POLITICO-INTERNATIONAL LAW

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INTRODUCTION

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

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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. 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.” 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. 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.” The general public prefers

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. pmbl. (“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]henever 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 (“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).

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.” Bush departed with the second lowest presidential approval rating in history at 22%, due to Iraq and poor economic conditions. 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. Within six months of the administration’s departure, favorable foreign views of the U.S. surged.

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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. Adhering to the recent trend in legal scholarship that incorporates social science research on government-citizen interactions, communications, and political accountability, 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. They vowed to alleviate obstreperous and minatory national security danger and affixed Iraq at the apex of perils to the United States. 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 (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).


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

deposing the Iraqi government. Immediately after 9/11, some administration officials attributed Iraqi culpability to the events, thereby kindling proclivities inside defense-related agencies. 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. On October 1, the American Intelligence Community (IC) completed a National Intelligence Estimate (NIE) that introduced drastic departures from previous assessments. 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. Those conditions for military action were evidently bypassed due to misperceptions about the threat from Iraq.

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).

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.


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. 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. The 1,400-member Iraqi Survey Group’s post-invasion inspection efforts failed to discover WMD evidence and other investigations were unsuccessful in confirming an al-Qaeda connection.

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

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


27. See infra notes 335, 510.

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.\textsuperscript{30} 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.”\textsuperscript{31}

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.\textsuperscript{32} 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.\textsuperscript{33}


\textsuperscript{33} Leigh Thompson & George Loewenstein, \textit{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, \textit{The Problem of Social Cost}, 3 J.L. & ECON. 1, 22-23 (1960) (externalities and transaction costs can impede action); \textit{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.\textsuperscript{34} Public misperceptions allowed the action, but once updated, the support for occupation dwindled, ostensibly also due to the realization that there were no WMDs.\textsuperscript{35} 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.\textsuperscript{36} 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.\textsuperscript{37} 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.\textsuperscript{38}

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).


predicted that an invasion would severely disrupt government spending and negatively impact the economy. 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. 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. 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. 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. 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.

39. See infra Part IV(A).

40. See infra notes 354-60.


II. VARIABLE ONE

A. NEOCONSERVATIVISM

Neoconservativism can be traced to the Nixon, Ford, and Kissinger era of Cold War struggles, 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. 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. 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. Consequently, Reagan withdrew the U.S. from the ICJ’s contentious jurisdiction to avoid being mandatorily hailed before the court.

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. 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

vital raw materials, primarily Persian Gulf oil.” 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 and violate Congress’s War Powers and the Constitution’s Treaty Clause. 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. 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,” even though oil prices had been low and stable for many years. 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.
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.57

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.58 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.”59 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.60 Despite such conclusions, the sanctions remained in place while neoconservative advocacy in policy documents, books, and media emphasized impending jeopardy without tangible evidence.61

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.’”62

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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.”

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.”

The end of the Cold War left the international system unipolar, but neoconservatives marketed a domineering foreign policy 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,” connote a decrepit and vulnerable military even though the U.S. was then (and remains) the most technologically advanced superpower. 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.

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). Allocations are now over $651 billion and

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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.


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


represent approximately half of aggregate global military expenditures. 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. 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), which paradoxically surmises that we are “now threatened less by conquering states than we are by failing ones.” Secretary of Defense Rumsfeld stated in prepared testimony: “We have entered a new security environment, arguably the most dangerous the world has known.” 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.

Government officials executed Cold War civil defense exercises and

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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.


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. 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, may lead some to contend that the security environment is not nearly as dangerous as others might suggest. Nonetheless, Cold War security threat practices were resurrected.

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. Modern day portrayals of anarchy may be estranged from facts and international law, 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 by forming the perception of crisis without a clear reason to suspect wrongdoing and

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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”).


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*.


