

MANAGING THE NEWS: THE HISTORY AND CONSTITUTIONALITY OF THE GOVERNMENT SPIN MACHINE

JODIE MORSE*

This Note grows out of two recent efforts by the Bush administration to shape media coverage of its programs: secret payments to columnists and the dissemination of fake press reports. It explores the little-studied history of such covert news management tactics and shows that, contrary to the prevailing wisdom, such attempts to manage the media by stealth did not originate with the Bush administration. Though these tactics may be time-honored, they have continually sparked criticism that they compromise the independence of the media. This Note further analyzes the treatment of government news management under current law. After showing why the regulatory regime is irredeemably flawed, this Note contends that judicial intervention is necessary to address core constitutional concerns. Specifically, it concludes that news management tactics that conceal the government's role as a source are unconstitutional forms of viewpoint discrimination that violate the First Amendment.

On January 7, 2005, the front page of *USA Today* carried the following headline: "White House Paid Commentator to Promote Law."¹ The article disclosed that in late 2003 the U.S. Department of Education signed a \$240,000 contract with conservative columnist Armstrong Williams requiring that he "regularly comment on"² the No Child Left Behind Act,³ the landmark education reform law that is also the cornerstone of President Bush's domestic policy agenda. Williams apparently made good on his end of the bargain, frequently touting the law both on the airwaves⁴ and in print⁵ throughout the run-up to Bush's reelection.

* Copyright © 2006 by Jodie Morse. B.A., 1997, Yale University; J.D. Candidate 2006, New York University School of Law. My thanks go to Professor Geoffrey Stone for advice and guidance throughout this project. I am also grateful to Shauna Burgess, Will Creeley, and David Bitkower.

¹ Gregg Toppo, *White House Paid Commentator to Promote Law*, USA TODAY, Jan. 7, 2005, at 1A.

² *Id.*

³ No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (2002) (codified at 20 U.S.C. § 6301 (2000)).

⁴ See *Race for the White House; Poll Positions; Flu Shot Shortage* (CNN television broadcast Oct. 18, 2004) (featuring Williams discussing No Child Left Behind Act).

⁵ See, e.g., Armstrong Williams, *Minorities Drop Out When They Should Drop In*, Mar. 10, 2004, <http://www.townhall.com/opinion/columns/Armstrongwilliams/2004/03/10/11018.html> (lauding No Child Left Behind Act); Armstrong Williams, *The Big Education Sell Out*, May 24, 2004, <http://www.townhall.com/opinion/columns/Armstrongwilliams/2004/05/24/11789.html> (same).

The Williams revelation set off a firestorm of public scrutiny. Democratic leaders on Capitol Hill charged the administration with squandering taxpayer funds on covert political propaganda.⁶ Within days, the cable news shows had a nickname for Williams's contract—"pay-to-praise"—and reports soon surfaced of other journalists with similar arrangements.⁷ No fewer than three agencies—as well as Congress—opened investigations.⁸ Even President Bush joined the chorus of critics, scolding his cabinet: "Our agenda ought to be able to stand on its own two feet."⁹

The government, of course, must communicate with the public about its agenda, but how much and in what way is not immediately obvious. Though federal spending on publicity is notoriously hard to track,¹⁰ according to one estimate the Bush administration spent over \$250 million on commercial public relations contracts during its first term—more than double what the second Clinton administration spent.¹¹ This increase in spending has paid for controversial public outreach strategies, including not only the secret columnist contracts, but also the distribution by federal agencies of prepackaged television news stories (featuring actors playing reporters) that similarly conceal their governmental origin.¹² Thus far, the highly partisan rhetoric from Capitol Hill has focused on whether these expenditures misused public funds by violating existing laws aimed at ensuring financial accountability and protecting consumers from misleading advertisements.¹³ But largely unmentioned in the debate has been the consti-

⁶ See Howard Kurtz, *Administration Paid Commentator; Education Dept. Used Williams to Promote 'No Child' Law*, WASH. POST, Jan. 8, 2005, at A1 (quoting Democratic Representative George Miller stating that Williams contract "is propaganda" that is "worthy of Pravda").

⁷ See Anne E. Kornblut, *Third Journalist Was Paid To Promote Bush Policies*, N.Y. TIMES, Jan. 29, 2005, at A17 (detailing \$10,000 contract between columnist Mike McManus and Health and Human Services Department to train marriage mentors); Howard Kurtz, *Writer Backing Bush Plan Had Gotten Federal Contract*, WASH. POST, Jan. 26, 2005, at C1 (describing \$21,500 contract between syndicated columnist Maggie Gallagher and Health and Human Services Department to help promote presidential marriage education initiatives).

⁸ See *infra* Part I.F.

⁹ See *Presidential News Conference* (CNN television broadcast Jan. 26, 2005).

¹⁰ KEVIN R. KOSAR, PUBLIC RELATIONS AND PROPAGANDA: RESTRICTIONS ON EXECUTIVE AGENCY ACTIVITIES, CRS REPORT FOR CONGRESS 7-9 (2005) (describing difficulties in tracing federal spending on publicity).

¹¹ STAFF OF H. COMM. ON GOV'T REFORM, 109TH CONG., FEDERAL PUBLIC RELATIONS SPENDING 4-6 (Comm. Print 2005).

¹² See David Barstow & Robin Stein, *Under Bush, a New Age of Prepackaged News*, N.Y. TIMES, Mar. 13, 2005, at A1 (describing widespread use of video news releases by Bush administration).

¹³ See, e.g., Kornblut, *supra* note 7, at A17 (quoting Democratic Senator Frank Lautenberg: "The issue here [is] . . . whether the Bush administration broke the law. If the

tutionality of the methods by which the government encourages media coverage of itself.¹⁴

The First Amendment is inherently suspicious of governmental interference with the press and distortion of information concerning public affairs. From a constitutional perspective, government-funded speech—in particular, efforts to influence the news received by the public—poses a difficult problem: It is both essential for creating an informed citizenry and potentially manipulative at the same time.¹⁵ As bureaucrats dream up increasingly subtle ways of managing the media to publicize government-favored views, the risk of manipulation is put into ever starker relief.

The purpose of this Note is to explore government news management: its history, treatment under current law, and constitutional implications. For all the talk of the Bush administration's unprecedented attempts to influence the news, there is a surprisingly rich history of tendentious government media relations techniques. Part I uncovers the little-studied history of these techniques and shows that since the establishment of the first agency press office in 1905, the government has used covert publicity tactics in the service of partisan ends. But, as Part I also shows, such tactics have continually erupted in controversy and drawn congressional ire. The arc of each controversy has been markedly similar: Any legislative action is swiftly circumvented, and the enforcement response, if there is one, lacks bite.

Part II turns to the current regulatory framework governing such practices. It contends that this framework is inadequate for two reasons. First, the laws and regulations as drafted are easily evaded. Second, because the debate about the propriety of government publicity is overwhelmingly partisan, enforcement of such laws is subsumed by grandstanding and party politics. As a result, the questions raised when the government manages the media to propagate its views are invariably left unaddressed.

G.A.O. finds that the payment to Armstrong Williams was an illegal use of taxpayer dollars, then the money should be returned and Education Department officials should be held accountable.”); Press Release, Office of Sen. Tom Harkin, Sen. Harkin Pushes for Review of Administration's Publicity Practices (Jan. 12, 2005), available at <http://harkin.senate.gov/news.cfm?id=230661> (“At the very least, this is a misuse of taxpayer dollars for a blatant propaganda effort. The administration should come clean with all such payments and see that this practice is stopped.”).

¹⁴ But see C. Edwin Baker, *Perspective: Corrupting the Press*, N.Y. L.J., Jan. 24, 2005, at 2 (arguing that payment to Williams by administration “to present [its] view[s] as his—even if they happen also to be his views—should be understood to violate the First Amendment”); Gregory Klass, *The Very Idea of a First Amendment Right Against Compelled Subsidization*, 38 U.C. DAVIS L. REV. 1087, 1129 (2005) (noting that video news releases are “contrary to First Amendment principles”).

¹⁵ See *infra* Part III.B.

Part III shifts the discussion to the First Amendment and argues that deceptive government news management compromises core constitutional values. Because the current regulatory regime has proved insufficiently attentive to these values both historically and at present, this Note argues that judicial intervention is necessary to break the legislative logjam.¹⁶ It contends that, under the Supreme Court's newly emergent government speech jurisprudence, when the government conceals itself as the source of publicity, it unconstitutionally discriminates on the basis of viewpoint. Part III reads the Court's decisions in this area to be most concerned with government speech that distorts the structure of certain essential relationships—such as that of the media to the government—grounded in the Constitution itself. Accordingly, the Note concludes that government news management that masquerades as the workings of an independent press is not only bad policy, but a violation of the First Amendment.

I

GOVERNMENT PUBLICITY IN HISTORICAL PERSPECTIVE

This Part examines the history of government news management and finds that, contrary to the received wisdom, the government has often succeeded in manipulating the media for partisan gain. From the party-controlled press of the Founding era to politically motivated wartime propaganda to more recent attempts by those in power to slant news coverage in their favor, the government has regularly and deliberately concealed its role in press communications. Indeed, it has done so by embracing many of the same stealth techniques as the Bush administration. Yet since the beginning, such techniques have also proved highly controversial, raising core First Amendment concerns. The recurrence of these controversies lends support to the view that the existing regulatory framework, discussed in Part II, is hobbled by partisan self-interest and is therefore inadequate to vindicate the unique constitutional interests involved. Moreover, the persistent legislative backlash against covert news management is also noteworthy since the constitutionality of news management techniques may turn

¹⁶ While this Note argues that judicial intervention would cure the ill of covert government news management, it does not purport to provide a detailed litigation blueprint for a First Amendment challenge. There may, in fact, be procedural hurdles to bringing such a suit, and these hurdles must be thought through in much greater depth. But even if these hurdles prove difficult to surmount, there is still merit in reframing the debate over government news management in constitutional terms and taking account of the important First Amendment values compromised when the government uses covert means to skew coverage of itself.

on what a court views as the historically accepted level of government interference with the press.

