

## POLITICO-INTERNATIONAL LAW

*Robert Bejesky\**

### INTRODUCTION

President Obama was awarded a Nobel Peace Prize for “extraordinary efforts to strengthen international diplomacy and cooperation between peoples.”<sup>1</sup> The nine-month-old administration evinced surprise and suggested it was premature, but supporters accentuated the significance of peace processes and multilateral diplomacy.<sup>2</sup> Praise was deserved but antecedent circumstances may have been more pertinent.<sup>3</sup> Being more of a unilateralist, George W. Bush was not among the nominees.<sup>4</sup> Nonetheless, there are alternative perceptions regarding the flexibility of international law.

In a *Foreign Policy* article, published three weeks before the Nobel Prize was endowed, Professor Eric Posner explained that the U.S. has a history of choosing which international laws to obey, that Bush “did not brush aside international law as casually as his critics claimed,” and that

---

\* MA Political Science (Michigan), MA Applied Economics (Michigan), LL.M. International Law (Georgetown). The author has taught courses in international law at Cooley Law School and for the Department of Political Science at the University of Michigan, courses in American Government and Constitutional Law for Alma College, and courses in business law at Central Michigan University and the University of Miami.

1. *Obama: Nobel Peace Prize is ‘call to action,’* CNN, Oct. 9, 2009, [http://articles.cnn.com/2009-10-09/world/nobel.peace.prize\\_1\\_norwegian-nobel-committee-international-diplomacy-and-cooperation-nuclear-weapons?\\_s=PM:WORLD](http://articles.cnn.com/2009-10-09/world/nobel.peace.prize_1_norwegian-nobel-committee-international-diplomacy-and-cooperation-nuclear-weapons?_s=PM:WORLD).

2. *Id.*; Karl Ritter & Matt Moore, *Gasps as Obama Awarded Nobel Peace Prize*, ASSOCIATED PRESS, Oct. 9, 2009, <http://www.thefreelibrary.com/Gasps+as+Obama+awarded+Nobel+Peace+Prize-a01612020803>.

3. *See generally* Kenneth Anderson, *Goodbye to All That? A Requiem for Neoconservatism*, 22 AM. U. INT’L L. REV. 277 (2007) (presenting a broad overview of the antecedent circumstances and the neoconservative movement).

4. *See* Ritter & Moore, *supra* note 2 (“The award appeared to be at least partly a slap at Bush from a committee that harshly criticized [him] for his largely unilateral military action . . .”). At least one critic contended Obama should not have received the award until after troops were pulled out of Iraq; *Cf.* Michael Sevi, *Original Intent, Timetables, and Iraq: The Founders’ Views on War Powers*, 13 TEX. REV. L. & POL. 73, 74 (2008) (reporting that President elect Obama called the decision to go to war with Iraq carelessly made and promised a pullout within eighteen months).

President Obama will likely follow a policy of selective adherence.<sup>5</sup> Professor Robert Delahunty and Professor John Yoo contend: “Whether the President should follow international law in the exercise of his constitutional authorities remains a policy question that is context specific.”<sup>6</sup> Pristine foreign policy might be unrealistic but, to other scholars, international law transgressions by preceding administrations have arguably paled in number and depth to the Bush Administration’s alleged violations.<sup>7</sup> Nonetheless, Posner’s prediction for the Obama administration could be correct, and Delahunty and Yoo may represent what some presidents *perceived* was prerogative.

An alternative view is that international law should be limited neither to sterile interpretations nor to normative postulations of whether it should be obligatorily followed. It would seem futile for American delegations to influence the substance of treaty provisions at conferences, hypocritical to make promises that are not reciprocally binding, and irrational to sign and ratify treaties and make reservations to those treaties merely to produce discretionary norms. The Constitution specifies that (1) ratified treaties have the status of federal law, (2) Presidents must “faithfully execute” the law, (3) “checking” government authority is imperative, and (4) presidential authority derives from the “people.”<sup>8</sup> The general public prefers

---

5. Eric Posner, *Think Again: International Law*, FOREIGN POL’Y (Sept. 17, 2009), [http://www.foreignpolicy.com/articles/2009/09/17/think\\_again\\_international\\_law](http://www.foreignpolicy.com/articles/2009/09/17/think_again_international_law).

6. Robert J. Delahunty & John Yoo, *Executive Power v. International Law*, 30 HARV. J.L. & PUB. POL’Y 73, 76 (2007).

7. See *infra* notes 41, 81, 121, 129, 136-39, 323-25, 493-95, 505, 508 (international law violations); see *infra* notes 46-48, 162-85 (examples of other violations and/or arguable interference in political and territorial sovereignty of other countries); see *infra* notes 105-17, 133-36 (more cooperative world).

8. U.S. democracy is grounded in the power of the People. U.S. CONST. pmb. (“We the people . . .”); *Id.* art. I, § 4 (the People elect the lawmakers); *Id.* art. II, § 1, 3 (the People “elect” the president, who executes the law and provides information to Congress); DECLARATION OF INDEPENDENCE, para. 2 (U.S. 1776) (“Governments are instituted among Men . . . . [W]hensoever any Form of Government becomes destructive . . . it is the Right of the People to alter or abolish it . . . .”); Abraham Lincoln, The Gettysburg Address (Nov. 19, 1863), *available at* [http://avalon.law.yale.edu/19th\\_century/gettyb.asp](http://avalon.law.yale.edu/19th_century/gettyb.asp) (“government of the people, by the people, for the people”). International law does not invariably involve norms that the executive can selectively enforce. U.S. CONST. art. VI, cl. 2 (“[L]aws of the United States . . . and all treaties made . . . shall be the supreme law of the land . . . .”); *The Paquete Habana*, 175 U.S. 677, 700 (1900) (“International law is part of our law.”); Vienna Convention on the Law of Treaties, art. 26, May 23, 1969, 1155 U.N.T.S. 331, 340 (“Every treaty in force is binding upon the parties to it and must be performed by them in good faith.”); Vienna Convention on the Law of Treaties, art. 53, May 23, 1969, 1155 U.N.T.S. 331 (there are “peremptory norm[s] of general international law”); Theodore Meron, *On a Hierarchy of International Human Rights*, 80 AM. J. INT’L L. 1, 6-18 (1986) (certain customary international law norms are said to incorporate a non-derogation quality).

compliance with international law,<sup>9</sup> and many U.S. domestic laws codify such paramount rules. For example, 18 U.S.C. § 2441 prohibits war crimes, 28 U.S.C. § 1605 forbids torture, and 5 U.S.C. § 3107 and 22 U.S.C. § 1461 proscribe subsidized-propagandizing.

Referencing a series of books, Professor Eric Yamamoto writes: “Many have documented [the Bush] administration’s penchant for deliberate misrepresentations on national security—in blunt terms, for lying to the American people about threats at home and abroad.”<sup>10</sup> Bush departed with the second lowest presidential approval rating in history at 22%, due to Iraq and poor economic conditions.<sup>11</sup> Startling expenditure and derivative costs are documented by Nobel Laureate Joseph Stiglitz and Professor Linda Bilmes, in *The Three Trillion Dollar War: The True Cost of the Iraq Conflict*.<sup>12</sup> Within six months of the administration’s departure, favorable foreign views of the U.S. surged.<sup>13</sup> These updated perceptions suggest that

---

9. See generally DAVID MALONE, DECISION-MAKING IN THE UN SECURITY COUNCIL: THE CASE OF HAITI 1990-1997, at 98-118 (1998); Andrew Hurrell, *International Society and the Study of Regimes: A Reflective Approach*, in REGIME THEORY AND INTERNATIONAL RELATIONS 49, 71 (Volker Rittberger & Peter Mayer eds., 1993).

10. Eric K. Yamamoto, *White (House) Lies: Why the Public Must Compel the Courts to Hold the President Accountable for National Security Abuses*, 68 L. & CONTEMP. PROBS. 285, 286-87 (2005); see David L. Altheide, *The Mass Media, Crime and Terrorism*, 4 J. INT’L CRIM. JUST. 982 (2006) (examining United States violations of international law in the invasion of Iraq and positing that U.S. institutional checks have been weakened after 9/11 by a planned political discourse centered on fear); HIJACKING CATASTROPHE: 9/11 FEAR & SELLING AMERICAN EMPIRE (Media Education Foundation 2006) (authors alleging officials not telling the truth); *The World According to Bush* (CBC Newsworld Broadcast Oct. 17, 2004) (CIA officer Robert Steele, Professor Hoffman, and historian Joseph Trento stating “they created lies;” Blinken likened administration rhetoric to marketing strategies that form misperceptions); see also SELECT COMM. ON INTELLIGENCE, REPORT ON THE U.S. INTELLIGENCE COMMUNITY’S PREWAR INTELLIGENCE ASSESSMENTS ON IRAQ, S. REP. NO. 108-301, at 495 (2004); Press Release, Senate Select Comm. on Intelligence, Press Release of Intelligence Committee (June 5, 2008) [hereinafter SSCI/June/2008/Press], <http://intelligence.senate.gov/press/record.cfm?id=298775>; see *infra* notes 13, 20, 302.

11. *Bush’s Final Approval Rating: 22 Percent*, CBS NEWS, Jan. 16, 2009, [http://www.cbsnews.com/stories/2009/01/16/opinion/polls/main4728399\\_page2.shtml?tag+contentMain;contentBody](http://www.cbsnews.com/stories/2009/01/16/opinion/polls/main4728399_page2.shtml?tag+contentMain;contentBody).

12. See generally JOSEPH E. STIGLITZ & LINDA BILMES, *THE THREE TRILLION DOLLAR WAR: THE TRUE COST OF THE IRAQ CONFLICT* 7 (2008).

13. See Ritter & Moore, *supra* note 2; *Confidence in Obama Lifts U.S. Image Around the World*, PEW RES. CENTER, July 23, 2009, <http://pewglobal.org/2009/07/23/confidence-in-obama-lifts-us-image-around-the-world/> (“The image of the United States has improved markedly . . . reflecting global confidence in Barak Obama. In many countries opinions of the United States are now about as positive as they were at the beginning of the decade before George W. Bush took office.”); Frank Newport, *Obama’s Nobel Prize: Public Opinion Context*, GALLUP INT’L, Oct. 9, 2009, <http://gallup.com/poll/123599/Obama-Nobel-Prize-Public-Opinion-Context.aspx> (stating that in February 2008, 71% of Americans said “leaders of other countries around the world . . . [d]on’t have much respect” for Bush; and in February 2009, 20% of

permitting asymmetric information chicanery undermines informed public will, begets dangerous political shifts, eschews international community sentiment, and disrupts propitious and peaceful international relations.

If a President can arbitrarily choose which rules to follow, such that international law might be invoked or ignored at will, then domestic law and politics should be regarded as prime exegeses for foreign affairs and public reactions to foreign policy. Commander-in-Chief authority is subject to Congress's respective powers, but sanctions are not serendipitously *carte blanche*. Instead, they are derived by measuring the costs and benefits of a particular policy under prevailing circumstances.<sup>14</sup> Adhering to the recent trend in legal scholarship that incorporates social science research on government-citizen interactions, communications, and political accountability,<sup>15</sup> this Article contends that domestic political restraints should be viewed as intrinsic to foreign policy and international law analyses. Accordingly, the research addresses political processes that should be scrutinized to ensure that foreign policy actions garner informed populace assent and to prevent unjustified circumvention of international law.

## I. ANALYTICAL FRAMEWORK

A vignette of key events introduces the analytical framework. A group of prominent political figures, referred to as neoconservatives, initiated several years of belligerent advocacy in think tanks, presenting themselves as an interest group during the late-1990s.<sup>16</sup> They vowed to alleviate obstreperous and minatory national security danger and affixed Iraq at the apex of perils to the United States.<sup>17</sup> In January 2001, the newly-inaugurated President appointed outspoken neoconservatives to key foreign policy positions in the State Department and Pentagon and held his first National Security Council (NSC) meetings with an agenda that highlighted

---

Americans said "leaders of other countries around world . . . [d]on't have much respect" for Obama); *Voice of the People: Global Survey Gives Thumbs Down to U.S. Foreign Policy*, GALLUP INT'L, Sept. 7, 2002, available at [http://www.voice-of-the-people.net/ContentFiles/docs%5CTerrorism\\_and\\_US\\_foreign\\_policy.pdf](http://www.voice-of-the-people.net/ContentFiles/docs%5CTerrorism_and_US_foreign_policy.pdf) (example of drastic foreign approval rating drop for Bush as diplomacy over Iraq began).

14. See U.S. CONST. art. I, § 8, cls. 11-14, 18; Kevin M. Kearney, *Private Citizens in Foreign Affairs: A Constitutional Analysis*, 36 EMORY L.J. 285, 316-19 (1987) (stating that article I, § 8, cl. 18 gives Congress the ability to pass laws that enable other branches of government to properly carry out their functions).

15. See Gia B. Lee, *Persuasion, Transparency, and Government Speech*, 56 HASTINGS L.J. 983, 991 (2005).

16. See *infra* notes 54-56, 58-64.

17. See *infra* notes 80-85, 118-24, 130-31.

deposing the Iraqi government.<sup>18</sup> Immediately after 9/11, some administration officials attributed Iraqi culpability to the events, thereby kindling proclivities inside defense-related agencies.<sup>19</sup> In early-September 2002, six months before the March 2003 invasion, the White House engaged in comprehensive press-agentry and U.N. diplomacy to address the perceived national security threat posed by Iraq.<sup>20</sup> On October 1, the American Intelligence Community (IC) completed a National Intelligence Estimate (NIE) that introduced drastic departures from previous assessments.<sup>21</sup> Ten days later Congress approved an *Authorization* to use force with the qualifications that the President exhaust peaceful dispute settlement mechanisms, substantiate national security threats with evidence, and seemingly even assure that military confrontation was connected to 9/11.<sup>22</sup> Those conditions for military action were evidently bypassed due to misperceptions about the threat from Iraq.<sup>23</sup>

Two journalism organizations compiled a database of 935 patently false statements and hundreds of other misleading allegations made by top

---

18. See *infra* Part II(C).

19. S. REP. NO. 108-301, at 359 (2004).

20. Study: *'False Pretenses' Led US to War*, CBS NEWS, Jan. 23, 2008, <http://www.cbsnews.com/stories/2008/01/23/national/main3741706.shtml>; Study: *Bush, Aides Made 935 False Statements in Run-up to War*, CNN, Jan. 23, 2008, [http://articles.cnn.com/2008-01-23/politics/bush.iraq\\_1\\_intelligence-flaws-iraq-and-al-qaeda-study?\\_s=PM:POLITICS](http://articles.cnn.com/2008-01-23/politics/bush.iraq_1_intelligence-flaws-iraq-and-al-qaeda-study?_s=PM:POLITICS); Charles Lewis & Mark Reading-Smith, *False Pretenses*, CTR. FOR PUB. INTEGRITY, Jan. 23, 2008, <http://projects.publicintegrity.org/WarCard/>; *War Card Chart*, CTR. FOR PUB. INTEGRITY, Jan. 23, 2008, <http://projects.publicintegrity.org/WarCard/Images/Charts/WarCardChart.jpg> (drastic increase in false and misleading statements starting in September 2002); Robert Bejesky, *Weapon Inspections Lessons Learned: Burdens of Proof and Evidentiary Standards*, 38 SYRACUSE J. INT'L L. & COM. (forthcoming 2011), at 8-16.

21. S. REP. NO. 108-301, at 84 (2004) (stating that from 1997 through December 2001, the IC produced a number of coordinated assessments, at least one every year, that "consistently concluded that the International Atomic Energy Agency (IAEA) and the United Nations Special Commission (UNSCOM) had destroyed or neutralized Iraq's pre-Gulf War nuclear infrastructure and that Iraq did not appear to have reconstituted a nuclear weapons program"); *Id.* at 23, 144, 148-49 (shifting chemical and biological weapon claim began in early-2000 with one anonymous defecting Iraqi engineer, codenamed "CURVE BALL"); 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 6-7 (2008), available at <http://intelligence.senate.gov/pdfs/110345.pdf>.

22. Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. 107-243, 116 Stat. 1498, 1498-1502 (2002); *Bush Sends Letter to Congress on Iraqi Action*, CNN, Mar. 21, 2003, [http://articles.cnn.com/2003-03-19/politics/sprj.irq.bush\\_1\\_military-action-iraqi-president-saddam-hussein-military-conflict?\\_s=PM:ALLPOLITICS](http://articles.cnn.com/2003-03-19/politics/sprj.irq.bush_1_military-action-iraqi-president-saddam-hussein-military-conflict?_s=PM:ALLPOLITICS) (preconditions recognized and repeated); Bejesky, *supra* note 20, at 52-58, 68-69.

23. JOHN W. DEAN, WORSE THAN WATERGATE: THE SECRET PRESIDENCY OF GEORGE W. BUSH 148-49, 155 (2004); Louis Fisher, *Lost Constitutional Moorings: Recovering the War Power*, 81 IND. L.J. 1199, 1253 (2006).

Bush administration officials (on 532 different occasions in speeches, interviews, and testimony) that unequivocally guaranteed Iraq's possession of weapons of mass destruction (WMDs) and its connections to al-Qaeda.<sup>24</sup> Pre-invasion polls revealed that 70% to 90% of Americans believed that Iraq was concealing nuclear, biological, and chemical weapons; majorities of those polled thought Hussein was aiding terrorists who would ultimately attack the U.S.<sup>25</sup> The 1,400-member Iraqi Survey Group's post-invasion inspection efforts failed to discover WMD evidence<sup>26</sup> and other investigations were unsuccessful in confirming an al-Qaeda connection.<sup>27</sup>

White House officials and supportive pundits attributed mistakes to reliance on faulty IC estimates.<sup>28</sup> Numerous IC officials and other commentators retorted that the White House pressured analysts, biased the intelligence gathering and analytic processes, or both.<sup>29</sup> Pandemonium

---

24. See *supra* notes 20-21; see *infra* note 27.

25. 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, 93-94 (2006); Linda Feldmann, *The impact of Bush linking 9/11 and Iraq*, CHRISTIAN SCIENCE MONITOR, Mar. 14, 2003, <http://www.csmonitor.com/2003/0314/p02s01-woiq.html>; Martin Merzer, *Americas Don't Want to Fight Iraq Alone, Poll Finds*, KNIGHT RIDDER, Jan. 12, 2003, [http://articles.orlandosentinel.com/2003-01-12/news/0301120008\\_1\\_war-with-iraq-saddam-hussein-military-action](http://articles.orlandosentinel.com/2003-01-12/news/0301120008_1_war-with-iraq-saddam-hussein-military-action); Jim Rutenberg & Robin Toner, *Critics Say Coverage Helped Lead to War*, N.Y. TIMES, Mar. 22, 2003, at B1; Dana Milbank & Claudia Deane, *Hussein Link to 9/11 Lingers in Many Minds*, WASH. POST, Sept. 6, 2003, at A01; Bruce Morton, *Selling an Iraq-al Qaeda Connection*, CNN, Mar. 11, 2003, <http://www.cnn.com/2003/WORLD/meast/03/11/Iraq.Qaeda.link/>; *Poll: Losing Patience with the U.N.*, CBS NEWS, Mar. 10, 2003, <http://www.cbsnews.com/stories/2003/03/18/opinion/polls/main544511.shtml>.

26. SENATE SELECT COMM. ON INTELLIGENCE, POSTWAR FINDINGS ABOUT IRAQ'S PROGRAMS AND LINKS TO TERRORISM AND HOW THEY COMPARE WITH PREWAR ASSESSMENTS, S. REP. NO. 109-331, at 22-26, 32-38, 41-44, 52-59 (2006); Spectar, *supra* note 25, at 88-89, 88 n.286; see CENT. INTELLIGENCE AGENCY, DCI SPECIAL ADVISOR REPORT ON IRAQ'S WMD (2004), [https://www.cia.gov/library/reports/general-reports-1/iraq\\_wmd\\_2004/Comp\\_Report\\_Key\\_Findings.pdf](https://www.cia.gov/library/reports/general-reports-1/iraq_wmd_2004/Comp_Report_Key_Findings.pdf); *The World According to Bush*, *supra* note 10 ("All the Iraqis we were talking to [denied the existence of WMD and] . . . no Iraqi had a story that said they had weapons . . . ." (remarks of ISG head David Kay)).

27. S. REP. NO. 109-331, at 105-12 (2006); *60 Minutes: At the Center of the Storm: Interview with George Tenet* (CBS television broadcast Apr. 29, 2007), <http://cbsnews.com/video/watch/?id=2739673n&tag=related;photovideo> ("We could never verify that there was any Iraqi authority, direction, connection and control, complicity with al-Qaeda for 9/11 or any operational act against America, period."); *Hussein's Iraq and al Qaeda Not Linked, Pentagon Says*, CNN, Mar. 13, 2008, [http://articles.cnn.com/2008-03-13/us/alqaeda.saddam\\_1\\_qaeda-targets-of-iraqi-state-iraqi-state-terror-operations?\\_s=PM:US](http://articles.cnn.com/2008-03-13/us/alqaeda.saddam_1_qaeda-targets-of-iraqi-state-iraqi-state-terror-operations?_s=PM:US); *Iraq 'Had No Links to al-Qaeda'*, BBC NEWS, June 27, 2003, [http://news.bbc.co.uk/2/hi/middle\\_east/3027234.stm](http://news.bbc.co.uk/2/hi/middle_east/3027234.stm).

28. See *infra* notes 335, 510.

29. See *infra* notes 236-40, 250-63, 290-92, 297-300, 302-04, 309-16; see also S. REP. NO. 108-301, at 272 (2004) (referencing reports that administration "pressured" IC officials to "skew their analyses"); S. REP. NO. 108-301, at 272-77, 284, 359-60, 450-51, 455-56, 461-62, 468, 484-

caused the Senate Select Committee on Intelligence (SSCI), Congress's prime intelligence oversight body, to undertake a five-year investigation that criticized both faulty NIE estimates and the administration.<sup>30</sup> In a statement that concluded the investigation, SSCI Chairman Rockefeller remarked: "In making the case for war, the administration repeatedly presented intelligence as fact when it was unsubstantiated, contradicted or even nonexistent."<sup>31</sup>

Three predominant political science theories help to explain these asymmetric information deficiencies and provide an inclusive lens for assessing international law and foreign policy: (1) the abiding philosophical battle between realism and liberalism in international relations; (2) *Exit, Voice, and Loyalty* bureaucratic dissent principles, and (3) Public Choice. In two-level games diplomatic positions interact and update with domestic support or restraint, such as in treaty ratification procedures or international relations crises.<sup>32</sup> Here, the philosophical neoconservative policy preference (variable one) might be inhibited or embraced by domestic bureaucratic positions (variable two), and/or public opinion (variable three). For variable two, other government agencies in the aggregate conformed to the preferred policy, as organizational theory and psychology research would likely predict, while some IC, State Department, and Pentagon officials voiced their dissent over the uncertainty of any alleged danger and even resigned.<sup>33</sup>

---

85, 499, 505 (2004) (SSCI discussing questions of "biasing" the process and ultimately concluding that Administration officials did not bias or pressure IC estimates, but on other pages recognizing information and circumstances that arguably were bias and pressure from the Administration); JAMES BRAMFORD, A PRETEXT FOR WAR 333-37 (2004); Fisher, *supra* note 23, at 1253; Yamamoto, *supra* note 10, at 299 (citing allegations that Bush "lied about the intelligence" to "satisfy the United Nations' criteria for war"); Paul R. Pillar, *Intelligence, Policy, and the War in Iraq*, 85 FOREIGN AFF., Mar./Apr. 2006, at 15; Walter Pincus & Dana Priest, *Some Iraq Analysts Felt Pressure from Cheney Visits*, WASH. POST, June 5, 2003, at A1; Walter Pincus, *Prewar Findings Worried Analysts*, WASH. POST, May 22, 2005, at A26, <http://www.washingtonpost.com/wp-dyn/content/article/2005/05/21/AR2005052100474.html>.

30. S. REP. NO. 108-301, at 14, 16, 18, 22-24, 27, 32-34, 136, 269, 270-71, 363, 370, 391, 417, 419 (2004).

31. Walter Pincus, *Records Could Shed Light on Iraq Group*, WASH. POST, June 9, 2008, at A15 (quoting SSCI Chairman John D. Rockefeller).

32. Robert D. Putnam, *Diplomacy and Domestic Politics: The Logic of Two-Level Games*, 42 INT'L ORG. 427, 460 (1988).

33. Leigh Thompson & George Loewenstein, *Egocentric Interpretations of Fairness and Interpersonal Conflict*, 51 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 176, 176-77 (1992) (finding that people fail to avoid mutually disadvantageous outcomes when negotiating because they tend to bias their assessment of what is fair in relation to another party based on their own self-interest); R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 22-23 (1960) (externalities and transaction costs can impede action); *see infra* Part III(B). In organizations, employees are apt to conform to a median position when participating in group interactions and to

Public Choice (variable three) presumes that there are bilateral interactions between populace preferences and government policy in democracies.<sup>34</sup> Public misperceptions allowed the action, but once updated, the support for occupation dwindled, ostensibly also due to the realization that there were no WMDs.<sup>35</sup> A majority of Americans doubted the president's honesty and demanded troop withdrawal; a Zogby poll found that 72% of returning veterans favored withdrawal within a year.<sup>36</sup> *ABC News* surveyed Congresspersons who had voted for the October 2002 *Authorization* and discovered that a substantial percentage reversed their positions in hindsight and confirmed that the resolution would have been rejected with more accurate information.<sup>37</sup> The low January 2009 presidential approval ratings were due to the Iraq War and poor domestic economic conditions, which may in fact be interrelated if foreign policy expenditures impact domestic economic conditions.<sup>38</sup>

Officials seemed reluctant to testify to projected invasion costs and proffered highly conservative estimates that contradicted experts who

---

follow orders of organizational leaders, both of which are influences that may make members of an organization moderate or even avoid dissent. *See infra* Part III(A) (considering dissenters).

34. *See generally* SHAUN HARGREAVES ET AL., *THE THEORY OF CHOICE: A CRITICAL GUIDE* (1992); Mark Kelman, *Consumption Theory, Production Theory, and Ideology in the Coase Theorem*, 52 S. CAL. L. REV. 669, 670-71 (1979).

35. *See Poll: Approval for Iraq Handling Drops to New Low*, CNN, Dec. 18, 2006, [http://articles.cnn.com/2006-12-18/politics/bush.poll\\_1\\_poll-iraq-war-anti-terrorism-efforts?\\_s=PM:POLITICS](http://articles.cnn.com/2006-12-18/politics/bush.poll_1_poll-iraq-war-anti-terrorism-efforts?_s=PM:POLITICS); *see also* Dalia Sussman, *Poll Shows View of Iraq War Is Most Negative Since Start*, N.Y. TIMES, May 25, 2007, <http://www.nytimes.com/2007/05/25/washington/25view.html?oref=slogin> (sixty-one percent saying U.S. should have stayed out of Iraq); Richard Morin & Dana Milbank, *Poll finds distrust of Bush on Iraq*, WASH. POST, Feb. 13, 2004, [http://www.boston.com/news/nation/articles/2004/02/13/poll\\_finds\\_distrust\\_of\\_bush\\_on\\_iraq/](http://www.boston.com/news/nation/articles/2004/02/13/poll_finds_distrust_of_bush_on_iraq/) (reporting that 54% thought Bush "exaggerated or lied about prewar intelligence" and only 47% approved "of his handling of the situation" in Iraq).

36. Charles Levinson, *In Iraq, Frontline Patience Wears Thin*, CHRISTIAN SCI. MONITOR, Mar. 30, 2006, at 1 (citing Zogby Poll), <http://www.csmonitor.com/2006/0330/p01s04-woiq.html>; *see* ANTHONY ARNOVE, *IRAQ: THE LOGIC OF WITHDRAWAL* 96 (2006); Richard W. Stevenson & David S. Cloud, *His Image Tarnished, Bush Seeks to Restore Credibility*, N.Y. TIMES, Nov. 11, 2005, at A21.

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

38. *See* Bruce Patsner, *Book Review: The Three Trillion Dollar War: The True Cost of the Iraq Conflict*, 11 DEPAUL J. HEALTH CARE L. 359, 362 (2008) (reviewing JOSEPH E. STIGLITZ & LINDA J. BILMES, *THE THREE TRILLION DOLLAR WAR: THE TRUE COST OF THE IRAQ CONFLICT* (2008)); *see also* Linda J. Bilmes & Joseph E. Stiglitz, *The Iraq War Will Cost Us \$3 Trillion, and Much More*, WASH. POST, Mar. 9, 2008, at B1, <http://www.washingtonpost.com/wp-dyn/content/article/2008/03/07/AR2008030702846.html>; *War Costs Could Total \$1.6 Trillion by 2009, Panel Estimates*, CNN, Nov. 13, 2007, [http://articles.cnn.com/2007-11-13/politics/hidden.war.costs\\_1\\_war-costs-iraq-oil-prices?\\_s=PM:POLITICS](http://articles.cnn.com/2007-11-13/politics/hidden.war.costs_1_war-costs-iraq-oil-prices?_s=PM:POLITICS); *see generally* VICTOR ARGY, *THE POSTWAR INTERNATIONAL MONEY CRISIS: AN ANALYSIS* (1981).



predicted that an invasion would severely disrupt government spending and negatively impact the economy.<sup>39</sup> The invasion, occupation, and security expenditures, soldier medical outlays, and rebuilding efforts have been estimated to cost as much as \$1.5 trillion through 2009.<sup>40</sup> An occupation requiring sustained expenditures was not publicly addressed, but instead the action was advanced to confront security threats, evolving into a “liberation” mission amid an equivocal Iraqi populace.<sup>41</sup> Security Council Resolution 1483 labeled Britain and the U.S. as the occupying “Authority” to ensure disarmament, to administer the country, to provide humanitarian aid, and to install a representative government, all of which were projected to take slightly over a year.<sup>42</sup> Despite the expiration of authority, there were still one hundred and sixty thousand soldiers and one hundred and eighty thousands private contractors in Iraq in July 2007.<sup>43</sup> The 2008 U.S.-Iraq “bridge” agreement called for occupation forces to withdraw by 2012, but Army chief of staff General George Casey recently explained that because the world remains “dangerous and unpredictable,” the Pentagon is prepared to remain for another decade.<sup>44</sup>

---

39. See *infra* Part IV(A).

40. See *infra* notes 354-60.

41. See U.N. Sec. Council, *The Situation Between Iraq and Kuwait*, U.N. Doc. S/PV.4726, at 8 (Mar. 26, 2003) (rejecting the use of force) (see Malaysia); U.N. Sec. Council, *The Situation Between Iraq and Kuwait*, U.N. Doc. S/PV.4721, at 8 (Mar. 19, 2003) (“Not one of those decisions authorizes the right to use force against Iraq . . .”) (Mr. Ivanov on behalf of the Russian federation)); Jutta Brunnée & Stephen J. Toope, *The Use of Force: International Law After Iraq*, 53 INT’L & COMP. L.Q. 785, 794 (2004); Thomas Franck, *What Happens Now? The United Nations After Iraq*, 97 AM. J. INT’L L. 607, 608 (2003); Sean D. Murphy, *Assessing the Legality of Invading Iraq*, 92 GEO. L.J. 173, 173-74 (2004); Colum Lynch, *At UN, Russia Challenges US on Iraq*, WASH. POST, Oct. 26, 2002, at A20 (noting that Russia called U.S. demands “unacceptable”); *Bush Press Conference, Urging Quick Action on U.N. Resolution*, AMERICA.GOV (Aug. 21, 2006), <http://www.america.gov/st/texttrans-english/2006/August/20060821135530eafas0.4053308.html> (“[T]he main reason we went into Iraq at the time was we thought he had weapons of mass destruction. It turns out he didn’t . . .”); *Excerpts: Annan Interview*, BBC NEWS, Sept. 16, 2004, [http://news.bbc.co.uk/2/hi/middle\\_east/3661640.stm](http://news.bbc.co.uk/2/hi/middle_east/3661640.stm); see also *supra* note 15.

42. S.C. Res. 1546, ¶¶ 1, 2, 4(c), U.N. Doc. S/RES/1546 (June 7, 2004); S.C. Res. 1483, ¶¶ 4, 9, U.N. Doc. S/RES/1483 (May 22, 2003); COALITION PROVISIONAL AUTHORITY, NOVEMBER 15 AGREEMENT: TIMELINE TO A SOVEREIGN, DEMOCRATIC AND SECURE IRAQ, available at <http://www.iraqcoalition.org/government/AgreementNov15.pdf>.

43. T. Christian Miller, *Contractors Outnumber Troops in Iraq*, L.A. TIMES, July 4, 2007, at A1.

44. Tom Curley, *Army Chief Casey: US Ready To Be In Iraq 10 Years*, ASSOC. PRESS, May 26, 2009, [http://www.huffingtonpost.com/2009/05/26/army-chief-casey-us-ready\\_n\\_207897.html](http://www.huffingtonpost.com/2009/05/26/army-chief-casey-us-ready_n_207897.html).

## II. VARIABLE ONE

## A. NEOCONSERVATISM

Neoconservatism can be traced to the Nixon, Ford, and Kissinger era of Cold War struggles,<sup>45</sup> but the more recent *weltanschauung* is encountered in the Reagan-Bush administration. The U.N. General Assembly condemned the 1983 Reagan-ordered attack on Granada to reinstall Maurice Bishop's government as a violation of international law by a vote of 108–9–27 and denounced the 1989 Bush-ordered invasion of Panama as a “flagrant violation of international law” by a vote of 75–20–40.<sup>46</sup> In 1985, Reagan alerted Congress that the Sandinista government was a state-sponsor of terror capable of launching hemispheric-wide communist revolutions, and that it posed an “unusual and extraordinary” security threat since Nicaragua was a mere two-day drive from the U.S. border.<sup>47</sup> The International Court of Justice (ICJ) eventually found that Reagan's use of covert CIA operations to organize, train, finance, and supply Contra insurgents in support of their efforts to overthrow the democratically-elected Nicaraguan government was a violation of international law.<sup>48</sup> Consequently, Reagan withdrew the U.S. from the ICJ's contentious jurisdiction to avoid being mandatorily hailed before the court.<sup>49</sup>

Neoconservative ideology moiled shortly after the 1991 Gulf War, as evidenced in a draft document entitled *Defense Planning Guidance*, written by Under Secretary of Defense for Policy Paul Wolfowitz for Secretary of Defense Dick Cheney.<sup>50</sup> The draft countenanced immense defense spending increases, unilateral and preemptive attacks—which prevent any military rival from emerging—and intervention in Iraq to ensure “access to

---

45. Anderson, *supra* note 3, at 288.

46. G.A. Res. 44/240, ¶¶ 1-2, U.N. Doc. A/RES/44/240 (Dec. 29, 1989); G.A. Res. 38/7, ¶ 1, U.N. Doc. A/RES/38/7 (Nov. 2, 1983); Michael Byers & Simon Chesterman, “*You, the People*”: *Pro-Democratic Intervention in International Law*, in DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW 259, 273 n.65, 275 n.79 (Gregory H. Fox & Brad R. Roth eds., 2000).

47. Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.) 1986 I.C.J. 14, 70 (June 27); NOAM CHOMSKY, HEGEMONY OR SURVIVAL 96-97 (2004); see Kearney, *supra* note 14, at 285-86; see generally Paul S. Reichler, *Holding America to Its Own Best Standards: Abe Chayes and Nicaragua in the World Court*, 42 HARV. INT'L L.J. 15 (2001) (discussing chronology of events from the Nicaraguan legal team's perspective and criticizing Reagan administration).

48. Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.) 1986 I.C.J. 14, 251-52 (June 27).

49. Symposium, *A New Legal Frontier in the Fight Against Global Warming: Panel II*, 16 FORDHAM ENVTL. L. REV. 335, 346 (2005).

