

CONGRESSIONAL OVERSIGHT OF THE “MARKETPLACE OF IDEAS”: DEFECTORS AS SOURCES OF WAR RHETORIC

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CONTENTS

INTRODUCTION: CONGRESSIONAL OVERSIGHT	1
I. IRAQI NATIONAL CONGRESS.....	5
A. <i>The CIA, Ahmad Chalabi, and Forming the INC</i>	5
B. <i>Public Diplomacy vs. Domestic Propaganda</i>	8
C. <i>Funding the INC</i>	12
II. INC AND DEFECTOR CLAIMS.....	14
A. <i>Allegations During the 1990s</i>	14
B. <i>INC Information Prior to the 2003 Invasion</i>	17
C. <i>Post-Invasion Accusation Casting Between the INC and the White House</i>	23
D. <i>White House Public Relations Programs That Brought Forward Defectors</i>	24
CONCLUSION.....	28

INTRODUCTION: CONGRESSIONAL OVERSIGHT

Congressional oversight is “one of the most important responsibilities of the United States Congress,” particularly when oversight can enhance the likelihood that executive policies will reflect the public interest, augment the efficiency and efficacy of government operations, and deter “capricious behavior, abuse, waste, dishonesty, and fraud.”¹ Legislative scrutiny of the executive has arguably been weak,² but was markedly deficient during the Bush administration.³ In

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1. Louise M. Slaughter, H.R. COMM. ON RULES MAJORITY OFFICE: THE GEN. PRINCIPLES OF CONG. OVERSIGHT (1999), *available at* http://democrats.rules.house.gov/archives/comm_gp_cong_oversight.htm.

2. Douglas Kriner, *Can Enhanced Oversight Repair “The Broken Branch”?*, 89 B.U.L. REV. 765, 773 (2009). Senator Alan Simpson remarked that “when people say, ‘Where is Congress?’ They are there. It’s just that you don’t see them there.” *Sherman J. Bellwood Lecture: National Security and the Constitution: A Dialogue with Senators Gary*

2006, when only 20% of Americans approved of Congress's performance, Ralph Nader, Norman Ornstein and Thomas Mann published a book which referred to Congress as the "broken branch."⁴

Long-term trends of growth in the administrative state,⁵ the president's role as head of state during periods of proliferating international relations, and the Commander in Chief authority during war and crises have the prospect of augmenting presidential power relative to congressional assertions of prerogative. However, the existing composition of Congress in particular can aggravate the separation of powers balance and impede effective legislative oversight. The majority party in Congress may be polarized, exploit the centralization of power within party leadership, obstruct the minority party,⁶ initiate a preferred legislative agenda,⁷ and avert or omit contentious issues from the congressional agenda, particularly when those issues could frustrate the president.⁸ The majority party in

Hart and Alan Simpson, 43 IDAHO L. REV. 7, 21 (2006).

3. THOMAS MANN & NORMAN ORNSTEIN, *THE BROKEN BRANCH: HOW CONGRESS IS FAILING AMERICA AND HOW TO GET IT BACK ON TRACK* 156-57 (2006).

4. Kriner, *supra* note 2, at 765-66 (citing MANN & ORNSTEIN, *supra* note 3); *Presidential Powers: Articles and Poetry: A Forum on Presidential Authority*, 6 SEATTLE J. SOC. JUST. 23, 43 (2007) (20% of Americans had confidence in Congress at the same time the President had approval ratings of about 30%).

5. Kriner, *supra* note 2, at 769 (Congressional delegation of responsibilities to the executive during periods of administrative state expansion). Executive power has been encroaching on Congressional authority for several decades. Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2315 (2006); Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 508 (1989). The administrative agency facilitates the legislative mission and promotes efficiency. Cynthia R. Farina, *False Comfort and Impossible Promises: Uncertainty, Information Overload, and the Unitary Executive*, 12 U. PA. J. CONST. L. 357, 361-62, 399-403 (2010) (expansive and complex rule-making procedures in the executive branch to address changing society). The agency's prerogative grows in that new jurisdictional arena. Legislative vetoes can restrict later congressional action. *See generally* *Immigration Naturalization Serv. v. Chadha*, 462 U.S. 919 (1983).

6. Kriner, *supra* note 2, at 766; MARK TUSHNET, *THE NEW CONSTITUTIONAL ORDER* 18-19 (2003). Michael Doran, *The Closed Rule*, 59 EMORY L.J. 1363, 1367-71, 1384, 1389 (2010) ("Although they too had used the closed rule regularly throughout their twelve years in the majority, the Republicans renewed their own attacks on the closed rule – calling it 'offensive to the spirit of representative democracy' – once the Democrats regained control of the House in 2007."). *Id.* at 1370-71, 1429-30 (discussing the significant power of hierarchical party leadership).

7. *See generally* Gerald B.H. Solomon & Donald R. Wolfensberger, *The Decline of Deliberative Democracy in the House and Proposals for Reform*, 31 HARV. J. ON LEGIS. 321 (1994).

8. *See generally* GREGORY J. WAWRO & ERIC SCHICKLER, *FILIBUSTER: OBSTRUCTION AND LAWMAKING IN THE U.S. SENATE* (2006).

2012]

Congressional Oversight

3

Congress has the foremost opportunity to challenge the president,⁹ which means that scrutiny is apt to dwindle under unified government.¹⁰ During the mid-1990s, Republicans, particularly House Speakers Gingrich and Hastert and Senate Majority Leaders Dole and Lott, endeavored to drive an ideological agenda, but they were unable to overcome President Clinton's veto.¹¹ After Bush was inaugurated, Republicans controlled the presidency and Congress from 2001 to 2006.¹²

The White House can also lead the congressional agenda. The President has a privileged institutional capability to communicate with audiences to champion chosen issues and dominate public discourse.¹³ While controversial, the President could intensify command over political agendas with advocacy programs that Congress unwittingly funds.¹⁴ This is particularly unsettling if government expends taxpayer

9. Levinson & Pildes, *supra* note 5, at 2312, 2333-37 (the president can exercise party discipline to ensure loyalty).

10. Sudha Sety, *The President's Question Time: Power, Information, and the Executive Credibility Gap*, 17 CORNELL J.L. & PUB. POL'Y 247, 259-60 (2008).

11. Charles Tiefer, *Congress's Transformative 'Republican Revolution' in 2001-2006 and the Future of One-Party Rule*, 23 J. L. & POL. 233, 240 (2007).

12. *Id.* at 234 ("in 2001-2006, a 'Republican Revolution' transformed the law of Congressional rules and procedures to allow that party to implement an ideological agenda"); Doran, *supra* note 6, at 1367-68.

13. The only clear recourse is at the polls every four years. Bd. of Regents of Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 235 (2000) ("When the government speaks, for instance to promote its own policies or to advance a particular idea, it is, in the end, accountable to the electorate and the political process for its advocacy. If the citizenry objects, newly elected officials later could espouse some different or contrary position."). In *Youngstown Sheet & Tube Co. v. Sawyer*, Justice Jackson wrote about the President's political power:

[n]o other personality in public life can begin to compete with him in access to the public mind through modern methods of communication. By his prestige as head of state and his influence upon public opinion he exerts a leverage upon those who are supposed to check and balance his power which often cancels their effectiveness.

343 U.S. 579, 653-54 (1952) (Jackson, J., concurring); *Branzburg v. Hayes*, 408 U.S. 665, 729 (1972) (Stewart, J., dissenting) (the media should challenge government and not be a "captive mouthpiece of 'newsmakers'").

14. While discussed in greater detail elsewhere, there were other executive branch operations, other than the one discussed in this Article, that sought to craft public opinion, including the Pentagon's embedded reporter program and military analysts, the Bush administration's Video News Releases, and Pentagon operations that controlled Iraqi media. See generally Robert Bejesky, *Public Diplomacy or Propaganda? Targeted Messages and Tardy Corrections to Unverified Reporting*, 40 CAP. U. L. REV. 967 (2012) [hereinafter "Bejesky, *Public Diplomacy*"]. Government investigations and Congress people criticized each of these programs *post facto*, but the common denominator with these and the Iraqi

funds to disseminate/propagandize a preferred message anonymously.¹⁵ The Constitution and legislation provide that no public funds may be dispensed without congressional approval.¹⁶ As for the substantive message, the marketplace model generally posits that government does not regulate information or prohibit speech,¹⁷ and the First Amendment “does not affirmatively entitle anyone to subsidies for their speech.”¹⁸ If government funds one position and excludes others, the latter may be disadvantaged.

This Article examines how the congressional spending power and wanting oversight can abet operations that market war policies. These considerations forged a vital issue preceding the Iraq War. In its five-year investigation of the pre-war intelligence estimates, the Senate Select Committee on Intelligence (“SSCI”) devoted a 208-page report to the Iraqi National Congress (“INC”), a group of defectors who sourced the media and U.S. intelligence services with allegations that Iraq possessed weapons of mass destruction (“WMDs”) and collaborated with al-Qaeda.¹⁹ INC publicity activities were funded by the U.S. government.²⁰

National Congress was that taxpayer funding was allocated to concerted efforts to promote a pro-war agenda. *Id.*

15. Gia B. Lee, *Persuasion, Transparency, and Government Speech*, 56 HASTINGS L.J. 983, 1023-24 (2005).

16. U.S. CONST. art. I, § 9, cl. 7. The President must submit certain information to Congress, particularly for budget appropriations. Setty, *supra* note 10, at 291-92. The Antideficiency Act states that “an officer or employee of the United States Government . . . may not . . . make or authorize an expenditure or obligation exceeding an amount available in an appropriation.” 31 U.S.C. § 1341(a)(1)(A) (1982).

17. Derek E. Bambauer, *Shopping Badly: Cognitive Biases, Communications, and the Fallacy of the Marketplace of Ideas*, 77 U. COLO. L. REV. 649, 653 (2006); David Cole, *Beyond Unconstitutional Conditions: Charting Spheres of Neutrality in Government-Funded Speech*, 67 N.Y.U. L. REV. 675, 680-81 (1992) (if the government “seeks to prohibit speech directly, the first amendment demands that it maintain neutrality toward content, viewpoint, and speaker identity” in order to “curb government action that threatens to skew the market-place of ideas or to indoctrinate the citizenry”); *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 67 (1976) (Stevens, J., plurality opinion); *Bd. of Regents of Univ. of Wis. Sys.*, 529 U.S. at 220-21 (1976); *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 382 (1992); *see, e.g., United States v. Eichman*, 496 U.S. 310, 317-18 (1990); LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 12-36 (2d ed. 1988) (also when the government delays publication of important stories, it deprives the stories of their timely news value).

18. Cole, *supra* note 17, at 676-78, 681 (the Court has permitted government to have some degree of influence on the content of the private speech that it is funding).

19. *See generally* S. SELECT COMM. ON INTELLIGENCE, *THE USE BY THE INTELLIGENCE CMTY. OF INFO. PROVIDED BY THE IRAQI NAT’L CONG.*, Sept. 8, 2006, *available at* <http://intelligence.senate.gov/phaseiiiinc.pdf> [hereinafter “SSCI/INC”].

20. *See infra* Part I.C.