A. “*The Era of the Party Press*”

Government efforts to exploit the press for partisan gain date back to the Founding era.¹⁷ In the early years of the Republic, before newspapers could count on subscription or advertising income, the press survived by political patronage alone.¹⁸ Newspaper editors received support from political parties either in outright payments or through informal kickbacks such as government printing contracts.¹⁹ Payments to reporters to espouse particular views were also commonplace. While serving in George Washington’s cabinet, political rivals Thomas Jefferson and Alexander Hamilton each hired journalists to malign the other in print.²⁰

Even as partisan control dominated the media landscape, there were some concerned voices. Warned one Founding-era commentator: “It is an easy step from restraining the press to making it place the worst actions of government in so favorable a light, that we may groan under tyranny and oppression without knowing from whence it comes.”²¹ But such admonitions went unheeded. Journalists continued to maintain close ties to government, even moonlighting as White House aides.²² The partisan allegiances of the media ran so deep that historians of the period have dubbed it “the era of the party press.”²³

This era lasted throughout the better part of the nineteenth century. With the birth of advertising in the 1840s, some papers began to declare their political autonomy,²⁴ but patronage remained the rule. According to one study conducted at the end of the Civil War, a full eighty percent of the country’s more than 4000 periodicals were still funded by a political party.²⁵ Indeed, newspapers did not truly claim

¹⁷ For a detailed discussion of partisan control of the press in early America, see generally HAZEL DICKEN-GARCIA, *JOURNALISTIC STANDARDS IN NINETEENTH-CENTURY AMERICA* (1989).

¹⁸ See *id.* at 30–31, 39 (recounting widespread patronage).

¹⁹ *Id.* at 40.

²⁰ Jonathan Alter, *The End of ‘Pay to Praise,’* NEWSWEEK, Feb. 7, 2005, at 39 (noting prevalence of pay-to-praise arrangements in early America).

²¹ Letter from Cincinnatus, no. 2, to James Wilson (Nov. 8, 1787), in 5 *THE FOUNDERS’ CONSTITUTION* 122, 122 (Philip B. Kurland & Ralph Lerner eds., 2000).

²² See DICKEN-GARCIA, *supra* note 17, at 32 (noting that in 1860 Abraham Lincoln gave his famous Cooper Union Speech with five journalists at his side).

²³ *Id.*

²⁴ See MICHAEL SCHUDSON, *DISCOVERING THE NEWS: A SOCIAL HISTORY OF AMERICAN NEWSPAPERS* 21 (1978) (describing early use of ads by newspapers).

²⁵ See DICKEN-GARCIA, *supra* note 17, at 40.

their independence until the turn of the century when advertising became the dominant business model and objectivity the accepted professional ethic.²⁶

B. The First Press Bureau, Further Controversy

Having lost its ready-made pipeline to the press, the government experimented with new, covert ways to shape public opinion that generated concern among legislators.

At the vanguard of these experiments was the Forestry Division of the U.S. Department of Agriculture and its new chief, Gifford Pinchot.²⁷ Appointed by President McKinley in 1898, Pinchot made publicizing the government's conservation efforts his top priority.²⁸ The now familiar trappings of the modern government public relations (P.R.) apparatus debuted on Pinchot's watch. Building on the Division's history of sending out pamphlets to farmers, Pinchot began reaching out to newspapers with what he called "press bulletins," which detailed everything from his own speeches to recent agricultural research.²⁹ During 1902, Pinchot sent out three such bulletins.³⁰ The next year he sent out twenty-three.³¹ By 1905, he had named his publicity operation the "press bureau," and by 1909 it was sending several bulletins a day to over 700,000 journalists and community leaders.³²

But as Pinchot's operation grew, so did the skepticism in Congress. Pinchot's loudest critics were, naturally, the President's rivals in Congress who opposed conservation. They accused him of leaking false information to the press and of secretly paying journalists to publish salacious stories.³³ The controversy came to a head during the 1908 budget negotiations when Congressman Frank Mondell introduced an amendment to the agriculture appropriations bill banning the use of appropriated funds for the preparation of news articles.³⁴

The 1908 floor debate on Mondell's amendment offers a glimpse into the rising suspicions of the co-optive potential of government publicity. The most common misgiving voiced was that the govern-

²⁶ See C. Edwin Baker, *Advertising and a Democratic Press*, 140 U. PA. L. REV. 2097, 2129-30 (1992) (describing transition to independent press).

²⁷ See Stephen Ponder, *Progressive Drive to Shape Public Opinion, 1898-1913*, 16 PUB. REL. REV. 94, 96 (1990).

²⁸ *Id.*

²⁹ *Id.* at 97.

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ 42 CONG. REC. 4137 (1908).

³⁴ *Id.* at 4140.

ment had failed to disclose its role in authoring publicity materials. Said Congressman Mondell: "Whatever effect [government] shall have in informing the people, in forming public opinion, should be had with the full knowledge on the part of those who receive such information that it comes from and through the Bureau [of Forestry]." ³⁵ On the Senate side, Charles Fulton made a dire but prescient prediction: "The first thing we know every official will have his own special correspondent whose duty it is to exploit and glorify the particular work." ³⁶ The audience was sympathetic, and the amendment passed into law. ³⁷

Doubts about Pinchot's tactics spread to the White House. When President Taft took office in 1909, Pinchot lost his backing from above. ³⁸ A year later, he was fired by Taft after admitting that he had helped prepare a muckraking article about the new Secretary of the Interior. ³⁹

The Pinchot episode paved the way for further congressional scrutiny of P.R. tactics. In 1913, a circular issued by the U.S. Civil Service Commission caught the attention of Representative Frederick H. Gillette. ⁴⁰ The notice announced a competitive examination for a "publicity expert" and sought a "man who has had wide experience in newspaper work and whose affiliations with newspaper publishers and writers is extensive enough to insure the publication of items prepared by him." ⁴¹ Making "publicity expert" into a formal civil-service grade was too much for Gillette, who introduced a bill banning funding of publicity experts altogether. ⁴²

The debate on Gillette's bill was unusually brief. Summing up the sentiments of his colleagues, Representative John Fitzgerald proclaimed: "[N]o service of the Government should employ a man whose duty is to extol or to advertise the work of the service with which he is connected. That will be best advertised by the efficiency with which the work is performed." ⁴³ The bill passed, and a near identical law remains on the books today. It provides: "Appropriated

³⁵ *Id.* at 4139.

³⁶ 42 CONG. REC. 6072 (1908).

³⁷ See Ponder, *supra* note 27, at 100.

³⁸ See *id.*

³⁹ See *id.* For further discussion of the Pinchot controversy, see generally JAMES PENICK, JR., *PROGRESSIVE POLITICS AND CONSERVATION: THE BALLINGER-PINCHOT AFFAIR* (1968).

⁴⁰ 50 CONG. REC. 4409 (1913).

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.* at 4410.

funds may not be used to pay a publicity expert unless specifically appropriated for that purpose.”⁴⁴

But the 1913 law did little to deter governmental attempts to convince the media to toe the party line. Instead of hiring “publicity experts,” those in power simply created a new array of jobs including “Director of Information” and “Editor-In-Chief.”⁴⁵

C. *Wartime Propaganda Machines*

If there was any lingering doubt that covert government publicity was here to stay, the outbreak of war quickly dispelled it. During World War I, news management took on a slightly different guise: The government so saturated the public with war-mongering propaganda that its own view of the war was often the only view available.

In the months leading up to World War I, President Wilson corresponded with columnist Walter Lippman about how the White House might rally public opinion.⁴⁶ Lippman proposed creating a clearinghouse of information on government activities.⁴⁷ Not one week after the United States entered the war, President Wilson signed an order creating the Committee on Public Information (CPI) and appointed journalist George Creel as its head.⁴⁸

The committee flooded the public with pamphlets, press releases, newsreels, and even government-authored political cartoons. Writers volunteered their services and crafted canned stories, which ran unaltered in newspapers around the country.⁴⁹ Many journalists also voluntarily submitted their stories to vetting by CPI officials.⁵⁰

Creel contended that the CPI’s goal was “to present the facts without the slightest trace or color of bias, either in the selection of news or the manner in which it was presented.”⁵¹ But the sheer avalanche of CPI information belied Creel’s assurances. According to one estimate, newspapers each received six pounds of CPI material per day, and across the country newspapers published at least 20,000 columns of CPI material each week.⁵² Thus, even if the CPI did not intentionally distort facts, the public surely took in a heavily slanted

⁴⁴ 5 U.S.C. § 3107 (2000).

⁴⁵ JAMES L. McCAMY, *GOVERNMENT PUBLICITY: ITS PRACTICE IN FEDERAL ADMINISTRATION* 7 (1939) (discussing failure of 1913 prohibition to curb growth of government publicity machine).

⁴⁶ STEPHEN VAUGHN, *HOLDING FAST THE INNER LINES* 5–6 (1980).

⁴⁷ *Id.*

⁴⁸ ALLAN M. WINKLER, *THE POLITICS OF PROPAGANDA* 2 (1978).

⁴⁹ See VAUGHN, *supra* note 46, at 30.

⁵⁰ *Id.* at 195.

⁵¹ *Id.*

⁵² *Id.* at 194–95.

version of the war as the government's own views crowded out independent reporting.⁵³ Frank Cobb, the editor of *New York World*, observed that the government "conscripted public opinion" and "taught it to stand at attention and salute."⁵⁴

Following the war, Americans grew less trusting of the propaganda mill. "Administrative publicity is particularly suspected as a trend towards thought-control," observed James L. McCamy in his 1939 book *Government Publicity*. "[T]he harmless character it may present now is visualized as a possible evil under some future political party that would frown on free expression."⁵⁵ But the warnings did not stem the expansion of government publicity. A study found that in a three-month period during the fall of 1936, agency press offices printed over seven million news releases.⁵⁶ Not only did press offices grow savvier about whom they recruited, often turning to well-connected former correspondents,⁵⁷ but they also adopted ever subtler news management strategies. One technique pioneered by the Federal Housing Administration during this period was to furnish newspapers with ready-to-publish articles on housing issues to help them lure advertising from real estate developers.⁵⁸ A Senate Committee found this form of media manipulation particularly objectionable and recommended regulation of "articles which deal with current political matters . . . [that] may simply be propaganda in behalf of a particular policy or person."⁵⁹

As World War II loomed, President Franklin Roosevelt was wary of repeating the CPI's missteps. But by June of 1942, he reluctantly authorized the Office of War Information (OWI) and tapped CBS radio reporter Elmer Davis to head it.⁶⁰ Though the OWI released patriotic pamphlets and films, the operation was much smaller than its predecessor. In fact, Davis saw his role not as a filter of government information but as a watchdog charged with ensuring that "the American people are truthfully informed."⁶¹

⁵³ For a discussion of the constitutional import and practical consequences of this crowding-out phenomenon, see GEOFFREY R. STONE, *PERILOUS TIMES: FREE SPEECH IN WARTIME FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM* 153–54 (2004).