50. Fisher, *supra* note 23, at 1248; see Zhiyuan Cui, *The Bush Doctrine and Neoconservatism: A Chinese Perspective*, 46 HARV. INT'L L.J. 403, 403-04 (2005); Patrick E. Tyler, *U.S. Strategy Plan Calls for Insuring No Rivals Develop*, N.Y. TIMES, Mar. 8, 1992, at A1.

vital raw materials, primarily Persian Gulf oil.”<sup>51</sup> This “guidance” signaled ideology but lacked legal significance. The Executive Branch has no prerogative to implement a broadly-aggressive, *ex ante*, and unilateralist foreign policy that may marginalize U.N. Charter rules<sup>52</sup> and violate Congress’s War Powers and the Constitution’s Treaty Clause.<sup>53</sup> Nonetheless, neoconservatives were relentless in offering policy prescriptions.

Many Reagan-Bush Sr. administration officials were affiliated with conservative think tanks during the 1990s and founded the Project for a New American Century (PNAC) in 1997.<sup>54</sup> In January 1998, eighteen PNAC members, ten of whom were appointed to top foreign policy positions in the Bush Jr. administration, addressed a letter to President Clinton that belittled the Security Council for its alleged impotence in addressing Iraq and urged Clinton to remove Hussein because he became a “hazard [to] the world’s supply of oil,”<sup>55</sup> even though oil prices had been low and stable for many years.<sup>56</sup> Furthermore, after the Gulf War, there

51. Tyler, *supra* note 50 (the draft postulated “regional wars against Iraq and North Korea,” and one major U.S. interest for such a war with Iraq would be “access to . . . Persian Gulf Oil”); see Altheide, *supra* note 10, at 983 (1992 “power broker” plan).

52. U.N. Charter arts. 2, 39, 42.

53. Stephen L. Carter, *The Constitutionality of the War Powers Resolution*, 70 VA. L. REV. 101, 109-11 (1984); S.J. Res. 1, 102d Cong., 137 CONG. REC. S169 (Jan. 10, 1991) (presenting arguments that not all conflicts meet traditional definition of a war); Stephen L. Carter, *Going to War Over War Powers*, WASH. POST, Nov. 18, 1990, at C1; see *supra* notes 8-9, 14.

54. THE PROJECT FOR THE NEW AM. CENTURY, REBUILDING AMERICA’S DEFENSES 90 (2000) [hereinafter PNAC/REBUILDING]; Fisher, *supra* note 23, at 1231; Charles J. Moxley, Jr., *The Sword in the Mirror—The Lawfulness of North Korea’s Use and Threat of Use of Nuclear Weapons Based on the United States’ Legitimization of Nuclear Weapons*, 27 FORDHAM INT’L L.J. 1379, 1409 n.137 (2004); Philippe Sands, *Poodles and Bulldogs: The United States, Britain, and the International Rule of Law*, 84 IND. L.J. 1357, 1360 (2009); Francis Fukuyama, *The Neoconservative Movement*, NAT’L INT., Summer 2004; HIJACKING CATASTROPHE, *supra* note 10; *Panorama: The War Party* (BBC television broadcast May 18, 2003), transcript available at <http://news.bbc.co.uk/nol/shared/spl/hi/programmes/panorama/transcripts/thewarparty.txt>; *The World According to Bush*, *supra* note 10; UNCOVERED: THE WHOLE TRUTH ABOUT THE IRAQ WAR (Brave New Films 2004), transcript available at <http://www.truthuncovered.com/UNCOVEREDtranscript.pdf>.

Prominent PNAC members include Donald Rumsfeld, Richard Cheney, Lewis Libby, Paul Wolfowitz, Richard Perle, John Bolton, Elliot Abrams, Douglas Feith, Michael Ledeen, Richard Armitage, Zalmay Khalilzad, William Kristol, and Jeb Bush. See Letter from The Project for the New Am. Century to President Bill Clinton (Jan. 26, 1998) [hereinafter PNAC Letter]; see also Ibrahim J. Gassama, *International Law at a Grotian Moment: The Invasion of Iraq in Context*, 18 EMORY INT’L L. REV. 1, 16 n.56 (2004) (discussing PNAC letter to Clinton); *Chronology: The Evolution of the Bush Doctrine*, PBS FRONTLINE, <http://www.pbs.org/wgbh/pages/frontline/shows/iraq/etc/cron.html> (last visited Mar. 20, 2011).

55. PNAC Letter, *supra* note 54; see Gassama, *supra* note 54, at 16 n.56 (2004) (discussing PNAC letter to Clinton); *Chronology: The Evolution of the Bush Doctrine*, *supra* note 54.

56. Robert Bejesky, *Geopolitics, Oil Law Reform, and Commodity Market Expectations*, 63(2)

were no Iraqi military encroachments toward any contiguous country, and the American military had effectively quarantined Iraq by establishing bases in neighboring countries and by patrolling 60% of Iraq's airspace.<sup>57</sup>

One month later, many of the same individuals, this time as "The Committee for Peace and Security in the Gulf," lobbied Clinton with a nine-point political and military strategy for bringing down Saddam and his regime.<sup>58</sup> Unsuccessful, they turned to Congressional leaders Trent Lott and Newt Gingrich and complained that Clinton was not heeding their counsel. The Committee urged Congress to "establish and maintain a strong U.S. military presence in the region, and to be prepared to use force to protect vital [US] interests in the Gulf—and, if necessary, to help remove Saddam from power."<sup>59</sup> For six years, U.N. inspection teams conducted thousands of inspections and presumed that Iraq was devoid of any prohibited weapon programs, which logically meant that Resolution 687's disarmament conditions were fulfilled and economic and trade sanctions could gradually be lifted.<sup>60</sup> Despite such conclusions, the sanctions remained in place while neoconservative advocacy in policy documents, books, and media emphasized impending jeopardy without tangible evidence.<sup>61</sup>

The key document signifying neoconservative philosophy is PNAC's *Rebuilding America's Defenses (Rebuilding)*. The preface espouses four goals: "[D]efend the American homeland; fight and decisively win multiple, simultaneous major theater wars; perform the 'constabulary' duties associated with shaping the security environment in critical regions; [and] transform U.S. forces to exploit the 'revolution in military affairs.'"<sup>62</sup>

---

OKLA. L. REV. (forthcoming 2011), at 85-88.

57. ROBERT DREYFUSS, *DEVIL'S GAME: HOW THE UNITED STATES HELPED UNLEASH FUNDAMENTALIST ISLAM* 70, 90-91, 121 (2005); see also Jules Dufour, *The Worldwide Network of US Military Bases*, GLOBAL RESEARCH (July 1, 2007), <http://www.globalresearch.ca/index.php?context=va&aid=5564>; see *infra* notes 326-32 (no-fly zones).

58. See *Overthrow Hussein, U.S. Group Advises*, CNN, Feb. 20, 1998, <http://www.cnn.com/WORLD/9802/20/iraq.war.presser/>.

59. Letter from The Project for the New Am. Century to Speaker of the House Newt Gingrich and Senate Majority Leader Trent Lott (May 29, 1998), available at <http://web.archive.org/web/20070814062038/www.newamericancentury.org/iraqletter1998.htm>.

60. Bejesky, *supra* note 20, at 6-7; see *supra* note 21; see also SARAH GRAHAM-BROWN, *SANCTIONING SADDAM: THE POLITICS OF INTERVENTION IN IRAQ* 80 (1999) (noting that Russia, China, and France supported resolution to lift sanctions in 1995).

61. PNAC/REBUILDING, *supra* note 54, at 4, 8, 14-15, 52-54, 75; David Wurmser, *Iraq Needs a Revolution*, WALL ST. J., Nov. 12, 1997, at A22; see generally WILLIAM KRISTOL & LAWRENCE F. KAPLAN, *THE WAR OVER IRAQ*, at ix, 3-5 (2003); DAVID WURMSER, *TYRANNY'S ALLY: AMERICA'S FAILURE TO DEFEAT SADDAM HUSSEIN* (1999); see *infra* notes 452-57 (Ledeen's advocacy).

62. PNAC/REBUILDING, *supra* note 54, at iv; Carl Bruch & John Pendergrass, *Type II*

The proposal advocates preserving global military hegemony, intervening in Middle East affairs, increasing the annual military budget by \$100 billion over a four-year period, and “shap[ing] circumstances before crises arise.”<sup>63</sup> With regard to Iraq, the document maintains that “the United States has for decades sought to play a more permanent role in Gulf regional security. While the unresolved conflict with Iraq provides the immediate justification, the need for a substantial American force presence in the Gulf transcends the issue of the regime of Saddam Hussein.”<sup>64</sup> The end of the Cold War left the international system unipolar, but neoconservatives marketed a domineering foreign policy<sup>65</sup> by conjuring *perceptions* of peril and by branding Iraq as the prime menace.

The document’s title, *Rebuilding America’s Defenses*, and metaphors, such as “American military forces limp toward exhaustion,”<sup>66</sup> connote a decrepit and vulnerable military even though the U.S. was then (and remains) the most technologically advanced superpower.<sup>67</sup> For example, the U.S. can exert significant influence over which countries may procure certain weapons, since ninety-four of the top one hundred global companies producing high-technology armaments are either located in the U.S. or in allied countries.<sup>68</sup> Moreover, in 1999, American military expenditures were approximately sixteen times the combined military spending of the labeled “axis of evil” countries (Iran, Iraq, and North Korea) and “rogue states” (Libya, Syria, and Cuba).<sup>69</sup> Allocations are now over \$651 billion and

---

*Partnerships, International Law, and the Commons*, 15 GEO. INT’L ENVTL. L. REV. 855, 879 n.109 (2003); Bruce Cronin, *The Paradox of Hegemony: America’s Ambiguous Relationship with the United Nations*, 7(1) EUR. J. INT’L REL. 108 (2001); John J. Davenport, *Just War Theory Requires a New Federation of Democratic Nations*, 28 FORDHAM INT’L L.J. 763, 771 n.46 (2005); Moxley, Jr., *supra* note 54, at 1409 n.137.

63. PNAC/REBUILDING, *supra* note 54, at preface, 2, 14, 51, 75; Altheide, *supra* note 10, at 983; *see* Spectar, *supra* note 25, at 124-25.

64. PNAC/REBUILDING, *supra* note 54, at 14; *see* Ian S. Lustick, *Fractured Fairy Tale: The War on Terror and the Emperor’s New Clothes*, 16 MINN. J. INT’L L. 335, 340-42 (2007).

65. *See* Martin V. Totaro, *Book Review: The Other Path of Neoconservatism: Francis Fukuyama, America at the Crossroads, Power, and the Neoconservative Legacy*, 47 VA. J. INT’L L. 927, 937 (2007) (book review).

66. PNAC/REBUILDING, *supra* note 54, at 1.

67. Scheherazade S. Rehman, *American Hegemony: If Not US, Then Who?*, 19 CONN. J. INT’L L. 407, 408 (2004); Charles Tiefer, *The Iraq Debacle: The Rise and Fall of Procurement-Aided Unilateralism as a Paradigm of Foreign War*, 29 U. PA. J. INT’L L. 1, 3 (2007).

68. STOCKHOLM INT’L PEACE RESEARCH INST., SIPRI YEARBOOK 2005: ARMAMENTS, DISARMAMENTS AND INTERNATIONAL SECURITY app. 9A (2005), *available at* <http://yearbook2005.sipri.org/ch9/app9A> (U.S., Western Europe, Japan, Israel and other close allies have ninety-four and Russia had six).

69. BUREAU OF VERIFICATION, COMPLIANCE, AND IMPLEMENTATION, U.S. DEP’T OF STATE, WORLD MILITARY EXPENDITURES AND ARMS TRANSFERS 1999, at 38, *available at* <http://www.state.gov/documents/organization/18738.pdf>. Iran, Iraq, North Korea, Libya (statistic

represent approximately *half* of aggregate global military expenditures.<sup>70</sup> For four decades, Pentagon foreign base expansions were premised on Cold War threats, but nearly one thousand foreign military bases and installations remain, with over 100,000 troops stationed in Europe, 37,000 in South Korea, and 50,000 in Japan.<sup>71</sup> Though taxpayers may not be fully cognizant of either expenditure levels or global military dominance, they may be preconditioned by risk portrayals.

Such portrayals are found in the September 2002 *National Security Strategy* (NSS),<sup>72</sup> which paradoxically surmises that *we* are “now threatened less by conquering states than we are by failing ones.”<sup>73</sup> Secretary of Defense Rumsfeld stated in prepared testimony: “We have entered a new security environment, arguably the most dangerous the world has known.”<sup>74</sup> Rumsfeld was the Secretary of Defense during the Cold War’s “mutually assured destruction” threats, which occurred as the U.S. and Soviet Union pointed intercontinental ballistic nuclear missiles at each other.<sup>75</sup> Government officials executed Cold War civil defense exercises and

---

N/A), Syria, and Cuba totaled \$17.47 billion, while U.S. expenditures were \$281 billion. *Id.* U.S. expenditures were nearly 225 times more than Iraq’s estimated expenditures. *Id.*

70. U.S. DEP’T OF DEF., THE BUDGET FOR FISCAL YEAR 2009, at 49, available at <http://www.gpoaccess.gov/usbudget/fy09/pdf/budget/defense.pdf>; Stewart Patrick & Kaysie Brown, *The Pentagon and Global Development: Making Sense of the DoD’s Expanding Role* 3 (Ctr. For Global Dev., Working Paper No. 131, 2007), available at <http://www.cgdev.org/content/publications/detail/14815/> (follow “Download (PDF, 307 KB)” hyperlink); *World Wide Military Expenditures*, GLOBALSEcurity.ORG, <http://www.globalsecurity.org/military/world/spending.htm> (last modified Jan. 17, 2011); see Charles V. Peña, *Bush’s National Security Strategy: A Global Security Strategy That Undermines National Security*, 6 J.L. & SOC. CHALLENGES 45, 50-51 (2004).

71. Peña, *supra* note 70, at 52; Eric Talmadge, *Recovery, US troops priority of new Japan leader*, ASSOCIATED PRESS, Sept. 1, 2009, <http://www.signonsandiego.com/news/2009/aug/31/japan-politics-083109/>; see U.S. DEP’T OF DEF., BASE STRUCTURE REPORT: FISCAL YEAR 2007 BASELINE 22, available at [http://www.defense.gov/pubs/BSR\\_2007\\_Baseline.pdf](http://www.defense.gov/pubs/BSR_2007_Baseline.pdf); Hugh Gusterson, *Empire of bases*, BULLETIN ATOMIC SCIENTISTS, Mar. 10, 2009, <http://www.thebulletin.org/web-edition/columnists/hugh-gusterson/empire-of-bases>.

72. Jeffrey W. Taliaferro, *Power, Liberal Imperialism, and the Bush Doctrine*, 31 FLETCHER F. WORLD AFF. 175, 177 (2007) (reviewing CHRISTOPHER LAYNE, *THE PEACE OF ILLUSIONS: AMERICAN GRAND STRATEGY FROM 1940 TO THE PRESENT* (2006) & TONY SMITH, *A PACT WITH THE DEVIL: WASHINGTON’S BID FOR WORLD SUPREMACY AND THE BETRAYAL OF THE AMERICAN PROMISE* (2007)) (attributing “Bush doctrine” to neoconservative blueprint).

73. WHITE HOUSE, *THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA* 1 (2002) [hereinafter NSS].

74. Testimony of the U.S. Secretary of Defense Donald H. Rumsfeld Prepared for Delivery to the National Commission on Terrorist Attacks upon the United States 3 (March 23, 2004), available at [http://www.fas.org/irp/congress/2004\\_hr/rumsfeld\\_statement.pdf](http://www.fas.org/irp/congress/2004_hr/rumsfeld_statement.pdf) (unpublished prepared testimony of Secretary of Defense).

75. See W. Michael Reisman, Comment, *Assessing Claims to Revise the Laws of War*, 97 AM. J. INT’L L. 82, 85-86 (2003) (discussing “mutually assured destruction”); see *infra* notes 390-92 (referencing Rumsfeld’s speeches about Soviet threats during the Cold War).

evacuations, such as the *Duck and Cover* sequence of films, literature, and drills that trained two generations of students to seek “nuclear-protective” refuge and presented nuclear winter survival skills in the event of a nuclear war.<sup>76</sup> As compared to the threat posed by the “Red Menace,” the alleged security threats posed by relatively *weak* countries, combined with an overwhelmingly powerful *American* intercontinental nuclear missile arsenal,<sup>77</sup> may lead some to contend that the security environment is not nearly as dangerous as others might suggest.<sup>78</sup> Nonetheless, Cold War security threat practices were resurrected.<sup>79</sup>

Neoconservative ideology permeated the government establishment with a courtly self-assurance of threats akin to that of a Hobbesian “state of nature” international system that could only achieve peace by global dominance.<sup>80</sup> Modern day portrayals of anarchy may be estranged from facts and international law,<sup>81</sup> indifferent to negative ramifications from antagonism, and insouciant to public costs. With an American public steeped in erroneous perceptions, Bush Administration officials goaded the U.N. to fixate on Iraq after four years of dormancy<sup>82</sup> by forming the perception of crisis without a clear reason to suspect wrongdoing<sup>83</sup> and

---

76. TRACY C. DAVIS, STAGES OF EMERGENCY: COLD WAR NUCLEAR CIVIL DEFENSE (2007) (considering 1950s and 1960s civil defense exercises through the lens of performance); Richard Delgado, *The Language of the Arms Race: Should the People Limit Government Speech?*, 64 B.U. L. REV. 961, 962-67 (1984) (discussing dominant fear rhetoric remaining in the 1980s); *Cold-War Days: School Drills of ‘Duck and Cover,’* N.Y. TIMES, Apr. 16, 2007, <http://query.nytimes.com/gst/fullpage.html?res=9402EFDE113FF935A25757C0A9619C8B63>; DUCK AND COVER (Archer Productions 1951), <http://www.archive.org/details/DuckandC1951>.

77. See CHALMERS JOHNSON, THE SORROWS OF EMPIRE: MILITARISM, SECRECY, AND THE END OF THE REPUBLIC 64 (2004); Arshad Mohammed & Phil Stewart, *U.S. reveals size of nuclear arsenal*, REUTERS, May 3, 2010, <http://us.mobile.reuters.com/article/idUSTRE64251X20100504?ca=rdt>.

78. See A. John Radsan, *An Overt Turn on Covert Action*, 53 ST. LOUIS L.J. 485, 487 (2009) (noting that “terrorists do not pose as great a threat as the Soviet Union during the Cold War, but they are more dangerous than drug traffickers and bank robbers”).

79. Eric S. O’Malley, *Destabilization Policy: Lessons from Reagan on International Law, Revolutions and Dealing with Pariah Nations*, 43 VA. J. INT’L L. 319, 320 (2003).

80. *Hobbes’s Moral and Political Philosophy*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY, revised on Aug. 23, 2008, <http://plato.stanford.edu/entries/hobbes-moral/> (real peace is only achievable in a state of nature by submitting to centralized rule); see *infra* notes 118-31.

81. See HIJACKING CATASTROPHE, *supra* note 10. Benjamin Barber, author of *Fear’s Empire*, noted that NSS’s rejection of “article 51 of the United Nations Charter” and declaration that “the United States will make war at a time and place of its choosing against enemies that it declares its enemies based on its own perception of what the threats are.” *Id.* Professor Miller contended, “It’s about power. It’s about domination.” *Id.*

82. See President George Bush, Remarks at the United Nations General Assembly (Sept. 12, 2002), <http://georgewbush-whitehouse.archives.gov/news/releases/2002/09/print/20020912-1.html>.

83. See *supra* note 21; see also Bejesky, *supra* note 20, at 7-14, 38-42.

projected U.S. military might to eliminate the vision of threat<sup>84</sup> that they had created. Professor Sunstein writes that the war against Iraq was “fueled by presidential speeches including vivid narratives of catastrophic harm.”<sup>85</sup> Professor Nzelibe remarks that “one can view the President’s role in an international crisis as that of an agent reacting to events that have been thrust upon him. Interestingly, however, his role as the nation’s spokesman actually puts the President in a position to create or escalate an international crisis.”<sup>86</sup>

## B. INTERNATIONAL RELATIONS PHILOSOPHY

### 1. REALISM & LIBERALISM

Neoconservative proposals may have attracted many subscribers because the allegations employ core premises of two predominant international relations philosophies, both of which provide precepts and form perceptions about the viability of international law. They are the philosophies of realism and liberalism. Neoconservatives are functionally realists, who envision dire threats and presume that power maximization is required for safety.<sup>87</sup> They are rhetorically liberalists who presuppose that international cooperation exists because all civilized countries appreciate military hegemony and the “shining beacon” of the exceptional American model of democracy.<sup>88</sup>

*Realists* contend that countries rationally choose power and wealth maximizing policies<sup>89</sup> due to a perceived anarchy of the international system and uncertain capabilities and intentions of rivals.<sup>90</sup> This philosophy is introverted in that national interest spurs competition<sup>91</sup> and renders altruistic cooperation as naive.<sup>92</sup> Accordingly, international law

---

84. See Michael C. Davis, *International Intervention in an Age of Crisis and Terror: U.N. Reform and Regional Practice*, 15 TUL. J. INT’L & COMP. L. 1, 4 (2006).

85. Cass R. Sunstein, *Precautions Against What?: The Availability Heuristic and Cross-Cultural Risk Perception*, 57 ALA. L. REV. 75, 99 (2005).

86. Jide Nzelibe, *A Positive Theory of the War-Powers Constitution*, 91 IOWA L. REV. 993, 1007 (2006).

87. See *infra* notes 89-95, 118-29.

88. See *infra* notes 125-29.

89. See KENNETH N. WALTZ, *THEORY OF INTERNATIONAL POLITICS* (1979) (constructing balance of power theory in which states pursue power-increasing strategies); see also GEORGE F. KENNAN, *AMERICAN DIPLOMACY, 1900-1950* (expanded ed. 1984) (presenting the view that U.S. officials have historically acted in foreign policy to increase power, sometimes without regard to consequences).

90. See JOHN J. MEARSHEIMER, *THE TRAGEDY OF GREAT POWER POLITICS* 30-36 (2001).

91. *Id.* at 33; BRUCE BUENO DE MESQUITA, *PRINCIPLES OF INTERNATIONAL POLITICS: PEOPLE’S POWER, PREFERENCES, AND PERCEPTIONS* 64-65, 141 (2000).

92. DE MESQUITA, *supra* note 91, at 436; see Joseph M. Greico, *Anarchy and the Limits of*



does not facilitate cooperation or provide predictability and is viewed favorably only to the extent that limited cooperation enhances state power<sup>93</sup> or powerful actors impose rules.<sup>94</sup> The status quo order merely reflects the dominant state-imposed balance of power over weaker countries.<sup>95</sup> The logical extension is that international law is not “real law” because it is imposed and there is no international judiciary or neutral enforcement mechanism to prevent other countries from selfishly shirking norms.<sup>96</sup> Those ascribing to a realist worldview may perceive little interest in promoting international institutions to constrain actions when other countries cannot be trusted to fulfill treaty obligations.

Realism’s antithesis, the liberalism view of international relations, is often traced to Immanuel Kant<sup>97</sup> and presumes that state interactions are governed by “self-restraint, moderation, compromise, and peace.”<sup>98</sup> Liberalists contend that international law is binding and fosters “trust” among nations.<sup>99</sup> This liberalist “trust” and realist “skepticism” continuum underlies the respective presumptions and perceptions of legal scholars who disagree over the potency, jurisprudential schemas, philosophical bases, and construction of international law.<sup>100</sup> Realist Hans Morgenthau believed that because maximizing “power is always the immediate aim,” a cooperative

---

*Cooperation: A Realist Critique of the Newest Liberal Institutionalism*, in INTERNATIONAL RULES: APPROACHES FROM INTERNATIONAL LAW AND INTERNATIONAL RELATIONS 147, 148-49 (Robert J. Beck et al. eds., 1996).

93. See Anne-Marie Slaughter Burley, *International Law and International Relations Theory: A Dual Agenda*, 87 AM. J. INT’L L. 205, 206 (1993).

94. Christopher H. Achen, *Institutional Realism and Bargaining Models*, in THE EUROPEAN UNION DECIDES 148 (Robert Thomson et al. eds., 2005), [http://politics.as.nyu.edu/docs/IO/4734/achen\\_4\\_s05.pdf](http://politics.as.nyu.edu/docs/IO/4734/achen_4_s05.pdf).

95. See JACK L. GOLDSMITH & ERIC A. POSNER, THE LIMITS OF INTERNATIONAL LAW 3 (2005) (“[I]nternational law emerges from states acting rationally to maximize their interests, given their perceptions of the interests of other states and the distribution of state power.”); Andrew Hurrell, *International Society and the Study of Regimes: A Reflective Approach*, in INTERNATIONAL RULES: APPROACHES FROM INTERNATIONAL LAW AND INTERNATIONAL RELATIONS 206, 207 (Robert J. Beck et al. eds., 1996); Nico Krisch, *International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order*, 16 EUR. J. INT’L L. 369, 369 (2005); see also DE MESQUITA, *supra* note 91, at 142.

96. CHRISTOPHER C. JOYNER, INTERNATIONAL LAW IN THE 21ST CENTURY: RULES FOR GLOBAL GOVERNANCE 5 (2005); see Oscar Schachter, *In Defense of International Rules on the Use of Force*, 53 U. CHI. L. REV. 113, 119 (1986); see also DE MESQUITA, *supra* note 91, at 213.

97. See generally IMMANUEL KANT, *Perpetual Peace: A Philosophical Sketch*, in KANT’S POLITICAL WRITINGS 93 (Hans Reiss ed., H.B. Nisbet trans., 1970).

98. STANLEY HOFFMANN, *Liberalism and International Affairs*, in JANUS AND MINERVA: ESSAYS ON THE THEORY AND PRACTICE OF INTERNATIONAL POLITICS 394, 396 (1987).

99. Greico, *supra* note 92, at 147-50.

100. W. Michael Reisman, *The View from the New Haven School of International Law*, 86 AM. SOC’Y INT’L L. PROC. 118, 119 (1992) (noting legalism/positivism views favor firm rules and diplomatic/natural law approaches favor elastic rules).

legalistic approach to international law is unrealistic.<sup>101</sup> The natural struggle for wealth and power<sup>102</sup> begets “subjective, politically motivated State wills or interests” and breeds unprincipled and chaotic behavior.<sup>103</sup>

Realism dominated international relations theory during the Cold War,<sup>104</sup> but since then globalization has proliferated international law, agreements, and organizations,<sup>105</sup> all of which provide more stable and predictable international relations.<sup>106</sup> Cooperation reduced competition for military “power” and the likelihood of conflict,<sup>107</sup> and it appears that most countries generally abide by international law.<sup>108</sup> Consequently, realists explained that such adherence exists because powerful countries establish the status quo and reap its dividends, while weaker countries abide by rules to avoid being sanctioned.<sup>109</sup> Other commentators coined the term “*institutionalism*” and either agreed with the realist contention that power compelled the growth of international institutions<sup>110</sup> or disagreed and asserted that countries mutually assent to principles and willingly coordinate domestic policies with international agreements.<sup>111</sup> Explanations

---

101. HANS J. MORGENTHAU, *POLITICS AMONG NATIONS: THE STRUGGLE FOR POWER AND PEACE* 27 (5th ed. 1973); see HANS J. MORGENTHAU, *IN DEFENSE OF THE NATIONAL INTEREST: A CRITICAL EXAMINATION OF AMERICAN FOREIGN POLICY 1911-1951* (1951); Hans J. Morgenthau, *Positivism, Functionalism, and International Law*, 34 *AM. J. INT'L L.* 260, 260 (1940) (critiquing legal positivism).

102. Korab-Karpowicz & W. Julian, *Political Realism in International Relations*, *THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY* 2.2 (Edward N. Zalta ed., Fall 2010 ed.), available at <http://plato.stanford.edu/archives/fall2010/entries/realism-intl-relations/>.

103. See MARTTI KOSKENNIEMI, *FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT* 2 (1989).

104. Richard H. Steinberg & Jonathan M. Zasloff, *Power and International Law*, 100 *AM. J. INT'L L.* 64, 73 (2006).

105. THOMAS M. FRANCK, *FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS* 3-6 (1995); Anupam Chander, *Globalization and Distrust*, 114 *YALE L.J.* 1193, 1195-99 (2005).

106. See LOUIS HENKIN, *HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY* 47 (2d ed. 1979); see also Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 *YALE L.J.* 2599 (1997) (reviewing ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* (1995); THOMAS FRANCK, *FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS* (1995)).

107. CHARLES W. KEGLEY JR., *CONTROVERSIES IN INTERNATIONAL RELATIONS THEORY: REALISM AND THE NEOLIBERAL CHALLENGE* 1, 12-15 (1995).

108. HENKIN, *supra* note 106, at 26.

109. MEARSHEIMER, *supra* note 90, at 364; see GOLDSMITH & POSNER, *supra* note 95, at 11-13.

110. Margaret E. McGuinness, *Multilateralism and War: A Taxonomy of Institutional Functions*, 51 *VILL. L. REV.* 149, 160-61 (2006); accord Greico, *supra* note 92, at 149-50.

111. See Andrew T. Gutzman, *A Compliance-Based Theory of International Law*, 90 *CAL L. REV.* 1823, 1825, 1838-40 (2002); John Gerard Ruggie, *Multilateralism: the Anatomy of an Institution*, in *MULTILATERALISM MATTERS: THE THEORY OF AN INSTITUTIONAL FORM* 3, 6 (John Gerard Ruggie ed., 1993).

for voluntary cooperation include the desire to promote international order and stability,<sup>112</sup> long-term economic interdependence,<sup>113</sup> international culture of compliance,<sup>114</sup> partiality for reciprocity,<sup>115</sup> preference to maintain treaty relationships,<sup>116</sup> and collective belief that rules and institutions are legitimate.<sup>117</sup>

## 2. NEOCONSERVATIVE “REALISTS” MASQUERADING AS “LIBERALISTS”

Like realists, neoconservatives reject the notion that international law and institutions can satisfactorily provide national security<sup>118</sup> and instead market the struggle for wealth and power and the inability to trust other countries.<sup>119</sup> They readily accept the realist presumption that power should not be redistributed,<sup>120</sup> and seemingly also endorse the notion that international law should be followed only when in a state’s best interest.<sup>121</sup>

---

112. See *supra* note 106.

113. See Hurrell, *supra* note 95, at 213; see also Harry Bliss & Bruce Russett, *Democratic Trading Partners: The Liberal Connection, 1962-1989*, 60 J. POL. 1126, 1137-38, 1144 (1998).

114. See LOUIS HENKIN, *INTERNATIONAL LAW: POLITICS, VALUES, AND FUNCTIONS: GENERAL COURSE ON PUBLIC INTERNATIONAL LAW* 86 (1990).

115. See Donald J. Kochan, *Boyakasha, Fist to Fist: Respect and the Philosophical Link with Reciprocity in International Law and Human Rights*, 38 GEO. WASH. L. REV. 349, 349-50 (2006).

116. See Kurt Taylor Gaubatz, *Democratic States and Commitment in International Relations*, 50 INT’L ORG. 109, 121 (1996).

117. FRANCK, *supra* note 105, at 3-7; see Harold Hongju Koh, Address, *The 1998 Frankel Lecture: Bringing International Law Home*, 35 HOUS. L. REV. 623 (1998); Koh, *supra* note 106, at 2599; see also IAN CLARK, *LEGITIMACY IN INTERNATIONAL SOCIETY* (2005).

118. Jesse Townsend, Book Note, *Recent Publications*, 32 YALE J. INT’L L. 269, 269 (2007) (reviewing FRANCIS FUKUYUMA, *AMERICA AT THE CROSSROADS: DEMOCRACY, POWER, AND THE NEOCONSERVATIVE LEGACY* (2006)).

119. See *supra* notes 82-88, 95-96, 111-16; see *infra* notes 121-23.

120. Mark A. Drumbl, *Collective Violence and Individual Punishment: The Criminality of Mass Atrocity*, 99 NW. U. L. REV. 539, 548 (2005).

121. It is unrealistic to presume that a neoconservative philosophical driving force cannot be gagged or is an ideology that unequivocally caused actions that were alleged to breach international law during the Bush administration. What is clear is the following: many appointed senior officials were proud neoconservatives indifferent to international law; PNAC has no qualm with favoring unilateralism; and the Bush administration engaged in many policy actions that were widely condemned by other countries and scholars. See Bejesky, *supra* note 20, at 50-51, 70-71; see *supra* notes 3, 10-11; see *infra* notes 136-39, 216-18, 323-25, 454, 505, 508; cf. David Abraham, *The Bush Regime from Elections to Detentions: A Moral Economy of Carl Schmitt and Human Rights*, 62 U. MIAMI L. REV. 249, 249 (2008) (noting a sacrifice of “long accepted legal norms—military and civilian, international and domestic” during the Bush administration along with domestic repression of the Patriot Act, torture scandals, and military tribunals); McGuinness, *supra* note 110, at 151 (stating that Bush rejected popularly-accepted international agreements once entering office); Philippe Sands, *Lawless World? The Bush Administration and Iraq: Issues of International Legality and Criminality*, 29 HASTINGS INT’L & COMP. L. REV. 295, 296 (2006); Yamamoto, *supra* note 10, at 318-19 (citing legal authorities challenging attacks on civil

Neoconservatives agree with the realist premise that rich and powerful states have a “disproportionate stake in maintaining the stability of the status quo.”<sup>122</sup> The preface to PNAC’s *Rebuilding* provides that its intention is to provide a framework to “shape a new century favorable to American principles and interests” and to serve the “vital role in maintaining peace and security in Europe, Asia, and the Middle East.”<sup>123</sup> This logic becomes distinctly wry when neoconservatives inject premises of liberalism. *Rebuilding* states:

America’s grand strategy should aim to preserve and extend this advantageous position [of power] as far into the future as possible. There are, however, potentially powerful states dissatisfied with the current situation and eager to change it, if they can, in directions that endanger the relatively peaceful, prosperous and free conditions the world enjoys today.<sup>124</sup>

*Rebuilding* deduces that enforcing a system of “law-abiding” nations facilitates a “social good” among the global community.<sup>125</sup> The concern is that a competitor country could destabilize the status quo and deprive law-abiding countries of the hegemon’s goodwill mission.<sup>126</sup> The altruistic justification for unilateralism is reflected in the NSS, which states: “[America’s] unprecedented—and unequalled—strength and influence in the world [is] [s]ustained by faith in the principles of liberty and values of a free society,” and America should defend “liberty and justice because these principles are right and true for all people everywhere.”<sup>127</sup> The NSS further states that the U.S. must “pursue international relations according to the

---

liberties); Scott Higham, *Law Experts Condemn U.S. Memos on Torture*, WASH. POST, Aug. 5, 2004, at A4; Carrie Johnson, *Senators Seek Ethics Findings*, WASH. POST, Feb. 17, 2009, <http://www.washingtonpost.com/wp-dyn/content/article/2009/02/16/AR2009021601198.html>; Peter J. Spiro, *The New Sovereignists: American Exceptionalism and Its False Prophets*, FOREIGN AFF., Nov./Dec. 2000, at 9, <http://www.foreignaffairs.com/articles/56621/peter-j-spiro/the-new-sovereignists-american-exceptionalism-and-its-false-pro> (stating that the Bush administration will “pick and choose the international conventions and laws that serve its purpose and reject those that do not”).

122. Hurrell, *supra* note 95, at 214.

123. PNAC/REBUILDING, *supra* note 54, at preface.

124. *Id.* at i.

125. *Id.* at ii, 47 (*Rebuilding* does not give efficacy to international law and uses the word “law” one time); UNCOVERED, *supra* note 54. In *Uncovered*, Foreign Service veteran Graham Fuller explains that neoconservatives recognize hegemony and feel compelled to assert “power globally everywhere and that anyone who resists this or defies American power is automatically unacceptable.”

126. See PNAC/REBUILDING, *supra* note 54, at iv; see also Bruch & Pendergrass, *supra* note 62, at 879 n.109.

127. NSS, *supra* note 73, at 1, 3; see Fisher, *supra* note 23, at 1249 (“Much of the neoconservative framework appears in [NSS] . . .”).

American values of democracy, freedom, and free markets” and defend those conditions as security threats.<sup>128</sup> The ends are altruistic, Kantian, and liberalist but the means are yoked by realist national security fear.<sup>129</sup> PNAC logic vacillates between realist self-interest to maintain hegemony and collective liberalist altruism.