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\textsuperscript{84} that they had created. Professor Sunstein writes that the war against Iraq was “fueled by presidential speeches including vivid narratives of catastrophic harm.”\textsuperscript{85} 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.”\textsuperscript{86}

**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.\textsuperscript{87} 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.\textsuperscript{88}

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

\begin{itemize}
\item \textsuperscript{87} See infra notes 89-95, 118-29.
\item \textsuperscript{88} See infra notes 125-29.
\item \textsuperscript{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).
\item \textsuperscript{90} See John J. Mearsheimer, *The Tragedy of Great Power Politics* 30-36 (2001).
\item \textsuperscript{91} Id. at 33; Bruce Bueno de Mesquita, *Principles of International Politics: People’s Power, Preferences, and Perceptions* 64-65, 141 (2000).
\item \textsuperscript{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 or powerful actors impose rules. The status quo order merely reflects the dominant state-imposed balance of power over weaker countries. 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. 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 and presumes that state interactions are governed by “self-restraint, moderation, compromise, and peace.” Liberalists contend that international law is binding and fosters “trust” among nations. 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. Realist Hans Morgenthau believed that because maximizing “power is always the immediate aim,” a cooperative

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

Realism dominated international relations theory during the Cold War,¹⁰⁴ but since then globalization has proliferated international law, agreements, and organizations,¹⁰⁵ all of which provide more stable and predictable international relations.¹⁰⁶ Cooperation reduced competition for military “power” and the likelihood of conflict,¹⁰⁷ and it appears that most countries generally abide by international law.¹⁰⁸ 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.¹⁰⁹ Other commentators coined the term “institutionalism” and either agreed with the realist contention that power compelled the growth of international institutions¹¹⁰ or disagreed and asserted that countries mutually assent to principles and willingly coordinate domestic policies with international agreements.¹¹¹


¹⁰⁸. HENKIN, supra note 106, at 26.

¹⁰⁹. Mearsheimer, supra note 90, at 364; see Goldsmith & Posner, supra note 95, at 11-13.


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

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

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

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112. See supra note 106.
116. See Kurt Taylor Gaubatz, Democratic States and Commitment in International Relations, 50 INT’L ORG. 109, 121 (1996).
119. See supra notes 82-88, 95-96, 111-16; see infra notes 121-23.
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.” 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.” 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.

Rebuilding deduces that enforcing a system of “law-abiding” nations facilitates a “social good” among the global community. The concern is that a competitor country could destabilize the status quo and deprive law-abiding countries of the hegemon’s goodwill mission. The altruistic justification for unilateralism is reflected in the NSS, which states: “[America’s] unprecedented—and unequaled—strength and influence in the world [is] sustained 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.” The NSS further states that the U.S. must “pursue international relations according to the

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.\(^{128}\) The ends are altruistic, Kantian, and liberalist but the means are yoked by realist national security fear.\(^{129}\) 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.\(^{130}\) 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,\(^{131}\) even though China’s foreign policy has typically been defensive, favoring non-interventionism.\(^{132}\) 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.”\(^{133}\)

Even allies seem opposed to this vision of hegemony. Some NATO members expressed the need to restrain American hegemony because they favor multilateral cooperation.\(^{134}\) The European Union is often recognized as favoring economic cooperation with concern for the internal governance


\(^{129}\) 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.


\(^{133}\) Wang, supra note 132, at 263 (citing Hu Jintau, 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).

of other countries but employs multiple nonmilitary, conflict prevention models.\textsuperscript{135} 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. . . . The 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.\textsuperscript{136}

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,\textsuperscript{137} attacking Iraq against U.N. Security Council determinations, and consistently finessing pre-invasion inspection reports and supplanting them with certainty of WMD possession.\textsuperscript{138} 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.”\textsuperscript{139} 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

\textsuperscript{135} Davis, supra note 84, at 27-28.


\textsuperscript{137} PHILLIE SANS, 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.

\textsuperscript{138} Bejesky, supra note 20, at 20-37.

