

POSTMODERN CENSORSHIP OF PACIFIST CONTENT ON TELEVISION AND THE INTERNET

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This Essay explores the legal history of the censorship of pacifist and antiwar speech. It devotes particular attention to postmodern techniques for chilling the production of pacifist content, or reducing the total output of it. Pacifist speech is defined broadly, as speech advocating peaceful alternatives to war or militarism, articulating doctrines or principles which urge forswearing war or violence in international disputes, or expressing reasons to oppose specific military episodes or entire wars.¹

A fundamental assumption of democratic governance is that the public keeps informed of important news and points of view

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¹ See THE NEW SHORTER OXFORD ENGLISH DICTIONARY 2065 (4th. ed. 1993); *Pacifism Definition*, WOLFRAMALPHA, <http://www.wolframalpha.com/input/?i=pacifism> (last visited Feb. 1, 2011); *Font v. Laird*, 318 F. Supp. 891, 897 (D. Md. 1970) (giving the broader contours of pacifism beyond the dictionary definition, “[s]o-called selective pacifism is essentially a political question of support or nonsupport of a war and cannot be judged in terms of special moral imperatives; such political opposition to a particular war is more properly expressed through recognized democratic processes and is entitled to no exemption from decisions reached through these processes” (quoting NAT’L ADVISORY COMMISSION ON SELECTIVE SERVICE, IN PURSUIT OF EQUITY. WHO SERVES WHEN NOT ALL SERVE? 48–51 (1967))); J. PATOUT BURNS, WAR AND ITS DISCONTENTS: PACIFISM AND QUIETISM IN THE ABRAHAMIC TRADITIONS 19 (1996) (comparing selective pacifism to opposition to unjust wars); see also Gregory S. Brown, *French Fries Or Humble Pie?*, LAS VEGAS MERCURY, Feb. 20, 2003, available at <http://www.lasvegasm Mercury.com/2003/MERC-Feb20Thu2003/20709649.html>; Editorial, *Is Pacifism Now a Crime?*, VICTORIA ADVOCATE, Mar. 16, 2006, at 11A; Brad Norington, *US Slams European Pacifism—NATO Complacency Is Hurting War Effort*, AUSTRALIAN, Feb. 25, 2010, at 10; Jason White, *Differing U.S. Theologians Justify War and Pacifism*, ST. PAUL PIONEER PRESS, Mar. 22, 2003, at E10.

by exposure in the press, whether print or electronic.² Yet the public is often denied complete information by governments and private media conglomerates acting in close concert.³

Legal scholars often condemn direct censorship by the U.S. Congress, President, or Supreme Court as violations of the First Amendment and basic human rights. They often, however, neglect the extent to which private parties may be mobilized by the government to foment false beliefs and propagate misleading portraits of vital public policy issues, foremost among them issues of foreign and military policy.⁴

² See Hannibal Travis, *Of Blogs, Ebooks, and Broadband: Access to Digital Media as a First Amendment Right*, 35 HOFSTRA L. REV. 1519, 1537–39, 1556–59 (2007).

³ See JEFF COHEN & NORMAN SOLOMON, *THROUGH THE MEDIA LOOKING GLASS: DECODING BIAS AND BLATHER IN THE NEWS* (1995).

⁴ For notable exceptions to this pattern of neglect see C. EDWIN BAKER, *ADVERTISING AND A DEMOCRATIC PRESS* 50–56 (1994); YOCHAI BENKLER, *THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM* 182 (2006); LAWRENCE LESSIG, *CODE AND OTHER LAWS OF CYBERSPACE* *passim* (1999); Joan Baker, *Free Speech and Federal Control: The US Approach to Broadcasting Regulation*, 39 MOD. L. REV. 147 (1976); Jerome A. Barron, *Access to the Media—A Contemporary Appraisal*, 35 HOFSTRA L. REV. 937 (2007); Jerome A. Barron, *An Emerging First Amendment Right of Access to the Media?*, 37 GEO. WASH. L. REV. 487 (1969); Roy Bates, *Private Censorship of Movies*, 22 STAN. L. REV. 618 (1970); Louis L. Jaffe, *The Editorial Responsibility of the Broadcaster: Reflections on Fairness and Access*, 85 HARV. L. REV. 768 (1972). For notable examples among journalistic commentary and media criticism see also DOUGLAS KELLNER, *THE PERSIAN GULF TV WAR* 1, 17–29, 96–97, 106 nn. 11–12, 115, 118, 126–28, 198–203, 271–75, 404 (1992); BRIAN MARTIN, *INFORMATION LIBERATION* *passim* (1998); DANNY SCHECHTER, *THE MORE YOU WATCH, THE LESS YOU KNOW* 448 (1997); BARBIE ZELIZER, *ABOUT TO DIE: HOW NEWS IMAGES MOVE THE PUBLIC* 16–19, 289 (2010); MEDIA MATTERS FOR AMERICA, *IF IT'S SUNDAY, IT'S CONSERVATIVE: AN ANALYSIS OF THE SUNDAY TALK SHOW GUESTS ON ABC, CBS, AND NBC, 1997–2005*, at 1 (2006), http://mediamatters.org/static/pdf/MMFA_SundayShow_Report.pdf; Peter Hart, *Media Bias: How to Spot It—And How to Fight It*, in *THE FUTURE OF MEDIA: RESISTANCE AND REFORM IN THE 21ST CENTURY* 54 (Robert W. McChesney et al. eds., 2005); James Reston, *The Press, the President, and Foreign Policy*, 44 FOREIGN AFF. 553 (1966), *reprinted in* CENSORSHIP IN THE UNITED STATES 133–37 (Grant S. McClellan ed., 1967); Jacqueline Sharkey, *News Media Lose the War with the Pentagon*, in *CENSORED 1992: NEWS THAT DIDN'T MAKE THE NEWS—AND WHY* 60 (Carl Jensen ed., 1993); Norman Solomon, *Manipulating Minds*, in *WAR AFTER WAR* 96, 99 (Nancy J. Peters ed., 1992); Joel Achenbach, *Battles Without Bodies; The Media Soften The*

This Essay explores postmodern censorship of pacifist expression. Postmodern censorship is distinguishable from its pre-modern or modern counterparts by its immaterial, seemingly nonviolent ways of watching and influencing apparently private activity, in contrast to a modern way of censoring speech by using violence as an ostentatious tyrant would.⁵ While still sculpting citizens' beliefs and behaviors,⁶ postmodern power applies itself to private technologies and the enjoyment of what seems to be leisure time or tools such as television or radio.⁷ Postmodern regulation directs itself at privatized implementation of governmental objectives, including the lies and crimes of governments.⁸ It simulates real events in spectacles of illusion and artifice.⁹ In the postmodern era, everything is increasingly artificial, real events are excluded from the public spectacle, and the meaning of words and concepts is lost.¹⁰

Hard Realities, WASH. POST, Feb. 5, 1991, at C01; Peter Howe, *Which Photos Tell Truer Story?*, USA TODAY, Apr. 10, 2003, at 15A; Molly Ivins, *Media Concentration is a Totalitarian Tool*, BOULDER DAILY CAMERA, Jan. 31, 2003, available at <http://www.commondreams.org/views03/0131-09.htm>; Steve Rendall & Tara Broughel, *Amplifying Officials, Squelching Dissent*, EXTRA! (N.Y.C.), May/June 2003, available at <http://www.fair.org/index.php?page=1145>; Kay Semion, *Who We Are and What We Do: An Internet-researched Update*, MASTHEAD, Oct. 1, 2006, at 12–13; David Zurawik, *Battle Stations: TV Networks Plan Strategy for Covering a War in the Gulf*, BALT. SUN, Jan. 14, 1991, at 1B.

⁵ See James Boyle, *Foucault in Cyberspace: Surveillance, Sovereignty, and Hardwired Censors*, 66 U. CIN. L. REV. 177, 177–80, 182–83 (1997).

⁶ See Reza Dibadj, *Postmodernism, Representation, Law*, 29 U. HAW. L. REV. 377, 410 (2007).

⁷ See JEAN BAUDRILLARD, *THE CONSUMER SOCIETY: MYTHS AND STRUCTURES* 154 (1998); ALLISON CAVANAGH, *SOCIOLOGY IN THE AGE OF THE INTERNET* 41 (2007); ALEXANDER R. GALLOWAY, *PROTOCOL: HOW CONTROL EXISTS AFTER DECENTRALIZATION* 114–15 tbl.3.1 (2009).

⁸ See Banu Helvacioğlu, *An Ethical Politics of Our Times: Moral Selves or Solidarity?*, in *CRITICAL POLITICAL STUDIES: DEBATES AND DIALOGUES FROM THE LEFT* 368, 383 (Abigail B. Bakan & Eleanor MacDonald eds., 2002).

⁹ See Jean Baudrillard, *Simulacra and Simulations*, in JEAN BAUDRILLARD: *SELECTED WRITINGS* 167, 170, 172, 179–80, 182 (Mark Poster ed., 1988); FRANK WEBSTER, *THEORIES OF THE INFORMATION SOCIETY* 247–48 (2006).

¹⁰ See WEBSTER, *supra* note 9, at 247–48.

I. THE DEVELOPMENT OF PACIFISM

Within Western culture, pacifism emerged primarily as a Christian movement.¹¹ It has been said that Christianity

¹¹ See, e.g., *Matthew* 5:9 (“Blessed are the peacemakers, for they will be called children of God.”); *id.* at 5:22 (“[A]nyone who is angry with a brother or sister will be subject to judgment.”); *id.* at 5:39, 42 (“I tell you, do not resist an evil person. If anyone slaps you on the right cheek, turn to them the other cheek also Give to the one who asks you, and do not turn away from the one who wants to borrow from you.”); *id.* at 5:43–44, 46 (“You have heard that it was said, ‘Love your neighbor and hate your enemy.’ But I tell you, love your enemies and pray for those who persecute you, that you may be children of your Father in heaven If you love those who love you, what reward will you get?”); CATECHISM OF THE CATHOLIC CHURCH §§ 2307–08 (Vatican trans., 1993), available at http://www.vatican.va/archive/ENG0015/_P81.HTM (“Because of the evils and injustices that accompany all war, the Church insistently urges everyone to prayer and to action so that the divine Goodness may free us from the ancient bondage of war. All citizens and all governments are obliged to work for the avoidance of war.”) (footnotes omitted); see also LISA SOWLE CAHILL, LOVE YOUR ENEMIES: DISCIPLESHIP, PACIFISM, AND JUST WAR THEORY 41 (1994) (“[T]he Christian fathers of the first three centuries [after Christ’s death and resurrection] were generally adamant that discipleship requires close adherence to the nonviolent and countercultural example of Jesus’ own life”); DAVID CHURCHMAN, WHY WE FIGHT: THEORIES OF HUMAN AGGRESSION AND CONFLICT 192 (2005) (“We utterly deny all outward wars and strife, and fightings with outward weapons, for any end, or under any pretense whatever [T]he Spirit of Christ by which we are guided is not changeable, so as once to command us from a thing as evil, and again to move unto it” (quoting Quakers, Declaration to Charles II (1660)); Pope Benedict XV, Encyclical Letter, *Pacem, Dei Munus Pulcherrimum* ¶ 13 (May 23, 1920), available at http://www.vatican.va/holy_father/benedict_xv/encyclicals/documents/hf_ben-xv_enc_23051920_pacem-dei-munus-pulcherrimum_en.html (“Therefore, Venerable Brethren, We pray you and . . . wish that you should exhort your priests, as the ministers of peace, to be assiduous in urging this love of one’s neighbour and even of enemies which is the essence of the Christian life.”); *id.* ¶ 7 (referring to “the pardoning of injuries which is no less solemnly commanded by the Lord: ‘But I say to you, love your enemies; do good to them that hate you; pray for those that persecute you and calumniate you.’” (quoting *Matthew* 5:44–45)); Frederick L. Brown, Stephen M. Kohn & Michael D. Kohn, *Conscientious Objection: A Constitutional Right*, 21 NEW ENG. L. REV. 545, 549 (1986) (noting that “Christianity teacheth people to beat their swords into plowshares, and their spears into pruning hooks, and to learn war no more” (quoting WILLIAM PENN, RISE AND PROGRESS OF THE QUAKERS, IV (1664))); Carl Joachim Friedrich, Book Review, 45 HARV. L. REV. 1277, 1278 (1932) (reviewing LEO GROSS, PAZIFISMUS UND IMPERIALISMUS (1931)) (“[B]oth imperialism and pacifism have, for obvious reasons, ancient roots in the political writings of western Europe which show the basis of all this thought more clearly than the

revolutionized the conception of ancient Greco-Roman statism that human beings are primarily subjects of a political authority, and secondarily individual personalities or souls.¹² The Roman Empire and its successor empires in Europe and Asia restored the ancient Greco-Roman conception of the inferiority of the person to the demands of national and imperial domination.¹³

contemporary literature.”).