*Rebuilding* posits that Iran, Iraq, and North Korea are seeking WMDs specifically with the intention to “dominate” their “regions” and to deter “American interventions” and further contends that these same countries, along with Libya and Syria, are threats to the U.S. and allies.<sup>130</sup> Such “interventions” will be required to thwart those intentions (realism), and the theory is that other countries will warmly welcome this global cloak of protection (liberalism). China’s economic rise is cited as a worrisome threat to American hegemony in Asia,<sup>131</sup> even though China’s foreign policy has typically been defensive, favoring non-interventionism.<sup>132</sup> In contrast to PNAC’s portrayal, President Hu Jintao stressed that China’s diplomatic strategy was to “strive for a peaceful and stable international environment, a good-neighborly and friendly surrounding environment, an environment for equal and mutually beneficial cooperation, and an objective and friendly publicity environment.”<sup>133</sup>

Even allies seem opposed to this vision of hegemony. Some NATO members expressed the need to restrain American hegemony because they favor multilateral cooperation.<sup>134</sup> The European Union is often recognized as favoring economic cooperation with concern for the internal governance

---

128. Anthony S. Winer, *The Reagan Doctrine, the 2003 Invasion of Iraq, and the Role of a Sole Superpower*, 22 LAW & INEQ. 169, 172 (2004) (citing NSS, *supra* note 73, at intro., para. 1); see Thomas Graham, Jr., *National Self-Defense, International Law, and Weapons of Mass Destruction*, 4 CHI J. INT’L L. 1, 1 (2003); see also Miriam Sapiro, *Iraq: The Shifting Sands of Preemptive Self-Defense*, 97 AM. J. INT’L L. 599, 600 (2003).

129. See Peña, *supra* note 70, at 48; see generally Winston P. Nagan & Craig Hammer, *The New Bush National Security Doctrine and the Rule of Law*, 22 BERKELEY J. INT’L L. 375, 375-76 (2004) (asserting that unilateralism can conflict with international law, diplomatic alliances, and the UN Charter; and that “[s]ome in the Bush administration saw a way to co-opt international collective security institutions to render them so weak that their prescriptive and operational force would simply become irrelevant”).

130. PNAC/REBUILDING, *supra* note 54, at 4, 51-52, 54, 75.

131. *Id.* at 4, 19, 65, 73.

132. Davis, *supra* note 84, at 22-23; see Yiwei Wang, *Public Diplomacy and the Rise of Chinese Soft Power*, 616 ANNALS AM. ACAD. POL. & SOC. SCI. 257, 268 (2008).

133. Wang, *supra* note 132, at 263 (citing Hu Jintao, President of the People’s Republic of China, Address to the 10th Conference of Diplomatic Envoys Stationed Abroad (Aug. 30, 2004)); see Cui, *supra* note 50, at 403 (Chinese perspective of neoconservatism).

134. See Nathan A. Canestaro, *Realism and Transnationalism: Competing Visions for International Security*, 25 B.U. INT’L L.J. 113, 159 (2007); Michael J. Glennon, *Seventeenth Waldemar A. Solf Lecture in International Law*, 181 MIL. L. REV. 138, 150-51 (2004).

of other countries but employs multiple nonmilitary, conflict prevention models.<sup>135</sup> Berkeley Political Science Professor Robert Kagan explains:

It is time to stop pretending that Europeans and Americans share a common view of the world, or even that they occupy the same world. . . . Europe . . . is moving beyond power into a self-contained world of laws and rules and transnational negotiation and cooperation. . . . [T]he United States remains mired in history, exercising power in an anarchic Hobbesian world where international laws and rules are unreliable, and where true security and defense and promotion of a liberal order still depend on the possession and use of military might.<sup>136</sup>

While “American” foreign policy may be somewhat institutionalized, given that Pentagon bases still span many regions of the world even though the Cold War ended two decades ago, neoconservatives and many top Bush administration officials seemed to rely on three distinct attributes of unilateralism to exploit the status quo—failing to listen to other countries, dictating a worldview, and refusing to accept factual realities that gainsay predispositions. These three attributes underlie the so-called “War on Terror,” the torture scandals,<sup>137</sup> attacking Iraq against U.N. Security Council determinations, and consistently finessing pre-invasion inspection reports and supplanting them with certainty of WMD possession.<sup>138</sup> In another prominent example, the twenty-two members of the Arab League adopted a unanimous resolution that “demanded the immediate and unconditional withdrawal of U.S. and British forces from Iraq” and affirmed that the invasion was a “violation of the United Nations Charter” and a “threat to world peace.”<sup>139</sup> Shortly after that condemnation, National Security Advisor Rice remarked: “Something had to be done about that threat and . . . this brutal dictator, with dangerous weapons, to continue to

---

135. Davis, *supra* note 84, at 27-28.

136. ROBERT KAGAN, OF PARADISE AND POWER: AMERICA AND EUROPE IN THE NEW WORLD ORDER 3 (2003); Eric Engle, *The EU Means Business: A Survey of Legal Challenges and Opportunities in the New Europe*, 4 DEPAUL BUS. & COM. L.J. 351, 354 (2006) (distinguishing PNAC ideals from the EU model).

137. PHILLIPE SANDS, LAWLESS WORLD: MAKING AND BREAKING GLOBAL RULES 206, 229 (2006); Spectar, *supra* note 25, at 114-21; see Kristen Boon, *Legislative Reform in Post-Conflict Zones: Jus Post Bellum and the Contemporary Occupant's Law-Making Powers*, 50 MCGILL L.J. 285, 291 (2005) (“Just war for some is thinly disguised neo-colonialism for others.”); see *supra* note 121.

138. Bejesky, *supra* note 20, at 20-37.

139. *Arab States Line Up Behind Iraq*, BBC NEWS, Mar. 25, 2003, [http://news.bbc.co.uk/2/hi/middle\\_east/2882851.stm](http://news.bbc.co.uk/2/hi/middle_east/2882851.stm); see Tiefer, *supra* note 67, at 1 (“shunning . . . neighboring countries”).

destabilize the Middle East.”<sup>140</sup> The “hegemonic conception of what constitutes ‘the better argument’”<sup>141</sup> may bypass facts and dominate discourse.

The liberalist view of cooperative peace envisions a federation of states that respect sovereignty so long as domestic conditions do not disrupt others’ rights,<sup>142</sup> which suggests that international interventions could be justified by balancing community and sovereign rights. The U.N. generally incorporates this philosophy and the Security Council has served as the diplomatic body to diffuse “threats to international peace and security” for six decades. However, PNAC’s *Rebuilding* predominantly mentions the United Nations only to deem its peacekeeping operations in the Balkans as unavailing and to conclude that this example confirms that solely U.S. leadership can effectively identify and respond to international security issues.<sup>143</sup> Past peacekeeping operations involved neutral, lightly-armed, and non-combatant troops<sup>144</sup> who lacked resources and had coordination problems,<sup>145</sup> but were apposite within mission context, authority, and resources.<sup>146</sup> Inevitably, U.N. peacekeeping success is substantially dependent on what the U.S. approves or does not veto in the Security Council, on what it provides to militarily and financially support U.N. missions,<sup>147</sup> and on what it does to influence NATO and other countries.<sup>148</sup>

---

140. *Newsmaker: Condoleezza Rice*, PBS ONLINE NEWSHOUR, July 30, 2003, [http://www.pbs.org/newshour/bb/white\\_house/july-dec03/rice\\_7-30.html](http://www.pbs.org/newshour/bb/white_house/july-dec03/rice_7-30.html).

141. Dana R. Villa, *Postmodernism and the Public Sphere*, 86 AM. POL. SCI. REV. 712, 715 (1992); see ROBERT W. COX & TIMOTHY J. SINCLAIR, APPROACHES TO WORLD ORDER 517-18 (1996).

142. Fernando R. Tesón, *The Kantian Theory of International Law*, 92 COLUM. L. REV. 53, 60-61, 74 (1992).

143. PNAC/REBUILDING, *supra* note 54, at 11; see U.N. Charter arts. 24, para. 2; see also William B. Wood, *Bolstering Democracy in Iraq, Afghanistan, and Kyrgyzstan: Post-Conflict Intervention Revisited: Relief, Reconstruction, Rehabilitation, and Reform*, 29 FLETCHER F. WORLD AFF. 119, 120 (2005).

144. See Brian D. Tittmore, *Belligerents in Blue Helmets: Applying International Humanitarian Law to United Nations Peace Operations*, 33 STAN. J. INT’L L. 61, 80 (1997).

145. U.N. Gen. Assembly Sec. Council, *Comprehensive Review of the Whole Question of Peacekeeping Operations in All Their Aspects*, 18, U.N. Doc. A/55/305 (Aug. 21, 2000); Seth G. Jones & James Dobbins, *The UN’s Record in Nation Building*, 6 CHI. J. INT’L L. 703, 706, 711, 719 (2006).

146. See Jones & Dobbins, *supra* note 145, at 706, 711, 713 (“More robust deployments were more likely to be peaceful and democratic,” and longer “nation-building missions were more likely to be peaceful and democratic.”); David Wippman, *Sharing Power in Iraq*, 39 NEW ENG. L. REV. 29, 30 (2004).

147. See Tiefer, *supra* note 67, at 3 (asserting that sole superpower status with sophisticated weaponry is “a capacity that does not depend upon the legitimation of multilateral institutions like the United Nations and NATO”).

148. Karima Bennouna, *Toward a Human Rights Approach to Armed Conflict: Iraq 2003*, 11

Thus, the full-scale military actions in Afghanistan and Iraq, both of which were premised on “security threats” and have cost hundreds of billions of dollars, are not comparable to such U.N. peacekeeping missions.

### 3. EXPLOITING “AMERICAN EXCEPTIONALISM”

While some view neoconservative unilateralism as incompatible with international law,<sup>149</sup> the extent to which the U.S. is not bound to uphold rules that others must accept relies on “American exceptionalism.”<sup>150</sup> American exceptionalism derives from patriotic nationalism and sufficient power to grant foreign policy immunity. Exceptionalism may breed a distrust of international agreements<sup>151</sup> and shape egotistic views of foreign sovereignty<sup>152</sup> that classify other states on a “sliding scale of both legitimacy and respect.”<sup>153</sup> It may even promote convenient heuristics in which demonized and dehumanized enemies can be represented with

---

U.C. DAVIS J. INT’L L. POL’Y 171, 216 (2004) (“The very nations charged with maintain[ing] peace and security and upholding the values of the U.N. Charter maintain the world’s biggest armies, account for the lion’s share of world military expenditures, hold virtually all nuclear weapons, are the biggest arms merchants and dominate the world economy.” (quoting DOUGLAS ROCHE, *THE HUMAN RIGHT TO PEACE* 50 (2003))); *see supra* notes 67-70.

149. *See* Nagan & Hammer, *supra* note 129, at 375 (quoting President John F. Kennedy); *see supra* notes 63-64, 81, 121, 128, 136.

150. *See generally* JOSEPH S. NYE, JR., *Soft Power, in* POWER IN THE GLOBAL INFORMATION AGE: FROM REALISM TO GLOBALIZATION 68 (2004) (asserting that the myth of American exceptionalism has been a prime source of power); PAUL ROGERS, *A WAR TO FAR: IRAQ, IRAN AND THE NEW AMERICAN CENTURY* (2006) (focusing on American exceptionalism); Harold Hongju Koh, *On American Exceptionalism*, 55 STAN. L. REV. 1479, 1479 (2003) (discussing positive and negative aspects of American exceptionalism); Note, *War, Schemas, and Legitimation: Analyzing the National Discourse About War*, 119 HARV. L. REV. 2099, 2112 (2006) (“[W]e are essentially ‘good,’ the other is ‘bad.’”).

151. *See* JOSEPH S. NYE, JR., *THE PARADOX OF AMERICAN POWER: WHY THE WORLD’S ONLY SUPERPOWER CAN’T GO IT ALONE* 155 (2002); Michael N. Barnett & Martha Finnemore, *The Politics, Powers, and Pathologies of International Organizations*, 53 INT’L ORG. 699, 699 (1999) (stating that international institutions are prone to exhibit “dysfunction, even pathological, behavior”); *see generally* EDWARD C. LUCK, *MIXED MESSAGES: AMERICAN POLITICS AND INTERNATIONAL ORGANIZATIONS, 1919-1999* (1999) (discussing U.S. ambivalence toward international organizations due to American exceptionalism); MULTILATERALISM AND U.S. FOREIGN POLICY: AMBIVALENT ENGAGEMENT (Stewart Patrick & Shepard Forman eds., 2002) (presenting varying perspectives on the U.S. not following more multilateral approaches to foreign policy, and prominent among the reasons is exceptionalism); U.S. HEGEMONY AND INTERNATIONAL ORGANIZATIONS: THE UNITED STATES AND MULTILATERAL INSTITUTIONS (Rosemary Fott et. al. eds., 2003) (recognizing a pattern of U.S. rejection of multilateral institutions).

152. Jenik Radon, *Sovereignty: A Political Emotion, Not a Concept*, 40 STAN. J. INT’L L. 195, 196 (2004).

153. Harlan Grant Cohen, *The American Challenge to International Law: A Tentative Framework for Debate*, 28 YALE J. INT’L L. 551, 562-63 (2003).



hyperbolic labels, such as “evil empire,” communists,<sup>154</sup> “axis of evil,” and “rogue states.” The use of such labels garners positive national character sketches, leverages and sanctions the “compassionate hegemonic” action directed at the label,<sup>155</sup> and may even marginalize the First Amendment rights of critics.<sup>156</sup>

Exceptionalism is not merely a neoconservative concept; it is entrenched in American history. For example, while she forcefully called Iraq “one of the worst disasters in American foreign policy,”<sup>157</sup> Clinton’s Secretary of State Madeleine Albright was known for visiting foreign capitals and declaring that the United States was the world’s “indispensable nation.”<sup>158</sup> Neoconservatives, however, were even more emphatic and enskied the U.S. as the leading power that provided a “geopolitical framework for widespread economic growth and the spread of American principles of liberty and democracy” throughout the world.<sup>159</sup> Louis Fisher writes that the same “belief in American exceptionalism . . . colored the National Security Strategy.”<sup>160</sup> Professor Francis Fukuyama traces neoconservatism to the Cold War and maintains that like-thinking forerunners bypassed rules of state sovereignty for “moral purposes” that favored democracy and human rights and undermined Soviet attempts to expand dictatorships.<sup>161</sup> The heuristics of a pristine American hegemonic and paragon democracy are undeniably powerful and can be a positive influence if properly employed. But controversies have arisen.

---

154. Arthur Schlesinger, Jr., *Foreign Policy and the American Character*, 62 FOREIGN AFF., Fall 1983, at 1, 5 (three-decade guiding Cold War premise was “that the United States is infinitely virtuous and the Soviet Union is infinitely wicked”).

155. Jeanne M. Woods & James M. Donovan, “*Anticipatory Self-Defense*” and *Other Stories*, 14 KAN. J.L. & PUB. POL’Y 487, 496-97 (2005); Joseph S. Nye, *Public Diplomacy and Soft Power*, 616 ANNALS AM. ACAD. POL. & SOC. SCI. 94, 104 (2008) (“[A]xis of evil [message] . . . was well received domestically . . . . [But] foreigners reacted against lumping together disparate diplomatic situations under a moralistic label.”); Peter Van Ham, *Place Branding: The State of the Art*, 616 ANNALS AM. ACAD. POL. & SOC. SCI. 126, 130, 141 (2008) (positing that “axis of evil” and “ally” are advertising forms).

156. Note, *The Supreme Court, 1986 Term: Leading Cases*, 101 HARV. L. REV. 119, 218 (1987).

157. Deborah Solomon, *The Way We Live Now: 4-23-06: Questions for Madeleine Albright*, N.Y. TIMES (Apr. 23, 2006), <http://query.nytimes.com/gst/fullpage.html?res=9BOCE5DB173FF930A15757C0A9609C8B63> (Magazine).

158. Glennon, *supra* note 134, at 149.

159. PNAC/REBUILDING, *supra* note 54, at 1.

160. Fisher, *supra* note 23, at 1247.

161. FRANCIS FUKUYAMA, AMERICA AT THE CROSSROADS: DEMOCRACY, POWER, AND THE NEOCONSERVATIVE LEGACY 48-49 (2006).

#### 4. EXCEPTIONS TO “EXCEPTIONALISM”

The Pentagon and CIA were reportedly involved in notorious operations in post-WWII Europe that compromised democracy, particularly in Greece and Italy.<sup>162</sup> Administrations supported the Saudi monarchy for sixty years by supplying billions of dollars in weapons and erecting military bases in Saudi Arabia while the undemocratic ruling royal family was cited for perpetrating human rights abuses.<sup>163</sup> The CIA carried out the 1953 Iranian coup that reinstalled the Shah’s kleptocratic dictatorship and subsequent administrations supported the Shah for twenty-five years.<sup>164</sup> In 1964, the Johnson administration was involved in the coup that displaced the democratically-elected João Goulart government in Brazil because it was perceived as too “left-leaning,”<sup>165</sup> which led to a two-decade dictatorship.<sup>166</sup> In 1966, the U.S. aided the coup that brought Suharto to power and supported his undemocratic regime in Indonesia for thirty-three years.<sup>167</sup> President Ford and Secretary of State Henry Kissinger approved Suharto’s 1975 invasion of East Timor that led to twenty-five years of suppressive rule.<sup>168</sup> In 1970, the Nixon Administration began to formulate

---

162. See generally DANIEL GANSER, NATO’S SECRET ARMIES: OPERATION GLADIO AND TERRORISM IN WESTERN EUROPE (2005); JOHNSON, *supra* note 77, at 204-07; Daniele Ganser, *Terrorism in Western Europe: An Approach to NATO’s Secret Stay-Behind Armies*, 61 WHITEHEAD J. DISP. & INT’L REL. 69 (2005); Anthee Carassava, *A Nation at War: Protest; Anti-Americanism in Greece Is Reinvigorated by War*, N.Y. TIMES, Apr. 7, 2003, <http://www.nytimes.com/2003/04/07/world/a-nation-at-war-protest-anti-americanism-in-greece-is-reinvigorated-by-war.html>.

163. *Is There a Human Rights Double Standard? U.S. Policy Toward Saudi Arabia, Iran, and Uzbekistan: Hearing of H. Foreign Affairs Comm.’s International Organizations, Human Rights and Oversight Subcomm.*, 110th Cong. 2-3, 6 (2007).

164. Bejesky, *supra* note 56, at 16-17.

165. See *Brazil Marks 40th Anniversary of Military Coup: Declassified Documents Shed Light on U.S. Role*, NAT’L SECURITY ARCHIVE (Mar. 31, 2004), <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB118/index.htm>; *Brazil Remembers 1964 coup d’etat*, BBC NEWS, Apr. 1, 2004, <http://news.bbc.co.uk/2/hi/americas/3588339.stm>.

166. See *Brazil Marks 40th Anniversary of Military Coup: Declassified Documents Shed Light on U.S. Role*, NAT’L SECURITY ARCHIVE (Mar. 31, 2004), <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB118/index.htm>; *Brazil Remembers 1964 coup d’etat*, BBC NEWS, Apr. 1, 2004, <http://news.bbc.co.uk/2/hi/americas/3588339.stm>; see also ALFRED W. MCCOY, A QUESTION OF TORTURE 76-77 (2006) (noting that the CIA assisted Brazil’s military government with interrogation methods, alleged to be torture).

167. CHALMERS JOHNSON, BLOWBACK: THE COSTS AND CONSEQUENCES OF AN AMERICAN EMPIRE 26, 74-77 (2000); *CIA Stalling State Department Histories*, NAT’L SECURITY ARCHIVE (July 27, 2001), <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB52/>; Isabel Hilton, *Our Bloody Coup in Indonesia*, GUARDIAN, Aug. 1, 2001, <http://www.guardian.co.uk/world/2001/aug/01/indonesia.comment>; *U.S. Blocks Indonesia History Revelations*, BBC NEWS, July 28, 2001, <http://news.bbc.co.uk/2/hi/americas/1461859.stm>.

168. See *East Timor Revisited: Ford, Kissinger and the Indonesian Invasion, 1975-76*, NAT’L SECURITY ARCHIVE (Dec. 6, 2001), <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB62/>

plans to overthrow the popularly-elected Allende government in Chile<sup>169</sup> and was involved in the 1973 coup that brought Pinochet's dictatorship to power.<sup>170</sup> Other scholars reference failures in foreign policy that may have abetted non-democratic systems in Guatemala, Nicaragua, Cuba, Haiti, and the Dominican Republic.<sup>171</sup>

Pentagon occupations have also been controversial. A recent Carnegie Endowment for Peace study considered sixteen cases of U.S. "nation-building" and identified only two (Germany and Japan) as successes.<sup>172</sup> The virtues of its people have made South Korea a strong democracy; however, under U.S. occupation and from the 1953 armistice until the December 1986 elections, the country effectively remained under military rule.<sup>173</sup> The American military held bases in the Philippines as President Marcos reigned as a dictator for over thirteen years and stole billions of dollars in public funds.<sup>174</sup> A Senate Committee on Foreign Relations investigation in 1972 summarized the Pentagon's reaction:

---

(presenting links to several declassified U.S. State Department documents).

169. See Memorandum of Conversation—NSC Meeting—Chile (NSSM 97) (Nov. 6, 1970), available at <http://www.gwu.edu/~nsarchiv/news/20001113/701106.pdf>.

170. GREG GRANDIN, EMPIRE'S WORKSHOP: LATIN AMERICA, THE UNITED STATES, AND THE RISE OF THE NEW IMPERIALISM 59 (2006); David Harvey, *Neoliberalism as Creative Destruction*, 610 ANNALS AM. ACAD. POL. & SOC. SCI. 22, 26 (2007); Navy Section, United States Military Group (Chile), Situation Report #2, Oct. 1, 1973, available at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB8/ch21-01.htm>.

171. Daniele Archibugi, *Can Democracy Be Exported?*, 13 WIDENER L. REV. 283, 284-85 (2007). Many other high-profile American interventions failed to bring democracy to the targeted country. See Petter Gleditsch et al., *Democratic Jihad? Military Intervention and Democracy*, 19-20 (World Bank Policy Research Working Paper No. 4242, 2007), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=991434](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=991434); Bruce Bueno de Mesquita & George W. Downs, *Intervention and Democracy*, 60 INT'L ORG. 627 (2006) (questioning the extent that military intervention promotes or erodes democracy and hypothesizing about the possible trajectory of democracy without an intervention); Robert Bejesky, *Currency Cooperation and Sovereign Financial Obligations*, 24(1) FLA J. INT'L L. 40-51, 56-60 (forthcoming 2012).

172. Wippman, *supra* note 146, at 30; see generally MINXIN PEI & SARA KASPER, LESSONS FROM THE PAST: THE AMERICAN RECORD ON NATION BUILDING (2003).

173. See JOHNSON, *supra* note 167, at 25, 102, 107-12, 116; Yoon-Ho Alex Lee, *Criminal Jurisdiction Under the U.S.-Korea Status of Forces Agreement: Problems to Proposals*, 13 FLA. ST. J. TRANSNAT'L L. & POL'Y 213, 214-15 (2003); Youngjin Jung & Jun-Shik Hwang, *Where Does Inequality Come From? An Analysis of the Korea-United States Status of Forces Agreement*, 18 AM. U. INT'L L. REV. 1103, 1142 (2003) (diminishing support for U.S. military presence); S. Koreans Stage Huge Anti-U.S. Rally, BBC NEWS, Dec. 14, 2002, <http://news.bbc.co.uk/2/hi/asia-pacific/2575381.stm>; see also GRANDIN, *supra* note 170, at 79; JAMES BRAMFORD, BODY OF SECRETS 261 (2001); JAMES CARROLL, CRUSADE: CHRONICLES OF UNJUST WAR 178-79, 188 (2004) (reporting that U.S. soldiers remained in South Korea and the Korean War propelled the fear of communism in the U.S.); JOHNSON, *supra* note 77, at 91-93.

174. JOHNSON, *supra* note 77, at 209, 212; MCCOY, *supra* note 166, at 76; WILLIAM I. ROBINSON, PROMOTING POLYARCHY: GLOBALIZATION, U.S. INTERVENTION, AND HEGEMONY 121 (1996).

“[M]ilitary bases and a familiar government in the Philippines are more important than the preservation of democratic institutions.”<sup>175</sup> Marcos was eventually removed from power, and the U.S. military provided him safe passage to Hawaii.<sup>176</sup> Once democracy reemerged, the Filipino Senate expelled the American military against the Bush Sr. administration’s protest.<sup>177</sup> Panama had a turbulent post-WWII political history replete with non-elected regimes despite the fact that the Pentagon stationed between 10,000 and 60,000 troops at fourteen military bases in the country, and made Panama the home of USSOUTHCOM’s regional South American operations and its “university-like” military training ground, the School of the Americas (SOA).<sup>178</sup> In her book, *School of the Americas*, Professor Gill summarizes Pentagon involvement in Latin America:

The release of a list of some 60,000 SOA graduates in 1993 revealed the names of some of the hemisphere’s most notorious dictators, death squad operatives, and assassins, and when human rights activists began comparing these names to those listed in a variety of truth commission reports, the results were startling: SOA graduates took part in some of the worst human rights atrocities in the cold war.<sup>179</sup>

Official government records of these chronologies rarely surface in public discourse because the American Textbook Publishers Institute advised publishers “to avoid statements that might prove offensive to economic, religious, racial, or social groups or any *civil, fraternal, patriotic*

---

175. ROBINSON, *supra* note 174, at 121 (quoting STAFF OF S. COMM. ON FOREIGN RELATIONS, 93D CONG., REPORT ON KOREA AND THE PHILIPPINES 45-46 (Comm. Print 1973)).

176. *5,000 in Manila Demand U.S. Bases Be Removed*, ASSOC. PRESS, July 5, 1986, [http://articles.latimes.com/1986-07-05/news/mn-20282\\_1\\_military-bases](http://articles.latimes.com/1986-07-05/news/mn-20282_1_military-bases) (population, military, and government turning on Marcos); see JOHNSON, *supra* note 77, at 212.

177. JOHNSON, *supra* note 77, at 212-13; Philip Shenon, *Philippine Senate Votes to Reject U.S. Base Renewal*, N.Y. TIMES, Sept. 16, 1991, <http://www.nytimes.com/1991/09/16/world/philippine-senate-votes-to-reject-us-base-renewal.html?pagewanted=all>.

178. See 144 CONG. REC., H2954-56 (May 7, 1998) (documenting CIA complicity in drug smuggling and its present imbroglia with Panama); GEORGE P. SCHULTZ, *TURMOIL AND TRIUMPH: MY YEARS AS SECRETARY OF STATE* 1052 (1993); see generally KEVIN BUCKLEY, *PANAMA: THE WHOLE STORY* (1991) (discussing the five years prior to Noriega’s ouster and his links to drug cartels and the Contras); FREDERICK KEMP, *DIVORCING THE DICTATOR: AMERICA’S BUNGLED AFFAIR WITH NORIEGA* (1990) (explains U.S. complicity and cooperation with Noriega); Eytan Gilboa, *The Panama Invasion Revisited: Lessons for the Use of Force in the Post Cold War Era*, 110 POL. SCI. Q. 539 (1995); *Living and Working in South Florida*, U.S. ARMY GARRISON - MIAMI, <http://www.southcom.mil/usag-miami/sites/about/history.asp> (last visited Mar. 23, 2011) (discussing the number of troops stationed in Panama).

179. LESLEY GILL, *THE SCHOOL OF THE AMERICAS: MILITARY TRAINING AND POLITICAL VIOLENCE IN THE AMERICAS* 137 (2004).

or philanthropic societies in the whole United States.”<sup>180</sup> Professor Gottlieb explains that “American policy is sanitized” and “[b]ooks rarely report questionable government action.”<sup>181</sup> Nobel Laureate Jody Williams explains: “We support *democracy* when it’s convenient to the interests of the United States of America. Maybe I’m an idealist . . . but I believe there should be a standard.”<sup>182</sup> President Reagan’s UN Ambassador Jeane Kirkpatrick provided a standard—pro-Soviet communist states were “totalitarian” while pro-Western dictatorships were “authoritarian.”<sup>183</sup> She contended that the Carter administration supported democracies with “fewer freedoms and less personal security” than an “autocracy.”<sup>184</sup> Harvard History and Business Administration Professor Niall Ferguson’s examination of the evolution of U.S. hegemony exhibits that expansionism for liberty has implicitly signified “Empire;” while UCLA Sociology Professor Michael Mann believes that hegemony permits an ideologically-unsound form of militarism.<sup>185</sup>

There is a history of asserting American moral superiority<sup>186</sup> in foreign policy to justify actions,<sup>187</sup> particularly of the benevolent “bearer of democracy,”<sup>188</sup> and public benightedness of antithetical facts,<sup>189</sup> followed by

180. J. NELSON & G. ROBERTS, *THE CENSORS AND THE SCHOOLS* 181 (1977) (emphasis added).

181. Stephen E. Gottlieb, *In the Name of Patriotism: The Constitutionality of “Bending” History in Public Secondary Schools*, 62 N.Y.U. L. REV. 497, 505 (1987); see *Academic Freedom*, 81 HARV. L. REV. 1045, 1053 (1968) (public schools are “indoctrinative”); Stanley Ingber, *Rediscovering the Communal Worth of Individual Rights: The First Amendment in Institutional Contexts*, 69 TEX. L. REV. 1, 76 (1990) (“[P]ublic schools are an indoctrinator’s dream.”); see generally Martin H. Redish & Kevin Finnerty, *What Did you Learn in School Today? Free Speech, Values Inculcation, and the Democratic-Education Paradox*, 88 CORNELL L. REV. 62 (2002).

182. HIJACKING CATASTROPHE, *supra* note 10 (Williams interview).

183. DREYFUSS, *supra* note 57, at 316; GRANDIN, *supra* note 170, at 76; see NOAM CHOMSKY, *DETERRING DEMOCRACY* 44, 51-57, 199-201 (1992) (“From an early stage in the Cold War . . . the United States was set on a course against self-determination and democracy.”); see also Winer, *supra* note 128, at 182-84; see generally Y [Louise Halle], *On a Certain Impatience with Latin America*, 28 FOREIGN AFF., July 1950, at 565.

184. Jeane Kirkpatrick, *Dictatorships & Double Standards*, COMMENTARY MAGAZINE (Nov. 1979), <http://www.commentarymagazine.com/article/dictatorships-double-standards/>.

185. See generally NIALL FERGUSON, *COLOSSUS: THE PRICE OF AMERICA’S EMPIRE* (2004); MICHAEL MANN, *INCOHERENT EMPIRE* (2003).

186. See WILLIAM APPLEMAN WILLIAMS, *THE TRAGEDY OF AMERICAN DIPLOMACY* 9, 49-50 (1959).

187. Cohen, *supra* note 153, at 558.

188. Michael H. Hunt, *Ideology of National Greatness and Liberty*, in *MAJOR PROBLEMS IN AMERICAN FOREIGN POLICY, VOLUME I: TO 1914*, at 7 (Thomas G. Patterson ed., 3d ed. 1989); see generally MARC TRACHTENBERG, *A CONSTRUCTED PEACE: THE MAKING OF THE EUROPEAN SETTLEMENT, 1945-1963* (1999); WILLIAMS, *supra* note 186.

189. See Walter Russell Mead, *The American Foreign Policy Legacy*, 81 FOREIGN AFF., Jan./Feb. 2002, at 163, 163-65; see also WALDEN BELLO, *DILEMMAS OF DOMINATION: THE*

reliance on ideological constructs to dismiss inconvenient revelations.<sup>190</sup> American political institutions and democratic frameworks can positively influence other countries, but those beneficial influences derive predominantly from the model of the U.S. Constitution, the existence of many respectable U.S. leaders, and the American people. Well-intentioned government officials may not make optimal decisions if they are guided by the simplified worldviews of overly confident politicians and bureaucrats proclaiming to possess the panacea to achieve pristine international relations. While neoconservatives embrace a nonpareil American model of democracy assumption, a LexisNexis or Westlaw search of the term “neoconservative” reveals that substantial literature arose during the 1980s with civil rights groups and scholars battling Reagan-era officials.<sup>191</sup> Then, it was domestic liberals who could undermine a unifying vision of national solidarity and patriotism; but scarcely a decade later it was the international community that was expected to rally behind a vision of unified cooperation led by the Bush Jr. Administration and the premises of exceptional American democracy.

##### 5. PEACE AND COOPERATION BY SELF-DETERMINATION AND GLOBALIZATION

Many causes explain enhanced international cooperation. The end of the Cold War ameliorated self-determination movements for numerous countries that had previously been within the Soviet or U.S. “sphere of influence” and each pole’s predisposition to favor allegiant leaders who could ensure potentially rebellious populations did not swing toward the other pole’s interpretation of property rights.<sup>192</sup> The Non-Aligned Movement (NAM) reflects this sentiment. NAM began in 1955 as an international agreement among twenty-nine countries, mostly former colonies, and grew into an international organization with 118 members.<sup>193</sup>

---

UNMAKING OF THE AMERICAN EMPIRE 16, 194-95 (2005); DREYFUSS, *supra* note 57, at 308; GRANDIN, *supra* note 170, at 59-60, 112; JOHNSON, *supra* note 77, at 208-10; THOMAS POWERS, THE MAN WHO KEPT SECRETS: RICHARD HELMS & THE CIA 250 (1979); Cohen, *supra* note 153, at 556; *see supra* notes 162-84; *see generally* JOHN STOCKWELL, IN SEARCH OF ENEMIES: A CIA STORY (1997).

190. Cohen, *supra* note 153, at 554.

191. Kimberle Williams Crenshaw, *Race, Reform, and Retrenchment*, 101 HARV. L. REV. 1331, 1336-37 (1988); Bernie D. Jones, *Critical Race Theory: New Strategies for Civil Rights in the New Millennium*, 18 HARV. BLACKLETTER L.J. 1, 46 (2002).

192. Vicki C. Jackson, *What’s in a Name? Reflections on Timing, Naming and Constitution-Making*, 49 WM. & MARY L. REV. 1249, 1265-66 (2008) (discussing prolonged and fairly autonomous constitution-building process in Eastern Europe in the 1980-90s); *see supra* notes 162-86.

193. *Profile: Non-Aligned Movement*, BBC NEWS, Aug. 7, 2009, [http://news.bbc.co.uk/2/hi/asia-pacific/country\\_profiles/2798187.stm](http://news.bbc.co.uk/2/hi/asia-pacific/country_profiles/2798187.stm); *The Non-Aligned Movement: Description and*

NAM bylaws require that no member country can be a member of “a multilateral military alliance concluded in the context of Great Power conflicts” and must adopt “an independent policy based on the coexistence of States with different political and social systems.”<sup>194</sup>

While the U.N. historically emphasized “cultural relativism”<sup>195</sup> and a state’s freedom to choose its own political, economic, and social systems,<sup>196</sup> U.N. institutions exhibited elevated interest in domestic governance and officially began to favor democracy to promote economic modernization and human rights during the 1990s.<sup>197</sup> The integrated European Union countries have served as a democratization model, possessing elevated human rights protections and transparency.<sup>198</sup> The progress of these international institutions and their congruous ideological justifications are consistent with liberalism’s cooperative tendencies. However, collective-based international interest in sovereign affairs<sup>199</sup> opens the door to debate “legitimate military action” when there are competing visions of self-determination, sovereignty, non-intervention, and international peace and human rights.<sup>200</sup>

Another influential political tool is economic development. Political Science Professor Ronald Inglehart’s global *Modernization and Postmodernization* surveys indicate that higher levels of economic development and appropriate social conditions lead to democracy.<sup>201</sup> The

---

*History*, <http://www.nam.gov.za/background/history.htm> (last visited Mar. 23, 2011).

194. *The Non-Aligned Movement: Description and History*, <http://www.nam.gov.za/background/history.htm> (last visited May 26, 2011).

195. See Diane Mauzy, *The Human Rights and “Asian Values” Debate in Southeast Asia: Trying to Clarify the Key Issues*, 10 PAC. L. REV. 210, 215 (1997).

196. International Covenant on Civil and Political Rights art. 1, Dec. 19, 1966, 999 U.N.T.S. 171; International Covenant on Economic, Social and Cultural Rights art. 1, Dec. 16, 1966, 993 U.N.T.S. 3 (right of self-determination); see *supra* notes 42-43.

