perhaps be discounted based on time horizons, if viewers' willingness to forgive inaccurate reporting increases over time. An alternative formula that discounts f_n based on the amount of time until λ will be clearly ascertained (t_n) may replace f_n with $f_n/(1 + t_n)$.

payoff and viewership. Status quo reporting when λ is false causes the entire industry to confront inaccurate portrayals together by sharing in the lower utility (7, 7). But with no significant departing outlier, there is no frame of reference for viewers to maintain that entities could have reported more effectively because aggregate industry performance contributed the same portrayal. The damage may only involve temporary reputation loss. Large-scale boycott of an unavailing media industry for ineffective reporting on a transient event is inconceivable.

A dissenting media entity that breaks from the status quo and challenges allegations faces a substantial risk, because if λ is true there is a considerable disutility (-10) from the combined current and future period loss, in terms of loss of viewership and credibility. The other players in the news media industry have a marginally higher payoff (11) for predominately reporting accurately and absorbing the viewers who abandon the incorrect dissenter. However, if a news media entity perceives $(1 - \lambda)$ to be high—that is, it believes the Administration’s secrecy threat allegations are likely false—and departs from the industry equilibrium, and λ does prove to be false, its payoff is 15; that particular media entity can leverage its enhanced credibility into viewership gains. Remaining industry players’ utility drops as viewers look elsewhere for balanced reporting.

In short, from the interpretation of the equation for $U(v)$ and payoffs in Figure 1, dissenting media players take a significant risk by engaging in investigative reporting, vociferously inquiring into the truth of purported threat assessments, or challenging government under conditions of a perceived security threat with an asymmetric or possibly even stochastic λ . Likewise, the entire industry is protected in the status quo equilibrium by the government’s official opinion, reducing the impact of f_n .

New sources could increase or decrease media entities’ perceptions of λ in later periods, perhaps resulting in fleeting discord over subissues that comprise the Executive’s security threat perception. Updated sources may include future government opinions and statements, defector allegations, opinions from the U.S. Intelligence Community, discussions in congressional debates or initiatives, revelations in international diplomacy, or Security Council meetings and weapons inspection reports. Media outlets might reinterpret past reporting and trends in light of new information (perhaps finding discrepancies between the Executive position and previous information), and these updates could correspondingly impact the perceived utility for a media entity. Likewise, political actors might view new information and anticipate media reactions in light of current period portrayals, probative variables, and existing assumptions. Perhaps political

actors will project that American media conglomerates will pursue status quo reporting, rather than confront the government as the Framers contemplated.

Moreover, a security threat atmosphere, at least partially derived from secret information, may make it more likely for media entities to engage in safe reporting and rely on government sourcing. The more that the policy agenda is dependent on classified data, the more that the media entities' decisionmaking results will approximate what is referred to in economics as a coalition analysis, a producer cartel, or a cooperative oligarchy.¹¹¹ This does not mean that this framework predicts that media entities clearly attempt to increase payoffs by implicitly or explicitly pursuing a group strategy; instead, it deduces that the existence of dominant and highly concentrated media conglomerates, their concerns about maximizing profitability sourcing that generally comes from the Executive, and the classified nature of sources, may make challenging or engaging in investigative reporting more unlikely.

Based on this analysis, the Executive's expectations about the performance of corporate media entities may assist in anticipating how agenda setting will unfold. Part IV applies this analytic framework to the news media's performance in the period preceding the invasion of Iraq and explains the dominance of fear (Π), and to some degree patriotism (σ), in the reporting on the alleged security threat presented by Iraq before the 2003 invasion. Part V addresses why, when there truly was no security threat ($1 - \lambda$), the media did not react as a watchdog of government and how, after invasion, the dominant emotions shifted to humanitarian justice (μ) and strong sentiments of patriotism (σ).

IV. APPLICATION OF MEDIA PORTRAYALS PRIOR TO WAR

A. *The Executive's Agenda Setting*

Following 9/11, a terror threat milieu prevailed in the United States.¹¹²

111. Cf. Randall G. Holcombe, *Product Differentiation and Economic Progress*, 12 Q. J. AUSTRIAN ECON. 17, 33–34 (2009) (noting that product differentiation in a competitive market is a key driver of welfare-enhancing benefits to consumers); see generally Ronald L. Goettler & Brett R. Gordon, *Competition and Product Innovation in Dynamic Oligopoly*, 12 QUANTITATIVE MARKETING & ECON. 1, 13–20 (2014) (finding that in different stages of product innovation, competition with fewer firms can reduce innovation and product differentiation).

112. See MARC SIEGEL, FALSE ALARM: THE TRUTH ABOUT THE EPIDEMIC OF FEAR vii (2005) (“We all personalized 9/11, and it made us all feel more at risk, whether we

The Bush Administration labeled Iraq a security threat in the State of the Union Address in January 2002 and disseminated additional allegations over the following months.¹¹³ In mid-2002, the American media announced Administration war plans and troop deployments to countries contiguous to Iraq.¹¹⁴ The White House lobbied members of Congress for an invasion, and top officials maintained that unilateral military action would be taken during 2002.¹¹⁵ As the first, clear step in agenda setting, the Bush Administration unleashed bold rhetoric by selectively declassifying information about Iraqi

were really at risk or not. We grew afraid more easily than before, misinformed by our leaders and provoked by the news media."); *see generally* Robert Bejesky, *A Rational Choice Reflection on the Balance Among Individual Rights, Collective Security, and Threat Portrayals Between 9/11 and the Invasion of Iraq*, 18 BARRY L. REV. 31 (2012) [hereinafter Bejesky, *Rational Choice Reflection*].

113. President George W. Bush, Address Before a Joint Session of the Congress on the State of the Union (Jan. 29, 2002), *available at* <http://www.presidency.ucsb.edu/ws/index.php?pid=29644> ("Iraq continues to flaunt its hostility toward America and to support terror. . . . By seeking weapons of mass destruction, these regimes pose a grave and growing danger. They could provide these arms to terrorists, giving them the means to match their hatred. They could attack our allies or attempt to blackmail the United States. In any of these cases, the price of indifference would be catastrophic."); *see* Bejesky, *Politico*, *supra* note 31, at 67–70.

114. *See* Bejesky, *Politico*, *supra* note 31, at 67–68 (noting that, in mid-2002, "[s]ome media speculated about a future attack and even announced that plans involved bombing operations, followed by a ground invasion of 70,000 to 250,000 troops").

115. Daniel Eisenberg, *We're Taking Him Out*, TIME (May 5, 2002), <http://content.time.com/time/world/article/0,8599,235395,00.html> (reporting that when Bush and Cheney met with Senate Republicans in March 2002, Bush stated, "We're taking [Saddam] out," and Cheney informed them it was inevitable that the United States would attack Iraq and that "[t]he only question was when"). Some members of Congress lobbied back:

This December will mark three years since United Nations inspectors last visited Iraq. There is no doubt that since that time, Saddam Hussein has reinvigorated his weapons programs.

....

.... We have no doubt that these deadly weapons are intended for use against the United States and its allies. Consequently, we believe we must directly confront Saddam, sooner rather than later.

Sen. John McCain et al., *Text: Letter Urging Action in Iraq*, WASH. POST (Dec. 7, 2001), http://www.washingtonpost.com/wp-srv/nation/specials/attacked/transcripts/iraqletter_120701.html; *see also* Robert Bejesky, *Political Penumbra of Taxes and War Powers for the 2012 Election*, 14 LOY. J. PUB. INT. L. 1, 19–20 (2012).

chemical, biological, and nuclear weapons.¹¹⁶ Additional allegations were introduced by President Bush and British Prime Minister Tony Blair at a joint news conference on September 7, 2002.¹¹⁷ The following day, Vice President Dick Cheney, Secretary of Defense Donald Rumsfeld, National Security Advisor Condoleezza Rice, and Secretary of State Colin Powell appeared on Sunday political talk shows and offered new security threat claims about Iraq—and each of them relied extensively upon a *New York Times* article published that morning, only hours earlier, which cited leaks from the Administration as conclusive proof of its assertions.¹¹⁸ These allegations set the stage for Bush's address to the United Nations General Assembly on September 12, which merged the allegations about the threat Iraq presented with sentimental remembrances of 9/11 and emotive language invoking the dangers of terrorism.¹¹⁹ The repetition of the claims

116. See Bejesky, *Weapon Inspections*, *supra* note 33, at 303–08 (noting that the “President has the ultimate authority to decide when, how, and to what degree intelligence information is declassified and released” and that the Bush Administration disseminated a National Intelligence Estimate (NIE) supporting a preemptive strike even over “dissent from agencies with greater expertise” maintaining that the declassified intelligence was without merit).

117. *Bush, Blair Address Reporters*, CNN (Sept. 7, 2002), <http://transcripts.cnn.com/TRANSCRIPTS/0209/07/bn.01.html> (President Bush: “We just heard the prime minister talk about the new report. I would remind you that when the inspectors first went into Iraq and were denied—finally denied access, a report came out of the Atomic—the [International Atomic Energy Agency (IAEA)], that they were six months away from developing a weapon. I don’t know what more evidence we need.”). Bush’s and Blair’s statements came as a surprise to the IAEA, which stated it was “unaware of the referenced report.” Bejesky, *Weapon Inspections*, *supra* note 33, at 304 (citing LISA FINNEGAN, NO QUESTIONS ASKED: NEWS COVERAGE SINCE 9/11, at 134 (2006)).

118. See Michael R. Gordon & Judith Miller, *Threats and Responses: The Iraqis; U.S. Says Hussein Intensifies Quest for A-Bomb Parts*, N.Y. TIMES (Sept. 8, 2002), <http://www.nytimes.com/2002/09/08/world/threats-responses-iraqis-us-says-hussein-intensifies-quest-for-bomb-parts.html>.

Critics point to September 8, 2002 and to [*Meet the Press*] in particular, as the classic case of how the press and the government became inseparable. Someone in the Administration plants a dramatic story in the *New York Times*. And then the Vice President comes on [Tim Russert’s] show and points to the *New York Times*. It’s a circular, self-confirming leak.

Bill Moyers Journal: Buying the War, *supra* note 89; see also Bejesky, *Weapon Inspections*, *supra* note 33, at 308–10 (“Hours after the [*New York Times*] article was published, officials appeared on Sunday talk shows to introduce the claims.”).

119. See President George W. Bush, President’s Remarks at the United Nations General Assembly, WHITE HOUSE (Sept. 12, 2002), <http://georgewbush-whitehouse>.

about the existence and magnitude of the threat elevated Π_{t1} to new heights.

Moreover, hearing a message repeatedly may make citizens more inclined to believe the message, particularly when an alternative position is not offered in the media.¹²⁰ Repetition of false statements may impact public perceptions because increased exposure to any idea, including false information, is apt to lead a greater portion of the public to accept the idea as true.¹²¹ Likewise, if the media frequently conducts polls to represent populous beliefs, the results of polling may lead—rather than reflect—public opinion by setting self-fulfilling perceptions and goading a crowd mentality that changes opinions to reflect polls.¹²² Within the framework discussed in Part III.B, these effects likely reduced news media entities' estimations of c_1 and f_n —that is, media entities perceived that consumers were more likely to believe that λ was true and less likely to demand dissenting reporting—and consequently made news media entities less likely to dissent.

The Bush Administration was adept at preventing unfavorable

archives.gov/news/releases/2002/09/20020912-1.html (“With every step the Iraqi regime takes toward gaining and deploying the most terrible weapons, our own options to confront that regime will narrow. And if an emboldened regime were to supply these weapons to terrorist allies, then the attacks of September the 11th would be a prelude to far greater horrors.”); SHELTON RAMPTON & JOHN STAUBER, WEAPONS OF MASS DECEPTION: THE USES OF PROPAGANDA IN BUSH’S WAR ON IRAQ 37–40 (2003) (recounting the media blitz and remarking that “[i]t was no accident, of course, that the Iraq rollout was timed to coincide with the first anniversary of Al Qaeda’s attack on the United States”).

120. GARTH S. JOWETT & VICTORIA O’DONNELL, PROPAGANDA & PERSUASION 210 (5th ed. 2012) (“Wherever a dominant definition of the situation is accompanied by a consistent, repetitious, and unchallenged message, the influence of the message is greater.”); *see also* ZIMBARDO & LEIPPE, *supra* note 105, at 179 (noting that studies consistently show that “repetition of a compelling message fosters strong and extreme attitudes”).

121. *See* ZIMBARDO & LEIPPE, *supra* note 105, at 179–81 (“[T]he impact of repetition [of a particular message] became evident 4 weeks later To hold on to the initial attitude change required repetition of the message.”); Robert B. Zajonc, *Attitudinal Effects of Mere Exposure*, 9 J. PERSONALITY & SOC. PSYCHOL. MONOGRAPH SUPPLEMENT, June 1968, at 1, 1, available at <http://isites.harvard.edu/fs/docs/icb.topic472736.files/Zajonc.pdf> (finding support for the hypothesis that “mere repeated exposure of the individual to a stimulus is a sufficient condition for the enhancement of his attitude toward it”).

122. *See* DOUGLAS RUSHKOFF, COERCION: WHY WE LISTEN TO WHAT “THEY” SAY 166 (1999) (“When we learn what other people are thinking—or are led to believe what other people are thinking—we tend to follow along.”); *see generally* discussion *infra* Part IV.B.

information from entering public discourse in order to promote its preferred narrative (λ).¹²³ In 2008, the Center for Public Integrity (CPI), a nonprofit journalism organization, assembled a database of 935 “false statements” made by Bush, Powell, Rumsfeld, Cheney, Rice, Deputy Secretary of Defense Paul Wolfowitz, and Press Secretaries Ari Fleischer and Scott McClellan in the two years following September 11, 2001, about Iraq’s alleged attempts to acquire or develop weapons of mass destruction (WMDs) and Iraq’s alleged ties to al-Qaeda.¹²⁴ Reflecting a near-diurnal pattern, false statements were made in at least 532 separate speeches, interviews, and briefings over a two-year period, and there were surges in the number of false statements made directly preceding key points in political interactions between the Bush Administration and the United Nations.¹²⁵

123. See Papandrea, *supra* note 3, at 245 (“[A]fter September 11, 2001, Attorney General John Ashcroft released a new policy essentially advising agencies to refrain from releasing information pursuant to a FOIA request whenever possible, a complete reversal from the operating presumption under Janet Reno that information should be withheld only when there was a foreseeable risk of harm.”); *see also* AL FRANKEN, *LIES (AND THE LYING LIARS WHO TELL THEM): A FAIR AND BALANCED LOOK AT THE RIGHT* 345 (2003) (“What has been discovered is that the Bush administration made its case to the American public on the basis of selectively chosen evidence that they knew was shaky. Or worse.”); *cf.* Adam M. Samaha, *Government Secrets, Constitutional Law, and Platforms for Judicial Intervention*, 53 UCLA L. REV. 909, 919–21 (2006) (“Concerns for adequate access are more serious regarding executive action that is difficult for individuals to detect on their own; when social, professional, and legal penalties for unauthorized disclosure make it less likely; and where political opposition is weak and public skepticism is minimal.”).

124. Charles Lewis & Mark Reading-Smith, *False Pretenses*, CTR. FOR PUB. INTEGRITY (Jan. 23, 2008), <http://www.publicintegrity.org/2008/01/23/5641/false-pretenses> (“Nearly five years after the U.S. invasion of Iraq, an exhaustive examination of the record shows that the statements were part of an orchestrated campaign that effectively galvanized public opinion and, in the process, led the nation to war under decidedly false pretenses.”).

125. *See id.* (“The false statements dramatically increased in August 2002, with congressional consideration of a war resolution, then escalated through the mid-term elections and spiked even higher from January 2003 to the eve of the invasion. It was during those critical weeks in early 2003 that the president delivered his State of the Union address and Powell delivered his memorable U.N. presentation.”); *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, 230 (2010) (noting that *New York Times* reporting on the Bush Administration’s claims contained increasingly frequent claims that Iraq was evil, “especially during the period from September 2002 to April 2003”).

News production, particularly for global events, normally involves a small sample of sources that are provided in press conferences and official statements.¹²⁶ PBS reported that there were “414 Iraq stories broadcast on NBC, ABC and CBS nightly news, from September 2002 until February 2003,” and “almost all the stories could be traced back to sources from the White House, the Pentagon, and the State Department.”¹²⁷ Howard Kurtz, CNN host and *Washington Post* media critic, remarked that from August 2002 until the Iraq War began in March 2003, the *Washington Post* published 140 front-page pieces that supported the President’s case for war—sourcing its reporting with attributions along the lines of “The President said yesterday,” “The Vice President said yesterday,” and “The Pentagon said yesterday”—but there were very few dissenting pieces, which were relegated to inner pages.¹²⁸

The President also wields dominance over the national security apparatus and government officials via bureaucratic control, reducing the opportunity for news media entities to receive dissenting views from other sources inside government.¹²⁹ Bush, Cheney, and Rice had ultimate authority

126. COOK, *supra* note 2, at 76–82 (noting that news media entities and journalists “converge on official sources to benefit from information subsidies, which gives them all a similar reliance on political power”); FRANK WEBSTER, THEORIES OF THE INFORMATION SOCIETY 120–24 (John Urry ed., 1995) (arguing that government exerts massive control over dissemination of certain information; this information “reaches us through secondary sources like the press and television, but this in no way negates the point that such information originates from government agencies”); Lidsky, *supra* note 91 (“Government leaders can also shape discourse by refusing to provide information: by refusing to hold press conferences, to discuss a policy choice beyond certain agreed upon talking points, or to allow access to documents and news sites within its control.”).

127. *Bill Moyers Journal: Buying the War*, *supra* note 89; see also Altheide, *supra* note 4 (“Messages that the war on terrorism, the importance of homeland security, including periodic elevated ‘terror alerts’ will not end soon, lead journalists to turn to administration news sources for information about the most recent casualties, operations, reactions to counter-attacks, as well as the omnipresent reports about soldiers, who have perished and those who are still in peril.”).

128. *Bill Moyers Journal: Buying the War*, *supra* note 89. Kurtz also remarked on the significance of the placement and relative prominence of these competing stories: “The front page of *The Washington Post* or any newspaper is a billboard of what the editors are telling you, these are the most important stories of the day. And stories that don’t run on the front page, the reader sort of gets that, well, these are of secondary importance.” *Id.*

129. *Waters v. Churchill*, 511 U.S. 661, 671–72 (1994) (explaining that the government as an employer “has far broader powers than does the government as sovereign” and that “the practical realities of government employment” justify holding

to release information for the White House; Rumsfeld and Wolfowitz held the same ultimate authority over the Pentagon, and Powell exercised the same authority over the State Department.¹³⁰ While weapons inspectors complained of false portrayals from the Bush Administration, the Administration continued to guarantee that classified intelligence proved prohibited weapons existed,¹³¹ and the U.S. media continued to sound a “drumbeat” for war.¹³²

that “the government must be able to restrict its employees’ speech”); *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968) (noting that the government “has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general”). Presumably, as a result of presidential appointments and hierarchical information flow, the message becomes more uniform in a bureaucracy. Bejesky, *Politico*, *supra* note 31, at 76 (“Arguably the most important element restraining dissent was that officials could not access the intelligence information that purportedly sustained the policy. Select individuals and specialized departments have varying levels of security clearances. The public, Congress, and bureaucracies are [only] given intelligence *conclusions*.); *cf. Transparency in the Media: Interview with Michael Getler, Washington Post Ombudsman*, 10 GEO. PUB. POL’Y REV. 133, 141 (2004) (stating that the news media is somewhat dependent on government sources to act as whistleblowers to frame dissent because, as a journalist, “you don’t have the power of authoritative news stories unless you have sources who know things and are willing to talk”).

130. See David A. Anderson, *Freedom of the Press in Wartime*, 77 U. COLO. L. REV. 49, 51 (2006) (arguing that “control of press access to information has become the principal means by which the government manipulates public opinion about war—not only military operations, casualties, prisoners, occupation, peacekeeping, and rebuilding, but also domestic surveillance, immigration practices, courts martial, and other war-related or terrorism-related legal proceedings”); Bejesky, *Information Flow*, *supra* note 103, at 402–04.

131. Bejesky, *Weapon Inspections*, *supra* note 33, at 331–33 (“Faulty perceptions infiltrated public consciousness. Inspectors never claimed evidence of prohibited programs had been discovered, but polls revealed that before [Hans] Blix’s February 14, 2003 Security Council presentation, 66% of Americans believed inspectors *had found proof* of WMD, while 57% still assumed evidence had been uncovered after the presentation.” (footnote omitted)); *see also Bill Moyers Journal* (PBS television broadcast June 6, 2008), transcript available at <http://www.pbs.org/moyers/journal/06062008/transcript2.html> (John Walcott, Washington Bureau Chief of McClatchy News, stating that “whatever information came from those unnamed anonymous sources is trumped by Donald Rumsfeld at the podium or Dick Cheney and Condoleezza Rice saying, ‘We can’t allow the smoking gun to be a mushroom cloud.’”).

132. Liz Cox Barrett, *Pre-Iraq War Coverage: “Pretty Good Job” or “Embarrassing?”*, COLUM. JOURNALISM REV. (May 29, 2008), http://www.cjr.org/the_kicker/preiraq_war_coverage_pretty_go.php (reporting that CBS’s Harry Smith, ABC’s Charles Gibson, CBS’s Katie Couric, NBC’s Brian Williams, and Tom Brokaw all emphasized the power of the inescapable “drumbeat” for war during the President’s

In 2008, after the Senate Select Committee on Intelligence (SSCI) completed its five-year investigation into the causes of the intelligence failures that led to the 2003 invasion of Iraq, SSCI Vice Chairman and Senator John D. Rockefeller IV remarked, “In making the case for war, the administration repeatedly presented intelligence as fact when it was unsubstantiated, contradicted or even nonexistent.”¹³³ Bush Administration Press Secretary Scott McClellan, who took over when Ari Fleischer resigned in July 2003, later acknowledged that the Bush Administration carried out a “political propaganda campaign” that misled Americans regarding the severity of the threat that Iraq presented.¹³⁴ Both the use of false statements and the suppression of dissenting voices likely fostered media entities’ confidences that λ was true and caused them to overestimate both the benefits of uncritical reporting and the costs of dissent.

President Bush was not reluctant to push the Iraq War with aggressive agenda setting, and the major players in the news media industry reacted as the framework equation proposed in Part III.B would predict: elevated values of Π_{t1} , heightened confidences that λ was true, and diminished estimations of c_1 and f_n motivated them to remain nestled in a safe-zone

determined portrayal of a severe security threat); *see* SENATE SELECT COMM. ON INTELLIGENCE, 108TH CONG., REP. ON THE U.S. INTELLIGENCE CMTYS. PREWAR INTELLIGENCE ASSESSMENTS ON IRAQ 453 (2004) (“The rhetorical drumbeat for war . . . repeatedly overstated what the Intelligence Community assessed at the time.”).

133. Walter Pincus, *Records Could Shed Light on Iraq Group*, WASH. POST, June 9, 2008, at A15, available at <http://www.washingtonpost.com/wp-dyn/content/article/2008/06/08/AR2008060801819.html> (internal quotation marks omitted); *see also* SENATE SELECT COMM. ON INTELLIGENCE, *supra* note 132 (“This national security rationale being put forth publicly by senior [Bush] Administration officials in support of regime change in Iraq was simple, direct and often fundamentally misleading.”); Press Release, U.S. Senate Select Comm. on Intelligence, *supra* note 6 (“Sadly, the Bush Administration led the nation into war under false pretenses.”); Spectar, *supra* note 5, at 90 (stating that “the Bush administration exploited, furthered, manipulated or thrived on the public’s confusion” about Iraq’s WMDs and about Iraq, “instead of making it clear from the very beginning that there was no evidence” of an actual threat).

134. SCOTT MCCLELLAN, *WHAT HAPPENED: INSIDE THE BUSH WHITE HOUSE AND WASHINGTON’S CULTURE OF DECEPTION* 135 (2010) (“Today, the fatal flaws of the [Bush] administration’s strategy are apparent. Bush’s team confused the political propaganda campaign with the realities of the war-making campaign. We were more focused on creating a sense of gravity and urgency about the threat from Saddam Hussein than governing on the basis of the truths of the situation.”); *Bill Moyers Journal*, *supra* note 131 (“While there’s nothing surprising in the book, this one-time insider confirms what just about everyone knew—that America was deceived, with the media’s help.”).

position rather than challenge the Bush Administration's allegations.

B. Polls

Regularly conducted polling of Americans continued to affirm that the security threat allegations were accepted even though they were unsubstantiated. Shortly after the January 2002 State of the Union Address that labeled Iraq an "axis of evil" country,¹³⁵ a CNN/USA Today/Gallup poll found that 82 percent of Americans believed that the government of Iraq was "evil," and 64 percent said "removing Saddam Hussein from power" was "very important."¹³⁶ Also telling is that 55 percent of Americans believed Iraq already possessed WMDs (chemical, biological, and nuclear weapons), and 40 percent believed that Iraq was "trying to develop weapons" of mass destruction, even if it did not already possess them.¹³⁷ Those 95 percent were wrong, perhaps because the information they received from the media did not enable them to make an objective and informed assessment of the situation.¹³⁸

The media selects the story, filters the sources for the story, and chooses how to present the news to the public, which influences the viewing populace's perceptions about events in the world.¹³⁹ In December 2002, as

135. George W. Bush, *supra* note 113; see David Sanger, *The State of the Union: The Overview; Bush, Focusing on Terrorism, Says Secure U.S. is Top Priority*, N.Y. TIMES, Jan. 30, 2002, at A1, A21, available at <http://www.nytimes.com/2002/01/30/us/state-unio-n-overview-bush-focusing-terrorism-says-secure-us-top-priority.html> ("Using unusually strong language, [President Bush] charged that 'states like [Iran, Iraq, and North Korea] and their terrorist allies constitute an axis of evil,' choosing a word once used to describe the alliance of Germany, Italy and Japan during World War II.").