⁵⁴ Frank I. Cobb, *The Press and Public Opinion*, *NEW REPUBLIC*, Dec. 31, 1919, at 144.

⁵⁵ McCAMY, *supra* note 45, at 246.

⁵⁶ BROOKINGS INST., 75TH CONG., *REPORT ON THE GOVERNMENT ACTIVITIES ON LIBRARY, INFORMATION, AND STATISTICAL SERVICES* 12 (Comm. Print 1937).

⁵⁷ *Id.* at 12 (describing trend of agencies hiring former Washington correspondents).

⁵⁸ *Id.* at 13.

⁵⁹ *Id.* at 17 (proposing budgetary and administrative checks on such articles).

⁶⁰ WINKLER, *supra* note 48, at 31.

⁶¹ *Id.* at 47.

On this score, Davis spent much of his time haggling with tight-lipped government officials. Rather than inundating the public with too many government communications, the Roosevelt administration clamped down on the information flow to the public, selectively releasing only those facts shading in its favor. One instance of this played out in public in April of 1943 after the Secretary of Agriculture sought to stop the publication of an OWI pamphlet offering a dim assessment of the food supply.⁶² A number of OWI writers resigned in protest. Fittingly, the writers explained themselves in a press release: "We are leaving because it is impossible for us . . . to tell the truth. . . . [T]he activities of OWI on the home front are now dominated by high-pressure promoters who prefer slick salesmanship to honest information."⁶³

The writers' walkout set off alarm bells in Congress. In the fall of 1943, Congress passed a bill requiring that the OWI stop distributing domestic propaganda.⁶⁴ The OWI was abolished permanently by President Truman on August 31, 1945.⁶⁵

D. The 1951 Appropriations Rider

The exigencies of war placed unique demands on government to communicate with the citizenry. The question confronting legislators after World War II was what form such communications would take during peace. In 1947, the Hutchins Commission, an independent group of distinguished journalists and academics, examined the relationship between government and the press.⁶⁶ It worried anew about the "lack[] [of] obvious boundaries"⁶⁷ between legitimate government communication and coercive propaganda. "An ambitious official with enormous public funds at his disposal might be tempted to drown out the private press,"⁶⁸ wrote the Commission. "The trouble is that there is nothing like a 'clear and present danger' test to fix a stopping-point."⁶⁹

For its part, Congress continued to police the line through the one tool readily at its disposal: fiscal oversight. According to a 1948 House report, postwar federal spending on publicity had approached

⁶² *Id.* at 64.

⁶³ *Id.* at 64-65.

⁶⁴ *Id.* at 70.

⁶⁵ *Id.* at 149.

⁶⁶ See generally ZECHARIAH CHAFEE, JR., *GOVERNMENT AND MASS COMMUNICATIONS: A REPORT FROM THE COMMISSION ON FREEDOM OF THE PRESS* (Archon Books 1965) (1947).

⁶⁷ *Id.* at 796.

⁶⁸ *Id.*

⁶⁹ *Id.*

the seventy-five million dollar mark.⁷⁰ A debate about this level of spending broke out during the 1951 budget negotiations. The immediate catalyst was a series of speeches delivered by Oscar R. Ewing, the Federal Security Agency Administrator, extolling government-subsidized health insurance.⁷¹ But lurking in the background were conservative political fears that the government was secretly building a Soviet-style propaganda machine, and that communists within the government were using agency P.R. “in furtherance of the Moscow party line”⁷² to whip up support for “socialized medicine.”⁷³ Prompted by such suspicions, Congressman Lawrence H. Smith introduced an amendment to the appropriations bill under debate providing that “[n]o part of any appropriation contained in this Act shall be used for publicity or propaganda purposes not heretofore authorized by the Congress.”⁷⁴

The measure was not received without debate. Some Congressmen were now of the view that government was obliged to inform the public about its programs.⁷⁵ The challenge, of course, was to draw the elusive line between information and indoctrination. Representative Sidney Yates, for example, insisted that Smith’s provision was overinclusive and might discourage the publication of important government pamphlets.⁷⁶ Representative Phillips made an intriguing attempt to differentiate educational materials from propaganda, contending that propaganda included anything intended to sway debate on those “matters which have not had the support or the approval of the Congress.”⁷⁷ By that point, though, the chairman was calling for a vote. Despite objections by members seeking a better definition of propaganda, the amendment passed 156 to 88.⁷⁸ A nearly verbatim prohibition has appeared in every annual appropriations bill since.⁷⁹

⁷⁰ FINAL REPORT OF THE SUBCOMMITTEE OF PUBLICITY AND PROPAGANDA, H.R. DOC. NO. 2474, at 2 (1948).

⁷¹ 97 CONG. REC. 4098 (1951).

⁷² H.R. DOC. NO. 2474, at 4.

⁷³ *Id.*

⁷⁴ 97 CONG. REC. 4098 (1951).

⁷⁵ *Id.* at 4098–4100 (detailing objections to Smith amendment).

⁷⁶ *Id.* at 4098. Yates worried that the provision might prevent the government from disseminating information on infant healthcare. *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.* at 4100.

⁷⁹ See Medicare Prescription Drug, Improvement, and Modernization Act of 2003—Use of Appropriated Funds for Flyer and Print and Television Advertisements, B-302504 at 6 (U.S. Gen. Accounting Office Mar. 10, 2004) (describing “almost identical” appropriations provisions dating back to 1951).

E. *The Modern Government Publicity Machine*

The latter half of the twentieth century has been marked less by any particular innovation in government publicity than by its overall intensification. But the institutionalization of government publicity has not put an end to government attempts to use the news media to score partisan gains with the public. For example, President Nixon's shadowy hold on the press has been documented at length.⁸⁰ Nixon's associates notoriously threatened news executives who did not support administration policies.⁸¹ And they also explored other covert avenues to positive coverage, engineering a campaign to blitz media outlets with phony letters lauding the administration.⁸²

For this Note's purposes, two additional episodes from the last fifty years merit special attention. The first episode, which transpired at the height of the Iran-Contra scandal, bears a striking resemblance to the current pay-to-praise controversy. In 1983, the State Department established the Office of Public Diplomacy for Latin America and the Caribbean to inform the public about the Reagan administration's policies regarding the Nicaragua conflict.⁸³ While the office did conduct news briefings, it also engaged in what an internal State Department memo described as "white propaganda"⁸⁴ operations that were kept secret even from the main State Department press office.⁸⁵ The office awarded contracts to journalists and academics to prepare op-ed columns critical of the Nicaraguan government's arms build-up. One such op-ed, "Nicaragua is Armed for Trouble," appeared in the *Wall Street Journal* under the byline of Rice University Professor John Guilmartin. The tagline made no mention of Guilmartin's government contract.⁸⁶ Other contractors were charged with writing op-eds to be signed by contra leaders.⁸⁷

⁸⁰ See, e.g., DAVID GREENBERG, *NIXON'S SHADOW: THE HISTORY OF AN IMAGE* 126-79 (2003) (analyzing Nixon's management of and interaction with Washington press corps).

⁸¹ See KATHERINE GRAHAM, *PERSONAL HISTORY* 455-56 (1997) (describing such threats against *Washington Post*).

⁸² GREENBERG, *supra* note 80, at 154.

⁸³ See Matter of: To the Honorable Jack Brooks, B-229069 at 1, 2 (U.S. Gen. Accounting Office Sep. 30, 1987) [hereinafter Letter to Jack Brooks] (discussing in detail activities of this office).

⁸⁴ Richard L. Berke, *State Dept. Linked to Contra Publicity*, N.Y. TIMES, Oct. 5, 1987, at A3.

⁸⁵ See Letter to Jack Brooks, *supra* note 83, at 3.

⁸⁶ *Id.* at 2.

⁸⁷ *Id.* at 3.

House Democrats promptly called on the General Accounting Office (GAO)⁸⁸ to investigate.⁸⁹ In its ruling, the GAO found that the office's activities amounted to "covert propaganda" banned by the successor to the appropriations rider enacted in 1951.⁹⁰ But because of difficulties in tracking how much money was spent by the office, the GAO declined to seek the repayment of any funds.⁹¹ Instead it referred the violation to the State Department, which took no public action.

Republicans were not the only modern, covert propagandists. The Clinton administration famously brought government spin to the nation's living rooms. The rise of the twenty-four hour news cycle combined with the president's penchant for scandal meant that television viewers were bombarded with soundbites from press conferences.⁹² But a more telling legacy of the Clinton administration's publicity juggernaut issued from the White House's Office of National Drug Control Policy (ONDCP). In 1997, Congress appropriated nearly \$1 billion for a print and television anti-drug advertising campaign to be administered by ONDCP.⁹³ The government offered to buy ads from television networks and the print media at half-price.⁹⁴ In a tepid ad climate, many outlets agreed. But as the economy revived, participation flagged. So White House officials made an unusual offer: If the networks inserted government-approved anti-drug messages into their shows, they did not have to run the ONDCP ads at all and could resell the time already underwritten by Congress to private advertisers.⁹⁵ Print publications that showcased anti-drug themes could similarly resell prepaid ad space. Many outlets jumped at the deal, and the White House was allowed to pre-approve scripts of shows such as "ER" and "Beverly Hills 90210."⁹⁶

⁸⁸ In 2004, the GAO changed its name to the Government Accountability Office. This Note uses "GAO" throughout.