197. World Conference on Human Rights, June 14-25, 1993, *Vienna Declaration and Programme of Action*, ¶ 8, U.N. Doc. A/CONF.157/23 (July 12, 1993) (beneficial impact of democracy on economic development); Gregory H. Fox, *Internationalizing National Politics: Lessons for International Organizations*, 13 WIDENER L. REV. 265, 266 (2007); Roland Rich, *Bringing Democracy into International Law*, 12 J. DEMOCRACY 20, 25 (2001); see generally Gregory H. Fox, *The Right to Political Participation in International Law*, 17 YALE J. INT’L L. 539 (1992); Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT’L L. 46 (1992).

198. van Ham, *supra* note 155, at 138.

199. See FRANCIS FUKUYUMA, *STATE-BUILDING: GOVERNANCE AND WORLD ORDER IN THE 21ST CENTURY* 92 (2004); DOMINICK ZAUM, *THE SOVEREIGNTY PARADOX: THE NORMS AND POLITICS OF INTERNATIONAL STATEBUILDING* 27 (2007); Boon, *supra* note 137, at 299.

200. GRAHAM-BROWN, *supra* note 60, at 52.

201. See generally Ronald Inglehart & Christian Welzel, *How Development Leads to Democracy*, 88 FOREIGN AFF., Mar./Apr. 2009, at 33.

dominant Western discourse to explain this result is neoliberalism,<sup>202</sup> which presumes that government's role is to promote political and economic well-being by maximizing entrepreneurial freedom, preserving property rights, freeing markets, and promoting free trade.<sup>203</sup> Notwithstanding that some maintain that neoliberalism is not always consistent with democratization,<sup>204</sup> neoconservatives and the Bush Administration embraced the seeming democracy/market correlation and presumed American ideals and military power created it and that hegemony was necessary to protect it.<sup>205</sup> The NSS emphasizes that "economic openness" is fundamental to "domestic stability," "international order," and national security.<sup>206</sup> Others are more skeptical and contend that neoconservatives conjoined democracy, liberation, and unilateralism as a "front" for prying open international markets to potentially benefit dominant American multinationals.<sup>207</sup>

## 6. INTERNATIONAL RELATIONS PHILOSOPHY CONCLUSIONS

Realism and liberalism offer worldviews and useful taxonomies for explaining cooperation and discord, but they coexist because persuasive arguments are applied to emphasized facts. Realists have compelling support from the history of colonialism, reactions to colonialism, and U.S.-Soviet Cold War interactions,<sup>208</sup> but circumstances have evolved. Realism

---

202. Harvey, *supra* note 170, at 23-24.

203. *Id.*; Don Mayer, *Corporate Citizenship and Trustworthy Capitalism: Cocreating a More Peaceful Planet*, 44 AM. BUS. L.J. 237, 260 (2007).

204. Amy Chua, Lecture, *The Sixth Annual Grotius Lecture: World on Fire*, 19 AM. U. INT'L L. REV. 1239, 1240 (2004) (referencing her book, *World on Fire*, and noting that "contrary to conventional wisdom, markets and democracy . . . may not be mutually-reinforcing in the developing world"); Hamid Dabashi, *The American Empire: Triumph of Triumphalism*, 4 UNBOUND: HARV. J. LEGAL LEFT 82, 87 (2008) ("calamity of Neo-conservatism and Neo-liberalism" is a "constellation of bankrupt, pathetic, and provincial doctrines and dogma"); Antonio Perez, *Occupation Under the Law of War vs. Global Governance Under the Law of Peace*, 18 TRANSNAT'L L. 53, 53 (2004) (stating that the "Washington Consensus" of "fiscal austerity, privatization and liberalization of markets is under considerable attack").

205. *See supra* notes 118-28.

206. NSS, *supra* note 73, at 17; PNAC/REBUILDING, *supra* note 54, at i, 1; MARK PALMER, *BREAKING THE REAL AXIS OF EVIL: HOW TO OUST THE WORLD'S LAST DICTATORS BY 2025* (2003) (Ambassador Palmer explaining democratization/market nexus).

207. *The World According to Bush*, *supra* note 10 (confronting PNAC members with making "the world safe for capitalism" allegations); *see* Anderson, *supra* note 3, at 320; Naomi Klein, *Baghdad Year Zero: Pillaging Iraq in Pursuit of a Neocon Utopia*, HARPER'S BAZAAR, Sept. 1, 2004, at 43; *see generally* NAOMI KLEIN, *THE SHOCK DOCTRINE: THE RISE OF DISASTER CAPITALISM* (2007).

208. MEARSHEIMER, *supra* note 90, at 51 (providing examples that include Japan from 1868 to 1945, Germany from 1862 to 1870, and the Soviet Union from 1917 to 1991). Other prominent examples include British, French, and Spanish colonialism, and U.S. domination in Latin America.



begins with the “state” as an “actor” projecting “rational” decisions, even though “rational” is often debatable—quite akin to “reasonableness” debates in law—while government “officials” are subject to multifarious competing sub-national influences and processes.<sup>209</sup> While realists presume that other states are competing for military and economic power and have the offensive capabilities and perhaps desire to attack others within an anarchical international system,<sup>210</sup> liberalists retort that confrontations occur because realists presume that there *is* an interminable, selfish struggle for power.<sup>211</sup> The mental state generates a self-fulfilling prophecy to create conflict. If one shifts the perception from fear to trust then there is predictability and a rationale for establishing international institutions and adhering to international law. Granted, submerging into liberalism too fully can beget an impractical worldview in which international institutions are presented as the omnipotent *sine qua non* to worldly woes.

A strict realism convention positing that states cannot cooperate is imperfect,<sup>212</sup> but power can drive international relations;<sup>213</sup> and the Iraq War clarifies that international law may not restrain power. If traditional philosophical orientations are applied, neoconservatives might be predisposed to presume that Iraq was lying about not possessing WMDs because Hussein wanted to attack Americans and change the “status quo,” while liberalists might presume that Iraqi promises could be trusted and that U.N. inspection institutions were effective in demonstrating that there was no threat. Those disagreeing, including allies, simply could not fathom the national security threat perception, which was, in the end, nonexistent.<sup>214</sup> A philosophical worldview may set predispositions for action.

---

209. See DE MESQUITA, *supra* note 91, at 95-126, 236-45 (emphasizing the complex interactions of sub-national influences on foreign policy); Lloyd Hitoshi Mayer, *What is This “Lobbying” That We Are So Worried About?*, 26 YALE L. & POL’Y REV. 485, 542-44 (2008) (the private sector may influence government); W. Michael Reisman, Lecture, *International Lawmaking: A Process of Communication*, 75 AM. SOC’Y INT’L PROC. 101, 103 (1981) (referencing the ability of officials to use conceptions of the “state” for cover to avoid responsibility for decision-making, Reisman notes that “States don’t have minds. Elites who manipulate the symbols of states do, but they are rarely accessible and even more rarely cooperative”).

210. See MEARSHEIMER, *supra* note 90, at 32-33.

211. See Alexander Wendt, *Anarchy Is What States Make of It: The Social Construction of Power Politics*, 46 INT’L ORG. 391, 394-96 (1992); KEGLEY, *supra* note 107, at 4-5.

212. See McGuinness, *supra* note 110, at 159-60.

213. See John J. Mearsheimer, *The False Promise of International Institutions*, 19 INT’L SECURITY 3 (1995).

214. See *supra* notes 21-27.

## C. INAUGURATION

George Bush's inauguration ushered in neoconservatives and affiliates of top defense contractors to key White House, Pentagon, and State Department positions.<sup>215</sup> Appointees guided bureaucracies to hawkish positions, hatched public relations/propaganda programs,<sup>216</sup> and allegedly prejudiced intelligence conclusions.<sup>217</sup> The White House maintained relationships with neoconservative think tanks and public relations firms that promoted the national security threat message to the public and media. Prominent neoconservatives regularly appeared on national media to present Iraq as a security threat.<sup>218</sup>

---

215. See Karen Kwiatkowski, *In Rumsfeld's Shop: A Senior Air Force Officer Watches as the Neocons Consolidate Their Pentagon Coup*, AMERICAN CONSERVATIVE (Dec. 1, 2003), <http://www.amconmag.com/article/2003/dec/01/00019/> (reporting that Rumsfeld replaced "key personnel" and long-time professionals with neoconservatives); Ismael Hossein-Zadeh, *Origins of the Recent Wars of Choice and Their Impact on U.S. Global Markets*, 13 ILSA J. INT'L & COMP. L. 67, 68-69, 86-87 (2006); see also William Hartung & Michelle Ciarrocca, *The Military-Industrial-Think Tank Complex*, 24(1) MULTINAT'L MONITOR, Jan./Feb. 2003, <http://www.multinationalmonitor.org/mm2003/03jan-feb/jan-feb03corp2.html> (calling PNAC the originator of Bush's preemptive strike policy and contending that PNAC appointees to the Bush administration have links to the arms industry); see *supra* notes 54-55.

216. David Barstow, *Behind TV Analysts, Pentagon's Hidden Hand*, N.Y. TIMES, Apr. 20, 2008, at A1; Bejesky, *supra* note 20, at 26-27; James Dao & Eric Schmitt, *Pentagon Readies Efforts to Sway Sentiment Abroad*, N.Y. TIMES, Feb. 19, 2002, <http://www.nytimes.com/2002/02/19/world/nation-challenged-hearts-minds-pentagon-readies-efforts-sway-sentiment-abroad.html?src=pm>; Thom Shanker & Eric Schmitt, *Pentagon May Push Propaganda in Allied Nations*, N.Y. TIMES, Dec. 16, 2002, <http://www.nytimes.com/2002/12/16/international/16MILI.html>; see *infra* notes 448-56.

217. SENATE SELECT COMMITTEE ON INTELLIGENCE, INTELLIGENCE ACTIVITIES RELATING TO IRAQ CONDUCTED BY THE POLICY COUNTERTERRORISM EVALUATIONS GROUP AND THE OFFICE OF SPECIAL PLANS WITHIN THE OFFICE OF THE UNDER SECRETARY OF DEFENSE FOR POLICY 1-2, June 5, 2008; S. REP. NO. 108-301, at 307-12, 457-58; Eric Schmitt & Thom Shanker, *Pentagon Sets Up Intelligence Unit*, N.Y. TIMES, Oct. 24, 2002, at A1 (reporting that Rumsfeld, Wolfowitz, and Feith established "data mining" efforts to link terrorism with Iraq, which was described as "cherry picking" data to fit preconceived conclusions); see David Rieff, *Blueprint for a Mess*, N.Y. TIMES (Nov. 2, 2003), <http://www.nytimes.com/2003/11/02/magazine/blueprint-for-a-mess.html> (magazine) (discussing PNAC-appointees in the Pentagon and their "Office of Special Plans," which was kept secret because "the administration did not want to have it widely known that there was a special unit in the Pentagon doing its own assessments of intelligence on Iraq"); *Panorama*, *supra* note 54 (presenting documentary interviews of prominent neoconservatives, framing the ideology, and summarizing that neoconservative thinking "has become George Bush's foreign policy"). Richard Perle explained that "[t]he President of the United States, on issue after issue, has reflected the thinking of Neoconservatives." *Panorama*, *supra* note 54; see *supra* note 29.

218. There were Iraqi exile groups meeting with government officials and other groups lobbying for the use of force in the media. SHELDON RAMPTON & JOHN STAUBER, WEAPONS OF MASS DECEPTION: THE USES OF PROPAGANDA IN BUSH'S WAR ON IRAQ 53-54 (2003) (explaining that the Committee for the Liberation of Iraq was meeting with White House officials and journalists and editorial boards throughout the United States to market its message); Eric

Former President Clinton was one of the first to emerge with accounts of these predispositions. He explained that at the presidential “exit interview,” Bush acknowledged that he would be placing Iraq at the top of the national security agenda.<sup>219</sup> 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.<sup>220</sup> O’Neill released NSC meeting memos, including one entitled *Plan*

---

Schmitt, *New Group Will Lobby for Change in Iraqi Rule*, N.Y. TIMES, Nov. 15, 2002, at A18 (explaining that the White House was tacitly supporting lobby groups to “press for the ouster of Saddam Hussein”); Elaine Sciolino & Patrick E. Tyler, *Some Pentagon Officials and Advisors seek to Oust Iraq’s Leader in War’s Next Phase*, N.Y. TIMES, Oct. 21, 2001, at B6 (reporting that Defense Policy Board heads Perle, Rumsfeld, and Wolfowitz invited guests, such as INC leader Ahmed Chalabi, to discuss issues related to military action, occupation, and installing a new government); Letter from Project for a New American Century to President George W. Bush (Sept. 20, 2001), available at [www.newamericancentury.org/Bushletter.htm](http://www.newamericancentury.org/Bushletter.htm) (“[E]ven if evidence does not link Iraq directly to the attack, any strategy aimed at the eradication of terrorism and its sponsors must include a determined effort to remove Saddam Hussein from power in Iraq.”); John Mearsheimer & Stephen Walt, *Israel Lobby*, 28(6) LONDON REV. BOOKS, Mar. 2006, at 3-12, available at <http://www.lrb.co.uk/v28/n06/john-mearsheimer/the-israel-lobby> (contending that support for action against Iraq was substantially due to lobbying). High-profile PNAC members were frequent advocates in the media and may have also pushed policymaking inside government. Seymour M. Hersh, *Selective Intelligence*, NEW YORKER, May 12, 2003, [http://www.newyorker.com/archive/2003/05/12/030512fa\\_fact](http://www.newyorker.com/archive/2003/05/12/030512fa_fact) (discussing how the combination of the Pentagon’s Office of Special Plans, leadership by Rumsfeld and Wolfowitz within the Secretary of Defense office, and the Iraqi National Congress produced “selective intelligence” that “rivalled both the C.I.A. and the Pentagon’s own Defense Intelligence Agency”); *Transcripts: Buying the War*, PBS, Apr. 25, 2007, <http://www.pbs.org/moyers/journal/btw/transcript1.html> (referencing Richard Perle’s hawkish comments); Michael Ledeen, *The War on Terror Won’t End in Baghdad*, WALL ST. J., Sept. 4, 2002; *60 Minutes*, *supra* note 27 (Tenet claiming Perle’s remarks after 9/11 were: “Iraq has to pay a price for what happened yesterday. They bear responsibility”); Lustick, *supra* note 64, at 342 (identifying the prominence of neoconservative advocacy regarding Iraq); Toby Harnden, *Building the Case Against Iraq*, TELEGRAPH, Oct. 26, 2001, <http://www.telegraph.co.uk/news/worldnews/middleeast/iraq/1360627/Building-the-case-against-Iraq.html>. An article notes that former CIA Director James Woolsey persistently contended Iraq was behind earlier terror attacks against the U.S. and that unsubstantiated reports of Iraqi connections to 9/11 “became the basis – endlessly repeated by Woolsey and other neoconservatives on television talk shows and in op-ed pages of major newspapers – of a major propaganda campaign against Iraq.” Jim Lobe, *Watch Woolsey*, ASIA TIMES (Apr. 8, 2003), [http://www.atimes.com/atimes/Middle\\_East/ED08Ak05.html](http://www.atimes.com/atimes/Middle_East/ED08Ak05.html). PNAC Letter, *supra* note 54 (Woolsey was a PNAC signatory); see *infra* notes 452-57 (referencing Ledeen’s advocacy).

219. *Avoiding Clinton’s Mistakes*, WASH. TIMES, Oct. 21, 2003, <http://www.washingtontimes.com/news/2003/oct/21/20031021-090350-3425t/>; *Clinton Warned Bush About Osama*, REUTERS, Oct. 15, 2003, [http://greenspun.com/bboard/q-and-a-fetch-msg.tcl?msg\\_id=00BQh2](http://greenspun.com/bboard/q-and-a-fetch-msg.tcl?msg_id=00BQh2); Eric Schmitt & James Dao, *Iraq is Focal Point as Bush Meets with Joint Chiefs*, N.Y. TIMES, Jan. 11, 2001, at A20; *Crowds line up for Clinton book*, CNN, June 23, 2004, [http://articles.cnn.com/2004-06-22/politics/clinton.book\\_1\\_clinton-book-clinton-notes-first-book?\\_s=PM:ALLPOLITICS](http://articles.cnn.com/2004-06-22/politics/clinton.book_1_clinton-book-clinton-notes-first-book?_s=PM:ALLPOLITICS).

220. 150 CONG. REC. H4273 (June 16, 2004); Spectar, *supra* note 25, at 97; *Bush Sought ‘Way’ to Invade Iraq?*, CBSNEWS.COM, Jan. 11, 2004, <http://www.cbsnews.com/>

for post-Saddam Iraq, which postulated troop requirements for invasion, a war crimes tribunal for Baathist officials, and oil industry reform.<sup>221</sup> O'Neill stated that the president gave assignments to a group of enthusiastically-supportive appointees—Secretary of State Powell would create a new sanctions regime, Secretary of Defense Rumsfeld and General Shelton would examine military options, CIA Director Tenet would improve current intelligence, and Treasury Secretary O'Neill would seek to economically pressure the regime.<sup>222</sup>

Ronald Suskind, a Pulitzer Prize recipient, details O'Neill's accounts and avowed that he interviewed hundreds of officials, including other cabinet members, to support the premise that displacing the Iraqi government and occupying the country was considered as early as January 2001.<sup>223</sup> O'Neill released a NSC document, dated March 5, 2001, entitled *Foreign Suitors for Iraqi Oilfield Contracts*, and noted that Defense Secretary Rumsfeld's accompanying extemporization at this meeting addressed "the oil fields, the reconstruction of the country's economy, and the 'freeing of the Iraqi people.'"<sup>224</sup> As for the evidentiary basis to justify action, O'Neill remarked: "In the 23 months I was there [as a cabinet member], I never saw anything that I would characterize as evidence of weapons of mass destruction. . . . There were allegations and assertions by people."<sup>225</sup> Exposing incompatibility between whistleblower protection laws and national security secrecy restrictions<sup>226</sup> (particularly when it was one year after the invasion), the administration opened an investigation into whether O'Neill illegally revealed classified documents to CBS.<sup>227</sup>

---

stories/2004/01/09/60minutes/main592330.shtml.

221. *Bush Sought 'Way' to Invade Iraq?*, *supra* note 220; John Cochran, *Official Confirms Claims That Saddam Was Bush's Focus Before 9/11*, ABC NEWS, Jan. 13, 2004, <http://www.commondreams.org/headlines04/0113-09.htm>; *O'Neill: Bush planned Iraq invasion before 9/11*, CNN, Jan. 14, 2004, [http://articles.cnn.com/2004-01-10/politics/oneill.bush\\_1\\_roomful-of-deaf-people-education-of-paul-o-neill-national-security-council-meeting?\\_s=PM:ALLPOLITICS](http://articles.cnn.com/2004-01-10/politics/oneill.bush_1_roomful-of-deaf-people-education-of-paul-o-neill-national-security-council-meeting?_s=PM:ALLPOLITICS).

222. RONALD SUSKIND, *THE PRICE OF LOYALTY: GEORGE W. BUSH, THE WHITE HOUSE, AND THE EDUCATION OF PAUL O'NEILL* 75 (2004); Spectar, *supra* note 25, at 98 ("President reportedly gave out assignments that included evaluating the feasibility of introducing U.S. ground forces into Iraq—ten days after the inauguration . . .").

223. *Bush Sought 'Way' to Invade Iraq?*, *supra* note 220.

224. Richard W. Stevenson, *Bush Disputes Ex-Official's Claim That Iraq War Was Early Goal*, N.Y. TIMES, Jan. 13, 2004, <http://www.nytimes.com/2004/01/13/politics/13ONEI.html>; see *Maps and Charts of Iraqi Oil Fields*, JUDICIAL WATCH, <http://www.judicialwatch.org/story/2002/mar/maps-and-charts-iraqi-oil-fields> (last visited Mar. 23, 2011).

225. John F. Dickerson, *Confessions of a White House Insider*, TIME (Jan. 10, 2004), <http://www.time.com/time/magazine/article/0,9171,1101040119-574809,00.html> (quoting Paul O'Neill, former Bush treasury secretary).

226. See *Bejesky*, *supra* note 20, at 11 n.56-57; see *infra* notes 297, 301-04.

227. *U.S. Treasury to Probe O'Neill Book*, BBC NEWS, Jan. 13, 2004,

Officials never denied meeting or document contents but asserted that there was not yet a “war plan” and that “regime change in Iraq has been U.S. policy since 1998.”<sup>228</sup> Indeed, neoconservatives goaded the legislation to “promote the emergence of a democratic government” in Iraq,<sup>229</sup> and it was pushed through Congress concurrent with Republican-led impeachment inquiries against President Clinton.<sup>230</sup>

Immediately after 9/11, administration officials began taking more tangible steps toward invading Iraq. Secretary of Defense Rumsfeld told aids to devise plans to strike Iraq within four hours of the attacks and directed his staff to attain the “best info fast. Judge whether good enough to hit S.H [Saddam Hussein] . . . . Go massive. . . . Sweep it all up. Things related and not.”<sup>231</sup> On *Meet the Press*, General Wesley Clark noted that “that there was a concerted effort during the fall of 2001, starting immediately after 9/11, to pin 9/11 and the terrorism problem on Saddam Hussein.”<sup>232</sup> Pentagon, SSCI, CIA, and 9/11 Commission investigations all concluded that there was no connection between al Qaeda and the Iraqi government, but uncovered documents indicating that a “handful of senior policy officials” immediately sought to take military action against Iraq and that they “wasted no time in pressing their case.”<sup>233</sup> Within one week, meetings at Camp David produced proposed operations against Afghanistan

---

<http://news.bbc.co.uk/2/hi/americas/3391239.stm>. Apparently Rumsfeld called O’Neill and warned him against publishing his accounts in Suskind’s book. See *Bush Sought ‘Way’ to Invade Iraq?*, *supra* note 220; see Thom Shanker, *Rumsfeld Says He Contacted Ex-Official on Bush Book*, N.Y. TIMES, Jan. 14, 2004, <http://www.nytimes.com/2004/01/14/us/rumsfeld-says-he-contacted-ex-official-on-bush-book.html>.

228. *Cabinet Members Defend Bush from O’Neill*, CNN, Jan. 12, 2004, [http://articles.cnn.com/2004-01-11/politics/oneill.bush\\_1\\_treasury-secretary-paul-o-neill-cabinet-longtime-bush-friend?\\_s=PM:ALLPOLITICS](http://articles.cnn.com/2004-01-11/politics/oneill.bush_1_treasury-secretary-paul-o-neill-cabinet-longtime-bush-friend?_s=PM:ALLPOLITICS); see Stevenson, *supra* note 224.

229. Iraq Liberation Act of 1998, H.R. 4655, 105th Cong. (2nd Sess. 1998); Lustick, *supra* note 64, at 341-42; see *supra* notes 50-51, 54-55, 58-59, 61.

230. Jane Mayer, *The Manipulator: Ahmad Chalabi Pushed a Tainted Case for War. Can He Survive the Occupation?*, NEW YORKER, June 27, 2004; A *Chronology: Key Moments in the Clinton-Lewinsky Saga*, CNN, <http://www.cnn.com/ALLPOLITICS/1998/resources/lewinsky/timeline/> (last visited Mar. 23, 2011).

231. Joel Roberts, *Plans for Iraq Attack Began On 9/11*, CBS NEWS, Sept. 4, 2002, <http://www.cbsnews.com/stories/2002/09/04/september11/main520830.shtml>; see SELECT COMM. ON INTELLIGENCE, REPORT ON THE U.S. INTELLIGENCE COMMUNITY’S PREWAR INTELLIGENCE ASSESSMENTS ON IRAQ, S. REP. NO. 108-301 at 451 (2004).

232. *Media Silent on Clark’s 9/11 Comments*, FAIRNESS & ACCURACY REPORTING, June 20, 2003, <http://www.fair.org/index.php?page=1842>; see Wesley Clark and Terry McAuliffe, 47(8) WEEKLY STANDARD (Aug. 25, 2003), <http://www.weeklystandard.com/Content/Public/Articles/000/000/003/002zlaay.asp> (neoconservative response to Clark).

233. R. Jeffrey Smith, *‘Operational Relationship’ with al Qaeda Discounted*, WASH. POST, July 23, 2004, at A1; see *supra* notes 19, 22, 24-25, 27.

and directed the Pentagon to plan military operations for Iraq.<sup>234</sup> The CIA was given authority to recruit and financially-support disloyal Iraqis and to unload a propaganda campaign, conduct sabotage operations, and to provoke an insurrection.<sup>235</sup>

Richard Clarke, another top White House official, emerged as a whistleblower two months after O'Neill. He stated that, on September 12,

The president in a very intimidating way left us, me and my staff, with the clear indication that he wanted us to come back with the word that there was an Iraqi hand behind 9/11 because they had been planning to do something about Iraq from before the time they came into office.<sup>236</sup>

He further contended that top Pentagon appointees, particularly Rumsfeld and Wolfowitz, immediately advocated attack and regime replacement without regard to evidence of wrongdoing.<sup>237</sup> The SSCI interviewed Pentagon Defense Intelligence Agency analysts who remarked that their analyses had to be “on target” with the assumption in the Office of the Secretary of Defense that Iraq was connected to al-Qaida or behind 9/11.<sup>238</sup>

234. See PETER IRONS, *WAR POWERS: HOW THE IMPERIAL PRESIDENCY HIJACKED THE CONSTITUTION* 222 (2005); William Hamilton, *Bush Began to Plan War Three Months After 9/11*, WASH. POST, Apr. 17, 2004, at A1; Glenn Kessler, *U.S. Decision on Iraq Has a Puzzling Past*, WASH. POST, Jan. 12, 2003, at A1; Eric Schmitt & David E. Sanger, *Bush Has Received Pentagon Options on Attacking Iraq*, N.Y. TIMES, Sept. 21, 2002, <http://www.nytimes.com/2002/09/21/international/middleeast/21PLAN.html>; *Woodward Shares War Secrets*, CBS NEWS, Apr. 18, 2004, <http://www.cbsnews.com/stories/2004/04/15/60minutes/main612067.shtml> (disclosing that Bush, Rumsfeld, and Tommy Franks had war plan discussions in November 2001).

235. Bob Woodward, *President Broadens Anti-Hussein Order*, WASH. POST, June 16, 2002, at A1; see S. REP. NO. 108-301, at 452. The Senate Report documents that Bob Woodward's book explains:

Vice President Dick Cheney asked the CIA to brief him on what the CIA could do in Iraq. On January 3, 2002, Director Tenet and other CIA officials briefed the Vice President and his staff on the limitations of covert operations in bringing down Saddam Hussein and explained that only a military operation and invasion would succeed.

S. REP. NO. 108-301, at 452; *Iraq scorns US covert operations*, BBC, June 17, 2002, [http://news.bbc.co.uk/2/hi/middle\\_east/2050243.stm](http://news.bbc.co.uk/2/hi/middle_east/2050243.stm) (“US officials have confirmed a Washington Post report that Mr. Bush had authorised operations to capture—or kill—Iraqi President Saddam Hussein.”); see generally MICHAEL ISIKOFF & DAVID CORN, *HUBRIS: THE INSIDE STORY OF SPIN, SCANDAL, AND THE SELLING OF THE IRAQ WAR* (2006) (discussing CIA actions and involvement with Bush administration orders, the Bush administration's intention to overthrow the regime, and how fraudulent intelligence was used).

236. *60 Minutes: Clarke's Take on Terror* (CBS television broadcast Mar. 21, 2004), <http://www.cbsnews.com/stories/2004/03/19/60minutes/main607356.shtml>.

237. *60 Minutes: Clark's Take on Terror*, *supra* note 236 (reporting that Bush insisted the goal should be to replace the government and not to just bomb Iraq); 150 CONG. REC. H4273-74 (June 16, 2004); Barton Gellman, *Memoir Criticizes Bush 9/11 Response*, WASH. POST, Mar. 22, 2004, at A1.

238. S. REP. NO. 108-301, at 359 (2004).

Subsequently released White House documents,<sup>239</sup> and many White House, Pentagon, and intelligence officials confirmed that war plans were discussed and the decision to invade was set as early as November 2001 without a broad-based intelligence assessment or Congressional debate and authorization.<sup>240</sup> At the international level, the U.N. did not renew deliberations about Iraq until October 2002<sup>241</sup> and the assumption held by Security Council members was that war could be avoided if there were no WMDs.<sup>242</sup>

By December 2001, victory in Afghanistan was proclaimed and the President began to infer that military objectives involved more than bin Laden and Afghanistan. The January 2002 State of the Union Address affixed Iraq into the equation: “States like these, and their terrorist allies, constitute an axis of evil. . . . By seeking weapons of mass destruction, these regimes pose a grave and growing danger. . . . I will not wait on events while dangers gather.”<sup>243</sup> The SSCI concluded that Bush administration officials led a consistent propaganda campaign that falsely linked Iraq and al-Qaida as a single threat.<sup>244</sup>

By mid-2002, officials began to express that there would be regime change in Iraq<sup>245</sup> and there was “full-scale lobbying” for war.<sup>246</sup> Some

239. Kessler, *supra* note 234.

240. John Diamond et al., *Iraq Course Set from Tight White House Circle*, USA TODAY, Sept. 11, 2002, [http://www.usatoday.com/news/world/2002-09-10-iraq-war\\_x.htm](http://www.usatoday.com/news/world/2002-09-10-iraq-war_x.htm). “[USA Today] interviewed officials at the White House, State Department, Pentagon, intelligence agencies, Congress and elsewhere to explore what factors were weighed and whose voices were heard” and discovered that the course for using force against Iraq “was set last fall” in 2001 by top officials in the White House “without a formal decision-making meeting[, consultation of Congress or key allies,] or the intelligence assessment that customarily precedes such a momentous decision.” *Id.*; see RICHARD CLARKE, *AGAINST ALL ENEMIES: INSIDE AMERICA’S WAR ON TERROR* 30 (2004) (“[F]riends in the Pentagon had been telling me that the word was we would be invading Iraq sometime in 2002.”); see *infra* Part III(C).

241. See *Resolving Iraq*, PBS ONLINE NEWSHOUR, Oct. 15, 2002, [http://www.pbs.org/newshour/bb/middle\\_east/july-dec02/undebate\\_10-15-02.html](http://www.pbs.org/newshour/bb/middle_east/july-dec02/undebate_10-15-02.html); *Straw Gives U.N. Iraq Warning*, BBC NEWS, Oct. 18, 2002, [http://news.bbc.co.uk/2/hi/uk\\_politics/2339191.stm](http://news.bbc.co.uk/2/hi/uk_politics/2339191.stm); *US Rejects Iraq Inspection Offer*, BBC NEWS Oct. 10, 2002, [http://news.bbc.co.uk/2/hi/middle\\_east/2315989.stm](http://news.bbc.co.uk/2/hi/middle_east/2315989.stm); Margaret Warner, *Debating Iraq*, PBS, Oct. 3, 2002, [http://www.pbs.org/newshour/bb/middle\\_east/july-dec02/iraq\\_10-03.html](http://www.pbs.org/newshour/bb/middle_east/july-dec02/iraq_10-03.html).

242. *Annan: ‘No Basis’ for Iraq War Now*, BBC NEWS, Dec. 31, 2002, [http://news.bbc.co.uk/2/hi/middle\\_east/2617783.stm](http://news.bbc.co.uk/2/hi/middle_east/2617783.stm); see *supra* notes 35-37.

243. S. REP. NO. 108-301, at 452 (2004) (quoting President George W. Bush); Spectar, *supra* note 25, at 99 (U.N. address targeted Iraq).

244. S. REP. NO. 108-301, at 453-54 (2004) (providing a non-exhaustive list of administration statements that consistently linked WMD and al-Qaeda); SSCI/June/2008/Press, *supra* note 10.

245. *Bush: ‘Saddam needs to go,’* GUARDIAN (Apr. 5, 2002), <http://www.guardian.co.uk/world/2002/apr/05/iraq.usa1> (“Saddam needs to go. . . .” (quoting President George W. Bush));

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.<sup>247</sup> In December 2002, Rumsfeld signed a deployment order for 25,000 troops to go to the Persian Gulf to accompany 60,000 soldiers already deployed earlier in the year.<sup>248</sup>

While the October 1, 2002, National Intelligence Estimate (NIE) was allegedly the foundation of evidence that served for six months (October

*Bush gives CIA green light to kill Saddam*, GUARDIAN (June 17, 2002) (“President Bush first started talking openly about a pre-emptive strike two weeks ago”); *President Stresses Need for Strong Iraq Resolution*, THE WHITE HOUSE (Oct. 1, 2002), <http://georgewbush-whitehouse.archives.gov/news/releases/2002/10/20021001-2.html> (“I’ve made up my mind we need to disarm the man.” (quoting President George W. Bush)); *Viewpoint: U.N. Inspections a Side-Show*, BBC NEWS, Dec. 19, 2002, [http://news.bbc.co.uk/2/hi/middle\\_east/2586425.stm](http://news.bbc.co.uk/2/hi/middle_east/2586425.stm). Secretary of State Colin Powell stated:

The United States reserves its option to do whatever it believes might be appropriate to see if there can be a regime change. . . . U.S. policy is that regardless of what the inspectors do, the people of Iraq and the people of the region would be better off with a different regime in Baghdad.

*Viewpoint: U.N. Inspections a Side-Show*, BBC NEWS, Dec. 19, 2002, [http://news.bbc.co.uk/2/hi/middle\\_east/2586425.stm](http://news.bbc.co.uk/2/hi/middle_east/2586425.stm).

246. RAMPTON & STAUBER, *supra* note 218, at 37; Elisabeth Bumiller, *Bush Aides Set Strategy to Sell Policy on Iraq*, N.Y. TIMES, Sept. 7, 2002, <http://query.nytimes.com/gst/fullpage.html?res=9C07E6D7103EF934A3575AC0A9649C8B63> (noting “full-scale lobbying” for war against Iraq starting in July 2002); Daniel Eisenberg, *We’re Taking Him Out*, TIME (May 5, 2002), <http://www.time.com/time/magazine/article/0,9171,1002405,00.html> (reporting Bush meeting with Congresspersons in March 2002 and relaying the ultimatum of “we’re taking him out” and Cheney acknowledging it was no longer “if” there would be an attack but “when”).

247. Eisenberg, *supra* note 246 (“A front-page story in the *New York Times* on April 28 claimed that Bush had all but settled on a full-scale ground invasion of Iraq early next year with between 70,000 and 250,000 U.S. troops. . . . Still, planning for some kind of military action is clearly under way.”); Julian Borger & Ewen MacAskill, *U.S. Targets Saddam*, GUARDIAN, Feb. 14, 2002, <http://www.guardian.co.uk/world/2002/feb/14/usa.iraq> (“200,000 U.S. troops . . . likely to be launched later this year with the aim of removing Saddam Hussein from power.”); Fisher, *supra* note 23, at 1230 n.193 (citing articles from August to October 2002 period); Tiefer, *supra* note 67, at 15. “President Bush has said the United States will have ‘zero tolerance’ for Iraqi noncompliance . . . Press reports have discussed various reported war plans . . .” KENNETH KATZMAN, IRAQ: WEAPONS THREAT, COMPLIANCE, SANCTIONS, AND U.S. POLICY 4 (2002), available at <http://fpc.state.gov/documents/organization/15581.pdf> (CRS Report for Congress).

248. Julian Borger, *Pentagon Build-up Reaches Unstoppable Momentum*, GUARDIAN, Dec. 31, 2002, <http://www.guardian.co.uk/world/2002/dec/31/iraq.julianborger/print> (“80,000 soldiers are expected to spearhead an assault . . . .”); Sean Naylor, *How the Iraq War Was Planned and Launched*, N.Y. TIMES, Mar. 28, 2006, <http://www.nytimes.com/2006/03/28/books/28nay1.html> (providing synopsis of MICHAEL GORDON & BERNARD TRAINOR, COBRA II: THE INSIDE STORY THE INVASION AND OCCUPATION OF IRAQ (2006) (detailing how war planning had been underway for six months when Bush announced at a May 23, 2002 new conference: “I have no war plans on my desk”)); *U.S. Military Planners to Move to Qatar*, CNN, Jan. 8, 2003, [http://articles.cnn.com/2003-01-08/us/sproject.iraq.us.planners\\_1\\_weapons-inspectors-nuclear-weapons-command-center?\\_s=PM:US](http://articles.cnn.com/2003-01-08/us/sproject.iraq.us.planners_1_weapons-inspectors-nuclear-weapons-command-center?_s=PM:US); see *infra* notes 309-17 (The Downing Street memos, dated July 21, 2002, documented the Blair and Bush administration plans for invasion).