2012]

Congressional Oversight

5

I. IRAQI NATIONAL CONGRESS

A. *The CIA, Ahmad Chalabi, and Forming the INC*

The exploits of Iraqi defectors were one variable that led to the invasion of Iraq. The INC, and its head, Ahmad Chalabi,²¹ made numerous false allegations about weapons and security threats. In 2006, former Ambassador Peter Galbraith wrote: “Ahmed Chalabi’s role in the events leading to the American invasion of Iraq cannot, in my view, be overstated. If it were not for him, the United States military likely would not be in Iraq today.”²² Professor Jules Lobel explained that the “war was initiated based not on reliable, tested, objective evidence, but rather on intelligence information, suspicions, surmises, or statements from defectors.”²³ Chalabi was the “darling” of the Bush administration,²⁴ but he “gained notoriety after his group provided false information to journalists and intelligence organizations . . . before the U.S. invasion of Iraq.”²⁵ Intricate INC involvement with U.S. government agencies actually commenced over a decade earlier.²⁶

Shortly after the 1991 Gulf War, President George Bush Sr. issued an order for a Central Intelligence Agency (“CIA”) covert action to fashion conditions to depose the Iraqi government, which led the CIA to found an Iraqi Opposition Group within its Directorate of Operations,²⁷ and form the INC.²⁸ The INC, a congregation of three hundred affluent

21. Chalabi was born in Iraq into a wealthy family with privileged ties to the former government, but he fled the country in 1958 following a coup. SHELTON RAMPTON & JOHN STAUBER, *WEAPONS OF MASS DECEPTION: THE USES OF PROPAGANDA IN BUSH’S WAR ON IRAQ* 43 (2003); Noah Feldman & Roman Martinez, *Constitutional Politics and Text in the New Iraq: An Experiment in Islamic Democracy*, 75 *FORDHAM L. REV.* 883, 888 (2006); *Clues Emerge to Saddam Whereabouts*, CNN, June 11, 2003, http://articles.cnn.com/2003-06-11/world/sprj.nitop.chalabi_1_ahmed-chalabi-iraqi-exile-saddam-whereabouts?_s=PM:WORLD; Robert Dreyfuss, *Ticker, Banker, NeoCon, Spy*, AM. PROSPECT, Oct. 23, 2002, <http://prospect.org/article/tinker-banker-neocon-spy>.

22. PETER W. GALBRAITH, *THE END OF IRAQ: HOW AMERICAN INCOMPETENCE CREATED A WAR WITHOUT END* 86 (2006).

23. Jules Lobel, *Preventive Detention and Preventive Warfare: U.S. National Security Policies Obama Should Abandon*, 3 *J. NAT’L SECURITY L. & POL’Y* 341, 343 (2009).

24. Liz Sly, *Iraqi Politician’s Star Rising Again*, L.A. TIMES, Feb. 28, 2010, at A3, available at <http://articles.latimes.com/2010/feb/28/world/la-fg-iraq-chalabi28-2010feb28>.

25. Kianne Sedeq & Aram Roston, *Sources: U.S. Cuts Off Iraqi Politician Chalabi*, NBC NEWS, May 14, 2008, http://www.msnbc.msn.com/id/24620260/ns/world_news-mideast_n_africa/t/sources-us-cuts-iraqi-politician-chalabi/.

26. *Id.*

27. SSCI/INC, *supra* note 19, at 128; Marcus Eyth, *The CIA and Covert Operations: To Disclose or Not to Disclose—That is the Question*, 17 *BYU J. PUB. L.* 45, 52 (2002).

28. Jane Mayer, *The Manipulator: Ahmad Chalabi Pushed a Tainted Case For War*.

Iraqi defectors and several organizations, was a product of the CIA, and was counseled and financed by the CIA.²⁹ Chalabi began to work with the CIA in 1992.³⁰ In 2006, the CIA Chief of the Iraq Operations Group explained to the SSCI that the CIA hired a “‘very controversial character’ . . . [who] ‘came with some baggage.’”³¹

That “‘baggage” may have been related to Jordan. After the invasion, the news reported that, in 1990, Chalabi’s Petra Bank in Jordan was unable to comply with the Central Bank Governor’s order for all banks to deposit 30% of foreign exchange holdings with the Central Bank.³² Jordan placed Petra under supervision; the bank collapsed in June 1990; the Central Bank seized it for engaging in illegal foreign exchange transactions; and Chalabi departed from Jordan and moved to London.³³ In April 1992, Jordan’s State Security Court convicted Chalabi in absentia on thirty-one criminal charges, including fraud, embezzlement, theft, forgery, breach of trust, and on making bad, nepotistic loans.³⁴ Chalabi was sentenced to twenty-two years in prison and was instructed to repay over 200 million dollars in embezzled funds.³⁵ After the invasion of Iraq, disputes surfaced over the

Can He Survive the Occupation?, The NEW YORKER, May 29, 2004, http://newyorker.com/archive/2004/06/07/040607fa_fact1?currentPage=all; Feldman & Martinez, *supra* note 21, at 889.

29. Thomas Twetten, the CIA’s former deputy director of operations, later candidly remarked about the INC: “[t]he INC was clueless. They needed a lot of help and didn’t know where to start.” JAMES BAMFORD, *A PRETEXT FOR WAR* 296-97 (2004). General Anthony, Clinton’s U.S. Central Command (“USCENTCOM”) head, gave his mid-1990s perception of the INC by calling it a “Bay of Goats” operation initiated by “some silk-suited, Rolex-wearing guys in London.” RAMPTON & STAUBER, *supra* note 21, at 45; Laura Miller, *One Man in Iraq: The Rise and Fall of Ahmed Chalabi*, PR WATCH, 2004, <http://www.prwatch.org/prwissues/2004Q2/chalabi.html> (the CIA created the INC) [hereinafter “Miller, *One Man*”].

30. SSCI/INC, *supra* note 19, at 6; Kristen A. Stilt, *Islamic Law and the Making and Remaking of the Iraqi Legal System*, 36 GEO. WASH. INT’L L. REV. 695, 703 (2004); Mayer, *supra* note 28.

31. SSCI/INC, *supra* note 19, at 7.

32. David Leigh & Brian Whitaker, *Financial Scandal Claims Hang Over Leader in Waiting*, GUARDIAN UK, Apr. 14, 2003, <http://www.guardian.co.uk/world/2003/apr/14/iraq.davidleigh>.

33. Mayer, *supra* note 28; Leigh & Whitaker, *supra* note 32; Dreyfuss, *supra* note 21.

34. John Dizard, *The Implosion of Chalabi’s Petra Bank*, SALON, May 4, 2004, <http://www.salon.com/2004/05/04/petra/>; *Chalabi Dismisses Jordanian Fraud Charges*, CNN, Dec. 21, 2003, http://articles.cnn.com/2003-12-21/world/sprj.nirq.chalabi.jordan_1_petra-bank-iraqi-national-congress-jordanian-government?_s=PM:WORLD [hereinafter “*Chalabi Dismisses*”]; Leigh & Whitaker, *supra* note 32; RAMPTON & STAUBER, *supra* note 21, at 44.

35. *Chalabi Dismisses*, *supra* note 34. A Jordanian military attorney general

2012]

Congressional Oversight

7

legitimacy of the absentia conviction, and Chalabi sued Jordan for claiming he committed fraud, but the U.S. federal court dismissed the claim.³⁶

Whatever actually occurred during the early 1990s with Jordan did not impede the CIA from collaborating with Chalabi.³⁷ Chalabi became the head of the INC in June 1992 and was granted direct access to top U.S. government officials.³⁸ The INC located its headquarters in Washington, D.C.³⁹ and ostensibly was named the “Iraqi National Congress” to intimate the impression of a budding government unit.⁴⁰ Shortly after the invasion of Iraq, the U.S. military flew Chalabi into Iraq with a 600-person security force and he and other INC members lived with American Special Forces.⁴¹ During the occupation, the

investigation produced a 500-page report accusing Chalabi of making “fictitious deposits and entries to make income . . . appear larger; losses on shares and investments; [and] bad debts.” Leigh & Whitaker, *supra* note 32. Audits ascertained that Petra Bank was overstating assets by \$200 million, had millions of dollars in unpaid loans that were routed to Chalabi family members in other countries, and Nabulsi later called Petra Bank “like a tiny Enron.” Mayer, *supra* note 28.

36. Sedeq & Roston, *supra* note 25; *Chalabi Dismisses*, *supra* note 34. Chalabi sued the Jordanian government for losses he says he suffered, but the suit was dismissed. Aram Roston, *Iraqi Politician’s Suit Against Jordan Dismissed*, NBC NEWS, Aug. 28, 2007, http://www.msnbc.msn.com/id/20483866/ns/nightly_news-nbc_news_investigates/t/iraqi-politicians-suit-against-jordan-dismissed/. Chalabi’s lawyers issued a statement: “Dr. Chalabi is continuing to explore ways in which we can vindicate the interests of the two banks and their shareholders.” *Id.*

37. See Mayer, *supra* note 28.

38. *Id.* Former CIA officer Robert Baer explained about this period during the 1990s: “[h]e [Chalabi] was like the American Ambassador to Iraq . . . He could get to the White House and the C.I.A. He would move around Iraq with five or six Land Cruisers.” *Id.* Miller, *One Man*, *supra* note 29 (Chalabi cultivated relations with Washington Republicans).

39. Mayer, *supra* note 28.

40. KENNETH KATZMAN, CONG. RESEARCH SERV., IRAQ’S OPPOSITION MOVEMENTS, (Mar. 26, 1998), available at <http://www.fas.org/irp/crs/crs-iraq-op.htm> (the INC and other opposition factions apparently believed they would be fit to establish an interim government of Iraq in 1998 if the current regime was displaced).

41. David Rohde, *Political Party in Mosul Emerges With Own Army*, N.Y. TIMES, Apr. 18, 2003, at B3, available at <http://www.nytimes.com/2003/04/18/world/a-nation-at-war-northern-iraq-political-party-in-mosul-emerges-with-own-army.html>. Early in the invasion, Chalabi was also sufficiently important to the Bush administration to be making nationally-televised appearances about the developments inside Iraq. *Id.* On one such appearance, on April 13, 2003, he denied any ambitions of holding any public office, but noted about how his “free Iraqi forces” were working with the U.S. military and that his ambitions were just to be “devoted . . . with the people in their hour of trial.” *Interview by Tim Russert with Ahmad Chalabi, Iraqi Nat’l Cong.*, NBC MEET THE PRESS (Apr. 13, 2003), available at <http://www.defense.gov/transcripts/transcript.aspx?transcriptid=2383>. Stanley Reed, *Dispatch from Iraq: Violence, Chaos . . . Enterprise*, BUS. WEEK MAG., May 11,

Coalition Provisional Authority named major opposition leaders to the Iraqi Governing Council.⁴² Eleven years after it was conceived and still headed by Chalabi, the INC became one of the first political parties in Iraq.⁴³ The Pentagon and White House officials apparently considered installing Chalabi as the president of Iraq,⁴⁴ but the ostensible plan crumbled after he was reproached for false claims about WMDs.⁴⁵

B. Public Diplomacy vs. Domestic Propaganda

Before reviewing the U.S. government allocations to the INC, WMD claims presented by INC-sponsored defectors, and INC operations, it is important to examine how U.S. law differentiates government funded messages that are disseminated to domestic or foreign audiences. This legal distinction emerged as the Cold War began. U.S. officials instituted operations to provide broadcasts to foreign audiences to counter Soviet Union messages⁴⁶ that reportedly intentionally distorted images of the U.S.⁴⁷ In 1948, the Smith-Mundt Act was enacted “to promote a better understanding of the United States in other countries, and to increase mutual understanding between the people of the United States and the people of other countries.”⁴⁸

Legislation prohibited those accounts from being transmitted to the

2003, http://www.businessweek.com/magazine/content/03_19/b3832034.htm (Chalabi has a “luxury private club with park-like grounds”).