\textsuperscript{139} Arab States Line Up Behind Iraq, BBC NEWS, Mar. 25, 2003, 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.”\textsuperscript{140} The “hegemonic conception of what constitutes ‘the better argument’”\textsuperscript{141} 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,\textsuperscript{142} 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.\textsuperscript{143} Past peacekeeping operations involved neutral, lightly-armed, and non-combatant troops\textsuperscript{144} who lacked resources and had coordination problems,\textsuperscript{145} but were apposite within mission context, authority, and resources.\textsuperscript{146} 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,\textsuperscript{147} and on what it does to influence NATO and other countries.\textsuperscript{148}


\textsuperscript{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).


\textsuperscript{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).


\textsuperscript{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).

\textsuperscript{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”).

\textsuperscript{148} Karima Bennoune, 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, the extent to which the U.S. is not bound to uphold rules that others must accept relies on “American exceptionalism.” American exceptionalism derives from patriotic nationalism and sufficient power to grant foreign policy immunity. Exceptionalism may breed a distrust of international agreements and shape egotistic views of foreign sovereignty that classify other states on a “sliding scale of both legitimacy and respect.” It may even promote convenient heuristics in which demonized and dehumanized enemies can be represented with...
hyperbolic labels, such as “evil empire,” communists, “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, and may even marginalize the First Amendment rights of critics.

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,” 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.” Neoconservatives, however, were even more emphatic and enshrined 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. Louis Fisher writes that the same “belief in American exceptionalism . . . colored the National Security Strategy.”

Professor Francis Fukuyama traces neoconservativism 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. 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”).


158. Glennon, supra note 134, at 149.

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


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.\(^{162}\) 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.\(^{163}\) The CIA carried out the 1953 Iranian coup that reinstated the Shah’s kleptocratic dictatorship and subsequent administrations supported the Shah for twenty-five years.\(^{164}\) 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,”\(^{165}\) which led to a two-decade dictatorship.\(^{166}\) In 1966, the U.S. aided the coup that brought Suharto to power and supported his undemocratic regime in Indonesia for thirty-three years.\(^{167}\) 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.\(^{168}\) In 1970, the Nixon Administration began to formulate


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

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. 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. 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. A Senate Committee on Foreign Relations investigation in 1972 summarized the Pentagon’s reaction:

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


“[M]ilitary bases and a familiar government in the Philippines are more important than the preservation of democratic institutions.”

Marcos was eventually removed from power, and the U.S. military provided him safe passage to Hawaii. Once democracy reemerged, the Filipino Senate expelled the American military against the Bush Sr. administration’s protest. 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).

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.

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

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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)).
or philanthropic societies in the whole United States. Professor Gottlieb explains that “American policy is sanitized” and “[b]ooks rarely report questionable government action.” 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.” President Reagan’s UN Ambassador Jeane Kirkpatrick provided a standard—pro-Soviet communist states were “totalitarian” while pro-Western dictatorships were “authoritarian.” She contended that the Carter administration supported democracies with “fewer freedoms and less personal security” than an “autocracy.” 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.

There is a history of asserting American moral superiority in foreign policy to justify actions, particularly of the benevolent “bearer of democracy” and public benightedness of antithetical facts, followed by

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.
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.\textsuperscript{190} 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.\textsuperscript{191} 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.\textsuperscript{192} 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.\textsuperscript{193}

\textsuperscript{190} Cohen, supra note 153, at 554.


\textsuperscript{193} Profile: Non-Aligned Movement, BBC NEWS, Aug. 7, 2009, 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.”

While the U.N. historically emphasized “cultural relativism” and a state’s freedom to choose its own political, economic, and social systems, 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. The integrated European Union countries have served as a democratization model, possessing elevated human rights protections and transparency. 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 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.

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. The

198. van Ham, supra note 155, at 138.
200. GRAHAM-BROWN, supra note 60, at 52.
dominant Western discourse to explain this result is neoliberalism, 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. Notwithstanding that some maintain that neoliberalism is not always consistent with democratization, 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. The NSS emphasizes that “economic openness” is fundamental to “domestic stability,” “international order,” and national security. 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.