2002 through March 2003) of national security threat claims and the core information presented to Congress during *Authorization to Use Force* vote debates,<sup>249</sup> some intelligence analysts explained that the NIE was intended for military invasion planning. The SSCI quoted one analyst stating:

[T]he going-in assumption was we were going to war, so this NIE was to be written with that in mind. We were going to war, which meant American men and women had to be properly given the benefit of the doubt of what they would face. . . . That was what was said to us. . . . This is about going to war and giving the combatant commander an estimate on which he can properly organize. . . . Remember, the conops [concept of operations] had already been published. . . . [Y]ou have to understand that from an executive branch [perspective] it's about planning. The conop order had been given months before, months. Deployments had already begun.<sup>250</sup>

There were also drastic changes in intelligence estimates. The NIE was hastily produced over a three-week period, many appointed officials had held a predestined position about Iraq combined with the desire for a prominent military role in the Middle East, war plans were announced in the media, and there were military deployments to the Middle East.<sup>251</sup> Even before the NIE was produced, the White House claimed that Iraq had a nuclear weapons program, stockpiles of chemical and biological weapons, and terrorist surrogates who would attack the U.S.<sup>252</sup> If the SSCI analyst quotation is accurate, then the White House held a preference for regime change and conclusions were fashioned around a policy that may have been more consistent with neoconservative philosophy than facts. A deductive reasoning sequence followed—the Iraqi government was a threat, it must possess WMDs and the intent to use those weapons to embody that security threat, the regime had to be displaced, and, to do so, an invasion was required.<sup>253</sup> The NIE even speculated *when* Iraq would likely use its alleged

---

249. See S. REP. NO. 108-301, at 298 (2004) (quoting Senator Durbin's request for the "production of a coordinated, consensus document produced by all relevant components of the Intelligence Community"); see *supra* notes 21-22.

250. S. REP. NO. 108-301, at 505 (2004); see *Conspiracies: Iraq* (Sky Television broadcast 2006). Kwiatkowski was transferred to the Pentagon's Near East South Asia Directorate in May 2002 and was startled to find that the "war plan for the invasion was already on its second coordination" and she asserts WMD claims involved administration officials "fabricating in order to get the American people and the Congress on board." *Conspiracies: Iraq* (Sky Television broadcast 2006).

251. See REP. NO. 108-301, at 450 (2004); see *supra* notes 29, 54-55, 58-59, 61, 64, 216-18, 228-50.

252. See *supra* notes 19-20, 24, 243.

253. See Lee, *supra* note 15, at 997 ("[I]ndividuals often pay little attention to the substance of

WMDs: (1) “preemptively against U.S. forces, friends, and allies . . . to disrupt U.S. war preparations and undermine the political will of the Coalition,” (2) “after an initial advance into Iraqi territory,” and (3) “when he perceived he irretrievably had lost control of the military and security situation.”<sup>254</sup> Ostensibly, the NIE was generated not to objectively assess *if* Iraq was a threat but to be cautious and guarded for worst-case scenario risks to complement already-existing invasion plans.

Such presumptions may have set standards for the relevancy of the intelligence information. The SSCI found that intelligence officers and managers interpreted ambiguous information as “conclusively indicative of a WMD program” and ignored contrary evidence.<sup>255</sup> Analysts “rationalized the lack of evidence was the result of ‘vigorous’ Iraqi denial and deception (D&D) efforts to hide the WMD programs that analysts were certain existed.”<sup>256</sup> Chastisements of NIE claims can be broken into multiple categories: first, pre-existing intelligence reports made overstatements;<sup>257</sup> second, false claims were accidentally inserted into the NIE;<sup>258</sup> third, IC miscommunications and failure to communicate led to false claims;<sup>259</sup> fourth, intelligence professionals were not sufficiently careful and conscientious;<sup>260</sup> fifth, reporting inconsistencies were not addressed;<sup>261</sup> sixth, allegations were not supported by preexisting intelligence reports;<sup>262</sup> and lastly, ambiguous and unsubstantiated data and witness accounts were improperly regarded as veritable.<sup>263</sup> Since existing data did not substantiate threat allegations, the next section examines how the combination of national security classification prerogatives, organizational dynamics, and evident policy preferences marginalized the dissent from inside government agencies.

---

arguments, and focus instead on ultimate conclusions.”); *The World According to Bush*, *supra* note 10 (“These people came to their conclusions and then looked for intelligence to support it.” (remarks of VIA officer Robert Steele)); *see infra* notes 254-56.

254. S. REP. NO. 109-331, at 114-15 (2006); *see* DIRECTOR OF CENT. INTELLIGENCE, NATIONAL INTELLIGENCE ESTIMATE: IRAQ’S CONTINUING PROGRAMS FOR WEAPONS OF MASS DESTRUCTION 7-8 (2002), *available at* <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB129/nie.pdf>.

255. S. REP. NO. 108-301, at 18 (2004).

256. *Id.* at 22.

257. *Id.* at 75, 132, 134, 137, 141, 188, 192, 194, 211, 213, 235-36, 253, 295.

258. *Id.* at 76, 131-33, 193, 253-54, 418.

259. *Id.* at 73-74, 237.

260. *Id.* at 76-77, 80-81, 83, 138-39, 191, 255, 269-70, 302.

261. S. REP. NO. 108-301, at 78, 296 (2004).

262. *Id.* at 82, 129, 131, 140, 187, 192, 194, 212-14, 236.

263. *Id.* at 130, 135, 137, 139, 141, 188, 256, 269, 295-96, 346, 391, 420-21.

### III. VARIABLE TWO

#### A. AMERICAN EXIT, VOICE, AND LOYALTY

In 1970, Harvard Political Science Professor Albert Hirschman published a pioneering thesis called *Exit, Voice, and Loyalty* that portrays how individuals dissent to an organization's policies.<sup>264</sup> The model has been applied to voter choices, economic forces and decisions, whistleblower actions, and political dynamics of corporations and agencies.<sup>265</sup> Hirschman emphasized that individuals who refuse to conform to an organization's mandates may either voice discontent to improve the organization or exercise an "exit" response and sacrifice organizational benefits, such as prestige, association, and financial security.<sup>266</sup> In this light, an organization is a restraining unit that breeds conformity, while individuals within the organization possess competing self-interests or altruistic motives. Already-referenced actions of appointees, such as O'Neill, Clarke, and IC officials, represent a form of *post facto* whistleblower dissent against an executed policy,<sup>267</sup> but internal strife also preceded the invasion as an attempt to thwart its occurrence. A July 2002 *Washington Post* article explains:

Despite President Bush's repeated bellicose statements about Iraq, many senior U.S. military officers contend that President Saddam Hussein poses no immediate threat and that the United States should continue its policy of containment . . . .

. . . .

The cautious approach—held by some top generals and admirals in the military establishment, including members of the Joint Chiefs of Staff—is shaping the administration's consideration of war plans for Iraq, which are being drafted at the direction of Bush and Defense Secretary Donald H. Rumsfeld. . . .

. . . .

High-level civilians in the White House and Pentagon . . . . contend that Hussein is still acting aggressively, is

---

264. See generally ALBERT O. HIRSCHMAN, *EXIT, VOICE, AND LOYALTY: RESPONSE TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES* (1970).

265. *Id.* at 15-20; see Orly Lobel, *Citizenship, Organizational Citizenship, and the Laws of Overlapping Obligations*, 97 CAL. L. REV. 433, 473 (2009); see also Stephen L. Carter, *Constitutional Improprieties: Reflections on Mistretta, Morrison, and Administrative Government*, 57 U. CHI. L. REV. 357, 377 (1990).

266. HIRSCHMAN, *supra* note 264, at 30, 80-81.

267. See *supra* notes 222, 225-26, 232, 236-37.

intimidating his neighbors and is eager to pursue weapons of mass destruction and the means to deliver them.<sup>268</sup>

Days later, another *Washington Post* article noted: “Much of the senior uniformed military, with the notable exception of some top Air Force and Marine generals, opposes going to war anytime soon, a stance that is provoking frustration among civilian officials in the Pentagon and in the White House.”<sup>269</sup> *Time* featured Rumsfeld as the leading hawk and cited an official who estimated that one-third of officers “question the wisdom of a preemptive war with Iraq.”<sup>270</sup> A *PBS* documentary later investigated the conflict between the administration’s consistent public message of urgency and the opposing message that reporters received from sources inside government agencies.<sup>271</sup> Consistent with Hirshman’s thesis, officials dissented and some resigned, but dissenters were marginalized and shifted neither agency positions nor public sentiment.

For example, at the Pentagon, Joint Chiefs of Staff Director of Operations Lieut. General Greg Newbold retired and recalled: “I made no secret of my view that the zealots’ rationale for war made no sense. . . . I was outspoken enough to make those senior to me uncomfortable. But I now regret that I did not more openly challenge those who were determined to invade . . . .”<sup>272</sup> Anthony Zinni, a forty-year official, was not reappointed as a Middle East envoy.<sup>273</sup> He remarked: “In the lead up to the Iraq war and its later conduct, I saw at a minimum, true dereliction, negligence and irresponsibility, at worse, lying, incompetence and corruption.”<sup>274</sup> Colonel

---

268. Thomas E. Ricks, *Some Top Military Brass Favor Status Quo in Iraq*, WASH. POST, July 28, 2002, at A1.

269. Thomas E. Ricks, *Timing, Tactics on Iraq War Disputed*, WASH. POST, Aug. 1, 2002, at A1 [hereinafter “Ricks, *Timing, Tactics*”].

270. *Pentagon Warlord*, TIME, Jan. 19, 2003, <http://www.time.com/time/covers/1101030127/nrummy2.html>.

271. *Buying the War*, *supra* note 218 (this was a general theme of the documentary, but see Warren Strobel interview); Michael Massing, *Now They Tell Us*, 51(3) N.Y. REV. BOOKS, Feb. 26, 2004, at § 4. In late-summer 2002 some reporters “began hearing from sources in the military, the intelligence community, and the foreign service of doubts about the arguments the administration was making” that political appointees were the chief proponents, and that there was “misrepresentation of intelligence.” Michael Massing, *Now They Tell Us*, 51(3) N.Y. REV. BOOKS § 4, Feb. 26, 2004; see Paul Krugman, *Who’s Unpatriotic Now*, N.Y. TIMES, July 22, 2003, <http://www.nytimes.com/2003/07/22/opinion/22KRUG.html?pagewanted=1&pagewanted=print> (“[A]dministration squelches dissenting views . . .”).

272. Greg Newbold, *Why Iraq was a Mistake*, TIME, Apr. 9, 2006, <http://www.time.com/time/printout/0,8816,1181629,00.html>.

273. Nick Turse, *Casualties of the Bush Administration*, ASIA TIMES, Oct. 18, 2005, [http://www.atimes.com/atimes/Front\\_Page/GJ18Aa01.html](http://www.atimes.com/atimes/Front_Page/GJ18Aa01.html).

274. *Id.* (quoting Anthony Zinni, former U.S. envoy to the Middle East). General Shinseki retired after being publicly derided by Wolfowitz and Rumsfeld for objecting to war policies.

Douglas Macgregor retired and noted: “The biggest problem we have inside the . . . Department of Defense at the senior level, but also within the officer corps—is that there are no arguments. Arguments are [seen as] a sign of dissent. Dissent equates to disloyalty.”<sup>275</sup>

Some State Department officials also dissented and exited. John Kiesling, a twenty-year diplomat, had portions of his resignation letter published in the *New York Times*. He noted: “No one of my colleagues is comfortable with our policy. Everyone is moving ahead with it as good and loyal. The State Department is loaded with people who want to play the team game—we have a very strong premium on loyalty.”<sup>276</sup> Additionally, Foreign Service veteran John Brown remarked in a letter of resignation to the Secretary of State: “I cannot in good conscience support President Bush’s war plans against Iraq. The president has failed to explain clearly why our brave men and women in uniform should be ready to sacrifice their lives in a war on Iraq at this time . . . .”<sup>277</sup>

Furthermore, some White House officials resigned or were fired.<sup>278</sup> For example, in December 2002, top economic advisor Larry Lindsey was fired when he revealed that a war with Iraq could cost \$200 billion and Treasury Secretary O’Neill was ostensibly dismissed over taxing and spending disputes.<sup>279</sup> After the invasion, many other American intelligence,

---

Tiefer, *supra* note 67, at 15-16; Turse, *supra* note 273; Pentagon intelligence official Karen Kwiatkowski’s resignation letter read:

What I saw was aberrant, pervasive and contrary to good order and discipline. If one is seeking the answers to why peculiar bits of ‘intelligence’ found sanctity in a presidential speech, or why the post-Hussein occupation has been distinguished by confusion and false steps, one need look no further than the process inside the Office of the Secretary of Defense.

Turse, *supra* note 273 (quoting Air Force lieutenant colonel Karen Kwiatkowski (ret.)); see Symposium, *Panel III: Ethics and Sports: Agent Regulation*, 14 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 747, 777 n.86 (referencing Kwiatkowski commentary on “Neocons” and media bias).

275. Turse, *supra* note 273 (quoting U.S. Army colonel Douglas Macgregor (ret.)); see Douglas A. Macgregor, *The Failure of Military Leadership in Iraq: Fire the Generals!*, COUNTERPUNCH (May 26, 2006), <http://www.counterpunch.org/macgregor05262006.html>.

276. Felicity Barringer, *U.S. Diplomat Resigns, Protesting, ‘Our Fervent Pursuit of War,’* N.Y. TIMES, Feb. 27, 2003, at A13 (quoting U.S. Diplomat Kiesling).

277. Letter from John Brown, foreign service veteran, to Sec’y of State Colin Powell (Mar. 10, 2003), available at [http://www.unc.edu/depts/diplomat/archives\\_roll/2003\\_01-03/brown\\_resign/brown\\_resign.html](http://www.unc.edu/depts/diplomat/archives_roll/2003_01-03/brown_resign/brown_resign.html); Turse, *supra* note 273.

278. Among those who resigned were Richard Clarke; Randy Beers, the senior director for combating terrorism within the National Security Council (NSC); Flynt Leverett, NSC Senior Director for Middle East Affairs; Ben Miller, NSC Iraq expert; and Hillary Mann, NSC Director for Iran and Persian Gulf Affairs. Turse, *supra* note 273; see *Bush Adviser to Join Staff of Top War Critic*, WASH. TIMES, Jan 16, 2007, <http://www.washingtontimes.com/news/2007/jan/16/20070116-101147-1470r/>.

279. Dan Collins, *Bush Dumps Economic Team*, CBS NEWS, Dec. 6, 2002, <http://www.cbsnews.com/stories/2002/12/07/politics/main532180.shtml>; Lawrence B. Lindsey,

military, and government officials objected that it was unreasonable to assume that Iraq possessed or intended to possess WMDs.<sup>280</sup> Other officials resigned in protest to other related policies, such as those involving detainee abuse and military tribunals.<sup>281</sup>

### B. RESTRAINING DISSENT

Despite palpable dissent from inside the agencies required to execute the administration's policy, it seems that the invasion proceeded without a significant countervailing bureaucratic influence for four primary reasons—(1) organizational theory and psychology principles restrain dissent; (2) appointed like-thinking bureaucrats impel federal hierarchies to a favored position amid discordant membership; (3) restraining forces in organizational dissent models are marginalized by commonly applicable federal policies; and (4) asymmetric information imparities restrain informed dissent within agencies.

First, organizational theory and psychology studies clarify how dissenters are marginalized in bureaucracies. Stanford Psychology Professor Philip Zimbardo explains that hierarchies maintain conformity by verbal abuse, punishment, demotions, and hostile remarks.<sup>282</sup> NYU Communications Professor Douglas Rushkoff notes that social control naturally develops in rule-based hierarchies with superiors directing subordinates to follow organizational policies,<sup>283</sup> begetting conformity and diffusing dissent.<sup>284</sup> Oxford University research scientist Kathleen Taylor states: "Compliance is rewarded, often by promotion to a higher rank in the

---

*What the Iraq War Will Cost the U.S.*, CNN, Jan. 11, 2008, <http://money.cnn.com/2008/01/10/news/economy/costofwar.fortune/index.htm>; see Edmund L. Andrews, *Economic View; O'Neill Says Bush Was Set On Cutting Taxes Too*, N.Y. TIMES, Jan. 18, 2004, <http://www.nytimes.com/2004/01/18/business/economic-view-o-neill-says-bush-was-set-on-cutting-taxes-too.html>.

280. Barton Gellman & Walter Pincus, *Depiction of Threat Outgrew Supporting Evidence*, WASH. POST, Aug. 10, 2003, at A1; Lauren Johnston, *Experts: Iraq Nuke Evidence Thin*, CBS NEWS, July 18, 2003, <http://www.cbsnews.com/stories/2003/07/19/iraq/main564084.shtml>; see *supra* note 24.

281. Turse, *supra* note 273.

282. PHILIP ZIMBARDO, *THE LUCIFER EFFECT: UNDERSTANDING HOW GOOD PEOPLE TURN EVIL* 278 (2007).

283. DOUGLAS RUSHKOFF, *COERCION: WHY WE LISTEN TO WHAT "THEY" SAY* 217-54 (1999).

284. See generally Thomas I. Emerson & David M. Helfeld, *Loyalty Among Government Employees*, 58 YALE L.J. 1 (1948) (discussing context of government imposing conformity on employees); Donald I. Warren, *The Effects of Power Bases and Peer Groups on Conformity in Formal Organizations*, 14 ADMIN. SCI. Q. 544 (1969) (discussing the impact of conformity through informal mechanisms and group dynamics); DENISE WINN, *THE MANIPULATED MIND: BRAINWASHING, CONDITIONING AND INDOCTRINATION* 201 (2000 ed.).

social system, ‘thus both motivating the person and perpetuating the structure simultaneously.’”<sup>285</sup> Conformity and “fitting in” merges one’s world and ideological views, especially when repeating the same action, which helps “confirm one’s belief in [the action’s] validity.”<sup>286</sup> “Group Think” stimulates conformity during collective deliberation and decision-making, with individuals often changing personal opinions, attitudes, and values to accommodate the group even when they disagree.<sup>287</sup> Communications and sociology studies evince that human behavior is driven by a need to be consistent, to form a good impression, and to be accepted.<sup>288</sup> When compared to civilian organizations, military bureaucracies have elevated conformity dynamics due to the intensified chain of command directives, a rigid hierarchy of loyalty and obedience, and internal reward and discipline-avoidance incentives.<sup>289</sup>

Many neoconservatives were appointed to lead “conformity-breeding” bureaucracies prior to the Iraq War. The Pentagon, subject to plenary civilian control by political appointees,<sup>290</sup> was controlled by Rumsfeld, Wolfowitz, Feith, and Perle, the policymaking appointees who were also PNAC members.<sup>291</sup> At the State Department, top appointees were retired General Powell and two PNAC members, Richard Armitage and John Bolton.<sup>292</sup> The SSCI’s foundational explanation for inaccurate NIE conclusions was “group think.”<sup>293</sup> However, the more probative analysis is

285. KATHLEEN TAYLOR, *BRAINWASHING: THE SCIENCE OF THOUGHT CONTROL* 75 (2004).

286. WINN, *supra* note 284, at 41-42; *see* Morton Deutsch & Harold B. Gerard, *A Study of Normative and Informational Social Influences upon Individual Judgment*, 51 J. ABNORMAL & SOC. PSYCHOL. 629, 629-30 (1955) (agreeing with other individuals or a group can lead to positive feelings and conformity).

287. WINN, *supra* note 284, at 112; *see* GARTH S. JOWETT & VICTORIA O’DONNELL, *PROPAGANDA AND PERSUASION* 173, 281 (4th ed. 2006); MARVIN KARLINS & HERBERT I. ABELSON, *PERSUASION: HOW OPINIONS AND ATTITUDES ARE CHANGED* 41-67 (2d ed. 1970); ANTHONY R. PRATKANIS & ELLIOT ARONSON, *AGE OF PROPAGANDA: THE EVERYDAY USE AND ABUSE OF PERSUASION* 167-73 (2d ed. 2001); Michael I. Norton et al., *Vicarious Dissonance: Attitude Change from the Inconsistency of Others*, 85 J. PERSONAL & SOC. PSYCHOL. 47, 51, 53, 58 (2003).

288. JOWETT & O’DONNELL, *supra* note 287, at 173; ABRAHAM TESSER, *ADVANCED SOCIAL PSYCHOLOGY* 74 (1995); *see generally* ROBERT K. MERTON, *SOCIAL THEORY AND SOCIAL STRUCTURE: TOWARD THE CODIFICATION OF THEORY AND RESEARCH* (1949).

289. Laura A. Dickinson, *Government for Hire: Privatizing Foreign Affairs and the Problem of Accountability Under International Law*, 47 WM. & MARY L. REV. 135, 208-09 (2005).

290. Geoffrey Corn & Eric Talbot Jensen, *The Political Balance of Power Over the Military: Rethinking the Relationship Between the Armed Forces, the President, and Congress*, 44 HOUS. L. REV. 553, 556 (2007); Ricks, *Timing Tactics*, *supra* note 269 (“[T]he military has limited influence in this administration.” (quoting a senior administration official)).

291. PNAC Letter, *supra* note 54 (Perle, Feith, Wolfowitz, Rumsfeld signatories).

292. *Id.* (Armitage, Bolton signatories).

293. S. REP. NO. 108-301, at 18, 21-22 (2004).

whether political leadership sets policies and whether group think derivatively fosters agency and intelligence community support for those policies.

It stands to reason that a potent countervailing opinion force did not form within the Hirschman *Exit, Voice, and Loyalty* model because objecting officers ostensibly lacked an adequate mechanism for dissent to shift national policies set at the apex of the federal government.<sup>294</sup> Some organizations function as relatively isolated units that make and implement decisions with few external restraints, often depending on the decisional context.<sup>295</sup> Alternatively, federal agency units, particularly for the invasion decision, are not isolated; successful dissenters must persuade their departments, the larger federal agency, and finally the White House. Dissent can be enfeebled, diffused, or marginalized before attaining critical mass by counterpoise from other departments or agencies that are willing to follow the set policy. Treasury Secretary O'Neill's circumstance may exhibit that the ultimate reaction to diffuse dissent is to dismiss the agency head.<sup>296</sup>

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 given intelligence *conclusions*. The SSCI writes that the White House's exclusive "prerogative to classify information" and

---

294. See *infra* notes 297-98, 304 (restrictions on disclosing national security information).

295. For example, an environmental protection issue presumably involves some White House political responsibility, but prime obligations fall within the prerogative and scientific expertise of the Environmental Protection Agency. See generally EPA, *Policy & Guidance*, <http://www.epa.gov/lawsregs/policy/>. A national security matter involves many agencies, including the Department of Defense, CIA, Department of Energy (nuclear expertise), and State Department. U.S. GEN. ACCOUNTING OFF., NATIONAL SECURITY: AN OVERVIEW OF PROFESSIONAL DEVELOPMENT ACTIVITIES INTENDED TO IMPROVE INTERAGENCY COLLABORATION 2 (Nov. 2010), available at <http://www.gao.gov/new.items/d11108.pdf>. Those agencies have various departments with different responsibilities and agency interactions. *Id.* at 17. There could be strong populace pressures and sentiment (external variables) that influence organizations. Chapter 3 -- *Key Forces in the External Environment*, INT'L DEV. RES. CENTER, [http://www.idrc.ca/en/ev-28364-201-1-DO\\_TOPIC.html](http://www.idrc.ca/en/ev-28364-201-1-DO_TOPIC.html) (last visited May 25, 2011).

296. There is the constitutional jurisprudence on the balance between discretion and restriction on the President's political appointments. See Corn & Jensen, *supra* note 290, at 559-60; U.S. GEN. ACCOUNTING OFFICE, PERSONNEL PRACTICES: CAREER APPOINTMENTS OF FORMER POLITICAL AND CONGRESSIONAL EMPLOYEES 2 (Sept. 1997), <http://www.gao.gov/archive/1997/gg97165.pdf> ("The majority of the federal civilian workforce obtained their positions by competing against others in the government's merit system . . . Presidential . . . appointees are appointed by an administration to support and advocate the president's goals and policies."). This framework could impact the level of dissent and conformity.



declassify information was “exploited . . . with impunity” and it prevented others from “disclos[ing] additional details that might provide balance or improve accuracy . . . under the threat of prosecution.”<sup>297</sup> Neither Congress nor the SSCI possessed the information underpinning the national security threat claims; and the SSCI’s *post facto* five-year investigation sought to determine the origin of those claims.<sup>298</sup> Yet, the determinant to best foster informed and sober debate, creating optimum dissent conditions for democratic decision-making, is full access to the information that ostensibly sets the policy.<sup>299</sup> In this sense, intelligence information becomes asymmetric information that may be speculative, sire random opinions, and permit executive bureaucracies to be led amid dissent. For example, the previously quoted July 2002 *Washington Post* article stated that many military officers did not think that Hussein posed any threat, but that certain individuals in the White House and Pentagon asserted that Hussein was acting aggressive and pursuing WMDs.<sup>300</sup> Yet there were no overtly threatening acts and Iraq was quarantined for over a decade. Phrases such as “acting aggressively,” “intimidating,” and “eager to pursue” are *mens rea* suppositions, consistent with what realism has traditionally ascribed to state intentions.

This asymmetric information secrecy prerogative, codified in the 1947 National Security Act, developed as an exception to democratic openness because certain information was deemed too dangerous for the public to possess.<sup>301</sup> Here, the White House guaranteed WMD possession in hundreds of statements and insisted that the public know the danger, while classification hid fragility. In a June 2008 statement that concluded the SSCI’s five-year investigation, SSCI Chairman Rockefeller remarked: “In

---

297. S. REP. NO. 110-345, at 92 (2008); see Mark Fenster, *The Opacity of Transparency*, 91 IOWA L. REV. 885, 900-01 (2006) (contending that military analysts denouncing strict classification procedures undermine democracy); see also *Garcetti v. Ceballos*, 547 U.S. 410, 422 (2006) (government employee speech can be controlled since the government employer “commissioned or created” it); Bejesky, *supra* note 20, at 11 n.56-57.

298. S. REP. NO. 110-345, at 2 (2008); S. REP. NO. 108-301, at 2-3, 9 (2004).

299. Delgado, *supra* note 76, at 979-81; see Seth F. Kreimer, *Sunlight, Secrets, and Scarlet Letters: The Tension Between Privacy and Disclosure in Constitutional Law*, 140 U. PA. L. REV. 1, 6 (1991) (“Secrecy interferes with rational decision-making, accountability, and the choice of national goals.”); Jules Lobel, *Emergency Power and the Decline of Liberalism*, 98 YALE L.J. 1385 (1989); Christina E. Wells, *Information Control in Times of Crisis: The Tools of Repression*, 30 OHIO N.U. L. REV. 451 (2004) (chronicling administrations using secrecy to hide information, propagandizing, thwarting free speech, and prosecuting dissent).

300. Ricks, *Timing, Tactics*, *supra* note 269.

301. See S. REP. NO. 108-301, at 441 (2004); Marcus Eyth, *The CIA and Covert Operations: To Disclose or Not to Disclose—That Is the Question*, 17 BYU J. PUB. L. 45, 66-67 (2002); Charles E. Simmons, *United States Foreign Policy v. the Press and the American Information Consumer: The Embattled First Amendment*, 1987 HOW. L.J. 849, 850.

making the case for war, the administration repeatedly presented intelligence as fact when it was unsubstantiated, contradicted or even nonexistent. . . . Sadly, the Bush Administration led the nation into war under false pretenses.”<sup>302</sup> University of Pittsburgh President Jem Spectar writes that the “Bush Administration exploited, furthered, manipulated or thrived on the public’s confusion.”<sup>303</sup> Louis Fisher explains: “There should be no question that the prewar information was distorted, hyped, and fabricated. The October 2002 NIE prepared by the intelligence community is plain evidence of that . . . .”<sup>304</sup>

### C. BRITISH EXIT, VOICE, AND LOYALTY

Proposals to attack Iraq were churning within a joint-U.S.-U.K. initiative.<sup>305</sup> Similar to the dissent in the U.S., there were resignations in Britain in opposition to war, and some officials, like former Treasury Secretary O’Neill, released revealing documents to the media.<sup>306</sup> For example, the Secretary of International Development, Claire Short, resigned in protest and later stated that high-ranking British officials told her in the summer of 2002 that President Bush and British Prime Minister Tony Blair had already decided to attack with a tentative February 2003 timeframe.<sup>307</sup> British Foreign Secretary Robin Cook resigned before becoming head of the British House of Commons and noted that his colleagues at the British Foreign Office (BFO) were strictly opposed to the war and did not possess incriminating intelligence.<sup>308</sup> David Manning, Blair’s chief foreign policy

---

302. SSCI/June/2008/Press, *supra* note 10; *see* Pincus, *supra* note 31.

303. Spectar, *supra* note 25, at 90. Senator Kennedy called it “reprehensible” that the “administration distorted, misrepresented and manipulated the intelligence.” *Id.*

304. Fisher, *supra* note 23, at 1253; *see* Spectar, *supra* note 25, at 87 (“flimsy, weak and opportunistic circumstantial evidence”); *see supra* notes 10, 24-27.

305. *See* Adam Roberts, *Transformative Military Occupation: Applying the Laws of War and Human Rights*, 100 AM. J. INT’L L. 580, 606 (2006) (referencing April 2002 memos); David Rose, *Bush and Blair Made Secret Pact for Iraq War*, GUARDIAN, Apr. 4, 2004, <http://www.guardian.co.uk/politics/2004/apr/04/iraq.iraq> (“[W]hen we have dealt with Afghanistan, we must come back to Iraq.” (quoting Sir Christopher Meyer, former British Ambassador, in a Sept. 2002 Blair/Bush meeting)); *see supra* notes 234, 239-49 (This was the position adopted by the White House three days earlier and that position was consistent with later public announcements).

306. *See generally supra* note 221.

307. *Ex-ministers Attack Weapons Claims*, BBC NEWS, June 17, 2003, [http://news.bbc.co.uk/2/hi/uk\\_news/politics/2995526.stm](http://news.bbc.co.uk/2/hi/uk_news/politics/2995526.stm); Patrick Wintour, *Short: I Was Briefed on Blair’s Secret War Pact*, GUARDIAN, June 18, 2003, <http://www.guardian.co.uk/politics/2003/jun/18/iraq.iraq1>.

308. Alan Cowell, *Robin Cook, Former British Foreign Secretary, Dies at 59*, N.Y. TIMES, Aug. 7, 2005, <http://www.nytimes.com/2005/08/07/obituaries/07cook.html>; David Cracknell, *Blair ‘Knew Iraq Had No WMD,’* SUNDAY TIMES, Oct. 5, 2003, <http://www.timesonline.co.uk/tol/news/uk/article1166479.ece> (Cook accusing Blair of deliberately

adviser, and Ambassador Meyer described meetings with Undersecretary of Defense Wolfowitz and National Security Advisor Rice about managing the press, parliament, public opinion, and “wrongfoot[ing] Saddam on the inspectors and the U.N. Security Council resolutions” to garner international support.<sup>309</sup> A July 21, 2002, British Cabinet Office memorandum reflected these positions and itemized the need to merge British participation with the Pentagon’s existing invasion plan, international law justifications, and an invasion timetable evidently derived from the estimated time required to prepare public opinion.<sup>310</sup> Two days later, Blair and his top military and intelligence officials met. The later released “Downing Street Memo” of the meeting reads:

Military action was now seen as inevitable. Bush wanted to remove Saddam, through military action, justified by the conjunction of terrorism and WMD. But the intelligence and facts were being fixed around the policy. . . .

. . . .

[T]he case was thin. Saddam was not threatening his neighbours, and his WMD capability was less than that of Libya, North Korea or Iran. We should work up a plan for an ultimatum to Saddam to allow back in the U.N. weapons inspectors. . . .

The Attorney-General said that the desire for regime change was not a legal base for military action. There were three possible legal bases: self-defence, humanitarian intervention, or UNSC authorization. . . .

. . . .

We should work on the assumption that the U.K. would take

---

crafting speech phrasing “to mislead the public” and soldiers); John Kampfner, *Robin Cook Was One of the Greats - Out of Office*, SUNDAY TIMES, Aug. 7, 2005, <http://www.timesonline.co.uk/tol/comment/article552581.ece>; Ewen MacAskill & Richard Norton-Taylor, *How Blair Was Puzzled by His Predicament on the Eve of War with Iraq*, GUARDIAN, Oct. 6, 2003, <http://www.guardian.co.uk/politics/2003/oct/06/uk.iraq>.

309. *An Oversight Hearing on Pre-War Intelligence Relating to Iraq: Senate Democratic Policy Committee Hearing*, 109th Cong. 2 (2006) [hereinafter “Senate DPCH”], available at <http://dpc.senate.gov/hearings/hearing33/smith.pdf> (statement Michael Smith, Defense Correspondent of the London Sunday Times); Richard Norton-Taylor, *The Need to Wrongfoot Saddam*, GUARDIAN, Sept. 21, 2004, <http://www.guardian.co.uk/politics/2004/sep/21/iraq.iraq>.

310. *Cabinet Office Paper: Conditions for Military Action*, SUNDAY TIMES, June 12, 2005, <http://www.timesonline.co.uk/tol/news/world/article531957.ece>; John Daniszewski, *Indignation Grows in the U.S. Over British PreWar Documents*, L.A. TIMES, May 12, 2005, <http://articles.latimes.com/2005/may/12/world/fg-memogate12> (reporting that Blair enumerated conditions for participation, which included “construct[ing] a coalition” and “shap[ing] public opinion”).

part in any military action.<sup>311</sup>

The memo discussed much of what unfolded. Consistent with long-standing neoconservative dogma, Bush administration officials favored a regime change as early as the first NSC meetings and, not long after, alleged that Iraq was in breach of Security Council Resolutions.<sup>312</sup> The SSCI's five-year investigation found that there was no substantial foundation for the claims asserted in six months of public statements, that preexisting intelligence community reports did not substantiate the October 2002 NIE, and that the inexplicably-emerging dire threat estimations drastically departed from previous intelligence assessments.<sup>313</sup> U.S. State Department intelligence analysts claimed pressure "was being put on them to shape intelligence to fit policy"<sup>314</sup> and the Pentagon intelligence officials claimed their analyses had to be "on target" with threat presumptions set by the Secretary of Defense.<sup>315</sup> Two key Blair administration intelligence dossiers also contained inaccurate claims.<sup>316</sup>

This meeting preceded significant British and U.S. intelligence reports, legislative debates, war powers authorities, and U.N. diplomacy. Scandal erupted in Britain and the U.S. Eighty-nine members of Congress addressed a letter to the President demanding an explanation and expressed that the memo "raises troubling new questions regarding the legal justifications for the war as well as the integrity of your own

---

311. *The Secret Downing Street Memo*, SUNDAY TIMES, May 1, 2005, <http://www.timesonline.co.uk/tol/news/uk/article387374.ece>; see Senate DPCH, *supra* note 309, at 3-4; Roberts, *supra* note 305, at 606; Spectar, *supra* note 25, at 100; Sands, *supra* note 121, at 303; see *supra* notes 247-48 (tentative invasion and troop plans were announced in the media in mid-2002).

312. See S.C. Res. 1441, U.N. Doc. S/RES/1441 (Nov. 8, 2002); see *supra* notes 16-19, 50-51, 54-56, 58-59, 61, 64, 215-30.