42. Feldman & Martinez, *supra* note 21, at 890.

43. Rohde, *supra* note 41, at B3.

44. RAMPTON & STAUBER, *supra* note 21, at 62-63. In 2004, former UN weapons inspector Scott Ritter explained that in a January 1998 meeting in which Chalabi asked him to do “intelligence work” for the INC, Chalabi was already promising him favors to be delivered after he would become president of Iraq. Chalabi denied Ritter’s claim. Mayer, *supra* note 28.

45. *An Ally No More*, S.F. CHRON., Aug. 10, 2004, <http://www.sfgate.com/opinion/editorials/article/An-ally-no-more-2702678.php>. General Anthony Zinnie, CENTCOM commander, remarked that Chalabi’s “pie in the sky” and “ridiculous” ideas “got me pretty angry,” and that he needed to warn Congress. Mayer, *supra* note 28.

46. Nancy Snow, *International Exchanges and the U.S. Image*, 616 ANNALS AM. ACAD. POL. & SOC. SCI. 198, 199 (2008); Allen W. Palmer & Edward L. Carter, *The Smith-Mundt Act’s Ban on Domestic Propaganda: An Analysis of the Cold War Statute Limiting Access to Public Diplomacy*, 11 COMM. L. & POL’Y 1, 3-4, 8 (2006); Monica Hakimi, *The Media as Participants in the International Legal Process*, 16 DUKE J. COMP. & INT’L L. 1, 16 (2006).

47. See Frederick C. Barghoorn, *The Soviet Image of the United States: A Deliberately Distorted Image*, 295 ANNALS AM. ACAD. POL. & SOC. SCI. 42, 43, 45 (1954).

48. U.S. DEP’T OF STATE, BUREAU OF EDUC. AND CULTURAL AFFAIRS, *History*, available at <http://exchanges.state.gov/ivlp/history.html>; 22 U.S.C. § 1431(1) (1948) (the goal is to distribute information about “the United States, its people, and its policies”).

2012]

Congressional Oversight

9

domestic audience.⁴⁹ The Smith-Mundt Act stated that “no funds authorized to be appropriated to the United States Information Agency shall be used to influence public opinion in the United States, and no program material prepared by the United States Information Agency shall be distributed within the United States.”⁵⁰ Since 1951, Congress has typically included analogous prohibitions in appropriation bills: “[n]o 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.”⁵¹ The Foreign Relations Authorization Act of 1972 banned the U.S. International Public Information Agency from disseminating any “information about the United States, its people, and its policies” prepared for dissemination within the United States.⁵² Professors Palmer and Carter summarize the institutional structure: “[f]or more than fifty years, the U.S. Code has authorized the federal government to disseminate messages about America to international audiences. For at least thirty years, federal law has also prohibited those international propaganda messages from being disseminated within the United States.”⁵³

Providing uniform approbatory newscasts and/or misrepresentations, depending on how the details are viewed, to foreign

49. 22 U.S.C. § 1461(a) (2008).

50. 22 U.S.C. §§ 1461(a)-(b)(1); Cole, *supra* note 17, at 735.

51. Consolidated Appropriations Act, 2004, H.R. 2673, 108th Cong. § 624 (2004), available at <http://www.gpo.gov/fdsys/pkg/PLAW-108publ199/pdf/PLAW-108publ199.pdf>; U.S. GOV'T ACCOUNTABILITY OFFICE, *Application of Anti-Lobbying Laws to the Office of National Drug Control Policy's Open Letter to State Level Prosecutors*, B-301022 (Mar. 10, 2004), available at <http://redbook.gao.gov/17.fl0083064.php>; Major Marci Lawson, 2006 ARMY LAW. 154, 156 (2006); Lee, *supra* note 15, at 985 (2005) (quoting appropriations acts and recent investigations of violations); Jodie Morse, *Managing the News: The History of the Constitutionality of the Government Spin Machine*, 81 N.Y.U. L. REV. 843, 859 (2006).

52. 22 U.S.C. § 1461(a); Palmer & Carter, *supra* note 46, at 9-10.

53. Palmer & Carter, *supra* note 46, at 1. The Voice of America (“VOA”) broadcast system became so extensive that by 1998, it was operating in 143 countries “to explain and support American foreign policy and promote U.S. national interests.” GARTH S. JOWETT & VICTORIA O'DONNELL, *PROPAGANDA AND PERSUASION* 27 (2006); SHAWN J. PARRY-GILES, *THE RHETORICAL PRESIDENCY, PROPAGANDA, AND THE COLD WAR, 1945-1955* 191 (2002); Susan L. Gough, *The Evolution of Strategic Influence*, STRATEGIC RES. PROJECT 29-30 (U.S. Army War College 2000). Similar restrictions prevented Americans from hearing VOA. Voice of America, *Contact Us*, available at http://www.voanews.com/info/contact_us/1360.html (“Voice of America programming should not be disseminated within the United States”); 22 U.S.C. § 1461(a) (2006) (information “shall not be disseminated within the United States”); Charles F. Gormly, *The United States Information Agency Domestic Dissemination Ban: Arguments for Repeal*, 9 ADMIN. L.J. AM. U. 191, 192 (1995).

audiences was legalized,⁵⁴ while that message would be unfair or baleful to democracy if the same content was broadcasted inside the U.S. At a time when amendments to the Act were being proffered, Senator Zorinsky explained that “the American taxpayer certainly does not need or want his tax dollars used to support U.S. Government propaganda directed at him or her.”⁵⁵ Indicative of the jaundiced overtone of the word, during the 1970s, U.S. officials stopped calling the circulations “propaganda” and minted the term “public diplomacy.”⁵⁶ While propaganda has a negative connotation, “public diplomacy” is a communication process that attempts to “inform, engage and influence global audiences . . . to promote greater appreciation and understanding of U.S. society, culture, institutions, values and policies.”⁵⁷ Americans have had a constitutional right to receive information since the 1940s,⁵⁸ but First Amendment challenges to access these foreign broadcasts, generally through the same time period when the INC was formed, were largely unavailing.⁵⁹

54. *Essential Info., Inc. v. U.S. Info. Agency*, No. 96cv01194 (D.C. Feb. 10, 1998), [http://www.cadc.uscourts.gov/internet/opinions.nsf/4A181AA63F18492A85256F12006E2283/\\$file/97-5017a.txt](http://www.cadc.uscourts.gov/internet/opinions.nsf/4A181AA63F18492A85256F12006E2283/$file/97-5017a.txt). Scholars have pointed out that the U.S. was providing inaccurate portrayals about the United States to other countries. MARY L. DUDZIAK, *COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY* 54-55 (2000) (USIA disseminated propaganda to portray domestic race relations more favorably than they were to counter criticism from the rest of the world, particularly the Soviet Union); James Edwin Bailey, III, *Current and Future Legal Uses of Direct Broadcast Satellites in International Law*, 45 *LA. L. REV.* 701, 716 (1985) (the Soviet policy presumed it was broadcasting “liberation” and “anti-colonialism” and restricted anti-Soviet government messages as subversive or defamatory “propaganda”). In 1981, Congressman George Crocket Jr. remarked: “[o]ne has only to travel abroad to realize the extent to which the American people are misinformed and lied to about what’s happening in other countries, and about the feeling that other governments, yes, and other peoples have about the government of the United States.” Charles E. Simmons, *Fundamental Rights: United States Foreign Policy v. The Press and The American Information Consumer: The Embattled First Amendment*, 1987 *HOW. L.J.* 849, 850 (1987).

55. *Gartner v. U.S. Info. Agency*, 726 F. Supp. 1183, 1186 n.2 (S.D. Iowa 1989) (citation omitted).

56. Bruce Gregory, *Public Diplomacy: Sunrise of an Academic Field*, 616 *ANNALS AM. ACAD. POL. & SOC. SCI.* 274, 275 (2008).

57. U.S. DEP’T OF STATE, *ASSESSING U.S. PUB. DIPLOMACY: A NOTIONAL MODEL* 10 (2010), available at <http://www.state.gov/documents/organization/149966.pdf>; see Kenneth L. Adelman, *Speaking of America: Public Diplomacy in Our Time*, 59 *FOREIGN AFF.* 913 (1981).

58. WILSON P. DIZARD JR., *DIGITAL DIPLOMACY: U.S. FOREIGN POLICY IN THE INFORMATION AGE* 73 (2001).

59. In 1989, in *Gartner*, a district court upheld the restriction on U.S. citizen access to USIA broadcasts as consistent with the First Amendment. 726 F. Supp. at 1185. Several news plaintiffs sought to obtain VOA broadcast materials and the court held that there was

Another challenge exists under international law. For example, Article 19 of the Universal Declaration of Human Rights states that “[e]veryone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.”⁶⁰ The American Convention on Human Rights and the International Covenant on Civil and Political Rights grant similar prerogatives.⁶¹ Yet, these treaties invoke somewhat of an exploitable standard with transnational communications since rights were endowed to “individuals” in a human rights documents aimed at curbing government abuse, which may engender disagreement over whether that should permit foreign governments to broadcast messages to another sovereign’s citizens.⁶² The U.S. statutory scheme remained controversial. In 1972, Senator Fulbright stated on the floor of the Senate that the U.S. government-sponsored “‘Radios [Voice of America, Radio Free Europe, and Radio Liberty] should be given an opportunity to take their rightful place in the graveyard of Cold War

no right to copy USIA editorials and the domestic restriction on U.S. citizen access was consistent with the First Amendment. *Id.* at 1189. After litigation, in January 1990, “members of the public [were allowed] to take notes but not to make verbatim copies, either by hand or mechanically.” Gormly, *supra* note 53, at 198; U.S. Information Agency, Announcement No. 16, Domestic Dissemination (1990).

60. G.A. Res. 217 (III), art. 19, U.N. Doc. A/217(III) (Dec. 10 1948); Fred H. Cate, *The First Amendment and the International “Free Flow” of Information*, 30 VA. J. INT’L L. 371, 374 (1990); see Stephen D. Bayer, *The Legal Aspects of TV Marti in Relation to the Law of Direct Broadcasting Satellites*, 41 EMORY L.J. 541, 556-57 (1992).

61. Likewise, the American Convention on Human Rights states that “[e]veryone has the right to freedom of thought and expression,” which includes the “freedom to seek, receive and impart information and ideas of all kinds.” American Convention on Human Rights, art. 13, Nov. 22, 1969, 1144 U.N.T.S. 123, available at <http://www.oas.org/juridico/english/treaties/b-32.html>. Article 19 of the International Covenant on Civil and Political Rights provides:

(1) Everyone shall have the right to hold opinions without interference. (2) Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice. (3) The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary . . . [f]or the protection of national security or of public order . . . or of public health or morals.