136. *USA Today/CNN/Gallup Poll Results*, USA TODAY (Feb. 11, 2002), <http://usatoday30.usatoday.com/news/2002-02-11-poll.htm>. An additional 24 percent stated that "removing Saddam Hussein from power" was only "somewhat important." *See id.*

137. *Id.*

138. Altheide, *supra* note 4, at 984 ("Public perceptions about crime and war are very much informed by propaganda and news reports about relevant acts"); Marianne M. Jennings, *Where Are Our Minds and What Are We Thinking? Virtue Ethics for a "Perfidious" Media*, 19 NOTRE DAME J.L. ETHICS & PUB. POL'Y 637, 690 (2005) ("History has taught us that those who own the papers drive the direction of the coverage.").

139. Ghetti, *supra* note 1, at 501 ("Like it or not, the media has the responsibility of deciding for the public what they want to experience in their lives."); Monica Hakimi, *The Media as Participants in the International Legal Process*, 16 DUKE J. COMP. & INT'L L. 1, 1 (2006) ("We know what we know about current international events through the media. . . . Yet the media do not simply communicate raw information; they selectively

United Nations weapons inspections were being conducted, 91 percent of Americans believed Iraq was concealing nuclear, biological, and chemical weapons,¹⁴⁰ and 81 percent saw “Iraq as a threat to the United States.”¹⁴¹ Sixty-two percent of Americans supported military action, and 40 percent believed “Bush ha[d] presented enough evidence showing why the United States should use military force to remove Saddam Hussein from power.”¹⁴²

High-profile addresses from government officials, delivered after a substantial percentage of Americans already accepted threat allegations, slightly altered populace beliefs. For example, beliefs about the need to invade Iraq intensified after both the President’s State of the Union Address in late January 2003 and Secretary of State Powell’s Security Council presentation in early February; prior to those addresses, 42 percent believed “Bush ha[d] explained clearly why the U.S. might use military force to end Saddam Hussein’s rule,” which increased to 53 percent afterward.¹⁴³ Forty-two percent of Americans supported military action against Iraq “even if U.S. allies oppose such action,” 37 percent supported military action “even if the United Nations opposes such action,” and 30 percent supported invasion “even if it means a significant number of U.S. military casualties.”¹⁴⁴

filter, define and give shape to the events that they cover—in terms of what is happening, whether it is appropriate, and how relevant international actors should and do respond.”); Wanta et al., *supra* note 94 (finding support for the proposition that “news media can show the public both how vitally important [other] countries are to the United States and how negatively the countries should be viewed”).

140. See Pepe Escobar, *Iraq First, Then Southwest Asia*, ASIA TIMES (Dec. 25, 2002), http://www.atimes.com/atimes/Middle_East/DL25Ak03.html (noting that “91 percent of Americans think the Iraqi weapons declaration”—in which Iraq denied the Bush Administration’s allegations—“is a lie”).

141. Daniel Merkle & Gary Langer, *Need More Evidence: Most Americans Believe Case Against Iraq, But More Want Proof*, ABC News (Dec. 17, 2002), <https://web.archive.org/web/20050905011710/http://abcnews.go.com/sections/world/DailyNews/iraqpoll021217.html>. Sixty-four percent believed Iraq presented a “substantial” threat, and 44 percent believed that Iraq presented “an ‘immediate’ danger.” *Id.*

142. *Washington Post—ABC News Poll*, WASH. POST (Dec. 18, 2002), <http://www.washingtonpost.com/wp-srv/politics/polls/vault/stories/data121802.htm>.

143. THE PEW RESEARCH CTR. FOR THE PEOPLE & THE PRESS, *Post-Blix: Public Favors Force in Iraq, But... U.S. Needs More International Backing* 2 (Feb. 20, 2003), <https://web.archive.org/web/20110310040957/http://people-press.org/reports/pdf/173.pdf> [hereinafter PEW RESEARCH CTR.]. Sixty-one percent of Americans believed “Powell clearly explained what’s at stake” in his address to the U.N. Security Council. *Id.* For an overview of the presentation and international reaction, see Bejesky, *Weapon Inspections*, *supra* note 33, at 335–41.

144. *Washington Post—ABC News Poll*, *supra* note 142.

Polls revealed that threat perceptions were slightly reduced after high-profile counter positions. For example, 66 percent of Americans believed inspectors had discovered evidence of WMDs in early February 2003, but that decreased to 57 percent directly after U.N. inspector Hans Blix's update to the Security Council on February 14.¹⁴⁵ This is intriguing because inspectors announced that evidence of WMDs had *not* been discovered, which involved an inability to confirm allegations that the Bush Administration had repeated for nearly five months and had asserted was provable through direct, physical evidence.¹⁴⁶ The inspectors explained that misperceptions arose because their public updates were attenuated in the media by the Bush Administration's consistent war rhetoric and WMD guarantees.¹⁴⁷

Apparently believing that habitually connecting Iraq to terrorism was an entitlement, President Bush later candidly admitted that "one of the hardest parts of my job is to connect Iraq to the war on terror."¹⁴⁸ This is frequently referred to as "framing speech."¹⁴⁹ The Bush Administration

145. PEW RESEARCH CTR., *supra* note 143, at 2, 22.

146. See *Hans Blix's Briefing to the Security Council*, GUARDIAN (Feb. 14, 2003), <http://www.theguardian.com/world/2003/feb/14/iraq.unitednations1>; see also Bejesky, *Weapons Inspections*, *supra* note 33, at 321–26 ("For four months inspectors provided Security Council and media updates which indicated nothing substantially incriminating was discovered, affirmed inspections were intrusive and comprehensive, and acknowledged Iraqi authorities were generally cooperative."); discussion *supra* Part IV.A.

147. Bejesky, *Weapon Inspections*, *supra* note 33, at 345–46 ("The effectiveness of the inspectors' evidentiary gathering process was fundamental to member diplomacy and a legitimate evaluation of the right to use force, but factual findings were superseded by heuristic premises and an international political logrolling process.").

148. Caitlin Johnson, *Katie Couric Interviews President George W. Bush: Transcript, Part 2*, CBS NEWS (Sept. 6, 2006), <http://www.cbsnews.com/news/transcript-president-bush-part-2/>.

149. BRUCE ACKERMAN, BEFORE THE NEXT ATTACK 16–17 (2006) (observing that "once the public is convinced that a larger 'war on terrorism' is going on, these old-fashioned wars can be repackaged as mere battles—as in President Bush's famous description of Iraq as 'the central front' on the war on terrorism"); Bejesky, *CFP*, *supra* note 4, at 29–30 (arguing that "framing speech with selective word choice can exploit the recipient's decision-making process, behaviors, and attitudes"); Michael T. Wawrzynski, *Language, Morals, and Conceptual Frameworks in Dispute Resolution: Establishing, Employing, and Managing the Logos*, 8 CARDOZO J. CONFLICT RESOL. 209, 238 (2006) (citing *Now with Bill Moyers: Politics and Economy—Frank Luntz*, (PBS television broadcast Jul. 2, 2004), available at <http://www.pbs.org/now/politics/luntz.html>) (noting that pollster Frank Luntz advised politicians to use rhetorical questions to imply that

frequently used framing speech to connect Iraq to 9/11 and al-Qaeda in order to persuade the American public that a connection existed¹⁵⁰—even though the allegation was false.¹⁵¹ In 2008, SSCI Vice Chairman Rockefeller stated that the Bush Administration was so transfixed on Iraq that it “used the 9/11 attacks by al-Qaeda as justification for overthrowing Saddam Hussein. To accomplish this, top Administration officials made repeated statements that falsely linked Iraq and al-Qaeda as a single threat.”¹⁵²

This strategy was successful. In August 2002, 86 percent of Americans thought Baghdad was supporting terrorist groups planning to strike the United States, and 52 percent believed Saddam Hussein was involved in

invading Iraq would help prevent al-Qaeda attacks); FAIR, *supra* note 42 (quoting CNN’s Jeff Greenfield, who examined Bush’s speech phrasing and explained that “the most striking substantive theme was the attempt to link Saddam Hussein with terror in general and with 9/11 in particular” in an effort to “make the war against Saddam Hussein a war against terrorism, which Americans would almost unanimously support”).

150. See Bejesky, *CFP*, *supra* note 4, at 34–42 (collecting examples of framing speech from Bush Administration officials that asserted connections between Iraq and al-Qaeda either by implying that a direct connection existed, by implying they were connected through a common high-ranking member (Abu Musab al-Zarqawi), or simply by pointing out more abstract similarities—that they “contained the same kind of people, were apt to do the same things, posed the same risks, and represented the same type of foe”).

151. The use of framing speech rather than direct accusations to make the connection between Iraq and 9/11 allowed President Bush to deny that he had willfully misled the American people about the existence of such a connection. See *Bush Discusses War on Terror* (CNN television broadcast Mar. 20, 2006), transcript available at <http://transcripts.cnn.com/TRANSCRIPTS/0603/20/se.01.html> (“I don’t think we ever said—at least I know I didn’t say—that there was a direct connection between September the 11th and Saddam Hussein. . . . I was very careful never to say that Saddam Hussein ordered the attacks on America.”). The plausibility of his denials was undermined when he used identical framing speech to argue against withdrawing U.S. troops from Iraq during his second term. See Michael R. Gordon & Jim Rutenberg, *Bush Distorts Qaeda Links, Critics Assert*, N.Y. TIMES (July 13, 2007), <http://www.nytimes.com/2007/07/13/world/middleeast/13qaeda.html> (“In rebuffing calls to bring troops home from Iraq, President Bush on Thursday employed a stark and ominous defense. ‘The same folks that are bombing innocent people in Iraq,’ he said, ‘were the ones who attacked us in America on September the 11th, and that’s why what happens in Iraq matters to the security here at home.’”).

152. Gilbert Cruz, *The Skimmer: Senate Report on Prewar Intelligence*, TIME, June 6, 2008, <http://content.time.com/time/printout/0,8816,1812507,00.html>; see also SENATE SELECT COMM. ON INTELLIGENCE, *supra* note 132; Press Release, U.S. Senate Select Comm. on Intelligence, *supra* note 6.

planning or carrying out the 9/11 attacks.¹⁵³ Polls consistently revealed that if the American public believed Iraq was involved in 9/11, that association would have provided a compelling reason to invade Iraq.¹⁵⁴ In April 2004,

153. Romesh Ratnesar, *Iraq & al-Qaeda: Is There a Link?*, CNN (Aug. 26, 2002), <http://edition.cnn.com/2002/ALLPOLITICS/08/26/time.iraq>; Joel Roberts, *Poll: No Rush to War*, CBS NEWS (Sept. 24, 2002), <http://www.cbsnews.com/news/poll-no-rush-to-war/> (reporting that, shortly after Bush's addresses to the U.N. General Assembly and U.S. Congress, 70 percent believed that al-Qaeda was in Iraq, and 51 percent believed Saddam Hussein was "personally involved" in the 9/11 attacks); PEW RESEARCH CTR., *supra* note 143, at 3, 23; *see also* Dana Milbank & Claudia Deane, *Hussein Link to 9/11 Lingers in Many Minds*, WASH. POST, Sept. 6, 2003, at A01, *available at* <http://www.informationclearinghouse.info/article4631.htm> (reporting that "[s]ixty-nine percent of Americans said they thought it at least likely that Hussein was involved in the attacks on the World Trade Center and the Pentagon . . . despite the fact that the hijackers were mostly Saudi nationals acting for al Qaeda"); Note, *War, Schemas, and Legitimation: Analyzing the National Discourse About War*, 119 HARV. L. REV. 2099, 2108–09 (quoting PEW RESEARCH CTR. FOR THE PEOPLE & THE PRESS, *Americans Thinking About Iraq, But Focused on the Economy* (Oct. 10, 2002) (noting that 52 percent of Americans believed invading Iraq would "help win the war on terrorism" in October 2002 (internal quotation marks omitted))).

154. *See* PROGRAM ON INT'L POLICY ATTITUDES & KNOWLEDGE NETWORKS POLL, MISPERCEPTIONS, THE MEDIA, AND THE IRAQ WAR 9 (2003) [hereinafter PIPA, MISPERCEPTIONS], *available at* http://www.uky.edu/~jafine2/PIPA_MisperceptionsofIraqWar.pdf (noting that, when Americans "who said they supported the war" in Iraq in April 2003 were asked to indicate the reasons for their support, "Iraq's connection with groups like Al-Qaeda" was rated as a major reason by 80%"). A United Nations report relying on an earlier PIPA/KN poll summarized the causal link succinctly:

Those who had the belief that Iraq was in some way connected to September 11 showed higher support for going to war without multilateral approval. In the PIPA/KN February 2003 poll, among those who believed that Iraq was directly involved in 9/11, 45% said that "the US should invade Iraq, even if the US has to go it alone." Among those who believed that Iraq had given al-Qaeda substantial support, but was not involved in September 11, support dropped to 37% for an invasion without UN approval or allied support. Support for unilateral action was much lower among those who believed that a few al-Qaeda individuals had contact with Iraqi officials (25% said go it alone) or that there was no connection at all (15% said go it alone).

The United Nations and the Use of Military Force, UNITED NATIONS, http://www.america-nations-world.org/digest/global_issues/un/un_force1.cfm (last visited Nov. 22, 2014); *see also* Kane Pryor, *A National State of Confusion*, SALON (Feb. 6, 2003), http://dir.salon.com/opinion/feature/2003/02/06/iraq_poll/print.html (arguing that the fact that 65 percent of Americans believed al-Qaeda and Iraq were two "closely collaborating allies . . . suggests that whatever support there is for a war against Iraq, it owes much to the erroneous belief of at least half of the American people that it was Saddam Hussein's operatives who flew

two months before the 9/11 Commission said there was “no ‘collaborative relationship’ between Iraq and al Qaeda,” 36 to 49 percent of Americans still thought that “clear evidence that Iraq was supporting al Qaeda ha[d] been found.”¹⁵⁵ The *Washington Post* suggested that the perceived connection between Iraq and al-Qaeda was an enduring reason for continued support of the occupation.¹⁵⁶

In summary, the analytical framework for predicting the media’s rational choice in Part III.B is consistent with the actual media portrayals prior to the invasion.

C. Media Interpretations of Discourse

Media entities largely did not take risks and challenge the government

the planes into the World Trade Center and Pentagon”).

155. Walter Pincus & Dana Milbank, *Al Qaeda-Hussein Link Is Dismissed*, WASH. POST, June 17, 2004, at A01 (June 17, 2004), <http://www.washingtonpost.com/wp-dyn/articles/A47812-2004Jun16.html> (internal quotation marks omitted). The percentage of respondents that thought Saddam Hussein assisted the 9/11 hijackers decreased from 66 percent (October 2002) to 57 percent (February 2003) and then to 41 percent (October 2004)—still stubbornly refusing to reflect the total lack of evidence of any connection. PEW RESEARCH CTR., *supra* note 143, at 3 (reporting in February 2003 that “[a] solid majority of the public (57%) believes that Saddam Hussein provided assistance to the men who carried out the 9/11 attacks”); David Krane, *Iraq, 9/11, Al Qaeda and Weapons of Mass Destruction: What the Public Believes Now, According to Latest Harris Poll*, PR NEWSWIRE (Feb. 18, 2005), <http://www.prnewswire.com/news-releases/iraq-911-al-qaed-a-and-weapons-of-mass-destruction-what-the-public-believes-now-according-to-latest-harris-poll-54105582.html> (reporting that 41 percent of Americans believed that “Saddam Hussein helped plan and support the hijackers who attacked the U.S. on September 11, 2001,” as of October 2004); *see also* Krane, *supra* (noting surprise at enduring levels of support for beliefs that “virtually no experts believe to be true” as of February 2005: “47 percent believe that Saddam Hussein helped plan and support the hijackers who attacked the U.S. on September 11, 2001,” “44 percent actually believe that several of the hijackers who attacked the U.S. on September 11 were Iraqis,” and “36 percent believe that Iraq had weapons of mass destruction when the U.S. invaded”).

156. Milbank & Deane, *supra* note 153 (“The poll’s findings are significant because they help to explain why the public continues to support operations in Iraq despite the setbacks and bloodshed there.”); *see also* PROGRAM FOR INT’L POLICY ATTITUDES & KNOWLEDGE NETWORKS POLL, U.S. PUBLIC BELIEFS ON IRAQ AND THE PRESIDENTIAL ELECTION 6 (2004), *available at* http://www.pipa.org/OnlineReports/Iraq/IraqReport4_22_04.pdf (“Among those who believed that Iraq was providing support to al Qaeda, 70% said that going to war with Iraq was the right decision and 54% said it was the best thing to do. Among those who did not have such a belief, only 35% said it was the right thing and 22% said it was the best thing to do.”).

on the facts but ostensibly conformed to median viewer perceptions as represented by polls. This Part explains why this occurred, addresses why an Executive would likely perceive that the American news media's performance could have been expected, and shows why this may make the Executive more willing to initiate agenda setting even when its allegations and its narrative are not accurate.

1. Media Discretion to Present a Continuum of Diversity

The starting point for detailing the media decisionmaking process is the First Amendment jurisprudence that legally prevents the government from censoring political communication¹⁵⁷ or interfering with editorial and media discretion over what and how to publish.¹⁵⁸ These limitations give rise to aspirations that the media will provide accurate representations of government actions¹⁵⁹ and diversity in the marketplace of ideas.¹⁶⁰ This is not

157. *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 556 (1976) (reiterating that the First Amendment "afford[s] special protection against orders that prohibit the publication or broadcast of particular information or commentary"); *N.Y. Times Co. v. United States*, 403 U.S. 713, 719 (1971) (Black, J., concurring) ("To find that the President has 'inherent power' to halt the publication of news by resort to the courts would wipe out the First Amendment and destroy the fundamental liberty and security of the very people the Government hopes to make 'secure.'"); *Org. for a Better Austin v. Keefe*, 402 U.S. 415, 418 (1971) (holding that an injunction against publication, "so far as it imposes prior restraint on speech and publication, constitutes an impermissible restraint on First Amendment rights"); *Near v. Minnesota*, 283 U.S. 697, 716–19 (1931) (articulating a "general principle that the constitutional guaranty of the liberty of the press gives immunity from previous restraints").

158. *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 672–75 (1998) ("Public and private broadcasters alike are not only permitted, but indeed required, to exercise substantial editorial discretion in the selection and presentation of their programming."); *cf. CBS, Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 117–21 (1979) (noting that "it would be anomalous for us to hold, in the name of promoting the constitutional guarantees of free expression, that the day-to-day editorial decisions of broadcast licensees" are government action, because "[j]ournalistic discretion would in many ways be lost to the rigid limitations that the First Amendment imposes on Government").

159. *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 491–92 (1975) ("Great responsibility is accordingly placed upon the news media to report fully and accurately the proceedings of government, and official records and documents open to the public are the basic data of governmental operations."); *N.Y. Times Co.*, 403 U.S. at 717 (Black, J., concurring) (stating that the Framers desired the press to "remain forever free" in order to "bare the secrets of government and inform the people"); *see also supra* notes 53–66, 86–88 and accompanying text.

160. *See CBS*, 412 U.S. at 121–23 ("With broadcasting, where the available means of communication are limited in both space and time, the admonition of Professor

always the case. Assume that news coverage involving a purported security crisis can strongly challenge the government's advocacy (Position 1), champion the government position (Position 3), or reside within an intermediate position between the two extremes (Position 2).¹⁶¹ Editorials, political forums, and talk shows that discuss controversial political issues and public policy normally span this entire spectrum, while newspapers of record and nightly news programming provide reporting that relies on official accounts of events, conveys neutrality, and seeks to garner the attention of the median viewer,¹⁶² which is more consistent with Position 2.

If the viewing population already accepts the government position on the purported security threat—as the American public accepted the Bush Administration's security threat allegations concerning Iraq¹⁶³—and news media entities' substantively rely on government officials' statements and press releases without challenge, deference to the government's position converges Position 2 and 3.¹⁶⁴ Meanwhile, Position 1 programming would be

Alexander Meiklejohn that '[w]hat is essential is not that everyone shall speak, but that everything worth saying shall be said' is peculiarly appropriate." (alteration in original) (quoting ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM* 26 (1948)); *see also supra* notes 79–85 and accompanying text.

161. *See* Eytan Gilboa, *Searching for a Theory of Public Diplomacy*, 616 ANNALS AM. ACAD. POL. & SOC. SCI. 55, 63 (2008) ("Media–government relations may stretch from a mere indexing of government internal opinions to controlling the policy-making process with a few additional modalities in between.").

162. *Cf. supra* notes 98–101 and accompanying text (discussing news media entities' motives: maximizing profits by increasing advertising revenues, which requires increasing viewership); *see generally* Gaye Tuchman, *Objectivity as Strategic Ritual: An Examination of Newsmen's Notions of Objectivity*, 77 AM. J. SOC. 660, 660 (1972) ("To journalists, like social scientists, the term 'objectivity' stands as a bulwark between themselves and critics. Attacked for a controversial presentation of 'facts,' newspapermen invoke their objectivity almost the way a Mediterranean peasant might wear a clove of garlic around his neck to ward off evil spirits." (footnote omitted)).

163. *See supra* Part IV.B.

164. *See, e.g.*, Mermin, *supra* note 2, at 952 ("The professional technique of 'objective journalism'—defined to mean balanced reporting of contending official perspectives—thus made it possible for reporters to answer concerns about the large scale and potential power of their news organizations with assurances that journalism was a profession, whose practitioners could be trusted not to shade or distort the news to serve private or partisan interests."); *Bill Moyers Journal: Buying the War*, *supra* note 89 (Michael Massing: "I think that what happened in the months leading up to the [Iraq] war is that there was a sort of acceptable mainstream opinion that got set. And I think that people who were seen as outside, that mainstream were viewed as sort of fringe, and they were marginalized.").

restrained and disincentivized by preexisting viewer inclinations, and investigative prowess and objective skepticism would be mistaken for bias because Position 1 reporting would be challenging what is already widely assumed to be true.¹⁶⁵

Consider some examples. The talk show *Donahue* had achieved high ratings relative to MSNBC's other political talk shows,¹⁶⁶ but MSNBC cancelled the program one month prior to the attack on Iraq, contending that it had poor ratings and that its liberal disposition was unable to compete with Fox's right-wing *O'Reilly Factor*.¹⁶⁷ *Donahue* was replaced by doubling the length of the prowar *Countdown: Iraq with Lester Holt*,¹⁶⁸ which was labeled "militainment," and criticized as being "more keen on glamorizing a potential war than scrutinizing or debating it."¹⁶⁹ MSNBC's internal report stated that "[Phil Donahue] seems to delight in presenting guests who are anti-war, anti-Bush and skeptical of the administration's motives."¹⁷⁰ In

165. See COOK, *supra* note 2, at 105 (noting that journalists' "legitimacy rests on not being seen as autonomous political actors," which often creates a struggle "to find how to provide critical coverage that cannot be taken as a politically based vendetta"); *Bill Moyers Journal: Buying the War*, *supra* note 89 (Bill Moyers: "It had now become unfashionable [in early 2003] to dissent from the official line—unfashionable and risky.").

166. See Bill Carter, *MSNBC Cancels the Phil Donahue Talk Show*, N.Y. TIMES (Feb. 26, 2003), <http://www.nytimes.com/2003/02/26/business/msnbc-cancels-the-phil-donahue-talk-show.html> ("Mr. Donahue's show had been growing slightly over the past few months, and he was actually attracting more viewers than any other show on MSNBC, even the channel's signature prime-time program 'Hardball With Chris Matthews.'").

167. Dan Collins, *Phil Donahue Gets the Ax*, CBS NEWS (Feb. 24, 2003), <http://www.cbsnews.com/stories/2003/02/25/entertainment/main542005.shtml> ("During this month, a 'sweeps' month in which ratings are watched closely to set advertising rates, 'Donahue' averaged 446,000 viewers. O'Reilly drew 2.7 million viewers, up 28 percent from February 2002, according to Nielsen Media Research.").

168. See *id.* (reporting that MSNBC temporarily used *Donahue*'s time slot to extend *Countdown: Iraq* into a two-hour program).

169. Jeff Cohen, *Military Propaganda Pushed Me Off TV*, HUFFINGTON POST (Apr. 28, 2008), http://www.huffingtonpost.com/jeff-cohen/military-propaganda-pushed_b_98925.html (explaining that he was a frequent guest on MSNBC until *Countdown: Iraq* aired, which "glamoriz[ed] a potential war" without scrutinizing or debating the reasons for war and consisted of "non-debates in which myth and misinformation were served up unchallenged"); see generally WEAPONS OF MASS DECEPTION, *supra* note 89, at 1:04:29–:45 (recounting that MSNBC fired Phil Donahue in an attempt to shift to the right and avoid confrontation with "the patriotism police").

170. *MSNBC's Double Standard on Free Speech, FAIRNESS & ACCURACY IN*

March 2003, Ralph Nader remarked that in the months before *Donahue* was canceled, “the corporate ‘suits’ even told Donahue that he had to have more conservative or right-wing guests than liberals on the same hour show.”¹⁷¹ Also, after several years of airing, ABC canceled Bill Maher’s talk show *Politically Incorrect* in summer 2002 when “Mr. Maher’s comments about September 11, 2001 drew criticism from the White House.”¹⁷² Networks were ostensibly drawn to present programming with increasing levels of prowar bias to meet the audience’s perceived inclinations; Position 1 was disfavored, and Position 3 increasingly resembled Position 2.

Similarly, studies show that reporting during critical periods of United States–United Nations diplomacy was not unbiased. FAIR studied nightly news coverage on ABC, NBC, CBS, and PBS, beginning one week before and ending one week after Secretary of State Powell’s February 5, 2003, speech to the U.N. Security Council and found that of the 393 on-camera sources, 76 percent were current or former government officials—overwhelmingly aligned in support of the proposed invasion of Iraq—while just 17 percent were skeptics about the need for war, and less than one percent were identified as representatives of antiwar activist

REPORTING (Mar. 7, 2003), <http://www.fair.org/take-action/action-alerts/msnbcs-double-standard-on-free-speech> (internal quotation marks omitted).