313. Bejesky, *supra* note 20, at 6-14, 30-35; *Ex-CIA Analyst Accuses Tenet of Hypocrisy For Not Speaking Out Earlier on White House Push For War*, DEMOCRACY NOW! (May 1, 2007), [http://www.democracynow.org/2007/5/1/ex\\_cia\\_analyst\\_accuses\\_tenet\\_of](http://www.democracynow.org/2007/5/1/ex_cia_analyst_accuses_tenet_of) (Thirty-year CIA analyst Ray McGovern remarked, "We have documentary evidence that George Tenet, for example, told his British opposite number on the 20th of July 2002 . . . that the intelligence was being 'fixed around the policy.' It doesn't get any clearer than that."); see Sands, *supra* note 121, at 303; see *supra* notes 20-31, 255-63, 302-04.

314. Yamamoto, *supra* note 10, at 299.

315. S. REP. NO. 108-301, at 359 (2004).

316. ANNIE MACHON, SPIES, LIES & WHISTLEBLOWERS: MI5, MI6 AND THE SHAYLER AFFAIR 371 (2005); see Michael White & Brian Whitaker, *U.K. War Dossier a Sham, Say Experts*, GUARDIAN, Feb. 7, 2003, <http://www.guardian.co.uk/politics/2003/feb/07/uk.internationaleducationnews>; Glenn Frankel, *Blair Acknowledges Flaws in Iraq Dossier*, WASH. POST, Feb. 8, 2003, at A15; *British Government Plagiarizes MERIA Journal: Our Response*, MERIA, <http://meria.idc.ac.il/british-govt-plagiarizes-meria.html> (last visited Mar. 23, 2011).

administration.”<sup>317</sup> Press Secretary McClellan claimed the White House had “not seen” the memo, that the President “went to the United Nations and tried to resolve this in a diplomatic manner,” and that Hussein “chose continued defiance.”<sup>318</sup> One month later, Bush responded: “There’s nothing farther from the truth . . . Look, both of us didn’t want to use our military . . . Nobody wants to commit military into combat. It’s the last option.”<sup>319</sup>

Another memo was released that documented minutes of a January 31, 2003, Bush-Blair meeting at the White House.<sup>320</sup> The memo quoted Bush as stating that an Iraqi defector might emerge to publicly attest to having seen WMDs and referenced a proposal to fly a reconnaissance aircraft at low altitudes to provoke a response that might justify military action.<sup>321</sup> This meeting was held shortly before U.S.-U.K. attempts to push for a second Security Council resolution to authorize attack and as inspectors provided periodic updates that nothing incriminating had been discovered.<sup>322</sup> Claire Short, then a Member of Parliament (MP), remarked: “[A]t senior levels in the U.S. administration, crazy, illegal, deceitful proposals like that were actually being contemplated to trigger a war by

---

317. Douglas Jehl, *British Memo on U.S. Plans for Iraq War Fuels Critics*, N.Y. TIMES, May 20, 2005, <http://www.nytimes.com/2005/05/20/politics/20weapons.html?ex=1117252800&en=e0786468dc1b73b4&ei=5070> (quoting Rep. John Conyers of Michigan); see Sudha Setty, *The President’s Question Time: Power, Information, and the Executive Credibility Gap*, 17 CORNELL J.L. & PUB. POL’Y 247, 256-57 (2008); Daniszewski, *supra* note 310; *White House challenges U.K. Iraq Memo*, CNN, May 17, 2005, [http://articles.cnn.com/2005-05-16/us/iraq.memo\\_1\\_british-memo-iraq-war-military-action?\\_s=PM:US](http://articles.cnn.com/2005-05-16/us/iraq.memo_1_british-memo-iraq-war-military-action?_s=PM:US).

318. *White House challenges U.K. Iraq Memo*, *supra* note 317 (quoting White House press secretary Scott McClellan).

319. Elisabeth Bumiller, *Bush and Blair Deny ‘Fixed’ Iraqi Reports*, N.Y. TIMES, June 8, 2005, <http://query.nytimes.com/gst/fullpage.html?res=9906E7D91338F93BA35755C0A9639C8B63>.

320. Don Van Natta, *Bush Was Set on Path to War, British Memo Says*, N.Y. TIMES, Mar. 27, 2006, <http://www.nytimes.com/2006/03/27/international/europe/27memo.html>; *Bush-Blair Iraq War Memo Revealed*, BBC NEWS, Mar. 27, 2006, <http://news.bbc.co.uk/2/hi/americas/4849744.stm>.

321. See ARNOVE, *supra* note 36, at 11; IN THE NAME OF DEMOCRACY: AMERICAN WARCRIES IN IRAQ AND BEYOND 21-22 (2005) (Jeremy Brecher et. al., eds. 2005); Rosemary Bennett & Michael Evans, *Bush ‘Tried to Lure Saddam into War Using U.N. Aircraft,’* SUNDAY TIMES, Feb. 3, 2006, <http://www.timesonline.co.uk/tol/news/world/iraq/article725857.ece>; Michael Smith, *The Real News in the Downing Street Memos*, L.A. TIMES, June 23, 2005, <http://articles.latimes.com/2005/jun/23/opinion/oe-smith23>.

322. Gary Younge & Nick Paton Walsh, *Report Gives Small Comfort to the Hawks and Doves*, GUARDIAN, Mar. 1, 2003, <http://www.guardian.co.uk/world/2003/mar/01/iraq.unitednations>; Brian Dakss, *Inspectors Call U.S. Tips ‘Garbage,’* CBS NEWS, Feb. 20, 2003, <http://www.cbsnews.com/stories/2003/01/18/iraq/main537096.shtml>; *U.S., U.K., Spain Introduce New Iraq Resolution*, CNN, Feb. 24, 2003, [http://articles.cnn.com/2003-02-24/world/sprj.irq.wrap\\_1\\_chief-un-weapons-inspector-new-resolution-security-council?\\_s=PM:WORLD](http://articles.cnn.com/2003-02-24/world/sprj.irq.wrap_1_chief-un-weapons-inspector-new-resolution-security-council?_s=PM:WORLD).

deceit.”<sup>323</sup> MP Menzies Campbell commented: “What is extraordinary is that the President of the United States should be talking about trying to provoke Saddam Hussein into some kind of action so as to give a justification . . . All of that suggests a degree of desperation . . . That conversation suggests that they knew and had accepted that they were not going to get WMD evidence that was going to support the argument that Saddam Hussein was in breach.”<sup>324</sup> Professor Sands, author of *Lawless World*, explains: “I think that the context is clear that by January 2003 the British Prime Minister and the U.S. President were conscious that they had no evidence of their own . . . They would have to procure a material breach through some other means.”<sup>325</sup>

It was conceivable that a low-flying aircraft might be fired upon. In August 2002, National Security Advisor Rice emphasized: “He shoots at . . . our airplanes in the no-fly zones where we are trying to enforce U.N. security resolutions.”<sup>326</sup> The U.S. and U.K. flew thirty thousand patrol sorties every year for nearly a decade across the “no-fly zone” that usurped 60% of Iraq’s airspace, occasionally bombed installations and killed several hundred people, but the U.N. had never authorized such zones.<sup>327</sup> Secretary-General Boutros-Ghali and other experts called the no-fly zones illegitimate,<sup>328</sup> and in 1998 Security Council members held hearings and deemed Operation Desert Fox strikes illegal.<sup>329</sup> Elizabeth Wilmshurst

---

323. Gary Gibson, *The White House Memo*, CHANNEL 4 NEWS (UK) (Feb. 2, 2006), <http://www.channel4.com/news/articles/politics/the%20white%20house%20memo/161410>.

324. *Id.*

325. *Id.*

326. BBC RADIO, WITH OR WITHOUT US: EXTENDED INTERVIEWS (2002), <http://www.bbc.co.uk/radio4/news/withus/rice.pdf> (transcript of radio broadcast interview of National Security Advisor Candoleeza Rice, taken by Edward Stourton on Aug. 1, 2002).

327. S.C. Res. 688, U.N. Doc. S/RES/0688 (Apr. 5, 1991) (no-fly zones not authorized); ARNOVE, *supra* note 36, at 10; *No-fly Zones: The Legal Position*, BBC NEWS, Feb. 19, 2001, [http://news.bbc.co.uk/2/hi/middle\\_east/1175950.stm](http://news.bbc.co.uk/2/hi/middle_east/1175950.stm); Michael Smith, *British Bombing Raids Were Illegal, Says Foreign Office*, SUNDAY TIMES, June 19, 2005, <http://www.timesonline.co.uk/tol/news/uk/article535045.ece>.

328. *The “Secret” War Which Has Seen a 300 Per Cent Increase in Bombing Raids on Iraq*, JOHN PILGER.COM (Dec. 20, 2002), <http://www.johnpilger.com/articles/the-secret-war-which-has-seen-a-300-per-cent-increase-in-bombing-raids-on-iraq>; Alexander Bernard, *Lessons from Iraq and Bosnia on the Theory and Practice of No-fly Zones*, 27 J. STRATEGIC STUD. 454, 455-56, 458 (2004) (stating that no-fly zones deny sovereign air space, intimidate, enforce standard patrols, and monitor ground positions); *see generally* Mary Ellen O’Connell, *Continuing Limits on U.N. Intervention in Civil War*, 67 IND. L.J. 903 (1992); *see supra* note 327.

329. Mary Ellen O’Connell, *Addendum to Armed Force in Iraq: Issues of Legality*, ASIL INSIGHTS, Apr. 2003, <http://www.asil.org/insigh99a1.cfm> (citing U.N. SCOR 53d Sess., 3955th mtg., UN Doc. S/PV.3955 at 4-5, 12 (Dec. 16, 1998)); *see* Steven Erlander, *U.S. Decision to Act Fast, and Then Search for Support Angers Some Allies*, N.Y. TIMES, Dec. 17, 1998, <http://www.nytimes.com/1998/12/17/world/attack-iraq-diplomacy-us-decision-act-fast-then->

resigned from the BFO after senior officials disregarded her March 2002 report that called attacks intended specially “to put pressure on the regime” a violation of international law.<sup>330</sup> Aerial attacks continued and by November news sources revealed that bombing efforts were so extensive that the war had already begun.<sup>331</sup> The no-fly zones may have been a form of creeping unilateralism forming the circumstances necessary for invasion.<sup>332</sup>

As previously stated, there were prevailing contradictory public signals prior to the attack. The bombings continued, tens of thousands of troops were dispatched to contiguous countries, and Congress deliberated spending allocations.<sup>333</sup> Meanwhile, dissent and resignations exhibited opposition and White House officials consistently avouched that an invasion would be only a contingent last resort to achieve disarmament.<sup>334</sup> In December 2008, Secretary of State Rice defended the war policy but averred that she “regret[ed] bad Iraq intelligence,” while Bush maintained

---

search-for-support-angers-some.html?pagewanted=2&src=pm.

330. Smith, *supra* note 327.

331. See Senate DPCH, *supra* note 309, at 5 (“21,736 sorties dropping more than 600 bombs on 391 carefully selected targets before the war”); Vernon Loeb, *Airstrikes in Iraq’s Southern No-Fly Zone Mount*, WASH. POST, Jan. 15, 2003, at A1.

332. See generally James Cockayne & David Malone, *Creeping Unilateralism: How Operation Provide Comfort and the No-Fly Zones in 1991 and 1992 Paved the Way for the Iraq Crisis of 2003*, 37 SECURITY DIALOGUE 123 (2006).

333. *President George Bush Discusses Iraq in National Press Conference*, WHITE HOUSE (Mar. 6, 2003), <http://georgewbush-whitehouse.archives.gov/news/releases/2003/03/20030306-8.html> (“[W]e have a quarter million troops in the Persian Gulf, and . . . you’ve called on the world to be ready to use force as a last resort.” (reporter’s remark to the President)).

334. *Excerpts from News Conference: Imagine ‘Hussein With Nuclear Weapons,’* N.Y. TIMES, Nov. 8, 2002, <http://query.nytimes.com/gst/fullpage.html?res=9907E1DD1731F93BA35752C1A9649C8B63> [hereinafter N.Y. TIMES *Excerpts*] (“I hope this can be done peacefully. It’s up to Saddam Hussein, however, to make that choice.”); *Annan: ‘No Basis’ for Iraq War Now*, *supra* note 242; *Bush: U.N. Resolution Must be Upheld* (CNN television broadcast Feb. 7, 2003) (televising Bush stating that Iraq has been “lying and deceiving” for “ninety days” and treating disarmament “demands of the world as a joke”); *Powell Discusses Iraq with Radio France International* (Feb. 28, 2003), [http://www.usembassy.it/file2003\\_02/alia/a3022808.htm](http://www.usembassy.it/file2003_02/alia/a3022808.htm) (transcript of interview with Colin Powell) (“1441 . . . had one goal, and that was to disarm Iraq of its weapons of mass destruction. . . . And that is all we have been insisting on.”); *Powell Sees Decision on U.N. Vote After March 7, Blix Report*, AMERICA.GOV (Mar. 4, 2004), <http://www.america.gov/st/washfile-english/2003/March/20030304175514lfenner@pd.state.gov0.0325281.html> (“I think there is a chance for peace . . . if Saddam Hussein and the Iraqi regime . . . completely comply with all their obligations to disarm, to get rid of their weapons of mass destruction . . .”); *President Bush’s News Conference on Iraq*, N.Y. TIMES, Mar. 6, 2003, <http://www.nytimes.com/2003/03/06/politics/07FTEX-BUSH.html> (“important moment in confronting the threat posed to our nation and to peace by Saddam Hussein and his weapons of terror”); James Risen, *Iraq Said to Have Tried to Reach Last Minute Deal to Avert War*, N.Y. TIMES, Nov. 6, 2003, <http://query.nytimes.com/gst/fullpage.html?res=940CE6D71739F935A35752C1A9659C8B63> (reporting that officials shunned Iraqi attempts to negotiate).

that the “biggest regret of his presidency was the ‘intelligence failure’ regarding the extent of Saddam’s threat to the United States.”<sup>335</sup>

#### IV. VARIABLE THREE

##### A. PUBLIC CHOICE AND COSTS

Consistent with the Constitution’s foundational principle that governmental legitimacy derives from the people, James Madison’s “social contract” ideals of deliberative democracy,<sup>336</sup> and First Amendment jurisprudence that embraces a “marketplace of ideas,”<sup>337</sup> public choice theory presumes bilateral interaction between government policymaking and citizen preferences.<sup>338</sup> Candidates offer platforms for voter approbation, citizens weigh benefits and costs of proposals, and incumbents enact policies to remain in office. Evidence from internal dissenters, public statements, and independent studies suggest that Bush administration policies, which seem largely consistent with neoconservative philosophy, exhibit three pillars—(1) to minimize the impact of cost, (2) to accentuate threats, and (3) to affix the benefit of alleviating threats at the pinnacle of public consciousness.

Presidents have a history of understating costs and overstating the ease and benefits of a military conflict<sup>339</sup> since greater costs produce more resistance. Americans were promised the benefit of a quick military victory that would discover WMDs and remove the malicious man allegedly bent on menacing Americans.<sup>340</sup> Long-term occupation was not presented as a

---

335. Alternatively, David Frum, neoconservative White House speechwriter (2001-02), explained that the invasion was just “power politics” to “put America more wholly in charge of the region.” Stephen Ohlemacher, *Rice Regrets Bad Intelligence; defends war*, ASSOC. PRESS, Dec. 7, 2008, <http://essenceofpolitics.blogspot.com/2008/12/rice-regrets-bad-iraq-intelligence.html>; George Packer, *Dreaming of Democracy*, N.Y. TIMES MAGAZINE, Mar. 2, 2003, at 49.

336. See William N. Eskridge, Jr., *Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 VA. L. REV. 275, 280-81 (1988); see generally Richard A. Epstein, *The Necessity for Constrained Deliberation*, 24 HARV. J.L. & PUB. POL’Y 159 (2000).

337. See *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Homes, J., dissenting); Delgado, *supra* note 76, at 962; Kreimer, *supra* note 299, at 6.

338. Bryan Caplan & Edward Stringham, *Mises, Bastiat, Public Opinion and Public Choice*, 17 REV. POL. ECON. 79 (2005) (exploring various versions of public choice theory, particularly of whether opinions and democratic mechanisms emerge into policy or whether politicians and bureaucrats predominantly drive public perceptions), available at <http://econfaculty.gmu.edu/bcaplan/pdfs/misesbastiat.pdf>; see generally HARGREAVES ET AL., *supra* note 34.

339. See Nzelibe, *supra* note 86, at 1014; see also ARTHUR OKUN, THE POLITICAL ECONOMY OF PROSPERITY, at Ch. 3 (1970) (stating that the \$10 billion estimate for the Vietnam War was a drastic underestimate of the actual \$110-150 billion cost).

340. N.Y. TIMES *Excerpts*, *supra* note 334 (“[S]hould it become a necessity in order to disarm him, the United States with friends will move swiftly with force to do the job. You don’t have to



contemplated contingency. Generally affirming public choice theory, Congress's pre-invasion sentiment in approving the *Authorization to Use Force* ostensibly reflected the 70% to 90% of Americans who believed Iraq was concealing WMDs, but with no WMDs found, public support dissipated and Congresspersons later noted that they would have rejected the *Authorization*.<sup>341</sup> Cost representations followed a pattern of ignoring warnings of potentially high expenses, underestimating future expenditures, and ignoring potential connections between war spending and economic conditions. Professor Charles Tiefer calls this the ongoing strategy to "relentlessly hide the full ongoing anticipated scale of the war's cost."<sup>342</sup>

Pre-invasion studies and experts warned of potentially high costs and economic ramifications.<sup>343</sup> Yale Economics Professor William Nordhaus estimated that costs could approach \$2 trillion for a decade-long occupation.<sup>344</sup> Experts testified at Senate hearings and warned that invading and deposing Hussein "would be long and expensive" and would "require a huge infusion of aid and a long-term commitment of American troops."<sup>345</sup> A Congressional Budget Office report, coinciding with the October Congressional *Authorization*, estimated that an invasion (without occupation) would cost \$6 to \$9 billion per month.<sup>346</sup> White House National Economics Head Lawrence Lindsey was fired after he remarked publicly that the war could cost \$200 billion.<sup>347</sup>

---

worry about that."); see *supra* notes 20, 25, 335.

341. See *supra* notes 11-13, 20-25, 34-38.

342. Tiefer, *supra* note 67, at 12.

343. See generally CARL KAYSEN ET AL., WAR WITH IRAQ: COSTS, CONSEQUENCES & ALTERNATIVES (2002), available at [http://www.amacad.org/publications/monographs/War\\_with\\_Iraq.pdf](http://www.amacad.org/publications/monographs/War_with_Iraq.pdf); Roberto Tamborini, *The Economic Consequences of Mr. G.W. Bush's Foreign Policy. Can the U.S. Afford It?* (Universita' Degli Studi di Trento – Dipartimento di Economia Discussion Paper No. 2, 2004), available at [http://www-econo.economia.unitn.it/new/pubblicazioni/papers/2\\_04\\_tamborini.pdf](http://www-econo.economia.unitn.it/new/pubblicazioni/papers/2_04_tamborini.pdf); Martin Wolk, *Cost of Iraq War Could Surpass \$1 Trillion*, MSNBC, Mar. 17, 2006, <http://www.msnbc.msn.com/id/11880954/>.

344. William D. Nordhaus, *The Economic Consequences of a War with Iraq*, in KAYSEN, *supra* note 343, at 51-86.

345. James Dao, *Experts Put Large Price Tag on Rebuilding Iraq*, N.Y. TIMES, Aug. 2, 2002, <http://www.nytimes.com/2002/08/02/world/experts-put-large-price-tag-on-rebuilding-of-iraq.html>.

346. U.S. CONGRESS, CONGRESSIONAL BUDGET OFFICE, AUTHORIZATION FOR THE USE OF MILITARY FORCE AGAINST IRAQ RESOLUTION OF 2002, H.R. REP. NO. 107-721, at 40-41 (2d Sess. 2002), available at <http://www.gpo.gov/fdsys/pkg/CRPT-107hrpt721/pdf/CRPT-107hrpt721.pdf>.

347. Lindsey, *supra* note 279; Senior Fellow, Center for American Progress Action Fund Before the H. Budget Comm., 110th Cong. 2 (2008); see also Gordon Adams & Steve Kosiak, *The Price We Pay*, N.Y. TIMES, Feb. 15, 2003, <http://www.nytimes.com/2003/02/15/opinion/the-price-we-pay.html> (\$127 to \$682 billion estimate); see *Testimony of Lawrence J. Korb Before the*

A Center for Strategic and Budgetary Assessments study concluded that an invasion would require 175,000 to 350,000 troops and cost \$18 billion (one-month war) to \$85 billion (six-month war) and that the possibility of a 20,000 to 90,000-troop occupation for five years could cost between \$25 and \$105 billion.<sup>348</sup> Post-war reconstruction, aid to allies, base construction, troop accommodations, humanitarian assistance, governance activities, reconstruction, and debt repayment aggregated the cost estimates to between \$84 and \$499 billion.<sup>349</sup> While this study opposed the assumption that Iraq's natural resources would fund the rebuilding efforts of an occupation, statements by officials invoked a guiding presumption that oil revenues would fund reconstruction.<sup>350</sup> This source of revenue is particularly controversial to the extent that U.S. rebuilding efforts imposed American costs of construction with repayment on a current Iraqi developing country standard of living. In testimony before a Senate Appropriations Hearing, Rumsfeld contended: "I don't believe that the United States has responsibility for reconstruction"<sup>351</sup> and "before we turn to the American taxpayer, we will turn first to the resources of the Iraqi government and the international community."<sup>352</sup>

Administration officials seemed reluctant to testify before Congress with estimates and publicly offered conservative \$50 to \$60 billion figures.<sup>353</sup> A projected \$400 billion deficit loomed, but Congress initially

---

*House Budget Committee – February 12, 2002*, <http://www.cfr.org/terrorism/testimony-lawrence-j-korb-before-house-budget-committee---february-12-2002/p4336> (envisioning budgetary problems with the proposed \$400 national security budget FY 2003, which was prior to discussions about Iraq).

348. Steven Kosiak, *Potential Costs of a War with Iraq and Its Post War Occupation*, CENTER FOR STRATEGIC AND BUDGETARY ASSESSMENTS 1 (Feb. 25, 2003).

349. *Id.* at 5.

350. *Id.*; Diane Marie Amann, Foreword, *Symposium: Rethinking Reconstruction After Iraq*, 11 U.C. DAVIS J. INT'L L. & POL'Y 1, 5-6 (2004); Jeff Gerth, *Report Offered Bleak Outlook About Iraq Oil*, N.Y. TIMES, Oct. 5, 2003, <http://www.nytimes.com/2003/10/05/world/the-struggle-for-iraq-reconstruction-report-offered-bleak-outlook-about-iraq-oil.html>; *Press Briefing with Ari Fleischer*, WHITE HOUSE (Feb. 18, 2003), <http://georgewbush-whitehouse.archives.gov/news/releases/2001/09/20010912-8.html> (cost quotes); John Conyers, Jr., *U.S. Government Issues Apology and \$2 Million Settlement to Falsely Arrested 'Terrorism Suspect'*, JOHNCONYERS.COM (Nov. 30, 2006), <http://www.johnconyers.com/node/73> (compiling some statements, including congressional testimony from Wolfowitz and Armitage).

351. Conyers, *supra* note 350 (citing Senate Appropriations Hearing, Mar. 27, 2003); H.R. 1111, 110th Cong. (2nd Sess. 2008) (citing Rumsfeld's testimony on Mar. 27, 2003); Kosiak, *supra* note 348, at 5 (noting that costs should be borne by friends, allies and financial institutions).

352. H.R. Res. 1111, 110th Cong. (2d. Sess. 2008).

353. See CARROLL, *supra* note 173, at 173; STIGLITZ & BILMES, *supra* note 12, at 7; Ariel Cohen & Gerald P. O'Driscoll, Jr., *The Road to Economic Prosperity for a Post-Saddam Iraq*, HERITAGE FOUND. (Sept. 25, 2002), <http://www.heritage.org/Research/MiddleEast/bg1594.cfm> (\$50-100b figure); *Secretary Rumsfeld Media Stakeout*, U.S. DEP'T DEF. (Jan. 19, 2003),

allocated \$75 billion for military operations.<sup>354</sup> One week into the invasion, Rumsfeld remarked, “[W]e don’t know what the war’s going to cost. . . . You can’t know it. It’s not knowable.”<sup>355</sup> Months later, Congress approved an \$87 billion supplemental bill, largely availing defense and rebuilding contractors.<sup>356</sup> By 2006, spending for Afghanistan and Iraq mounted to over \$300 billion while social services were being cut and cities and states were reporting fiscal crises.<sup>357</sup> By 2008, Congress had allocated \$747 billion for operations in Afghanistan and Iraq.<sup>358</sup> Economists began incorporating derivative costs, such as veterans’ healthcare expenditures<sup>359</sup> and estimated that expenditures would exceed \$1.5 trillion through 2009.<sup>360</sup>

### B. DERIVATIVE ECONOMIC CONSEQUENCES

The correlation between the domestic economic conditions and the war spending went largely unaddressed. On a rare occasion in January 2003 when a reporter probed about cost ramifications, Bush remarked: “I’m hopeful we won’t have to go to war, and let’s leave it at that.”<sup>361</sup> In the same month, a U.N. *World Economic Situation and Prospects* report was

---

<http://www.defense.gov/transcripts/transcript.aspx?transcriptid=1322> (Rumsfeld \$50 billion contention).

354. *The Cost of War*, PBS, Mar. 25, 2003, [http://www.pbs.org/newshour/bb/middle\\_east/jan-june03/budget\\_3-25.html](http://www.pbs.org/newshour/bb/middle_east/jan-june03/budget_3-25.html).

355. *Id.*

356. David Firestone, *Senate Sends Spending Bill for War Costs to President*, N.Y. TIMES, Nov. 4, 2003, <http://www.nytimes.com/2003/11/04/politics/04COST.html>; see Tiefer, *supra* note 67, at 31.

357. *House Passes \$409 Billion in Defense Spending*, REUTERS, June 21, 2005, [http://www.washingtonpost.com/wp-dyn/content/article/2005/06/20/AR2005062001379\\_pf.html](http://www.washingtonpost.com/wp-dyn/content/article/2005/06/20/AR2005062001379_pf.html); see ARNOVE, *supra* note 36, at 103; Linda Bilmes, *Soldiers Returning from Iraq and Afghanistan: The Long-Term Costs of Providing Veterans Medical Care and Disability Benefits* (Harvard Univ. Kennedy School of Gov’t, Working Paper No. RWP07-001, 2007), available at <http://web.hks.harvard.edu/publications/workingpapers/citation.aspx?PubId=4329> (follow “attachment pdf” link); Iris J. Lav & Elizabeth McNichol, *13 States Face Total Budget Shortfall of at Least \$23 Billion in 2009; 11 Others Expect Budget Problems*, CENTER ON BUDGET AND POLICY PRIORITIES, Dec. 18, 2007, <http://www.cbpp.org/cms/?fa=view&id=927>.

358. AMY BELASCO, *THE COST OF IRAQ, AFGHANISTAN, AND OTHER GLOBAL WAR ON TERROR OPERATIONS SINCE 9/11*, at 3 (2011), <http://www.fas.org/sgp/crs/natsec/RL33110.pdf> (CRS Report for Congress).

359. See Patsner, *supra* note 38, at 360.

360. See Tiefer, *supra* note 67, at 12; see generally STIGLITZ & BILMES, *supra* note 12 (estimating \$3 trillion based on conservative assumptions); Bilmes & Stiglitz, *supra* note 38; *War Costs Could*, *supra* note 38; BELASCO, *supra* note 358, at 3; David Allen Larson, *Understanding the Cost of the War Against Iraq and How That Realization Can Affect International Law*, 13 CARDOZO J. INT’L & COMP. L. 387 (2005).

361. *Bush: ‘What I’m worried about is job creation,’* CNN, Jan. 2, 2003, [http://articles.cnn.com/2003-01-02/politics/transcript.bush\\_1\\_texas-ranch-north-korea-nuclear-weapons?\\_s=PM:ALLPOLITICS](http://articles.cnn.com/2003-01-02/politics/transcript.bush_1_texas-ranch-north-korea-nuclear-weapons?_s=PM:ALLPOLITICS).

released and alerted that two of the four great economic uncertainties and risks in the coming year for the global economy were the “sustainability of the external deficits of the United States” and “military action in [Iraq, which] might lead to a disruption in oil supplies, provoking an oil-supply shock to the world economy or exacerbating the effects of the increase in oil prices in late 2002.”<sup>362</sup> Indeed, without an actual supply disruption, oil prices eventually increased sevenfold, perhaps because of risks inherent to “perception” of supply disruption, which then begets price increases.<sup>363</sup> And in 2005, the IMF surmised that “fears of potential supply disruption” were driving price increases.<sup>364</sup>

Critics were miffed that Vice President Cheney asserted that it was the President who bears “the biggest burden” of the war.<sup>365</sup> Beyond 4,000 U.S. casualties and 40,000 seriously wounded and injured,<sup>366</sup> expenditures mounted. Large-scale foreign policy expenditures may negatively impact domestic economic conditions,<sup>367</sup> and business and economics experts predicted that unilateral prosecution of a war in Iraq would undermine U.S. competitiveness.<sup>368</sup> Pentagon-dependent industries prospered,<sup>369</sup> whereas hundreds of other companies attributed poor financial results to involvement in Iraq.<sup>370</sup> During Bush’s tenure, the economy was in a

---

362. UNITED NATIONS, WORLD ECONOMIC SITUATION AND PROSPECTS 5-6 (2003), available at <http://www.un.org/esa/policy/wess/wesp2003.pdf>.

363. Bejesky, *supra* note 56, at 85-88.

364. Pelin Berkmen et al., *The Structure of the Oil Market and Cause of High Prices*, INT’L MONETARY FUND (Sept. 21, 2005), <http://www.imf.org/external/np/pp/eng/2005/092105o.htm> (emphasis added).

365. Dan Froomkin, *Cheney’s Unforgivable Egotism*, WASH. POST, Mar. 25, 2008, <http://www.washingtonpost.com/wp-dyn/content/blog/2008/03/25/BL2008032501430.html>; Martha Raddatz et al., *Cheney on Iraq: ‘It’s Important to Win.’* ABC NEWS, Mar. 24, 2008, <http://abcnews.go.com/WN/Politics/story?id=4513250&page=1>.

366. See DATA, ANALYSIS & PROGRAMS DIV., DEF. MANPOWER DATA CTR., GLOBAL WAR ON TERRORISM—OPERATION IRAQI FREEDOM: CASUALTY CATEGORY WITHIN SERVICE: MAR. 19, 2003 THROUGH FEB. 28, 2009, available at <http://siadapp.dmdc.osd.mil/personnel/CASUALTY/OIF-Total.pdf>; Karen DeYoung & Michael Abramowitz, *Bush Says War’s Outcome ‘Will Merit the Sacrifice,’* WASH. POST, Mar. 25, 2008, at A1.

367. See *supra* note 38.

368. See Michael J. Mandel et al., *How War Will Shape the Economy*, BUSINESS WEEK, Apr. 14, 2003, at 29-32; Geoffrey E. Garten, *Commentary: Bush’s Guns-and-Butter Dilemma*, BUSINESS WEEK, Mar. 17, 2003, [http://www.businessweek.com/magazine/content/03\\_11/b3824090\\_mz057.htm](http://www.businessweek.com/magazine/content/03_11/b3824090_mz057.htm); see *supra* notes 342-43.

369. See Michelle Ciarrocca, *Post-9/11 Economic Windfalls for Arms Manufacturers*, 7(10) FOREIGN POL’Y IN FOCUS, Sept. 2002, available at <http://old.911digitalarchive.org/objects/50.pdf>; Leslie Wayne, *Heady Days for Makers of Weapons*, N.Y. TIMES, Dec. 26, 2006, <http://query.nytimes.com/gst/fullpage.html?res=9F04EEDC1E31F935A15751C1A9609C8B63>; see *infra* notes 495-500.

370. See James Cox, *Financially Ailing Companies Point to Iraq War*, USA TODAY, June 14, 2004, [http://www.usatoday.com/money/companies/2004-06-14-iraq\\_x.htm](http://www.usatoday.com/money/companies/2004-06-14-iraq_x.htm).

recession, unemployment increased, and the home foreclosure rate doubled.<sup>371</sup> The fiscal and banking crises dominating the 2008 presidential campaign might have been related to war allocation fiscal deficits. As an attempt to alleviate recessionary conditions, newly elected President Obama passed a \$787 billion stimulus plan in February 2009.<sup>372</sup>

Long-term studies affirm that menacing budget deficits undermine an economy and impede long run growth.<sup>373</sup> Treasury Secretary O'Neill was dismissed over fiscal disputes and scholars complained that "[t]ax cuts remained the primary domestic policy response [as an economic stimulus] to almost everything [from] . . . wars in Afghanistan and Iraq, a recession, a temporary stock market plunge, a dramatic fall in revenues, and predictions of large deficits stretching far into the future."<sup>374</sup> Consequently, Bush promised to cut the yearly deficit in half by 2009.<sup>375</sup> Current deficits decreased but were financed by aggregating the national long-term debt from \$5.674 trillion (2000) to \$10.025 trillion (2008).<sup>376</sup> In 2000, candidate Bush promised to decrease the national debt, but it doubled.<sup>377</sup> For a

371. *US Headed for Longest Post-War Recession*, CBS NEWS, Mar. 9, 2009, <http://www.cbsnews.com/stories/2009/03/09/business/main4852985.shtml>; Les Christie, *Record 1.2 Million Homes Hit by Foreclosure*, CNN, Sept. 5, 2008, [http://money.cnn.com/2008/09/05/real\\_estate/foreclosures\\_rise\\_again/index.htm](http://money.cnn.com/2008/09/05/real_estate/foreclosures_rise_again/index.htm).

372. *Obama: Stimulus lets Americans claim destiny*, ASSOC. PRESS, Feb. 17, 2009, [http://www.msnbc.msn.com/id/29231790/ns/politics-white\\_house/](http://www.msnbc.msn.com/id/29231790/ns/politics-white_house/).

373. See Alice M. Rivlin & Isabel Sawhill, *Growing Deficits and Why They Matter*, in RESTORING FISCAL SANITY: HOW TO BALANCE THE BUDGET 15, 26 (Alice M. Rivlin & Isabel Sawhill eds., 2004); Daniel N. Shaviro, *Reckless Disregard: The Bush Administration's Policy of Cutting Taxes in the Face of an Enormous Fiscal Gap*, 45 B.C. L. REV. 1285, 1298-99 (2004). IMF Chief Economist Olivier Blanchard remarked that "many countries, including the United States, have failed to put in place a convincing medium term fiscal consolidation plan . . . [for high deficits; and without such a plan, negative economic conditions can manifest and] growth can be derailed." Conway G. Gittens, *Deficits threaten global growth: IMF*, REUTERS, June 17, 2011, <http://uk.reuters.com/video/2011/06/18/deficits-threaten-global-growth-imf?videoId=216056303&newsChannel=wtUKMostShared>.

374. Katherine Pratt, *Deficits and Dividend Tax Cut: Tax Policy as the Handmaiden of Budget Policy*, 41 GA. L. REV. 503, 508 (2007); see C. EUGENE STEUERLE, CONTEMPORARY U.S. TAX POLICY 238-39 (2004).

375. Pratt, *supra* note 374, at 541.

376. *Historical Debt Outstanding – Annual 2000-2008*, TREASURYDIRECT.GOV, [http://www.treasurydirect.gov/govt/reports/pd/histdebt/histdebt\\_histo5.htm](http://www.treasurydirect.gov/govt/reports/pd/histdebt/histdebt_histo5.htm) (last updated Oct. 1, 2010) (showing national debt in trillions as \$5.674 (2000), \$5.807 (2001), \$6.228 (2002), \$6.783 (2003), \$7.379 (2004), \$7.933 (2005), \$8.506 (2006), \$9.008 (2007), \$10.025 (2008)); see 151 CONG. REC. H5748 (July 13, 2005) ("largest national debt in history") (remarks of Rep. Maloney); OFFICE OF MGMT. AND BUDGET, CONG. BUDGET OFFICE, REVENUES, OUTLAYS, DEFICITS, SURPLUSES, AND DEBT HELD BY THE PUBLIC, 1968 TO 2007, IN BILLIONS OF DOLLARS 1 (2008) (showing annual account surplus/deficits as 86.4 (2000), -32.4 (2001), -317.4 (2002), -538.4 (2003), -568.0 (2004), -493.6 (2005), -434.5 (2006), -342.2 (2007)), available at <http://www.cbo.gov/budget/data/historical.pdf>.