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, but circumstances have evolved. Realism

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).
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. 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, liberalists retort that confrontations occur because realists presume that there is an interminable, selfish struggle for power. 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, but power can drive international relations, 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. 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.


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


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. Appointees guided bureaucracies to hawkish positions, hatched public relations/propaganda programs, and allegedly prejudiced intelligence conclusions. 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.


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. 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. 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 (“[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 (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 “rivaled 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/ED08Ai05.html. PNAC Letter, supra note 54 (Woolsey was a PNAC signatory); see infra notes 452-57 (referencing Ledeen’s advocacy).
for post-Saddam Iraq, which postulated troop requirements for invasion, a war crimes tribunal for Baathist officials, and oil industry reform. 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.

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. 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.’” 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.”

Exposing incompatibility between whistleblower protection laws and national security secrecy restrictions (particularly when it was one year after the invasion), the administration opened an investigation into whether O’Neill illegally revealed classified documents to CBS.

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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 . . . .”).


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

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.” Indeed, neoconservatives goaded the legislation to “promote the emergence of a democratic government” in Iraq, and it was pushed through Congress concurrent with Republican-led impeachment inquiries against President Clinton.

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.” On Meet the Press, General Wesley Clark noted 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.” 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.” Within one week, meetings at Camp David produced proposed operations against Afghanistan.


and directed the Pentagon to plan military operations for Iraq.\textsuperscript{234} 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.\textsuperscript{235}

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.\textsuperscript{236}

He further contended that top Pentagon appointees, particularly Rumsfeld and Wolfowitz, immediately advocated attack and regime replacement without regard to evidence of wrongdoing.\textsuperscript{237} 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-Qa’ida or behind 9/11.\textsuperscript{238}


\begin{quote}
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.
\end{quote}

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 (“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).

\textsuperscript{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.

\textsuperscript{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.

Subsequently released White House documents, 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. At the international level, the U.N. did not renew deliberations about Iraq until October 2002 and the assumption held by Security Council members was that war could be avoided if there were no WMDs.

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.” The SSCI concluded that Bush administration officials led a consistent propaganda campaign that falsely linked Iraq and al-Qaida as a single threat.

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

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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. “[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).


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.\footnote{247}{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.}\footnote{248}{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).} While the October 1, 2002, National Intelligence Estimate (NIE) was allegedly the foundation of evidence that served for six months (October
2002 through March 2003) of national security threat claims and the core information presented to Congress during Authorization to Use Force vote debates,\textsuperscript{249} 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.\textsuperscript{250}

There were also drastic changes in intelligence estimates. The NIE was hastily produced over a three-week period,\textsuperscript{251} 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.\textsuperscript{251} 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.\textsuperscript{252} 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.\textsuperscript{253} The NIE even speculated when Iraq would likely use its alleged


\textsuperscript{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).

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

\textsuperscript{252} See supra notes 19-20, 24, 243.

\textsuperscript{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.” 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. 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.” Chastisements of NIE claims can be broken into multiple categories: first, pre-existing intelligence reports made overstatements; second, false claims were accidentally inserted into the NIE; third, IC miscommunications and failure to communicate led to false claims; fourth, intelligence professionals were not sufficiently careful and conscientious; fifth, reporting inconsistencies were not addressed; sixth, allegations were not supported by preexisting intelligence reports; and lastly, ambiguous and unsubstantiated data and witness accounts were improperly regarded as veritable. 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.

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.
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. The model has been applied to voter choices, economic forces and decisions, whistleblower actions, and political dynamics of corporations and agencies. 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. 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, 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


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

intimidating his neighbors and is eager to pursue weapons of mass destruction and the means to deliver them.

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.”

*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.” 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. 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 . . . .” Anthony Zinni, a forty-year official, was not reappointed as a Middle East envoy. 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.”

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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 . . . .”).


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.”

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.”

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 . . . .”

Furthermore, some White House officials resigned or were fired. 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.

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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.