International Covenant on Civil and Political Rights, G.A. Res. 2200A, U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316, at 19 (Dec. 19, 1966), available at <http://www2.ohchr.org/english/law/ccpr.htm>.

62. Monroe Price, *Public Diplomacy and the Transformation of International Broadcasting*, 21 CARDOZO ARTS & ENT. L.J. 51, 67 (2003).

relics.”⁶³

C. Funding the INC

Nonetheless, the distinction between U.S. government sponsored messages for domestic and foreign audiences was still recognized in the Iraq case. Francis Brooke, an official of the Rendon Group, a public relations (“PR”) firm specializing in “perception management” and operating in conjunction with the INC,⁶⁴ remarked that if Rendon’s stories about Iraq surfaced in the American press, project managers would be reprimanded for “transgressing laws that prohibited domestic propaganda.”⁶⁵ Likewise, similar PR projects involving Iraq operated around the same time and were chided on the same grounds.⁶⁶

Since the INC’s origin derived from a secret order, the CIA provided incognito funding to the Rendon Group and the INC for six years.⁶⁷ However, after the 1998 Iraqi Liberation Act (“ILA”) was

63. *Report on the Smith-Mundt Symposium of Jan. 13, 2009*, at 6 (Mar. 12, 2009), available at http://mountainrunner.us/files/s-m/Smith-Mundt_Symposium_Final_Report.pdf [hereinafter “*Report on the Smith-Mundt Symposium*”].

64. Mayer, *supra* note 28; GREG GRANDIN, *EMPIRE’S WORKSHOP: LATIN AMERICA, THE UNITED STATE, AND THE RISE OF THE NEW IMPERIALISM* 228 (2006).

65. Mayer, *supra* note 28.

66. One of the ways that public and Congressional support emerged for the 1991 Gulf War, which expelled the Iraqi military from Kuwait, was for the Kuwaiti ruling monarchy to compose an interest group called Citizens for Free Kuwait. GRANDIN, *supra* note 64, at 228; JOHN R. MACARTHUR, *SECOND FRONT: CENSORSHIP AND PROPAGANDA IN THE 1991 GULF WAR* 64, 70, 73 (2nd ed. 2004); RAMPTON & STAUBER, *supra* note 21, at 42, 71; *A Debate on One of the Most Frequently Cited Justifications for the 1991 Persian Gulf War: Did the PR Firm Hill & Knowlton Invent the Story of Iraqi Soldiers Pulling Kuwaiti Babies From Incubators?*, DEMOCRACY NOW!, Dec. 2, 2003, http://www.democracynow.org/2003/12/2/a_debate_on_one_of_the (Hill & Knowlton, the involved PR firm, claimed there were investigations of the claims); *How PR Sold the War in the Persian Gulf*, CENT. FOR MEDIA AND DEMOCRACY, <http://www.prwatch.org/books/tsigfy10.html>. President Bush Sr. began giving speeches across the country citing these sources as justifications to attack Iraq. Mitchell Cohen, *How Bush Sr. Sold the Gulf War*, COUNTERPUNCH, Dec. 28-30, 2002, <http://www.counterpunch.org/2002/12/28/how-bush-sr-sold-the-gulf-war/> (“Bush quoted Nayirah at every opportunity.”).

67. RAMPTON & STAUBER, *supra* note 21, at 43. Brooke remarked about disseminated stories: “[i]t was amazing how well it worked. It was like magic.” Mayer, *supra* note 28. Brooke was paid \$22,000 per month and was the chief lobbyist for the group before Congress, from the time it was formed in 1991, acknowledges that “Rendon was funded by the CIA.” *Id.* Brooke also remarked that the Rendon Group’s contract with the CIA provided it with a 10% management fee and that “[w]e tried to burn through forty million dollars a year . . . It was a very nice job.” *Id.* See GRANDIN, *supra* note 64, at 228 (“the CIA and then the Pentagon paid hundreds of millions of dollars to the Rendon Group . . . to lay the groundwork for the removal of Saddam Hussein”).

2012]

Congressional Oversight

13

adopted, the INC was officially and openly designated a recipient of \$97 million more by congressional allocation.⁶⁸ Neoconservatives, Ahmed Chalabi, and the Rendon Group lobbied Congress to adopt the ILA,⁶⁹ and they jostled the legislation through Congress during Republican-led impeachment inquiries against President Clinton.⁷⁰

The ILA states that it “should be the policy of the United States to support efforts to remove the regime headed by Saddam Hussein from power in Iraq and to promote the emergence of a democratic government to replace that regime.”⁷¹ The ILA raises questions under international law. The UN Charter proscribes countries from interfering in the sovereign affairs of other countries,⁷² but crafting conditions that might *pressure* internal governance by disseminating truthful information seems more legitimate. While going to war was not part of that legislation,⁷³ in late 1998, Chalabi was a chief proponent of a U.S. military invasion.⁷⁴

While being funded, responsibility and oversight for the INC was transferred to different federal agencies. CIA Director Tenet later

68. Robin Wright, *U.S. Suspends Funds for Key Iraqi Rebels / Group Can't Account for Millions in Aid*, S.F. CHRON., Jan. 5, 2002, http://articles.sfgate.com/2002-01-05/news/17526153_1_iraqi-group-iraqi-national-congress-iraqi-troops; KATZMAN, *supra* note 40 (INC requesting \$100 million); Charles Tiefer, *The Iraq Debacle: The Rise and Fall of Procurement-Aided Unilateralism as a Paradigm of Foreign War*, 29 U. PA. J. INT'L L. 1, 45 (2007); Miller, *One Man*, *supra* note 29 (“a good deal of the INC’s ‘product’ was financed with U.S. taxpayers money”).

69. Sally Quinn, *The Man Who Would Succeed Saddam*, WASH. POST, Nov. 24, 2003, at C01 (Brooke accompanied Chalabi in Washington in 1996 to lobby for regime change). Brooke later explained: “[w]e thought very carefully about this, and realized there were only a couple of hundred people” in Washington who could adopt a more aggressive position against Iraq. Mayer, *supra* note 28. Chalabi allied with neoconservatives, particularly Perle, Cheney, Wolfowitz, and Feith. *Id.* Brooke explained how the advocates allied with hawkish Republicans in Congress: “[w]e took a Republican Congress and pitted it against a Democratic White House. We really hurt and embarrassed the President . . . [Republican leadership] didn’t care . . . about the ammunition. They just wanted to beat up the President.” *Id.* David Sirota, Christy Harvey & Judd Legum, *How Far the Mighty Have Fallen*, ALTERNET, May 21, 2004, <http://www.alternet.org/world/18757/> (the ILA quite literally slipped into the legislative agenda by Republicans in Congress in the midst of Clinton’s high profile scandals).

70. Robert Bejesky, *Politico-International Law*, 57 LOY. L. REV. 29, 65 (2011) [hereinafter “Bejesky, *Politico-International Law*”].

71. *Iraq Liberation Act of 1998*, H.R. 4655, 105th Cong. § 3 (2d Sess. 1998).

72. U.N. Charter art. 2, para. 4 (“[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state”).

73. See H.R. 4655.

74. RAMPTON & STAUBER, *supra* note 21, at 56.

expressed to the SSCI that the CIA had a falling out with Chalabi: “there was a breakdown in trust and we never wanted to have anything to do with him anymore.”⁷⁵ The SSCI “[did] not attempt to resolve lingering questions regarding what led to the CIA’s and INC’s mutual disaffection,” but apparently the CIA relationship with Chalabi was severed in February 1997.⁷⁶

The U.S. State Department entered into “cooperative agreements” with the INC in March 2000 to publicize information on Iraq’s “war crimes and crimes against humanity.”⁷⁷ The agreement with the State Department authorized the INC to “implement a public information campaign to communicate with Iraqis inside and outside of Iraq and also to promulgate its message to the international community at large.”⁷⁸ No provisos mentioned communications to the American public.⁷⁹ In May 2002, the State Department ceased funding the INC, but two months later Bush’s National Security Council reapproved INC operations; and in late-October 2002 the Pentagon’s Defense Intelligence Agency (“DIA”) accepted responsibility for the INC.⁸⁰

II. INC AND DEFECTOR CLAIMS

A. Allegations During the 1990s

In effect, long-term public perceptions about Iraq at least partially trace back to government operations that funded the Rendon Group and the INC. There were varying opinions about the INC’s utility and the accuracy of the publications. For example, the SSCI assessed details provided by the INC during the 1990s and opined that “the INC

75. SSCI/INC, *supra* note 19, at 25.

76. *Id.* at 4, 25.

77. *Id.* at 25. (“In February 1997, the CIA terminated its relationship with Chalabi and the INC . . . Beginning in March 2000, the Department of State entered into a series of cooperative agreements with the [INC] which included funding of almost \$33 million for several programs, including a weekly newspaper publication, radio and satellite television broadcasts into Iraq, a public information campaign, and the collection of information on the Saddam regime’s war crimes and crimes against humanity.”).

78. OFFICE OF INSPECTOR GEN., U.S. DEP’T ST. AND THE BROAD. BD. OF GOVERNORS, Rep. No. 01-FMA-R-092, REVIEW OF AWARDS TO IRAQI NAT’L CONG. SUPPORT FOUND. 4 (2001), <http://oig.state.gov/documents/organization/7508.pdf> [hereinafter “OFFICE OF INSPECTOR GEN.”]; Mayer, *supra* note 28 (“[a]ll transactions were in cash”); Mark Hosenball & Michael Hirsh, *Chalabi: A Questionable Use of U.S. Funding*, NEWSWEEK, Apr. 5, 2004, at 7 (according to Francis Brooke, there was no limit to how State Department funds were used to fund defectors or to make them available to the media).

79. See OFFICE OF INSPECTOR GEN., *supra* note 78, at 4.

80. SSCI/INC, *supra* note 19, at 30-31.

2012]

Congressional Oversight

15

provided a steady stream of low-ranking walk-ins from various Iraqi army and Republican Guard units who generally had interesting information.”⁸¹ Alternatively, while he was present in Iraq in 1994, Middle East CIA operative Robert Baer explained that Chalabi was operating a ““forgery shop.””⁸² Baer explained: “[i]t was a room where people were scanning Iraqi intelligence documents into computers, and doing disinformation. There was a whole wing of it that he did forgeries in . . . [H]e was forging back then.”⁸³ Chalabi reportedly forged documents made to appear to come from President Clinton’s National Security Council, an Iraqi newspaper filled with stories about human rights abuses, and documents identifying Iraq as a “leaking warehouse of gas.”⁸⁴ Baer notes, “[h]e was reporting no intel; it was total trash. The I.N.C.’s intelligence was so bad, we weren’t even sending it in.”⁸⁵

Perhaps there should have been a detailed congressional or executive branch appraisal that itemized the value of the INC’s information that was delivered to the global media, how U.S. taxpayer dollars were being spent, and what were authorized INC operations. If the INC was designated to collect genuine national security data, it would have been performing activities generally conducted by American intelligence agencies. The CIA could have just employed defectors to serve as intelligence assets. Instead, the INC remained a separate entity; some of its information was apparently intended to be dispensed as intelligence and some of it was directly publicized.⁸⁶ There were also allegations that U.S. taxpayer funds were being misused,⁸⁷ to which the CIA responded that it could not penetrate the

81. *Id.*

82. Mayer, *supra* note 28.

83. *Id.*

84. *Id.*

85. *Id.*

86. *See supra* Part II.A.