171. *Id.* (quoting Ralph Nader, *MSNBC Sabotages Donahue*, COMMON DREAMS (Mar. 3, 2003), <https://web.archive.org/web/20080325012709/http://www.commondreams.org/views03/0303-06.htm>); see *Bill Moyers Journal: Buying the War*, *supra* note 89 (Phil Donahue: “You could have the supporters of the President alone. . . . [but y]ou couldn’t have a dissenter alone. Our producers were instructed to feature two conservatives for every liberal.”). MSNBC, which is “co-owned by Microsoft and General Electric/NBC,” was criticized for its “double standard on free speech”; even though its mission statement declares a commitment to disseminating “a wide range of strong, opinionated voices” in theory, replacing *Donahue* with more *Countdown: Iraq* showed that it thought “progressive criticism of a war with Iraq [was] too controversial” in practice. *MSNBC’s Double Standard*, *supra*; see also Elizabeth Jensen, *Donahue Among MSNBC Critics*, L.A. TIMES (Feb. 27, 2003), <http://articles.latimes.com/2003/feb/27/news/wk-quick27.4> (“Donahue charged that, by hiring three conservatives in recent days, including former House Majority Leader Dick Armey, MSNBC is pursuing a ‘strategy to out-Fox’ Fox News Channel.”).

172. Magarian, *supra* note 70, at 126; Wines & Lau, *supra* note 68, at 119–20. Press Secretary Ari Fleischer stated that the reaction to Bill Maher’s comments was a reminder “to all Americans that they need to watch what they say, watch what they do.” Press Briefing from Ari Fleischer, White House Press Secretary (Sept. 26, 2001), available at <https://web.archive.org/web/20090117044207/http://www.whitehouse.gov/news/releases/2001/09/20010926-5.html>.

organizations.¹⁷³ After the speech, headlines in American news media called Powell's discourse “‘A Masterful Legal Summary,’ ‘A Strong, Credible and Persuasive Case,’ ‘A Powerful Case,’ ‘An Ironclad Case... Succinct and Damning Evidence,’ ‘A Detailed and Convincing Argument,’ ‘An Overwhelming Case,’ ‘A Compelling Case,’ and ‘A Persuasive, Detailed Accumulation of Information.’”¹⁷⁴ After the invasion, it would become clear that virtually nothing in Powell’s Security Council address was true.¹⁷⁵

Interestingly, even as the news networks pushed the Bush Administration’s position, polls revealed that Americans were not yet dedicated to the war option, meaning Position 1 was still viable.¹⁷⁶ Nonetheless, there was an unmistakable bias in the American media favoring uncritical acceptance of the Bush Administration’s reasons for attacking Iraq, and alternative positions were scarce.¹⁷⁷ “Corporate chains

173. *In Iraq Crisis, Networks Are Megaphones for Official Views*, FAIRNESS & ACCURACY IN REPORTING (Mar. 18, 2003), <http://www.fair.org/article/in-iraq-crisis-networks-are-megaphones-for-official-views>; *see also* Travis, *supra* note 71, at 66 (“In 2003, both broadcast and cable networks refused to carry antiwar messages by speakers willing to pay for airtime, triggering an outcry . . .”); Arzon, *supra* note 85, at 351 (citing DANNY SCHECHTER, *EMBEDDED: WEAPONS OF MASS DECEPTION* 37 (2003)) (“The coverage was disproportionately pro-war, and the numbers show a marginalization of dissenting viewpoints. Specifically, sixty-three percent of all sources in stories about Iraq on major evening newscasts were current or former government employees, the majority of those sixty-three percent being U.S. officials alone.”).

174. *Bill Moyers Journal: Buying the War*, *supra* note 89; *see* Bejesky, *Weapon Inspections*, *supra* note 33, at 341–42.

175. *See* Bejesky, *Weapon Inspections*, *supra* note 33, at 336–40 (dissecting the false claims presented in Powell’s February 5, 2003, speech).

176. *See* FAIR, *supra* note 42 (noting that as of February 12, 2003, when polls reported that most Americans accepted Bush Administration threat representations, 61 percent still preferred to “wait and give the United Nations and weapons inspectors more time”) (internal quotation marks omitted); *see also* PEW RESEARCH CTR., *supra* note 143, at 4 (reporting that surveys conducted after Hans Blix’s report on February 14, 2003, found that “[m]ost Americans (57%) believe the U.S. should first get a United Nations resolution before any military engagement”).

177. *See* Fisher, *supra* note 6, at 1229 (“No doubt there is a desire to rush scoops into the paper. But why wouldn’t a scoop undermining the case for the WMDs be just as newsworthy as a scoop by an Iraqi exile claiming the existence of WMDs? Why did articles based on dire claims about WMDs get more prominent display? Why were articles challenging that assessment sometimes buried or never pursued?”); Falk, *supra* note 14, at 9–10 (noting that arguments about “the unlawfulness of the contemplated invasion” of Iraq were not allowed “to enter into the debate in the pages of the *New York Times*”); *Transparency in the Media*, *supra* note 129, at 139 (*Washington Post* Ombudsman Michael Getler remarking that dissent from Senator Ted Kennedy, Senator

acquired six to seven radio stations in each city, and imposed rules limiting criticism, for example, of President Bush or the Iraq war.”¹⁷⁸ U.S. corporate news media not only avoided alternative positions and dissent from the antiwar opposition¹⁷⁹ but occasionally ridiculed dissent¹⁸⁰ and ignored the

Robert Byrd, the Senate Foreign Relations Committee, the Senate Armed Services Committee, and others with “very serious critiques and challenges” to the Bush Administration’s war effort, “amazingly, got little or no coverage.”).

178. Travis, *supra* note 70, at 436; see Robert F. Kennedy, Jr., *We Must Take America Back*, 22 J. ENVTL. L. & LITIG. 201, 204 (2007) (“Ten percent [of Americans] say their source of news is the Sinclair Network, the most right wing of all and the largest television network in America, . . . who once required all seventy-five of [its] local affiliates to take a pledge that they will not report critically about this President or the war in Iraq or a number of other issues.”); see also Burkeman, *supra* note 95 (reporting that media conglomerate Clear Channel, which owns 1,200 local radio stations, had financed, organized, and managed prowar rallies).

179. RAMPTON & STAUBER, *supra* note 119, at 172–73 (stating that “pundits from pro-war think tanks generally had ready access to talk shows,” while news media gave only “cursory attention to the existence of a large, grassroots peace movement” and made “little attempt to present the actual reasoning and arguments put forward by war opponents”); Clay Calvert & Mirelis Torres, *Staring Death in the Face During Times of War: When Ethics, Law, and Self-Censorship in the News Media Hide the Morbidity of Authenticity*, 25 NOTRE DAME J.L. ETHICS & PUB. POL’Y 87, 101 (2011) (quoting Morgen S. Johansen & Mark R. Joslyn, *Political Persuasion During Times of Crisis: The Effects of Education and News Media on Citizens’ Factual Information About Iraq*, 85 JOURNALISM & MASS COMM. Q. 591, 594 (2008)); Magarian, *supra* note 70, at 122–24 (“In the broadcast arena, television networks and channels including CNN and CBS refused to sell advertising time to various advocacy groups who sought to air their views on Middle East controversies, including the invasion of Iraq, and wartime economic policies.”); Bill Carter, *Some Stations to Block ‘Nightline’ War Tribute*, N.Y. TIMES, Apr. 30, 2004, at A13, available at http://www.nytimes.com/2004/04/30/business/media/30TUB_E.html (reporting that Sinclair Broadcast Group television stations refused to air a particular broadcast of *Nightline*, “saying the program’s plan to have Ted Koppel read aloud the names of every member of the armed forces killed in action in Iraq was motivated by an antiwar agenda and threatened to undermine American efforts there”).

180. MSNBC’s Michael Savage remarked that the government should “arrest the leaders of the antiwar movement,” and that critics of his prowar position were “stinking rats who hide in the sewers.” *MSNBC’s Double Standard*, *supra* note 170 (internal quotation marks omitted); see also FRANKEN, *supra* note 123, at 128–31 (contrasting statements made by congressional Republicans criticizing President Bill Clinton during the 1999 Kosovo bombing campaign with statements made by Sean Hannity, a Fox News pundit, attacking Senate Democrats for criticizing President Bush during the Iraq invasion); RAMPTON & STAUBER, *supra* note 119, at 176 (recalling a TV news segment in 2003 involving “Fox anchor Neil Cavuto berating a professor who had written an anti-war letter as an ‘obnoxious, pontificating jerk,’ a ‘self-absorbed, condescending imbecile’ and an ‘Ivy League intellectual Lilliputian’”); WEAPONS OF MASS DECEPTION, *supra*

record-setting “World Says No to War” protests.¹⁸¹ The protests represented the mainstream position outside the U.S.; polls in 40 out of the 41 countries surveyed indicated that at least 80 percent of respondents opposed U.S. action against Iraq without a U.N. Security Council authorization.¹⁸² Several premises, existing during a portrayed security threat circumstance, may attenuate the viability of Position 1.

2. Premises That Shift Broadcasting Content

a. *Executive Expectation of Media Restraints.* There are prevalent restraints within the media that form by interaction with government, and these interactions may provide the Executive with indications and expectations of whether news media entities will harness discord during and after agenda setting (at Position 1) or be obsequious (at Position 2 or Position 3). If the media challenges the government on the factual underpinnings of the security threat issue, it could offend viewers or appear unpatriotic, especially if patriotism is associated with endorsing the President’s position.¹⁸³ Corporate news media’s emphasis on profitability may reduce its ability to check government due to bandwagoning, aversion to offending viewers, and competition to present states-of-chaos stories that capture viewer attention.¹⁸⁴

Previous episodes involving analogous interactions between the government’s agenda setting and the corporate news media may also provide

note 89, at 1:02:58–03:52 (explaining the response to veteran reporter Peter Arnett’s interview on Iraqi TV that criticized the planning of the Iraq War, which included 157 political cartoons in newspapers the next morning depicting Arnett as an unwitting ally of terrorists or as Saddam Hussein’s consort).

181. WEAPONS OF MASS DECEPTION, *supra* note 89, at 20:14–22:59.

182. GALLUP INT’L, *supra* note 33; *see* Bejesky, *Weapon Inspections*, *supra* note 33.

183. Bejesky, *CFP*, *supra* note 4, at 50–51 (addressing different ways of viewing patriotism). “If patriotism is soaring and loyalty to the president is equated to obligatory nationalism, which seemed to be the case after 9/11, controversial government actions may go unquestioned due to patriotism.” *Id.* at 51 (footnote omitted).

184. *See* FRANKEN, *supra* note 123, at 1 (“[T]here are other, far more important, biases in the mainstream media than liberal or conservative ones. Most of these biases stem from something called ‘the profit motive.’ . . . Pack Mentality. Negativity. Soft News. The Don’t-Offend-the-Conglomerate-That-Owns-Us bias. And, of course, the ever-present bias of Hoping There’s a War to Cover.”); *see supra* notes 98–101 and accompanying text (discussing news media entities’ motives: maximizing profits by increasing advertising revenues, which requires increasing viewership).

the Executive with expectations about how the media will behave in response to a security threat agenda and may apprise the Executive about the necessity of reacting to and offsetting any aggressive or critical reporting. For example, the Bush Administration relied on Iraqi defectors as key sources for intelligence on Iraq's alleged nefarious activities.¹⁸⁵ Twelve years of media precedent of accepting defector accusations as confirmed facts suggested that this was a safe bet, at least politically—the media was likely to continue that same record.¹⁸⁶ Additionally, historical lessons from “rally 'round the flag” effects seen during World War I, World War II, the Vietnam War, the 1991 Gulf War, during President Reagan's presentation of Cold War threats, and even during presentation of social threats like McCarthyism confirm that the news media are inclined to capitulation when government portrays a security-threat atmosphere.¹⁸⁷ Especially after news media served as such an effective stimulus to galvanize support for the 1991 Gulf War, the Bush Administration's expectation that the news media would uncritically accept new security threat allegations on Iraq was understandable.¹⁸⁸

185. See Robert Bejesky, *Congressional Oversight of the “Marketplace of Ideas”: Defectors as Sources of War Rhetoric*, 63 SYRACUSE L. REV. 1, 5–8, 17–22 (2012); James Risen, *Data From Iraqi Exiles Under Scrutiny*, N.Y. TIMES, Feb. 12, 2004, at A16, available at <http://www.nytimes.com/2004/02/12/politics/12EXIL.html> (“A review of prewar information by the Defense Intelligence Agency has already concluded that much of the information it received from Iraqi defectors, including information provided by the [Iraqi National Congress], was of little or no use.”).

186. See Bejesky, *Information Flow*, *supra* note 103, at 460–65.

187. SIEGEL, *supra* note 112, at 57–59 (“Leaders create fear around their central issues, making them seem more urgent than the things they're less interested in. . . . No matter how safe we are, all we need to hear is the word *danger* or *threat*, and the cycle of worry starts. When one cycle is extinguished, another one takes its place.”); Bejesky, *Security Threats*, *supra* note 14, at 5–32; Christina E. Wells, *Information Control in Times of Crisis: The Tools of Repression*, 30 OHIO N.U. L. REV. 451, 464–68 (2004) (recounting the extensive history of government actors “perceiving a potential national security threat” using indirect control over the media to use “widespread propaganda—i.e., dissemination of wholly or partially untrue information—to spur public support for immediate action”) (italics removed); see generally John King Gamble & Nicole Lee Dirling, *Mass Media Coverage of International Law: (Benign) Neglect?, Distortion?*, 18 FLA. J. INT'L L. 211, 214 (2006) (presenting “a systemic analysis of how the mass media has reported on international law” during foreign policy crises).

188. ANTHONY PRATKANIS & ELLIOT ARONSON, *AGE OF PROPAGANDA: THE EVERYDAY USE AND ABUSE OF PERSUASION* 30 (rev. ed. 2001) (reporting that Professor John Zaller found that only 23 percent of Americans who watched “very little news” favored attacking Iraq in 1991, while 76 percent of “those who habitually kept track of the news” favored the Gulf War); RAMPTON & STAUBER, *supra* note 119, at 175–76

Political experts and governmental advisors will likely recall precedent involving security peril overreactions and advise the Executive accordingly, but news media entities are not so perfectly informed and may not recognize the Executive's current intentions as the event is unfolding.¹⁸⁹ Accordingly, following 9/11, the media broadcasted the Bush Administration's warnings and dutifully reported on adjustments of the color-coded terror alert system; polls indicated that Americans perceived danger even though no attacks took place and few suspects were arrested in conjunction with the announcements, and the media was relatively apathetic about scrutinizing the factual details underlying the false alarms as each successive threat came and passed.¹⁹⁰

b. *Substantive Content.* Emotive states of chaos, such as potential conflict and security threats, can capture public attention and boost viewership, perhaps making the media less prone to defy premises that might undermine the emotive event. The news media succinctly broadcasts core

(2003) (citing Justin Lewis et al., *The Gulf War: A Study of the Media, Public Opinion and Public Knowledge*, CTR. FOR STUDY OF COMM. (Feb. 1991), <https://web.archive.org/web/20070616110437/http://www-unix.oit.umass.edu/~commdept/resources/gulfwar.html>) (noting that the more television news people watched during Operation Desert Storm, the less they knew about the Middle East—and the less people knew about the Middle Eastern region, the more likely they were to support the war); *see generally* John Zaller, *The Myth of Massive Media Impact Revived: New Support for a Discredited Idea*, in *POLITICAL PERSUASION AND ATTITUDE CHANGE* 17, 50–59 (Diana C. Mutz et al., eds., 1996) (arguing the data from news consumption during Operation Desert Storm demonstrates that “the greater a person’s propensity for habitual news reception, the greater the likelihood of being influenced in the direction of the predominant message”).

189. Bejesky, *Information Flow*, *supra* note 103, at 432–34 (noting that the modern press operates “within a twenty-four hour information cycle,” and that “returning to previous reportage” in order to assess the accuracy of previous framing and to guide its framing of current events “is generally not the press’s role”).

190. Bejesky, *Rational Choice Reflection*, *supra* note 112, at 36–43, 47–49 (collecting examples of the Bush Administration’s decisions to raise the terror alert level without disclosing credible threat information and relatively uncritical press coverage); *see also* AL FRANKEN, *THE TRUTH WITH JOKES* 28–31 (2005) (“From the first terror alert on February 12, 2002, until the November 2, 2004, election, the Bush administration raised the nationwide threat level to orange, meaning a “high risk of terrorist attack,” six times. For the record, during that period there were no terrorist attacks. Also for the record, there have been no nationwide orange alerts since the election. Also for the record, former Homeland Security Secretary Tom Ridge has now gone on the record to say that he didn’t know why they kept issuing alerts.”).

information on political events and favors emotive sound bites,¹⁹¹ sensationalism,¹⁹² and violence¹⁹³ to increase ratings and market share. If the President portrays threats and “the twenty-four-hour media corroborates [threats] and propagates the presidential will,”¹⁹⁴ an environment of coercion can result and expand the distance between proven facts and persuasive opinions.¹⁹⁵ An escalating cycle of societal patriotism and fear, abetted by

191. See Bejesky, *Information Flow*, *supra* note 103, at 432–34 (noting that “broadcasters conventionally report on current events with entertaining, emotional, and attention-grabbing stories of thirty-second to one minute duration”); Travis, *supra* note 71, at 61 (“[R]eporters strip context from stories, depriving the public of understanding, creating stereotypes and caricatures of politicians and subjects, and blurring the perceptions of cause and effect.”); *see also* Jonathan Graubart, *What’s News: A Progressive Framework for Evaluating the International Debate over the News*, 77 CALIF. L. REV. 629, 660 (1989) (discussing “a serious shortage of reporting on substantive policies of the government” and a glut of “reporting on politicians’ personalities, sexual practices, drinking habits, and slips of the tongue”).

192. Maurice Murad, *Shouting at the Crocodile*, in *INTO THE BUZZSAW* 77, 81–83 (Kristina Borjesson ed., 2002) (“The corporations are now pretty much in control of the network news divisions, and keeping audiences awake is paramount. If the information is going to put you to sleep, it isn’t going to be there. A news broadcast gets ratings, or it is gone.”); *see also* SIEGEL, *supra* note 112, at 1–4; Peter Margulies, *The Detainees’ Dilemma: The Virtues and Vices of Advocacy Strategies in the War on Terror*, 57 BUFF. L. REV. 347, 383 (2009) (“Outlets for journalism typically must survive in an increasingly competitive marketplace, where novelty attracts eyeballs and advertising.”); Morant, *supra* note 101, at 482, 487–88; Ralph Nader, *Corporate Law Firms and the Perversion of Justice: What Public Interest Lawyers Can Do About It*, 1 WASH. U. J.L. & POL’Y 53, 60 (1999) (“[M]ass media is increasingly screening out any subject matter that does not center around violence, sex, addiction, or celebrity status.”).

193. Gamble & Dirling, *supra* note 187, at 215 (“By emphasizing violent, sensational or simple elements of international law-related events, the media can appeal to a wider audience.”); *see also* FRANKEN, *supra* note 123, at 1 (arguing that the mass media’s profit motive creates a bias toward reporting on stories “involving Scandal, and, hopefully Sex or Violence, or please, please, *pleeeeze*, both”).

194. Ghoshray, *supra* note 78, at 327; *see* Altheide, *supra* note 4, at 982–84 (arguing that widespread failure to critique the Bush Administration’s rationales for invading Iraq “can be attributed to a pervasive media logic that was quite consistent with entertaining programming about crime and fear, which in turn merged very easily with simplistic scenarios about international bandits, criminals and evil ones”).

195. *See* Altheide, *supra* note 4, at 992–95 (“The major impact of the discourse of fear is to promote a sense of disorder and a belief that ‘things are out of control.’”); *see also* M. Cherif Bassiouni, *Terrorism, Law Enforcement, and the Mass Media: Perspectives, Problems, Proposals*, 72 J. CRIM. L. & CRIMINOLOGY 1, 21–22 (1981) (“Perhaps the most pervasive problem associated with media reporting of terror-violence is the climate of intimidation it engenders, a general fear of victimization that

the media, may force reporters to continue to endorse prowar advocacy and to refrain from critical examination of prevalent fears and alleged threats.¹⁹⁶

This may especially be the case when media entities must accept Administration portrayals of a potential security threat due to an inability to access classified data and extract alternative conclusions;¹⁹⁷ the President controls the national security apparatus and can shroud details of classified intelligence reports—even though this same classified data can be the entire foundation for activating constitutional war powers.¹⁹⁸ While the corporate

both despoils the quality of life and destabilizes social institutions.”); Ghetti, *supra* note 1, at 488, 495 (arguing that terrorism could not exist without the media’s willingness to cover shocking, dramatic, and conflict-laden events; “television puts everyone at the scene of the crime, helpless to do anything, engendering feelings of anxiety and fear—the terrorist’s instruments of coercion”).

196. See Murad, *supra* note 192, at 100 (noting that, in the news media, “the biggest no-no is to offend a substantial chunk of the audience by reporting things in a way that goes against their attitudes”); see also Travis, *supra* note 71, at 63–64 (discussing how corporate news media editors glorified war and silenced dissent amongst their staff to ensure viewpoint uniformity and hedge against alienating prowar viewers); Joan Konner, *Eye on the Media: Media’s Patriotism Provides a Shield for Bush*, NEWSDAY, Jan. 9, 2002, at A31, available at <https://www.mail-archive.com/ctrl@listserv.aol.com/msg84594.html> (“It appears the news media, no less than the politicians, have been swayed by the Bush ultimatum ‘either you’re with us or for terrorism’—which is more a non-sequitur than a syllogism.”); *Bill Moyers Journal: Buying the War*, *supra* note 89 (“Walter Isaacson, former CEO of CNN: ‘So, you would get phone calls. You would get advertisers. You would get the Administration. . . . [W]e were caught between this patriotic fervor and a competitor 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.’”).

197. See *supra* notes 103–04, 111, 129–132 and accompanying text.

198. See, e.g., SENATE SELECT COMM. ON INTELLIGENCE, REPORT ON WHETHER PUBLIC STATEMENTS REGARDING IRAQ BY U.S. GOVERNMENT OFFICIALS WERE SUBSTANTIATED BY INTELLIGENCE INFORMATION, S. REP. NO. 110-345, at 92 (2008) (“The Administration’s misuse of intelligence prior to the war was aided by the selective declassification of intelligence reporting. . . . 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.”); SENATE SELECT COMM. ON INTELLIGENCE, REPORT ON THE U.S. INTELLIGENCE COMMUNITY’S PREWAR INTELLIGENCE ASSESSMENTS ON IRAQ, S. REP. NO. 108-301, at 457 (2004) (discussing how the Intelligence Community “selectively declassified information in a way that kept from the public important judgments central to the debate at the time, namely the likelihood that Baghdad would launch a terrorist attack against the United States or assist Islamic terrorists in launching such an attack, especially using weapons of mass destruction”); Bejesky, *Information Flow*, *supra* note 103, at 402–03.

news media certainly possesses massive resources that permit it to conduct investigative reporting generalizations and riskless “safe zone” reporting may be required because national security is an anomalistic policy issue that cannot involve open debate with the classified data.¹⁹⁹ If media entities contest the informational basis and demand access to classified material, the populace’s dominant attitudinal perspective may interpret vehement inquiry as antigovernment or antipatriotic bias, whereas reliance on government statements may be regarded as orthodox.

Aspects of journalists’ self-interest are probative and may also lead an administration to believe that an agenda based on national security questions can be successfully pushed to the public and goad acceptance with minimal dissent. Reporters and news media entities crave breaking stories, which in national security contexts can derive from “controlled leaks” or declassified intelligence.²⁰⁰ Controlled or authorized leaks can permit the government to speak anonymously and enable furtive agenda setting, which favors acceptance of government allegations because reporters may be unable to distinguish the types and value of the source’s contribution to public discourse.²⁰¹ American news is frequently sourced with labels that

199. See Papandrea, *supra* note 3, at 240 (“The executive branch has virtually unbridled power to control the flow of national security information to the public.”); Wells, *supra* note 187, at 460 (“Even after FOIA, then, public access to ‘national security’ information has depended largely on the good will of the President.”); *see also* Bejesky, *Weapon Inspections*, *supra* note 33, at 307 nn.57–58, 308 nn.64–65 (discussing the Bush Administration’s significant expansion of the use of classification and declassification of national security intelligence and attendant penalties for unauthorized disclosure). For example, this is very different from an environmental protection question where government decisions are based on information that is made publicly available and readily accessible, and news media entities’ follow-up inquiries can involve soliciting scientists and experts to provide competing opinions on the environmental impact of a government proposal. *See, e.g.*, *Environmental Impact Statement (EIS) Database*, EPA (last updated June 25, 2012), <http://www.epa.gov/compliance/nepa/eisdata.html>.

200. See Bejesky, *Information Flow*, *supra* note 103, at 414–20 (“There may be a conventional preconception that ‘leaks’ are tantamount to whistleblower actions, but this is not always the case and not all leaks are valuable to public discourse.”); Michael Kinsley, *Sources Worth Protecting?*, WASH. POST, Oct. 10, 2004, at B07, available at <http://www.washingtonpost.com/wp-dyn/articles/A18877-2004Oct8.html> (“People leak for various reasons. Sometimes they are truth-tellers exposing institutional lies. Sometimes they are promoting an institutional agenda and want anonymity because they are spreading lies.”).

201. *See, e.g.*, Bejesky, *Information Flow*, *supra* note 103, at 456–66 (analyzing the media response to the Valerie Plame leaks and noting that “[t]he American media performed abysmally by accepting allegations at face value, and it was largely

hide the source's interests in the subject matter, such as "unnamed White House sources," "anonymous sources," "intelligence officials," and "CIA officials."²⁰² *Washington Post* reporter Michael Kinsley refers to these practices as the "cult of the anonymous source," where journalists treat an anonymous source as a courageous dissident, often unwittingly advancing the Executive's agenda.²⁰³ Moreover, government officials may bestow

disinterested in scrutinizing the underlying core issues of false claims in the context of leaks, even though this is what seemingly caused the confidential source leak issue to develop" (footnote omitted)). Reporters have a history of accepting leaked intelligence at face value, even when leaks are authorized by an anonymous administration official instead of a whistleblower. *See id.* at 468–70; Papandrea, *supra* note 3, at 236 (showing that "a 'game of leaks' has developed among government officials and employees and the press" in which "the press alternatively serves as lapdogs, watchdogs, and scapegoats for the executive branch"); Robert A. Sedler, *The Media and National Security*, 53 WAYNE L. REV. 1025, 1034 (2007) (referring to the practice of "planting information" and further noting that "information is [often] disclosed surreptitiously, without identifying the governmental source, so that it is best described as an 'authorized leak,'"—and in those cases, "the media's publication of the information that the government wants to convey to the public" furthers the government's agenda).