Although the Book of Exodus states “Thou shalt not kill” in a popular English translation (King James), the commandment is better rendered from Hebrew into English as: “Thou shalt not murder” or “Thou shalt not commit illegal killing.” Therefore, in a popular twentieth-century English translation of Exodus, the commandment is rendered: “You shall not murder.” *Exodus* 20:13 (NIV). The proposition that killing during wartime was not intended to be prohibited by the Book of Exodus is supported by both the wording of verse 20:13, which could have used the more neutral term *harag* (kill) rather than *ratsach* (murder), and the provisions of the remainder of the Book of Exodus, which call for the systematic killing of pagans and polytheists. See JOEL M. HOFFMAN, *AND GOD SAID: HOW TRANSLATIONS CONCEAL THE BIBLE’S ORIGINAL MEANING* 186 (2010); *Exodus* 22:18 (NIV) (“Do not allow a sorceress to live.”); *id.* 22:20 (“Whoever sacrifices to any god other than the LORD must be destroyed.”). Later books often collected together with the Book of Exodus to form the Jewish canon are even more clear that war and killing are permitted notwithstanding the commandment of Exodus 20:13. See HOFFMAN, *supra* note 11, at 100 (describing *Book of Numbers* 31); *Numbers* 31:1–7 (“The LORD said to Moses, ‘Take vengeance on the Midianites for the Israelites. After that, you will be gathered to your people. . . .’ [The clans of Israel] fought against Midian, as the LORD commanded Moses, and killed every man.”); *Numbers* 31:14–17 (“Moses was angry with the officers of the army—the commanders of thousands and commanders of hundreds—who returned from the battle. ‘Have you allowed all the women to live?’ he asked them Now kill all the boys. And kill every woman who has slept with a man, but save for yourselves every girl who has never slept with a man.”); 1 *Samuel* 15:3 (“LORD Almighty” tells king of Israel: “Now go, attack the Amalekites and totally destroy everything that belongs to them. Do not spare them; put to death men and women, children and infants, cattle and sheep.”).

¹² See, e.g., Paul M. Landskroener, *Not the Smallest Grain of Incense: Free Exercise and Conscientious Objection to Draft Registration*, 25 VAL. U. L. REV. 455, 477 n.117 (1991) (quoting G.H.C. MACGREGOR, *THE NEW TESTAMENT BASIS OF PACIFISM* 109 (1936)).

¹³ See CHRISTOPHER M. BELLITTO, *RENEWING CHRISTIANITY: A HISTORY OF CHURCH REFORM FROM DAY ONE TO VATICAN II* 36 (2001) (describing the “Roman imperial ideology with which Charlemagne wrapped himself” and attempted a “renewal of the Roman empire”); *id.* (“Another element of renewal developed when the Carolingian Empire sought to renew a golden era of Constantinian Christianity.”); CORNEL WEST, *DEMOCRACY MATTERS: WINNING THE FIGHT AGAINST IMPERIALISM* 147–48 (2004)).

The Society of Friends (Quaker) movement popularized pacifism in Britain and the United States, among other countries.¹⁴ Many Americans “denounced the militarism of Washington in 1776 and of Lincoln in 1861.”¹⁵ Antiwar sentiment was so widespread by 1916 that presidential candidate Woodrow Wilson ran on the slogan, “He kept us out of war,” referring to World War I.¹⁶ A similar dynamic emerged in the 1930s, as President Franklin Delano Roosevelt ran on a promise not to send American youth to any foreign wars.¹⁷ Over 50 percent of Americans believed that fighting a war in Vietnam had been a mistake during the war years 1968 to 1974.¹⁸ Between January and April 1971, the percentage of Americans believing the war to be fundamentally wrong and immoral rose from 47%

¹⁴ See James Bowden, *THE HISTORY OF THE SOCIETY OF FRIENDS IN AMERICA* (Arno Press 1972) (1850); Brown et al., *supra* note 11, at 547–55. The Society of Friends apparently began as a loose group of like-minded English-speaking Christians who listened to the light of Jesus Christ in their own hearts. See JOHN STEPHENSON ROWNTREE, *THE SOCIETY OF FRIENDS: ITS FAITH AND PRACTICE* 18–25 (1901). They are credited along with other English Christians and parliamentarians with ending the slave trade in the British Empire during the first half of the nineteenth century. See *Anthony Benezet*, in 3 *QUAKER BIOGRAPHIES* 95 (1912) (“By the aid of Thomas Clarkson, Granville Sharp, William Wilberforce, and the Society of Friends, Great Britain was enabled to liberate 800,000 slaves in the West India Islands.”); JOHN STOUGHTON, *WILLIAM WILBERFORCE* 67 (1880) (Society of Friends petitioned the Parliament of Great Britain and Northern Ireland to abolish slave trade a generation before the act to do so was passed); WILLIAM WILBERFORCE: *GREATEST WORKS* 11 (Lloyd Hildebrand ed., 2007) (discussing same).

¹⁵ THEODORE ROOSEVELT, *RIGHTEOUS PEACE THROUGH NATIONAL PREPAREDNESS: SPEECH OF THEODORE ROOSEVELT AT DETROIT, MAY 19, 1916*, at 5 (Kessinger Publ’g 2006) (1916).

¹⁶ BARBARA A. BARDES, MACK C. SHELLEY, STEFFEN W. SCHMIDT, *AMERICAN GOVERNMENT AND POLITICS TODAY 2008: THE ESSENTIALS* 529 (2008).

¹⁷ See KEIICHIRO KOMATSU, *ORIGINS OF THE PACIFIC WAR AND THE IMPORTANCE OF ‘MAGIC,’* 185 (1999). On one occasion, Roosevelt emphasized the point: “I have said this before, but I shall say it again and again and again: Your boys are not going to be sent into any foreign wars.” *World War II*, in *ENCYCLOPEDIA OF AMERICAN POLITICAL HISTORY* 918 (Michael Kazin ed., 2010).

¹⁸ EUGENE R. WITTKOPF, *FACES OF INTERNATIONALISM: PUBLIC OPINION AND AMERICAN FOREIGN POLICY* 174 (1990).

to 58%.¹⁹ In the early 1980s, over 70% of Americans believed the war to have been wrong and/or immoral, looking back.²⁰ By the late 1980s, an estimated twenty-six churches and sects in the United States counseled their adherents to avoid war and killing, out of whom at least fifteen were Christian denominations.²¹

The British Empire persecuted pacifists both on its own territory and in the colonies.²² Pacifism became formally recognized during the American Revolution as a legitimate act of conscience.²³ The Founders regarded pacifism as a natural and constitutional right, with James Madison proposing that the Second Amendment to the Constitution clarify that “no one religiously scrupulous of bearing arms, shall be compelled to render military service in person.”²⁴ This was aimed at state militia service.²⁵ The clause was stricken, but only after the drafters of the Bill of Rights had voted to retain it.²⁶ One drafter noted:

¹⁹ See *id.* at 312 tbl.A.5.9.

²⁰ See *id.*

²¹ See Brown et al., *supra* note 11, at 567 n.180; Landskroener, *supra* note 12, at 475 n.110.

²² See William D. Palmer, *Time to Exorcise Another Ghost From the Vietnam War: Restructuring the In-Service Conscientious Objector Program*, 140 MIL. L. REV. 179, 182 (1993) (“Some [British] colonies excused objectors from compulsory service in the militias, while other colonies forced conscientious objectors to choose between fidelity to their religious beliefs and heavy taxes, fines, or even prison.”); Brown et al., *supra* note 11, at 547 (describing persecution of pacifist Quakers in the seventeenth century on the British mainland for blasphemy and refusing to kill); *id.* at 551 (“In the mid 1600s, Massachusetts passed a number of laws directed at Quakers, including banishing them from the colony. A Quaker who returned after banishment could be sentenced to death.”); *id.* (“In 1704, an anti-Quaker governor [of New Jersey] passed a broad militia act which imposed heavy fines and confiscation of property of those who refused to train [as militia].”).

²³ See Palmer, *supra* note 22, at 182 (“Early in the American Revolution the Continental Congress adopted a resolution recognizing and respecting conscientious objections to compulsory service in the state militias when such objections arose from religious beliefs.”).

²⁴ Brown et al., *supra* note 11, at 555 (Bernard Schwartz, *The Great Rights of Mankind* 171 (1977)).

²⁵ See *id.* (proposed amendment referred to “well regulated militia,” not the federal army).

²⁶ See *House of Representatives, Amendments to the Constitution, Aug. 17–20, 1789*, in 1 ANNALS OF CONG. 749–52, 766–67 (1789), available at <http://press-pubs.uchicago.edu/founders/documents/amend1Is6.html>.

It is well known that those who are religiously scrupulous of bearing arms, are equally scrupulous of getting substitutes or paying an equivalent. Many of them would rather die than do either one or the other; but he did not see an absolute necessity for a clause of this kind. We do not live under an arbitrary Government, said he, and the States, respectively, will have the government of the militia, unless when called into actual service; besides, it would not do to alter it so as to exclude the whole of any sect Certainly it will be improper to prevent the exercise of such favorable dispositions, at least whilst it is the practice of nations to determine their contests by the slaughter of their citizens and subjects.²⁷

Another, while opposing Madison's language, noted that there were "many sects . . . who are religiously scrupulous in this respect," and many persons who would want to be "get excused from bearing arms."²⁸

The demands of modern warfare overcame religious conscience in the nineteenth and twentieth centuries.²⁹ During the U.S. Civil War, the Union imposed conscription during the first three years of the war, which "made no provision for Quakers and others having conscientious objections to military service."³⁰ During World War I, Congress enacted a conscription law that required pacifists to perform non-combat military operations, and to submit their request for an exemption from the draft to local bureaucracies, which resulted in only about 2% of conscripted men raising a successful request for an exemption.³¹ For World War II, Congress established a conscription regime that saw fewer than one-third of 1% of those registered for

²⁷ *Id.*

²⁸ *Id.*

²⁹ See DENNIS M. DREW & DONALD M. SNOW, *THE EAGLE'S TALONS: THE AMERICAN EXPERIENCE AT WAR* 196 (1988) (describing how modern wars such as World War II became "total wars" in which entire population was mobilized to participate); Brown et al., *supra* note 11, at 568 (arguing, with some exaggeration, that "federal courts are denied the power to grant [conscientious objection to war] claims" so that "the rights of conscience have been completely ignored."); Habold G. Molton, *Why Not Industrial Conscription?*, 206 N. AM. REV. 218 (1917) (describing need for mobilization of entire population in modern wars).

³⁰ Palmer, *supra* note 22, at 182–84.

³¹ See *id.* at 185.

conscription successfully asserting their pacifist conscience.³²

Since 1956, Title 10 of the United States Code has declared that exemption from military service is available from combat service only “because of religious belief,” so an exemption, in the event of a draft, may not be available to those whose pacifism is based on the value of human life, and may not relieve persons from contributing to the death or maiming of other human beings by virtue of forced military logistics work.³³ The exemption, moreover, is only available “if the conscientious holding of that [religious] belief is established under such regulations as the President may prescribe.”³⁴ The former regulations prescribed under this statute were extremely vague in denying conscientious objector status to those whose “moral and ethical beliefs are against participation in war” are not “the primary controlling force in the applicant’s life,” and to those who would fight a war for the survival of the nation or of the human race, but would not fight minor wars for power or material gain.³⁵ These provisions seem to contemplate that only clerics, monks, and nuns are assured of an exemption.

II. THE HISTORY OF CENSORSHIP OF PACIFIST SPEECH BY LAW

A. *Eighteenth Century*

In the eighteenth century, President John Adams signed the

³² *See id.*

³³ 10 U.S.C. § 312(b) (2006).

³⁴ *Id.*

³⁵ 32 C.F.R. § 75.5(c) (2006), *repealed by* 72 Fed. Reg. 33677-01 (June 19, 2007). *See also* Allison v. Stone, No. C-92-1541 BAC, 1992 U.S. Dist. LEXIS 12429 (N.D. Cal. Aug. 4th, 1992); United States *ex rel.* Brandon v. O’Malley, No. 91 C 1016, 1991 U.S. Dist. LEXIS 11492 (N.D. Ill. Aug. 19th, 1991); Johnson v. Stone, No. C-91-0427 EFL, 1991 U.S. Dist. LEXIS 4053 (N.D. Cal. Mar. 19, 1991); Ballard v. Sec’y of the Army, Civ. No. 90-12509-H (D. Mass. July 8, 1991); Wiggins v. Sec’y of the Army, 751 F. Supp. 1238 (W.D. Tex. 1990); H.R. 5060, 102d Cong., 2d Sess. (1992); Peter Applebome, *Epilogue to Gulf War: 25 Marines Face Prison*, N.Y. TIMES, May 3, 1991, at A14; Elizabeth Hudson, *Army Doctor Continues Hunger Strike*, WASH. POST, Dec. 13, 1990, at A44; Alan C. Miller & Ronald J. Ostrow, *Some Fear Civil Liberties May Be Added to Conflict’s Toll*, L.A. TIMES, Feb. 14, 1991, at A9; Rorie Sherman, *Challenge Brought Over Army Regulation*, NAT’L L.J., Aug. 5, 1991, at 22; Rorie Sherman, *War Is Not Over For “Cos,”* NAT’L L. J., Aug. 5, 1991, at 1.

Sedition Act of 1798 to secure the power to promote war with revolutionary France by censoring opposition by the Republican Party of Thomas Jefferson and others who sympathized with the French Revolution's pro-democratic objectives.³⁶ Under the Sedition Act, the Adams administration prosecuted a congressman for accusing the President of grasping for power, a publisher for saying that the American people disliked standing armies, and a journalist for arguing that wars with European empires might increase the nation's debt.³⁷ Ten reporters or editors were convicted of seditious crimes.³⁸ The law's reach extended to publications "intended to excite the people to oppose any law or act of the President in pursuance of law, or to resist, or oppose or defeat, any law," which "provoked great resentment," so "when it expired by its own limitation in 1801 it was not renewed."³⁹ Disloyalty laws proliferated at the state level as well.⁴⁰

B. Nineteenth Century

In the nineteenth century, the United States was engaged in twin wars to maintain a large population of African slaves in a miserable state of unfreedom and premature death, and to exterminate or deracinate its native populations.⁴¹ The first attempt to censor periodicals sent by mail was proposed by the

³⁶ NANCY C. CORNWELL, FREEDOM OF THE PRESS: RIGHTS AND LIBERTIES UNDER THE LAW 37 (2004) ("The Federalists were tired of being attacked by the Republican press and feared that public opinion might swing against the Federalist government.").