87. SSCI/INC, *supra* note 19, at 28 (“concerns grew in [the State Department] that there were serious mishandling of money issues that needed to be examined in INCSF to avoid a potentially embarrassing situation for the administration and for State”); OFFICE OF INSPECTOR GEN., *supra* note 78, at 10 (“[i]nsufficient documentation for cash transactions”). The State Department’s Office of Inspector General September 2001 report found that during the 2000-2001 period, when it had authority over and administrative oversight over the INC, auditors found that between \$2.2 out of \$4.3 million in allocations could be questioned as it was placed into a black budget “classified” category and undocumented, that the organization’s financial practices were plagued by “fraud, waste, and abuse,” accounting methods were being comingled, it did not comply with regulations or agreements, and there was a lack of standard policies and procedures. OFFICE OF INSPECTOR

secrecy of the INC.⁸⁸ Also, the INC operated anonymously, or at least in a nonpublic fashion, while being funded by the government to carry out a mission to publicly disseminate particular information.⁸⁹

The British government enacted a similar program.⁹⁰ According to post-war investigations, Britain's MI6 instituted Operation Mass Appeal, which was specifically designed to exaggerate the threat of Iraq's alleged arsenal of WMDs based on information from a "single source data of dubious quality."⁹¹ After 9/11, the program was spun

GEN., *supra* note 78, at 1, 7, 13. An intelligence official who worked with Chalabi stated: "[t]here was a lot of hanky-panky with the accounting: triple billing, things that weren't mentioned, things inflated . . . It was a nightmare." Hosenball & Hirsh, *supra* note 78, at 8 (there was no limit to how State Department funds were used to fund defectors or to make them available to the media); *see also* Evan Thomas, *The Rise And Fall Of Chalabi: Bush's Mr. Wrong*, NEWSWEEK, MAY 30, 2004, at 23.

88. The CIA claimed that the CIA did conduct audits of the INC but the "shoddy records" were hard to inspect, and INC officials "refused to cooperate with an audit because [Chalabi] argued it would breach the security of the operation." DAVID L. PHILLIPS, LOSING IRAQ: INSIDE THE POSTWAR RECONSTRUCTION FIASCO 72 (2005). A former INC official stated: "[t]he agency [CIA] didn't know how he [Chalabi] spent his money. All transactions were cash." Mayer, *supra* note 28.

89. Lee, *supra* note 15, at 1012-13 ("When the government communicates in a transparent fashion, the public understands when and how the government is injecting its views into public debate By communicating in a non-transparent manner, however, the government can make its favored positions appear more popular than they really are. . . . Multiple source influence describes the observed phenomenon that if a message is perceived to have the support of more social entities, greater persuasion will result.").

90. The operation was barely mentioned in the U.S. press, but it was the equivalent to what was happening inside the U.S. GRANDIN, *supra* note 64, at 229. A special top secret office was established to portray information about Iraq without heedful regard for accuracy or truth. *See supra* Part II.A. Former UN weapons inspector Scott Ritter also spoke about this program, mentioning that it had support from the highest levels of military and intelligence officials, and stated: "Rockingham was spinning reports and emphasizing reports that showed non-compliance (by Iraq with UN inspections) and quashing those which showed compliance. It was cherry-picking intelligence." Neil Mackay, *Revealed: The Secret Cabal Which Spun for Blair*, SUNDAY HERALD, June 8, 2003, <http://www.freerepublic.com/focus/f-news/925493/posts> [hereinafter "Mackay, *Revealed*"]. ("[Britain] ran a covert 'dirty tricks' operation designed specifically to produce misleading intelligence that Saddam had weapons of mass destruction to give the UK a justifiable excuse to wage war on Iraq."); Neil Mackay, *Blair's Secret Weapon*, SUNDAY HERALD, June 8, 2003, at 14 [hereinafter "Mackay, *Blair's Secret Weapon*"].

91. *MI6 Ran 'Dubious' Iraq Campaign*, BBC News, Nov. 21, 2003, http://news.bbc.co.uk/2/hi/uk_news/3227506.stm [hereinafter "*MI6 Ran*"] (Former UN weapons inspector Scott Ritter admitted that he was "involved personally" with British agents several times during 1997-98 for the operation); Mackay, *Blair's Secret Weapon*, *supra* note 90; Michael Meacher, *The Very Secret Service*, GUARDIAN UK, Nov. 21, 2003, <http://www.guardian.co.uk/politics/2003/nov/21/davidkelly.media>; Scott Ritter, *The Role of Operation Rockingham*, GUARDIAN UK, Nov. 29, 2003, <http://www.guardian.co.uk/world/2003/nov/29/iraq.iraq>.

2012]

Congressional Oversight

17

into Prime Minister Blair's Operation Rockingham, which was "cherry picking" data to build a case to attack Iraq.⁹²

B. INC Information Prior to the 2003 Invasion

On June 26, 2002, the INC delivered a memo to the Senate Appropriations Committee to maintain funding.⁹³ This was three months before diplomacy involving Iraq began in the United Nations and four months before Congress adopted the Authorization to Use Force Against Iraq.⁹⁴ The letter "gave the INC credit" for information "product" collected from "defectors, reports, and raw intelligence," and for directly providing it to media sources to produce 108 English-language news stories between October 2001 and May 2002.⁹⁵

While it allocated funding for these media accounts, members of Congress were apparently unaware that INC-sponsored witnesses and reports dispensed inaccurate information.⁹⁶ However, INC-sponsored defectors were making allegations of WMDs apparently without U.S. government officials having access to those sources.⁹⁷ The DIA eventually became aware that INC data "was of little or no value," and often false.⁹⁸ In the meantime, other allegations evaded deeper scrutiny. The SSCI discovered that one part of an Intelligence Community ("IC") agency issued a "fabrication notice" or otherwise provided warnings,

92. Mackay, *Revealed*, *supra* note 90; Meacher, *supra* note 91; *MI6 Ran*, *supra* note 91.

93. SSCI/INC, *supra* note 19, at 187.

94. Robert Bejesky, *Weapon Inspections Lessons Learned: Evidentiary Presumptions and Burdens of Proof*, 38 SYRACUSE J. INT'L L. & COM. 295, 311-14 (2011) [hereinafter "Bejesky, *Weapon Inspections*"].

95. Mayer, *supra* note 28; Miller, *One Man*, *supra* note 29.

96. SSCI/INC, *supra* note 19, at 29-31.

97. *Id.*; See generally this Part.

98. SSCI/INC, *supra* note 19, at 29-31 (other agencies questioned INC data); Douglas Jehl, *Agency Belittles Information Given by Iraq Defectors: Exile Group Got Millions*, N.Y. TIMES, Sept. 29, 2003, at A1, available at <http://www.nytimes.com/2003/09/29/world/agency-belittles-information-given-by-iraq-defectors.html?scp=1&sq=&st=nyt>

An internal assessment by the Defense Intelligence Agency has concluded that most of the information provided by Iraqi defectors who were made available by the Iraqi National Congress was of little or no value, according to federal officials briefed on the arrangement. In addition, several Iraqi defectors introduced to American intelligence agents by the exile organization and its leader, Ahmad Chalabi, invented or exaggerated their credentials as people with direct knowledge of the Iraqi government and its suspected unconventional weapons program, the officials said.

Id.

but notices were lost, disregarded, or overlooked.⁹⁹ Ultimately, the DIA was apparently irritated with the INC's publicity operations and attempted to halt the direct release of information to the media by imposing contractual oversight restrictions when it accepted responsibility over the INC in late-October 2002.¹⁰⁰ The clause states:

[T]he INC committed to 'NOT publicize or communicate in any way with anyone any of its information collection operations or announce the names and activities of Iraqi expatriates without prior written authorization from DIA. . . . [The INC also agreed to] NOT conduct any intelligence collection operations in Iraq without prior authorization from DIA.'¹⁰¹

Nonetheless, the DIA restriction came after successions of media allegations were provided by witnesses, only some of whom were sponsored by the INC. The following are a few accounts from defectors. One week after Bush was inaugurated, an anonymous defecting Iraqi military engineer contended that "[t]here are at least two nuclear bombs which are ready for use. Before the UN inspectors came, there were 47 factories involved in the project. Now there are 64."¹⁰² Despite the abundant number of facilities involved, the source maintained that the program was so secretive "that apart from the scientists, only four or five people know what is happening."¹⁰³ The claim also seemed implausible because UN inspectors affirmed in 1998 that there were no known active facilities in Iraq, and it can require up to a decade to enrich the uranium necessary for a nuclear bomb.¹⁰⁴

99. SSCI/INC, *supra* note 19, at 65, 77, 79, 90-91, 114-17, 120-22.

100. *Id.* at 31.

101. *Id.* at 31.

102. Jessica Berry, *Saddam Has Made Two Atomic Bombs*, TELEGRAPH, Jan. 29, 2001, <http://www.telegraph.co.uk/news/worldnews/middleeast/iraq/1320004/Saddam-has-made-two-atomic-bombs-says-Iraqi-defector.html>.

103. *Id.*

104. On February 14, 2003, Mohammed ElBaradei concluded once again that "there were no unresolved [nuclear program] issues left [in 1998 when inspectors left]. . . . Hence, our focus since the resumption of our inspections in Iraq, two and half months ago, has been verifying whether Iraq revived its nuclear programme in the intervening years." Dr. Mohamed ElBaradei, *The Status of Nuclear Inspections on Iraq: 14 February 2003 Update*, INTERNATIONAL ATOMIC ENERGY AGENCY, (Feb. 14, 2003), <http://www.iaea.org/NewsCenter/Statements/2003/ebsp2003n005.shtml>; Bejesky, *Weapon Inspections*, *supra* note 94, at 301-02; Robert Bejesky, *Intelligence Information and Judicial Evidentiary Standards*, 44 CREIGHTON L. REV. 811, 820 (2011) [hereinafter "Bejesky, *Intelligence Information*"]. Nonetheless, the article quoted a security expert who stated: "[t]his is vital information. The fact that General Ismail is involved can only mean that the programme is complete." Berry, *supra* note 102.

In mid-October 2001, a former Iraqi army captain named Sabah Khodada claimed Iraq was training terrorists to hijack planes.¹⁰⁵ Another anonymous defector, purportedly “a retired lieutenant general in the Iraqi intelligence service,” stated that Arab students in Iraq were being taught how to hijack a Boeing 707.¹⁰⁶ Another source alleged that he underwent biological and chemical weapons training at secret al Qaeda camps in Iraq.¹⁰⁷ Abu Zeinab al-Qurairy, a former high-ranking member of the Iraqi intelligence service, claimed that the INC sponsored an imposter with his name who asserted that he worked at a terrorist camp in Iraq, called Salman Pak, where trainees learned to hijack planes.¹⁰⁸ The INC denied that it sponsored the source.¹⁰⁹

On November 8, the *New York Times* wrote that:

[T]wo defectors from Iraqi intelligence said yesterday that they had worked for several years at a secret Iraqi government camp that had trained Islamic terrorists . . . since 1995. They said the training in the camp, south of Baghdad, was aimed at carrying out attacks against neighboring countries and possibly Europe and the United States.¹¹⁰

The article explained that the reports of the two anonymous men “mesh with statements by Sabah Khalifa Khodada Alami, a [former] captain in the Iraqi army.”¹¹¹ The *Times* explained that the “Iraqi National Congress . . . helped arrange the meeting and interview with the defectors.”¹¹²

On December 20, 2001, the *New York Times* published a story about a defecting Iraqi civil engineer named Adnan Ihsan Saeed al-Haideri, who “said he personally worked on renovations of secret facilities for biological, chemical and nuclear weapons in underground wells, private villas and under the Saddam Hussein Hospital in Baghdad as recently as a year ago.”¹¹³ He claimed to have visited at least twenty

105. Seymour M. Hersh, *Selective Intelligence*, NEW YORKER, May 12, 2003, http://www.newyorker.com/archive/2003/05/12/030512fa_fact?currentPage=all.