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/.

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

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.\textsuperscript{282} NYU Communications Professor Douglas Rushkoff notes that social control naturally develops in rule-based hierarchies with superiors directing subordinates to follow organizational policies,\textsuperscript{283} begetting conformity and diffusing dissent.\textsuperscript{284} Oxford University research scientist Kathleen Taylor states: “Compliance is rewarded, often by promotion to a higher rank in the

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\textsuperscript{281} Turse, supra note 273.

\textsuperscript{282} PHILIP ZIMBARDO, \textit{THE LUCIFER EFFECT: UNDERSTANDING HOW GOOD PEOPLE TURN EVIL} 278 (2007).

\textsuperscript{283} DOUGLAS RUSHKOFF, \textit{COERCION: WHY WE LISTEN TO WHAT “THEY” SAY} 217-54 (1999).

social system, ‘thus both motivating the person and perpetuating the structure simultaneously.’”  

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.” “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. 

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. 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. 

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

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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).


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)).


292. Id. (Armitage, Bolton signatories).

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. Some organizations function as relatively isolated units that make and implement decisions with few external restraints, often depending on the decisional context. 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.

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).


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 ... 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.”  

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. 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. 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. 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. 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

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

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.”

University of Pittsburgh President Jem Spectar writes that the “Bush Administration exploited, furthered, manipulated or thrived on the public’s confusion.” 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 . . . .”

C. BRITISH EXIT, VOICE, AND LOYALTY

Proposals to attack Iraq were churning within a joint-U.S.-U.K. initiative. 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. 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. 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. 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.


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.\textsuperscript{309} 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.\textsuperscript{310} 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

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part in any military action. \textsuperscript{311}

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. \textsuperscript{312} 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. \textsuperscript{313} U.S. State Department intelligence analysts claimed pressure “was being put on them to shape intelligence to fit policy” \textsuperscript{314} and the Pentagon intelligence officials claimed their analyses had to be “on target” with threat presumptions set by the Secretary of Defense. \textsuperscript{315} Two key Blair administration intelligence dossiers also contained inaccurate claims. \textsuperscript{316}

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

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  \item \textsuperscript{311} \textit{The Secret Downing Street Memo}, \textsc{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).
  \item \textsuperscript{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.
  \item \textsuperscript{313} Bejesky, supra note 20, at 6-14, 30-35; \textit{Ex-CIA Analyst Accuses Tenet of Hypocrisy For Not Speaking Out Earlier on White House Push For War, \textsc{Democracy Now!}} (May 1, 2007), 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.
  \item \textsuperscript{314} Yamamoto, supra note 10, at 299.
  \item \textsuperscript{315} S. REP. NO. 108-301, at 359 (2004).
\end{itemize}
administration.”

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.”

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.”

Another memo was released that documented minutes of a January 31, 2003, Bush-Blair meeting at the White House. 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.

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.

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

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deceit.” 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.”

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.”

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.” 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. Secretary-General Boutros-Ghali and other experts called the no-fly zones illegitimate, and in 1998 Security Council members held hearings and deemed Operation Desert Fox strikes illegal. Elizabeth Wilmshurst

324. Id.
325. Id.
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.\textsuperscript{330} Aerial attacks continued and by November news sources revealed that bombing efforts were so extensive that the war had already begun.\textsuperscript{331} The no-fly zones may have been a form of creeping unilateralism forming the circumstances necessary for invasion.

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.\textsuperscript{333} 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.\textsuperscript{334} In December 2008, Secretary of State Rice defended the war policy but averred that she “regret[ed] bad Iraq intelligence,” while Bush maintained

\textsuperscript{330} Smith, supra note 327.

\textsuperscript{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.


\textsuperscript{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)).

\textsuperscript{334} Excerpts from News Conference: Imagine ‘Hussein With Nuclear Weapons,’ N.Y. TIMES, Nov. 8, 2002, http://query.nytimes.com/gst/fullpage.html?res=9907E1DD1731F93BA35752C1A9649CB63 [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/aliciahtml20030228.html (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/20030304175514fenn@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.”