³⁷ See Geoffrey R. Stone, *Free Speech in World War II: "When Are You Going to Indict the Seditionists?"*, 2 INT'L J. CONST. L. 334, 349, 351–53 (2004).

³⁸ *Id.* at 38.

³⁹ *Masses Publ'g Co. v. Patten*, 246 F. 24, 29 (2d Cir. 1917).

⁴⁰ See Stone, *supra* note 37, at 362.

⁴¹ ROBERT W. COAKLEY, THE ROLE OF FEDERAL MILITARY FORCES IN DOMESTIC DISORDERS, 1789–1878, at 12, 26, 78, 92–94, 293, 300, 334–37 (1988); TIM ALAN GARRISON, THE LEGAL IDEOLOGY OF REMOVAL: THE SOUTHERN JUDICIARY AND THE SOVEREIGNTY OF NATIVE AMERICAN NATIONS 3 (2009); ANDREW C. LENNER, THE FEDERAL PRINCIPLE IN AMERICAN POLITICS, 1790–1833, 135 (2001); JOHN MISSALL & MARY LOU MISSALL, THE SEMINOLE WARS: AMERICA'S LONGEST INDIAN CONFLICT (2004); DANIEL RASMUSSEN, AMERICAN UPRISING: THE UNTOLD STORY OF AMERICA'S LARGEST SLAVE REVOLT (2011); Michael James Forêt, Book Review, 38 LA. HIST. 377, 378 (1997).

administration of Andrew Jackson, who actively prosecuted both wars and became the namesake of both Jackson, Mississippi and Jacksonville, Florida. Abolitionist literature, which frequently had Christian pacifist themes,⁴² was one focus of this censorship. The Incendiary Publications Bill, which failed to pass, sought to suppress abolitionist literature from reaching southern slaves of African descent.⁴³ Virginia passed a law in 1849 prohibiting the advocacy of the idea that slavery was immoral.⁴⁴ Other southern states seized abolitionist literature at the post office, and demanded a federal ban on abolitionism.⁴⁵

After the secession of the Confederate States, federal censorship shifted to target the proslavery camp as well as pacifists. During the Civil War, resistance to the war and military conscription prompted both the United States and the Confederate States to impose censorship, particularly on newspapers and other mails.⁴⁶ The federal government closed New York newspapers for criticizing the war.⁴⁷ The army attacked newspapers' offices and arrested writers and editors.⁴⁸ The military attempted to condition use of the telegraph wires to reporting that did not reveal troop movements, but the press resisted not one but two attempts to impose such "voluntary" or agreed-upon censorship.⁴⁹ Military commanders excluded war correspondents from the battlefield after incidents in which

⁴² ALEXANDER MCLEOD, NEGRO SLAVERY UNJUSTIFIABLE: A DISCOURSE 15 (10th ed. 1860); RELIGIOUS TRACT SOC'Y, THE NEGRO SLAVE, OR, LOVE YOUR ENEMIES (1800); HARRIET ELIZABETH BEECHER STOWE, UNCLE TOM'S CABIN; OR, LIFE AMONG THE LOWLY (1851); CHARLES SUMNER, THE BARBARISM OF SLAVERY: SPEECH OF MR. CHARLES SUMNER ON THE BILL 46, 101 (1860); W. A. Essery, *Speeches*, 1863 ADVOC. PEACE 311; Theodore Parker, *A Sermon of Slavery*, in THE COLLECTED WORKS OF THEODORE PARKER: DISCOURSES OF SLAVERY 4 (Frances Power Cobbe ed., 1863).

⁴³ Jay A. Sigler, *Freedom of the Mails: A Developing Right*, in MASS MEDIA AND THE LAW 339, 339–40 (David G. Clark & Earl R. Hutchison eds., 1970).

⁴⁴ See CORNWELL, *supra* note 36, at 41.

⁴⁵ See *id.* at 41–43.

⁴⁶ See ANTHONY R. FELLOW, AMERICAN MEDIA HISTORY 131–33, 136 (2d ed. 2010).

⁴⁷ See CORNWELL, *supra* note 36, at 43.

⁴⁸ See *id.* at 43–44.

⁴⁹ *Id.*

reporters revealed breaking news or news that would impede either the Union or Confederate war efforts.⁵⁰ The Postmaster General of the United States seized newspapers and telegrams subversive of the war effort and the army shut down newspapers.⁵¹

C. *Twentieth Century*

The Espionage Act of 1917 provided severe punishment for any person who, “when the United States is at war,” shall willfully make or convey false reports or false statements with intent to interfere with the operation and success of the military or naval forces of the country, or with the intent to promote the success of its enemies, or who shall cause, or attempt to cause, insubordination, disloyalty, mutiny or refusal of duty in such forces, or who shall willfully obstruct the recruiting and enlistment service of the United States.⁵²

President Woodrow Wilson declared that disloyal Americans “sacrificed their right to civil liberties.”⁵³ Justice Oliver Wendell Holmes argued that Wilson and his Postmaster General, Albert Burleson, gained “a practically despotic power.”⁵⁴ The army investigated and the police arrested, beat, and searched the offices of an anarchist publication that opposed the U.S. invasion of Russia in 1918, and the publishers were charged with publishing “disloyal material intended to obstruct the war and cause contempt for the government of the United States.”⁵⁵ Sentenced to fifteen years in prison, one member of the group publishing the material appealed to the Supreme Court, which affirmed two convictions over Justice Holmes’ dissent, which argued that the material had no “appreciable tendency” to “hinder

⁵⁰ See FELLOW, *supra* note 46, at 133, 136.

⁵¹ See *id.* at 133–37.

⁵² United States *ex rel.* Milwaukee Soc. Democratic Publ’g Co. v. Burleson, 255 U.S. 407, 411 (1921) (citing 40 Stat. 217, § 3, tit. 1, June 15, 1917, Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 10212c). See also GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME FROM THE SEDITION ACT OF THE 1780S TO THE WAR ON TERRORISM 150, 153–54 (2004); Sigler, *supra* note 43, at 341.

⁵³ STONE, *supra* note 52, at 137.

⁵⁴ Burleson, 255 U.S. at 437.

⁵⁵ STONE, *supra* note 52, at 139.

the success of the government” in its invasion of Russia.⁵⁶

President Franklin Roosevelt’s administration used the Espionage Act to ban major magazines from the postal system, with about thirty prohibited by 1942 alone.⁵⁷ In 1940, the Alien Registration Act prohibited the knowing or willful advocacy, teaching, or advising of the duty or necessity of overthrowing the U.S. government.⁵⁸ President Roosevelt largely disarmed the law by appointing a member of the American Civil Liberties Union, Francis Biddle, as Attorney General.⁵⁹ Biddle and his successor, Robert Jackson, ensured that few prosecutions resulted, despite numerous opportunities and potential defendants.⁶⁰ Despite some respect for freedom of expression at the federal level, state and local officials tolerated and participated in the systematic persecution of the anti-war Jehovah’s Witnesses, about 1,600 of whom “were beaten by mobs, tarred and feathered, tortured, castrated, and killed in more than forty states.”⁶¹

The Cold War saw renewed efforts to present a one-sided picture of America’s wars in Korea and Vietnam, as well as covert operations in Africa and the Middle East, as justified. In 1950, Congress overrode President Harry Truman’s veto to pass the McCarran Act, which established a Subversive Activities

⁵⁶ *Abrams v. United States*, 250 U.S. 616, 628 (1919) (Holmes, J., dissenting). See also STONE, *supra* note 52, at 204–06.

⁵⁷ See Stone, *supra* note 37, at 361–62.

⁵⁸ See STONE, *supra* note 52, at 251.

⁵⁹ See *id.* at 254.

⁶⁰ See *id.* at 251–54.

⁶¹ Stone, *supra* note 37, at 364. See also Associated Press, *Members of Sect Beaten in Illinois*, EVENING INDEP. (St. Petersburg, Fla.), June 17, 1940, at 1; ‘Conchie’ Cites Bible on War; Gets 5 Years on Draft Count, MILWAUKEE J., May 4, 1943, at 1; *Curbs on Freedom by States Feared; Civil Liberties Union Predicts Attempt to Restrict Labor*, N.Y. TIMES, Jan. 2, 1941, at 8; *Jail for Jehovah Men*, N.Y. TIMES, Oct. 2, 1942, at 9; *Jehovah Sect Leader Dies*, L.A. TIMES, Jan. 11, 1942, at 11. Jehovah’s Witnesses were widely persecuted:

Since May, 1940, the Hierarchy and the American Legion, through such mobs that have taken the law into their own hands, violently worked havoc indescribable. Jehovah’s witnesses have been assaulted, beaten, kidnapped, driven out of towns . . . [with] damages totaling very many thousands of dollars.

This demonized violence . . . charged Jehovah’s witnesses with sedition and like crimes of being ‘against the government.’

JEHOVAH’S WITNESSES IN THE DIVINE PURPOSE 181 (1959).

Control Board to ban suspected communists from sensitive employment, and to create a registry of them for use in detaining all persons inclined to spying or sabotage in time of war or rebellion.⁶² Truman regarded the Act as an attempt to “greatly weaken our liberties.”⁶³ In 1962, Congress banned Americans’ receipt by mail of “political propaganda” from overseas.⁶⁴ President Lyndon Johnson himself might even call and complain to the networks’ presidents when television networks attempted to broadcast documentaries that included graphic combat footage.⁶⁵

Under the Reagan and Bush I administrations, the Defense Department prevented reporters from covering much of the human cost of American bombing campaigns in Grenada, Panama, and Iraq. During Grenada and Panama, President Reagan and his Defense Department “restricted press access [to the war] and controlled information [about it] not for national security purposes, but for political purposes, to protect the image and priorities of the Defense Department and its civilian leaders, including those of the president, the commander-in-chief.”⁶⁶ The restrictions grew out of military studies of damaging television coverage of the Vietnam War, which recommended that “the government would have to keep journalists out of the theater of operations.”⁶⁷ Such coverage had clear moral implications.⁶⁸

The Persian Gulf War against Iraq in 1991 represented a shift towards postmodern, privatized censorship in the post-Vietnam era, with the manifest purpose of preventing the full

⁶² See STONE, *supra* note 52, at 335.

⁶³ *Id.*

⁶⁴ Sigler, *supra* note 43, at 345.

⁶⁵ STONE, *supra* note 52, at 443.

⁶⁶ Sharkey, *supra* note 4, at 60.

⁶⁷ *Gulf War Censorship*, in *ENCYCLOPEDIA OF AMERICAN JOURNALISM* 206 (Stephen L. Vaughn ed., 2007).

⁶⁸ See, e.g., SEYMOUR M. HERSH, *COVER-UP: THE ARMY’S SECRET INVESTIGATION OF THE MASSACRE AT MY LAI* 4, 38–47 (1972); SEYMOUR M. HERSH, *MY LAI 4: A REPORT ON THE MASSACRE AND ITS AFTERMATH* 5–11, 23 (1970); James M. Gavin, *War in Vietnam Both a Moral and Political Problem*, SARASOTA HERALD-TRIB., Dec. 2, 1967, at 5; Siegfried Kogelfranz, *Study of the Viet Cong That the US Suppressed*, CHI. TRIB., Nov. 21, 1971, at A1; *Search, Destroy: Will It Go On?*, L.A. TIMES, Mar. 31, 1968, at K4; *Vietnam: ‘Victory!’ Cry Washington, Hanoi*, L.A. TIMES, Mar. 12, 1967, at L4.

reality of war from reaching the public. President Bush's "Operation Desert Shield Ground Rules and Supplementary Guidelines" of January 7, 1991, stated that, in addition to sensitive operational information, "details of major battle damage or major personnel losses of specific U.S. units" is "information [that] should not be reported," even though the enemy would be aware of such details due to their role in causing them.⁶⁹ In addition, members of the press were ordered to "remain with [their] military escort at all times, until released, and follow their [escort's] instructions regarding [their] activities."⁷⁰ The "escort" system helped ensure that, even when journalists approached the field of war, they could not obtain much useful information because the escorts "probably inhibited soldiers' candidness."⁷¹ A periodical and a wire service tried to challenge the violation of the First Amendment by this system, but failed.⁷²

Ultimately, the escorts and the pools "isolated correspondents from the war," which reduced analysis.⁷³ An academic study found that those who watched television coverage of the war knew the least about it.⁷⁴ Out of 1,000 reporters, television producers, and camerapersons under the jurisdiction of the United States Armed Forces Joint Information Bureau in 1991, fewer than 150 obtained access to the war itself.⁷⁵ One observer reporting for *The New York Times* compared the arrangement to the "total blackout" of censorship during Pakistan's civil war.⁷⁶ The news media had effectively nominated their employees to become unpaid members of the U.S. government, bound to "a 'security review' (censorship) of everything they report[ed]."⁷⁷ The required escorts deleted

⁶⁹ OPERATION DESERT SHIELD GROUND RULES AND SUPPLEMENTARY GUIDELINES (1991), reprinted in CORNWELL, *supra* note 36, at 293–95.

⁷⁰ *Id.*

⁷¹ *Gulf War Censorship*, *supra* note 67, at 206.

⁷² *See id.*

⁷³ *Id.*

⁷⁴ *See TV: The More You Watch, the Less You Know*, EXTRA! (N.Y.C.), Special Gulf War Issue 1991, available at <http://www.fair.org/index.php?page=1517>.

⁷⁵ Malcolm W. Browne, *The Military v. the Press*, N.Y. TIMES, Mar. 3, 1991, § 6 (Magazine), at 30.