377. *The 2000 Campaign; Transcript of Debate Between Vice President Gore and Government*

portion of this debt, American taxpayers may have accepted a 4% loan partially influenced by neoconservative foreign relations philosophy. Professor Patsner writes,

[T]he financing of the current conflict has been with money borrowed from overseas. Instead of raising taxes so that American citizens were aware of the direct costs of this war and its long-term veterans' healthcare consequences, the current Bush administration cut taxes for Americans and shifted the burden for paying off our war debt to future generations.<sup>378</sup>

Congresspersons may have difficulty tying the purse strings since the expedient solution to garner constituent support may be to borrow, spend now, and accumulate debt instead of increasing taxes on the current electorate.<sup>379</sup> These ramifications, however, are passed on to future governments. Brookings Institute Fellows Alice Rivlin and Isabel Sawhill remark that politicians "have little incentive to do much about [deficits]. They may talk about the need for fiscal discipline and even propose small measures that move the federal budget in that direction, but serious deficit reduction is not likely to be winning a political strategy."<sup>380</sup> The "winning political strategy" was agitated and aggrandized by those who controlled the political and media discourse about Iraq.<sup>381</sup> Senator Obama cursorily acknowledged the interrelationship between war spending and domestic economic woes,<sup>382</sup> but this potential consequence seems unpopular to acknowledge.

Using the 2005 Iraq-related appropriation numbers of \$236 billion, Professor Larson explains that if American taxpayers had been properly informed and were given spending alternatives, citizens might have rejected a foreign policy that violated international law and instead favored policies to promote goodwill.<sup>383</sup> For example, \$236 billion could save as many as 1,000,000 lives each year from Malaria deaths for the next seventy-four years, or it could feed the world's 797 million undernourished people for the next seven years.<sup>384</sup> To address domestic issues, \$236 billion could

---

*Bush*, N.Y. TIMES, Oct. 4, 2000, <http://www.nytimes.com/2000/10/04/us/2000-campaign-transcript-debate-between-vice-president-gore-governor-bush.html?src=pm>.

378. Patsner, *supra* note 38, at 360.

379. See Lee C. Buchheit et al., *The Dilemma of Odious Debts*, 56 DUKE L.J. 1201, 1211 (2007).

380. Rivlin & Sawhill, *supra* note 373, at 24; STEUERLE, *supra* note 374, at 252.

381. Nzalibe, *supra* note 86, at 1007 (remarking generally about the president's ability to "create or escalate an international crisis").

382. Patsner, *supra* note 38, at 362.

383. See Larson, *supra* note 360, at 405-06.

384. *Id.* at 405-07.

fund a minimum wage increase of \$1 per hour for the next thirteen years, K-12 school lunches for nearly twenty-eight years, or Head Start programs for nearly thirty-five years.<sup>385</sup> Instead, Bush endeavored to trim overspending by proposing significant federal, state, and local government spending cuts for social programs, such as health care funding, aid to low-income families and the elderly, and environmental protection.<sup>386</sup>

### C. THREAT EMBELLISHMENT

The second pillar of Bush Administration political strategy was to accentuate and exaggerate the cost of inaction, which eclipses the consequences of pillar one: ignoring the financial cost. Long-term studies demonstrate that presidents presiding over perceived security crises or war situations reap higher approval ratings.<sup>387</sup> Bush Sr.'s approval ratings rose to 85% during the 1991 Gulf War as the Pentagon showcased high-technology weapons with minimal combat.<sup>388</sup> Reagan-era political appointees presumably learned that embellishing threats garners populace support.<sup>389</sup> Professor Delgado, analyzing the Reagan administration approach to public diplomacy as it unfolded, explained that the administration relied on "euphemism, abstraction, and doublespeak" to market dire threats and then "prevent[ed] access to the data necessary to support a contrary opinion."<sup>390</sup> Likewise, shortly after the *Détente* agreements were signed with the Soviet Union in 1975 to alleviate tensions, Secretary of Defense Rumsfeld began giving speeches about renewed dire Soviet threats. In conjunction with these speeches, Rumsfeld sponsored an "alternative" intelligence assessment, provided by appointed consultants (Team B) who claimed the Soviets possessed a new arsenal of weapons,

---

385. See Larson, *supra* note 360, at 408-09, 414-15.

386. Pratt, *supra* note 374, at 556-57; Stanley Hoffmann, *America Goes Backwards*, N.Y. REV. BOOKS (June 12, 2003), <http://www.nybooks.com/articles/archives/2003/jun/12/america-goes-backward/>.

387. John E. Mueller, *Presidential Popularity from Truman to Johnson*, 87(1) AMER. POL. SCI. REV. 87-101 (1970); JOHN MUELLER, *WAR PRESIDENTS AND PUBLIC OPINION* (1973); Lee Sigelman & Pamela Johnston Conover, *The Dynamics of Presidential Support During International Conflict Situations*, 3(4) POL. BEHAV. 303-18 (1981); Robert Bejesky, *Press Clause Aspirations and the Iraq War* (Working Paper, Apr. 2011), at 5-22, 42-47 (contending that the media may uncritically accept an administration's war time message and thereby promote higher approval ratings); see generally ROBERT S. ERIKSON ET AL., *THE MACRO POLITY* (2002); Helmut Norpoth & Andrew Sidman, *Wartime Presidents: Battle Casualties and Popular Support*, Midwest Political Science Association Paper Presentation, Apr. 12-15, 2007, [http://www.allacademic.com/meta/p\\_mla\\_apa\\_research\\_citation/1/9/7/7/4/pages197746/p197746-1.php](http://www.allacademic.com/meta/p_mla_apa_research_citation/1/9/7/7/4/pages197746/p197746-1.php).

388. Jeffrey T. Richelson, *Operation Desert Storm: Ten Years After*, THE NATIONAL SECURITY ARCHIVE, Jan. 17, 2001, <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB39/>.

389. Delgado, *supra* note 76, at 962-67.

390. *Id.* at 973, 979-81.

such as laser beams and undetectable nuclear submarines.<sup>391</sup> Dr. Anne Cahn, who served on the Arms Control and Disarmament Agency, explains that no such weapon systems existed and the report was “all a fantasy.”<sup>392</sup> Similar portrayals of dire threats, use of secrecy, and failure to acknowledge alternative opinions abounded during McCarthyism and the Vietnam War.<sup>393</sup>

Professor Altheide contends that PNAC documents directly led to threat embellishment.<sup>394</sup> The international dimensions are pellucid, but Bush Administration officials also followed a pattern of presenting “worst-case” but unsubstantiated threat scenarios at the domestic level. Attorney General Ashcroft announced that there were hundreds of terrorists inside the U.S. and nearly one thousand individuals had been detained,<sup>395</sup> but after several years prosecutors claimed to find enough evidence to charge just three and only one was convicted.<sup>396</sup> In July 2004, Ashcroft reported to Congress that the Patriot Act had been extremely effective at fighting terrorism and it was “al-Qaeda’s worst nightmare,” but the 310 arrests and 179 guilty pleas primarily involved immigration overstay violations and domestic crimes.<sup>397</sup> Likewise, President Bush referenced successful investigations: “We’ve thwarted terrorists in Buffalo, and Seattle, Portland, Detroit, North Carolina, and Tampa, Florida.”<sup>398</sup> Georgetown

---

391. *The Power of Nightmares, Part II: The Phantom Victory* (BBC 2 television broadcast Oct. 27, 2004).

392. *Id.*

393. Tom W. Bell, *Treason, Technology, and Freedom of Expression*, 37 ARIZ. ST. L.J. 999, 1003, 1038 (2005); Brian C. Castello, *The Voice of Government as an Abridgment of First Amendment Rights of Speakers: Rethinking Meese v. Keene*, 1989 DUKE L.J. 654, 679; Kreimer, *supra* note 299, at 28; *see generally* David Cole, *The New McCarthyism: Repeating History in the War on Terrorism*, 38 HARV. C.R.-C.L. L. REV. 1 (2003).

394. Altheide, *supra* note 10, 983-85.

395. CARROLL, *supra* note 173, at 47-48; DREYFUSS, *supra* note 57, at 13, 305; IRONS, *supra* note 234, at 246.

396. MCCOY, *supra* note 166, at 194; David Cole & Jules Lobel, *Are We Safer?*, L.A. TIMES, Nov. 18, 2007, at M4.

397. Cole & Lobel, *supra* note 396 (noting that the Justice Department claimed that there were two hundred and sixty-one “terrorism and terrorism-related” convictions, but only two cases “actually involve[d] attempted terrorist activity”); IRONS, *supra* note 234, at 246-47; *Attorney General John Ashcroft Addresses U.S. Conference of Mayors*, CNN, Oct. 25, 2001, <http://transcripts.cnn.com/TRANSCRIPTS/0110/25/se.04.html> (“Let the terrorists among us be warned: If you overstay your visa even by one day, we will arrest you . . . .”); *President Bush Speaks at FBI Academy*, CNN, Sept. 10, 2003, <http://transcripts.cnn.com/TRANSCRIPTS/0309/10/se.03.html> (citing false statistics: “more than 260 suspected terrorists have been charged . . . more than 140 have already been convicted”); *see generally* U.S. DEP’T OF JUSTICE, REPORT FROM THE FIELD: THE USA PATRIOT ACT AT WORK (2004), available at [http://www.justice.gov/olp/pdf/patriot\\_report\\_from\\_the\\_field0704.pdf](http://www.justice.gov/olp/pdf/patriot_report_from_the_field0704.pdf).

398. *The Power of Nightmares, Part 3: Shadows in the Cave* (BBC 2 television broadcast Nov.



Constitutional Law Professor David Cole disagreed:

They [call them all] “terrorist sleeper cell[s].” [T]hey call the Lackawanna [Buffalo] a terrorist sleeper cell, the Detroit people a terrorist cell, the Portland people a terrorist cell. But when you look at the details, the facts just don’t support that, and they have not proved that any group within the United States has plotted to engage in any terrorist . . . activity within the United States in all of the cases that they’ve brought since 9/11.<sup>399</sup>

White House directives created the “traffic-light” color-coded terror alert system<sup>400</sup> and the Justice Department and Department of Homeland Security issued numerous warnings of terror attacks.<sup>401</sup> Bridges, stadiums, landmarks, apartment buildings, nuclear power facilities, water supplies, small towns, and even the 2004 elections could be targeted.<sup>402</sup> After two years and frequent media portrayals of a “nation under siege,”<sup>403</sup> a Congressional GAO study surveyed twenty-eight agencies and concluded that the color-coded announcement system was vague and confusing for law enforcement officials, that they “did not receive specific threat information and guidance,” and that it “hindered their ability . . . to determine and implement protective measures.”<sup>404</sup> President Bush created the announcement system, but seemed chagrined when appointees implemented it. On one occasion the President remarked: “Today, the Justice Department did issue a blanket alert. It was in recognition of a general threat we received. This is not the first time the Justice Department [has] acted like this. I hope it’s the last.”<sup>405</sup> Ashcroft “engage[d] Congress,

---

3, 2004).

399. *The Power of Nightmares, Part 3: Shadows in the Cave* (BBC 2 television broadcast Nov. 3, 2004); see Lustick, *supra* note 64, at 338-39; Cole & Lobel, *supra* note 396.

400. See *Homeland Security Presidential Directive 3*, HOMELAND SECURITY (Mar. 11, 2002), [http://www.dhs.gov/xabout/laws/gc\\_1214508631313.shtm#1](http://www.dhs.gov/xabout/laws/gc_1214508631313.shtm#1).

401. CARROLL, *supra* note 173, at 97; MARC SIEGEL, FALSE ALARM: THE TRUTH ABOUT THE EPIDEMIC OF FEAR 137-38 (2005); ‘*Countdown with Keith Olbermann*’ for August 21, 2006, MSNBC, Aug. 24, 2006, <http://www.msnbc.msn.com/id/32539126> (transcript of television broadcast).

402. *Countdown with Keith Olbermann*, *supra* note 401 (compiling just ten terror announcements, emphasizing specious nature of sources, and explaining how announcements correlated with concomitant political fallout).

403. CARROLL, *supra* note 173, at 96.

404. U.S. GOV’T ACCOUNTABILITY OFFICE, HOMELAND SECURITY: COMMUNICATION PROTOCOLS AND RISK COMMUNICATION PRINCIPLES CAN ASSIST IN REFINING THE ADVISORY SYSTEM 5 (2004), <http://www.gao.gov/new.items/d04682.pdf>; Eric Lichtblau, *Report Questions the Value of Color Coded Warnings*, N.Y. TIMES, July 13, 2004, <http://www.nytimes.com/2004/07/13/politics/13alert.html>.

405. *President Holds Prime Time News Conference*, WHITE HOUSE (Oct. 11, 2001), <http://georgewbush-whitehouse.archives.gov/news/releases/2001/10/20011011-7.html>.

the media, and the American people” to increase awareness of the critical need to prevent leaks of classified information and punish offenders with stiff penalties,<sup>406</sup> but then used classified information to issue threat warnings.

Former U.N. weapons inspector Scott Ritter aptly summarized the succession of national threat announcements: “We have an intelligence report that terrorists are about to attack, ‘*who?*,’ we don’t know, ‘*where?*,’ we don’t know, ‘*what?*,’ we don’t know.”<sup>407</sup> University of Pennsylvania Political Science Professor Ian Lustick reminds us that there has been no evidence of “sleeper cells,” “attacks,” or “preparation for an attack.”<sup>408</sup> But, there were suspects. A September 2003 presidential directive required government agencies to supply names and information about people “known or appropriately suspected to be . . . engaged in conduct constituting, in preparation for, in aid of, or related to terrorism.”<sup>409</sup> Despite parameters, the “terrorism watch list” that was derived from classified information, grew to 325,000 names (2006), to 700,000 (2007), and to 900,000 (2008) and was considered “virtually useless.”<sup>410</sup>

In an NYU address, former Vice President Al Gore candidly noted that fear was being used as rhetoric to help politicians like Bush stay in office.<sup>411</sup> Harvard Professor Stanley Hoffman explains: “[A] technique that the administration has used brilliantly is the manipulation of fear.”<sup>412</sup> Congressman McDermott remarks: “Fear does work. . . . You can make

---

406. Letter from the Office of the Attorney General to J. Dennis Hastert, Speaker of the U.S. House of Representatives (Oct. 15, 2002), available at [http://www.justice.gov/ag/readingroom/letter\\_house.pdf](http://www.justice.gov/ag/readingroom/letter_house.pdf).

407. HIJACKING CATASTROPHE, *supra* note 10 (interview with Ritter); see *The Power of Nightmares*, *supra* note 398. National Security Archives official Dr. Prados explained one clear warning source:

[Abu] Zubaida told interrogators a set of stories based on what he thought would alarm us. . . . [From watching *Godzilla*] the Brooklyn Bridge was destroyed by the monster. He told us al Qaeda was interested in destroying the Brooklyn Bridge . . . mass transit sources like subway trains . . . apartment buildings and shopping centers.

*The Power of Nightmares*, *supra* note 398. The documentary also chronicles how these interrogations led Ashcroft to announce: “Recent intelligence reports suggest that al Qaeda leaders have emphasized planning for attacks on apartment buildings, hotels, and other soft or lightly-secured targets . . .” *Id.*

408. Lustick, *supra* note 64, at 338.

409. Walter Pincus & Dan Eggen, *325,000 Names on Terrorism List*, WASH. POST, Feb. 15, 2006, [http://www.washingtonpost.com/wp-dyn/content/article/2006/02/14/AR2006021402125\\_pf.html](http://www.washingtonpost.com/wp-dyn/content/article/2006/02/14/AR2006021402125_pf.html).

410. *Id.*; U.S. Terror List Now Exceeds 900,000 Names (Feb. 27, 2008), <http://www.aclu.org/national-security/us-terror-list-now-exceeds-900000-names>.

411. SIEGEL, *supra* note 401, at 55.

412. Stanley Hoffmann, *America Goes Backward*, *supra* note 386, at 1.

people do anything if they're afraid. . . . You make [people] afraid by creating an aura of endless threat. . . . [The Bush administration] played us like an organ. They raised the [threat level] up to orange, then up to red, then they dropped it back to orange. . . . It was really very, very skillfully and . . . ugly in what they did."<sup>413</sup> Representative Kucinich provided an impassioned speech in which he emphasized that Congress "did not authorize a permanent war economy" or suppression of dissent by the "Patriot Games, the Mind Games, [and] the War Games."<sup>414</sup> Some labeled the terror alert system as propaganda and a way to diffuse political fallout while increasing approval ratings.<sup>415</sup> Former United Nations Assistant Secretary-General Denis Halliday remarked:

Mr. Bush has very cleverly manipulated the fear, the anxiety, and every time he wants to jack up his ratings he simply stirs up the fear plot by upgrading the level of impending danger without any specifics, of course. I think it's . . . a very ugly game that's being played on the Americans.<sup>416</sup>

The White House insisted that elections in other countries represent the will of the people,<sup>417</sup> but former Homeland Security head Tom Ridge recently claimed that he resigned suddenly in December 2004 because "he was pressured by top advisers to President George W. Bush to raise the national threat level just before the 2004 election in what he suspected was an effort to influence the vote."<sup>418</sup> That is quite a charge, but ultimately accusation casting and "pressuring" allegations on *one* instance detract from what should be the core substantive issue of *why* substantive evidence was lacking to support the multitude of national warnings.

---

413. DVD: Fahrenheit 9/11 (2003) (Interview with McDermott) (on file with author).

414. John Nichols, *Kucinich Rocks the Boat*, THE NATION, Mar. 7, 2002, <http://www.thenation.com/article/kucinich-rocks-boat>.

415. See SIEGEL, *supra* note 401, at 16; HIJACKING CATASTROPHE, *supra* note 10. In an interview, Ritter remarked: "The more we're afraid, the more you ask us to give—Patriot Act II . . . now the budget is starting to be bankrupted, billions flowing out of this country . . ." HIJACKING CATASTROPHE, *supra* note 10. Professor Johnson noted: "Perpetual war, the loss of civil liberties . . . the lack of trust in government because they don't tell the truth . . ." *Id.*; see CARROLL, *supra* note 173, at 196 (the "war on terrorism is a cynical manipulation of fears for the sake of power"); Wells, *supra* note 299, at 488; DVD: Breaking The Silence: Truth and Lies is the War on Terror (2003) (Professor Lewis states: "war . . . gives the incumbent sitting president . . . a ten to fifteen point bounce on public opinion.").

416. Breaking the Silence, *supra* note 415 (Halliday interview); see Yamamoto, *supra* note 10, at 285, 290, 300-01.

417. Jayanth K. Krishnan, *From the ALI to the ILI: The Efforts to Export an American Legal Institution*, 38 VAND. J. TRANSNAT'L L. 1255, 1256-58 (2005).

418. Peter Baker, *Bush Official, in Book, Tells of Pressure on '04 Vote*, N.Y. TIMES, Aug. 21, 2009, <http://www.nytimes.com/2009/08/21/us/21ridge.html>.

#### D. ERA OF PRIVATIZATION

The third pillar of Bush Administration political strategy—impression of viability—is aptly described by NYU Media Professor Mark Crispin Miller, who calls administration appointees a jejune “gang that . . . needs people to be afraid. It’s a gang that really can’t have any political success whatsoever . . . in a state of . . . tranquility and peace of mind.”<sup>419</sup> For more than a century, the American polity navigated tumultuous strife—the 1870s administrative growth era built national governance, quelled antitrust abuses, and balanced employer/worker rights; the 1930s New Deal era allayed economic instability and poverty; and the 1960-70s Civil Rights Revolution promoted individual rights, curbed law enforcement abuses, produced equality, assisted labor unions, and favored environmental protection.<sup>420</sup> Politicians appeased constituents and engaged in social, economic, and moral debates to produce new status quo rules and societal norms. Succeeding administrations refined rules and enforcement mechanisms, but new institutions and administrative agencies erected during these periods operated in a self-sustaining mode from the original congressional delegation of authority as societal norms evolved.

The last major non-security issue that politicians confronted is arguably that which dominated the 1992 presidential campaign. Candidate Clinton and incumbent President Bush both favored free trade and NAFTA, while billionaire Ross Perot injected himself into the virtually impenetrable two-party political system with unwieldy economic charts to warn that unrestricted investment into Mexico would reap lottery profit margins for corporations and sack American labor unions. Perot led Bush and Clinton early in the campaign and garnered 19% of the election vote.<sup>421</sup> President Clinton consummated NAFTA and the WTO (1995) against the will of his Democratic base<sup>422</sup> and was called “pro-business” by the *Wall Street*

---

419. HIJACKING CATASTROPHE, *supra* note 10 (Interview with Miller).

420. Robert Bejesky, *An Analytical Appraisal of Public Choice Value Shifts for Environmental Protection in the United States & Mexico*, 11 *IND. INT’L & COMP. L. REV.* 251, 265-66 (2001).

421. *See Poll Gives Perot a Clear Lead*, *N.Y. TIMES*, June 11, 1992, <http://query.nytimes.com/gst/fullpage.html?res=9E0CE7DB133EF932A25755C0A964958260>; Robin Toner, *Contest Tightens as Perot Resurges and Clinton Slips*, *N.Y. TIMES*, Oct. 25, 1992, <http://www.nytimes.com/1992/10/25/us/1992-campaign-overview-contest-tightens-perot-resurges-clinton-slips.html>; *The 1992 Elections: State By State*, *N.Y. TIMES*, Nov. 5, 1992, <http://www.nytimes.com/1992/11/05/us/the-1992-elections-state-by-state-west.html?pagewanted=all>.

422. *See* LAWRENCE MISHEL & RUY A. TEIXEIRA, *ECONOMIC POLICY INST., THE POLITICAL ARITHMETIC OF THE NAFTA VOTE*, available at [http://epi.3cdn.net/3d995382f3252362c7\\_ydm6bx14u.pdf](http://epi.3cdn.net/3d995382f3252362c7_ydm6bx14u.pdf); 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, 61 (1999); *Running Scared from Nafta*, *N.Y. TIMES*, Nov. 16, 1993, <http://www.nytimes.com/>

*Journal* and a “Republican” president for the economy by Federal Reserve Chairman Greenspan.<sup>423</sup> Two primary social issues that candidate Bush addressed during the 2000 election cycle were social security reform, which required a privatization and investment program because the government could not effectively provide financial security or be trusted to hold the fruits of taxpayer labor, and public school reform, which required competitive testing processes and perhaps even bankruptcy/privatization for failing public schools.<sup>424</sup>

Today, the public and private sectors are virtually indistinguishable<sup>425</sup> and many speak of “corporate” and monetary “capture” over American political life.<sup>426</sup> A 2008 poll revealed that 94% of Americans believe that “leaders should pay attention to the views of the people when they make decisions,” 80% think that the U.S. is “run by a few big interests,” and only 19% believe that it is “run for the benefit of the people.”<sup>427</sup> Professor Kuhner writes:

National scandals involving corporate fraud, political corruption, lobbyists, and campaign finance have called attention to worrisome dynamics: the decreasing power of natural persons relative to legal persons in the political process; and the erosion of civic or democratic values in favor of corporate values. Both dynamics relate to the vexing problem of money in politics.<sup>428</sup>

---

1993/11/16/opinion/running-scared-from-nafta.html; *Clinton Signs Trade Bill, Rebuts Claims His Policies Harm Workers*, ASSOC. PRESS, Dec. 9, 1994, [http://articles.latimes.com/1994-12-09/news/mn-7059\\_1\\_world-trade](http://articles.latimes.com/1994-12-09/news/mn-7059_1_world-trade).

423. Noam Chomsky, “*Consent Without Consent*”: *Reflections on the Theory and Practice of Democracy*, 44 CLEV. ST. L. REV. 415, 415, 419 (1996); *Alan Greenspan vs. Naomi Klein on the War in Iraq, Bush’s Tax Cuts, Economic Populism, Crony Capitalism, and More*, DEMOCRACY NOW!, Sept. 24, 2007, [http://i2.democracynow.org/2007/9/24/alan\\_greenpan\\_vs\\_naomi\\_klein\\_on](http://i2.democracynow.org/2007/9/24/alan_greenpan_vs_naomi_klein_on) (interview with Greenspan).

424. Alexandra Marks, *Election 2000: Defining the Issues*, HARV. KENNEDY SCH. BULL. ARCHIVES (Autumn 2000), [http://www.hks.harvard.edu/ksgpress/bulletin/autumn2000/election\\_00.html](http://www.hks.harvard.edu/ksgpress/bulletin/autumn2000/election_00.html) (emphasizing that education and social security were the main issues in the 2000 campaign and that Bush’s platform emphasized privatization).

425. Mayer, *supra* note 203, at 250-57, 273.

426. *See generally* CHARLES DERBER, *CORPORATION NATION: HOW CORPORATIONS ARE TAKING OVER OUR LIVES AND WHAT WE CAN DO ABOUT IT* (1998); TED NACE, *GANGS OF AMERICA: THE RISE OF CORPORATE POWER AND THE DISABLING OF DEMOCRACY* (2003); RALPH NADER & WESLEY J. SMITH, *NO CONTEST: CORPORATE LAWYERS AND THE PERVERSION OF JUSTICE IN AMERICA* (1996); Mayer, *supra* note 209, at 492 (“[T]he Supreme Court has held that Congress cannot prohibit individuals or entities, including corporations, from expending funds on speech aimed at influencing government actions in most instances.”).

427. PROGRAM INT’L POLICY ATTITUDES, SURVEY: JANUARY 18-27, 2008 (2008), *available at* [http://www.worldpublicopinion.org/pipa/pdf/mar08/USGov\\_Mar08\\_quaire.pdf](http://www.worldpublicopinion.org/pipa/pdf/mar08/USGov_Mar08_quaire.pdf).

428. Timothy K. Kuhner, *The Separation of Business and State*, 95 CAL. L. REV. 2353, 2353 (2007).

Some believe that privatizations relative to traditional public functions have made the state “increasingly irrelevant,”<sup>429</sup> eroded democratic participation,<sup>430</sup> and undermined state sovereignty.<sup>431</sup> The *Harvard Law Review* held a symposium that labeled the present political and economic landscape the “Era of Privatization.”<sup>432</sup> It seems ironic that PNAC was organized as a “non-profit educational organization,” which normally implies charitable connotations and endows tax law benefits<sup>433</sup> intended to accommodate public interest.

The hot topic on Capitol Hill reflects this trend. President Clinton advocated universal health care but all proposals terminated within a year; and President Obama elevated health care initiatives and urged Congress to pass his legislation.<sup>434</sup> Democrats might prefer social programs that appease constituents like predecessors of yore and provide more comprehensive health care analogous to other industrialized countries,<sup>435</sup> but budgetary constraints loom. When the issue surfaced for the Bush administration, the President deflected health care reform with assuredly relevant but hackneyed explanations that the tort law system for medical malpractice is “out of control.”<sup>436</sup> The problem is also one of budgetary priorities—nine percent of the \$3 trillion annual budget is interest on

---

429. Timothy K. Kuhner, *The Separation of Business and State*, 95 CAL. L. REV. 2353, 2376 (2007).

430. See ALFRED C. AMAN, JR., *THE DEMOCRATIC DEFICIT: TAMING GLOBALIZATION THROUGH LAW REFORM* 137-81 (2004).

431. See generally SASKIA SASSEN, *LOSING CONTROL?: SOVEREIGNTY IN AN AGE OF GLOBALIZATION* (1996).

432. Symposium, *Public Values in an Era of Privatization*, 116 HARV. L. REV. 1211 (2003).

433. See PNAC/REBUILDING, *supra* note 54, at preface; Joseph A. Schumpeter, *Developments in the Law: Nonprofit Corporations*, 105 HARV. L. REV. 1578, 1583-86, 1635-39, 1677 (1992) (discussing nonprofit characteristics); see generally Joseph S. Klapach, *Thou Shalt Not Politic: A Principled Approach to Section 501(C)(3)'s Prohibition of Political Campaign Activity*, 84 CORNELL L. REV. 504 (1999) (discussing restrictions on nonprofit lobbying).

434. Joanne Silberner, *How Obama Can Heed Clinton Health Reform Failure*, NPR, Jan. 7, 2009, <http://www.npr.org/templates/story/story.php?storyId=98884027>; Paul Starr, *What Happened to Health Care Reform?*, AM. PROSPECT (Winter 1995), <http://www.princeton.edu/~starr/20starr.html>; see generally THEDA SKOCPOL, *BOOMERANG: HEALTH CARE REFORM AND THE TURN AGAINST GOVERNMENT* (1996); David Espo, *Obama to Congress: 'Time for Bickering Is Over,'* ASSOC. PRESS, Sept. 9, 2009, [http://www.denverpost.com/breakingnews/ci\\_13301731](http://www.denverpost.com/breakingnews/ci_13301731).

435. See generally Fazal Khan, *Towards Achieving Lasting Healthcare Reform: Rethinking the American Social Contract*, 19 ANN. HEALTH L. 73 (2010).

436. Randolph I. Gordon & Brook Assefa, *A Tale of Two Initiatives: Where Propaganda Meets Fact in the Debate Over America's Health Care*, 4 SEATTLE J. SOC. JUST. 693, 699-702, 708-09 (2006); see generally Robert Kagan, *Review Essay, How Much Do Conservative Tort Tales Matter?*, 31 LAW & SOC. INQUIRY 711 (2006) (assessing myths and reality in “conservative-goaded” tort reform); Nader, *supra* note 422, at 56.

national debt, with over 85% of that \$10 trillion being amassed under the Reagan, Bush Sr., and Bush Jr. governments; and twenty-one percent is defense spending.<sup>437</sup> To place the Pentagon's \$651 billion budget into perspective, the total oil revenue received by *all* twelve OPEC countries—recently portrayed as the source of U.S. economic ills—was \$675 billion in 2007.<sup>438</sup> Overly risk-averse worldviews may be a necessary and dependent condition to justify such high levels of defense spending.

This vista elucidates the neoconservative public choice irony. The Reagan and Bush Sr. Administrations deregulated and dismantled social nets and opposed many civil rights causes.<sup>439</sup> They blamed “big government” spending for economic ills but their administrations presided over conditions that doubled *real* spending, increased the deficit, increased the national debt by over 300%, drastically cut tax rates, resulted in the hundred billion dollar Savings and Loan scandal (likely caused by excessive deregulation), and marketed the Soviet threat to drastically expand military spending.<sup>440</sup> The Reagan and Bush Sr. administrations pushed the trend of privatization and self-responsibility and advocated that government should not intervene in private sector affairs or provide financial security, but neoconservative philosophy presented such catastrophic security threats that citizens required a visionary protective cloak, proactive government intervention, and substantial military spending

---

437. CONG. BUDGET OFFICE, REVENUES, OUTLAYS, SURPLUSES, DEFICITS, AND DEBT HELD BY THE PUBLIC, 1969 TO 2008, at 6 (2009), available at [http://www.cbo.gov/ftpdocs/100xx/doc10014/March2009\\_HistoricalTables.pdf](http://www.cbo.gov/ftpdocs/100xx/doc10014/March2009_HistoricalTables.pdf); *Historical Debt Outstanding*, U.S. DEP'T TREASURY, <http://www.treasurydirect.gov/govt/reports/pd/histdebt/histdebt.htm> (national debt increasing by \$3,067b, from \$997b (1981) to \$4,064b (1992), during the Reagan-Bush Sr. administrations; increasing by \$1,263b, from \$4,411b (1993) to \$5,674b (2000) during the Clinton administration; and increasing by \$4,217b, \$5,807b (2001) to \$10,024b (2008), during the Bush Jr. administration).

438. JOINT ECON. COMM., RESEARCH REP. NO. 110-19, at 3 (2008), <http://www.house.gov/jec/Research%20Reports/2008/rr110-19.pdf>.

439. Abraham, *supra* note 121, at 252; Richard D. Cudahy & William D. Henderson, *From Insull to Enron: Corporate (Re)Regulation After the Rise and Fall of Two Energy Icons*, 26 ENERGY L.J. 35, 100 (2005); Stanley Hoffmann, *America Goes Backward*, *supra* note 386, at 1 (“Republicans’ relentless war against the state’s welfare functions”); *see supra* note 191; *see generally* PAUL PIERSON, *DISMANTLING THE WELFARE STATE? REAGAN, THATCHER, AND THE POLITICS OF RETRENCHMENT* (1994).

440. OFFICE OF THE PRESIDENT, HISTORICAL TABLES: BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2006, at 22, 118-19 (2006), <http://www.gpoaccess.gov/usbudget/fy06/pdf/hist.pdf#page=29>; Glenn Kessler, *Right-Leaning Policy Won a Nickname: Reaganomics*, WASH. POST, June 6, 2004, <http://www.washingtonpost.com/ac2/wp-dyn/A19171-2004Jun5?language=printer>; *see supra* note 436 (calculating national debt growing from \$997b in 1981 to \$4,064b in 1992); *see generally* ANTHONY S. CAMPAGNA, *THE ECONOMY IN THE REAGAN YEARS: THE ECONOMIC CONSEQUENCES OF THE REAGAN ADMINISTRATION* (1994).

increases to be safe. By process of elimination, fear, buttressed by patriotic American exceptionalism, seems to be the prime mechanism that provides a political platform. Fear psychologically makes citizens dependent on government as the official and essential protector.<sup>441</sup>

Unfortunately, emotive cognitive processes are open to politicization. NYU Medical School Professor Marc Siegel explains that the brain is wired to make fear-messages habitual, physical, and emotional response reactions.<sup>442</sup> Professor Ekman explains that people can be trained to be afraid of anything.<sup>443</sup> Professor Reisberg notes that “people regularly overestimate the frequency of events that are, in actuality, quite rare.”<sup>444</sup> People have a great capacity to misperceive and imagine dangers, leading to overstated and inappropriately calculated risks, and irrational judgments.<sup>445</sup> Professor Inglehart’s surveys across forty-three countries reveal that as countries become wealthier, public desire to accept the same risks decreases.<sup>446</sup> With a high standard of living, boundless technology, global cooperation, decreased health threats, and improved security, “fear” infects like never before.<sup>447</sup> Professor Sunstein writes of the risk/preemptive action *Precautionary Principle* tradeoff: “My major hypothesis is that the availability heuristic is often the source of people’s fears about certain risks. If a particular incident is cognitively ‘available’—both vivid and salient—then people will have a heightened fear of the risk in question.”<sup>448</sup> For eight years, White House speechwriters pathologically emphasized domestic and international threats.<sup>449</sup> Professor Lustick writes about this heuristic—

---

441. See SIEGEL, *supra* note 401, at 3, 6, 8, 216 (“sad state of affairs when the public is constantly cowed, shocked and awed, manipulated to be afraid”); CARROLL, *supra* note 173, at 96-98, 139 (the “state of emergency” gave the Bush administration its “extensive exercise of power”); see generally GAVIN DE BECKER, *THE GIFT OF FEAR* (1997); Arthur Lupia & Jesse O. Menning, *When Can Politicians Scare Citizens Into Supporting Bad Policies?*, 53 AM. J. POL. SCI. 90 (2009).

442. SIEGEL, *supra* note 401, at 5, 28, 195.

443. See generally PAUL EKMAN, *EMOTIONS REVEALED: RECOGNIZING FACES AND FEELINGS TO IMPROVE COMMUNICATIONS IN EMOTIONAL LIFE* (2003); John B. Watson & Rosalie Rayner, *Conditioned Emotional Reactions*, 3 J. EXPERIMENTAL PSYCHOL. 1 (1920).

444. DANIEL REISBERG, *COGNITION: EXPLORING THE SCIENCE OF THE MIND* 380 (2d ed. 2001); see generally Sarah Lichtenstein et al, *Judged Frequency of Lethal Events*, 4 J. EXPERIMENTAL PSYCHOL. 551 (1978).