⁸⁹ See Berke, *supra* note 84 at A3.

⁹⁰ See Letter to Jack Brooks, *supra* note 83, at 4.

⁹¹ *Id.*

⁹² See generally HOWARD KURTZ, *SPIN CYCLE: INSIDE THE CLINTON PROPAGANDA MACHINE* xiii-xxvi (1998) (examining Clinton administration's press management strategies).

⁹³ 21 U.S.C. §§ 1801-04 (2000).

⁹⁴ See Daniel Forbes, *Prime-time Propaganda*, SALON, Jan. 13, 2000, <http://dir.salon.com/news/feature/2000/01/13/drugs/index.html>.

⁹⁵ *Id.*

⁹⁶ See Marc Lacey with Bill Carter, *In Trade-Off With TV Networks, Drug Office Is Reviewing Scripts*, N.Y. TIMES, Jan. 14, 2000, at A1; see also Alex Kuczinski & Marc Lacey, *U.S. Office Encouraged Antidrug Message in Magazines*, N.Y. TIMES, Apr. 1, 2000, at A7 (discussing appearance of government-vetted anti-drug themes in print publications).

After freelance writer Daniel Forbes detailed the arrangement in *Salon* magazine,⁹⁷ Congress quickly convened hearings.⁹⁸ And the National Organization for the Reform of Marijuana Law filed a complaint with the Federal Communications Commission (FCC) claiming that the networks' failure to reveal the government as the sponsor of their shows violated FCC disclosure rules.⁹⁹ Ruling in December of 2000, the FCC wrote that "listeners [and viewers] are entitled to know by whom they are being persuaded,"¹⁰⁰ and chided the networks for not being candid with their viewers. But it nevertheless stopped short of fining the networks because the arrangement did not technically break the law.¹⁰¹ Six months later, the Bush White House quietly shuttered the program.¹⁰²

As the modern government P.R. machine has grown, attempts to shape public opinion by stealth have continued unabated. Whether via secret columnist contracts or backhanded government control of editorial content, these efforts have succeeded in skewing news reports on public affairs.

F. The Current Controversy

As the foregoing historical survey demonstrates, the Bush administration's publicity operation is by no means the first to manipulate the press. But the administration has also broken with its predecessors in significant ways. First, it has consciously made publicity a top priority. The administration has poured funds into commercial public relations contracts,¹⁰³ and the ranks of public affairs officials have swelled by nine percent since the end of the Clinton administration.¹⁰⁴ Meanwhile, the Bush administration has exercised unusually firm con-

⁹⁷ See Forbes, *supra* note 94.

⁹⁸ See *The White House and Censorship: Hearing Before the Subcomm. on Telecomm., Trade, and Consumer Protection of the Comm. on Commerce*, 106th Cong. (2000).

⁹⁹ FCC Action Ltr., 16 F.C.C.R. 1421, 1421 (2000).

¹⁰⁰ *Id.* at 1423.

¹⁰¹ *Id.* at 1425-26.

¹⁰² Daniel Forbes, *The Quiet Death of Prime-Time Propaganda*, SALON, June 30, 2001, <http://archive.salon.com/news/feature/2001/06/30/ondcp>.

¹⁰³ See STAFF OF H. COMM. ON GOV'T REFORM, 109TH CONG., FEDERAL PUBLIC RELATIONS SPENDING 4-6 (Comm. Print 2005).

¹⁰⁴ Tom Brune, *Cadre Grows to Rein in Message*, NEWSDAY, Feb. 24, 2005, at A22.

trol over the flow of information to the press¹⁰⁵ and, at times, over the press itself.¹⁰⁶

Within this environment of tightly managed information, the administration has also been more aggressive in its use of the type of covert publicity strategies that are the focus of this Note. In addition to pay-to-praise contracts, the administration has invested heavily in “video news releases”—prepackaged segments designed to be broadcast uncut by local stations—to get its message out. Federal agencies have been producing video news releases since at least the early 1990s.¹⁰⁷ But the P.R. tool has gained in popularity and has been used to publicize many of President Bush’s signature initiatives.¹⁰⁸ For example, one release on prescription drug benefits was narrated by P.R. consultant Karen Ryan and included an “interview” with Tommy Thompson, then-Secretary of Health and Human Services.¹⁰⁹ The video ended with her typical sign-off: “In Washington, I’m Karen Ryan reporting.”¹¹⁰ Distributed by CNN’s video feed service, the segment, in full or in part, aired in forty of the nation’s largest television markets.¹¹¹ The report made no mention of any of the law’s vocal critics.¹¹² But more importantly, it failed to disclose that it was written, filmed, and edited by the government.¹¹³

The backlash from Congress has been fiercely partisan. Democrats have hosted hearings and introduced a flurry of bills aimed at curbing both pay-to-praise and video news releases.¹¹⁴ In two separate rulings, the GAO concluded that video news releases were

¹⁰⁵ See, e.g., Adam Clymer, *Government Openness at Issue as Bush Holds On to Records*, N.Y. TIMES, Jan. 3, 2003, at A1 (describing how agencies now have more leeway to withhold documents requested under Freedom of Information Act); Steven Aftergood, *The Age of Missing Information: The Bush Administration’s Campaign Against Openness*, SLATE, Mar. 17, 2005, <http://www.slate.com/id/2114963> (noting seventy-five percent increase in pace of document classification since Bush took office).

¹⁰⁶ See Greg Mitchell, *Enlistment Papers*, EDITOR & PUBLISHER, Feb. 24, 2003, at 34 (describing how reporters in military’s embedding program are subject to de facto censorship). These efforts to control the press have reportedly even extended to the foreign media. See Jeff Gerth & Scott Shane, *U.S. Is Said to Pay to Plant Articles in Iraq Papers*, N.Y. TIMES, Dec. 1, 2005, at A1 (describing payments by Pentagon to Iraqi journalists to print sympathetic stories).

¹⁰⁷ For an early discussion of the practice, see David Lieberman, *Fake News*, TV GUIDE, Feb. 22, 1992, at 10, 11.

¹⁰⁸ See Barstow & Stein, *supra* note 12, at A1, A34 (noting use of video news releases by twenty agencies to publicize, inter alia, Iraq war and Medicare reform).

¹⁰⁹ *Id.* at A34 (describing format of interview in which Thompson knew questions ahead of time).

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ See *infra* Part II.C.

“covert propaganda” in violation of the most recent appropriations prohibition.¹¹⁵ The GAO also ruled that the Armstrong Williams contract violated the same prohibition.¹¹⁶ Meanwhile, a Department of Education audit found that there was nothing illegal about the Armstrong Williams contract.¹¹⁷

G. Conclusion

The preceding historical analysis demonstrates that covert governmental efforts to use the media to manipulate the public are nothing new. In fact, such efforts have been a source of controversy since the Founding era and have continually inspired legislative reform efforts. The next Part explains why these legislative efforts have proved futile.

II

HOLES IN THE REGULATORY REGIME

This Part examines the patchwork regulatory regime currently in force to curb covert government news management. In practice, the laws discussed in Part II.A are difficult to administer for two reasons. First, the laws lack clear definitional language to guide regulators. Second, there are political barriers to enforcement. With each party seeking to score political gains from covert propaganda, political actors are uniquely unconcerned with curbing deceptive P.R. tactics. Part II.B turns to the FCC’s role and the potential enforcement of sponsorship identification regulations on broadcasters who transmit government information. The Section then proceeds to a discussion of the significant obstacles to the use of these laws in the current context. Part II.C briefly summarizes new legislation introduced in Congress, and Part II.D concludes that because a regulatory solution to the propaganda problem is foreclosed by partisan politics, judicial intervention is necessary.

¹¹⁵ See Office of Nat’l Drug Control Policy—Video News Releases, B-303495 at 2 (U.S. Gen. Accounting Office Jan. 4, 2005); Dep’t of Health and Human Servs., Ctrs. for Medicare & Medicaid Servs.—Video News Releases, B-302710, 16 (U.S. Gen. Accounting Office, May 19, 2004); see also Prepackaged News Stories, B-3044272, 1–3 (U.S. General Accounting Office Feb. 17, 2005) (reiterating earlier rulings and calling on agency heads to “scrutinize any proposed prepackaged news stories to ensure appropriate disclosures”).

¹¹⁶ Dep’t of Educ.—Contract to Obtain Servs. of Armstrong Williams, B-305368 (U.S. Gen. Accounting Office Sept. 30, 2005).

¹¹⁷ OFFICE OF INSPECTOR GEN., U.S. DEP’T OF EDUC., CONTROL NO. ED-OIG/A19-F0007, FINAL REPORT: REVIEW OF FORMATION ISSUES REGARDING THE DEPARTMENT OF EDUCATION’S FISCAL YEAR 2003 CONTRACT WITH KETCHUM, INC. FOR MEDIA RELATIONS SERVICES 1, 18 (2005).

A. *The GAO and "Covert Propaganda"*

Though a handful of laws strictly regulate the dissemination of foreign propaganda in the United States,¹¹⁸ the principal control on deceptive domestic propaganda is the aforementioned prohibition that has appeared nearly verbatim in every appropriations bill since 1951.¹¹⁹ The primary administrative body charged with the enforcement of the prohibition is the GAO, which oversees expenditures of taxpayer dollars.¹²⁰

Several features of the GAO make it particularly ill-suited for checking government publicity overreaches. First, its jurisdiction is almost entirely discretionary. Though the GAO can initiate its own audit investigations, it must also act at Congress's behest.¹²¹ Second, it serves a purely advisory role. Its legal opinions do not have any weight as precedent.¹²² Lastly, it has no direct enforcement power.¹²³ At most, it can refer its findings to Congress or other agencies for further investigation.¹²⁴

The GAO has had particular trouble enforcing the propaganda prohibition. It has stated that the provision "mark[s] the boundary between an agency making information available to the public and . . . creating news reports unbeknownst to the receiving audience."¹²⁵ But it has also said that it does not know where this boundary falls.¹²⁶ Over the years, the GAO has read the provision to bar "covert propaganda . . . materials that 'are misleading as to their origin,'" ¹²⁷ and the

¹¹⁸ See, e.g., 22 U.S.C. §§ 612(a), 614 (2000) (requiring foreign agents to register themselves and to file copies of propaganda materials with Attorney General); 22 U.S.C. § 1461(a) (2000) (banning dissemination to U.S. audiences of foreign propaganda generated by United States Information Agency).