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, and First Amendment jurisprudence that embraces a “marketplace of ideas,” public choice theory presumes bilateral interaction between government policymaking and citizen preferences. 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 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. Long-term occupation was not presented as a

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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.


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.341 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.”342

Pre-invasion studies and experts warned of potentially high costs and economic ramifications.343 Yale Economics Professor William Nordhaus estimated that costs could approach $2 trillion for a decade-long occupation.344 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.”345 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.346 White House National Economics Head Lawrence Lindsey was fired after he remarked publicly that the war could cost $200 billion.347

342. Tiefer, supra note 67, at 12.
344. William D. Nordhaus, The Economic Consequences of a War with Iraq, in KAYSEN, supra note 343, at 51-86.
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.\(^{348}\) 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.\(^{349}\) 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.\(^{350}\) 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”\(^{351}\) and “before we turn to the American taxpayer, we will turn first to the resources of the Iraqi government and the international community.”\(^{352}\)

Administration officials seemed reluctant to testify before Congress with estimates and publicly offered conservative $50 to $60 billion figures.\(^{353}\) A projected $400 billion deficit loomed, but Congress initially

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349. Id. at 5.


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).


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. Rumsfeld remarked, “[W]e don’t know what the war’s going to cost. . . . You can’t know it. It’s not knowable.” Months later, Congress approved an $87 billion supplemental bill, largely availing defense and rebuilding contractors. 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. By 2008, Congress had allocated $747 billion for operations in Afghanistan and Iraq. Economists began incorporating derivative costs, such as veterans’ healthcare expenditures and estimated that expenditures would exceed $1.5 trillion through 2009.

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.” In the same month, a U.N. World Economic Situation and Prospects report was


355. Id.


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).

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.” 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. And in 2005, the IMF surmised that “fears of potential supply disruption” were driving price increases.

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

367. See supra note 38.
recession, unemployment increased, and the home foreclosure rate doubled. 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.

Long-term studies affirm that menacing budget deficits undermine an economy and impede long run growth. 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.” Consequently, Bush promised to cut the yearly deficit in half by 2009. Current deficits decreased but were financed by aggregating the national long-term debt from $5.674 trillion (2000) to $10.025 trillion (2008). In 2000, candidate Bush promised to decrease the national debt, but it doubled.
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.  

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. 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.” The “winning political strategy” was agitated and aggrandized by those who controlled the political and media discourse about Iraq. Senator Obama cursorily acknowledged the interrelationship between war spending and domestic economic woes, 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. 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. To address domestic issues, $236 billion could

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378. Patsner, supra note 38, at 360.
380. Rivlin & Sawhill, supra note 373, at 24; STEUERLE, supra note 374, at 252.
381. Nzelibe, 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. 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.

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. Bush Sr.’s approval ratings rose to 85% during the 1991 Gulf War as the Pentagon showcased high-technology weapons with minimal combat. Reagan-era political appointees presumably learned that embellishing threats garners populace support. 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.” 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,

390. Id. at 973, 979-81.
such as laser beams and undetectable nuclear submarines. 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.”

Similar portrayals of dire threats, use of secrecy, and failure to acknowledge alternative opinions abounded during McCarthyism and the Vietnam War.

Professor Altheide contends that PNAC documents directly led to threat embellishment. 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, but after several years prosecutors claimed to find enough evidence to charge just three and only one was convicted. 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. Likewise, President Bush referenced successful investigations: “We’ve thwarted terrorists in Buffalo, and Seattle, Portland, Detroit, North Carolina, and Tampa, Florida.”

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392. Id.