⁷⁶ *Id.*

⁷⁷ *Id.*

words like “bomber” from newspaper articles.⁷⁸ Reporters venturing outside the escort system were actively pursued and arrested, spending most of their time on evasion, not reporting.⁷⁹

In 1992, the Defense Department concluded negotiations with the American Society of Newspaper Editors and broadcast and cable television executives about the coverage of wars like the one in Iraq.⁸⁰ In the agreement that resulted, newspapers and television corporations submitted to regulations on their reporting of future conflicts that would be written by the Defense Department in the future to ensure the protection of military secrecy and orders.⁸¹ The head of the Reporters Committee for Freedom of the Press said acceptance of these terms was the equivalent of the media “writing [its] own death warrant.”⁸² “It’s a very effective form of censorship,” commented Joan Lowy, a reporter for a newspaper chain, in 1991.⁸³ The regulations, it was believed, would “enable the Pentagon and White House to control images and information” that might otherwise reach the public from the battlefield, because unfiltered images might present an undistorted portrait of war and its unbearable human toll.⁸⁴ The network television news programs generally refused to report on the agreement they had reached with the federal government, and the major newspapers buried the story.⁸⁵

III. POSTMODERN CENSORSHIP OF TELEVISION AND THE INTERNET

Postmodern censorship, like other postmodern law, involves the mobilization of private surveillance and control over private activity in the interests of shaping behavior and beliefs.⁸⁶

⁷⁸ See *id.* at 44.

⁷⁹ See *id.* at 45; *Gulf War Censorship*, *supra* note 67, at 207.

⁸⁰ Sharkey, *supra* note 4, at 60.

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.* at 61.

⁸⁵ See *id.*

⁸⁶ See Dibadj, *supra* note 6, at 410 (describing Michel Foucault as a postmodern scholar who posits that “social institutions indirectly shape behavior that privileges one group over another” in a manner that is more influential than “blatant or direct expressions of power” by states).

Postmodern power does not stop at making working hours productive to corporate and national power, but even colonizes leisure time to prevent its being “wasted” in a way that does not reinforce power.⁸⁷ Corporate structures for the mobilization of leisure time are therefore emblematic of postmodern law.⁸⁸ Postmodern power may exercise centralized control over decentralized telecommunications equipment like television stations, cable wires, or broadband lines by implementing protocols, or “ultrarapid forms of apparently free-floating control,” such as algorithms, inflections, and “social sculpture.”⁸⁹ Unlike modern methods of exercising control by making the presence of the center visible and forceful at the periphery through efficient means such as bureaucracy, vehicles powered by fossil fuels, or nuclear energy, postmodern power may operate by immaterial means designed to ensure fidelity, patterns, architectures, and network effects.⁹⁰ This Part explores the possibility that private monitoring and restrictions have become more central than law and sovereign power.

A. *Network and Cable Television*

Television filters the reality experienced by Americans in several different ways. First, it reports many false and misleading statements as if they were facts, polluting the public mind with error.⁹¹ Second, small cliques of owners and managers—often formed in ways that discriminate on the basis of gender, national origin, race, and religion—dictate which facts and opinions should be allowed on the air (or wire).⁹² The result

⁸⁷ See BAUDRILLARD, *supra* note 7, at 154.

⁸⁸ See Helvacioğlu, *supra* note 8, at 383 (arguing that postmodern politics tend toward privatization of the social contract, including state assets, public goods and productions, and even crimes); WEBSTER, *supra* note 9, at 248 (“On the contrary, says Baudrillard, Disney is a means of acknowledging the simulation that is the entirety of modern America: everything about the United States is artifice, construction and creation”); *id.* at 247 (“Baudrillard contends that the society of spectacle and simulation reaches everywhere”); *id.* at 249 (Baudrillard argues that “the real is abolished” and “the meaning of signs is lost”).

⁸⁹ GALLOWAY, *supra* note 7, at 81 (quoting GILES DELEUZE, *NEGOTIATIONS* 178 (Martin Joughin trans., 1990)).

⁹⁰ See *id.* at 114–15 tbl.3.1; CAVANAGH, *supra* note 7, at 41.

⁹¹ See MARTIN, *supra* note 4, at 8.

⁹² See *id.* at 7, 84–86.

is called “mass media” because it constitutes mass communication by the few, or one-to-many communication.⁹³ Third, reporters strip context from stories, depriving the public of understanding, creating stereotypes and caricatures of politicians and subjects, and blurring perceptions of cause and effect.⁹⁴ Fourth, some advertisers directly influence the coverage of events by television, and propagate misleading, personality-distorting, and money-wasting messages on a consistent basis.⁹⁵ Finally, the government buttresses corporate censorship with rules, regulations, and direct censorship.

The government has increasingly mobilized private media corporations and their employees to present a twisted and incomplete portrayal of foreign and military affairs for consumption by a deluded public. False and misleading reports are increasingly common, but the press oligarchs often protest that they unintentionally reported them, after themselves being fooled. Many untrue claims made in support of the 1991 war in Iraq, Kuwait, and Saudi Arabia, including reports of a “nuclear weapons capacity,” went undetected due to a lack of debate on television.⁹⁶ National anti-war leaders appeared on television about 99% less often than national leaders in support of the war.⁹⁷ The mass media conceded by 1992 that “they had been manipulated by the Pentagon and the White House during the Gulf War and had presented a misleading and highly sanitized view of the conflict and its consequences to the American people.”⁹⁸ During the war against Iraq in 1991, the “Operation Desert Shield Ground Rules and Supplementary Guidelines” for the press were summarized as follows:

The restrictions . . . give the Pentagon the right to screen and censor transmission of pictures and reports from pool photographers and correspondents. Last week, the Pentagon said that pictures of American soldiers in ‘severe shock’ or pictures of victorious Iraqi troops would not be allowed out of

⁹³ See *id.* at 8.

⁹⁴ See *id.*

⁹⁵ See *id.*

⁹⁶ KELLNER, *supra* note 4, at 201. See also *id.* at 1, 17–29, 96–97, 106, 115, 118, 126–28, 198–203, 271–75, 404.

⁹⁷ See Hart, *supra* note 4, at 54.

⁹⁸ Sharkey, *supra* note 4, at 61.

the Gulf.⁹⁹

Despite knowing that they had issued misleading reports in 1991, many of the same corporations agreed to employ “embedded reporters in Iraq” under Defense Department procedures, which could be described as requiring no reports of attack plans, rules of engagement, “friendly force . . . deployments,” “special operations units,” photographs of “interviews with persons under custody,” or off-the-record interviews.¹⁰⁰ These corporations agreed to “security review of their coverage” involving “sensitive information.”¹⁰¹

Private ownership and control help prevent the uninhibited reporting and opinion-formation that might prevail were journalists and commentators allowed to be autonomous freelancers. As Secretary of Commerce, Herbert Hoover complained as early as the 1920s that radio content suffered from the threat of “arbitrary power.”¹⁰² Former FCC commissioner Nicholas Johnson wrote in 1966 that he was seeing “local and regional monopolies, growing concentration of control of the most profitable and powerful television stations in the major markets, broadcasting-publishing combines, and so forth.”¹⁰³ By 1968, 60% of the television markets serving 75% of American homes had at least one of its stations owned by a local newspaper.¹⁰⁴ Twelve corporations or combinations owned more than one-third of the television stations in these markets.¹⁰⁵

Reporters in a position to inform the American public about the costs and crimes of war express frustration at corporate and governmental censorship of their speech and writing. The former

⁹⁹ Zurawik, *supra* note 4, at 1B. (“The following information should not be reported: Specific attacks or battles, and deaths or injuries to U.S. personnel therein; Photographs or video revealing the location of battles; Instructions to troops as to who they should kill, and when; Information on the use of torture or cruel methods for intelligence collection; Information, poor intelligence or false intelligent reports; and Anything else your military escort tells you not to publish or broadcast.”) *See also* CORNWELL, *supra* note 36, at 293.

¹⁰⁰ CORNWELL, *supra* note 36, at 301–07.

¹⁰¹ *Id.* at 307.

¹⁰² Nicholas Johnson, *The Media Barons and the Public Interest: An FCC Commissioner’s Warning*, in *MASS MEDIA AND THE LAW*, *supra* note 43, 99 at 104–05.

¹⁰³ *Id.* at 104.

¹⁰⁴ *Id.* at 115.

¹⁰⁵ *Id.*

head of NBC News warned more than a decade ago against “enormous corporations that know how to turn knowledge into profit—but are not equally committed to inquiry or debate or to the First Amendment.”¹⁰⁶ Corporate editors and executives embrace journalistic principles that silence dissent and ensure “uniformity of view.”¹⁰⁷ The president of CBS News confirmed that the guidelines his corporation agreed to for the 1991 war with Iraq “orchestrate and control the news before it reaches the American people.”¹⁰⁸ One of the executives at CBS News later admitted that he would fire any “left-wing” person at CBS.¹⁰⁹ Another CBS producer confirmed that “[e]veryone plays by the rules of the game.”¹¹⁰ Christiane Amanpour of CNN admitted that the government and biased journalists at Fox News intimidated her network to not ask tough policy questions, and to practice “self-censorship” instead.¹¹¹ Ashleigh Banfield of MSNBC criticized the networks for glorifying war and making it seem “wonderful” for everyone.¹¹² The president of NBC News summed up the culture: “rebels” and the “idiosyncratic” voices are lost to journalism because of editors and corporations.¹¹³

In the twentieth century, newspapers began to filter their presentation of the outbreak and conduct of wars to benefit the political objectives of American presidents and military officers. *The New York Times* editorial staff wrote in 1966 that “[i]n time of open and declared war . . . the need for censorship, even if it is self-censorship, as it was in this country during [World War II], is universally recognized and generally observed.”¹¹⁴ The Cold War provided further excuses for censorship, as “the Communist technique for fighting that war” was blamed for making secret

¹⁰⁶ SCHECHTER, *supra* note 4, at 446 (quoting Reuven Frank).

¹⁰⁷ *See id.* at 38 (quoting Mark Crispin Miller, media critic formerly of Johns Hopkins University).

¹⁰⁸ Solomon, *supra* note 4, at 99.

¹⁰⁹ SCHECHTER, *supra* note 4, at 36.

¹¹⁰ *Id.* at 39 (quoting Richard Cohen, formerly of CBS).

¹¹¹ Liz Harrop, *Human Writes: The Media's Role in War Propaganda*, in COMMUNICATION ETHICS NOW 19, 26 (Richard Keeble ed., 2008).

¹¹² *Id.* at 26–27.

¹¹³ SCHECHTER, *supra* note 4, at 39 (quoting Larry Grossman, formerly president of NBC News).

¹¹⁴ Editorial, N.Y. TIMES, June 5, 1966, at 12, *reprinted in* CENSORSHIP IN THE UNITED STATES, *supra* note 4, at 149.

covert operations necessary.¹¹⁵ In 1961, President John F. Kennedy called upon the American Newspaper Publishers Association to ask, before they printed any newsworthy stories, whether it was “in the interest of national security?”¹¹⁶ James Reston, the associate editor of *The New York Times*, quashed a report by a *Times* reporter in Miami indicating that Cuban exiles were being recruited there for an imminent U.S. invasion of Cuba.¹¹⁷ President Kennedy urged an aide to stop reports in the press that “the exiles were telling everyone that they would receive United States recognition as soon as they landed in Cuba, to be followed by the overt provision of arms.”¹¹⁸ The aide later wrote that the press, had it done its job, could have “spared the country a disaster.”¹¹⁹ Reston later asked why “absolutely nothing [must] be printed about clandestine plans by the President to mount an illegal invasion at the Bay of Pigs in Cuba for fear of interfering with [it]?”¹²⁰ Kennedy himself agreed, saying “I wish you [the press] had run everything on Cuba.”¹²¹

Narrow distribution of the ownership and control of newspapers compounded the self-censorship trend. Over 95% of cities with daily newspapers had a one-owner monopoly by the 1960s.¹²² The FCC recognized in 1953 that the concentration of media ownership in few hands harms the “diversification of program and service viewpoints” and amounts to the “undue concentration of economic power contrary to the public interest.”¹²³ The FCC explained that the concentration of media ownership is inimical to a free society and is tantamount to government control over public debate on television.¹²⁴ The

¹¹⁵ *Id.* at 149–50.

¹¹⁶ See Clifton Daniel, *Excerpts from Speech on Coverage of Bay of Pigs Buildup*, N.Y. TIMES, June 2, 1966, at 14, reprinted in CENSORSHIP IN THE UNITED STATES, *supra* note 4, at 145.

¹¹⁷ See *id.* at 141, 144–45.

¹¹⁸ *Id.* at 141 (quoting ARTHUR M. SCHLESINGER, JR., A THOUSAND DAYS: JOHN F. KENNEDY IN THE WHITE HOUSE 261 (2002)).

¹¹⁹ *Id.* at 146.

¹²⁰ James Reston, *supra* note 4, at 132, 137.

¹²¹ Daniel, *supra* note 116, at 146.

¹²² Johnson, *supra* note 102, at 113.

¹²³ Rules and Regulations Relating to Multiple Ownership of Standard, FM and Television Broadcast Stations, 18 F.C.C. 288, 291 (1953).

¹²⁴ See Policy Statement on Comparative Broadcast Hearings, 1 F.C.C.2d 393, 394–96 (1965).