¹¹⁹ See, e.g., Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, § 624, 118 Stat. 3, 356 (2004) ("No part of any appropriation contained in this or any other Act shall be used for publicity or propaganda purposes within the United States not heretofore authorized by the Congress."); Consolidated Appropriations Resolution, Pub. L. No. 108-7, § 626, 117 Stat. 11, 470 (2003) (same).

¹²⁰ See OFFICE OF GEN. COUNSEL, U.S. GEN. ACCOUNTING OFFICE, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW 21-24 (3d ed. 2004) (outlining GAO's mandate).

¹²¹ See *id.* at 22-24 (GAO must investigate and report upon congressional request, but it also has independent authority to audit financial transactions of most agencies).

¹²² *Id.* at 40.

¹²³ *Id.* at 36, 40.

¹²⁴ *Id.*

¹²⁵ Dep't of Health and Human Servs., Ctrs. for Medicare & Medicaid Servs.—Video News Releases, B-302710 at 13 (U.S. Gen. Accounting Office May 19, 2004).

¹²⁶ See Medicare Prescription Drug, Improvement, and Modernization Act of 2003—Use of Appropriated Funds for Flyer and Print and Television Advertisements, *supra* note 79, at 6 ("Given the absence of definitional guidance in the statute and its legislative history, we have struggled over the years to balance the need to give meaning to this prohibition with an agency's right or duty to inform the public . . .").

¹²⁷ *Id.* at 8 (quoting B-223098, U.S. Gen. Accounting Office Oct. 10, 1986).

use of funds “designed to aid a political party or candidates.”¹²⁸ Even so, it gives agencies “wide discretion” and only finds violations where the agency’s justification for its actions is “palpably erroneous.”¹²⁹ Finally, in those few instances, such as the State Department columnist scandal, where the GAO has referred violations elsewhere, there is no evidence of further action.

Thus far, the dynamic in the current controversy has proved little different. None of the GAO’s three opinions holding that video news releases or columnist contracts are “covert propaganda” has led to follow-up enforcement action. Instead, the opinions have merely added to the political fray, prompting a flurry of press releases and a memorandum from the Department of Justice’s Office of Legal Counsel telling agency heads to ignore the GAO altogether.¹³⁰

B. *The FCC and Sponsorship Identification*

The FCC is charged with regulating the other side of the government publicity machine: the broadcast media’s role in delivering misleading information to the public. The FCC is currently investigating whether either the columnist contracts or the deceptive video news releases violated a sponsorship identification law requiring that stations disclose the source of any material broadcast in exchange for money.¹³¹ Originally passed in 1927 to prevent advertisers from secretly dictating radio content,¹³² this so-called “payola” law was amended in 1960 to include a provision requiring sponsorship identifi-

¹²⁸ *Id.* (quoting B-147578, U.S. Gen. Accounting Office Nov. 8, 1962, available at <http://redbook.gao.gov/5/fi0020639.php>).

¹²⁹ *Id.* at 7.

¹³⁰ Memorandum from Steven G. Bradbury, Principal Deputy Assistant Attorney Gen., U.S. Dep’t of Justice, Office of Legal Counsel, to the Office of Mgmt. and Budget (Mar. 1, 2005) (“Our view is that the prohibition does not apply where there is no advocacy of a particular viewpoint, and therefore it does not apply to the legitimate provision of information concerning the programs administered by an agency.”). Bradbury also noted that video materials “are the television equivalent of the printed press release.” *Id.* at 2. However, media reports have suggested that a different arm of the Department of Justice (DOJ) is at least investigating the Armstrong Williams contract. *See, e.g.,* Gregg Toppo, *Senator: Charges Possible over Williams Contract*, USA TODAY, Oct. 17, 2005, at A6 (noting that Armstrong Williams has been “cooperating” with DOJ for several months and quoting spokesman Channing Phillips that DOJ is “working with the Department of Education in reviewing the matter”).

¹³¹ *See* 47 U.S.C. § 317(a)(1) (2000) (requiring identification of sponsor of matter broadcast in exchange for money); Christopher Lee, *Federal Agencies’ Disclosure of Prepackaged News Urged*, WASH. POST, May 13, 2005, at A21 (describing FCC action on video news releases); Gail Russell Chaddock, *Bush Administration Blurs Media Boundary*, CHRISTIAN SCI. MONITOR, Feb. 17, 2005, at 1 (referring to FCC investigation of Armstrong Williams’ contract).

¹³² Radio Act of 1927, ch. 169, § 19, 44 Stat. 1162, 1170 (1927) (repealed 1934); *see* Richard Kielbowicz & Linda Lawson, *Unmasking Hidden Commercials in Broadcasting*:

cation for “political programs” or those dealing with “controversial issues,” even when the information is furnished for free.¹³³

In the past, the agency has consistently maintained that no identification is necessary when “[n]ews releases are furnished to a station by Government. . . and editorial comment therefrom is used on a program.”¹³⁴ But following the flap over video news releases, the FCC issued a notice reminding stations of their obligation to disclose sources of political programming¹³⁵ and noting the “danger that groups advocating ideas or promoting candidates, rather than consumer goods, might be particularly inclined to attempt to mask their sponsorship.”¹³⁶

But this new position seems untenable, and the FCC has already begun retreating from it.¹³⁷ As evidenced by the lack of action against the ONDCP ads, the FCC almost never enforces the payola rules.¹³⁸ And an interpretation of the rules that mandates disclosure by broadcasters whenever government press materials are used would touch a wide swath of broadcasts that rely on government information, and would potentially chill useful reporting. Because such an interpretation could require identification every time a journalist refers to information gleaned from a press release—a frequent occurrence in public affairs reporting—broadcasters could lose editorial control over how to narrate their stories and might be less likely to rely on such government information. Not surprisingly, television news directors are already voicing opposition.¹³⁹

Origins of the Sponsorship Identification Regulations, 1927-1963, 56 FED. COMM. L.J. 329, 334 (2004) (describing aims of 1927 law).

¹³³ 47 U.S.C. § 317(2) (2000).

¹³⁴ *In re Applicability of Sponsorship Identification Rules*, 40 F.C.C. 141, 146 (1963).

¹³⁵ Request for Comments on the Use of Video News Releases by Broadcast Licensees and Cable Operators, 70 Fed. Reg. 24,791 (May 11, 2005).

¹³⁶ *Id.* at 24,793.

¹³⁷ See Drew Clark, *Democrats, Stevens Spar on ‘News’ Release Disclosures*, NAT’L J. CONG. DAILY, May 13, 2005 (quoting FCC Commissioner Jonathan Adelstein: “We don’t have authority to compel government agencies to do anything regarding VNRs.”).

¹³⁸ See Anne E. Kornblut & David Barstow, *Debate Rekindles Over Government-Produced ‘News’*, N.Y. TIMES, Apr. 15, 2005, at A17.

¹³⁹ See *id.* (quoting Barbara Cochran, president of Radio-Television News Directors Association: “Any time you have the government interfering in news content, you have a huge problem How this material is identified should be at the discretion of the news departments”). Broadcast journalists, for their part, instead support voluntary identification conducted in accordance with professional codes of ethics. See *Pre-packaged News Stories: Hearing on S.967 Before the Senate Comm. on Commerce, Science and Transp.*, 109th Cong. (2005) [hereinafter *Hearing*] (testimony of Barbara Cochran) (“We believe that [our professional] guidelines help to ensure that the public receives the highest quality and most accurate information and is fully informed as to the source of third party material.”). Though a full evaluation of voluntary identification is beyond the scope of this Note, it bears mentioning that these professional codes did not prevent government news

It is even less likely that the FCC will act on the columnist contracts. Although the agency opened an investigation, it is unclear whether it is pursuing the columnists or the networks that hosted them. If it is pursuing the columnists, it is worth noting that the agency has never acted against an individual. Requiring columnists to self-identify on air as government contractors would thus be unprecedented.¹⁴⁰ If the FCC is focusing on the networks, case law could pose obstacles to effective enforcement. In 1983, the Court of Appeals for the D.C. Circuit ruled that the sponsorship identification regulations impose only the most minimal duty on networks to investigate the sources and financial backers of aired material.¹⁴¹ Under this interpretation of the statute, networks would escape enforcement action as long as they exercised "reasonable diligence" in inquiring into pundits' government ties.¹⁴²

C. Proposed Legislation

Two new bills introduced by Democrats in Congress, one in the House and one in the Senate, have proposed significant changes to the current framework. The House bill¹⁴³ would require federal agencies to notify Congress no later than thirty days after entering into public relations contracts.¹⁴⁴ Additionally, the bill would codify the appropriations prohibition,¹⁴⁵ and mandate that agency-produced publicity materials carry a "prominent notice" of their government source.¹⁴⁶ The Senate bill¹⁴⁷ is more narrowly targeted to video news releases. It would mandate that agencies disclose their role in preparing prepack-

releases from running with no identification whatsoever in forty of the nation's largest television markets. See *supra* text accompanying note 111. There is other evidence that voluntary identification is not a panacea. According to one study, as many as a third of news directors regularly aired video news releases and disclosed the government's role only rarely or never. See Marion Just & Tom Rosensteel, Op-Ed, *All the News That's Fed*, N.Y. TIMES, Mar. 26, 2005, at A13 ("[A] quarter to a third of news directors in our surveys showed video news releases and disclosed the source 'occasionally,' 'rarely,' or 'never.'").

¹⁴⁰ See Kornblut & Barstow, *supra* note 138.

¹⁴¹ See *Loveday v. FCC*, 707 F.2d 1443, 1445, 1458 (D.C. Cir. 1983). Judge Bork's opinion stated:

Were we to approve a stringent obligation to investigate . . . [t]he rule might have the effect of choking off many political messages. Quite aside from any First Amendment difficulties that such a rule might implicate, we are certainly not prepared to say that the public would be benefited from a decline in the number and variety of political messages it receives.