202. Bejesky, *Information Flow*, *supra* note 103, at 414–15; *see Online NewsHour with Jim Lehrer: Lurking in the Shadows* (PBS broadcast Sept. 30, 1998), transcript available at https://web.archive.org/web/20130301035456/http://www.pbs.org/newshour/bb/media/july-dec98/sources_9-30.html (Jack Nelson, Chief Washington correspondent for the *Los Angeles Times*: "[I]f you were identified as a White House official or White House source, at least we know something about where it's coming from. But, unfortunately, in many of these cases [of anonymous sourcing], they say sources, they never say whether it's the White House, . . . and almost invariably if it comes from the White House, they refer to the White House spin."); *see, e.g.*, Scott Shane et al., *Secret U.S. Endorsement of Severe Interrogations*, N.Y. TIMES, Oct. 4, 2007, at A1, available at <http://www.nytimes.com/2007/10/04/washington/04interrogate.html?pagewanted=all> ("Most officials would speak only on the condition of anonymity because of the secrecy of the documents and the C.I.A. detention operations they govern."); *Nukes a Possibility if U.S. Decides to Attack Iranian Sites, Report Says*, SEATTLE TIMES (Apr. 9, 2006), http://seattletimes.com/html/nationworld/2002920093_iran09.html (discussing Seymour Hersh's April 2006 *New Yorker* article regarding the Bush Administration's plans for war with Iran over its nuclear program and noting that Hersh's sources were only referred to as "unnamed officials at the White House," "numerous anonymous sources," "four Pentagon, military, and administration officials . . . granted anonymity to speak candidly," "a senior Pentagon official," "[s]enior administration officials," "[s]enior officers and Pentagon officials," "U.S. officials and independent analysts," "specialists," "military officers," and "military officers and specialists").

203. Kinsley, *supra* note 200 (arguing that, in reality, most leaks involving secrets guarded by a powerful institution are "plotted by the powerful institution itself—in the Valerie Plame case,] the White House—for the purpose of stomping on exactly the kind of dissident who plays the hero's role in the generic leak fantasy"); *see also* COOK, *supra*

privileged access to breaking stories by leaking information to favored journalists who appear to be deferent to government officials.²⁰⁴

c. Protecting the Corporation. Corporate media entities operate in a hierarchy with reporters beholden to editors, and editors following directives from corporate owners and executives, which can make broadcasts more accordant with corporate decisions than with public value.²⁰⁵ Reporters who produce the news product are socialized by the newsroom to conform to hierarchical authority.²⁰⁶ Sometimes, this socialization requires acceptance of official government statements, particularly when departing from the norm of official accounts is prohibited, scorned, ridiculed, or would contravene median viewer beliefs.²⁰⁷ Reporters and editors have financial and professional pressures to ascend within their media organizations, which can obfuscate their judgments, breed biases, and undermine their ability to uphold the public trust.²⁰⁸ In a security threat or wartime atmosphere, news

note 2, at 129 (“[S]uccess in sending forth a factual definition of a situation, whether by leaks or not, may enhance one’s chances of policy success.”).

204. See Bejesky, *Information Flow*, *supra* note 103, at 416–17 (“Government officials in Washington oblige favored reporters with ‘scoops,’ provide privileged access to reports and classified information, and ubiquitously offer leaks.”); Papandrea, *supra* note 3, at 249 (noting that “reporters who cover affairs in Washington enjoy a certain level of prestige and depend upon the federal government to supply them with the content for their publications”).

205. See Ghetti, *supra* note 1, at 507–08 (arguing that corporate news media entities’ motivations are not “conducive to responsible reporting”); see also HERBERT J. GANS, DECIDING WHAT’S NEWS: A STUDY OF CBS EVENING NEWS, NBC NIGHTLY NEWS, NEWSWEEK, AND TIME 83 (1979) (noting that a typical news media entity is structured as a “hierarchical organization in which those with more power can enforce their judgment as to what considerations are relevant for a given story”); *supra* notes 68–78 and accompanying text.

206. Bejesky, *Politico*, *supra* note 31, at 71–78 (explaining how hierarchy breeds conformity within organizations); Jennings, *supra* note 138, at 677–78 (noting that news media entities’ corporate management can “bully” underlings and discourage departures from the status quo so effectively that “even those who see the issue of malfeasance and its consequences will say nothing”).

207. See INTO THE BUZZSAW, *supra* note 192, at 11–14 (introducing the book as a collection of accounts of reporters explaining how corporate media processes undermine investigative journalism and suppress critical reporting).

208. KOVACH & ROSENSTEIL, *supra* note 85 (“The bonuses of newsroom executives today are based in large part on how much profit their companies make. . . . By the end of the twentieth century, . . . America’s journalistic leaders had been transformed into businesspeople.”); Jennings, *supra* note 138, at 674–76 (“It seems media organizations

media entities' fears of being contentious, pressure to conform to patriotism, and predispositions to reflect status quo reporting are elevated²⁰⁹ and further the media's inclination to assume that there are few checks on presidential authority.

Scholars have noted that these corporate and political incentives may compel corporate news media entities to avoid tenaciously investigating and reporting on matters that challenge the status quo, leading to safe zone reporting and overreliance on official government sources for bolstered credibility and protection from liability.²¹⁰ Brant Houston, Executive Director of Investigative Reporters and Editors, remarks that "investigative reporting and reporters are always under attack . . . Powerful people and corporations want [critical reporting] censored, and they usually have quite a bit of success."²¹¹ Professor C. Edwin Baker notes that "[w]hen a media

are not immune from standard business numbers pressure. The numbers pressure in the media is so real that there has been a business crossover; even newspapers are under SEC investigation for possible falsification of circulation numbers."); Elizabeth Coenia Sims, *Reporters and Their Confidential Sources: How Judith Miller Represents the Continuing Disconnect Between the Courts and the Press*, 5 FIRST AMEND. L. REV. 433, 477-78 (2007) (quoting AM. SOC'Y OF NEWSPAPER EDITORS, STATEMENT OF PRINCIPLES (1996), available at <https://web.archive.org/web/20120902024241/http://asne.org/kiosk/archive/principl.htm>) ("Newspapermen and women who abuse the power of their professional role for selfish motives or unworthy purposes are faithless to that public trust."); *see also* Ghetti, *supra* note 1, at 507-08 ("Network policies of recruitment and advancement assure that newsroom policies rather than philosophical principles succeed in network news.").

209. *See* Entman, *supra* note 2, at 113-15 (discussing how, after 9/11, "media bosses seemed wary indeed about appearing to tolerate employees with anti-administration sentiments"); Magarian, *supra* note 70, at 118 ("[T]he news media's coverage of the Iraq war often sacrificed independence and critical analysis for access to official decisionmakers and feel-good patriotism."); *Bill Moyers Journal: Buying the War*, *supra* note 89 (Dan Rather: "Fear is in every newsroom in the country. . . . [A primary fear is that] if you don't go along to get along, you're going to get the reputation of being a troublemaker. There's also the fear that, you know, particularly in networks, they've become huge, international conglomerates. They have big needs, legislative needs, repertory needs in Washington. Nobody has to send you a memo to tell you that that's the case.").

210. *See, e.g.*, Robert McChesney, *The Rise and Fall of Professional Journalism*, in *INTO THE BUZZSAW*, *supra* note 192, at 363, 363-69, 378-81 (explaining that safe zone reporting occurred after 9/11 because of "reliance on official sources that is written into the professional code" and because "[t]he entire political establishment fell in line for the war effort, leaving little wiggle room for journalists to challenge the jingoist sentiment, without being accused of being unprofessional, partisan, or unpatriotic").

211. Brant Houston, *The Light That Won't Go Out*, in *INTO THE BUZZSAW*, *supra*

entity is part of a conglomerate in multiple lines of business, either governmental or powerful private groups may find themselves both able and willing to put serious economic pressure on one portion of the conglomerate in order to induce the media entity to mute critical reporting.”²¹² Emphasizing that scandals have made the news industry an object of popular skepticism and distrust, Professors Grundy, Hirst, Little, Hayes and Treadwell emphasize that “[t]he commercial pressure to maintain audience share and profits from advertising and subscriptions is also a factor in what appears to be declining ethical standards” in journalism.²¹³ Finally, Professor Gregory Magarian explains that “[m]any nongovernmental institutions willingly squelch speech critical of government policies in wartime, whether motivated by sincere animus against dissenters, desire to curry favor with customers, or interest in the benefits wartime economic and military initiatives can bring to industry”—which is exactly what occurred prior to the 2003 invasion of Iraq.²¹⁴

D. Prewar Outcome

The media could have challenged and reported critically on the prewar

note 192, at 351, 352–53; *see also* Travis, *supra* note 71, at 61–62 (stating that advertisers and government sources “directly influence the coverage of events by television, and propagate misleading, personality-distorting, and money-wasting messages on a consistent basis”).

212. Baker, *supra* note 67, at 908; *see also* Magarian, *supra* note 70, at 117 (“Increasingly controlled by large entertainment corporations that strive to avoid alienating consumers and advertisers, national media outlets have suppressed information of potentially great importance for assessing government policy.”); McLeod, *supra* note 76, at 114 (“[Economic] constraints have increased the pressure to rely on official sources for ‘information subsidies’ in the interest of economic efficiency. Economic pressures also have led to more efficient news styles that emphasize ‘infotainment,’ ‘personality journalism,’ ‘pseudo-events,’ ‘soft news,’ and ‘talk show politics.’”).

213. BRUCE GRUNDY, ET AL., *SO YOU WANT TO BE A JOURNALIST?: UNPLUGGED 6* (Cambridge Univ. Press 2nd ed. 2014).

214. Magarian, *supra* note 70, at 107; *see also* DANNY HAYES & MATT GUARDINO, *INFLUENCE FROM ABROAD: FOREIGN VOICES, AND U.S. PUBLIC OPINION* 48 (Cambridge Univ. Press 2013) (remarking that dissenting members of Congress and critics were “powerless to affect the outcome of the Iraq episode . . . mainstream U.S. media acted as they nearly always do, offering infrequent and negative coverage to these [dissenting] sources”); Travis, *supra* note 71, at 85 (“Postmodern censorship of pacifist speech often occurs by privatized censorship, such as when antiwar advocates are denied access to the means of reaching listeners, and the public is therefore deprived of access to antiwar messages, images, or videos.”).

allegations about Iraq, but it instead methodically amplified the Bush Administration's disputable allegations as proven facts.²¹⁵ Scholars have generally criticized the way media outlets present the news by focusing on entertainment value at the expense of debatable substantive issues,²¹⁶ which can cause political apathy in the populace²¹⁷ by appealing to emotional perceptions²¹⁸ and generating a "uniform perspective" on controversial

215. See *supra* notes 41–46, 126–32, 166–81 and accompanying text.

216. KOVACH & ROSENSTEIL, *supra* note 85, at 150–52 ("[The press] is squandering its ability to demand the public's attention because it has done so too many times about trivial matters. It is turning watchdogism into a form of amusement."); Helen Malmgren, *Stories We Love, Stories We Hate, in INTO THE BUZZSAW*, *supra* note 192, at 189, 189–91 (noting the media's drive to report "dainty little details" while ignoring considerations with more expansive impact on society "has changed [journalism] significantly, and not exactly for the public good"); see also Cass R. Sunstein, *Half-Truths of the First Amendment*, 1993 U. CHI. LEGAL F. 25, 35–36 (1993) (leveling criticism at scholars who often emphasize "comparatively trivial issues" and not "[t]he principal questions for the system of free expression" created by the news media's perverse incentives "in the operation of the free market"); sources cited *supra* notes 191–95. With weak efforts at portraying news accurately on television, societal norms for news coverage may be recast to favor portrayals intended to entertain. See LEO BOGART, *COMMERCIAL CULTURE: THE MEDIA SYSTEM AND THE PUBLIC INTEREST* 174–83 (1995) (recounting the shift that has taken place in reporting as "[t]he pursuit of audiences increasingly forces journalism to assume the guise of entertainment"); NEIL POSTMAN, *AMUSING OURSELVES TO DEATH: PUBLIC DISCOURSE IN THE AGE OF SHOW BUSINESS* 83–98 (1986) ("To say it still another way: Entertainment is the *supra*-ideology of all discourse on television. . . . A news show, to put it plainly, is a format for entertainment, not for education, reflection or catharsis.").

217. Bruce E. Pinkleton et al., *Perceptions of News Media, External Efficacy, and Public Affairs Apathy in Political Decision Making and Disaffection*, 89 JOURNALISM & MASS COMM. Q. 23, 23–24, 30–34 (2012) (demonstrating through empirical study that "citizens' use of entertainment media for public affairs information tends to associate with relatively low levels of engagement"); see Pippa Norris, *Does Television Erode Social Capital? A Reply to Putnam*, PS: POL. SCI. & POL. 474, 478 (demonstrating that "the hours people spent watching television was negatively associated with [political efficacy] attitudes: people who watch a great deal of television know less about politics, feel less able to affect government, and are less interested in politics"); see also KOVACH & ROSENSTEIL, *supra* note 85, at 174–75 (noting that polarizing political coverage "over time tend[s] to alienate the larger public that increasingly fails to see itself in the debate"); Altheide, *supra* note 4, at 987 (arguing that "entertainment, fear and social control have helped join the interests and narrative of popular culture with an expansive social control industry").

218. POSTMAN, *supra* note 216, at 102–06 (arguing that newscasters' "fixed and ingratiating enthusiasm as they report on earthquakes, mass killings and other disasters" within "the surrealistic frame of a television news show" is a "vaudeville act" that is "not to be taken seriously or responded to sanely"); see sources cited *supra* note 191–93.

issues.²¹⁹ Taken to an extreme, the mass media's "sycophantic or cynical acquiescence to official policy"²²⁰ may pollute popular perceptions with misinformation²²¹ and undermine democratic values,²²² which was ostensibly the case with the basis for the 2003 Iraq War.

Allegations over whether the news media's product can be more directly compromised are not new. Some presidents have successfully intimidated the broadcast industry for being critical.²²³ Moreover, the media industry employed extensive lobbying to push deregulation and then self-censored both its efforts and their negative ramifications.²²⁴ In fact, in June

219. Price, *supra* note 75 (arguing that "American television may provide more channels and choices than any other system, but, ironically, it provides less diversity and a more uniform perspective on national identity" as "infomercials replace documentaries and celebrities replace civic leaders").

220. Magarian, *supra* note 70, at 109–10 (showing that this acquiescence often occurs when the "possibility or reality of war" prompts journalists and news media entities to "forego aggressive, critical newsgathering and reporting").

221. POSTMAN, *supra* note 216, at 107 (arguing that television news is a form of "disinformation," defined as "misleading information—misplaced, irrelevant, fragmented or superficial information—information that creates the illusion of knowing something but which in fact leads one away from knowing"); Travis, *supra* note 71, at 61 ("[Television] reports many false and misleading statements as if they were facts, polluting the public mind with error.").

222. MONROE E. PRICE, TELEVISION, THE PUBLIC SPHERE, AND NATIONAL IDENTITY 28 (1995) (arguing that "broadcasting has become, at best, irrelevant to the operation of a democratic society and, at worst, so implicated in the harmful transformation of culture that the possibility of recuperation for an effectively institutionalized public sphere is dim indeed"); *see* Sunstein, *supra* note 57, at 551–52 (proposing solutions to address the reality that competitive pressures in broadcast news media industries "lead to sensationalistic, prurient, or violent programming, and to a failure to provide sufficient attention to educational values, or to the kind of programming that is indispensable to a well-functioning democracy").

223. *See, e.g.*, Price, *supra* note 75, at 689 (noting that Lyndon Johnson and Richard Nixon intimidated broadcasters "who challenged their views" during the Vietnam War using the FCC licensing process); Wells, *supra* note 187, at 461–62 ("World War I provides the best example of direct government censorship. At the behest of the Wilson administration, which argued that dissent was 'threatening the formation and maintenance of the armed forces,' Congress passed two pieces of legislation designed to punish speech interfering with the war effort." (quoting DAVID M. RABBAN, FREE SPEECH IN ITS FORGOTTEN YEARS 249 (1997))).

224. Records from investigations during the 1950s and 1960s revealed that the FCC was vulnerable to regulatory capture. *See, e.g.*, 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, 246 (2006)

2003, three months after the invasion of Iraq, the Federal Communication Commission (FCC) further eased media ownership restrictions,²²⁵ which Senator Byron Dorgan called “one of the most complete cave-ins to corporate interests I’ve ever seen by what is supposed to be a federal regulatory agency.”²²⁶

(noting “a 1959 investigation of several federal regulatory commissions revealed that the FCC was ‘perhaps the worst in countenancing cozy relations with the industry it supervised’” (quoting Richard Kielbowicz & Linda Lawson, *Unmasking Hidden Commercials in Broadcasting: Origins of the Sponsorship Identification Regulation, 1927–1963*, 56 FED. COMM. L.J. 329, 354 (2004))). Corporate news media entities, recognizing that vulnerability, led a push to relax the rules against media consolidation. Canova, *supra* note 54, at 78 (noting that “powerful broadcast and media interests have been wildly successful in pushing deregulation of everything from TV and radio to cable and satellite telecommunications,” especially “during the Reagan administration when the FCC systematically deregulated these industries by permitting larger ownership concentrations, big media mergers and takeovers”); WEAPONS OF MASS DECEPTION, *supra* note 89, at 1:31:40–32:12 (Congressman Maurice Hinckley stated that the media consolidation was not serendipitous but was “an organized, concerted, thought-out, well-planned, and well-executed process” intended to “control the political discussion”); *see also* sources cited *supra* notes 68–70. Referring to the passage of the 1995 Telecommunications Deregulation Bill, Ralph Nader argued, “Congress is moving the law in the wrong direction, toward greater concentration and fewer choices for consumers, all under the guise of ‘greater competition.’” Ralph Nader et al., *Federal Telecommunications Legislation: Impact on Media Concentration*, in CENSORED 1996: THE NEWS THAT DIDN’T MAKE THE NEWS 50, 51 (Carl Jensen ed., 1996), available at <http://www.projectcensored.org/telecommunications-deregulation-closing-up-americas-marketplace-of-ideas/>. “The interests which benefit the most from the lack of debate over policies about concentration and cross-ownership are the large corporations which own telecommunications and media businesses, as well as some players who want a chance to sell their firms to the larger players”—who are naturally disincentivized from reporting on their own lobbying efforts. *See id.* at 52 (internal quotation mark omitted).

225. *Media Ownership Rule Changes*, PBS (June 3, 2003), <http://www.pbs.org/now/politics/fccchanges.html> (reporting that shortly after the 2003 invasion of Iraq, the FCC further relaxed rules permitting more “cross-ownership” of media outlets in a single market); *see* Wines & Lau, *supra* note 68, at 160–61 (recounting how “the FCC, under very ideological appointees who profess an almost religious-like devotion to the so-called ‘free market,’ has marched steadfastly toward deregulation of the media”).

226. ROBERT W. MCCHESNEY, THE PROBLEM OF THE MEDIA: U.S. COMMUNICATION POLITICS IN THE TWENTY-FIRST CENTURY 287 (2004) (quoting Demitri Sevastopulo, *Senators Deploy Veto to Attack Media Rules*, FINANCIAL TIMES, July 16, 2003, at 3); Susan Stuart, *Shibboleths and Ceballos: Eroding Constitutional Rights Through Pseudocommunication*, 2008 BYUL. REV. 1545, 1555 (2008) (remarking on modern authoritarians’ “attempts to control mass media through the coordination of government regulation and corporate cronies”); *see also* WEAPONS OF MASS DECEPTION, *supra* note 89, at 1:32:40–33:34 (noting critics discussing the conflict of

Even if one assumes that journalists and news media entities generally intend to stimulate debate and foster a check on government,²²⁷ corporate missions that inject a private sector informational product for sale, may dilute journalist obligations.²²⁸ In the utility function, $U(v) = \lambda (r_1 + n_{a1}) - [(1 - \lambda)(c_1 + f_n)]$, the media did emphasize a high level of emotion and assumed that there was danger $[\lambda (r_1 + n_{a1})]$. Consequently, very low current and future costs likely registered as potential losses for being wrong $[(1 - \lambda)(c_1 + f_n)]$. There were minimal signs that individual media entities engaged in risk-taking by challenging the Bush Administration on its WMD security threat allegations.²²⁹ Instead, the mainstream news media industry as a whole converged at median viewer perceptions with a safe zone output and reliance on government sourcing, which is tantamount to having a government-controlled media when the facts on which those perceptions were based were entirely false.

interest that resulted when George W. Bush appointed Michael Powell, the son of Secretary of State Colin Powell, as chairman of the FCC).

227. Morant, *supra* note 60, at 597–99 (arguing that the news media is principally a self-regulating industry and that it produces its own ethics codes with standards that aim to promote integrity, voluntary self-restraint, and good faith reporting); *but see* David E. Boeyink, *How Effective Are Codes of Ethics? A Look at Three Newsrooms*, 71 JOURNALISM Q. 893, 894–95 (1994) (investigating three newsrooms and finding that written codes of journalistic ethics are almost never used by media professionals to confront difficulties, “even when the code was relevant to the case”); Jennings, *supra* note 138, at 640 (“Virtue ethics have all but disappeared as the standard for journalistic choices and dilemmas, and their absence explains where journalists’ minds were and what they were thinking as they participated in or allowed the breaches to occur.”); Morant, *supra* note 60, at 613–14 (“The blatantly amorphous language in most codes suggests that they were intentionally drafted to maintain a certain ambiguity.”).

228. MCCHESNEY, *supra* note 226, at 78 (arguing that “journalism has increasingly become explicitly commercial” and that journalistic integrity and professionalism “can no longer offer as much protection from commercial pressure”); Mermin, *supra* note 2, at 964 (observing that “advertiser-supported media have incentives to avoid controversial stories that might offend major advertisers,” and likewise “large corporate media with mass audiences for their journalistic and other product lines may prefer to avoid association with controversial out-of-the-mainstream political views”).

229. *See* Morant, *supra* note 60, at 631 (detailing major print media outlets’ failure to vet “assertions about the presence of WMDs” in Iraq); Travis, *supra* note 71, at 72–74 (demonstrating that “top news Web sites drastically censor[ed] pacifist speakers and activists” in the debate over the war in Iraq); *see also* *supra* notes 41–46, 126–32, 166–81 and accompanying text.

V. AFTERMATH OF INVASION

A. *The Transition*

When the media *did* question the weapon allegations prior to the invasion, the Bush Administration's response was frequently to reiterate their absolute confidence that Saddam Hussein had WMDs—that the intelligence confirmed that Iraq had been lying about not having prohibited programs²³⁰ or that Iraq had the burden of proving that it did not possess weapons in violation of Security Council resolutions.²³¹ After learning that none of the weapon charges were true, the media's response was to dismiss responsibility for its own failings and to refuse to hold the Bush Administration accountable by fixing attention on the issue, which may be an example of the media emphasizing economic gain over public service.²³²

230. Bejesky, *CFP*, *supra* note 4, at 61–68 (detailing the security threat allegations); Ari Fleischer, Press Briefing (Jan. 9, 2003), <http://georgewbush-whitehouse.archives.gov/news/releases/2003/01/20030109-8.html> (Fleischer: “We know for a fact that there are weapons there.”); Ari Fleischer, Press Briefing (Dec. 2, 2002), <http://georgewbush-whitehouse.archives.gov/news/releases/2002/12/20021202-6.html> (Fleischer: “[Y]ou've heard the President say repeatedly that [Hussein] has chemical and biological weapons”); *see U.S. Insists Iraq is Hiding Weapons*, BBC (Dec. 6, 2002), http://news.bbc.co.uk/2/hi/middle_east/2548437.stm (quoting Press Secretary Fleischer's remarks that “[t]he president of the United States and the secretary of defence would not assert as plainly and bluntly as they have that Iraq has weapons of mass destruction if it was not true, and if they did not have a solid basis for saying it”) (internal quotation marks omitted).

231. *See* Bejesky, *Weapon Inspections*, *supra* note 33, at 317–21 (noting that the Bush Administration's rhetoric “consistently shifted a burden to Iraq not of proving compliance, but of proving that it *was* in breach” and in possession of prohibited weapons, so that it could subsequently show that it had brought itself into compliance by destroying them); *see, e.g.*, Bush, *supra* note 119 (arguing to the U.N. Security Council in September 2002 that “[i]f the Iraqi regime wishes peace,” it needed to “disclose, and remove or destroy all weapons of mass destruction”); Ari Fleischer, Press Briefing (Dec. 5, 2002), <http://georgewbush-whitehouse.archives.gov/news/releases/2002/12/20021205-7.html> (noting that veteran reporter Helen Thomas asked, “[I]f you had this evidence . . . , why don't you lay it out on the table? Why don't you share it with the American public?,” and Fleischer responded, “I think the burden now falls on Saddam Hussein and his opportunity to shed that burden comes this weekend when he will send to the United Nations a declaration of the weapons that he possesses.”).

232. *See* Mermin, *supra* note 2, at 947–50 (“Even after support for the war started to unravel in Washington, the critical perspectives featured in the news continued to be the ones that were articulated in Washington; other notable points were not emphasized.”); *see also* Jennings, *supra* note 138, at 640 (stating that “the Fourth Estate have fancied themselves different—above the fray, and certainly above the obvious missteps of the corporate scoundrels”).

When conspicuous reporting deficiencies and omissions become apparent, publicly traded corporate news media entities concerned with stock market prices might possess minimal interest in self-chastisement.²³³ But in terms of credibility, news media conglomerates may have had nothing to lose; polls conducted in July 2002 revealed that 56 percent of Americans already believed media outlets “usually report inaccurately,” 67 percent believed media outlets “try to cover up mistakes,” and 59 percent believed the media is “politically biased.”²³⁴ In any event, media outlets did not critically investigate the origins or motivations behind clearly misleading White House pronouncements or demand accountability for false security threat allegations²³⁵ but instead were obsequious and attuned to the Bush Administration’s rapidly evolving justifications for the Iraq War.²³⁶

One month after the war began, ABC News provided an apropos representation of the transformed rationale for war when it reported that “some [Bush Administration] officials now privately acknowledge the White House had another reason for war—a global show of American power and democracy.”²³⁷ But “a global show of American power and democracy” is not a legal basis for action, and it was not what Americans, Congress, the

233. See Morant, *supra* note 60, at 605 (“In order to maximize the size of its audience, a media source must establish a certain level of credibility, which is a foundational element of the triad [of its interests].”). Some of the more established print media entities apologized for their uncritical coverage. See *supra* notes 43–44 and accompanying text. But these apologies, decoupled from commitments to more critical reporting in the future, struck media scholars as inadequate—“a *mea culpa* without the *mea*.” Fisher, *supra* note 6, at 1228–30 (“The press should have been on guard and skeptical about their claims. . . . It should have been one red flag followed by another.”).