106. *Id.*

107. *Id.*

108. *Interview with An Iraqi Lt. General*, PBS (Nov. 6, 2011), <http://www.pbs.org/wgbh/pages/frontline/shows/gunning/interviews/>.

109. *Id.*

110. Chris Hedges, *Defectors Cite Iraqi Training For Terrorism*, N.Y. TIMES, Nov. 8, 2001, at A1, available at <http://www.nytimes.com/2001/11/08/world/a-nation-challenged-the-school-defectors-cite-iraqi-training-for-terrorism.html?src=pm&pagewanted=print>.

111. *Id.* at B2; Mayer, *supra* note 28.

112. Hedges, *supra* note 110, at B2.

113. Judith Miller, *Iraqi Tells of Renovations at Sites For Chemical and Nuclear Arms*, N.Y. TIMES, Dec. 20, 2001, at A1, available at

of these weapon sites.¹¹⁴ The *Times* noted that “[t]he interview with Mr. Saeed was arranged by the Iraqi National Congress, the main Iraqi opposition group, which seeks the overthrow of Mr. Hussein.”¹¹⁵ The INC reportedly had coached al-Haideri on what to state as a witness.¹¹⁶

However, even before the *Times* story broke, Saeed failed a CIA administered lie detector test and some CIA officials judged that he had fabricated the story.¹¹⁷ Nine months later, Al-Haideri’s accounts were quoted as accurate in the White House’s document, *A Decade of Deception and Defiance* which was used as a basis to recommence diplomacy involving Iraq at the United Nations.¹¹⁸

In July 2002, Ahmed Chalabi provided accounts of informants, allegedly within the Iraqi intelligence community, who maintained that Iraq possessed multi-ton VX stockpiles and that the “VX had been converted into a dry salt for long-term storage and was positioned in various sites across Iraq for use in the event of a foreign attack.”¹¹⁹ Khidir Hamza, an Iraqi defector, provided many assertions about Iraqi weapon stocks during Senate Foreign Relations Committee hearings on August 1, 2002.¹²⁰ While Hamza may have been a well-placed witness

<http://www.nytimes.com/2001/12/20/world/nation-challenged-secret-sites-iraqi-tells-renovations-sites-for-chemical.html?ref=richardbutler&pagewanted=all> [hereinafter “Miller, *Iraqi Tells*”]; Hersh, *supra* note 105.

114. Miller, *Iraqi Tells*, *supra* note 113, at B4.

115. *Id.* at A1.

116. James Bamford, *The Man Who Sold the War (John Rendon)*, ROLLING STONE, Nov. 17, 2005, <http://ics.leeds.ac.uk/papers/vp01.cfm?outfit=pmt&folder=2053&paper=2539>.

117. *Id.*

118. *Text: A Decade of Deception and Defiance*, WASH. POST, Sept. 12, 2002, http://www.washingtonpost.com/wp-srv/onpolitics/transcripts/whitehouse_iraq091202.htm (the witness “had visited twenty secret facilities for chemical, biological, and nuclear weapons. Mr. Saeed, a civil engineer, supported his claims with stacks of Iraqi government contracts, complete with technical specifications”).

119. Joby Warrick, *In Assessing Iraq’s Arsenal, The ‘Reality is Uncertainty’: Details of Bioweapons Lab Emerge, but Not Proof*, WASH. POST, July 31, 2002, at A1.

120. See *Hearings to Examine Threats, Responses, and Regional Considerations Surrounding Iraq: Hearings Before the Committee on Foreign Relations U.S. Senate*, 107th Cong. 15-24 (2002), available at <http://www.gpo.gov/fdsys/pkg/CHRG-107shrg81697/pdf/CHRG-107shrg81697.pdf> [hereinafter “*Hearings to Examine Threats*”](statement of Dr. Khidir Hamza, Former Iraqi Nuclear Physicist, President, Council on Middle Eastern Affairs, stated he played a key engineering role in Iraq’s nuclear program and explained: (1) “Iraq is well into CW production and may well be in the process of BW production,” (2) Iraq has “more than 10 tons of uranium and more than one ton of slightly enriched uranium,” (3) Iraq is importing needed equipment from India and using Malaysia to ship equipment, (4) “Iraq is importing directional control instruments for its missiles” that will exceed the 150 km UN limits, and (5) it is importing equipment that can

2012]

Congressional Oversight

21

in the past, he defected in 1994 and his testimony does not indicate that he currently possessed first-hand knowledge of ongoing WMD programs.¹²¹ Similarly, an Iraqi defector codenamed “Curve Ball” was the decisive source who relayed that there were mobile biological weapon trailers in Iraq.¹²² Curve Ball recounted data for 112 U.S. intelligence reports even though only one U.S. intelligence official had apparently met him.¹²³ Curve Ball’s descriptions were unverifiable and he could not have had current knowledge of imminent threats or the state of such a program because he had been seeking asylum in Germany for three years.¹²⁴

It appears that many sources were weaving delusive stories about Iraqi ties to 9/11 and of tremendous WMD stocks into intelligence reports and public consciousness.¹²⁵ Some information was vetted through American intelligence agencies¹²⁶ and other descriptions flowed directly into the U.S. media. The SSCI explained that the INC sponsored nineteen witnesses for the IC.¹²⁷ However, it is not possible to evaluate whether they are the same witnesses that the INC brought to the media because the SSCI identifies each of the witnesses as “Source One,” “Source Two,” and so on up to “Source Nineteen,” to maintain confidentiality.¹²⁸

SSCI Conclusion 1 summarizes: “[f]alse information from the Iraqi

manufacture its own materials and precursors for chemical weapons); *Defector: Iraq Could Have Nukes by 2005*, CNN, July 31, 2002, http://articles.cnn.com/2002-07-31/politics/senate.iraq.hearing_1_weapons-inspection-team-nuclear-weapons-khidir-hamza?_s=PM:ALLPOLITICS; Julian Borger, *Iraq ‘Close to Nuclear Bomb Goal’*, GUARDIAN UK, July 31, 2002, <http://www.guardian.co.uk/world/2002/aug/01/iraq.julianborger>.

121. *Hearings to Examine Threats*, *supra* note 120, at 8, 15-24.

122. Bejesky, *Intelligence Information*, *supra* note 104, at 837; Bejesky, *Public Diplomacy*, *supra* note 14, at 1009-17.

123. Bejesky, *Intelligence Information*, *supra* note 104, at 838, 876.

124. *Id.* at 838-40, 876.

125. *Id.* at 817-19, 858-59, 875-77 (a series of post-invasion investigations concluded that Iraq did not have an association with al-Qaeda and that there were no WMDs or prohibited weapon programs in Iraq); Kane Pryor, *A National State of Confusion*, SALON, Feb. 6, 2003, http://www.salon.com/2003/02/06/iraq_poll_2/ (in a January 2003 poll, only 17% were correct in responding that they knew that none of the 9/11 hijackers were Iraqi, while 44% believed that “some” or “most” were Iraqi, and 33% did not know enough to form an opinion); Dana Milbank & Claudia Deane, *Hussein Link to 9/11 Lingers in Many Minds*, WASH. POST, Sept. 6, 2003, at A01 (69% still believed Iraq played a role in the attacks and well into the occupation public perceptions changed very little).

126. SSCI/INC, *supra* note 19, at 74, 85.

127. *See id.* at 35-112.

128. *Id.* at 40, 57, 110.

National Congress (INC) . . . was used to support key Intelligence Community assessments on Iraq and was widely distributed in intelligence products prior to the war.”¹²⁹ Conclusion 2 reads: “[the INC] attempted to influence United States policy on Iraq by providing false information through defectors directed at convincing the United States that Iraq possessed weapons of mass destruction and had links to terrorists.”¹³⁰ Former senior CIA official Vincent Cannistraro remarked: “[w]ith Chalabi, we paid to fool ourselves. It’s horrible. In other times, it might be funny. But a lot of people are dead as a result of this. It’s reprehensible.”¹³¹ Cannistraro further explained:

The [INC’s] intelligence isn’t reliable at all. . . . Much of it is propaganda. Much of it is telling the Defense Department what they want to hear. And much of it is used to support Chalabi’s own presidential ambitions. They make no distinction between intelligence and propaganda, using alleged informants and defectors who say what Chalabi wants them to say, [creating] crooked information that goes right into presidential and vice-presidential speeches.¹³²

Seven of the fifteen SSCI Senators believed that the investigation should have more deeply assessed the false information that the INC directly transmitted to the Bush Administration and U.S. government agencies, which bypassed the IC.¹³³ The Director of the INC’s Washington office wrote in a June 26, 2002 memo to the Senate Appropriations Committee that justified its funding: “[d]efectors, reports, and raw intelligence are cultivated and analyzed and the results are reported through the INC newspaper (*Al Mutamar*), the [A]rabic and western media and to appropriate governmental, non-governmental and international agencies . . . [and to] U.S. Governmental recipients . . . [in] the Department of Defense [and the White House].”¹³⁴

129. *Id.* at 113.

130. *Id.*

131. Miller, *One Man*, *supra* note 29.

132. RICHARD LANCE KEEBLE, JOHN TULLOCH, & FLORIAN ZOLLMAN, PEACE JOURNALISM, WAR AND CONFLICT RESOLUTION 36 (2010); *see generally* Mayer, *supra* note 28; Miller, *One Man*, *supra* note 29.

133. *See* SSCI/INC, *supra* note 19, at 187.

134. *Id.* at 187. This memo was delivered while the State Department had responsibility for monitoring INC’s activities and the memo revealed that the five individuals on the team who analyzed and processed the raw data for *Al Mutamar*’s reports were all inner members of the INC. James Risen, *Data From Iraqi Exiles Under Scrutiny: War Critics Say U.S. Relied Too Much on Dubious Information*, N.Y. TIMES, Feb. 12, 2004, at A16, available at <http://www.nytimes.com/2004/02/12/politics/12EXIL.html>.