Supreme Court agreed in 1978, declaring that to allow a federal broadcast licensee to continue to operate stations in a manner injurious to the public interest would violate “the interests of the ‘people as a whole . . . in free speech.’”¹²⁵

Lack of context in corporate media reports of foreign and military policy has seemingly become the Prime Directive of American journalism. In 1966, James Reston of the *New York Times* wrote that 300,000 Americans had been sent to a war in Vietnam, most not knowing how the war began or how it became so serious.¹²⁶ Of course, the population of American males of draft age stood at 16 million or more, while the circulation of the *Times* was a small fraction of that, less than one million.¹²⁷ One problem, Reston noted, is that in the founding era and nineteenth century the “tradition of the American press” was to expose government secrets in the interests of democracy, while the attitude of the twentieth century press was “not printing intelligence and even military information” so as not to “risk the nation’s freedom” in “an underground . . . intelligence war, [waged by the U.S.] in every continent of the earth.”¹²⁸ The invention of nuclear weapons empowered the presidency and weakened the press and Congress, rendering them steadily less and less able to restrain presidential threats and acts of war.¹²⁹

Advertiser influence can be very subtle. Former ABC personality Edmund Morgan noted that “every facet” of the American press “not only ducks but pulls its punches to save a supermarket of commercialism or shield an ugly prejudice and is putting the life of the republic in jeopardy thereby.”¹³⁰ A reporter with ABC and NBC confirmed that issue coverage that fails “commercial criteria” will not “get aired” at all.¹³¹ A Harvard

¹²⁵ *FCC v. Nat’l Citizens Comm. for Broad.*, 436 U.S. 775, 800 (1978) (quoting *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969)).

¹²⁶ See Reston, *supra* note 4, at 133.

¹²⁷ Compare, e.g., *Women and the Draft*, ARGUS-PRESS, Jan. 25, 1980, at 1, with *New York Times Income Declines by \$5.02 Million*, WINDSOR STAR, Feb. 19, 1971, at 4.

¹²⁸ See Reston, *supra* note 4, at 134.

¹²⁹ See *id.* at 135. See also GARY WILLS, *BOMB POWER: THE MODERN PRESIDENCY AND THE NATIONAL SECURITY STATE* (2010); Walter Isaacson, *Who Declares War?*, N.Y. TIMES, Jan. 21, 2010, at BR1.

¹³⁰ Johnson, *supra* note 102, at 113.

¹³¹ SCHECHTER, *supra* note 4, at 47.

study found that public relations firms increasingly control coverage.¹³² Media critic George Seldes argued that advertisers censored more than governments as early as the 1930s.¹³³ In 1965, a major advertiser, Proctor & Gamble, admitted that it tried to suppress war coverage with “horror” aspects” or stories which “depicted men in uniform as villains.”¹³⁴ First Amendment theorist Jerome Barron argued in an influential 1967 article that radio and television censored debates on important political, social, and economic issues because controversial or ideological discussion is less attractive to advertisers than bland entertainment.¹³⁵ Another media critic, Lawrence Soley, argued in 2002 that “[n]ewspapers and other media edit or kill stories offensive to advertisers because media profits come from the sale of advertising, not sales . . . to consumers.”¹³⁶ In 2003, both broadcast and cable networks refused to carry antiwar messages by speakers willing to pay for airtime, triggering an outcry:

“It is irresponsible for news organizations not to accept ads that are controversial on serious issues, assuming they are not scurrilous or in bad taste,” said Alex Jones, director of the Joan Shorenstein Center on the Press, Politics and Public Policy at Harvard. “In the world we live in, with the kind of media concentration we have, the only way that unpopular beliefs can be aired sometimes is if the monopoly vehicle agrees to accept an ad.”

Miles Solay, a youth representative of Not in Our Name, said, “From the very beginning, the antiwar movement has had to buy some free speech.” He added that even MTV’s coverage of antiwar sentiment has not made up for what his group viewed as promotional segments on military life or an hourlong forum with Tony Blair, prime minister of Britain and President Bush’s closest ally on Iraq . . .

Broadcast operations with blanket no-advocacy policies include CBS, ABC, NBC, and Fox Broadcasting, along with

¹³² See *id.* at 447.

¹³³ See LAWRENCE SOLEY, *CENSORSHIP, INC.* 195 (2002).

¹³⁴ *Id.* at 197.

¹³⁵ See Jerome A. Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641, 1641, 1646-50 (1967).

¹³⁶ SOLEY, *supra* note 133, at 195.

cable channels like CNN and MTV, a Viacom subsidiary.¹³⁷

The medium of radio has experienced analogous censorship to that applied to television. Common ownership of AM and FM stations in the same market became quite common in the 1960s.¹³⁸ Due to the proliferation of local and regional monopolies, American politicians came to regard media barons, rather than the voters, as “their effective constituency.”¹³⁹ Woe be to those confronting a broadcaster, became the cliché.¹⁴⁰ Centralized control of radio content became standard in the twentieth century. Over 6,000 theoretically distinctly controlled and diversely inspired radio stations colluded to report the same news and opinion by relying on wire services such as the Associated Press or United Press International.¹⁴¹ As Molly Ivins observed shortly before the launching of the Iraq War of 2003, Federal Communications Commission regulations are written so as to ensure that “one company can own all the radio stations, television stations, newspapers and cable systems in any given area.”¹⁴² As a result, press freedom in the United States fell below levels prevailing in emerging democracies like Slovenia, with one cause being that: “Political opinions expressed on talk radio are approaching the level of uniformity that would normally be achieved only in a totalitarian society.”¹⁴³

Motion picture production reveals a similar trend towards postmodern censorship of pacifist speech and reporting. The federal government, through its Office of War Information and other agencies, ensured that popular film would be “intimately aligned” with “national politics.”¹⁴⁴ The methods employed to achieve this alignment included threats as well as more friendly appeals.¹⁴⁵

More recently, the government has reinforced the already

¹³⁷ Nat Ives, *MTV Refuses Antiwar Commercial*, N.Y. TIMES, Mar. 13, 2003, at C4.

¹³⁸ Johnson, *supra* note 102, at 113.

¹³⁹ *See id.* at 113–14.

¹⁴⁰ *See id.*

¹⁴¹ *Id.*

¹⁴² Ivins, *supra* note 4.

¹⁴³ *Id.*

¹⁴⁴ SUSAN SMULYAN, POPULAR IDEOLOGIES: MASS CULTURE AT MID-CENTURY 89 (2007) (quoting Thomas Dougherty).

¹⁴⁵ *See id.*

entrenched culture of self-censorship among the editors and owners of the press by issuing regulations directed to the stripping of context from war reporting. It is a common experience to see disembodied soldiers ducking behind nondescript walls or ruins and firing at invisible opposing forces at an undisclosed location. Even worse, some observers felt that most “war” coverage involved interviews with soldiers, trucks driving down nameless highways, and even “boxes being loaded and unloaded.”¹⁴⁶ The Defense Department attempts to mandate this type of coverage, which represents a stark departure from good journalism as exemplified by U.S. Civil War newspaper coverage,¹⁴⁷ by issuing regulations prioritizing military operations over journalism that would provide the public with contextual information about battles, impacts, and strategy.¹⁴⁸

Another method employed by the federal government is to restrict the opportunities available to pacifists to create newsworthy protests that might be covered on television or in the newspaper. Over the past decade, protesters have been routinely arrested and removed from public places during presidential speeches.¹⁴⁹ For example, the government has banned antiwar

¹⁴⁶ COMMUNICATION ETHICS NOW, *supra* note 111, at 26 (quoting John MacArthur).

¹⁴⁷ See CORNWELL, *supra* note 36, at 44 (writing that the Civil War press reported “many details regarding the multitude of battles,” as well as “troop movements . . . and reports of troop mutinies and riots”); FELLOW, *supra* note 46, at 130–37.

¹⁴⁸ See CORNWELL, *supra* note 36, at 293–95.

¹⁴⁹ See Plaintiff’s Opposition to Defendant Hamm’s Motion for Summary Judgment, Rank v. Hamm, No. 2:04-0997 (S.D. W. Va. 2007), 2007 WL 2361396, at *18–19 (“The Presidential Advance Manual, obtained in discovery from the federal government . . . establishes guidelines for thwarting the ability of ‘protestors’ or ‘demonstrators’ to express their message and/or attract attention from the media.”); *id.* at 32 (“Proper ticket distribution is vital to . . . deterring potential protestors from attending events.”); *id.* (“[W]ork with the Secret Service and have them ask the local police department to designate a protest area where demonstrators can be placed, preferably not in view of the event site or motorcade route.”) (quoting OFFICE OF PRESIDENTIAL ADVANCE, PRESIDENTIAL ADVANCE MANUAL (2002), http://www.aclu.org/pdfs/freespeech/presidential_advance_manual.pdf). See also Complaint, Rank v. Jenkins, No. 2:04-0997 (S.D. W. Va. 2004), 2004 WL 3026751; *Is It Legal: Access to Information*, 53 NEWSL. ON INTELL. FREEDOM 65, 68–69 (Mar. 2004); Kimberly Albrecht-Taylor, Note, *Giving Dissenters Back Their Rights: How the White House Presidential Advance Manual Changes the First*

protesters from the campus of West Point, a public forum to which outside speakers are invited to speak in favor of war, and the Second Circuit upheld the ban on the basis that a protest “during the Vice President’s speech to an audience of 20,000 people, unquestionably raises security concerns that would justify West Point’s denial of the requested demonstration.”¹⁵⁰

It is well established that the “government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views.”¹⁵¹ Yet outright restrictions on antiwar protests have proliferated, and were evidently intended to help solidify public opinion in favor of war with Iraq in 2003. Dozens of antiwar protesters were arrested in New York City during the main protest held on February 15, 2003, and the remaining protesters were muzzled. “In accordance with a federal court order, the demonstrators in New York were prohibited from staging a march, which city officials had insisted might be dangerous to the protesters. Instead, they were limited to a rally behind barricades, a penned-in, more pacific and less powerful expression of protest.”¹⁵² Video from the event showed “police using pepper spray on penned-in people, backing horses into crowds, going after demonstrators with their nightsticks and forcing people back with metal barricades.”¹⁵³ As a further deterrent to protest activity, “tens of thousands of anti-war marchers were forced into holding pens, assaulted with pepper sprays and many of the arrested compelled by the police to reveal their political leanings and histories of earlier protests.”¹⁵⁴ The New York police warned antiwar protesters contemplating a march outside the Republican National Convention in 2004 that they would arrest at least 1,000 protesters, a number which

Amendment and Standing Debates, 17 WM. & MARY BILL RTS J. 539, 539–46 (2008); Todd Dvorak, *Dissenters at Rallies Look to Court for Justice*, TULSA WORLD, July 23, 2006, at A18; Dan Frosch, *2 Ejected From Bush Speech Posed a Threat, Lawyers Say*, N.Y. TIMES, Apr. 15, 2007, at 20.

¹⁵⁰ Sussman v. Crawford, 548 F.3d 195, 200 (2d Cir. 2008).

¹⁵¹ Police Dep’t of Chicago v. Mosley, 408 U.S. 92, 96 (1972).

¹⁵² Robert D. McFadden, *From New York to Melbourne, Cries for Peace*, N.Y. TIMES, Feb. 16, 2003, at A1.

¹⁵³ Shaila K. Dewan, *Protesters Say City Police Used Rough Tactics at Rally*, N.Y. TIMES, Feb. 19, 2003, at B3.

¹⁵⁴ Murray Poiner, Op-Ed., *Spy Tactics Endanger Political Dissent*, NEWSDAY, Mar. 16, 2004, at A46.

seemed punitive.¹⁵⁵ The police attempted to force protesters to march along a highway in August heat, a route which the protest organizers believed would cause heat stroke and deny speakers access to a sound system.¹⁵⁶ Police banned protesters from marching to Central Park, where hundreds of thousands of people have been permitted to gather at a time for concerts.¹⁵⁷

The Democratic National Convention in Boston in 2004 saw protesters suffering “dramatically limited” opportunities for antiwar speech.¹⁵⁸ The United States Secret Service and local police issued restrictions in advance of the Democratic National Convention in Boston in 2004 designed to prohibit antiwar protesters from leaving their protest pen to hand out leaflets, display visual media such as signs, or engage in one-on-one discussions with the media.¹⁵⁹ The First Circuit, hearing an appeal in a case related to these restrictions, found no security justification for this censorship regime at the country’s main political event of the year.¹⁶⁰ In another instance, protestors at a NATO conference in Colorado in 2007 were confined several blocks from the convention site, too far for the international media to see or interview them.¹⁶¹

¹⁵⁵ Michael Wilson, *Groups Accuse City of Trying to Stifle Protest*, N.Y. TIMES, Mar. 13, 2004, at B6.

¹⁵⁶ Grant McCool, *Anti-War Group Rejects West Side Highway Rally Site*, REUTERS (Aug. 10, 2004), <http://web.archive.org/web/20041013202055/www.unitedforpeace.org/article.php?id=2533>.

¹⁵⁷ Editorial, *Grass 1, People 0*, GLOBE AND MAIL (Toronto, Can.), Aug. 15, 2004, at A16; Raja Mishra & Tatsha Robertson, *Crowds Protest as GOP Gathers; Hundreds of Thousands March Against Bush, War*, BOS. GLOBE, Aug. 30, 2004, at A1.

¹⁵⁸ *Compare* *Bl(a)ck Tea Soc’y v. City of Boston*, 378 F.3d 8, 19 (1st Cir. 2004) (Lipez, J., concurring) (stating that the United States Secret Service created the security plan for the event, which was similar to subsequent plans for President Bush’s speeches or the 2008 Democratic National Convention, where a security zone was created for politicians, voters, the media, and staff, and restricted to antiwar protests, while creating a fenced, hidden, far-off protest pen for First Amendment activity), *with* *ACLU of Colorado v. City & County of Denver*, 569 F. Supp. 2d 1142 (D. Colo. 2008), *and* Plaintiff’s Opposition to Defendant Hamm’s Motion for Summary Judgment, *Rank v. Hamm*, No. 2:04-0997 (S.D. W. Va. 2007), 2007 WL 2361396.

¹⁵⁹ *Bl(a)ck Tea Soc’y*, 378 F.3d at 10–11.