234. *News Media’s Improved Image Proves Short-Lived*, PEW RESEARCH CTR. FOR THE PEOPLE & THE PRESS (Aug. 4, 2002), <http://people-press.org/report/159/news-media-s-improved-image-proves-short-lived>.

235. See McLeod, *supra* note 76, at 133–35 (“As the U.S. intervention in Iraq yielded information that contradicted these [security threat] assertions, the media was hesitant to abandon their concern for providing balanced viewpoints, treating the Bush Administration assertions as viable even in the absence of supporting evidence.”).

236. Yamamoto, *supra* note 5, at 296–97 (noting that mainstream news media entities, especially on the right, “have been slow to seriously investigate and critique executive national security pronouncements that now appear to have been misleading if not deliberately false”); see also McLeod, *supra* note 76, at 135 (arguing that the media’s dependence on “the official policy line” on the war in Iraq “was maintained long after it was no longer factually viable”).

237. 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>.

Security Council, or the rest of the world were told.²³⁸ ABC News further noted that White House officials insisted that the Bush Administration had not lied but that it had “emphasized the danger of Saddam’s weapons to gain the legal justification for war from the United Nations and to stress the danger at home to Americans.”²³⁹ This is a distinction without a difference—“emphasizing” false accusations “to gain the legal justification for war” and “to stress the danger” is lying, especially when Iraq’s possession of prohibited weapons was the only legal basis for using military force and the only justification presented to Congress and to the American people.²⁴⁰

238. Ackerman & Hathaway, *supra* note 22, at 464 (noting that public support and congressional authorization for the war was “expressly premised” on the threat presented by WMDs that “never really existed in the first place”); *see supra* notes 37–40, 113–19, 123–25, 131–34 and accompanying text.

239. Cochran, *supra* note 237; *see also* Bejesky, *Weapon Inspections*, *supra* note 33, at 351–54, 360–61 (discussing the Bush Administration’s deliberate emphasis on dangers posed by Iraq’s alleged WMDs in terms of “[t]hreat immediacy and gravity, and risk of inaction”).

240. *See* Ackerman & Hathaway, *supra* note 22, at 464 (noting that “[t]here never had been a direct threat of the kind the Bush Administration had invoked in gaining congressional support for the war”); Yamamoto, *supra* note 5, at 296–99, 302 (collecting evidence showing that “[m]uch of the national security information conveyed by the President’s administration to the public” was “deliberately misleading,” as a result of a “deliberate strategy” rather than from “inadvertence or honest mistake”). President Bush himself was not bothered by the use of this misleading emphasis to convince Congress and the public to support invading Iraq.

In Bush’s mind, how the case for war had been made scarcely mattered. . . . If the policy was right and the selling of the policy could be justified at the time, then any difference between the two mattered little. In this view, governing successfully in Washington is about winning public opinion and getting positive results.

To this day, [President Bush] seems unbothered by the disconnect between the chief rationale for war and the driving motivation behind it, and unconcerned about how the case was packaged.

MCCLELLAN, *supra* note 134, at 202. This is a clear acceptance and endorsement of his Administration’s use of “noble lies” to sell the Iraq War. *See* Earl Shorris, *Ignoble Liars: Leo Strauss, George Bush, and the Philosophy of Mass Deception*, HARPER’S MAG., June 1, 2004, at 65, available at <http://harpers.org/archive/2004/06/ignoble-liars/> (arguing that the Bush Administration adopted “a philosophy of the noble lie” and demonstrated a belief that “lies, far from being simply a regrettable necessity of political life, are instead virtuous and noble instruments of wise policy”); *see also* Yamamoto, *supra* note 5, at 294–96 (“The ‘noble lie’ philosophy thus produces two sets of truth-telling rules—one for those at the top rung of political power and another for the rest of the public.”).

The AUMF against Iraq stated that the use of military force required that Iraq be a national security threat to the United States or that force be necessary to enforce U.N. Security Council resolutions, and that the use of military force be “consistent with the United States and other countries continuing to take the necessary actions against international terrorist and terrorist organizations.”²⁴¹ When the Authorization was adopted, Congress expressed that it intended to provide the President with leverage for resolute diplomacy through the United Nations and was not *per se* endorsing war.²⁴² Professors Ackerman and Hathaway correctly emphasize that this was a limited authorization to use force conditioned on the actual existence of an imminent threat.²⁴³ The President understood that the AUMF’s terms attached conditions to the use of force because he reiterated them verbatim in a letter to Congress two days before the attack, formally setting out his compliance with the 48-hour requirement in section 3(b).²⁴⁴

241. Authorization for Use of Military Force Against Iraq Resolution of 2002, H.R.J. Res. 114, 107th Cong. § 3 (2002).

242. H.R. REP. No. 107-721, at 4-5 (2002) (stating the House Committee on International Relations intended the Authorization to serve as a means to “persuade Iraq to meet its international obligations” and ultimately avoid the use of military force); 148 CONG. REC. S10,290 (2002) (statement of Sen. Clinton) (supporting the Authorization not as “a vote to rush to war” but as a warning to Saddam Hussein to “disarm or be disarmed” and advising President Bush to “[u]se these powers wisely and as a last resort”); 148 CONG. REC. S10,290 (statement of Sen. Joseph Biden) (endorsing the Authorization because “a strong vote in Congress . . . increases the prospect for a tough, new U.N. resolution on weapons of mass destruction, . . . [and] decreases the prospects of war”); *see* Ackerman & Hathaway, *supra* note 22, at 462 (“Many in Congress had pushed for an even narrower resolution, authorizing the use of force only with the explicit approval of the United Nations. But the president suggested that the United Nations would be tougher on Saddam Hussein if he could credibly threaten military action.”); *cf.* Fisher, *supra* note 6, at 1212 (arguing that because Congress passed the Authorization with the express goal of averting war and delegated the responsibility to determine whether military action was necessary to the President, “Congress did not satisfy its constitutional obligation to *decide* on war”).

243. Ackerman & Hathaway, *supra* note 22, at 461-63 (“If [President Bush] eliminated the ‘continuing threat by Iraq’ to American national security, the 2002 resolution allowed the further use of force *only* if the United Nations explicitly authorized it in additional Security Council resolutions.”); *see also* JOHN DEAN, *WORSE THAN WATERGATE* 142 (2004) (“Congress conditioned its grant of authority on a formal *determination* by the president of the United States that there continued to be a threat that could not be dealt with through diplomacy and that his actions were consistent with the war against those involved in 9/11—a detail unreported by the news media.”); Bejesky, *CFP*, *supra* note 4, at 16-18.

244. Letter from George W. Bush, President of the U.S., to Speaker of the House

Similarly, the AUMF was never intended to condone an extended occupation.²⁴⁵ Looking back on the prewar period from 2004, when Americans were already jaded by a prolonged and unexpected occupation, Jim Lehrer of PBS remarked that occupation “was never mentioned in the run-up to the war. It was liberation. This was [discussed as] 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.”²⁴⁶ The Bush Administration did mention “liberation” prior to invasion,²⁴⁷ but the overwhelming emphasis and basis for military action was alleged possession of chemical and biological weapons and the alleged nuclear weapons programs—the only warrants for Congress’s authorization. The Bush Administration’s additional post hoc rationalizations, particularly its “humanitarian and regional security” rationales, were “blatantly inconsistent with the plain language of the 2002 resolution.”²⁴⁸

After the invasion, in terms of the r_1 emotion variables presented in the decisionmaking analysis, there was a distinct increase in σ (patriotism) as news media clamored to support the troops (Part V.B, *infra*), but the underlying reason for the invasion began to shift from Π (fear of security threats to Americans) to μ (humanitarian justice) in the form of liberation. This new emphasis effectively dismissed the fact that λ was false and that the conditions that Congress required for continuing military action were not met.²⁴⁹ In addition to the general tone that fostered patriotism, the Bush

Resolution (Mar. 18, 2003), available at <http://www.cbsnews.com/stories/2003/03/19/iraq/main544604.shtml>; see Bejesky, *CFP*, *supra* note 4, at 17.

245. Ackerman & Hathaway, *supra* note 22, at 463–67 (explaining that Congress structured the Authorization so that even if it became “necessary to invade Iraq to destroy its weapons of mass destruction, this did not mean President Bush could continue the war indefinitely”).

246. *Hardball with Chris Matthews* (MSNBC television broadcast May 12, 2004), transcript available at <http://www.nbcnews.com/id/4969709/#Vfa/I6Pnabg>.

247. See Bejesky, *Politico*, *supra* note 31, at 102–03 (collecting examples of top Bush Administration officials’ statements regarding liberation in the days before the 2003 invasion began); see also *In Their Own Words: Bush Administration Officials Predict Iraqis Will Greet US Soldiers as Liberators*, DEMOCRATIC POLICY COMM. (July 22, 2004), available at https://web.archive.org/web/20090823211559/http://democrats.senate.gov/dpc/dpc-new.cfm?doc_name=fs-108-2-211 (collecting statements made by Cheney, Rumsfeld, Wolfowitz, Powell, and Fleischer asserting that U.S. forces would be greeted as liberators in Iraq).

248. Ackerman & Hathaway, *supra* note 22, at 464; Bejesky, *CFP*, *supra* note 4, at 17–18; see *supra* notes 37–40 and accompanying text.

249. This transition was deliberately and relentlessly pushed by the Bush

Administration encouraged a smooth transition in those variables through the Pentagon's military analyst program (Part V.C, *infra*) and the embedded journalist program (Part V.D, *infra*).

B. Patriotism

War journalism is inherently and predictably slanted toward patriotism,²⁵⁰ which further promotes the use of force and the aspiration to take the steps necessary to achieve victory.²⁵¹ American war coverage emphasized patriotic support for U.S. troops and suppressed dissent, which

Administration and by compliant news media.

We needed to refocus the debate on the larger strategic framework—the big picture of national security that the president would relentlessly push during the reelection campaign against his eventual opponent, Senator John Kerry.

....

For the next ten weeks, every significant opportunity on the president's schedule would be used for pushing this message. Republicans in Congress and allies in the media, such as conservative columnists and talk radio personalities, would be enlisted in the effort and given communications packets with comprehensive talking points aimed at helping them pivot the message whenever they could.

MCCLELLAN, *supra* note 134, at 175.

250. Eytan Gilboa, *Media and Conflict Resolution: A Framework for Analysis*, 93 MARQ. L. REV. 87, 102 (2009) ("War journalism is driven by propaganda and manipulation and is therefore biased and distorted."); Elana J. Zeide, Note, *In Bed with the Military: First Amendment Implications of Embedded Journalism*, 80 N.Y.U. L. REV. 1309, 1317–18 (2005) (discussing the news media's shift in response to "market-imposed pressure to appear patriotic and emotionally sensitive" to families of soldiers and victims); *Hardball with Chris Matthews*, *supra* note 246 (Jim Lehrer: "We're at war. We have to root for the country to some extent. You're not supposed to be too aggressively critical of a country at combat, especially when it's your own."); *Larry King Live: Interview with Dan Rather* (CNN television broadcast Apr. 14, 2003), transcript available at <http://transcripts.cnn.com/TRANSCRIPTS/0304/14/lkl.00.html> (documenting that then-embedded CBS reporter Dan Rather stated, "I'm an American. . . . And when my country is at war, I want my country to win About that I am prejudiced. About that, there is an inherent bias in the coverage of the American press, in general.").

251. Anderson, *supra* note 130, at 63 (attributing the patriotic tenor in reporting on the Iraq War, in part, to "public distaste for unpleasant war news" and "public hostility to detached war reporting"); Matthew J. Jacobs, Comment, *Assessing the Constitutionality of Press Restrictions in the Persian Gulf War*, 44 STAN. L. REV. 675, 705–06 (1992) (outlining the argument that popular support is necessary for military success and that media coverage, in turn, influences levels of popular support for a conflict).

created a rally-around-the-flag effect that likely ideologically benefited Republicans during the 2004 election season²⁵² because of their heightened view of security threats and patriotism. Alternatively, Arab news coverage of the invasion depicted scenes of Iraqi suffering, deaths, and injuries,²⁵³ and other Western media sources were more critical of the Bush Administration and openly questioned whether there were ulterior reasons for the war.²⁵⁴ Russell Smith of the Toronto *Globe and Mail* opined that “[t]he media

252. Humphrey Taylor, *Successful War Lifts Many (Republican) Boats and Their Ratings Surge*, HARRIS INTERACTIVE, 1–3 (Apr. 18, 2003), <http://www.harrisinteractive.com/vault/Harris-Interactive-Poll-Research-Successful-War-Lifts-Many-Republican-Boats-and-Their-Ratings-Surge-2003-04.pdf> (reporting that the earliest stages of the Iraq War had “not only given President Bush a huge increase in support, it ha[d] also caused substantial improvements in the ratings of other cabinet members, Republican leaders and the Republican Party”). Increased levels of patriotism benefited President Bush in particular by insulating him from criticism of his handling of the Iraq issue during critical months before the 2004 election, when “any suggestion that the White House was exaggerating the threat posed by WMD would have played into the Republican strategy of painting Democrats as soft on national security.” Mermin, *supra* note 2, at 949; Krane, *supra* note 155 (reporting that surveys conducted less than three weeks before the 2004 presidential election showed “[l]arge majorities of the public accept many of [President Bush]’s positions” on the Iraq War); *see also* FRANKEN, *supra* note 190, at 33 (noting that in the 2004 presidential election, “86 percent of terrorism voters went for Bush” as a result of consistent security threat messaging during the campaign).

253. Compare *PBS NewsHour: A Different Language: Arab Media*, (PBS television broadcast Apr. 6, 2003), http://www.pbs.org/newshour/bb/media/jan-june03/arabnews_04-06.html (“Some of the most graphic images from the war—Injured and dead civilians, dead and wounded Iraqi and American soldiers and POW’s, the hail of rockets, missiles and bombs—have been played over and again on Arab television.”), with Saby Ghoshray, *When Does Collateral Damage Rise to the Level of a War Crime?: Expanding the Adequacy of Laws of War Against Contemporary Human Rights Discourse*, 41 CREIGHTON L. REV. 679, 703–06 (2008) (recounting inhumane acts and “human atrocities” committed during the invasion of Fallujah and noting that embedded American journalists could not or simply did not report them); *see also* Arzon, *supra* note 85, at 358 (observing that “Al-Jazeera coverage showed more fatalities, updated death tolls, bloodshed, and anti-war protests, while American news channels highlighted press conferences and interviews with military families awaiting soldiers abroad” (footnote omitted)).

254. Robert Bejesky, *Geopolitics, Oil Law Reform, and Commodity Market Expectations*, 63 OKLA. L. REV. 193, 225–29 (2011) (stating that foreign observers were more critical of the stated rationale for war and frequently contended there were more nefarious and unstated reasons for invasion); Arzon, *supra* note 85, at 356–57 (“News reports from countries such as Germany, France, Spain, Mexico, Kenya, Russia, and Turkey, regardless of the governmental support of the United States, had mainstream, front-page coverage criticizing U.S. war efforts or questioning U.S. motives for the war.”).

coverage of this war has been disgusting” and that “U.S. television stations[] have been cravenly submissive to the Pentagon and the White House.”²⁵⁵ American news programs welcomed prowar guests onto news programs and ignored antiwar opposition.²⁵⁶ FAIR studied 1,617 on-camera sources appearing on American television news evening broadcasts between March 20, 2003, (the day after the invasion began) and April 9, 2003, and found that 64 percent of all sources were prowar and only 10 percent were antiwar; of the American sources, 70 percent were prowar and only 3 percent were antiwar.²⁵⁷

Rhetoric also plays a role in demanding and reinforcing patriotism. Professor Chomsky emphasizes the government’s capability to use a rhetorical stratagem to dismiss criticisms and supplant the original reasons for war by accentuating patriotism with “good propaganda”—and to do that, government officials can “create a slogan that nobody’s going to be against, and everybody’s going to be for,” such as “support our troops.”²⁵⁸ This tactic prevails because people will advocate support for the troops, making the original precondition for the war action immaterial.²⁵⁹ Hence, the

255. MACARTHUR, *supra* note 11, at xlii–xliv (“In both gulf wars, the degradation unto sleep of the U.S. media was largely self-inflicted.”); Russell Smith, *Facts Fall Victim to War Jargon*, GLOBE & MAIL (Apr. 22, 2009), <http://www.theglobeandmail.com/arts/arts-fall-victim-to-war-jargon/article1160603/> (“[A]re we all so terrified of being accused of “anti-Americanism” that we forget basic journalistic principles? Who are we afraid of?”).

256. RAMPTON & STAUBER, *supra* note 119, at 171–72 (“The newspapers and TV networks could have easily interviewed academics and other more traditional anti-war sources, but they rarely did.”); Eric Boelert, *Lapdogs*, SALON (May 4, 2006) <http://www.salon.com/news/feature/2006/05/04/lapdogs> (noting that, on the night before the invasion was launched, MSNBC’s Chris Matthews hosted a discussion panel with “a pro-war Republican senator (Saxby Chambliss, from Georgia), a pro-war former Secretary of State (Lawrence Eagleburger), a pro-war retired Army general (Montgomery Meigs), a pro-war retired Air Force general (Buster Glosson), a pro-war Republican pollster (Frank Luntz),” along with one antiwar figure “for the sake of balance”).

257. Steve Rendall & Tara Broughel, *Amplifying Officials, Squelching Dissent: FAIR Study Finds Democracy Poorly Served by War Coverage*, FAIRNESS & ACCURACY IN REPORTING (May 1, 2003), <http://www.fair.org/index.php?page=1145> (“Thus viewers were more than six times as likely to see a pro-war source as one who was anti-war; with U.S. guests alone, the ratio increases to 25 to 1.”).

258. RUSHKOFF, *supra* note 122, at 162 (citing NOAM CHOMSKY, *MEDIA CONTROL: THE SPECTACULAR ACHIEVEMENTS OF PROPAGANDA* 26 (1991)).

259. *Id.*; see also MCCHESNEY, *supra* note 226, at 121–23 (“Predictably, even before the invasion, conservative media critics were hunting vocal war critics. . . . When the news media persisted in suggesting that the Iraqi campaign was not going swimmingly for the

speechcraft transplant of “liberating the Iraqi people”²⁶⁰ was conjoined with the need to tenaciously support the troops, which presumably reduced the likelihood that Congress or the news media would question the President for displacing the originally espoused mission of preventing the possession of prohibited weapons.²⁶¹

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 audiences.²⁶² In a book abounding with examples of propaganda, media critics Shelton Rampton and John Stauber observed that the media produced certain images repeatedly—“the toppling of Saddam Hussein’s statue, the rescue of American [prisoners of war], and soldiers’ joyful homecoming reunions with their families”—which naturally became the images that most Americans would remember.²⁶³ Substantive commentary to accompany these superficial

Bush administration, the White House criticized the news media, with no sense of irony, for being biased against it.”).

260. See Bejesky, *Weapon Inspections*, *supra* note 33, at 361; see also President George W. Bush, State of the Union Address (Jan. 21, 2004), available at <http://www.cnn.com/2004/ALLPOLITICS/01/20/sotu.transcript.3/index.html> (“Some in this chamber, and in our country, did not support the liberation of Iraq. . . . For all who love freedom and peace, the world without Saddam Hussein’s regime is a better and safer place.”).

261. See Bush, *supra* note 260 (“And the men and women of the American military they have taken the hardest duty. . . . Many of our troops are listening tonight. And I want you and your families to know: America is proud of you. And my administration, and this Congress, will give you the resources you need to fight and win the war on terror.”); cf. *Mitchell v. Laird*, 488 F.2d 611, 615 (D.C. Cir. 1973) (“A Congressman wholly opposed to the war’s commencement and continuation might vote for the military appropriations and for the draft measures because he was unwilling to abandon without support men already fighting.”).

262. Compare MACARTHUR, *supra* note 11, at 101–06 (“No matter what one’s feelings [on the 1991 Gulf War], there were plenty of chances to cash in on war fever. . . . Patriotism—ersatz or genuine—blared out from magazine covers and television sets.”), with SWEENEY, *supra* note 17, at 201–03 (“In a bid for ratings, Fox News flavored its broadcasts with overt boosterism[,] . . . emphasizing bright graphics, conservative commentators, and tabloid style. . . . Its reporting of the [2003] Iraq war supported President George W. Bush, marginalized voices of the opposition, and steeped its coverage of combat in patriotic rhetoric.”).

263. RAMPTON & STAUBER, *supra* note 119, at 201; see *supra* notes 120–21 and accompanying text (discussing the effects of repeated messaging and repeated exposure on reinforcement of existing attitudes). Another notable image was Bush’s “Mission Accomplished” speech, in front of the iconic banner on the deck of the USS *Abraham Lincoln*, when he claimed that “[w]e’ve removed an ally of al Qaeda, and cut off a source of terrorist funding.” George W. Bush, President Bush Announces Major Combat

images was provided by the Secretary of Defense's "independent" military analyst program.

C. "Independent" Military Analysts

In 2008, 8,000 pages of "e-mail messages, transcripts and records describing years of private briefings" and other interactions among the Secretary of Defense, the Pentagon, and independent military analysts were finally released by the government and obtained by the *New York Times* after it sued the Department of Defense in a Freedom of Information Act (FOIA) action.²⁶⁴ The acquired documents describe how the military analysts were instructed to argue for the invasion by emphasizing dangers from Iraq's chemical, biological, and nuclear weapons and support the liberation of the Iraqi people.²⁶⁵ The Department of Defense's military

Operations in Iraq Have Ended, (May 1, 2003) (transcript available at <http://georgewbush-whitehouse.archives.gov/news/releases/2003/05/20030501-15.html>); *see RAMPTON & STAUBER, supra* note 119, at 189–91 ("Like all good television, the war in Iraq had a dramatic final act, broadcast during prime time—the sunlight gleaming over the waves as the president's fighter jet . . . descended from the sky onto the USS *Abraham Lincoln*. . . . Although White House officials originally claimed that the navy jet was necessary, they later admitted that the aircraft carrier was close enough to shore that a helicopter would have worked just fine. It was so close to shore, in fact, that the aircraft carrier had to be repositioned in the water to keep the TV cameras from picking up the San Diego shoreline."); Bejesky, *Intelligence Information*, *supra* note 40, at 856, 858–59 ("The SSCI report unequivocally determined that no evidence supported Iraqi connections to 9/11 or al-Qaeda either before or after the invasion.").

264. David Barstow, *Message Machine: Behind TV Analysts, Pentagon's Hidden Hand*, N.Y. TIMES, Apr. 20, 2008, at A01, available at http://www.nytimes.com/2008/04/20/us/20generals.html?pagewanted=all&_r=0 ("To the public, these men are members of a familiar fraternity, presented tens of thousands of times on television and radio as 'military analysts' Hidden behind that appearance of objectivity, though, is a Pentagon information apparatus that has used those analysts in a campaign to generate favorable news coverage of the administration's wartime performance, an examination by The New York Times has found.").

265. *Id.* ("Internal Pentagon documents repeatedly refer to the military analysts as 'message force multipliers' or 'surrogates' who could be counted on to deliver administration 'themes and messages' to millions of Americans 'in the form of their own opinions.'"); John H. Cushman, Jr., *A Nation at War: Military Commentators; Iraq War Keeps Generals 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 [T]heir evident sympathies with the current commanders, not to mention their respect for the military and immersion in its doctrines, sometimes

analyst program was kept classified for more than five years and was only revealed, against the will of the Bush Administration, mere months before President Bush left office.²⁶⁶

The *New York Times* investigation emphasized that the Bush Administration was already engaged in detailed planning for the invasion of Iraq by early 2002, but “[m]any 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.”²⁶⁷ Consequently, the Secretary of Defense “recruited more than 75 retired officers,” and they became regulars on the national news networks, particularly FOX News, NBC, and CNN.²⁶⁸ *Media Matters* found that just 20 of the named military analysts “appeared or were quoted as experts” on ABC, CBS, NBC, CNN, FOX, MSNBC, CNBC, and NPR “more than 4,500 times.”²⁶⁹

seem to immunize them to the self-imposed skepticism of the news organizations that now employ them.”).

266. Barstow, *supra* note 264; *See* 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> (“The publicly available record consists of approximately 12,000 pages of documents and electronic audio and pictorial files that DOD released in response to a suit brought by the *New York Times* pursuant to the Freedom of Information Act (FOIA), *New York Times Co. v. United States Department of Defense*, Civ. A. No. 07 Civ 7481 (RJS) (S.D.N.Y. Aug. 23, 2007.”).

267. Barstow, *supra* note 264; *see also* Bejesky, *Weapon Inspections*, *supra* note 33, at 363 (noting that “whistleblowers revealed that White House officials began contemplating operations to remove the Iraqi government and to possibly occupy Iraq at the first National Security Council meetings in January and February 2001”).

268. Barstow, *supra* note 264; Norman Solomon, *War Made Less Easy: Media Execs Back Pedalling Support for War*, PAC. FREE PRESS (Aug. 17, 2007), <http://www.pacificfreepress.com/news/rss/1548-war-made-less-easy-media-execs-back-pedalling-support-for-war.html> (noting that CNN news executive Eason Jordan remarked that the “military generals turned war analysts” who appeared on CNN’s panels “had all been vetted and approved by the U.S. government”).

269. Meredith Adams et al., *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), <http://mediamatters.org/research/2008/05/13/military-analysts-named-in-times-exposeacute-ap/143430>; *see also* Glenn Greenwald, *Joe Galloway Blasts Pentagon and Larry Di Rita on ‘Military Analyst’ Claims*, SALON (May 15, 2008), <http://www.salon.com/2008/05/15/analysts/31> (“If anything, the Media Matters study actually *under-counts* the appearances, since it only counted ‘the analysts named in the *Times* article,’ and several of the analysts who were most active in the Pentagon’s propaganda program weren’t mentioned by name in that article.”).