Id. at 1458.

¹⁴² *Id.* at 1448.

¹⁴³ Federal Propaganda Prohibition Act of 2005, H.R. 373, 109th Cong. (2005).

¹⁴⁴ *Id.* § 3(a).

¹⁴⁵ *Id.* § 4(a). Codification would eliminate the need for annual reenactment.

¹⁴⁶ *Id.* § 5(a).

¹⁴⁷ Truth in Broadcasting Act of 2005, S. 967, 109th Cong. (2005).

aged news stories by displaying the statement “Produced By The U.S. Government” throughout the duration of any video release.¹⁴⁸

By requiring some form of government disclosure, either to Congress of the names of journalists contracting with agencies or directly to television viewers via an onscreen disclaimer, the bills could effectively eliminate the secrecy in government news management. However, as with previous attempts to legislate a solution to deceptive publicity, sizeable obstacles remain. Support for the House bill has broken purely on party lines.¹⁴⁹ And while the Senate bill has garnered more bipartisan support, a version of the bill with watered down disclosure requirements was voted out of committee.¹⁵⁰ Moreover, broadcasters have vigorously challenged onscreen disclosure, contending that it interferes with their editorial freedom.¹⁵¹ Given these objections from partisans and the press as well as the historical failure of legislative intervention to cure covert propaganda, there is little chance that the reforms will succeed.

D. Conclusion

The above discussion demonstrates that the current regulatory regime is an ineffective monitor of government news management techniques. The regime is also incomplete. While the FCC regulates broadcast media, there is no corollary restraint on print media. As it stands now, and absent judicial intervention, we can expect the government publicity machine to grow unchecked and increasingly shape news content on public affairs.

III

GOVERNMENT NEWS MANAGEMENT AND PUBLIC DEBATE: THE FIRST AMENDMENT IMPLICATIONS

This Part shifts the discussion to the First Amendment. Part III.A contends that deceptive government news management, with its

¹⁴⁸ *Id.* § 2.

¹⁴⁹ H.R. 373, 109th Cong. (2005). At the time of this writing, the bill had sixty-eight cosponsors and had been referred to the House Committee on Government Reform. Bill Summary and Status Report, <http://thomas.loc.gov/cgi-bin/bdquery/z?d109:h.r.00373>: (last visited Mar. 28, 2006).

¹⁵⁰ See S. 967, 109th Cong. § 2 (as voted out of committee, Dec. 20, 2005) (directing FCC to promulgate rules providing for circumstances in which disclosure is not required). See also *Commerce Okays Weaker VNR Measure*, O'DWYER'S PR SERVICES REP., NOV. 2005, at 37 (reporting that Senate bill approved by Commerce Committee imposes “less stringent” disclosure obligations).

¹⁵¹ See, e.g., *Hearing*, *supra* note 139 (statement of Barbara Cochran) (“We think that how that looks on the air should be in the hands of the people producing the news.”); see also Just & Rosensteil, *supra* note 139; Kornblut & Barstow, *supra* note 138.

propensity to distort news coverage received by the public, implicates the First Amendment's fundamental values. Part III.B discusses the special First Amendment concerns raised by selective government support of speech that both facilitates public discussion and threatens to sway it towards the government-favored view. Part III.C analyzes manipulative news management techniques under the Supreme Court's emerging government speech jurisprudence. It maintains that the Court's government speech opinions require government neutrality in two discrete instances: when the speech itself serves an impermissible purpose, and when it disrupts the functioning of a constitutionally enshrined institution such as the press. Part III concludes that certain covert government news management practices disrupt the function of the press, and, accordingly, violate the First Amendment.

A. *Relevant First Amendment Principles*

The First Amendment prohibits the government from "abridging the freedom of speech, or of the press."¹⁵² Three values serve as the principal justifications for this ban: promoting the search for truth in the marketplace of ideas,¹⁵³ ensuring a well-informed populace primed for self-governance,¹⁵⁴ and allowing for autonomous decision-making by citizens.¹⁵⁵ Government news management, with its capacity to alter individuals' opinions and to skew the tenor and outcome of public debate, potentially compromises all three values. It also implicates a fourth function of the First Amendment: to "check[] the abuse of power by public officials."¹⁵⁶ This checking function is primarily fulfilled by the press, often referred to as government's watchdog. The insulation of the media from government interference is central to this function.¹⁵⁷

¹⁵² U.S. CONST. amend. I.

¹⁵³ See *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market . . .").

¹⁵⁴ See Alexander Meiklejohn, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 15-17 (The Lawbook Exchange 2000) (1948) (arguing that First Amendment guarantee of open discussion enhances self-governance by fully informed public).

¹⁵⁵ See David A.J. Richards, *Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment*, 123 U. PA. L. REV. 45, 62 (1974) ("The value of free expression . . . rests on its deep relation to self-respect arising from autonomous self-determination . . .").

¹⁵⁶ Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521, 527.

¹⁵⁷ See, e.g., *FCC v. League of Women Voters*, 468 U.S. 364, 382 (1984) ("[T]he press . . . carries out a historic, dual responsibility of reporting information and of bringing critical judgment to bear on public affairs."); Potter Stewart, "*Or of the Press*", 26 HASTINGS L.J.

Given the interest in promoting energetic democratic debate amongst an informed populace, the First Amendment is most concerned with government restrictions that prevent ideas from being voiced.¹⁵⁸ Consequently, the Supreme Court has reserved its most speech-protective review for laws that proscribe particular viewpoints¹⁵⁹ and are motivated by the government's desire to suppress those views or shield itself from criticism.¹⁶⁰

B. First Amendment Theory and Government Subsidies of Speech

The government's impact on the marketplace of ideas is not limited to speech prohibitions. In reality, the government exerts a much greater influence on public debate by funding certain speakers and viewpoints than by prohibiting speech. In the modern state, the government speaks to the people in myriad ways: by educating citizens in its schools, interpreting its laws in Supreme Court opinions, recruiting people for its armed forces, and by issuing information, many times each day, about its programs via news releases and press conferences. Much of this speech necessarily reflects a particular view: reading is good; crime is bad; Great Britain is our friend.

Of course, promoting viewpoint-based speech is not the same as suppressing it. As an initial matter, educating and safeguarding the public—by telling citizens about an approaching hurricane or publicizing a terror alert—are part of government's mandate and would be impossible to accomplish in a neutral way. For example, the government needs to take a position on whether a terror threat has reached code red proportions. Government-funded speech also furthers the First Amendment value of self-government by giving citizens the information necessary to select their leaders at the ballot box. Finally, government speech such as public radio can make audible

631, 634 (1975) ("The primary purpose of the constitutional guarantee of a free press was . . . [to] create a fourth institution outside the Government as an additional check on the three official branches.").

¹⁵⁸ See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339–40 (1974) ("Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas.").

¹⁵⁹ See Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 198 (1983) ("[T]he first amendment is concerned, not only with the extent to which a law reduces the total quantity of communication, but also—and perhaps even more fundamentally—with the extent to which a law distorts public debate.").

¹⁶⁰ As Geoffrey Stone has observed: "[T]he First Amendment places out of bounds any law that attempts to freeze public opinion at a particular moment in time." Lee C. Bollinger & Geoffrey R. Stone, *Dialogue*, in *ETERNALLY VIGILANT: FREE SPEECH IN THE MODERN ERA* 1, 29 (Lee C. Bollinger & Geoffrey R. Stone eds., 2002).

those whose voices might not otherwise be heard above the clamor of the commercial media.

Yet at the same time, government-subsidized speech directly implicates the First Amendment's concern with the quality of public debate. The specter of indoctrination haunts the government's participation in this debate, especially when it participates covertly. The government's voice has the potential to dominate the discourse, skew it towards a government-preferred resolution, or, in the extreme, stifle private speech altogether.¹⁶¹ "A government need not directly curtail the activities of private pamphleteers," explains one scholar. "[I]t can effectively displace them by subsidizing the 'friendly' press, or, better still, by establishing an inexhaustibly more powerful press committed exclusively to its own view."¹⁶² Indeed, the Supreme Court has at least hinted at the danger inherent in selective government support of the broadcast press, writing that "[i]t is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee."¹⁶³

Against this backdrop, government news management techniques—whether routine press releases endorsing government programs, covert payments to journalists supporting a friendly viewpoint, or video news releases that provide free, partisan coverage of public

¹⁶¹ While all of these threats exist and are important to understand from the perspective of First Amendment theory, the analysis in Part III.C. *infra* is principally concerned with government's covert participation in public debate.

¹⁶² MARK G. YUDOF, *WHEN GOVERNMENT SPEAKS* 15 (1983) ("There is the danger that government communications will be employed to falsify consent. . . . [or] to fashion a majority will through uncontrolled indoctrination activities."). See also David Cole, *Beyond Unconstitutional Conditions: Charting Spheres of Neutrality in Government-Funded Speech*, 67 N.Y.U. L. REV. 675, 734 (1992) ("[W]hile a news conference, television advertisement, or even television program devoted to the Administration's point of view does not raise serious first amendment concerns, a national television station devoted to propagating its point of view might."); Robert D. Kamenshine, *The First Amendment's Implied Political Establishment Clause*, 67 CAL. L. REV. 1104, 1105 (1979) ("If a government can manipulate [public discourse], it can ultimately subvert the processes by which the people hold it accountable."); Robert C. Post, Essay, *Subsidized Speech*, 106 YALE L.J. 151, 192 (1996) ("Subsidies that literally overwhelm public discourse, that seriously rupture foundational notions of a functioning marketplace of ideas, can and should be set aside."); William W. Van Alstyne, *The First Amendment and the Suppression of Warmongering Propaganda in the United States: Comments and Footnotes*, 31 LAW & CONTEMP. PROBS. 530, 533 (1966). But see Frederick Schauer, Book Review, *Is Government Speech a Problem?*, 35 STAN. L. REV. 373, 386 (1983) ("Governments may abuse their power in many ways, including ways that relate to government communication, but it does not follow that abuse of governmental power should, in every case, be a first amendment problem.").