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


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.\(^3\)\(^9\)

White House directives created the “traffic-light” color-coded terror alert system\(^4\)\(^0\) and the Justice Department and Department of Homeland Security issued numerous warnings of terror attacks.\(^4\)\(^0\) Bridges, stadiums, landmarks, apartment buildings, nuclear power facilities, water supplies, small towns, and even the 2004 elections could be targeted.\(^4\)\(^0\) After two years and frequent media portrayals of a “nation under siege,” 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.”\(^4\)\(^0\) 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.”\(^4\)\(^0\) Ashcroft “engage[d] Congress,
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,"406 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.”407 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.”408 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.”409 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.”410

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.411 Harvard Professor Stanley Hoffman explains: “[A] technique that the administration has used brilliantly is the manipulation of fear.”412 Congressman McDermott remarks: “Fear does work. . . . You can make

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

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.”

Some labeled the terror alert system as propaganda and a way to diffuse political fallout while increasing approval ratings.

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.

The White House insisted that elections in other countries represent the will of the people, 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.” 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.

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.
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.” 419 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. 420 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. 421 President Clinton consummated NAFTA and the WTO (1995) against the will of his Democratic base 422 and was called “pro-business” by the Wall Street

419. HIJACKING CATASTROPHE, supra note 10 (Interview with Miller).
Journal and a “Republican” president for the economy by Federal Reserve Chairman Greenspan. 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.

Today, the public and private sectors are virtually indistinguishable and many speak of “corporate” and monetary “capture” over American political life. 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.” 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.

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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.”).


Some believe that privatizations relative to traditional public functions have made the state “increasingly irrelevant,” eroded democratic participation, and undermined state sovereignty. The Harvard Law Review held a symposium that labeled the present political and economic landscape the “Era of Privatization.” It seems ironic that PNAC was organized as a “non-profit educational organization,” which normally implies charitable connotations and endows tax law benefits 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. Democrats might prefer social programs that appease constituents like predecessors of yore and provide more comprehensive health care analogous to other industrialized countries, 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.” The problem is also one of budgetary priorities—nine percent of the $3 trillion annual budget is interest on

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.\(^{437}\) 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.\(^{438}\) 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.\(^{439}\) 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.\(^{440}\) 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.


\(^{439}\) 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).

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.  

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. Professor Ekman explains that people can be trained to be afraid of anything. Professor Reisberg notes that “people regularly overestimate the frequency of events that are, in actuality, quite rare.” People have a great capacity to misperceive and imagine dangers, leading to overstated and inappropriately calculated risks, and irrational judgments. Professor Inglehart’s surveys across forty-three countries reveal that as countries become wealthier, public desire to accept the same risks decreases. With a high standard of living, boundless technology, global cooperation, decreased health threats, and improved security, “fear” infects like never before. 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.”

For eight years, White House speechwriters pathologically emphasized domestic and international threats.

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).
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.450

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,451 one genre of neoconservative shilling openly exceeds all of these mechanisms—the concept of the “noble lie.”452 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.’”453 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.”454 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.455 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,456 and circulated media fora to portray such dire security threats that “total war” was required to replace regimes in

450. Lustick, supra note 64, at 335-36.
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)).
455. See Bejesky, supra note 20, at 6-7, 64-66; see supra notes 19-31, 54-55, 58-61, 64, 130.
Iran, Syria, and Saudi Arabia.457

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,458 but that mission shifted to emphasize “liberation” shortly before the invasion, seemingly because exiles proffered this sentiment to administration officials.459 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.460

A Senate report compiled an extensive list of administration statements regarding “liberation.”461 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.”462 Secretary of Defense Rumsfeld espoused two commitments: “stay as long as necessary, and leave as soon as possible.”463 Bush announced that the mission would be successful and Iraq would be liberated when Hussein’s “corrupt gang is gone.”464 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).


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 [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)).


461. See SENATE DPC, supra note 459.


463. Id.

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.\(^{465}\)

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.\(^{466}\) 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.\(^{467}\) 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.”\(^{468}\) The Security Council did not address the \textit{ex post facto} humanitarian intervention ground of “liberation,”\(^{469}\) and humanitarian intervention remains controversial. To date, it has been employed only with the “object of protecting human rights”\(^{470}\) to prevent imminent, “widespread and grave violations of the fundamental human rights of individuals.”\(^{471}\) Invading a country to

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apprehend a despot who had apparently suppressed a rebellion two decades prior 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.” Even some of the most respected human rights groups condemned the attack.