¹⁶⁰ *See id.* at 13.

¹⁶¹ *Citizens for Peace in Space v. City of Colorado Springs*, 477 F.3d 1212, 1218–26 (10th Cir. 2007) (upholding the First Amendment exile into

At the Republican National Convention in 2008, about 800 protesters were arrested, although evidence against them was lacking, and most criminal charges were dismissed.¹⁶² One constitutional lawyer and blogger described the scene:

Targeting people with automatic-weapons-carrying SWAT teams and mass raids in their homes, who are suspected of nothing more than planning dissident political protests at a political convention and who have engaged in no illegal activity whatsoever, is about as redolent of the worst tactics of a police state as can be imagined.¹⁶³

At the Democratic Convention that same year, the city of Denver confined protesters to a “protest zone” in a parking lot “surrounded by two wire mesh or chain link fences,” so that protesters could be forced “inside the inner fence” with a double “buffer” to prevent approaching, speaking to, or giving leaflets to politicians from a distance of closer than 200 feet.¹⁶⁴

which these protesters were cast, despite noting that “many courts have struck down security zones that push protestors far away from their intended audience” and stating that “[they] do not have a right to convey their message in any manner they prefer. Instead, they have a right to convey their message in a manner that is constitutionally adequate.”).

¹⁶² William Petroski, *FBI Infiltrated Iowa Anti-War Group Before GOP Convention*, DES MOINES REG., May 17, 2009, at 1A.

¹⁶³ Glenn Greenwald, *Massive Police Raids on Suspected Protesters in Minneapolis*, SALON (Aug. 30, 2008), http://www.salon.com/news/opinion/glenn_greenwald/2008/08/30/police_raids.

¹⁶⁴ Sara Burnett, *Time Not On Side of Invesco Field Security Forces*, ROCKY MOUNTAIN NEWS, July 14, 2008, at 5. See also *ACLU of Colorado v. City & County of Denver*, 569 F. Supp. 2d 1142, 1172 (D. Colo. 2008) (stating that, “[t]he Plaintiffs have satisfied their burden of demonstrating that the city has restricted their ability to engage in expressive activity in a traditional public forum. It is undisputed that the security perimeter around the Pepsi Center will restrict public access to city streets, such as Chopper Circle, 9th Street, and Auraria Parkway”); *id.* at 1184 (agreeing with the government that “permit the speaker to dictate the precise time, place, and manner of his or her desired speech as being essential components, thus trumping any possibility of adequate alternatives and dooming an otherwise reasonable restriction by the government.”); *id.* at 1185, 1187 (noting that the government’s “denial of the request to conduct a Downtown parade clearly serves the identified traffic interests,” but that the government’s authorization of some parades that were not in Downtown Denver, and refusal to “authorize any further parades (or modify the routes of currently approved parades) during the term of the Convention, mean[s] that all other opportunities for expressive activity in the form of parades during this time period are

B. *The Internet*

The Internet industry is also developing an increasingly powerful capability to filter out unpopular or offensive ideas, including those relating to the immorality and undesirability of warfare. First, like television, a few very popular sources of Web content reach many, if not most, Web users each month. Although the nature of the Web makes it very difficult for them to exclude pacifist content from reaching Web users, the largest Web firms are more and more able to control platforms on which they may promote pro-war authors or videos over antiwar or pacifist ones. This extends to policies and practices that denude war coverage from its full human context and impact, a trend which distorts the public's understanding of wars. Second, rather unlike newspapers and television, the federal government saw in Internet service providers, such as AT&T, Comcast, and Verizon, a unique source of information on the reading habits and First Amendment expressive activities of millions of Americans, thereby deterring further reading or speech. Antiwar activists have documented in a number of lawsuits and hearings their belief that pacifist speaking, writing, and reading are significantly chilled by such postmodern public-private censorship.

1. *Slanted Coverage*

The most popular Web sites have several tools at their disposal with which to silence and deter pacifist speech. First, they ignore pacifists in favor of publishing militarist articles and other content. Second, they selectively quote the statements of public officials and investigations into war-related facts and events. Third, they prohibit their users in many cases from making effective pacifist statements.

As Nielsen, which maintains and publishes authoritative ratings of Web site popularity, explains, "When it comes to online news, while it is a long tail world, with thousands of sites offering news, the top websites dominate traffic."¹⁶⁵ By 2007, media conglomerates like News Corp., Time Warner, and Disney

foreclosed.").

¹⁶⁵ PEW PROJECT FOR EXCELLENCE IN JOURNALISM AND THE PEW INTERNET & AM. LIFE PROJECT, STATE OF THE NEWS MEDIA, NIELSEN ANALYSIS: ONLINE (2010), available at <http://stateofthemedias.org/2010/online-summary-essay/nielsen-analysis/>.

commanded tens of millions of distinct visitors per month, more than 100 million in the case of Time Warner.¹⁶⁶ In addition, Google/YouTube, Yahoo!, AOL, and MSN/Live each had more than 90 million monthly visitors.¹⁶⁷

According to Hitwise ratings, the top ten sites are as follows:

TABLE 1: THE TOP TEN WEB NEWS SITES OF 2009

	News Site	Address
1	Yahoo News (Yahoo!)	news.yahoo.com
2	CNN (Time Warner)	www.cnn.com
3	MSNBC Digital Network (Microsoft/NBC)	www.msnbc.com
4	Google News (Google)	news.google.com
5	Fox News (News Corp.)	www.foxnews.com
6	The Drudge Report	www.drudgereport.com
7	The New York Times	www.nytimes.com
8	USA Today	www.usatoday.com
9	People	www.people.com
10	AOL News (AOL)	news.aol.com

Source: Nielsen

Several of the top news Web sites drastically censor pacifist speakers and activists.¹⁶⁸ Table 2 indicates the relative exclusion of several famous antiwar speakers and writers from the Iraq war debate as presented on these top ten news sites, as compared to several famous pro-war speakers and writers.

¹⁶⁶ NIELSEN//NETRATINGS, NIELSEN//NETRATINGS REPORTS TOPLINE U.S. DATA FOR AUGUST 2007 (2007), http://www.nielsen-online.com/pr/pr_070910.pdf.

¹⁶⁷ *Id.*

¹⁶⁸ I am using the term “censor” to refer broadly to the “control of news” and not simply the governmental or departmental review and excision or destruction of articles, correspondence, etc. See THE NEW SHORTER OXFORD ENGLISH DICTIONARY 360 (4th ed. 1993).

TABLE 2: DISTRIBUTION OF MILITARIST AND PACIFIST VOICES ON
SELECT TOP NEWS WEB SITES' IRAQ ARTICLES

Web Site	CNN.com	MSNBC.com	foxnews.com
Pro-war Voices			
George W. Bush, President	247,000	102,000	5,970
Dick Cheney, Vice President	112,000	56,200	3,620
Donald Rumsfeld, Secretary of Defense	50,500	6,500	3,820
Colin Powell, Secretary of State	48,300	6,580	2,460
Ken Pollack, Author	1,250	167	25
Antiwar Voices			
Jimmy Carter, Former President	47,300	25,800	1,100
Barbara Boxer, Senator	5,390	2,190	414
John Conyers, Congressperson	1,320	777	163
Bob Graham, Senator	2,790	568	262
Ron Paul, Congressperson*	47,000	24,700	897

Source: Google searches for mentions of specific speakers on Iraq War as of March 18, 2011.

* Figures are likely inflated due to candidacy of subject for 2008 presidential nomination

These numbers are remarkable because the three principal advocates for a militaristic policy in the 2002-2008 period had their words or actions featured more than four times as often as the three main pacifist officials with high positions of power within the American government. Strikingly, an individual with no official position, yet a pro-war advocate, was cited about as often on CNN.com as a congressman with the power, and indeed the inclination, to prevent (or redirect the course of) the war.¹⁶⁹

Selective quotation of public officials and important investigations also distort the picture of the world presented on the World Wide Web. For example, CNN.com repeatedly quoted chief U.N. nuclear weapons inspector Mohammed El Baradei as saying Iraq had no “wiggle room” in proving that the country had no nuclear materials remaining within it,¹⁷⁰ but did not quote him as saying that Iraq had no “physical capability for the production

¹⁶⁹ Compare KENNETH M. POLLACK, *THE THREATENING STORM: THE CASE FOR INVADING IRAQ* (2002), with Bob Graham, *What I Knew Before the Invasion*, WASH. POST, Nov. 20, 2005, at B07.

¹⁷⁰ *Chief Nuke Inspector: Iraq Knows There's No 'Wiggle Room,'* CNN (Nov. 22, 2002), http://articles.cnn.com/2002-11-22/world/iraq.inspections_1_inspectors-mohamed-elbaradei-iaea?s=PM:WORLD.

of amounts of weapons-usable nuclear material of any practical significance.”¹⁷¹ CNN quoted the U.N. nuclear agency’s spokesperson, calling Iraq’s compliance with inspections “evasive,”¹⁷² but did not quote him as stating that:

[t]here is no evidence in our view that can be substantiated on Iraq’s nuclear-weapons program. If anybody tells you they know the nuclear situation in Iraq right now, in the absence of four years of inspections, I would say that they’re misleading you because there isn’t solid evidence out there.¹⁷³

CNN quoted the chief U.N. non-nuclear weapons inspector as being “not satisfied” with Iraq’s compliance with relevant resolutions,¹⁷⁴ but did not quote his admission that the United Nations had no evidence to show that Iraq had any nuclear, biological, or chemical weapons, or that any such weapons had been designed, bought, produced or stored since the last inspections by his agency in 1998.¹⁷⁵ CNN quoted over forty times one U.N. weapons inspector’s statement that Iraq “appears not to have come to a genuine acceptance, not even today, of the disarmament which was demanded of it and which it needs to carry out to . . . live in peace,”¹⁷⁶ but quoted only once the same individual’s statement that his agency’s reports “do not contend that weapons of mass destruction remain in Iraq,” and that one

¹⁷¹ *Gunning for Saddam: Saddam Hussein’s Weapons of Mass Destruction*, PBS FRONTLINE, <http://www.pbs.org/wgbh/pages/frontline/shows/gunning/etc/arsenal.html> (last visited Mar. 14, 2011).

¹⁷² Letter, *Iraq: No Obstacles to Inspections*, CNN (Oct. 12, 2002), http://articles.cnn.com/2002-10-12/world/Iraq.letters_1_al-saadiweapons-inspectors-unmovic?s=PM:WORLD.

¹⁷³ Joseph Curl, *Agency Disavows Report on Iraq Arms*, WASH. TIMES, Sept. 27, 2002, A16. See also Roger D. Hodge, *Weekly Review*, HARPER’S MAG. (Oct. 1, 2002), www.harpers.org/archive/2002/10/WeeklyReview2002-10-01.

¹⁷⁴ Blix ‘Not Satisfied’ with Iraq’s Weapons Accounting, CNN (Jan. 9, 2003), http://articles.cnn.com/2003-01-09/world/iraq.tracker.update_1_chief-un-weapons-inspector-aluminum-tubes-hansblis?s=PM:WORLD.

¹⁷⁵ Blix Urges US and UK to Hand Over Iraq Evidence, GUARDIAN (U.K.) (Dec. 20, 2002, 9:39 GMT), <http://www.guardian.co.uk/world/2002/dec/20/iraq.foreignpolicy>.

¹⁷⁶ See, e.g., Powell: Iraq’s Time to Disarm ‘Fast Coming to an End,’ CNN (Jan. 23, 2003), http://articles.cnn.com/2003-01-27/us/powell.presser.transcript_1_genuine-acceptance-weapons-inspectors-previous-inspectors?s=PM:US.

quote was dutifully reproduced in a transcript, but not featured by CNN's editors in an article or journalistic report.¹⁷⁷

The same selectivity carried over into U.S. intelligence reports and important public speeches. CNN quoted Secretary of State Colin Powell several times stating that Iraq had "at least seven"¹⁷⁸ mobile biological weapons factories, but never quoted him, during the critical debate over waging war that Congress engaged in from August 2002 through May 2003, as saying Iraq "has not developed any significant capability with respect to weapons of mass destruction."¹⁷⁹ Foxnews.com quoted President Bush as having said that "you can't distinguish between al Qaeda and Saddam,"¹⁸⁰ and urging Americans to imagine the nineteen hijackers from 9/11 "with other weapons and other plans—this time armed by Saddam" with "chemical agents and lethal viruses" that would "bring a day of horror like none we have ever known."¹⁸¹ It did not, however, quote a probable admission he made during a joint press conference with British Prime Minister Tony Blair on January 21, 2003. In response to the question, "Do you believe there is a link between Saddam Hussein, a direct link, and the men who attacked on September the 11th" he was quoted as responding, "I can't make that claim."¹⁸² Similarly, Foxnews.com quoted Vice President Cheney as claiming that Iraq was "the geographic base of the terrorists who have had us

¹⁷⁷ Compare HANS BLIX, THE SECURITY COUNCIL, 27 JANUARY 2003: AN UPDATE ON INSPECTION (2003), available at <http://www.un.org/Depts/unmovic/Bx27.htm>, with *Transcript of Blix's Remarks*, CNN (Jan. 27, 2003), http://articles.cnn.com/2003-01-27/us/sprj.iqr.transcript.blix_1_genuine-acceptance-chief-un-weapons-inspector-unmovic?_s=PM:US.

¹⁷⁸ See, e.g., *Transcript of Powell's U.N. Presentation*, CNN (Feb. 5 2003), <http://www.cnn.com/2003/US/02/05/sprj.iqr.powell.transcript.05/index.html?iref=allsearch>.

¹⁷⁹ See Interview by Judy Woodruff with Colin Powell, U.S. Sec'y of State (Sept. 28, 2003), available at <http://archives.cnn.com/TRANSCRIPTS/030928/le.00.html>.