The *New York Times* explained that “[i]n the fall and winter leading up to the invasion, the Pentagon armed its analysts with talking points portraying Iraq as an urgent threat” with chemical and biological weapons.²⁷⁰ The military analysts, who were specifically hired to appear “independent” of the Pentagon, were instructed by the Secretary of Defense to hide that association.²⁷¹ While Pentagon spokesperson Bryan Whitman maintained that the “intent and purpose” of the military analyst program was “nothing other than an earnest attempt to inform the American people,” many analysts disagreed and “expressed regret for participating in what they regarded as an effort to dupe the American public with propaganda dressed as independent military analysis.”²⁷² Former Green Beret Robert Bevelacqua, an analyst for FOX News, attended a prewar briefing about Iraq’s purported stockpiles of WMDs and was alarmed when he was told, “We don’t have any hard evidence.”²⁷³ Retired Army Lieutenant Colonel Robert L. Maginnis attended the same briefing and “concluded that the analysts were being ‘manipulated’ to convey a false sense of certainty about the evidence of the weapons.”²⁷⁴

The danger of overreliance on military analysts was clear to some observers, even before it was known that the Pentagon was involved.

270. Barstow, *supra* note 264 (“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 a relatively quick and inexpensive ‘war of liberation.’”).

271. *See id.* (“Participants were instructed not to quote their briefers directly or otherwise describe their contacts with the Pentagon.”).

272. *Id.*; Gordon, *supra* note 266, at 2, 11 (concluding that “[t]here is no doubt that DOD attempted to favorably influence public opinion with respect to the Administration’s war policies in Iraq and Afghanistan through the [military analysts program]”).

273. Barstow, *supra* note 264 (internal quotation marks omitted) (“It was them saying, “We need to stick our hands up your back and move your mouth for you,” [Bevelacqua] said.”).

274. *Id.* (“Kenneth Allard, a former NBC military analyst . . . said the campaign amounted to a sophisticated information operation. . . . As conditions in Iraq deteriorated, Mr. Allard recalled, he saw a yawning gap between what analysts were told in private briefings and what subsequent inquiries and books later revealed.”); *see also* Joseph L. Galloway, *Commentary: Propaganda and the Media*, MCCLATCHY DC (May 15, 2008), <http://www.mcclatchydc.com/2008/05/15/37225/commentary-propaganda-and-the.html> (describing the military analyst program as Rumsfeld and the Pentagon “hand-feeding horse manure to their TV generals, who in turn were feeding the same product to the American public by the cubic yard”).

Professor Colman McCarthy wrote, “That news divisions of NBC, ABC, CBS, CNN and Fox sanction[ed] this domination by militarists is a further assault on what the public deserves: independent, balanced and impartial journalism.”²⁷⁵ McCarthy continued, “The tube [wa]s a parade ground for military men” who were “saluting the ethic that war is rational, that bombing and shooting is the way to win peace” and “that their uniformed pals in Iraq [we]re there to free people, not slaughter them.”²⁷⁶ After the program’s existence was disclosed, the danger became inescapably clear. Army Major General John Batiste, who was not a participant in the Pentagon’s program but was later dismissed from CBS for voicing a comprehensive anti-Bush message,²⁷⁷ called the program a “very deliberate attempt on the part of the [Bush] administration to shape public opinion.”²⁷⁸ Andrew Heyward, former President of CBS News from 1996 to 2005, called it a “deliberate attempt to deceive the public” by presenting “[a]nalysts whose real allegiance was to the Pentagon” disguised as impartial sources “whose allegiance was to the networks and, therefore, the public.”²⁷⁹ Retired Colonel Sam Gardiner remarked,

275. 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* Clavier & El Ghaoui, *supra* note 125, at 224–25 (“[U]nlike their foreign counterparts, the [U.S.] networks proved an effective ‘conduit for Bush administration and Pentagon propaganda.’” (quoting Douglas Kellner, *Media Propaganda and Spectacle in the War on Iraq: A Critique of U.S. Broadcasting Networks*, 4 CULTURAL STUD. 329, 329 (2004), available at <http://csc.sagepub.com/cgi/reprint/4/3/329>)).

276. McCarthy, *supra* note 275; *see also* Mermin, *supra* note 2 (“The view that a preemptive war based on Iraq’s possession of chemical and biological weapons, which it had neither the interest nor the means to deploy to any real effect against the United States, was a bad idea, even if such weapons had in fact existed—a much more profound indictment of American policy—was marginalized in the prewar and postwar coverage.”).

277. “*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 (“CBS News is being accused of political censorship after it fired a retired U.S. general from his position as a paid news consultant after he criticized President Bush’s Iraq War policy.”).

278. David Folkenflik, *Pentagon Used Military Analysts to Deliver Message*, NPR (May 1, 2008), <http://www.npr.org/templates/story/story.php?storyId=90111757> (internal quotation marks omitted).

279. *Id.* (internal quotation marks omitted) (“*The New York Times* story has stirred discomfort within television news divisions already bruised by the media’s failure to challenge the administration before the invasion over claims that Iraq had weapons of mass destruction.”).

I think that there are about four or five levels of problems here. The most profound and the most painful is [the] disdain of the Pentagon for democracy. . . . They don't believe in democracy. They don't believe that the American people, if given the truth, will come to a good decision. That's very painful.²⁸⁰

Pentagon documents blatantly affirmed that the intention was to develop a core group of “message force multipliers” and “surrogates” to deliver the Bush Administration’s themes, views, and messages to Americans, who would depend on their perceived credibility and impartiality in forming their own opinions.²⁸¹ The military analysts’ commanding presence, familiarity with military doctrines, and decorated ranks made them largely immune from criticism.²⁸² The Pentagon even hired a consulting firm, Omnitec Solutions, and paid \$1,837,989 for services involving “list[ing] names of [participating military analysts] who provided commentary during a given period of time, summariz[ing] the commentary, and provid[ing] excerpts of transcripts” so that the Pentagon could evaluate how well their commentary “reflected, or failed to reflect, DOD’s stated

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

281. See Glenn Greenwald, *How the Military Analyst Program Controlled News Coverage: In the Pentagon’s Own Words*, SALON (May 10, 2008), http://www.salon.com/news/opinion/glenn_greenwald/2008/05/10/analysts/index.html (quoting an internal Pentagon memorandum stating that the mission was to “develop a core group from within our media analyst list of those that we can count on to carry our water”); see also PBS *NewsHour: Government Curries Favor with Military News Analysts* (PBS television broadcast Apr. 24, 2008), available at http://www.pbs.org/newshour/bb/media-jan-june_08-tvgenerals_04-24/ (John Stauber: “What happened here was a psy-ops campaign, an incredible government propaganda campaign whereby Donald Rumsfeld and Torie Clark, the head of public relations for the Pentagon, designed a program to recruit 75, at least 75 former military officers, . . . and insert them, beginning in 2002, before the attack on Iraq was even launched, into the major networks to manage the messages, to be surrogates. And that’s the words that are actually used, ‘message multipliers’ for the secretary of defense and for the Pentagon.”).

282. See Barstow, *supra* note 264 (noting that military analysts “often got more airtime than network reporters” and were extremely effective at “framing how viewers ought to interpret events” surrounding the Iraq War); Cushman, *supra* note 265 (“The generals bring a new, deep perspective to the coverage of the war. Many of them led the same units that are fighting in Iraq—or commanded, trained or shared barracks and beers with the current commanders.”); Folkenflik, *supra* note 278 (observing that network news media used the military analysts because they “conferr[ed] expertise and credibility on their television employers”).

policies or views.”²⁸³ These reports were used to keep military analysts on a short leash; Secretary of Defense Rumsfeld followed up on “even the mildest of criticism” and even fired some participants for being too critical.²⁸⁴

Democratic candidates during the 2008 presidential campaign denounced the program,²⁸⁵ and two months after the program was revealed,

283. Gordon, *supra* note 266, at 6–7; see Barstow, *supra* note 264 (“The Omnitec monitoring reports, circulated to more than 80 officials, confirmed that analysts repeated many of the Pentagon’s talking points: that Mr. Rumsfeld consulted ‘frequently and sufficiently’ with his generals; that he was not ‘overly concerned’ with the criticisms; that the meeting focused ‘on more important topics at hand,’ including the next milestone in Iraq, the formation of a new government.”).

284. Barstow, *supra* note 264; see also Glenn Greenwald, *Larry Di Rita’s Responses to Questions About the ‘Military Analyst’ Program*, SALON (May 15, 2008), http://www.salon.com/news/opinion/glenn_greenwald/2008/05/12/di_rita (documenting that “the 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” by Pentagon handlers). Retired Marine Lieutenant Colonel William V. Cowan was let go from the group for providing a viewpoint that did not conform to the party line.

On Aug. 3, 2005, 14 marines died in Iraq. That day, Mr. Cowan, who said he had grown increasingly uncomfortable with the “twisted version of reality” being pushed on analysts in briefings, called the Pentagon to give “a heads-up” that some of his comments on Fox “may not all be friendly,” Pentagon records show. Mr. Rumsfeld’s senior aides quickly arranged a private briefing for him, yet when he told Bill O’Reilly that the United States was “not on a good glide path right now” in Iraq, the repercussions were swift.

Mr. Cowan said he was “precipitously fired from the analysts group” for this appearance. . . . The next day James T. Conway, then director of operations for the Joint Chiefs, presided over another conference call with analysts. He urged them, a transcript shows, not to let the marines’ deaths further erode support for the war.

Barstow, *supra*; see also Greenwald, *supra* (reporting that program directives explicitly stated to employ only enthusiasts and to monitor message discipline “to weed out the less reliably friendly analysts” so that pro-Administration analysts “become the key go to guys for the networks”).

285. Michael Calderone & Avi Zenilman, ‘Deafening’ Silence on Analyst Story, POLITICO (May 8, 2008), <http://www.politico.com/news/stories/0508/10204.html> (quoting Senator John Kerry’s remarks that a thorough investigation was needed into “whether Americans’ tax dollars were being used to cultivate talking heads to sell the [Bush] administration’s Iraq policy”); Ari Melber, *Obama, Clinton Respond to Pentagon Analysts Story, McCain and Networks Remain Silent*, HUFFINGTON POST (Apr. 6, 2008), http://www.huffingtonpost.com/2008/04/28/obama-clinton-respond-to_n_98999.html (reporting that Senator Hillary Clinton’s campaign issued a statement saying that the

Congressman Dennis Kucinich offered Articles of Impeachment against George W. Bush.²⁸⁶ Part of Article I's allegation was that secret propaganda was used to "manufacture a false case for war against Iraq."²⁸⁷ The Resolution charged that "[t]he Department of Defense (DOD) has engaged in a years-long secret domestic propaganda campaign to promote the invasion and occupation of Iraq. The White House Press Secretary defended this secret program following its exposure."²⁸⁸

House Democrats Rosa DeLauro and John Dingell wrote a letter to FCC Chairman Kevin Martin contending that the Pentagon's program was "unethical and perhaps illegal."²⁸⁹ The Representatives remarked,

"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."²⁹⁰

program "raises questions of 'credibility and trust at the Pentagon,'" and that Senator Barack Obama's campaign issued a statement saying he was "'deeply disturbed' that the [Bush] administration 'sought to manipulate the public's trust,' and saying the program 'deserves further investigation to determine if laws or ethical standards were violated.'").

286. *Kucinich Introduces Bush Impeachment Resolution*, CNN (June 11, 2008), <http://www.cnn.com/2008/POLITICS/06/11/kucinich.impeach/>.

287. Resolution Impeaching George W. Bush, President of the United States, of High Crimes and Misdemeanors, H.R. Res. 1258, 110th Cong., at 2 (2008).

288. *Id.* at 7 ("Asked about the Pentagon's propaganda program at White House press briefing in April 2008, White House Press Secretary Dana Perino defended it, not by arguing that it was legal but by suggesting that it 'should' be . . .").

289. Press Release, Rosa L. DeLauro & John D. Dingell, U.S. House of Representatives, DeLauro, Dingell Call for FCC Investigation of Pentagon Propaganda Program, (May 6, 2008), <https://web.archive.org/web/20090130031709/http://delaurow.house.gov/release.cfm?id=566>.

290. *Id.* (internal quotation mark omitted); *see also* Galloway, *supra* note 274 ("Particularly abhorrent to the U.S. Government Accountability Office (GAO), which oversees compliance with the [propaganda] ban, is an agency's use of covert propaganda or covert attempts to mold opinion through the undisclosed use of third parties."). Representative DeLauro and 40 other members of Congress wrote a similar letter to Pentagon Inspector General Claude M. Kicklighter, which argued that "this unethical, and potentially illegal, propaganda campaign aimed at deliberately misleading the American public should have been disclosed long ago by your office." Letter from Rosa L. DeLauro et al., Members of Congress, to Claude M. Kicklighter, Inspector General, Dept. of Def. (May 2, 2008), available at <https://web.archive.org/web/20090228070810/http://www.house.gov/frank/DoD%20IG>

More than a year after investigations were requested, the U.S. Government Accountability Office produced a report in response to the congressional inquiries, finding that the program violated no laws.²⁹¹ But considering all of the false allegations about prohibited weapons programs that lacked substantiation in the classified intelligence,²⁹² and considering that the Bush Administration planned to displace the Iraqi government from the moment it entered office,²⁹³ many critics viewed this report's conclusion with shock and awe.²⁹⁴ There is no basis for the White House or Secretary of Defense to authorize these operations,²⁹⁵ and the program met the definition

%20Propaganda%20Letter%20FINAL.pdf).

291. Gordon, *supra* note 266, at 2, 11; *see also* David Barstow, *Inspector General Sees No Misdeeds in Pentagon's Effort to Make Use of TV Analysts*, N.Y. TIMES, Jan. 16, 2009, at A15, available at http://www.nytimes.com/2009/01/17/us/politics/17military.html?_r=0 ("The office of the Defense Department's inspector general said in a report Friday that it had found no wrongdoing in a Pentagon public relations program that made use of retired officers who worked as military analysts for television and radio networks.").

292. Bejesky, *Intelligence Information*, *supra* note 40, at 875–76 (describing the extremely weak evidence for the argument that Iraq possessed an active weapons program or posed a threat to the United States); *see* sources cited *supra* notes 5–6 and discussion *supra* Part IV.A.

293. *See* Robert Bejesky, *The SSCI Investigation of the Iraq War: Part II: Politicization of Intelligence*, 40 S.U. L. REV. 243, 249–51 (2013); Bejesky, *Politico*, *supra* note 31, at 63–64 ("Scandal broke shortly after former Treasury Secretary Paul O'Neill went public to explain that the first National Security Council (NSC) meetings (January/February 2001) focused on Iraq."); Spectar, *supra* note 5, at 94–99 (collecting evidence that "the Bush Administration had decided to overthrow Saddam Hussein's regime, one way or another, long before 9/11").

294. *See* Barstow, *supra* note 291 ("Some Democratic members of Congress immediately expressed concerns about the scope, methodology and accuracy of the report."); Jeremy Berkowitz, Comment, *Raising the Iron Curtain on Twitter: Why the United States Must Revise the Smith-Mundt Act to Improve Public Diplomacy*, 18 COMMLAW CONSPPECTUS 269, 299–301 (2009) (calling the military analyst program the "most egregious example of the Bush Administration implementing propaganda techniques"); Glenn Greenwald, CNN, *The Pentagon's "Military Analyst Program" and Gitmo*, SALON (May 9, 2008), http://www.salon.com/2008/05/09/cnn_abc ("[I]f this wasn't an example of an illegal, systematic 'domestic propaganda campaign' by the Pentagon, then nothing is."); *see also* Greenwald, *supra* note 284 ("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.").

295. The Constitution provides that Congress has the authority to declare war and affirms that regulating the military's size, organization, and appropriations are congressional powers—not executive powers. *See* U.S. CONST. art. I, § 8, cl. 12–14; Chappell v. Wallace, 462 U.S. 296, 301 (1983) (holding that Congress has "plenary

of propaganda and fell within the 2002–2008 appropriations acts’ prohibitions against spending for “publicity or propaganda purposes not authorized by Congress.”²⁹⁶

However, the television news outlets that had hosted the implicated analysts for several years virtually ignored the *New York Times* investigation²⁹⁷—even though the experts had provided a biased message on behalf of the Bush Administration and even though many of the Pentagon’s analysts may have held personal financial interests in military contractors operating in Iraq.²⁹⁸ It was a further example of networks sourcing their news

control over rights, duties, and responsibilities in the framework of the Military Establishment”).

296. Department of Defense Appropriations for 2008, Pub. L. No. 110-116, § 8001, 121 Stat. 1295, 1313 (2007). Propaganda historically was defined as the “dissemination of biased ideas and opinions, often through the use of lies and deception,” but the definition evolved to mean “suggestion” or “influence” by “manipulation of symbols and the psychology of the individual” through mass communications. PRATKANIS & ARONSON, *supra* note 188, at 11. As a reaction to the military analysts program, Congress codified the prohibition against the use of appropriated funds for propaganda programs not specifically authorized by law and demanded that the Comptroller General “issue a legal opinion to Congress on whether the Department of Defense violated appropriations prohibitions on publicity or propaganda activities.” Duncan Hunter National Defense Authorization Act for Fiscal Year 2009, Pub. L. No. 110-417, § 1056, 122 Stat. 4356 (2008) (codified as amended at 10 U.S.C. § 2241a); *see* Gordon, *supra* note 266, at 2 n.1 (noting that the prohibition against unauthorized spending on propaganda “is now permanently applicable to all DOD appropriations”).

297. *See* Berkowitz, *supra* note 294, at 301 (noting that “several media outlets have ignored the report, and Fox News continues to use one of the analysts mentioned in the New York Times article that broke the story”); Calderone & Zenilman, *supra* note 285 (reporting that, as of May 8, 2008, coverage of and reaction to the military analysts program revelations were “noticeably absent from television airwaves since the story broke on April 20”); Greenwald, *supra* note 294 (“[T]he truly extraordinary blackout by the major television and cable news networks—which were complicit in this program—continues.”).

298. *See* Gordon, *supra* note 266, at 11 (finding 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 resulting from potential competitive advantages for defense contractors with commercial ties to [military analysts in the program]”); Press Release, DeLauro & Dingell, *supra* note 289 (“[W]e are concerned that the military analysts may have violated Section [508] of the [Communications Act of 1934], 47 U.S.C. § [508], 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.”); *see also* Barstow, *supra* note 264 (“Most of the analysts have ties to military contractors vested in the very war policies they are asked to assess on air. Those business

coverage, both before and after the invasion of Iraq, using analysts who were willing to provide commentary in support of the official government position even when it diverged from a more honest evaluation of the situation.

D. False Positive WMD Discoveries

Embedded journalists who accompanied U.S. military personnel into Iraq kept American viewers transfixed to the real-time event of invasion, instilled patriotism, and generated some ambiguity over whether WMDs were found. This was also a Pentagon program—the Pentagon “allocat[ed] embed slots to media organizations,” selected approximately 700 reporters to travel and live with U.S. soldiers, and provided all accommodations and protective equipment for embeds.²⁹⁹ The Pentagon maintained near-total control over the embed program; Pentagon officials chose pools, funded journalists’ accommodations, provided necessities, security, and camaraderie,³⁰⁰ could freely dismiss noncompliant journalists, could impose temporary blackouts,³⁰¹ screened and controlled information prior to

relationships are hardly ever disclosed to the viewers, and sometimes not even to the networks themselves. But collectively, [the military analysts] represent more than 150 military contractors either as lobbyists, senior executives, board members or consultants.”); Daniel Benaim et al., *TV’s Conflicted Experts*, THE NATION (Apr. 21, 2003), <http://www.thenation.com/article/tvs-conflicted-experts> (contending that military analysts were biased and had “ideological or financial stakes in the war” and specifying that “[m]any [of the program’s military analysts] hold paid advisory board and executive positions at defense companies and serve as advisers for groups that promoted an invasion of Iraq”).

299. 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) ¶¶ 2.A–C, 3.A, 5.C (2003), available at <http://www.defense.gov/news/Feb2003/d20030228pag.pdf>; JOHNSON, *supra* note 7, at 115–16 (describing the process of preparing embedded “reporters, photographers, and television crews”); Anderson, *supra* note 130, at 57 (“More than 700 U.S. and foreign journalists covered the invasion in this fashion.”).

300. Anderson, *supra* note 130, at 57 (“It was widely observed, by the journalists themselves as well as by outsiders, that the embedded journalists identified with the soldiers they were covering and came to view matters from their perspective. This gave the reporting a patriotic flavor.” (footnote omitted)); Zeide, *supra* note 250, at 1315, 1321–22 (stating that embedded journalists’ “complete immersion” reinforces military control over the content and tone of reporting because journalists may be eager to continue participating in the foreign adventure, afraid of offending unit commanders, or motivated to build camaraderie with soldiers).

301. RAMPTON & STAUBER, *supra* note 119, at 185 (noting that “officers could censor and temporarily delay reports for ‘operational security.’”); see Zeide, *supra* note

publication or broadcast,³⁰² and could prevent journalists from departing from assigned units or locations.³⁰³

These mechanisms of control were potentially inconsistent with First Amendment requirements that government sponsorship for speech be content-neutral and not have a “coercive effect” on information,³⁰⁴ and scholars, journalists, and news agencies openly agreed that the embed system biased reporting.³⁰⁵ The Department of Defense enjoyed unequal bargaining

250, at 1328–29 (arguing that military “prepublication review” of journalists’ clearance to access or publish information and the “mandated preference for temporary blackouts” allowed the military to exert control over content while “avoid[ing] imposing formalized prior restraints” and thus avoiding more difficult constitutional questions).

302. U.S. DEP’T OF DEF, *supra* note 299, ¶¶ 6.A.1–2 (“U.S. military personnel shall protect classified information from unauthorized or inadvertent disclosure. . . . When in doubt, media will consult with the unit commander or his/her designated representative.”); Robert Jensen, *The Military’s Media*, THE PROGRESSIVE (APR. 30, 2003), <http://www.progressive.org/> news/2003/04/1228/militarys-media (noting that the Pentagon’s rules could be construed to permit censorship of “whatever field commanders want[ed] to censor”).

303. See U.S. DEP’T OF DEF., *supra* note 299, ¶¶ 2.C.1 (“Embedded media are not authorized use of their own vehicles while traveling in an embedded status.”); RAMPTON & STAUBER, *supra* note 119, at 185 (noting that Pentagon rules “said that reporters could not travel independently,” which allowed the Pentagon to shape the message by controlling “the actual physical location from which reporters witness events”).

304. See Zeide, *supra* note 250 (examining “the First Amendment implications of the embed program” employed during the 2003 Iraq War, including “the provision for broad governmental discretion over media content and the possible promotion of pro-military coverage”); see also Jacobs, *supra* note 251 (analyzing restrictions on embedded journalists during the 1991 Gulf War “in terms of First Amendment jurisprudence”); cf. Yamamoto, *supra* note 5, at 297 (noting that, unlike more independent embedding practices used during the Vietnam War, the use of “government-chosen ‘embedded’ journalists” and content-based restrictions skews reporting in favor “of the government’s war propaganda”); *supra* notes 1–4, 47–66 and accompanying text (discussing First Amendment principles and the importance of a free and independent press).

305. Howell Raines, an editor for the *New York Times*, wrote about the interaction between the embedded media and the Pentagon during the 1991 Gulf War: “They managed us completely. If it were an athletic contest, the score would be 100 to 1.” MACARTHUR, *supra* note 11, at 35; see also Jacobs, *supra* note 251, at 675 (stating that the 1991 Gulf War embed program “suggest[ed] that the military, in the twenty years since the Vietnam War, ha[d] fashioned a comprehensive strategy to manipulate the media’s coverage of military affairs”). Likewise, an embed during the 2003 Iraq War noted, “The point wasn’t that I wasn’t reporting the truth; the point was that I was reporting the marine grunt truth—which had also become my truth.” Zeide, *supra* note 250, at 1322 (internal quotation marks omitted) (quoting Gordon Dillow, *Grunts and Pogues: The Embedded Life*, COLUM. JOURNALISM REV., May/June 2003, at 33); see also

power over the embedded journalists because the Executive has enhanced discretion to establish conditions of classification and military secrecy during war,³⁰⁶ and the media has neither an elevated First Amendment right to access beyond the public's right of access to government information³⁰⁷ nor a First Amendment right to accompany the military into battle.³⁰⁸

The Bush Administration's preselected embedded reporter model was effectively President George H.W. Bush's 1991 Gulf War model,³⁰⁹ which

CHRIS AYERS, WAR REPORTING FOR COWARDS 12–13 (2005) (providing the firsthand account of an embedded reporter who "sneered at the notion" that embedded journalists whose lives were at stake could be "in any way impartial"); Anderson, *supra* note 130, at 50 ("The practice of embedding journalists with military units during the invasion of Iraq in 2003 had the effect, whether calculated or fortuitous, of providing mole's eye views of the war that were overwhelmingly favorable to the military without enhancing coverage of the overall progress of the war."); WEAPONS OF MASS DECEPTION, *supra* note 89, 36:43–37:00 (noting that the embed program conflicts with journalists' ethical standards that protect against biased reporting and conflicts of interest by prohibiting journalists from accepting anything of value from the sources they cover).

306. See *supra* notes 129–30, 198–200 and accompanying text.

307. *Pell v. Procurier*, 417 U.S. 817, 833–34 (1974) ("The First and Fourteenth Amendments bar government from interfering in any way with a free press. The Constitution does not, however, require government to accord the press special access to information not shared by members of the public generally."); *Branzburg v. Hayes*, 408 U.S. 665, 684–85 (1972) ("It has generally been held that the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally.").