¹⁶³ *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969).

affairs—should be understood as viewpoint-based subsidies of speech. Like government speech more generally, they simultaneously foster free-flowing debate and threaten to undermine it. As the next Section explains, certain covert techniques cross the line from education into indoctrination, and so violate the First Amendment.

C. *News Management as an Unconstitutional Government Subsidy*

Academics seized on the First Amendment puzzle of viewpoint discrimination in government speech in the early 1980s.¹⁶⁴ A decade later, the Court issued its first ruling on the issue. In *Rust v. Sullivan*,¹⁶⁵ the Court upheld restrictions under Title X of the Public Health Service Act prohibiting doctors who receive federal funds from discussing abortion with their patients. The Court wrote that when “Government appropriates public funds to establish a program it is entitled to define the limits of that program.”¹⁶⁶ There is no viewpoint discrimination, it continued, when government chooses to fund a program “dedicated to advanc[ing] certain permissible goals.”¹⁶⁷ Under the Court’s vague guidance, *Rust* seemed to broadly sanction viewpoint distinctions in government subsidized speech so long as the affected subsidy could be framed—as nearly every subsidy could—as part of a government program.

Four years later, in *Rosenberger v. Rector and Visitors of University of Virginia*,¹⁶⁸ the Court struck down a University of Virginia policy authorizing school funding of a variety of student publications but prohibiting the use of such funds to finance religious publications. The Court distinguished *Rust* as an instance of the government “us[ing] private speakers to transmit specific information pertaining to [government’s] own program,”¹⁶⁹ and held that viewpoint restrictions were improper where the government “expends funds to encourage a diversity of views from private speakers.”¹⁷⁰ This key distinction is subtle. In the decade since, lower courts have read *Rosenberger* to require a determination of who is speaking—either the government itself through a mouthpiece, in which case viewpoint restrictions are permissible, or a private individual through a government subsidy, in which case viewpoint restrictions are not

¹⁶⁴ For the earliest and most nuanced analysis of government speech, identifying the scope of government speech, analyzing its dangers, and determining when remedies are necessary, see generally YUDOF, *supra* note 162.

¹⁶⁵ 500 U.S. 173 (1991).

¹⁶⁶ *Id.* at 194.

¹⁶⁷ *Id.*

¹⁶⁸ 515 U.S. 819 (1995).

¹⁶⁹ *Id.* at 833.

¹⁷⁰ *Id.* at 834.

permissible. It is a fact-specific, formalistic inquiry that has often proved difficult to apply.¹⁷¹

A decade after *Rust*, in *Legal Services Corp. v. Velazquez*, the Court confronted another government subsidy with strings attached.¹⁷² The *Velazquez* subsidy prohibited lawyers funded by the government's Legal Services Corporation (LSC) from challenging the constitutionality of welfare laws. The Court struck down the restriction, hewing to the speaker-identity inquiry formulated in *Rosenberger* and asserting that "the LSC program was designed to facilitate private speech, not to promote a governmental message."¹⁷³ For evidence of the private quality of this speech, it looked to the government's attempt to "use an existing medium of expression and to control it . . . in ways which distort its usual functioning."¹⁷⁴ Further, the Court concluded that the restriction distorted both the adversarial process and the process of judicial review as outlined in the Constitution itself.¹⁷⁵

Though the Supreme Court's elusive approach to government speech remains very much in flux, and has generated dozens of spirited critiques,¹⁷⁶ the emerging jurisprudence paves the way for a First Amendment challenge to deceptive government news management. There are two forms this challenge could take. The first centers on the "impermissible purpose" inquiry announced in *Rust*. The second, and by far the more viable, draws primarily on *Velazquez* and contends that the government improperly discriminates by viewpoint when it distorts the traditional functioning of the press.

¹⁷¹ Cf. *Sons of Confederate Veterans, Inc. v. Comm'r of the Va. Dep't of Motor Vehicles*, 305 F.3d 241, 244–45 (4th Cir. 2002) (Luttig, J., respecting the denial of rehearing en banc) ("[C]ircuit courts . . . have struggled . . . because they have assumed, in oversimplification, that all speech must be either that of a private individual or that of the government, and that a speech event cannot be *both* private and governmental at the same time.").

¹⁷² 531 U.S. 533 (2001).

¹⁷³ *Id.* at 542.

¹⁷⁴ *Id.* at 543.

¹⁷⁵ See *id.* at 544 ("[Government] may not design a subsidy to effect this serious and fundamental restriction on advocacy of attorneys and the functioning of the judiciary.").

¹⁷⁶ See, e.g., Randall P. Bezanson & William G. Buss, *The Many Faces of Government Speech*, 86 IOWA L. REV. 1377, 1381–82 (2001) (criticizing speaker-based distinction in *Velazquez* as "incoherent"); Cole, *supra* note 162, at 680–83 (arguing that government speech doctrine ignores harm to public's interest in free flow of ideas); Post, *supra* note 162, at 151–52 (finding doctrines in subsidized speech cases have "grown increasingly detached from the real sources of constitutional decisionmaking" and "have become formalistic labels for conclusions, rather than useful tools for understanding").

The Court in *Rust* first broached the prospect of using a subsidy's purpose as a touchstone of constitutionality.¹⁷⁷ But beyond asserting that a "subsidy may not 'aim at the suppression of dangerous ideas,'" ¹⁷⁸ the Court has given no guidance on what, in fact, makes a purpose impermissible. Yet with near uniformity, scholars of government speech have ventured one such impermissible purpose: an administration's funding of purely partisan speech aimed at ensuring its own reelection to office.¹⁷⁹ These scholars read the First Amendment to imply a political establishment clause which, in the mold of the religious one, forbids the government from establishing an official state party organ.¹⁸⁰ Though this account is persuasive, neither the payments to columnists nor video news releases—nor, for that matter, any of the examples in Part I—presents such an extreme case. The Bush administration may be using these techniques to encourage support for its policies, but this support is only tangentially connected to a reelection effort.

A second, smaller group of commentators has suggested that impermissible purpose extends beyond electioneering to encompass government-funded speech that "tak[es] sides in a currently contested political debate."¹⁸¹ Under this view, government exceeds constitutional bounds merely by funding speech aimed at tipping the balance

¹⁷⁷ *Rust v. Sullivan*, 500 U.S. 173, 194 (1991) ("[Government does not] unconstitutionally discriminate on the basis of viewpoint when it chooses to fund a program dedicated to advance certain permissible goals . . .").

¹⁷⁸ *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 587 (1998) (quoting *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 550 (1987)).

¹⁷⁹ See, e.g., *Int'l Ass'n of Machinists v. Street*, 367 U.S. 740, 788 (1961) (Black, J., dissenting) (asserting that First Amendment is violated when government creates fund "to be used in helping certain political parties or groups favored by the Government to elect their candidates or promote their controversial causes"); THOMAS I. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 699 (1970) ("[T]he government would not be empowered to engage in expression in direct support of a particular candidate for office. It is not the function of the government to get itself reelected."); STONE, *supra* note 53, at 154 ("It may also be that the First Amendment would prohibit the government from using public resources directly to support *partisan* goals."). But see Schauer, *supra* note 162, at 382 ("Governmental support of particular candidates, for example, is not likely to be a great problem if we assume that at least some information about all of the candidates is available to the electorate.").

¹⁸⁰ For the most comprehensive articulation of this view, see Kamenshine, *supra* note 162, at 1104: "The free exercise of political rights . . . depends as much on a guarantee against political establishment as it does on the guarantee against interference with free speech."

¹⁸¹ CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* 231 (1993); cf. Elena Kagan, *The Changing Faces of First Amendment Neutrality: R.A.V. v. St. Paul, Rust v. Sullivan, and the Problem of Content-Based Underinclusions*, 1992 SUP. CT. REV. 29, 70 ("[A] law applies in a viewpoint discriminatory manner when it takes one side of a political debate.").

of a current policy controversy in its favor.¹⁸² This theory has the advantage of encapsulating speech that, like the columnist payments and video news releases, is not technically part of a campaign but is nevertheless directed at hot-button campaign issues. But the theory also has the drawback of finding only the most evanescent support in current doctrine. Unless such communications are so voluminous that they inundate the marketplace¹⁸³—as perhaps was the case with the CPI's wartime activities¹⁸⁴—the Court would be loathe to engage in the impossible line-drawing exercise of determining which political issues are so charged that they require constitutional safeguards. Such an exercise would doubtless chill otherwise valuable government speech along the way, and the Court would likely look to private counter-speech as the most plausible remedy.¹⁸⁵

A more promising constitutional challenge would contend that, regardless of their purpose, news management techniques that conceal the government's authorship amount to improper forms of viewpoint discrimination. The Court has indicated that identifying who is speaking—either a private individual expressing his or her views or the government endorsing its own message¹⁸⁶—is crucial to determining when viewpoint discrimination is constitutionally suspect. If, for example, the Vice President took to the airwaves to praise wire-tapping without a warrant, there would be no doubt that government itself was the speaker, and the audience could evaluate the usefulness and truthfulness of the received information accordingly. But as both the payments to columnists and video news releases illustrate, this speaker-identity inquiry does not always lend itself to such neat resolution. When the government contracted with Armstrong Williams to

¹⁸² It was this very prospect of government speech skewing the resolution of open political questions that time and again worried those in Congress who have tried to rein in government publicity. See *supra* notes 59, 77, and accompanying text.

¹⁸³ Scholars of government speech have regularly pointed out the dangers of market monopolization. See Bezanson & Buss, *supra* note 176, at 1488 (“[G]overnment speech should receive little or no immunity. . . when the government’s speech creates a monopoly for a particular point of view . . .”). The Court has been somewhat more sympathetic to such arguments in the campaign finance context, where it has accepted the rationale that “the appearance of public corruption” generated by huge accretions of wealth in campaigns is enough to justify speech restrictions. See, e.g., *McConnell v. FEC*, 540 U.S. 93, 144 (2003). An argument by analogy would have to contend that government speech on open political questions is so corrosive to democracy in the extreme that even a minor amount of this speech is cause for prophylactic judicial intervention.