Perception management seemed poignant to the new mission. Pentagon neoconservatives proposed the “Rapid Reaction Media Team.” 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.” 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, 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. An October 2004 Harris Poll, revealed that Americans seemed to initially support the new justification—76% of Americans (97% of Bush supporters) believing Iraqis


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.”

General Tommy Franks remarked: “This has been about liberation, not about occupation.” Iraqis were likely better off with a new government, but polls revealed a significant objection to foreign officiousness. A USA Today/CNN/Gallup Poll found that 71% of Iraqis considered foreign troops “occupiers” and not “liberators.” A May 2004 poll found that 92% viewed foreign troops as occupiers and 2% viewed them as liberators. 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). 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. 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. 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. January 2009 polls reflected that three-fourths rejected the foreign presence.

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”).
Societal violence was presumed to be due to a lack of democratic traditions and institutions, 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. 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.” Furthermore, a June 2006 University of Michigan ISR poll revealed that 76% believed that the invasion was “to control Iraqi oil.”

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.” 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. 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. Yet, the directives were consistent with neoconservative dogma, which presumes representative government and capitalism are congenitally

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)).
united, and were consistent with preferences of Iraqi exiles working for the White House and later being appointed to leadership positions. 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. 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. American corporate interests, particularly in the arms and oil industries, may have been primary beneficiaries of the occupation.

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 verifiable facts and unknowns.

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.
with preexisting worldview penchants. Vague notions of morality could be employed as “legal authority” with messages vacillating among domestic and international audiences. 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 nocuous intentions of other states and employed liberalism to presume that cooperation exists because “American exceptionalism” emanates a paragon democratic model to the world. Neoconservativism might even share similar penchants of rhetorical unilateralism of past eras, most notably the McCarthy era, the Vietnam War, or the Reagan years. 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. 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.” 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.”

501. See Townsend, supra note 118, at 271.
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.”\textsuperscript{506} 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.\textsuperscript{507} Professor Tiefer accurately called it “a unilateral war in the absence of international and local support.”\textsuperscript{508} 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.\textsuperscript{509} 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 . . . .”\textsuperscript{510} However, they did not look at such entails the legal responsibility of the intervening country . . . .”\textsuperscript{506}. \textit{Transcript of State of the Union}, CNN, Jan. 21, 2004, http://www.cnn.com/2004/ALLPOLITICS/01/20/sotu.transcript.3/index.html; \textit{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.”).

\textsuperscript{507}. McGuinness, \textit{supra} note 110, at 167-70 (reporting that over 90% of “coalition” troops during the invasion were from the U.S.); Bejesky, \textit{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), \textit{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”).

\textsuperscript{508}. Tiefer, \textit{supra} note 67, at 2.

\textsuperscript{509}. \textit{See supra} note 8.

\textsuperscript{510}. Charles Babington, \textit{Hawkish Democrats Join Calls for Pullout}, WASH. POST, Nov. 18, 2005, A1; \textit{see} Spectar, \textit{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. 511

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. 512 Thomas I. Emerson remarked that “[i]f democracy is to work,” “[t]he public, as sovereign, must have all information available in order to instruct its servants, the government.” 513 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. 514 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. 515 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.” 516 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.” 517 The case and controversy involved indictments of non-government actors for selling weapons in violation of an executive order, 518 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.
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.
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.\textsuperscript{519}

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.\textsuperscript{520} 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 spurious, classified information into war powers authorization was precisely what led to Congress’s Gulf of Tonkin Resolution for the Vietnam War.\textsuperscript{521}

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.”


\textsuperscript{520} See JOHNSON, supra note 77, at 10; Eyth, supra note 301, at 57-58; Paul Gumina, \textit{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, \textit{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.