308. *Flynt v. Rumsfeld*, 355 F.3d 697, 702–06 (D.C. Cir. 2004) (holding there is no First Amendment "right to travel with military units into combat, with all of the accommodations and protections that entails—essentially what is currently known as 'embedding'"); Karen C. Sinai, Note, *Shock and Awe: Does the First Amendment Protect a Media Right of Access to Military Operations?*, 22 CARDOZO ARTS & ENT. L.J. 179, 197–200 (2004) (stating that the media does not have a constitutional right of unconditional access to the battlefield and arguing that challenges to restrictions on embedded journalists' press freedoms must start by "focusing the dispute" to "couch the issue in terms where the court can meaningfully consider the 'information sought'" (quoting *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 588 (1980) (Brennan, J., concurring))).

309. See also Anderson, *supra* note 130, at 58 ("Journalists [embedded in 2003] who had also covered the first Gulf War said access to military officers directing the campaign was much worse in 2003."); *supra* note 305 and accompanying text. Compare *MACARTHUR*, *supra* note 11, at 189–94 (discussing "censorship by delay" and "censorship by preventing reporters from seeing anything interesting" during the 1991 Gulf War), Arzon, *supra* note 85, at 333–34 (noting that during the 1991 Gulf War, "the military controlled the reporters' movements and what footage was taped"), and Zeide, *supra* note 250, at 1313 & n.12 ("The military implemented the pool system and

had already been recognized as a system of bias and censorship that overtly controlled media coverage.³¹⁰ The *New York Times* reported that the military operations for the 1991 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 of Vietnam.”³¹¹ In 2003, the program parameters had changed, but its goal was the same—providing “views of the war that were overwhelmingly favorable to the military without enhancing coverage of the overall progress of the war.”³¹² Moreover, the second Bush Administration could use the news

prepublication review during Operation Desert Storm in the Persian Gulf War, although commentators criticized the restrictive implementation of the policies.”), *with MACARTHUR, supra*, at xx–xxii (describing embedding practices during the 2003 Iraq war as “a kind of censorship by envelopment instead of by force”), Arzon, *supra*, at 345–47 (discussing the security reviews and travel restrictions that embedded journalists were required to agree to “[i]n order to receive embedding privileges” in 2003), and Zeide, *supra*, at 1317–19 (noting that under the 2003 embedding policies, reporters are “subject to removal at the commander’s discretion for compromising operational security” and that “the military expelled approximately two dozen journalists from Iraq” in this way).

310. *See MACARTHUR, supra* note 11, at 8–9 (noting widespread consensus that the 1991 Gulf War was “a devastating and immoral victory for military censorship and a crushing defeat for the press and the First Amendment”); Anderson, *supra* note 130, at 54 (noting that during the 1991 Gulf War, the military always accompanied reporters during interviews, escorted pool members to preselected locations, detained those who strayed from authorized locations, retained an absolute right to censor reporting, denied interviews to reporters who criticized the war, and “assured that reporters would hear nothing from military personnel who questioned official versions of events”); Jacobs, *supra* note 251, at 677–78, 690–91 (arguing the 1991 pool coverage policy was “politically harmful in its chilling effect on public discourse,” particularly because “the military used access control as a tool to reward and punish correspondents on the basis of what they wrote”); *see also* John E. Smith, Note, *From the Front Lines to the Front Page: Media Access to War in the Persian Gulf and Beyond*, 26 COLUM J.L. & SOC. PROBS. 291, 301–04 & nn.53–58 (1993) (noting that the 1991 media access policy gave the Pentagon extensive and multifaceted control over media coverage of the war).

311. Jason DeParle, *After the War; Long Series of Military Decisions Led to Gulf War News Censorship*, N.Y. TIMES (May 5, 1991), <http://www.nytimes.com/1991/05/05/world/after-the-war-long-series-of-military-decisions-led-to-gulf-war-news-censorship.html>; *see MACARTHUR, supra* note 11, at 7. To that end, General Norman Schwarzkopf and then-Secretary of Defense Dick Cheney possessed “a near monopoly on information about the war” and even implemented periodic news blackouts. Anderson, *supra* note 130, at 50.

312. Anderson, *supra* note 130, at 50; Zeide, *supra* note 250, at 1313–14 (quoting U.S. DEP’T OF DEF., *supra* note 299, at ¶ 2.A) (noting that the Pentagon designed the embedded journalist program “as an exercise in media warfare—to shape worldwide

media's meek response to the 1991 press coverage policies to predict a similarly meek response to the 2003 program's more subtle but equally pervasive restrictions.³¹³

During the invasion, Bush Administration officials continued to reiterate that their preinvasion allegations of chemical, biological, and nuclear weapons would be confirmed.³¹⁴ Press Secretary Ari Fleischer reminded Americans, “[T]here is no question that we have evidence and information that Iraq has weapons of mass destruction, biological and chemical particularly.”³¹⁵ On March 22, 2005, Secretary of Defense Rumsfeld remarked on *Face the Nation* that months of intelligence reports confirmed that there was still a lingering danger of a devastating WMD attack—“that [Iraqi forces] have chemical and biological weapons, and that they have dispersed them, and that they are weaponized, and that, in one case at least,

public perception of the ‘national security environment’”).

313. MACARTHUR, *supra* note 11, at 8 (explaining that U.S. corporate news media identified the system of information control during the 1991 Gulf War and “made polite inquiries, held informal meetings, and sent respectful letters, but they voiced no strong objection”); Jacobs, *supra* note 251, at 687 (noting that the media anecdotally and informally complained about restrictions during the 1991 Gulf War but lodged few official objections and appealed only five of 820 censored reports); *see also supra* Part IV.A.2.a.

314. See *Weapons of Mass Destruction: Who Said What When*, COUNTERPUNCH (May 29, 2003), <http://www.counterpunch.org/wmd05292003.html> (chronicling top military and Bush Administration officials’ statements regarding their expectations that WMDs would be found). On April 10, 2003, Press Secretary Fleischer summarized, “I think you have always heard, and you continue to hear from officials, a measure of high confidence that, indeed, the weapons of mass destruction will be found.” *Id.* Nearly a month after Bush delivered his “Mission Accomplished” speech, General Tommy Franks stated that he had “absolute confidence” that WMDs would be found “in one of the 2,000 or 3,000 sites” he claimed the United States “already kn[e]w about” or in another as-yet-unknown location. *Transcript: Gen. Tommy Franks on Fox News Sunday*, FOX NEWS (Apr. 13, 2003), <http://www.foxnews.com/story/0,2933,84055,00.html>.

315. Ari Fleischer, Press Briefing (Mar. 21, 2003), <http://georgewbush-whitehouse.archives.gov/news/releases/2003/03/20030321-9.html>; *see also* President George W. Bush, Radio Address: President Discusses Beginning of Operation Iraqi Freedom (Mar. 22, 2003), <http://georgewbush-whitehouse.archives.gov/news/releases/2003/03/20030322.html> (“[O]ur mission is clear, to disarm Iraq of weapons of mass destruction, to end Saddam Hussein’s support for terrorism, and to free the Iraqi people.”); *Frank Holds Press Briefing*, CNN (Mar. 22, 2003), <http://transcripts.cnn.com/TRANSCRIPTS/0303/22/se.22.html> (General Tommy Franks: “There is no doubt that the regime of Saddam Hussein possesses weapons of mass destruction. And as this operation continues, those weapons will be identified, found, along with the people who have produced them and who guard them.”).

that the command in control arrangements have been established" and "that orders have been issued that permit selected [Iraqi] commanders to make judgments" regarding when and how to use those weapons.³¹⁶ According to this narrative, the U.S. military needed to discover and disarm the weapons; this mission unfolded with U.S. military officials escorting embedded journalists to locations of suspected weapons sites to report alleged chemical and biological weapons discoveries.³¹⁷

Using embedded journalists' on-site reports, news agencies broke biological and chemical weapon discovery stories without subjecting them to more critical analysis. Just four days into the war, premature reports stated that U.S. forces "up the road from Nasiriyah, in a town called Najaf," may "have captured a chemical weapons plant and perhaps more important, the commanding general of that facility" and "huge amounts of chemicals."³¹⁸ Days later, the U.S. military spokesperson announced that chemical protection suits, decontamination equipment, and stockpiles of atropine (a nerve gas antidote) were found near Nasiriyah;³¹⁹ one week later, British

316. *Face the Nation: Secretary Rumsfeld Interview* (CBS television broadcast Mar. 22, 2003), transcript available at <http://www.defense.gov/transcripts/transcript.aspx?transcriptid=2098>; see also Bejesky, *Weapon Inspections*, *supra* note 33, at 338–39 n.213 (collecting Bush Administration officials' repeated claims that intelligence confirmed "Hussein had already given orders to deploy [chemical] weapons;" even those weapons were never found or shown to exist).

317. *Face the Nation: Secretary Rumsfeld Interview*, *supra* note 316.

318. FAIR, *supra* note 42 (ABC's John McWethy: "One U.S. official said [the captured commander] is a potential 'gold mine' about the weapons Saddam Hussein says he doesn't have."); 'Huge' Suspected Chemical Weapons Plant Found in Iraq, FOX NEWS (Mar. 24, 2003), <http://www.foxnews.com/story/2003/03/24/huge-suspected-chemical-weapons-plant-found-in-iraq/> ("The Jerusalem Post ran a story earlier Sunday that was written by a journalist on-hand with the U.S. unit—the 1st Brigade of the 3rd Infantry Division—that took the plant."); see also *Lack of Skepticism Leads to Poor Reporting on Iraq Weapons Claims*, FAIRNESS & ACCURACY IN REPORTING (Mar. 25, 2003), <http://fair.org/take-action/action-alerts/lack-of-skepticism-leads-to-poor-reporting-on-iraq-weapons-claims/> ("Fox News Channel, less cautious than some of its competitors, treated the report of a chemical weapons factory as fact in a series of onscreen banners like 'Huge Chemical Weapons Factory Found in So. Iraq.'"); Council on Foreign Relations, *Q&A: Where Are Iraq's Chemical and Biological Weapons?*, N.Y. TIMES (Apr. 2, 2003), http://www.nytimes.com/cfr/international/slot1_040203.html?_r=1&pagewanted=print&position=top& (clarifying that "preliminary searches at a suspected chemical weapons factory near the central Iraqi town of Najaf found no banned materials").

319. Tony Perry & David Wharton, *British Battle for Control of Basra*, SEATTLE TIMES (Mar. 26, 2003), <http://community.seattletimes.nwsource.com/archive/?date=2003>

military forces purportedly found a cache of protective chemical suits, training materials, and atropine injectors near Basra.³²⁰

Three weeks into the invasion, 14 barrels of chemicals were discovered “near Hindiyah in central Iraq”; military officials stated they believed that they contained the “nerve agents sarin and tabun,” but testing confirmed that the barrels contained pesticides.³²¹ The next day, embedded reporter John Burnett told NPR that the 101st Airborne found “the first solid confirmed existence of chemical weapons”—they had allegedly discovered “20 medium-range rockets with warheads containing sarin, a nerve gas, and mustard gas, which is a blister agent,” that were “truck-mounted” and “ready to fire.”³²² The following day, CNN broadcast video of U.S. soldiers

0326&slug=iraq26 (“The Marines [in An Nasiriyah] took 170 prisoners and found . . . 3,000 chemical-protective suits with masks and atropine injectors.”). Nasiriyah did not have chemical weapons; coverage relating to Nasiriyah focused instead on the capture and rescue of Private First Class Jessica Lynch, which became a patriotic media narrative of its own and demonstrated that “when the media are hungry for a story” they tend to “latch on to the more sensational version of events.” Dante Chinni, *Jessica Lynch: Media Myth-Making in the Iraq War*, PROJECT FOR EXCELLENCE IN JOURNALISM (June 23, 2003), <http://web.archive.org/web/20101109131945/http://www.journalism.org/node/223> (“The story [of Jessica Lynch] was heralded on front pages and newscasts across the country. And a picture of Lynch, looking tired, but grateful lying on a stretcher with a folded American flag draped over her, flooded the airwaves.”); *see also* FAIR, *supra* note 42 (“Most of the early details of the raid to rescue Lynch would prove to be entirely false.”).

320. Michael Martinez, *Troops Seize Weapons, “Enough for Battalion,”* CHI. TRIB. (Mar. 31, 2003), http://articles.chicagotribune.com/2003-03-31/news/0303310074_1_chemical-weapons-chemical-decontamination-gas-masks (reporting that British forces “[p]atrolling rural roads outside Basra” had found a cache containing stockpiles of “chemical warfare equipment such as gas masks, filters and antidote injectors for nerve agents”); *Weapons of Mass Destruction*, EACH ONE TEACH ONE (Aug. 1, 2003), <http://www.eachoneteachone.org.uk/weapons-of-mass-destruction> (noting that the equipment found in Basra and Nasiriyah was “[l]ater confirmed to be for defensive purposes”).

321. *Blair: We Will Find Iraq’s Weapons*, SKY NEWS (Apr. 08, 2003), <http://news.sky.com/story/177051/blair-we-will-find-iraqs-weapons>.

322. *Morning Edition* (NPR broadcast Apr. 7, 2003), available at <http://www.npr.org/programs/morning-edition/2003/04/07/13040179/?showDate=2003-04-07>; *see also* Derek Rose, *Poison Missiles Are Found By G.I.s*, N.Y. DAILY NEWS (Apr. 8, 2003), <http://www.nydailynews.com/archives/news/poison-missiles-found-g-s-article-1.670858> (“NPR identified the truck-mounted rocket launcher as a BM-21—the same Soviet-made system Saddam used in the 1980s to deliver deadly nerve agents during the Iran–Iraq war.”). The Pentagon “backed off and would not confirm the report,” which NPR’s *All Things Considered* discussed later that day, but “neither *Morning Edition* nor *All Things Considered* went back to the story” to clarify that no chemical weapons had been found.

in gas masks using detection equipment on barrels at a military facility near Karbala, south of Baghdad.³²³ Anonymous Pentagon sources stated that “preliminary field tests on substances found at the site suggest[ed] they contain[ed] several banned chemical weapons, including deadly nerve agents and blister agents.”³²⁴

Four days later, Fox News announced, “U.S. Marines may have found weapons-grade plutonium in a massive underground facility discovered beneath Iraq’s Al Tuwaitha nuclear complex.”³²⁵ U.S. defense officials confirmed that “preliminary tests conducted on the material have indicated that it may be weapons-grade plutonium.”³²⁶

On April 26, five weeks into the invasion, *ABC World News Tonight*

Jeffrey A. Dvorkin, *NPR News in Iraq: Getting the Full Story?*, NPR (Apr. 11, 2003), <http://www.npr.org/yourturn/ombudsman/2003/030411.html> (“That left a lot of listeners with the impression that NPR was eager for the scoop, but less eager to stay on the story.”); *see also* FAIR, *supra* note 42 (noting that the story of chemical weapons found in warheads “would quickly wash out” as U.S. officials stated that they had seen no intelligence corroborating it).

323. *Tests Show Barrels Contain Chemicals Agents: US Officials*, SYDNEY MORNING HERALD (Apr. 8, 2003), <http://www.smh.com.au/articles/2003/04/08/1049567645646.html> (“Video of the search taken by CNN television showed soldiers in gas masks using handheld chemical weapons detectors to investigate metal drums.”); *see also* *All Things Considered* (NPR broadcast Apr. 7, 2003), <http://www.npr.org/programs/all-things-considered/2003/04/07/13060187/?showDate=2003-04-07> (reporting that “U.S. officials have cited the discovery of suspicious chemicals, apparently in 50-gallon drums, that are in a warehouse along the Euphrates River, southwest of Baghdad” and that “the contents of the barrels are being analyzed”).

324. *Preliminary Tests Show Chemical Weapons at Iraqi Site*, FOX NEWS (Apr. 7, 2003), <http://www.foxnews.com/story/0,2933,83449,00.html> (conveying embedded journalist Tom Lasseter’s reports that “he and several soldiers were decontaminated after some of the soldiers felt ill while searching the compound”); *see* Rose, *supra* note 324 (“Initial tests revealed the chemical agents found in the barrels were sarin, tabun and lewisite. About a dozen soldiers became sick and developed rashes.”). The initial testing turned out to be flawed “because nerve agents are chemically very similar to many pesticides,” and Lieutenant General Benjamin Freakley later clarified that the soldiers “were suffering from heat exhaustion, not chemical exposure.” SYDNEY MORNING HERALD, *supra* note 323.

325. *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” and that he saw “many, 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.*

326. *Id.* This story was debunked soon after it aired. *See* FAIR, *supra* note 42.

aired an exclusive report from embedded journalist David Wright indicating that “U.S. troops discover[ed] chemical agents, missiles, and what could be a mobile laboratory” at a site “130 miles northwest of Baghdad,” and that chemicals in 55-gallon drums initially tested positive for chemical weapons—adding that an Army lieutenant told Wright “the tests have an accuracy of 98 percent.”³²⁷

Nearly two months into the invasion, the finding that was hailed as potentially “the most significant WMD finding[]” was 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.”³²⁸ Top Bush Administration officials kept repeating “for months afterward” that this find was “a vindication of the decision to go to war,”³²⁹ but investigations

327. *ABC's Weapons "Scoop" Turns Up Empty*, FAIRNESS & ACCURACY IN REPORTING (Apr. 29, 2003), <http://fair.org/take-action/action-alerts/abcs-weapons-quot-coopquot-turns-up-empty/> (internal quotation mark omitted) (“ABC continued to pump the story the next day, with Wright appearing on This Week to explain that ‘what may turn out to be a very significant find are these mobile laboratories, which appear to have a pumping apparatus as well as machinery to mix chemicals.’”); FAIR, *supra* note 42 (noting that 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.”) (internal quotation marks omitted). On April 28, the *New York Times* discounted ABC’s announcements, reporting that “Capt. Ryan Cutchin, the leader of Mobile Exploitation Team Bravo, or MET Bravo, said that after surveying the site, near the northern Iraqi town of Bayji, his team believed that the earlier reports were wrong.” Judith Miller, *Aftereffects: Weapons; Suspicious Discovery Apparently Wasn’t Chemical Weapons*, N.Y. TIMES (Apr. 28, 2003), <http://www.nytimes.com/2003/04/28/world/aftereffects-weapons-suspicious-discovery-apparently-wasn-t-chemical-weapons.html>. ABC issued no retraction or correction, and “there was no mention of the story on the Monday or Tuesday broadcasts of *World News Tonight*.” *ABC’s Weapons “Scoop,”* *supra*.

328. FAIR, *supra* note 42 (quoting *NBC Nightly News* (NBC television broadcast May 12, 2003)). NBC had introduced the discovery one day earlier as “new evidence” that “Saddam Hussein’s regime was capable of building weapons of mass destruction,” and embedded correspondent Jim Avila reported that “military sources contend [the discovery] is very close to that elusive smoking gun.” *Id.* (quoting *NBC Nightly News* (NBC television broadcast May 11, 2003)); *see also* 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/international/worldspecial/21WEAP.html> (reporting that “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”).

329. 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>

confirmed that this was not the case.³³⁰ Three years later, reporters learned of a classified 122-page Defense Intelligence Agency report that “concluded that the trailers had nothing to do with biological weapons” on May 27, 2003—but the Bush Administration chose to classify this report and keep repeating the opposite.³³¹

Secretary Rumsfeld affirmed that announcements had to be treated

e/2006/04/11/AR2006041101888_pf.html; *see also* Interview by TVP, Poland with George W. Bush (May 29, 2003), *available at* <http://www.presidency.ucsb.edu/ws/?pid=64743> (“We found the weapons of mass destruction. We found biological laboratories. 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.’ They’re illegal. They’re against the United Nations resolutions, and we’ve so far discovered two.”); Ari Fleischer, Press Briefing (May 29, 2003), <http://www.presidency.ucsb.edu/ws/index.php?pid=61102> (“Those biological trucks themselves . . . that’s why the American people had a lot to fear about Saddam Hussein developing these weapons, including biological weapons, which there’s now proof-positive that he had these biological mobile trucks for the purpose of producing biological weapons.”).

330. SENATE SELECT COMM. ON INTELLIGENCE, 109TH CONG. REPORT ON POSTWAR FINDINGS ABOUT IRAQ’S WMD PROGRAMS AND LINKS TO TERRORISM AND HOW THEY COMPARE WITH PREWAR ASSESSMENTS 34–38 (2006) (noting that the Iraq Survey Group examined the trailers and found them “impractical for biological agent production and almost certainly designed and built for hydrogen generation”); Peter Beaumont et al., *Iraqi Mobile Labs Nothing to Do with Germ Warfare, Report Finds*, GUARDIAN (June 14, 2003), <http://www.theguardian.com/world/2003/jun/15/iraq> (“An official British investigation into two trailers found in northern Iraq has concluded they are not mobile germ warfare labs, as was claimed by Tony Blair and President George Bush, but were for the production of hydrogen to fill artillery balloons, as the Iraqis have continued to insist.”); *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> (reporting that “while some have described the Iraqi explanation” that the trailers produced hydrogen for weather balloons “as far-fetched, the US Army has its own fleet of vehicles designed for precisely the same purpose”).

331. Warrick, *supra* note 329 (“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 [on Polish television.”]; *Bush Administration Continued Claims on Mobile Iraqi Bioweapons Labs After Receiving Contrary Evidence*, GLOBAL SEC. NEWSPWIRE (Apr. 12, 2006), <http://www.nti.org/gsn/article/bush-administration-continued-claims-on-mobile-iraqi-bioweapons-labs-after-receiving-contrary-evidence/> (“The report and a longer follow-up issued three weeks later were stamped ‘secret’ and shelved. White House and intelligence officials continued for nearly a year afterward to argue that the trailers were involved in biological weapons production.”).

with caution because “[a]lmost all first reports turn out to be wrong.”³³² Armed with that knowledge, Rumsfeld could have easily prevented the false announcements by requiring internal verification prior to reporting; but instead, military officials led embeds to potential weapons discovery locations, sourced purported weapons discovery stories, and approved embeds’ reporting for broadcast and publication.³³³ None of the embedded journalists’ discovery stories were verified before being broadcasted or published, and each announcement was later disproven.³³⁴ The Iraq Survey Group, the multinational task force led by U.S. weapons inspectors, conducted an 18-month inspection process; chief U.S. inspector David Kay later remarked that the inspection teams did not find “the people, the documents or the physical plants that you would expect to find if [WMD] production was going on.”³³⁵ Moreover, the SSCI’s report produced after its

332. Donald MacIntyre, *Missile Cache May Be Regime’s Elusive Chemical Weapons, Claim US Sources*, 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> (internal quotation marks omitted).

333. See U.S. DEP’T OF DEF., *supra* note 299, at ¶ 4 (requiring media to adhere to rules as prerequisite to participation); see *supra* notes 299–303 and accompanying text (discussing the totality of the Pentagon’s control over embedded journalists).

334. Robert Scheer, *How Their Big Lie Came to Be*, L.A. TIMES (June 3, 2003), <http://articles.latimes.com/2003/jun/03/opinion/oe-scheer3> (quoting Marine Lt. Gen. James Conway’s explanation for the failure to find WMDs: “We were simply wrong. . . . We’ve been to virtually every ammunition supply point between the Kuwait border and Baghdad, but they’re simply not there.”); see FAIR, *supra* note 42 (chronicling the origin and debunking of various weapons discovery claims); *supra* notes 318–31 and accompanying text; see also FRANKEN, *supra* note 123, at 345–46 (“Every time I watched *Hannity and Colmes*, Sean was certain they had just found the smoking gun. And then someone . . . would update the story with the information that what had, in fact, been found was a box of Tide.”) (emphasis removed); cf. NOAM CHOMSKY, *HEGEMONY OR SURVIVAL: AMERICA’S QUEST FOR GLOBAL DOMINANCE* 13–14 (2003) (noting that when WMDs were not found in Iraq, the Administration’s position evolved into an argument that the presence of “equipment that potentially could be used to produce weapons” had been sufficient justification for “immediate military action”).

335. IRONS, *supra* note 7, at 237–39; *Weekend Edition Sunday* (NPR broadcast May 29, 2011), <http://www.npr.org/2011/05/29/136765601/david-kay-wmds-that-never-were-a-war-that-ever-was> (David Kay: “[N]ot only didn’t we find [WMDs], we found they didn’t exist prior to the war.”) see also Julian Borger, *The Inspector’s Final Report*, GUARDIAN (Mar. 2, 2004), <http://www.theguardian.com/world/2004/mar/03/usa.iraq> (“Kay, a veteran diplomat and nuclear weapons expert, set off convinced he would find the weapons but within a few weeks of interrogating Iraqi scientists and officials, and sending out search parties in vain, he was already convinced that no significant stockpiles would be found.”).

five-year investigation made clear that there were no chemical or biological weapons in Iraq, no chemical or biological programs in development in Iraq, no nuclear programs in Iraq, and no connections between al-Qaeda and Saddam Hussein's government.³³⁶

E. False Perceptions

While the embed program's stated mission was to shape global perceptions by "tell[ing] the factual story—good or bad—before others [could] seed the media with disinformation and distortions,"³³⁷ embedded reporters were themselves a source of disinformation and distortions; they provided stories regarding premature weapon discoveries, and the Bush Administration repeated their unsubstantiated statements that chemical and biological weapons had been found, which may have solidified American misperceptions. In a May 2003 poll, the Program on International Policy Attitudes at the University of Maryland (PIPA) found that 34 percent of Americans believed WMDs were discovered after the invasion and 22 percent believed Iraqi forces used them on U.S. troops.³³⁸

Lingering general misperceptions may partially be due to the false positive announcements provided by embedded journalists and the continued ambiguity in other media messages about developments inside Iraq, but there were also clear relationships between the likelihood that Americans would hold misperceptions and their primary sources of information. In early October 2003, PIPA examined Americans' misperceptions about the war in Iraq and found that 48 percent of surveyed respondents believed that links between al-Qaeda and Iraq had been found, 22 percent thought that WMDs had already been discovered, and 25 percent believed that world public opinion favored the invasion of Iraq.³³⁹ Sixty

336. See SENATE SELECT COMM. ON INTELLIGENCE (2008), *supra* note 198, at 16, 28, 38, 58, 71–72, 82–83; see also Robert Bejesky, *The SSCI Investigation of the Iraq War: Part I: A Split Decision*, 40 S.U. L. REV. 1, 35–45 (2012); Bejesky, *Intelligence Information*, *supra* note 40, at 875–76, 881–82.

337. U.S. DEP'T OF DEF., *supra* note 299, at ¶ 2.A.

338. PIPA, MISPERCEPTIONS, *supra* note 154, at 5; Krane, *supra* note 155 (reporting that in November 2004, 38 percent of those surveyed "believe[d] that Iraq had weapons of mass destruction when the U.S. invaded").