¹⁸⁰ Interview by Chris Wallace with Senator Richard Lugar, U.S. Senator, on Fox News Sunday (Nov. 28, 2005), available at <http://www.foxnews.com/story/0,2933,176807,00.html>.

¹⁸¹ Associated Press, *Nightmare Scenario: Iraq, Al Qaeda Linked* (Jan. 30, 2003), available at <http://www.foxnews.com/story/0,2933,77046,00.html>.

¹⁸² Compare Bush, *Blair Press Conference*, CNN (Jan. 31, 2003), <http://quiz.cnn.com/TRANSCRIPTS/0301/31/bn.13.html>, with ERIC ALTERMAN & MARK J. GREEN, *THE BOOK ON BUSH: HOW GEORGE W. (MIS)LEADS AMERICA* 276 (2004).

under assault for many years, but most especially on 9-11,”¹⁸³ but not his earlier admission that he lacked “any evidence linking Saddam Hussein or Iraqis” to the 9/11 attacks.¹⁸⁴

Many Internet companies have developed “terms of use” that prohibit traditional war reporting on the grounds that it is “graphic.” During the U.S. Civil War or even the Vietnam War, images such as battlefield corpses or burned and bloodied children of civilians could be widely circulated.¹⁸⁵ Internet companies, however, are developing “terms of use” that disallow graphic violence or “someone getting hurt.”¹⁸⁶ Microsoft tries to forbid not only “violence” but “any content” that “depicts . . . hatred, bigotry . . . or criminal . . . activity,” which would presumably include war crimes.¹⁸⁷ As Tim Wu argues, “[W]hen you have a limited number of gatekeepers, whether Facebook or Google, or Verizon or AT&T, companies that have interests in some content and not others, you have the potential for private censorship.”¹⁸⁸ The traditional media long ago displayed their willingness to cleanse war reporting of “gratuitous” images of violence.¹⁸⁹

2. Other Chilling Effects

Over four decades ago, the Supreme Court recognized that surveillance of a political organization’s communications may

¹⁸³ Wendell Goler et al., *Bush: No Link Between Iraq, Sept. 11 Attacks*, FOXNEWS (Sept. 17, 2003), <http://www.foxnews.com/story/0,2933,97527,00.htm>.

¹⁸⁴ FRANK RICH, *THE GREATEST STORY EVER SOLD: THE DECLINE AND FALL OF TRUTH FROM 9/11 TO KATRINA* 230 (2006).

¹⁸⁵ See Mathew B. Brady: *Biographical Note*, LIBR. OF CONGRESS, <http://memory.loc.gov/ammem/cwphtml/cwbrady.html> (last visited Mar. 14, 2011); Letter to the Editor, *Beat of Life*, LIFE, July 14, 1972, at 29.

¹⁸⁶ See Google Inc., *Memorandum to Culture, Media and Sport Committee, U.K. Parliament*, in HARMFUL CONTENT ON THE INTERNET AND IN VIDEO GAMES: ORAL AND WRITTEN EVIDENCE 117 (2008).

¹⁸⁷ *Zune Code of Conduct*, MICROSOFT, www.zune.net/ZH-SG/legal/codeofconduct.htm (last visited Mar. 6, 2011).

¹⁸⁸ Andrew Richard Albanese, *The Game of Monopoly*, PUBLISHER’S WKLY, Dec. 6, 2010, at 25.

¹⁸⁹ See ZELIZER, *supra* note 4, at 16–19, 289. See also Joel Achenbach, *Battles Without Bodies; The Media Soften the Hard Realities*, WASH. POST, Feb. 5, 1991, at C01; Ellen Futterman, *Joy Over Success in Gulf Will Fade, Psychologists Say*, ST. LOUIS POST-DISPATCH, Mar. 7, 1991, at 1C; Howe, *supra* note 4, at 15A; Zurawik, *supra* note 4, at 1B.

threaten to reveal its membership and cause its activists to abandon their advocacy and expression out of fear of what the government will do with the evidence it gathers.¹⁹⁰ Potential exposure as a “subversive” may frighten off the members and financial supporters of unpopular causes, including pacifist causes.¹⁹¹

Despite this First Amendment case law, journalists and attorneys working to understand and mitigate the effects of war, and perhaps to prevent it in the future by documenting its horrors, have alleged that their speech has been chilled by a federal campaign over the past decade to intercept, without a warrant or other judicial approval, private international telephone and Internet communications. Several journalists have demonstrated that they must “conduct extensive research in the Middle East, Africa, and Asia, and must communicate with individuals abroad whom the United States government believes to be terrorist suspects or to be associated with terrorist organizations.”¹⁹² Similarly, several attorneys “indicate that they must also communicate with individuals abroad whom the United States government believe to be terrorist suspects or to be associated with terrorist organizations, and must discuss confidential information over the phone and email with their international clients.”¹⁹³ In concluding that the executive branch of the federal government violated the First Amendment in instituting surveillance of international communications of Americans, one court held:

A governmental action to regulate speech may be justified only upon showing of a compelling governmental interest; and that the means chosen to further that interest are the least restrictive of freedom of belief and association that could be chosen. . . .

Finally, as Justice Powell wrote for the Court in the *Keith* case:

National security cases, moreover, often reflect a convergence of First and Fourth Amendment values

¹⁹⁰ See *Bates v. City of Little Rock*, 361 U.S. 516 (1960); *Dombrowski v. Pfister*, 380 U.S. 479 (1965).

¹⁹¹ *Dombrowski*, 380 U.S. at 494.

¹⁹² *ACLU v. NSA*, 438 F. Supp. 2d 754, 767 (E.D. Mich. 2006), *vacated*, 493 F.3d 644 (6th Cir. 2007).

¹⁹³ *Id.*

not present in cases of ‘ordinary’ crime. Though the investigative duty of the executive may be stronger in such cases, so also is there greater jeopardy to constitutionally protected speech. ‘Historically the struggle for freedom of speech and press in England was bound up with the issue of the scope of the search and seizure power. . . .’ History abundantly documents the tendency of Government—however benevolent and benign its motives—to view with suspicion those who most fervently dispute its policies. Fourth Amendment protections become the more necessary when the targets of official surveillance may be those suspected of unorthodoxy in their political beliefs.¹⁹⁴

Surveillance of pacifists and antiwar organizations became pervasive in the mid-2000s. By the fall of 2001, the federal government had begun contacting telecommunications corporations to seek access to the private telephone records of Americans.¹⁹⁵ In 2002, federal agents approached at least one telecommunications corporation to gain access to the facilities from which Americans’ telephone calls are routed.¹⁹⁶ Other agents began following antiwar protesters in person.¹⁹⁷ By 2003 if not earlier, the surveillance had reached the Internet, as secret devices capable of sifting through Internet communications were installed in offices in major cities in California and Washington state, which belonged to the second largest Internet service provider in the United States.¹⁹⁸ When asked about its activities, AT&T, which became the largest telecommunications corporation in the United States, told a reporter that “without commenting on or confirming the existence of the program, we can say that when the government asks for our help in protecting national security, and the request is within the law, we will

¹⁹⁴ *Id.* at 776 (quoting *United States v. U.S. District Court*, 407 U.S. 297, 313–14 (1972) (quoting *Marcus v. Search Warrants*, 367 U.S. 717, 724 (1961))).

¹⁹⁵ *Hepting v. Am. Tel. & Tel. Corp.*, 439 F. Supp. 2d 974, 988 (N.D. Cal. 2006).

¹⁹⁶ *See id.* at 988–89.

¹⁹⁷ Dan Eggen, *FBI Took Photos of Antiwar Activists in 2002*, WASH. POST, Mar. 15, 2006, at A5.

¹⁹⁸ *See Hepting*, 439 F. Supp. 2d at 989, 992.

provide that assistance.”¹⁹⁹ A “major government-telecommunications partnership, first publicly reported in May 2006, has involved an arrangement whereby telecommunications companies agreed to transfer vast amounts of telephone and Internet information, even of purely domestic telephone calls and emails, to the [federal government].”²⁰⁰ President Bush asserted the right to open physical mail, as well as emails, and listen to telephone calls.²⁰¹ His FBI director and the chairman of the Federal Reserve secured federal access to a database of about thirteen million daily financial transactions, maintained by over eight thousand financial institutions.²⁰²

Although many reports of federal surveillance of Internet communications focus on terrorism, antiwar activists appear to be a secondary target of the surveillance and reprisal campaigns that have been launched. The Church Committee’s reports in the 1970s revealed that President Richard Nixon’s Administration spied on antiwar protesters.²⁰³ A federal campaign to neutralize antiwar activism swept up the Quakers, which were “the target of

¹⁹⁹ *Id.* at 992 (quoting Declan McCullagh, *Legal Loophole Emerges in NSA Spy Program*, CNETNEWS (May 19, 2006, 5:14 AM), http://news.cnet.com/2100-1028_3-6073600.html).

²⁰⁰ Jon D. Michaels, *All the President’s Spies: Private-Public Intelligence Partnerships in the War on Terror*, 96 CALIF. L. REV. 901, 912 (2008).

²⁰¹ *See id.* at 915 n.59 (citing Dan Eggen, *Bush Warned About Mail-Opening Authority*, WASH. POST, Jan. 5, 2007, at A3).

²⁰² Josh Meyer & Greg Miller, *U.S. Secretly Tracks Global Bank Data*, L.A. TIMES, June 23, 2006, A1.

²⁰³ *See* Book II: Intelligence Activities and the Rights of Americans, S. Rep. No. 94-755, at 96 (1976) (describing spying on antiwar activists); Christopher M. Ford, *Intelligence Demands in a Democratic State: Congressional Intelligence Oversight*, 81 TUL. L. REV. 721, 738 (2007) (“At the [Church Committee] hearings, reams of information exposed the Army’s clandestine operations against antiwar activists, as well as similar operations conducted by the CIA (Operation CHAOS) and the FBI (Operation COINTELPRO). All told, these three entities had files on more than 400,000 individuals and 100 domestic organizations.”); Nathan Alexander Sales, *Share and Share Alike: Intelligence Agencies and Information*, 78 GEO. WASH. U. L. REV. 279, 330 (2008) (“Consider [the] CIA’s weakened position after the release of the Church Committee reports in the mid-1970s. The reports accused the agency of systematic legal violations over many years, including wiretapping domestic dissident groups, opening mail, participating in assassinations, interfering in foreign elections, and so on.”).

FBI surveillance and infiltration dating to the 1970s.”²⁰⁴ By 2002, the FBI-Joint Terrorism Task Force had begun investigating antiwar protests on military bases.²⁰⁵ Antiwar groups expressed alarm, and their lawyers argued that federal grand juries were “being employed for the purposes of . . . intimidating and harassing supporters of the peace or anti-war movement.”²⁰⁶ The federal government “awarded at least \$33 million in contracts to corporate giants Lockheed Martin, Unisys Corporation, Computer Sciences Corporation and Northrop Grumman to develop databases that comb through classified and unclassified government data, commercial information and Internet chatter to help sniff out terrorists, saboteurs and spies.”²⁰⁷ As a result, Quakers and other antiwar activists fell victim to tracking in “a secret Pentagon database,” leading some of them to be “upset to learn they had been targets of federal government surveillance.”²⁰⁸ The American Library Association warned that expanded executive power “threaten[ed] civil rights and liberties guaranteed under the United States Constitution and Bill of Rights;” these new powers let officials engage in widespread surveillance of “the activities of library users, including their use of computers to browse the Web or access e-mail,” which may “suppress the free and open exchange of knowledge and information or to intimidate individuals exercising free inquiry.”²⁰⁹

In 2002, the FBI’s internal discussions turned to interviewing activists in order to trigger “paranoia.” The agency stepped up surveillance of antiwar activists in 2003.²¹⁰ In 2008,

²⁰⁴ Francis Grandy Taylor, *The Pacifist ‘Threat’: Disclosure of Recent Government Surveillance of Quaker Activities Doesn’t Surprise Members*, HARTFORD COURANT, Jan. 16, 2006, at D1.

²⁰⁵ Jeff Eckhoff & Mark Siebert, *Anti-war Inquiry Unrelated to Terror*, DES MOINES REG., Feb. 10, 2004, at A1.

²⁰⁶ *Id.*

²⁰⁷ Lisa Myers et al., *Is the Pentagon Spying on Americans?*, MSNBC (Dec. 14, 2005), http://www.msnbc.msn.com/id/10454316/ns/nightly_news-nbc_news_investigates/.

²⁰⁸ Taylor, *supra* note 204.

²⁰⁹ *Resolution on the USA Patriot Act And Related Measures that Infringe on the Rights of Library Users*, AM. LIBRARY ASS’N (Jan. 29, 2003), <http://www.ala.org/ala/aboutala/offices/oif/statementspols/ifresolutions/resolutionusa.cfm>.

²¹⁰ James Bovard, *Quarantining Dissent: How the Secret Service*

the American Civil Liberties Union obtained FBI documents indicating surveillance of antiwar activists, including “in-depth descriptions” with “personal information such as names, height, weight, place of employment, cell phone numbers and e-mail addresses.”²¹¹

Pacifists may be especially sensitive to surveillance and implicit threats of reprisal, because fear itself undermines pacifism, and the psychological profiles of pacifists often reveal an aversion to destructive conflict-resolution or other forms of oppression.²¹² Justice Samuel Alito recently described the potential harms caused by tracking and disclosing the identity of the advocates of unpopular political causes, such as pacifism during a time when media calls for war:

[W]hen speakers are faced with a reasonable probability of harassment or intimidation, the State no longer has any interest in enabling the public to locate and contact supporters of a particular measure—for in that instance, disclosure becomes a means of facilitating harassment that impermissibly chills the exercise of First Amendment rights

If [the name or address of a speaker] is posted on the Internet, then anyone with access to a computer could compile a wealth of information about all of those persons, including in many cases all of the following: the names of their spouses and neighbors, their telephone numbers, directions to their homes, pictures of their homes, information about their homes (such as size, type of construction, purchase price, and mortgage amount), information about any motor vehicles that they own, any court case in which they were parties, any information posted on a social networking site, and newspaper articles in

Protects Bush from Free Speech, S.F. CHRON., Jan. 4, 2004, available at http://articles.sfgate.com/2004-01-04/opinion/17406956_1_free-speech-zone-bush-visits-bush-s-speech.