¹⁸⁴ See *supra* text accompanying notes 49–53.

¹⁸⁵ See *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 791–92 (1978) (“[T]he people in our democracy are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments. They may consider, in making their judgment, the source and credibility of the advocate.”).

¹⁸⁶ See *supra* text accompanying notes 169–171.

publicize No Child Left Behind, it purposefully sought out a private journalist not outwardly affiliated with the administration to espouse its education policy positions as his own. The inquiry is no easier in the context of video news releases, which also aim to communicate the government's views by simulating private discussion from television broadcasters. Again, though the government seeks to convey its slant on pressing policy matters, it does so insidiously in the guise of private, unbiased reporters while obscuring itself as the source.

In *Velazquez*, the Court refined the speaker-identity inquiry by asking whether the government "seeks to use an existing medium of expression and to control it . . . in ways which distort its usual functioning."¹⁸⁷ There, the Court discussed the traditional independence of both lawyers and the judiciary and found that the prohibition of certain types of legal arguments threatened to corrupt the "advocacy of attorneys and the functioning of the judiciary" by "insulat[ing] the Government's interpretation of the Constitution from judicial challenge."¹⁸⁸ In short, the Court found the speech restriction impermissible because it undermined an enterprise grounded in the Constitution itself: judicial review.¹⁸⁹

By disrupting the traditional role of the press enshrined in the First Amendment, surreptitious government news management techniques work a distortion similar to that prohibited in *Velazquez*. Of course, as with any constitutional determination that puts stock in tradition, much depends on how the tradition in question is framed.¹⁹⁰ And though, as chronicled in Part I, the government has long embraced covert news management tactics, these tactics have never

¹⁸⁷ *Legal Servs. Corp. v. Velazquez*, 531 U.S. at 543 (2001).

¹⁸⁸ *Id.* at 544, 548. In *United States v. American Library Association*, the Court further elaborated on why it concluded that the restriction on advocacy created such a distortion, writing that "the role of lawyers who represent clients in welfare disputes is to advocate against the Government, and there was thus an assumption that counsel would be free of state control." 539 U.S. 194, 213 (2003).

¹⁸⁹ One might ask why the speech restriction in *Rust* did not similarly distort the doctor-patient relationship. There are several possible ripostes. One is that it *did* create such a distortion, but that the relationship was not deserving of the same privileged status because it lacked a constitutional tie. Also, the Court might have viewed the doctors' speech restriction as less constraining. The Court suggested as much when it wrote in *Rust* that the restrictions did "not significantly impinge upon the doctor-patient relationship The doctor is always free to make clear that advice regarding abortion is simply beyond the scope of the program." *Rust v. Sullivan*, 500 U.S. 173, 200 (1991). Finally, some have contended that the cases are indistinguishable and the Court's holdings are flatly inconsistent. See Jessica Russak Sharpe, Recent Development, *Legal Services Corp. v. Velazquez: Tightening the Noose on Patients' Rights*, 81 N.C. L. REV. 1312, 1312 (2003) (arguing that "no significant distinction exists between the type[s] of speech" in *Rust* and *Velazquez*).

¹⁹⁰ See GEOFFREY STONE ET AL., CONSTITUTIONAL LAW 890-92 (4th ed. 2001) (discussing tradition and problem of framing).

been thought of as legitimate. Indeed, Part I also documented the tradition of fierce objections to these tactics as improperly manipulative of both the media and the public.¹⁹¹ It is this tradition of objection—and the underlying assumption that the press should be free from governmental interference—that must guide the constitutional inquiry.¹⁹²

This view of the traditional role of the press as government's adversary—rather than its handmaiden—is underscored by Supreme Court precedent. The Court has written that “the press serves and was designed to serve as a powerful antidote to any abuses of power by governmental officials.”¹⁹³ And in its media-related public forum cases, which also look to evidence of government distortions of the traditional role of the press, the Court has expressed solicitude for editorial discretion and the necessity of shielding it from government meddling.¹⁹⁴ Finally, in keeping with its general attentiveness to the quality of public debate, the Court has pointed out the hazards of communications that fail to disclose their sources, thus making it difficult for the audience to evaluate them fully and fairly.¹⁹⁵

By concealing government as the true speaker, covert payments to columnists and prepackaged newscasts intrude on the media's editorial independence and impair its ability to call government to account for wrongdoing. Consequently, such practices erode the public's confidence in the press as an objective watchdog. Like the

¹⁹¹ As evidenced by the statement of Cincinnatus, *see supra* note 21 and accompanying text, this tradition of objection dates back to the Founding itself.

¹⁹² In *Velazquez*, the Court took a similar approach to the traditional role of attorney speech. Rather than focusing on the tradition of government attempts to limit lawyer's speech (of which there is a venerable one), the Court looked instead to the “accepted” role of attorney speech within the adversary system and discussed its relationship to the independent judiciary. *Velazquez*, 531 U.S. at 545–46. Though government time and again has used covert tactics to manage the news, these tactics have never been “accepted.” Rather, as discussed in Part I, they have continually generated controversy and criticism.

¹⁹³ *Mills v. Alabama*, 384 U.S. 214, 219 (1966).

¹⁹⁴ *See Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 672–73 (1998) (“Public and private broadcasters alike are not only permitted, but indeed required, to exercise substantial editorial discretion . . .”); *FCC v. League of Women Voters*, 468 U.S. 364, 382 (1984) (recognizing special role of editorial in facilitating open, uninhibited, and robust debate on public issues); *see also Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974) (“[The] treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press . . .”).

¹⁹⁵ *See First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 792 (1978) (noting that while people generally consider “source and credibility” of competing arguments, “if there be any danger that the people cannot [do so] . . . it is a danger contemplated by the Framers of the First Amendment”).

restrictions in *Velazquez*,¹⁹⁶ these government news management techniques distort the adversarial role of the press and violate the First Amendment.

Unlike the theory that all government-funded speech on contested political questions is unconstitutional,¹⁹⁷ the *Velazquez* distortion principle has the benefit of being both easily administrable and relatively self-containing. The strict reading of the principle advocated here would limit its application only to those relationships, such as lawyers to the judiciary and the press to government, so fundamental that they are rooted in the Constitution. The need to find a constitutional pedigree would ensure that courts do not invoke the principle too broadly, thus chilling otherwise legitimate speech. Moreover, limiting the inquiry to public relations tactics that conceal the government as their source would further confine judicial intervention to those tactics—like the ONDCP ad scheme, the State Department and columnist contracts, and video news releases—that genuinely distort the transparency of the press.

That the constitutional infirmity of both secret columnist contracts and deceptive video news releases derives from lack of government disclosure tentatively points the way to a remedy. Once government reveals itself as the true origin of these communications,¹⁹⁸ the media's editorial integrity will no longer be in jeopardy

¹⁹⁶ It is worth addressing—and dismissing—the objection that the distortion here is somehow materially different from the one in *Velazquez*. The objection runs as follows: Unlike the lawyers in *Velazquez* (or even the doctors in *Rust*), who wanted to convey a view contrary to the government's, both Armstrong Williams and the news stations that run unedited video news releases are willingly publicizing the government's message. But rather than serving as a basis for distinguishing deceptive publicity tactics from the Court's speech restriction in *Velazquez*, this stealth cooperation between the press and government only underscores the distortion worked by columnist contracts and video news releases. Indeed, it is precisely this cooperation between government and reporters that prevents the press from serving in its traditional adversarial capacity as government's watchdog and, ultimately, erodes the public's trust in the institution as a means of rooting out government corruption.

¹⁹⁷ For a description of this theory's potential pitfalls, see *supra* notes 181–185 and accompanying text.

¹⁹⁸ Though the goal of this Note is not to provide a blueprint for litigation, it is important to acknowledge that a judicial challenge to covert news management may face hurdles. The path to remedial reform would likely proceed in the following manner. A First Amendment suit would be brought by either a group of citizen media consumers or a press outlet that unknowingly hosted a contracting columnist. These plaintiffs would have to establish standing, which might prove difficult under these circumstances. Assuming standing was established and a First Amendment violation was found, a court would then issue an injunction and not lift this injunction until the constitutional defect—the lack of full disclosure—was remedied by the government revealing itself as the source of the publicity practice at issue. It is also possible, though less likely given the partisan landscape discussed at length in Part II, that judicial intervention might spur Congressional action.

and the distortion will be cured. As with forms of disclosure elsewhere approved by the Court,¹⁹⁹ greater transparency in news management would promote First Amendment values by facilitating more educated public debate. Of course, there are numerous forms this disclosure could take, including visual disclaimers on video news releases or disclosure by agencies to Congress of those journalists with pay-to-praise contracts.²⁰⁰ Depending on how they interact with existing news-gathering practices,²⁰¹ some disclosure measures might be more or less conducive to engendering the free flow of government information. But for present purposes, each of these measures shares the same important First Amendment goal: removing the distortion caused by covert government news management.

CONCLUSION

Despite the rhetoric to the contrary, government attempts to manage the news by stealth did not originate with the Bush administration. But these tactics, while longstanding, have continually sparked debate that they compromise the independence of the press and the openness of public discourse. Falling victim to partisan warfare, regulatory responses have thus far been unavailing.

This Note has argued that judicial intervention is necessary to break this partisan cycle. Specifically, it has concluded that payments to columnists and video news releases that conceal the government as their source are unconstitutional forms of viewpoint discrimination that violate the First Amendment. Given this defect, greater disclosure promises to help liberate the news from government's heavy—and hidden—hand.

¹⁹⁹ See, e.g., *McConnell v. FEC*, 540 U.S. 93, 201 (2003) (upholding disclosure requirements in Bipartisan Campaign Reform Act of 2002 that “perform an important function in informing the public about various candidates’ supporters”).

²⁰⁰ Bills currently before Congress propose these forms of disclaimer. See *supra* notes 143–151 and accompanying text. Additionally, pay-to-praise contracts might also be redrafted to require that journalists reveal their government affiliation on the air or in print.

²⁰¹ See *supra* note 151 and accompanying text (detailing broadcasters’ objections to continuously running disclaimer proposed in S. 967).