C. Post-Invasion Accusation Casting Between the INC and the White House

After the invasion, several investigations determined that Iraq had no WMDs, which meant that INC-sponsored allegations to the IC were incorrect.¹³⁵ Chalabi provided diverse responses to criticism. On one occasion, Chalabi explained: “How can we be blamed for the failure of the entire world’s intelligence? We didn’t mislead anyone We said we had information. We didn’t say the information was great. We thought it would be useful.”¹³⁶ On another occasion, he remarked: “We are heroes in error . . . As far as we’re concerned we’ve been entirely successful. That tyrant Saddam is gone and the Americans are in Baghdad. What was said before is not important. The Bush administration is looking for a scapegoat. We’re ready to fall on our swords if [Bush] wants.”¹³⁷

Despite Chalabi’s token, the impact reverberated beyond squabbling with White House officials. Polls conducted between 2003 and 2009 consistently indicated that approximately 80% of Iraqis opposed foreign occupation,¹³⁸ all of Iraq’s neighbor’s except for Kuwait deemed the invasion a violation of international law,¹³⁹ the war was not approved by the United Nations Security Council,¹⁴⁰ the entire international community was not accurately informed,¹⁴¹ and American taxpayers spent upwards of \$1.5 trillion dollars through 2009 on the invasion and occupation.¹⁴² President Bush exited office with the lowest presidential approval rating in history at 22% and the low rating was due to the Iraq War and poor domestic economic conditions.¹⁴³

135. Bejesky, *Intelligence Information*, *supra* note 104, at 817-19, 858-59, 875-77.

136. Mayer, *supra* note 28.

137. Jack Fairweather & Anton La Guardia, *Chalabi stands by faulty intelligence that toppled Saddam’s regime*, TELEGRAPH (Feb. 19, 2004, 12:01 AM), <http://www.telegraph.co.uk/news/worldnews/northamerica/usa/1454831/Chalabi-stands-by-faulty-intelligence-that-toppled-Saddams-regime.html>.

138. Bejesky, *Politico-International Law*, *supra* note 70, at 104-06.

139. *Arab States Line Up Behind Iraq*, BBC NEWS, Mar. 25, 2003, http://news.bbc.co.uk/2/hi/middle_east/2882851.stm.

140. U.N. SCOR, 58th Sess., 4726 mtg. at 7, 16-17, U.N. DOC. S/PV.4726 (Mar. 26, 2003) (statement of Malaysia; statement by Libyan delegation); Bejesky, *Weapon Inspections*, *supra* note 94, at 342-50 (opposition throughout the world); Ian Soloman, *Letter of European Law Professors: War Would Be Illegal*, GUARDIAN UK, Mar. 7, 2003, <http://www.guardian.co.uk/politics/2003/mar/07/highereducation.iraq>.

141. *See generally* Bejesky, *Weapon Inspections*, *supra* note 94.

142. *See* Bejesky, *Politico-International Law*, *supra* note 70, at 84-89.

143. *Bush’s Final Approval Rating: 22 Percent*, CBS NEWS, Jan. 16, 2009, http://www.cbsnews.com/stories/2009/01/16/opinion/polls/main4728399_page2.shtml?tag+

D. White House Public Relations Programs That Brought Forward Defectors

One impression is that the invasion transpired because the Bush administration was operating on faulty intelligence estimates.¹⁴⁴ Another interpretation is that defectors merely set the stage and succored the Bush Administration from accepting extended responsibility for an action it favored. There is evidence to indicate that the foreign policy was established and intelligence conclusions were developed to support the policy.¹⁴⁵

Based on former Secretary of Treasury Paul O'Neill's startling interview on *60 Minutes* in 2004 and from the accounts of other officials, top Bush Administration officials examined methods to depose the Iraqi government at the first White House National Security Council meetings in January and February 2001.¹⁴⁶ Defectors appeared in the

contentMain;contentBody.

144. Bejesky, *Intelligence Information*, *supra* note 104, at 811-13.

145. SENATE SELECT COMM. ON INTELLIGENCE, REP. ON THE U.S. INTELLIGENCE CMTY.'S PREWAR INTELLIGENCE ASSESSMENTS ON IRAQ 272, 484, 505 (July 7, 2004) [hereinafter "SSCI/2004"] ([a]n intelligence analyst stated that:

[T]he going-in assumption was we were going to war, so this NIE was to be written with that in mind. We were going to war, which meant American men and women had to be properly given the benefit of the doubt of what they would face . . . That was what was said to us . . . Remember, the conops [concept of operations] had already been published . . . The conop order had been given months before, months. Deployments had already begun.

Press Release, U.S. SENATE SELECT COMM. ON INTELLIGENCE, *Senate Intelligence Committee Unveils Final Phase II Reports on Prewar Iraq Intelligence*, 110th Cong. (June 5, 2008), available at <http://intelligence.senate.gov/press/record.cfm?id=298775>; Risen, *supra* note 134, at A16; BAMFORD, *supra* note 29, at 333-37; Bejesky, *Politico-International Law*, *supra* note 70, at 64; Paul R. Pillar, *Intelligence, Policy, and the War in Iraq*, FOR. AFFAIRS, Mar. 2006, <http://www.foreignaffairs.com/articles/61503/paul-r-pillar/intelligence-policy-and-the-war-in-iraq>; Walter Pincus, *Records Could Shed Light on Iraq Group*, WASH. POST, June 9, 2008, at A15; Senator Carl Levin, *Remarks of Senator Carl Levin at the Paul Warnke Lecture on International Security at the Council on Foreign Relations*, (Sept. 13, 2004), available at <http://levin.senate.gov/newsroom/release.cfm?id=226066>; Julian Borger, *The Spies who Pushed for War*, GUARDIAN UK, July 17, 2003, <http://www.guardian.co.uk/world/2003/jul/17/iraq.usa>; Chalmers Johnson, *Porter Goss' WIA & 8211; Worthless Intelligence Agency*, TOMDISPATCH.COM, Nov. 27, 2004, http://www.alternet.org/story/20600/porter_goss%27_wia_%26%238211%3B_worthless_intelligence_agency.

146. Bejesky, *Politico-International Law*, *supra* note 70, at 63-64; Robert Bejesky, *Geopolitics, Oil Law Reform, and Commodity Market Expectations*, 63 OKLA. L. REV. 193, 216-20, 229-31 (2011) (explaining that the White House established a Future of Iraq Project in early 2002 that selected Iraqi defectors to generate advisory reports for government and private sector reform during a planned occupation of Iraq, and that those defectors became prominent government officials in Iraq after

2012]

Congressional Oversight

25

media with terrorist and WMD tales after these meetings.¹⁴⁷ The Administration even increased funding to the INC to provide information pertaining to military operations, weapons, war crimes, and internal developments inside Iraq.¹⁴⁸

Moreover, the White House created an Office of Global Communication, which included work product from Iraqi defectors and public relations firms.¹⁴⁹ The *Washington Post* wrote that the Office of Global Communication earmarked \$200 million for a “PR blitz against Saddam Hussein . . . [to persuade] American and foreign audiences, particularly in Arab nations skeptical of U.S. policy in the region [and utilized] . . . advertising techniques to persuade crucial target groups that the Iraqi leader must be ousted.”¹⁵⁰ NYU Professor Greg Grandin explained:

[The] Office of Global Communication . . . coordinated the work of PR cadres like Rendon, [and] committed itself to starting a war in Iraq. The office produced a daily set of talking points and vetted all communication issued by the president and his advisers . . . Rendon and other government-contracted public relations firms coached Iraqi dissidents on how to sound good on TV and synchronized the message of conservative think tanks and analysts with that of the White House. . . Rendon’s organization flooded media sources with disinformation, often supplied by supposedly independent journalists who were in fact on Rendon’s—and by extension the Pentagon’s—payroll.¹⁵¹

Government agencies actively summoned defectors to bring their information to the U.S. intelligence community (“IC”). The CIA composed a Joint Task Force on Iraq (“JTFI”) in fall 2001.¹⁵² The JTFI’s mission was to “target Iraqi scientists” and track “down relatives, students and associates of Iraqi scientists—in America and abroad—

Hussein’s regime was ousted).

147. *Id.* at 62-66; *see supra* Part II.

148. SSCI/INC, *supra* note 19, at 30 (between May and July, “[t]he National Security Council Deputies Committee decided that the [INC] program should be continued”); Martin Kettle, *Bush Funds Iraqi Opposition*, *GUARDIAN* UK, Feb. 2, 2001, <http://www.guardian.co.uk/world/2001/feb/03/iraq.usa>.

149. Laura Miller, *War Is Sell*, *PR WATCH*, 2002, <http://www.prwatch.org/prwissues/2002Q4/war.html> [hereinafter “Miller, *War Is Sell*”].

150. RAMPTON & STAUBER, *supra* note 21, at 38; Miller, *War Is Sell*, *supra* note 149.

151. GRANDIN, *supra* note 64, at 229; Martha Brant, *West Wing Story: Ladies and Gentlemen . . . the Band*, *NEWSWEEK*, Sept. 18, 2002; Bamford, *supra* note 116, at 10; Douglas Quenqua, *U.S. Training Iraqis in Media to Raise Support for Attack*, *PR WEEK*, Sept. 2, 2002, at 3.

152. SSCI/2004, *supra* note 145, at 262.

looking for potential sources” with data about Iraq weapon programs.¹⁵³ The JTFI procured data from defectors, intelligence collectors provided the ultimately false accounts to intelligence analysts; analysts dispensed estimates to the Bush Administration, and the Administration declassified estimates to produce allegations to the public.¹⁵⁴

In its investigation of circumstances preceding the formation of the JTFI, the SSCI emphasized that from 1991 to 1998 the American IC was almost wholly-reliant on United Nations (“UN”) inspections for intelligence, which meant that the IC lacked sources after UN inspections ceased.¹⁵⁵ When UN activities concluded in 1998, inspectors did not have evidence that prohibited weapons existed and they believed that Iraq had been successfully disarmed.¹⁵⁶ The SSCI also ascertained that there was no “direct” evidence of WMD programs in Iraq, which was also accordant with what UN weapons inspectors kept reaffirming in their updates to the Security Council during the four months of renewed investigations immediately prior to the March 2003 attack.¹⁵⁷ The expanse between the lacking evidentiary foundation and the public allegations suggests that the JTFI performance could have been a product of antecedent rhetoric.

Starting in early September 2002, Bush administration officials began to surfeit the global media with claims about WMDs and Bush addressed the UN General Assembly about dangers from Iraq.¹⁵⁸ The SSCI discovered that immediately prior to and especially after this address “Iraqi defectors were showing up at Western embassies claiming they had information on Saddam’s WMDs.”¹⁵⁹ Hence, a

153. David Corn, *What Valerie Plame Really Did at the CIA*, NATION, Sept. 18, 2006, <http://www.thenation.com/article/what-valerie-plame-really-did-cia> (Iraqi scientists also denied that there were any WMD programs); SSCI/2004, *supra* note 145, at 262.

154. *See generally* SSCI/INC, *supra* note 19; Bejesky, *Intelligence Information*, *supra* note 104, at 877-82; Charles Lewis & Mark Reading-Smith, *False Pretenses*, CTR. FOR PUB. INTEGRITY, (Jan. 23, 2008), <http://www.publicintegrity.org/2008/01/23/5641/false-pretenses>.

155. SSCI/2004, *supra* note 145, at 258-61. The SSCI conducted an “unprecedented outside examination of a broad range” of IC Human Intelligence operations (“HUMINT”). *Id.* at 24-25. From 1991 to 1998, the IC relied on UN information about Iraq and not “sufficient unilateral HUMINT collection effort targeting Iraq” had been made during this period or after 1998. *Id.* Through 2001, there was little information and ability to access information and materials indicating there were WMD programs. *Id.* at 260-61.