²¹¹ *FBI Infiltrated Iowa Anti-War Group Before GOP Convention*, DES MOINES REG., May 17, 2009, available at <http://www.commondreams.org/headline/2009/05/17-4>.

²¹² Cf. DANIEL MAYTON, NONVIOLENCE AND PEACE PSYCHOLOGY: INTRAPERSONAL, INTERPERSONAL, SOCIETAL AND WORLD PEACE 90 (2009) (noting that “agreeable adolescents approved of constructive conflict tactics and disapproved of destructive conflict tactics more than their peers,” and that “[c]hildren with lower agreeableness scores endorsed destructive conflict resolution strategies, manipulation, guilt, and physical force at significantly higher levels than their peers with higher agreeableness scores.”).

which their names appeared (including such things as wedding announcements, obituaries, and articles in local papers about their children's school and athletic activities). The potential that such information could be used for harassment is vast.²¹³

Lower courts have made similar points. "The right to speak anonymously extends to speech via the Internet. Internet anonymity facilitates the rich, diverse, and far ranging exchange of ideas."²¹⁴ Creating dossiers of visited Web sites "may inhibit free flow of information and create a chilling effect on the freedom of adults who wish to access lawful though perhaps controversial material."²¹⁵ Pacifists' "freedom of association will be chilled by disclosure of allegedly privileged material," because "active members will leave, or prospective members will not join, the organization for fear of threats, harassment, or reprisal."²¹⁶ "Privacy is particularly important where the group's cause is unpopular," and especially "where the government itself is being criticized, for in this circumstance it has a special incentive to suppress opposition."²¹⁷ Once speakers "lose their anonymity, intimidation and suppression may follow."²¹⁸ The names, addresses, and telephone numbers of Americans who protested or intended to protest federal action "is exactly the kind of information the First Amendment is designed to protect."²¹⁹

The government is considering moving beyond surveillance to more active control of Internet content by licensing its usage. On a more targeted basis, cyber security experts within the federal government are advocating so-called "two-factor authentication" for Internet use, including "[t]he creation of a system for identity management that would allow citizens to use additional authentication techniques, such as physical tokens or modules on mobile phones, to verify who they are before buying

²¹³ John Doe No. 1 v. Reed, 130 S.Ct. 2811, 2825 (2010) (Alito, J., concurring).

²¹⁴ Doe v. 2TheMart.com, Inc., 140 F. Supp. 2d 1088, 1092 (W.D. Wash. 2001).

²¹⁵ Southeast Booksellers Ass'n v. McMaster, 371 F. Supp. 2d 773, 782–83 n.10 (D.S.C. 2005).

²¹⁶ Wyoming v. U.S. Dep't of Agric., 239 F. Supp. 2d 1219, 1236 (D. Wyo. 2002), *vacated as moot*, 414 F.3d 1207 (10th Cir. 2005).

²¹⁷ Black Panther Party v. Smith, 661 F.2d 1243, 1268 (D.C. Cir. 1981).

²¹⁸ *Id.*

²¹⁹ Int'l Action Ctr. v. United States, 207 F.R.D. 1, 3 (D.D.C. 2002).

things online or accessing such sensitive information as health or banking records.”²²⁰ One expert previously stated that “[f]or more than 20 years the world has been using two-factor authentication as a pre-requisite for accessing cash at an ATM, yet today we still depend on passwords to gain access to online resources,” and that he “expect[ed] to see more and more strong authentication deployed to bolster existing security mechanisms.”²²¹ A researcher at RSA Laboratories testified before Congress that mobile phones could be used to “enhance our security experience” as part of a “National Cyber Security

²²⁰ Joseph Menn, *US Outlines Online Security Strategy*, FIN. TIMES, June 26, 2010, at 18.

²²¹ Press release, RSA Security, RSA Security to Offer Consumers Simplicity and Choice in Authentication Across Multiple Sites (Feb. 15, 2005), http://www.rsa.com/press_release.aspx?id=5527. The expert, Howard Schmidt, stated in 2003:

It is the role of industry to take the lead in the implementation of the strategy and the creation of the mosaic of security. To accomplish this will require real-time solutions, not just reports and plans that take years to implement [and] have limited value in dealing with the tremendous vulnerabilities that exist here and now. Each sector, each enterprise, each company and each user must do their part to secure their piece of cyberspace.

Dan Verton, *Howard Schmidt Leaving Government Cybersecurity Job*, COMPUTERWORLD (Apr. 21, 2003, 12:00 PM), http://www.computerworld.com/s/article/80549/Howard_Schmidt_leaving_government_cybersecurity_job?taxonomyId=017.

[T]he responsibility does not rely solely on the government or law enforcement to protect people from these [Internet] criminals. We [the private sector] have a responsibility also. The third thing is that as we build new products, services, technology and hardware, they must be built by taking into consideration some of the things the bad guys might do with it. If you couple those three things, we could go a long way in reducing the size of the next book 20 years from now that looks back and says “gee, we’ve come a long way and solved a lot of these problems”

Going back to 1997, when we first had the President’s Commission on Critical Infrastructure Protection, all the way up to the release of the National Strategy to Secure Cyberspace in 2003, the focus has been that industry owns and operates the vast majority of critical infrastructure and IT that we work in on a daily basis.

Bill Brenner, *Schmidt: Cybersecurity a Private Affair*, SEARCH SECURITY (Mar. 8, 2007), http://searchsecurity.techtarget.com/news/interview/0,289202,sid14_gci1246660,00.html.

Alliance.”²²² The *Financial Times* has noted that “Internet companies and government agencies have long supported the idea of multipurpose identification systems, but adoption has floundered in part because of limited incentives for participation.”²²³ As Jonathan Zittrain has noted, such technology would permit Internet usage to be restricted to users who comply with “unsheddable identity tokens,” such as “biometric readers” or “citizen identity numbers” like those used in Asia.²²⁴ Thus, the government may censor the Internet by controlling users’ devices, blocking access to the network.²²⁵

3. The Internet “Kill Switch”

In 2007, the House of Representatives passed a bill aimed at Internet “radicalization.”²²⁶ As Congressman Ron Paul of Texas declared, after the vote was taken on this proposal:

There are many causes for concern in H.R. 1955. The legislation specifically singles out the Internet for “facilitating violent radicalization, ideologically based violence, and the homegrown terrorism process” in the United States. Such language may well be the first step toward U.S. government regulation of what we are allowed to access on the Internet. Are we, for our own good, to be subjected to the kind of governmental control of the Internet that we see in unfree societies? This bill certainly sets us on that course

This legislation will set up a new government bureaucracy to monitor and further study the as-yet undemonstrated pressing problem of homegrown terrorism and radicalization. It will no

²²² *The State of Small Business Security in a Cyber Economy: Hearing Before the Subcomm. on Regulatory Reform and Oversight of the Comm. on Small Business*, 109th Cong. 21 (2006) (statement of Dr. Burton S. Kaliski, Jr., RSA Laboratories, RSA Security).

²²³ Menn, *supra* note 220.

²²⁴ JONATHAN ZITTRAIN, *THE FUTURE OF THE INTERNET AND HOW TO STOP IT* 228 (2008).

²²⁵ *See id.* at 125.

²²⁶ The Violent Radicalization and Homegrown Terrorism Prevention Act of 2007, H.R. 1955, 110th Cong. (2007). The bill, which passed the House of Representatives, would have established a commission to study and recommend action against “violent radicalization.” *Id.* *See also* Lee Hall, *Disaggregating the Scare From the Greens*, 33 VT. L. REV. 689 (2009); James J. Ward, Note, *The Root of All Evil: Expanding Criminal Liability for Providing Material Support to Terror*, 84 NOTRE DAME L. REV. 471 (2008).

doubt prove to be another bureaucracy that artificially inflates problems so as to guarantee its future existence and funding. But it may do so at great further expense to our civil liberties. What disturbs me most about this legislation is that it leaves the door wide open for the broadest definition of what constitutes “radicalization.” Could otherwise non-violent anti-tax, antiwar, or anti-abortion groups fall under the watchful eye of this new government commission? Assurances otherwise in this legislation are unconvincing.²²⁷

Senator Joseph Lieberman proposed the bill in the Senate, arguing that the radicalization of sectors of the population was possible and that the Internet needed to be censored to prevent it.²²⁸ Senator Lieberman sent a list of YouTube videos he wanted removed to Google, which found that “most” of them “did not contain violent or hate speech content,” raising the possibility that they were simply antiwar videos or videos critical of the federal government.²²⁹

Most recently, parts of the federal government have been seeking a power over the Web already greater than that it exercises over television and other traditional media. The Protecting Cyberspace as a National Asset Act of 2010 would grant the President the power to shut down the Internet for 120 days, or indefinitely and/or permanently with the approval of Congress.²³⁰ Critics have suggested that the bill “suggest[s] an intent to nationalize the Internet.”²³¹ Senator Lieberman noted,

²²⁷ 153 Cong. Rec. E2492–93 (daily ed. Dec. 5, 2007) (statement of Rep. Paul).

²²⁸ See Matt Renner, *Update*, in CENSORED 2009: THE TOP 25 CENSORED STORIES OF 2007–08, at 48 (2008) (“According to civil liberties activists, Chairman Lieberman has been spearheading an effort to censor speech on the Internet.”); Ralph E. Shaffer & R. William Robinson, *Here Come The Thought Police*, BALTIMORE SUN, Nov. 19, 2007, at A13.

²²⁹ Renner, *supra* note 228, at 47–48.

²³⁰ Bianca Boske, *Internet ‘Kill Switch’ Approved By Senate Homeland Security Committee*, HUFFINGTON POST (June 25, 2010), http://www.huffingtonpost.com/2010/06/17/internet-kill-switch-wouldn_615923.html.

²³¹ James E. Dunstan, *Lieberman’s Cyberspace Protection Bill: Enhancing Cybersecurity, or Establishing a New Uber-Authority?*, PROGRESS & FREEDOM FOUND. (June 2010), http://www.pff.org/issues-pubs/ps/2010/pdf/ps6.11-cyberspace_protection_bill.pdf. See also Letter from ACLU et al., to Senator Joseph Lieberman, Senator Susan Collins & Senator Tom Carper, United States Senate (June 23, 2010) (on file with author), available at

“Right now, China, the government, can disconnect parts of its Internet in case of war. We need to have that here, too.”²³² Protected on its flank by mass media conglomerates, the government could then occupy and preempt the field of perception nearly completely, just as governments in Asia aspire to do with varying degrees of success.

IV. CONCLUSION

Postmodern censorship of pacifist speech often occurs by privatized censorship, such as when antiwar advocates are denied access to the means of reaching listeners, and the public is therefore deprived of access to antiwar messages, images, or videos. Interfering with the publication of news about war subverts the First Amendment and “destroy[s] the fundamental liberty and security of the very people the Government hopes to make ‘secure.’”²³³ The belief at the time that the First Amendment was adopted was that the constitutional right of free speech, free press and free assembly, if preserved “inviolable,” may make government “responsive to the will of the people and that changes, if desired, may be obtained by peaceful means.”²³⁴ In fact, many people in the early American republic opposed the Constitution of the United States itself because they believed that it would lead to violations of their rights.²³⁵

Postmodern censorship is a process generally characterized by close ties between big business and government and their mutual support at the expense of the mere citizen or speaker. A variety of techniques, including government influence over media corporations, and media corporations’ silencing of critics of the government when it suits them, block pacifist speech from

http://www.aclu.org/files/assets/Joint_cybersec_ltr_final.pdf (Letter discusses the coalition’s concerns regarding the Protecting Cyberspace as a National Asset Act, S. 3480).

²³² Federaljacktube2, *Joe Lieberman Tells Web Users to Relax About Internet Kill Switch*, YOUTUBE (June 21, 2010), <http://www.youtube.com/watch?v=P1caZvxMUWk>. See also *State of the Union with Candy Crowley: Interviews with Senators Lieberman, Murkowski, Feinstein and Lugar*, CNN (June 20, 2010), <http://transcripts.cnn.com/TRANSCRIPTS/1006/20/sotu.01.html>.

²³³ *New York Times Co. v. United States*, 403 U.S. 713, 719 (1971).

²³⁴ *Id.* (quoting *De Jonge v. Oregon*, 299 U.S. 353, 365 (1937)).

²³⁵ See *id.* at 715 n.1 (quoting James Madison, in 1 ANNALS OF CONG. 433).

being heard in many American homes. The media and political system are looking to export to the Internet the pervasive surveillance and sanctions that are used to cleanse unpopular or minority viewpoints from television, the radio, and large newspapers. By tying Internet users to their responsible media conglomerate with “terms of use,” such as a cable Internet service provider, government may be the midwife of a new regime of censorship. The targets will be the same appeals to conscience and peace that had to be curtailed in newsprint, over the airwaves, and on public streets. The tools used to muffle such appeals will need to be, like broadband, “always on.” The watchwords of postmodern censorship may become innovation, mobility and flexibility.²³⁶

²³⁶ See GALLOWAY, *supra* note 7, at 26.