339. Press Release, Program on Int'l Policy Attitudes & Knowledge Networks, Study Finds Widespread Misperceptions on Iraq Highly Related to Support for War: Misperceptions Vary Widely Depending on News Source 1 (Oct. 2, 2003), available at http://www.pipa.org/OnlineReports/Iraq/IraqMedia_Oct03/IraqMedia_Oct03_pr.pdf [hereinafter Press Release, PIPA]; see PIPA, MISPERCEPTIONS, *supra* note 154.

percent of all respondents held at least one of those three misperceptions.³⁴⁰ News media outlets varied in how effectively they informed (or misinformed) their viewers; Fox News viewers were the most misinformed, and those relying on NPR and PBS had a much lower likelihood of harboring misperceptions:³⁴¹

	FOX	CBS	ABC	CNN	NBC	Print Sources	NPR/PBS
None of the three misperceptions	20%	30%	39%	45%	45%	53%	77%
One or more misperceptions	80%	71%	61%	55%	55%	47%	23%
Two or more misperceptions	69%	51%	41%	38%	34%	26%	13%
Three or more misperceptions	45%	15%	16%	13%	12%	9%	4%

The significant variance in misperception rates across news networks may be partially explained by viewers selecting their prime source of information based on its consistency with their own personal ideological inclinations (consistency theory)³⁴² and the fact that networks are

340. Press Release, PIPA, *supra* note 339. While the explanation that “misperceptions are derived from a failure to pay attention to the news” is intuitively appealing, the PIPA poll found that “overall, those who pay greater attention to the news are no less likely to have misperceptions.” *Id.* at 2; *see* PIPA, MISPERCEPTIONS, *supra* note 154, at 16 (“Most striking, in the case of those who primarily watched Fox News, greater attention to news modestly *increases* the likelihood of misperceptions.”); *see also* MCCHESNEY, *supra* note 226, at 123 (“[A] more damning comment on the U.S. news media would be difficult to imagine, as it goes directly against what a free press is supposed to do in a democratic society.”).

341. PIPA, MISPERCEPTIONS, *supra* note 154, at 12–15; *see* Press Release, PIPA, *supra* note 339, at 2; *see also* MCCHESNEY, *supra* note 226, at 123 (commenting that the PIPA survey “was conducted by a reputable and mainstream organization” and that its results are profoundly troubling, “[e]ven allowing for a significant margin of error”).

342. *See* JOWETT & O’DONNELL, *supra* note 120, at 177–79 (explaining that consistency theory views the desire for “mental agreement between a person’s notion about some object or event and new information about it” as “a central motivator in attitude formation and behavior”); ZIMBARDO & LEIPPE, *supra* note 105, at 131–32

incentivized to cater to an audience's comfort zone to retain viewership (common denominator programming theory).³⁴³ However, PIPA controlled for political affiliation and demographic characteristics and found that variations in misperception rates are still robust "when comparing the rate of misperceptions within demographic [and partisan] subgroups of each audience."³⁴⁴ Further, commentators also maintained that the postwar news coverage became more skewed across all news networks because of a "Fox effect" that compelled other networks to avoid being perceived as less patriotic than Fox.³⁴⁵ There is reason to believe that networks did require their journalists to conform³⁴⁶ and that the Fox News position, which has a

(noting that "many TV viewers and newspaper readers have a political party affiliation" and seek out "those with the same [political] allegiance" for news and commentary); *see also* Morant, *supra* note 60, at 606 (citing PEW CTR. FOR THE PEOPLE & THE PRESS, NEWS AUDIENCES INCREASINGLY POLITICIZED 5, 40 (2004), available at <http://www.peoplepress.org/files/legacy-pdf/215.pdf>) (noting that although 32 percent believed CNN was the most credible news source and 25 percent believed Fox News was the most credible, Fox News still maintained a 12 percent larger viewing audience than CNN).

343. MARA EINSTEIN, MEDIA DIVERSITY: ECONOMICS, OWNERSHIP, AND THE FCC 4 (2004) (stating that "common denominator programming" "means that *when audiences have similar preferences*, then programming will be similar"); *See* Morant, *supra* note 101, at 488–92 ("[A]chievement of a sizeable audience that ensures profit requires media to become sensitive to the interests of the very audience they seek to attract."); Morant, *supra* note 60, at 607–08 (noting that a network can "gain a regular core of viewers" based on its "tendency to report news from a desired ideological perspective"); *see also* *supra* notes 107–08 and accompanying text.

344. Press Release, PIPA, *supra* note 339, at 2; PIPA, MISPERCEPTIONS, *supra* note 154, at 15–16, 19–20 (reporting that, regardless of demographics or political affiliation, "respondents' choices of a news source make a significant difference in how prevalent misperceptions are"); *see also* BROCK, *supra* note 75, at 334–35 ("The study factored in the political bias of the viewer and still found that FOX significantly misinformed its audience.").

345. *See* BROCK, *supra* note 75, at 331–34 (recounting how Fox News "aided the Republicans in an attack on the freedom, integrity, and patriotism of journalists" who criticized the Bush Administration or the war in Iraq); RAMPTON & STAUBER, *supra* note 119, at 174 (noting that Fox's "belligerent brand of hyper-patriotism" shaped other networks' coverage "to compete with what industry insiders called 'the Fox effect'"); WEAPONS OF MASS DECEPTION, *supra* note 89, at 1:02:28–:38 ("What was called 'the Fox Effect' drove all the TV coverage to the right. No network wanted to be accused of being unpatriotic.").

346. Some journalists were ostensibly punished by media employers for reporting that could be attacked as unpatriotic. Magarian, *supra* note 70, at 125 (discussing the rationale behind NBC's decision to fire veteran correspondent Peter Arnett after he appeared on Iraqi television to criticize the U.S. invasion plan); Wines & Lau, *supra* note 68, at 155 (noting that radio conglomerate Clear Channel dropped Howard Stern's

history of being “a blatantly biased, conservative news service,”³⁴⁷ might have had some impact on other networks.

Christiane Amanpour, CNN’s chief war correspondent, explained that her network’s reaction to the Fox effect had “muzzled” its war coverage because top executives were “intimidated by the [Bush] administration and its foot soldiers at Fox News” and that CNN’s war reporting represented “disinformation at the highest levels” as a result.³⁴⁸ Similarly, Walter Isaacson, former CEO of CNN, remarked that CNN was “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.”³⁴⁹

By contrast, NPR and PBS viewers were the most informed—which might be predominately due to their mission. Public broadcasting was created and funded as an alternative to the corporate media to “amplify voices not heard in the private marketplace.”³⁵⁰ The Public Broadcasting Act

popular show from its 1200 stations because he “started to publicly criticize President Bush”); *see also* *supra* notes 166–72 and accompanying text (discussing repercussions for Phil Donahue and Bill Maher for coverage perceived as insufficiently patriotic).

347. Konner, *supra* note 196; McLeod, *supra* note 76, at 132 (noting that “Fox News coverage was heavily saturated with sources and panelists who represented the Bush Administration”); *see* BROCK, *supra* note 75, at 319–31 (collecting statements from insiders and observers and examples of biased coverage demonstrating “systemic bias” at Fox News); MCCHESNEY, *supra* note 226, at 111 (describing Fox News as “some of the most rabid right-wing journalism and punditry”).

348. Peter Johnson, *Amanpour: CNN Practiced Self-Censorship*, USA TODAY, Sept. 14, 2003, at 4D, *available at* http://usatoday30.usatoday.com/life/columnist/mediamix/2003-09-14-media-mix_x.htm (internal quotation marks omitted); *see also* Veteran CBS News Anchor Dan Rather Speaks Out on BBC Newsnight Tonight, BBC NEWS (May 16, 2002), http://www.bbc.co.uk/pressoffice/pressreleases/stories/2002/05_may/16/dan_rather.shtml (quoting CBS anchor Dan Rather’s explanation that journalists engaged in “a form of self-censorship” and declined to ask tough questions about the war on terror out of a fear of being marked with “a flaming tyre of lack of patriotism”). Fox News spokeswoman Irena Briganti inadvertently proved Amanpour’s point by responding, “Given the choice, it’s better to be viewed as a foot soldier for Bush than a spokeswoman for al-Qaeda.” Johnson, *supra*.

349. *Bill Moyers Journal: Buying the War*, *supra* note 89; *see also* David Folkenflik, *Fox News Defends its “Patriotic” Coverage*, BALT. SUN (Apr. 2, 2003), http://articles.baltimoresun.com/2003-04-02/features/0304020026_1_fox-reporting-from-iraq-brit-hume (describing “the tone of Fox News at war: It is patriotic, it is pugilistic, and it takes things personally”).

350. Cole, *supra* note 83, at 734; *see* CARNEGIE COMM’N ON EDUC. TELEVISION, PUBLIC TELEVISION: A PROGRAM FOR ACTION 13–18 (1967) (“We have come to see that

of 1967, which governs PBS, requires fairness, objectivity, and diversity of opinions, particularly in treatment of controversial topics.³⁵¹ Public broadcasting has been attacked by Republicans in the past; in 1994, Republican Speaker of the House Newt Gingrich advocated that PBS be privatized³⁵² and during the 2012 presidential campaign, Republican presidential candidate Mitt Romney pledged to “stop the subsidy to PBS.”³⁵³ With respect to a war that cost American taxpayers \$2.2 trillion,³⁵⁴ PBS did ostensibly provide more accurate telecasts, which might justify the \$445 million annual federal subsidy to public broadcasting.³⁵⁵

since the technology of television lends itself readily to uses that increase the pressure toward uniformity, there must be created means of resisting that pressure, and of enlisting television in the service of diversity.”); *About CPB*, CORP. FOR PUB. BROAD., <http://www.cpb.org/aboutcpb/> (last visited Nov. 29, 2014) (“When Congress created CPB, it declared that developing public media is an important objective not only for private and local initiatives, but also ‘of appropriate and important concern’ to the federal government.”).

351. 47 U.S.C. § 396(g)(1)(A) (2012) (specifically authorizing CPB to develop “programs of high quality, diversity, creativity, excellence, and innovation, which are obtained from diverse sources, . . . with strict adherence to objectivity and balance in all programs or series of programs of a controversial nature”).

352. Steve Behrens, *Gingrich Wants to “Zero-Out” Federal Funding to CPB*, CURRENT (Dec. 12, 1994), <http://www.current.org/1994/12/gingrich-wants-to-zero-out-federal-funding-to-cpb/> (“Until Gingrich became the most-watched man in Washington last month, he had not been a vocal campaigner against CPB appropriations, but he now has begun objecting to political imbalance on public TV.”); Walter Goodman, *Critic’s Notebook; If PBS and Newt Gingrich Go Head to Head*, N.Y. TIMES (Dec. 19, 1994), <http://www.nytimes.com/1994/12/19/arts/critic-s-notebook-if-pbs-and-newt-gingrich-go-head-to-head.html> (noting that Gingrich called for PBS’s privatization very quickly after becoming Speaker of the House).

353. Brian Stelter & Elizabeth Jensen, *Romney’s Pledge Puts Focus on Public TV*, N.Y. TIMES, Oct. 12, 2012, at A11, available at http://www.nytimes.com/2012/10/12/us/politics/romneys-pledge-puts-public-television-in-spotlight.html?_r=0 (internal quotation marks omitted).

354. See *CBS Evening News*, Mar. 19, 2013, *supra* note 31, at 17:28–:46; see also STIGLITZ & BILMES, *supra* note 31, at 24–31 (“[W]e estimate that the total cost of the war ranges from \$2.7 trillion in strictly budgetary costs to \$5 trillion in total economic costs.”).

355. *About CPB: Financial Information: Fiscal Year 2014 Operating Budget*, CORP. FOR PUB. BROAD., <http://www.cpb.org/aboutcpb/financials/budget/> (last visited Nov. 29, 2014); see Stelter & Jensen, *supra* note 353 (“The total amount [of the CPB appropriation] is about one one-hundredth of 1 percent of the federal budget, contradicting the widely held belief that public broadcasting represents 1 percent or more.”); see also Paul Fahri, *Public Broadcasting Targeted by House*, WASH. POST (June 10, 2005), <http://www.washingtonpost.com/wp-dyn/content/article/2005/06/09/AR20050>

Polls conducted during the 2004 Bush–Kerry presidential election cycle also seemed to be heavily influenced by political preferences rather than verified facts. The liberation rationale played well with Republican voters; 89 percent of Bush supporters believed that “[h]istory will give the U.S. credit for bringing freedom and democracy to Iraq,” while only 39 percent of Kerry supporters agreed.³⁵⁶ And the discredited security threat allegations remained viable in Bush supporters’ views as well; 92 percent of Bush supporters—but only 30 percent of Kerry supporters—believed that “Iraq, under Saddam Hussein, was a serious threat to U.S. security,”³⁵⁷ and 58 percent of Bush supporters—compared with only 16 percent of Kerry voters—believed that “Iraq had weapons of mass destruction when the U.S. invaded.”³⁵⁸ The final ISG report was released a month before the election

60902283.html (“Americans overwhelmingly see public broadcasting as an unbiased information source,’ Rep. David Obey (Wis.), the ranking Democrat on the subcommittee, said in a statement. ‘Perhaps that’s what the GOP finds so offensive about it.’”).

356. *Iraq, Al Qaeda and Weapons of Mass Destruction: What the Public Believes Now, According to Latest Harris Poll*, PR NEWSWIRE (Oct. 21, 2004), <http://www.prnewswire.com/news-releases/iraq-911-al-qaeda-and-weapons-of-mass-destruction-wh-at-the-public-believes-now-according-to-latest-harris-poll-54105582.html> [hereinafter *Harris Poll*] (“If President George Bush is re-elected it will be because he succeeded in persuading most people that his sense of what happened in Iraq, and why, is more accurate than that of his critics.”); *see also Iraq Support Stable, Bush Not Seen as Unilateralist*, PEW RES. CTR. FOR PEOPLE & PRESS (Jan. 22, 2004), <http://peoplepress.org/reports/display.php?ReportID=202.html> (“Only about four-in-ten Democrats (42%) feel the war was the right decision, down from 56% in December. By comparison, independents have become somewhat more supportive of the war—66% now, 60% then—while Republicans overwhelmingly believe the war was the right decision.”).

357. *Harris Poll*, *supra* note 356. PIPA also found a strong association between support for President Bush and belief in their targeted misperceptions.

Taking the averages of the percentage that had each of the three key misperceptions—evidence of al-Qaeda links found, WMD found, and world public opinion favors war—those that said they would vote for the President were far more likely to misperceive. On average, those who would vote for the president held misperceptions 46% of the time, while those who say they will vote for a Democrat misperceived, on average, 17% of the time.

PIPA, MISPERCEPTIONS, *supra* note 154, at 17–18.

358. *Harris Poll*, *supra* note 356. Another poll found that 49 percent of Americans surveyed in October 2004 believed that Iraq possessed WMDs; in March 2006, 41 percent still believed Iraq had possessed WMDs “despite the fact that no such weapons were discovered.” McLeod, *supra* note 76, at 135–36 (citing *Most Americans Believe Bush Administration Is Still Saying Iraq Had Major WMD Program*, PROGRAM ON INT’L POL.

and confirmed that there were no biological or chemical weapons or nuclear weapons programs; nonetheless, Bush supporters were nearly four times more likely than Kerry supporters to disbelieve the vast evidence of those weapons' nonexistence and to believe that "Iraq had weapons of mass destruction when the U.S. invaded."³⁵⁹ Bush voters were more likely to retain their prewar perception of security threats and to assimilate the supplanting liberation rationale, which might be due to cognitive dissonance—Bush voters adopted these beliefs to justify their vote choice or partisan allegiance and avoid coming to terms with painful realities.³⁶⁰

A gradually increasing percentage of Americans updated their perceptions to become more consistent with the fact that there was minimal evidentiary basis for war. The percentage of Americans believing that Bush Administration officials "deliberately misled" to mold conditions for war rose from 37 percent in June 2003, to 45 percent in June 2004, to 51 percent in June 2005, and to 55 percent in June 2006.³⁶¹ Although the Bush Administration provided six months of preinvasion guarantees about the existence of WMDs in Iraq, many Americans allowed the discredited security threat allegations to be supplanted by the *ex post facto* mission of liberation during the ensuing occupation.³⁶² It is important to emphasize that

ATTITUDES, (Apr. 13, 2006), <http://www.worldpublicopinion.org/pipa/articles/brunitedstatescanadara/188.php>).

359. *Harris Poll*, *supra* note 356. PIPA found that Bush had the support of 74 percent of Americans who believed that Iraq had possessed WMDs, 39 percent of those who believed Iraq had a major WMD program, 23 percent of those who believed Iraq had minor WMD activities, and only five percent of those who believed Iraq had no WMD programs. PIPA, MISPERCEPTIONS, *supra* note 156, at 14.

360. See ZIMBARDO & LEIPPE, *supra* note 105, at 107–17 ("When behavior cannot be changed or revoked, one or more of the beliefs or attitudes with which it is inconsistent might be changed. . . . These means of reducing dissonance, of course, are modifications in attitude—changes in a person's view of the world in the service of seeing his or her current or past behavior as consistent, reasonable, and justified."); *see also* Wilson, *supra* note 94, at 681, 689 ("[T]he tendency of voters to rely on less than perfect information and to process that information in a relatively cursory way means that the decision-making process is particularly vulnerable to manipulation by political candidates and parties.").

361. 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>.

362. *Harris Poll*, *supra* note 356 (reporting that "76 percent believe that the Iraqis are better off now than they were under Saddam Hussein," while only "63 percent believe that Iraq, under Saddam Hussein, was a serious threat to U.S. security"); *see also* U.S. TROOPS IN IRAQ: 72% SAY END WAR IN 2006, ZOGBY INT'L (Feb. 28, 2006), <https://web>.

preinvasion discussions within the Security Council were exclusively devoted to disagreements over alleged WMD violations, and there were no discussions of overthrowing the government or of liberating the Iraqi people.³⁶³ The Security Council never authorized use of force for the 2003 attack against Iraq, and using military force to foster regime change was—and is—illegal under international law and is incompatible with core United Nations Charter rules.³⁶⁴

VI. CONCLUSION

From the media entity decision equation, $U(v) = \lambda (r_1 + n_{a1}) - [(1 - \lambda)(c_1 + f_n)]$, r_1 is a composite for viewer emotion and is comprised of patriotism, security threat perceptions, and humanitarian justice; n_{a1} is perceived utility in attacking a security threat first; c_1 is the media's perceived current period loss for inaccurate reporting or for not providing diversity; f_n is the possible future loss for biased and inaccurate reporting; and λ is the likelihood that the Executive's security threat advocacy is real.³⁶⁵ The equation probes potential discord between constitutional aspirations for the news media as a purveyor of political discourse and corporate media profitability obligations to shareholders and suggests that a media entity could view departing from the industry status quo and investigating and challenging the government's security threat allegations as a move that risks losing viewership—which it must avoid at all costs.³⁶⁶

Prior to the 2003 Iraq War, top Bush Administration officials proffered hundreds of unequivocal threat claims in the media, and the media

archive.org/web/20080214225850/http://www.zogby.com/news/ReadNews.dbm?ID=1075 (“Ninety-three percent said that removing weapons of mass destruction is not a reason for U.S. troops being there,’ said Pollster John Zogby, President and CEO of Zogby International. ‘Instead, that initial rationale went by the wayside and, in the minds of 68% of the troops, the real mission became to remove Saddam Hussein.’”).

363. See Bejesky, *Weapon Inspections*, *supra* note 33, at 311–13, 336–37, 344–46.

364. U.N. Charter art. 2, para. 4; see Bejesky, *Weapon Inspections*, *supra* note 33, at 344–50 (“Numerous law professors and legal organizations objected [to the proposed invasion of Iraq], including by sending a letter to the White House and warning that attacking Iraq would be a war crime.”); see also Ackerman & Hathaway, *supra* note 22, at 467–74 (examining the Bush Administration’s expansion of the Iraq War into an occupation that extended far beyond the original purposes for which it was authorized by Congress, which “transformed a war authorized by Congress into a war authorized by the president alone”).

365. See *supra* Part III.B.

366. Bejesky, *Politico*, *supra* note 31, at 67–68; see *supra* Part IV.A–B.

broadcasted allegations as fact while ignoring antiwar positions and dissent.³⁶⁷ Media positions of advocacy and repetition of official and quasi-official sources' arguments converged and drowned out alternative views to generate an extremely pervasive prowar bias in the news media.³⁶⁸ Rhetoric and polls intimated that n_{a1} and r_1 were positively related and high and that the perceived c_1 was low due to median viewer perceptions.³⁶⁹ Media entities may have individually assumed that they would earn a higher utility payoff by declining to challenge threat allegations or provide more diverse viewpoints.

After the invasion of Iraq, it became clear that there were no chemical, biological, or nuclear weapons and no connections between al-Qaeda and Hussein's regime—and that the Bush Administration's intelligence estimates about Iraq were thoroughly wrong, unreasonably relied upon, and based on details and sources hidden by White House classification prerogatives.³⁷⁰ Many news entities and journalists acknowledged the American media's poor performance, particularly for uncritically accepting the Executive's security threat proclamations and the unverified accounts of Iraqi defectors.³⁷¹ The nearly diurnal government message was unequivocal and false (λ was 0). If the news media had been held accountable, the cost side of the equation, $[(1 - \lambda)(c_1 + f_n)]$, could have imposed enormous consequences for conforming to the Bush Administration's expectations and uncritically reporting on its unsubstantiated security threat allegations—but that was not the case.

The news media refused to impose any reverberating cost on the Bush Administration and largely accepted the shift from justifying the invasion of Iraq on the basis of security threats to Americans (Π) to justifications based on liberating Iraqis (Π) and blind patriotism (σ).³⁷² Further, the news media was complicit in generating ambiguities through participation in the embedded reporter program, where reporters endeavored to be the first to announce that prohibited weapons had been discovered but rarely followed

367. See *supra* Parts II.B, IV.A, IV.C.

368. See *supra* Part IV.C–D.

369. See *supra* Part IV.A–B.

370. See Bejesky, *Intelligence Information*, *supra* note 40, at 811–12, 875–82; *supra* Parts IV.A., V.D.

371. See *supra* Part II.B.

372. See *supra* Part V.A–B.

up to dispel false positives³⁷³ and through reliance on military analysts kept on a short leash by the Bush Administration, who provided patriotic, prowar commentary disguised as impartial sourcing.³⁷⁴ After the invasion, the effect on the composite emotion variable (r_1) was that Π dropped because there was no verified security threat, while patriotism (σ) and humanitarian justice (π) were elevated with the *ex post facto* liberation rationale.

Perhaps confirming the logic behind the model interaction, the American media coalesced again at uncritical reporting during the invasion and occupation;³⁷⁵ for this, the future cost (f_n)—after the security threat perception (λ) was finally disproved—was citizens' profound irritation aimed at the entire news media industry. Media entities experienced the repercussion of a share in a temporary loss of trust in the entire industry.³⁷⁶ Consider this: a poll conducted during the post-Watergate 1970s—a time of near-peak cynicism—indicated that about 25 percent of the American public trusted the media.³⁷⁷ In 2005, after the media's failure to investigate and defuse the Bush Administration's false security threat allegations, only 12 percent of Americans had confidence in their news media.³⁷⁸

Citizens would assuredly not favor false information saturation over truthful and trustworthy information,³⁷⁹ but given the possibility that news

373. *See supra* Part V.D.

374. *See supra* Part V.C.

375. *See supra* Part V.A–B.

376. *See Bill Moyers Journal, supra* note 131 (Jonathan Landay, McClatchy News: "I also want to say one thing I think that it behooves the media to come out—major companies to say, 'Yes, we got it wrong,' because if you look at surveys today, the American public has lost an enormous amount of trust in the news media, in the people who are supposed to be watch, their watchdogs over government."); *see also* Morant, *supra* note 101, at 505 ("The audience should check media's behavior through avoidance of sources that engage in distorted coverage, or direct communication to those sources of flawed news coverage.").

377. Patrick D. Healy, *Believe It: The Media's Credibility Headache Gets Worse*, N.Y. TIMES, May 22, 2005, at 4, available at <http://www.nytimes.com/2005/05/22/weekinrevie w/22healy.html> ("In the post-Watergate 1970's, some 25 to 30 percent of Americans reported to the Harris Poll that they had a great deal of confidence in the press, more than they had in Congress, unions or corporate America.").

378. *Id.* ("In the 2005 poll, the press ranked only ahead of law firms, with 12 percent reporting high confidence in the media."); *see also* McLeod, *supra* note 76, at 113 ("The American media's wholesale acceptance of Bush Administration claims about al-Qaeda connections to the Iraqi government, as well as about Iraq's alleged weapons of mass destruction (WMDs) program, constitutes a dereliction of duty.").

379. *See* Morant, *supra* note 60, at 605 ("An audience generally prefers information

media entities' reporting could span a spectrum that included the extremes of being lapdogs for the Executive or watchdogs as the Framers intended,³⁸⁰ could President Bush have been able to anticipate the news media's obeisant performance when choosing to initiate an agenda-setting blitz in September 2002, or even prior to his State of the Union Address in January 2002?³⁸¹ This analysis suggests it is highly probable. A media system with dominant corporate conglomerates that amplify the same general "facts" in a comparable manner across national, regional, and local media sources is apt to beget uniformity in perspective and may utterly fail to check the government. Profitability interests may accordingly restrict dissent and curtail, chill, or silence speech that should be promoted in the public interest. This failure may be even more likely in a national security threat scenario due to concerns about appearing sufficiently patriotic and informational asymmetries that result when the evidentiary bases of security threat allegations are classified. It is not clear that there are currently any viable catalysts that would goad the media to perform differently in a security threat scenario; if, in a similar situation in the future, a scofflaw regime without firm factual justifications to substantiate its policy agenda chooses overly aggressive security threat agenda setting, the outcome—American use of military force in costly, debilitating, and illegal ways—might be predictable or even inevitable.

that is both newsworthy and truthful."); *supra* Part II.

380. See *supra* Part III.A–B; see generally Papandrea, *supra* note 3.

381. See *supra* Part IV.A.