156. Bejesky, *Weapon Inspections*, *supra* note 94, at 302-03; Corn, *supra* note 153.

157. SSCI/2004, *supra* note 145, at 417; Bejesky, *Weapon Inspections*, *supra* note 94, at 330-31.

158. Bejesky, *Weapon Inspections*, *supra* note 94, at 303-19; Lewis & Reading-Smith, *supra* note 154 (major spike in false statements in August 2002).

159. Corn, *supra* note 153; SSCI/2004, *supra* note 145, at 263. The SSCI remarked that from “late summer 2002 until the start of . . . [the invasion] in March 2003, the CIA

2012]

Congressional Oversight

27

government sub-agency was created to gather evidence and it seems dubious that Iraqi defectors, who assumedly opposed the current regime, would emerge to provide evidence to rebut what Bush administration officials were unequivocally enumerating in the global media.¹⁶⁰ What would defectors be expected to say? As former Iraqi Survey Group head David Kay remarked about defectors and their agendas: “dissidents and exiles have their own agenda—regime change,” and one must be critical before accepting what they say “as truth” and “evidence.”¹⁶¹

Nonetheless, the Bush Administration *post facto* distanced itself and exhibited a detachment from defectors.¹⁶² In May 2004, White House accusation casting at Chalabi climaxed. The *New York Times* wrote: “[c]omplicating matters for journalists, the accounts of these exiles [wanting regime change] were often eagerly confirmed by United States officials convinced of the need to intervene in Iraq. Administration officials now acknowledge that they sometimes fell for misinformation from these exile sources.”¹⁶³ Another *New York Times*

‘dramatically picked up the pace’ of HUMINT collection according to a CIA collector.” *Id.* There were up to fifty CIA agents assigned to JTFI and they produced and disseminated over 400 intelligence reports since its creation. *Id.* at 262.

160. David Kay, *Let’s Not Make the Same Mistake in Iran*, WASH. POST, Feb. 7, 2005, at A21, available at <http://www.washingtonpost.com/wp-dyn/articles/A3601-2005Feb6.html>. The SSCI wrote:

[N]umerous interviews with intelligence analysts and documents provided to the Committee indicate that analysts and collectors assumed that sources who denied the existence or continuation of WMD programs and stocks were either lying or not knowledgeable about Iraq’s program, while those sources who reported ongoing WMD activities were seen as having provided valuable information.

SSCI/2004, *supra* note 145, at 21. They discarded alternative information and managers and supervisors did not “encourage analysts [and information collectors] to challenge their assumptions” or question their assumptions about the information they were gathering. *Id.* at 23-24.

161. Kay, *supra* note 160, at A21.

162. Ken Guggenheim, *Chalabi: Defectors gave Iraqi Arms Info*, ASSOC. PRESS, June 13, 2003, <http://www.apnewsarchive.com/2003/Chalabi-Defectors-Give-Iraq-Arms-Info/id-0d4b818170a4b81d911a94493a912947> (Powell remarked he couldn’t substantiate Chalabi’s claims making new ones every year); see generally SSCI/INC, *supra* note 19 (INC was being funded by the U.S. government); David E. Sanger, *A Seat of Honor Lost to Open Political Warfare*, N.Y. TIMES, May 21, 2004, at A1, available at <http://www.nytimes.com/2004/05/21/world/the-struggle-for-iraq-the-exile-a-seat-of-honor-lost-to-open-political-warfare.html?pagewanted=all&src=pm>; Kay, *supra* note 160, at A21; John Dizard, *How Ahmed Chalabi Conned the Neocons*, SALON, May 4, 2004, http://www.salon.com/2004/05/04/chalabi_4/; Mayer, *supra* note 28.

163. Editorial, *The Times and Iraq*, N.Y. TIMES, May 26, 2004, at A10, available at http://www.nytimes.com/2004/05/26/international/middleeast/26FTE_NOTE.html?pagewanted=all. Another account maintained that Chalabi even manipulated neoconservatives such

article reported:

Now [Chalabi] says that with the liberation of Iraq, the United States should get out of the way. ‘My message is let my people go, let my people be free,’ he said, clearly angry that his bedroom had been invaded and that his computers and papers had been confiscated [by the Bush Administration’s order]. ‘We are grateful to President Bush for liberating Iraq, but it is time for the Iraqi people to run their affairs.’¹⁶⁴

CONCLUSION

Many scholars have recently complained about congressional oversight of the executive branch. This Article provides a context-specific example and flags three controversial issues—the government funding of private publicity organizations; the distinction between government-financed messages that flow to foreign or domestic audiences; and the use of privately—constituted data on foreign policy, which can either be classified as intelligence or directly publicized in the media. These issues might be candidates for legislative initiatives to improve clarity.

First, following the 1991 Gulf War, President Bush Senior issued a covert order that led to alliances with the INC and Rendon Group. The CIA employed Ahmed Chalabi and started funding the INC with what would eventually be more than a hundred million in U.S. taxpayer dollars to “create the conditions for removal of Saddam Hussein from power.”¹⁶⁵ In Britain, the British MI6 authorized Operation Mass Appeal to disseminate inculpatory details about the Iraqi government, much of which was demonstrated to be false.¹⁶⁶

The second interesting facet involving the Rendon Group and the INC was the concern over fifty-year-old restrictions that condoned U.S. government-funded messages released to global audiences, but not to American citizens.¹⁶⁷ These Cold War-era restrictions are conspicuous in the Smith-Mundt Act of 1946, Congressional appropriations bills, and in the endeavors of the U.S. Information Agency and the Voice of

as Cheney, Wolfowitz, Perle, and Feith as they shared an affinity to overthrow the Iraqi government in the late 1990s. Dizard, *supra* note 162.

164. Sanger, *supra* note 162, at A1. Despite not living in Iraq for over forty-five years, he was devoted to the country. Dexter Filkins, *Where Plan A Left Ahmad Chalabi*, N.Y. TIMES MAG., Nov. 5, 2006, at 50.

165. Miller, *One Man*, *supra* note 29; Mayer, *supra* note 28.

166. *See supra* nn. 87-89.

167. *See supra* Part I.B.

2012]

Congressional Oversight

29

America.¹⁶⁸ For the INC and the Rendon Group, the theory was that U.S. government-funded stories were generated and reproduced outside U.S. territory and dispensed to foreign audiences, which made them permissible.¹⁶⁹ With global media operations and technological changes, experts have recently called this domestic/international distinction archaic.¹⁷⁰

Funding intensified with the Iraq Liberation Act of 1998 even after some government officials doubted the value of INC intelligence and the CIA had relinquished oversight.¹⁷¹ In the lead up to the 2003 invasion of Iraq, defectors, frequently sponsored by the INC, made numerous allegations of Iraqi WMDs and ties to terrorism. Responsibility to oversee the INC shifted to different government agencies and Congress-appropriated funds for publicity operations. The Bush Administration utilized the Rendon Group and similar public relations organizations in its White House Office of Global Communication and expended \$1.6 billion for publicity operations, as revealed in a February 2006 General Accounting Office investigation.¹⁷²

Third, INC defectors were providing stories to three recipients—the media, the American intelligence apparatus, and government agencies. The first communication goes more directly to the public and the media decides whether to publish the “witness” account. The second type is vetted by IC analysts, who may deliver the classified information to top government officials, and top officials decide to publicly disseminate. The third is a direct disclosure to government agencies. Perhaps the second communication has a screening mechanism that emends credibility, but it is not clear that there was much difference among the witness accounts regardless of the recipient in this case.¹⁷³ The CIA handled the INC when it disseminated data to

168. *Id.*

169. *Id.*

170. *Report on the Smith-Mundt Symposium, supra* note 63, at 7.

171. *See generally* Part I.C, II.A.

172. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-06-305, MEDIA CONTRACTS: ACTIVITIES AND FIN. OBLIGATIONS FOR SEVEN FED. DEP'T (2006), *available at* <http://www.gao.gov/highlights/d06305high.pdf>; *see generally* RAMPTON & STAUBER, *supra* note 21; C. Edwin Baker, *The Independent Significance of the Press Clause Under Existing Law*, 35 HOFSTRA L. REV. 955, 969 (2007); Lee, *supra* note 15, at 985, 990, 1009 (problematic was that views were disseminated in a way that “obscured the government’s role in promoting the message,” apparently even by engaging in anonymous communications, to enhance credibility of the message and avoiding political accountability by “masking its identity as speaker”).

173. Bejesky, *Intelligence Information, supra* note 104, at 875-82; *see generally* Part II.

the IC and the media; the U.S. State Department contracted to have the INC directly publicize reports in the media; and the DIA imposed contractual restrictions to maintain control over the data and prevent direct publication in the media.¹⁷⁴ Problems are compounded when it is not clear that there is any effective deterrent to prevent witnesses from providing inaccurate statements to these recipients.

The President also has the authority to decide what is a national security secret, what specifically must be held secret, and who can have access to that secret.¹⁷⁵ The Bush administration exercised significant control over that system.¹⁷⁶ When combined with the fact that the White House sponsored defectors and funded them to provide public accounts and controlled access to the data, this provides enormous control over discourse.

174. *See supra* Part I.

175. Honorable J. Dennis Hastert, OFF. OF THE ATT'Y GEN., *Report to Congress*, at 2, transmitted on Oct. 15, 2002, http://www.justice.gov/ag/readingroom/letter_house.pdf. It is the “virtually unbridled power to control the flow of national security information . . . [via the] classification system [that] is the executive branch’s principal method of information control.” Mary-Rose Papandrea, *Lapdogs, Watchdogs, and Scapegoats: The Press and National Security Information*, 83 IND. L.J. 233, 240 (2008); Robert Bejesky, *National Security Information Flow: From Source to Reporter’s Privilege*, 24(3) ST. THOMAS L. REV. at 4-21 (forthcoming 2012). The Bush administration also restricted government employees from having access to any particular national security secrets unless it was absolutely necessary to carry out their official duties. *See supra* Part II.D.

176. A recent Congressional General Accounting Office report indicated that “this classification activity is probably greater than the combined total activity of all components and agencies of the Government.” GEN. ACCOUNTING OFFICE, LCD-81-13, REPORT TO THE CONG. BY THE COMPTROLLER GEN. OF THE U.S.: OVERSIGHT OF THE GOV’T SEC. CLASSIFICATION PROGRAM – SOME IMPROVEMENT STILL NEEDED 14 (1980), *available at* <http://www.gao.gov/assets/140/131343.pdf>. Author James Bamford explains that every year, somewhere between 60 and 120 million documents, or 60 million pounds of classified documents are stamped “Top Secret,” 80% of which came from the NSA and are taken to a vast, secure warehouse. JAMES BAMFORD, *BODY OF SECRETS* 516-17 (2001). According to an April 2006 *Seattle Times* article, the Bush administration overwhelmingly increased the number of documents classified as either “top secret,” “secret,” or “confidential” more than any other administration in American history, including by reclassifying information that has been available for years. Mark Silva, *Cheney Won’t Tell How Much He Keeps Secret*, CHI. TRIB., Apr. 30, 2006, http://seattletimes.nwsourc.com/html/nationworld/2002962226_cheney30.html.