445. SIEGEL, *supra* note 401, at 26; see DANIEL T. WILLINGHAM, *COGNITION: THE THINKING ANIMAL* 366-70 (2d ed. 2004); see generally DAVID ROPEIK & GEORGE GRAY, *RISK: A PRACTICAL GUIDE FOR DECIDING WHAT’S REALLY SAFE AND WHAT’S REALLY DANGEROUS IN THE WORLD AROUND YOU* (2002).

446. See generally RONALD INGLEHART, *MODERNIZATION AND POST-MODERNIZATION: CULTURAL ECONOMIC AND POLITICAL CHANGE IN 43 SOCIETIES* (1997).

447. SIEGEL, *supra* note 401, at 15-16; Lustick, *supra* note 64, at 336.

448. Sunstein, *supra* note 85, at 77.

449. Lustick, *supra* note 64, at 335-36; Woods & Donovan, *supra* note 155, at 499; Sidney



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.<sup>450</sup>

Cognitive processes can be combined with various questionable communication mechanisms. While it is often difficult to distinguish among “Intelligence Shaping,” military psychological operations (PSYOP), “soft power” diplomacy, public relations (PR), and propaganda,<sup>451</sup> one genre of neoconservative shilling openly exceeds all of these mechanisms—the concept of the “noble lie.”<sup>452</sup> Neoconservative Michael Ledeen wrote in his book that “‘lying is central to the survival of nations and to the success of great enterprises, because if our enemies can count on the reliability of everything you say, your vulnerability is enormously increased.’”<sup>453</sup> It is quite strenuous to comprehend how this philosophy could have been employed to discourse about Iraq because doing so would ostensibly mean that there was a hope that Hussein and his sycophants, as the target of the lie, would become confused and imagine that they really did possess WMDs. Nonetheless, as Louis Fisher writes about “Neocons:” “If facts must be withheld or twisted to promote war and achieve a noble cause, justification comes easy.”<sup>454</sup> Since 1998, neoconservatives asserted the same claims about Iraq even though U.N. inspectors left the country and reported that there were no prohibited weapons, and U.S. intelligence officials were more equivocal about any potential danger during the Clinton administration.<sup>455</sup> Americans have never endorsed a “noble lie” philosophy, but Ledeen unabashedly advocated the use of noble lies, distributed copies of his book to members of Congress,<sup>456</sup> and circulated media fora to portray such dire security threats that “total war” was required to replace regimes in

---

Blumenthal, *Apocalyptic President*, GUARDIAN, Mar. 23, 2006, <http://www.guardian.co.uk/commentisfree/2006/mar/23/comment.religion1>.

450. Lustick, *supra* note 64, at 335-36.

451. Eytan Gilboa, *Searching for a Theory of Public Diplomacy*, 616 ANNALS AM. ACAD. POL. & SOC. SCI 55, 56 (2008); Peter J. Smychek, *Regulating the Battlefield of the Future: The Legal Limitations on the Conduct of Psychological Operations (PSYOP) Under Public International Law*, 57 A.F. L. REV. 209, 217 (2005).

452. Totaro, *supra* note 65, at 929 (noting that neoconservatives offer a “persuasion” and not a systematic set of principles); Yamamoto, *supra* note 10, at 285, 294-96.

453. Yamamoto, *supra* note 10, at 298 (quoting MICHAEL LEDEEN, MACHIAVELLI ON MODERN LEADERSHIP: WHY MACHIAVELLI’S IRON RULES ARE AS TIMELY AND IMPORTANT TODAY AS FIVE CENTURIES AGO (1999)).

454. Fisher, *supra* note 23, at 1232.

455. See Bejesky, *supra* note 20, at 6-7, 64-66; see *supra* notes 19-31, 54-55, 58-61, 64, 130.

456. Yamamoto, *supra* note 10, at 298.

Iran, Syria, and Saudi Arabia.<sup>457</sup>

### E. IRAQI PUBLIC CHOICE

The justification for military action against Iraq shifted from a reason that was driven by American public choice to one that was dependent on Iraqi public choice. The mission presented for six months was to disarm WMDs that posed an imminent threat to American security,<sup>458</sup> but that mission shifted to emphasize “liberation” shortly before the invasion, seemingly because exiles proffered this sentiment to administration officials.<sup>459</sup> The SSCI investigation discovered that the intelligence community (IC) did not estimate “whether U.S. personnel would be ‘greeted as liberators,’” but did estimate that an invasion might breed rivalries, which was a conclusion that the Bush administration did not adequately present publicly.<sup>460</sup>

A Senate report compiled an extensive list of administration statements regarding “liberation.”<sup>461</sup> Deputy Secretary of Defense Wolfowitz emphasized: “If the President should decide to use force, let me assure you again that the United States would be committed to liberating the people of Iraq, not becoming an occupying force.”<sup>462</sup> Secretary of Defense Rumsfeld espoused two commitments: “stay as long as necessary, and leave as soon as possible.”<sup>463</sup> Bush announced that the mission would be successful and Iraq would be liberated when Hussein’s “corrupt gang is gone.”<sup>464</sup> One month after the invasion, *ABC News* reported:

---

457. WILLIAM D. HARTUNG, HOW MUCH ARE YOU MAKING ON THE WAR, DADDY?: A QUICK AND DIRTY GUIDE TO WAR PROFITEERING IN THE GEORGE W. BUSH ADMINISTRATION 109 (2003); Ledeen, *supra* note 218; *Panorama: The War Party*, *supra* note 54 (interview with Ledeen).

458. See S.C. Res. 1441, U.N. Doc. S/RES/1441 (Nov. 8, 2002); *Inspecting Iraq*, PBS ONLINE NEWSHOUR, Nov. 22, 2002, [http://www.pbs.org/newshour/bb/middle\\_east/july-dec02/iraq\\_11-22.html](http://www.pbs.org/newshour/bb/middle_east/july-dec02/iraq_11-22.html); see *supra* notes 16-20.

459. See *In Their Own Words: Bush Administration Officials Predict Iraqis Will Greet US Soldiers as Liberators*, DEMOCRATIC POLICY COMM. (July 22, 2004), [http://democrats.senate.gov/dpc/dpc-new.cfm?doc\\_name=fs-108-2-211](http://democrats.senate.gov/dpc/dpc-new.cfm?doc_name=fs-108-2-211) [hereinafter SENATE DPC] (“[B]ased on what Iraqi-Americans told me in Detroit a week ago . . . I am reasonably certain that they will greet us as liberators . . .”) (citing Wolfowitz (House Budget Committee, 2/27/03)).

460. S. REP. NO. 110-345, at 82-88 (2d Sess. 2008).

461. See SENATE DPC, *supra* note 459.

462. See *Town Hall Meeting with Iraqi-American Community*, U.S. DEP’T DEF. (Feb. 23, 2003), <http://www.defense.gov/speeches/speech.aspx?speechid=339> (remarks prepared for delivery by deputy secretary of defense Paul Wolfowitz).

463. *Id.*

464. Linda D. Kazaryn, Am. Forces Press Serv., “Your Nation Will Be Free,” *Bush Tells Iraqis*, U.S. DEP’T DEF., Apr. 10, 2003, <http://www.defense.gov/news/newsarticle.aspx?id=29129>.

Some [Bush administration] officials now privately acknowledge the White House had another reason [(beside WMD)] for war a global show of American power and democracy.

Officials inside government and advisers outside told *ABC News* the administration 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.<sup>465</sup>

Now, the invasion justification relies on American Exceptionalism.

Days later Wolfowitz asserted that there were many reasons for invasion, but "weapons of mass destruction" was the "bureaucratic" justification agreed upon by top officials.<sup>466</sup> Research of historical polls evinces that the public is reluctant to support the use of force if internal political change of another country is the prime military objective.<sup>467</sup> Professor Jane Stromseth, Dean David Wippman, and Professor Rosa Brooks explain: "Interventions are a costly and dangerous business, diverting government resources away from domestic priorities and risking the lives of the intervening power's soldiers. The electorates of western nations are often loathe to support expensive, risky foreign ventures that offer few clear short-term domestic dividends."<sup>468</sup> The Security Council did not address the *ex post facto* humanitarian intervention ground of "liberation,"<sup>469</sup> and humanitarian intervention remains controversial. To date, it has been employed only with the "object of protecting human rights"<sup>470</sup> to prevent imminent, "widespread and grave violations of the fundamental human rights of individuals."<sup>471</sup> Invading a country to

---

465. John Cochran, *Officials: 9/11 Was Main Reason for War*, ABC NEWS, Apr. 26, 2003, <http://abcnews.go.com/Nightline/story?id=128467&page=1>.

466. *News Transcript: Deputy Secretary Wolfowitz Interview with Sam Tannenhaus*, *Vanity Fair*, U.S. DEP'T DEF. (May 9, 2003) <http://www.defense.gov/transcripts/transcript.aspx?transcriptid=2594>; *Wolfowitz Comments Revive Doubts over Iraq's WMD*, USA TODAY, May 30, 2003, [http://www.usatoday.com/news/world/iraq/2003-05-30-wolfowitz-iraq\\_x.htm](http://www.usatoday.com/news/world/iraq/2003-05-30-wolfowitz-iraq_x.htm).

467. Bruce Jentleson, *The Pretty Prudent Public: Post Post-Vietnam American Opinion on the Use of Military Force*, 36 INT'L STUD. Q. 49, 49-54 (1992).

468. JANE STROMSETH ET AL., CAN MIGHT MAKE RIGHTS?: BUILDING THE RULE OF LAW AFTER MILITARY INTERVENTIONS 4 (2006).

469. See HUMAN RIGHTS WATCH, WORLD REPORT 2004: HUMAN RIGHTS AND ARMED CONFLICT 33 (2004).

470. Ian Brownlie, *Humanitarian Intervention*, in LAW AND CIVIL WAR IN THE MODERN WORLD 217, 217 (John Norton Moore ed., 1974).

471. J.L. Holzgrefe, *The Humanitarian Intervention Debate*, in HUMANITARIAN INTERVENTION: ETHICAL, LEGAL, AND POLITICAL DILEMMAS 15, 18 (2003); see ALLEN BUCHANAN, JUSTICE, LEGITIMACY, AND SELF-DETERMINATION: MORAL FOUNDATIONS FOR INTERNATIONAL LAW 443 (2004).

apprehend a despot who had apparently suppressed a rebellion two decades prior<sup>472</sup> is arguably not within these parameters. Neville Dastoor, an attorney specializing in international human rights law, writes: “[W]hat cannot be disputed is that the use of force would likely not have been ratified by the global community on solely humanitarian grounds.”<sup>473</sup> Even some of the most respected human rights groups condemned the attack.<sup>474</sup>

Perception management seemed poignant to the new mission. Pentagon neoconservatives proposed the “Rapid Reaction Media Team.”<sup>475</sup> The team’s purpose was to quickly disassemble the current Iraqi media network, deploy “hand-picked” U.S.-U.K. media experts to Iraq, implement “Free Media” network to “[i]nform the Iraqi public about USG/coalition intent and operation[,] [s]tabilize Iraq,” broadcast Hussein’s war crimes, and provide U.S.-sponsored versions of “history telling.”<sup>476</sup> After Baghdad was captured, a typical portrayal was one of Iraqis dancing, cheering on American soldiers, showering them with flowers, and hoisting babies for soldiers to kiss,<sup>477</sup> but many were critical of the Pentagon’s use of perception management and psychological operations (PSYOPs) to create favorable impressions of the mission and occupation.<sup>478</sup> An October 2004 Harris Poll, revealed that Americans seemed to initially support the new justification—76% of Americans (97% of Bush supporters) believing Iraqis

---

472. See Ellen Knickmeyer, *Cheers, Anger as Hussein Is Condemned*, WASH. POST, Nov. 6, 2006, [http://www.boston.com/news/world/middleeast/articles/2006/11/06/cheers\\_anger\\_as\\_hussein\\_is\\_condemned/](http://www.boston.com/news/world/middleeast/articles/2006/11/06/cheers_anger_as_hussein_is_condemned/) (reporting Hussein’s death sentence for killing 148 Shiites in the town of Dujail following a 1980s rebellion).

473. Neville F. Dastoor, *The Responsibility to Refine: The Need for a Security Council Committee on the Responsibility to Protect*, 22 HARV. HUM. RTS. J. 25, 51 (2009).

474. Noah Feldman, *Imposed Constitutionalism*, 37 CONN. L. REV. 857, 868 n.52 (2005).

475. Jim Lobe, *Iraq’s Own Pentagon (News)Papers*, ASIA TIMES ONLINE, May 11, 2007, [http://www.atimes.com/atimes/Middle\\_East/IE11Ak02.html](http://www.atimes.com/atimes/Middle_East/IE11Ak02.html).

476. U.S. DEP’T OF DEF., WHITE PAPER: “RAPID REACTION MEDIA TEAM” CONCEPT 5-7 (2003), available at [http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB219/iraq\\_media\\_01.pdf](http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB219/iraq_media_01.pdf).

477. Associated Press, *Marines Help Topple Statue; Baghdadis Loot City*, FOXNEWS.COM, Apr. 10, 2003, [http://www.foxnews.com/printer\\_friendly\\_story/0,3566,83655,00.html](http://www.foxnews.com/printer_friendly_story/0,3566,83655,00.html).

478. See Brenner A. Allen, Comment, *A Cause of Action Against Private Contractors and the U.S. Government for Freedom of Speech Violations in Iraq*, 31 N.C. J. INT’L L. & COM. REG. 535, 546-47 (2005); Mark Mazzetti, *Pentagon Audit Clears Propaganda Effort*, N.Y. TIMES, Oct. 20, 2006, <http://www.nytimes.com/2006/10/20/washington/20lincoln.html?ex=1318996800&en=c25c569ae52997db&ei=5088&partner=rssnyt&emc=rss&pagewanted=all>; Thomas E. Ricks, *Military Plays Up Role of Zarqawi*, WASH. POST, Apr. 10, 2006, <http://www.washingtonpost.com/wp-dyn/content/article/2006/04/09/AR2006040900890.html>; David Zucchino, *Army Stage-Managed Fall of Hussein Statue*, L.A. TIMES, July 3, 2004, <http://articles.latimes.com/2004/jul/03/nation/na-statue3> (reporting US military toppling statue as a PSYOP); Barstow, *supra* note 216; see generally RAMPTON & STAUBER, *supra* note 218 (documenting the Pentagon’s widespread operations to manage perceptions about the invasion and occupation).

were “better off now than they were under Saddam Hussein” and 63% (89% of Bush supporters) believed “history will give the U.S. credit for bringing freedom and democracy to Iraq.”<sup>479</sup>

General Tommy Franks remarked: “This has been about liberation, not about occupation.”<sup>480</sup> Iraqis were likely better off with a new government, but polls revealed a significant objection to foreign officiousness.<sup>481</sup> A *USA Today/CNN/Gallup Poll* found that 71% of Iraqis considered foreign troops “occupiers” and not “liberators.”<sup>482</sup> A May 2004 poll found that 92% viewed foreign troops as occupiers and 2% viewed them as liberators.<sup>483</sup> In October 2005, the British Ministry of Defense revealed that 82% of Iraqis were “strongly opposed” to occupation and 67% felt less secure with the occupation (only one percent felt more secure).<sup>484</sup> One month later, Representative Murtha sponsored a House Resolution to withdrawal and cited polls indicating that 80% wanted forces to leave and that 45% felt attacks on U.S. forces were justified.<sup>485</sup> A January 2006 University of Maryland *PIPA* poll discovered that 80% believed that the U.S. planned to establish permanent bases even though 70% wanted occupation forces to withdrawal.<sup>486</sup> 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.<sup>487</sup> January 2009 polls reflected that three-fourths rejected the foreign presence.<sup>488</sup>

---

479. HARRIS POLL, IRAQ, 9/11, AL QAEDA, AND WEAPONS OF MASS DESTRUCTION, WHAT THE PUBLIC BELIEVES NOW (Oct. 21, 2004).

480. Boon, *supra* note 137, at 306.

481. NOAM CHOMSKY, IMPERIAL AMBITIONS 78 (2005); ARNOVE, *supra* note 36, at 55 (White House presumed those opposing occupation were “interfering in Iraqi affairs”).

482. Cesar G. Soriano & Steven Komarow, *Poll: Iraqis out of Patience*, USA TODAY, Apr. 30, 2004, [http://www.usatoday.com/news/world/iraq/2004-04-28-poll-cover\\_x.htm](http://www.usatoday.com/news/world/iraq/2004-04-28-poll-cover_x.htm).

483. INDEP. INST. FOR ADMIN. & CIVIL SOC’Y, PUBLIC OPINION IN IRAQ: FIRST POLL FOLLOWING ABU GHRAIB REVELATIONS 35 (2004), *available at* <http://www.globalpolicy.org/images/pdfs/06iiacss.pdf>.

484. Sean Rayment, *Secret MoD Poll: Iraqis Support Attacks on British Troops*, TELEGRAPH, Oct. 23, 2005, <http://www.telegraph.co.uk/news/worldnews/middleeast/iraq/1501319/Secret-MoD-poll-Iraqis-support-attacks-on-British-troops.html>.

485. H.R.J. Res. 73, 109th Cong. (2005), *available at* <http://www.govtrack.us/congress/billtext.xpd?bill=hj109-73>.

486. PROGRAM ON INT’L POLICY ATTITUDES, WHAT THE IRAQI PUBLIC WANTS: A WORLDPINION.ORG POLL 5-6 (2006), *available at* [http://www.pipa.org/OnlineReports/Iraq/Iraq\\_Jan06\\_rpt.pdf](http://www.pipa.org/OnlineReports/Iraq/Iraq_Jan06_rpt.pdf).

487. BBC-ABC, IRAQ POLL SEPTEMBER 2007 11, *available at* [http://news.bbc.co.uk/2/shared/bsp/hi/pdfs/10\\_09\\_07\\_iraqpoll.pdf](http://news.bbc.co.uk/2/shared/bsp/hi/pdfs/10_09_07_iraqpoll.pdf).

488. Juan Cole, *Iraq: The Necessary Withdrawal*, THE NATION, Jan. 12, 2009, <http://www.thenation.com/article/iraq-necessary-withdrawal>.

Societal violence was presumed to be due to a lack of democratic traditions and institutions,<sup>489</sup> but much opposition to occupation existed across all groups with evident polarities. The appointed political and economic *nouveau riche* enthusiastically favored the American presence, while some Iraqis expressed extraordinary opinions of preferring Hussein's government over the occupational authority.<sup>490</sup> Others believed they were the target of self-interest—only five percent said the invasion was “to assist the Iraqi people” and one percent believed it was to “establish democracy.”<sup>491</sup> Furthermore, a June 2006 University of Michigan *ISR* poll revealed that 76% believed that the invasion was “to control Iraqi oil.”<sup>492</sup>

Hamada Zahawi writes: “Many in Washington subscribed to this fiction of liberation and consequently believed that as liberators, American forces did not need to abide by international obligations reserved for occupiers.”<sup>493</sup> The occupation undertook highly controversial reforms that would not only impact Iraq's future, but could also leave a lasting impression of the Bush administration.<sup>494</sup> Overhauling political institutions to support elections and democratic governance remained uncontroversial, but Coalition Provisional Authority directives failed to respect self-determination and other societal values. The directives violated the Hague Conventions and other international laws by urging privatization and by attempting to produce one of the most capitalist economies in the world.<sup>495</sup> Yet, the directives were consistent with neoconservative dogma, which presumes representative government and capitalism are congenitally

---

489. See S. REP. NO. 110-345, at 66, 71, 191 (2d Sess. 2008).

490. See Howard LaFranchi, *Goodwill Is Fragile in New Iraq*, CHRISTIAN SCIENCE MONITOR, Nov. 5, 2003, <http://www.csmonitor.com/2003/1105/p01s02-woiq.html> (“[N]ow I hate [the occupiers], they are worse than Saddam.” (quoting an Iraqi former film student)).

491. Walter Pincus, *Skepticism About U.S. Deep, Iraq Poll Shows*, WASH. POST, Nov. 12, 2003, <http://www.washingtonpost.com/ac2/wp-dyn/A27979-2003Nov11>.

492. *Iraqi Attitudes: Survey Documents Big Changes*, U. MICH. NEWS SERVICE, June 14, 2006, [www.umich.edu/news/index.html?Releases/2006/Jun06/r061406a](http://www.umich.edu/news/index.html?Releases/2006/Jun06/r061406a).

493. Hamada Zahawi, *Redefining the Laws of Occupation in the Wake of Operation Iraqi Freedom*, 95 CAL. L. REV. 2295, 2315 (2007).

494. See Note, *Democracy in Iraq: Representation Through Ratification*, 199 HARV. L. REV. 1201, 1201 (2006).

495. See James Thuo Gathii, *Commerce, Conquest, and Wartime Confiscation*, 31 BROOK. J. INT'L L. 709, 736-37 (2006); Asli U. Bali, *Justice Under Occupation: Rule of Law and the Ethics of Nation-Building in Iraq*, 30 YALE J. INT'L L. 431, 435, 442-43 (2005); Bartram S. Brown, *Intervention, Self-Determination, Democracy and the Residual Responsibilities of the Occupying Power in Iraq*, 11 U.C. DAVIS J. INT'L L. & POL'Y 23, 43-44 (explaining that international law “does not authorize the occupying power to pursue its vision of local democracy by any means necessary”); Zahawi, *supra* note 493, at 2298, 2322, 2328-29 (noting that Transitional Administrative Law gave permanence to rules *before* an Iraqi government was elected); Harvey, *supra* note 170, at 25.

united,<sup>496</sup> and were consistent with preferences of Iraqi exiles working for the White House and later being appointed to leadership positions.<sup>497</sup> Market-oriented institutions are advisable, but “shock treatment” reforms were “rammed through in six months,” while capitalist evolutions of developed Western economies took more than a century, and transition countries, such as Argentina, Chile, and Russia, have taken decades.<sup>498</sup> Other commentators have demonstrated occupational economic self-interest by noting that American and British oil conglomerates began temporary projects, but by mid-2008 were given no-bid, exclusive, and long-term Production Sharing Agreements.<sup>499</sup> American corporate interests, particularly in the arms and oil industries, may have been primary beneficiaries of the occupation.<sup>500</sup>

## V. CONCLUSIONS AND JURISPRUDENCE

This Article maintains that government officials are capable of injecting alternative interpretations of political and constitutional processes and international law by relying on worldview predispositions. Political leadership might be able to influence the government information apparatus by replacing reasonable interpretations of veritable facts and unknowns

---

496. See Robert Looney, *Neoliberalism and Iraqi Economic Reconstruction*, 2(8) STRATEGIC INSIGHTS (Aug. 1, 2003), <http://www.nps.edu/Academics/centers/ccc/publications/OnlineJournal/2003/aug03/middleEast.html>; see *supra* notes 205-07.

497. See Bejesky, *supra* note 56, at 26-29, 39-42.

498. Naomi Klein, *Bomb Before You Buy: The Economics of War*, 2 SEATTLE J. SOC. JUST. 331, 333 (2004); see generally KLEIN, *supra* note 207.

499. Bejesky, *supra* note 56, at 60-62.

500. See GRANDIN, *supra* note 170, at 159-60; James Thuo Gathii, *Foreign and Other Economic Rights Upon Conquest and Under Occupation: Iraq in Comparative and Historical Context*, 25 U. PA. J. INT'L ECON. L. 491, 513 (2004); Klein, *supra* note 498, at 340; Mayer, *supra* note 203, at 247-51; Nagan & Hammer, *supra* note 129, at 377 (“win-win scenario for American corporate interests, as well as the Iraqi exiles who would replace Saddam’s elite ruling autocracy”); Douglas Jehl, *Insiders’ New Firm Consults on Contracts in Iraq*, N.Y. TIMES, Sept. 30, 2003, <http://www.nytimes.com/2003/09/30/politics/30LOBB.html>; Tim Shorrock, *Crony Capitalism Goes Global*, THE NATION, Apr. 1, 2002, <http://www.thenation.com/article/crony-capitalism-goes-global>; see *supra* notes 424-31 (discussing privatization trends and lobbying); see also Harold P. Southerland, *The Case for American History in the Law-School Curriculum*, 29 W. NEW ENG. L. REV. 661, 661, 706-08 (2007) (describing the Bush administration’s devotion to privatization, contending that commentators and policymakers should remember lessons from history, and noting that the nineteenth century’s “fabled Golden Age of capitalism” in the U.S. was a period in which “interests of government and interests of big business were virtually indistinguishable,” but the frequent result of unfettered capitalism was industry monopolization); see generally KEVIN PHILLIPS, *AMERICAN DYNASTY: ARISTOCRACY, FORTUNE, AND THE POLITICS OF DECEIT IN THE HOUSE OF BUSH* (2004) (alleging that three generations of the Bush family held political office while financially and professionally exploiting relations with banking, the military-industrial complex, and oil industry); P.W. SINGER, *CORPORATE WARRIORS: THE RISE OF THE PRIVATIZED MILITARY INDUSTRY* (2003).

with preexisting worldview penchants. Vague notions of morality could be employed as “legal authority” with messages vacillating among domestic and international audiences.<sup>501</sup> Frequently repeated but unsubstantiated security threats may garner perceptions of palpability. The will of the populace and rational choice may be lost in the process. The three variables presented here are pertinent to dominant international law and constitutional law genres.

The sixty-year-long (and counting) philosophical battle between realism and liberalism formulated guiding precepts around a trust/skepticism and threat perception continuum, thereby establishing competing visions of comity and cooperation, assent to international law, and solidity of treaties. Normative international law arguments still reflect such inclinations. PNAC’s *Rebuilding* document culled realism’s precepts that envision formidable threats and noxious intentions of other states and employed liberalism to presume that cooperation exists because “American exceptionalism” emanates a paragon democratic model to the world. Neoconservatism might even share similar penchants of rhetorical unilateralism of past eras, most notably the McCarthy era, the Vietnam War, or the Reagan years.<sup>502</sup> Cooperation has since proliferated. From the liberalist, institutionalist, and U.N. perspectives, the “rule of law” is stereotypically advanced as a system in which all institutions, including the state, are bound and held accountable.<sup>503</sup> In a General Assembly address, Secretary-General Annan remarked: “Those who seek to bestow legitimacy must themselves embody it; and those who invoke international law must themselves submit to it.”<sup>504</sup> Professor Falk explains that Council rejection of action against Iraq “served the purposes of its founding by its refusal to endorse recourse to a war that could not be persuasively reconciled with the U.N. Charter and international law.”<sup>505</sup>

---

501. See Townsend, *supra* note 118, at 271.

502. See *supra* notes 45, 389-92.

503. U.N. Sec’y-Gen., *Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, ¶ 6, U.N. Doc. S/2004/616 (Aug. 23, 2004).

504. Press Release, U.N. Sec’y-Gen., Rule of Law at Risk Around the World, Says Secretary-General in Address to General Assembly, U.N. Doc. SG/SM/9491, GA/10258 (Sept. 21, 2004); see U.N. Sec’y-Gen., *A More Secure World: Our Shared Responsibility, Report of the High-Level Panel on Threats, Challenges, and Change*, ¶¶ 29-30, U.N. Doc. A/59/565 (Dec. 2, 2004).

505. Richard A. Falk, *What Future for the U.N. Charter System of War Prevention?*, 97 AM. J. INT’L L. 590, 590 (2003); see U.N. Charter arts. 2, para. 4, 24, 25 (prohibiting use of force, endowing Security Council with “responsibility for the maintenance of international peace and security,” and affirming that Member States are bound to follow Council decisions); William A. Schabas, *Prosecutorial Discretion v. Judicial Activism at the International Criminal Court*, 6 J. INT’L CRIM. JUST. 731, 743 nn.54-55 (2008) (noting International Criminal Court authorities considered indictments against the U.K., but declined); Brown, *supra* note 495, at 26 (“[A]ttacking and occupying another sovereign country is a violation of international law, and as



The action was also defended as a country-wide “vote count” outside of Council recalcitrance. Returning to the original realist threat justification, Bush remarked in the 2004 State of the Union Address: “There is a difference, however, between leading a coalition of many nations, and submitting to the objections of a few. America will never seek a permission slip to defend the security of our people.”<sup>506</sup> The coalition did garner at least tacit diplomatic acquiescence from one-fourth of the world’s countries, but volitional support seems incongruent with the aid and benefits provided to assenters, the vehement popular opposition in most countries, and the fact that the U.S. provided approximately ninety percent of military force and CPA personnel.<sup>507</sup> Professor Tiefer accurately called it “a unilateral war in the absence of international and local support.”<sup>508</sup> Liberalist notions of broad-based cooperation linger with the “coalition” label.

Alternatively, one can shift from international law as an empowering or restrictive source on foreign policy and emphasize that the Constitution embodies a dualist view of international law, such that Presidents are perhaps less bound than leaders in other countries with more monistic legal systems. However, the Constitution clearly provides that ratified treaties have the status of federal law and the president must “faithfully execute” the law.<sup>509</sup> In terms of authorizing a right to use force, executive/legislative war power allocations sanction an affirmative right to act, but that process is dependent on information. When confronted with criticism and congressional demands to withdrawal from Iraq, President Bush retorted: “I expect there to be criticism . . . . But when Democrats say that I deliberately misled the Congress and the people, that’s irresponsible. They looked at the same intelligence I did . . . .”<sup>510</sup> However, they did not look at

---

such entails the legal responsibility of the intervening country . . .”).

506. *Transcript of State of the Union*, CNN, Jan. 21, 2004, <http://www.cnn.com/2004/ALLPOLITICS/01/20/sotu.transcript.3/index.html>; *Remarks by the Vice President Following a Presidential Debate Watching Party*, WHITE HOUSE (Sept. 30, 2004), <http://georgewbush-whitehouse.archives.gov/news/releases/2004/09/20040930-12.html>. (“[W]e will never submit to the objections of a few. We will never seek a permission slip to defend the United States of America.”).

507. McGuinness, *supra* note 110, at 167-70 (reporting that over 90% of “coalition” troops during the invasion were from the U.S.); Bejesky, *supra* note 20, at 45-46, 48-51; U.S. GEN. ACCOUNTING OFFICE, *REBUILDING IRAQ: RESOURCES, SECURITY, GOVERNANCE, ESSENTIAL SERVICE AND OVERSIGHT ISSUES* 37-38 (2004), *available at* <http://www.gao.gov/new.items/d04902r.pdf> (noting that the “composition of [CPA] personnel remained consistent,” and an “average of 13 percent were detailees from other coalition countries”).

508. Tiefer, *supra* note 67, at 2.

509. *See supra* note 8.

510. Charles Babington, *Hawkish Democrats Join Calls for Pullout*, WASH. POST, Nov. 18, 2005, A1; *see* Spectar, *supra* note 25, at 88-89 (quoting Cheney calling those who attacked the administration for skewing or lying about the pre-war intelligence “dishonest and reprehensible”).

the intelligence. Congress, citizens, bureaucracies, and the media are given intelligence *conclusions* and cursory information. They are told to accept conclusions as verified and are unable to critique the evidentiary bases of those estimates. In this circumstance, it is difficult to separate the extent to which appointed ideologues employed presumptions that might have guided bureaucracies and intelligence conclusions.<sup>511</sup>

Developments may have bypassed the original intent of the Constitution's Framers. The imperative nature of domestic "checks" on power are found in Madison's "social contract," the Declaration of Independence's affirmation that government officials derive "just powers from the consent of the governed," and the Constitution's Separation of Powers and dedication to ensuring that political authority derives from the people.<sup>512</sup> Thomas I. Emerson remarked that "if democracy is to work," "[t]he public, as sovereign, must have all information available in order to instruct its servants, the government."<sup>513</sup> A key constitutional moment that may have obfuscated legislative power and informational transparency began when Justice Sutherland issued his opinion in *United States v. Curtiss-Wright Export Co.*<sup>514</sup> Sutherland espoused two key principles. First, the national government's authority is strictly limited by the Constitution, by federalism, and by the citizens, but federal government power in the international sphere is expansive and perhaps even extra-constitutional.<sup>515</sup> Louis Fisher writes that the "long list of miscalculations, false claims, and misjudgments" about Iraq was "built upon a half century of violations of constitutional principles over the war power."<sup>516</sup> Indeed, a core reason this happened is due to a second key principle derived from *Curtiss-Wright*. Justice Sutherland believed that "[executive] secrecy in respect of information gathered . . . may be highly necessary, and the premature disclosure of it productive of harmful results."<sup>517</sup> The case and controversy involved indictments of non-government actors for selling weapons in violation of an executive order,<sup>518</sup> but the battle over the broad

---

511. See Bejesky, *supra* note 20, at 6-7; Robert Bejesky, *Intelligence Information and Judicial Evidentiary Standards*, 44 CREIGHTON L. REV., at 70-79 (forthcoming 2011); see *supra* notes 16-18; see generally *supra* Parts II(C), III(A).

512. See *supra* notes 8-9, 14.

513. ALEXANDER J. BOTT, HANDBOOK OF UNITED STATES ELECTION LAWS AND PRACTICES: POLITICAL RIGHTS 377 (1990).

514. Charles A. Lofgren, *United States v. Curtiss-Wright Export Corporation: An Historical Reassessment*, 83 YALE L.J. 1, 32 (1976) (criticizing opinion as theoretically "lax[]" and resting on a "shockingly inaccurate" presentation of history); Kearney, *supra* note 14, at 309.

515. See Kearney, *supra* note 14, at 308-10.

516. Fisher, *supra* note 23, at 1200.

517. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936).

518. Kearney, *supra* note 14, at 307-08.

and expansive dicta in favor of executive plenary authority in foreign affairs may commingle to obscure reasonable interpretations of power sharing on the latter principle.<sup>519</sup>

The 1947 National Security Act (NSA) codified the secrecy principle not only to protect classified information that was intended to improve policy-making of *all* officials, but also to permit a wide range of secret and controversial covert actions and propaganda operations.<sup>520</sup> Most important from the Separation of Powers jurisprudence arena, secrecy prerogatives should never have permitted hiding information in light of Congress's war powers or as justifications for whether international law could be circumvented, both of which are constitutional principles that preempt the NSA. Lessons have not been learned because commingling specious, classified information into war powers authorization was precisely what led to Congress's Gulf of Tonkin Resolution for the Vietnam War.<sup>521</sup>

Accentuating security threats may be a viable technique for a political movement to garner public attention. If hawkish ideology was influential in prodding government policymaking, providing a lens that turned equivocal information into apodictic peril or swaying citizens to positions that they would not otherwise rationally choose, then that is unfortunate. There are public consequences to contrived or aggrandized portrayals of threats associated with non-existent WMDs. After effects include U.S. budget deficits, the impact on the national debt, an estimated \$1.5 trillion in expenditures through 2009, quagmires encountered by a cynical Iraqi public, accusation-casting across American government units for intelligence failures, resignations of government officials, and the resounding chastisement for failure to abide by international law. Yet, after a mere nine months in office, President Obama was awarded a Nobel Peace Prize for "extraordinary efforts to strengthen international diplomacy and cooperation between peoples."

---

519. Harold Hongju Koh, *Can the President Be Torturer in Chief?*, 81 *IND. L.J.* 1145, 1155 (2005); see Michael Glennon, *Two Views of Presidential Foreign Affairs Power: Little v. Barreme or Curtiss-Wright*, 13 *YALE J. INT'L L.* 5, 12-13 (1988); Jide Nzelibe & John Yoo, *Essay, Rational War and Constitutional Design*, 115 *YALE L.J.* 2512, 2522-24, 2526, 2528 (2006) (discussing power sharing derived from information capabilities).

520. See JOHNSON, *supra* note 77, at 10; Eyth, *supra* note 301, at 57-58; Paul Gumina, *Title VI of the Intelligence Authorization Act, Fiscal Year 1991: Effective Covert Action Reform or "Business As Usual?"*, 20 *HASTINGS CONST. L.Q.* 149, 162-63 (1992); Loch K. Johnson, *On Drawing a Bright Line for Covert Operations*, 86 *AM. J. INT'L L.* 284, 292-93 (1992); Radsan, *supra* note 78, at 520 ("'[P]lausible deniability' . . . was implied, not explicit."); see *supra* notes 162-90, 299, 301; see generally STOCKWELL, *supra* note 189; Wells, *supra* note 299.

521. Lori Fisler Damrosch, *Comment: War and Uncertainty*, 114 *YALE L.J.* 1405, 1409 (2005); Fisher, *supra* note 23, at 1210-14.