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### Government Speech and the War on Terror

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# GOVERNMENT SPEECH AND THE WAR ON TERROR

*Helen Norton\**

## INTRODUCTION

The government is unique among speakers because of its coercive power, its substantial resources, its privileged access to national security and intelligence information, and its wide variety of expressive roles as commander-in-chief, policymaker, educator, employer, property owner, and more. Precisely because of this power, variety, and ubiquity, the government's speech can both provide great value and inflict great harm to the public. In wartime, specifically, the government can affirmatively choose to use its voice to inform, inspire, heal, and unite—or instead to deceive, divide, bully, and silence.

This Article examines the U.S. government's role as speaker (rather than as regulator of speech) in its War on Terror, drawing from historical and contemporary examples to illuminate the great power of the government's wartime expression. As we shall see, on the one hand, the government's expressive choices in wartime can be enormously valuable. On the other hand, the government has also engaged in wartime fearmongering and lies, with at times devastating effects not only on its intended targets but also on the American public.<sup>1</sup> Many of the challenges involving the government's speech in today's War on Terror are familiar (often painfully so), while some seem different in degree and perhaps even in kind.

Although courts and commentators have discussed at some length the First Amendment issues raised by the government's restriction of others' speech as part of its War on Terror,<sup>2</sup> relatively little attention has yet been devoted

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1. See *infra* Parts I–II.

2. See, e.g., *Holder v. Humanitarian Law Project*, 561 U.S. 1, 7–16 (2010); Ashutosh Bhagwat, *Terrorism and Associations*, 63 *EMORY L.J.* 581, 638 (2014); Thomas Healy,

to the implications of the government's own expression in this setting. Apart from its interpretation of the Establishment Clause to limit the government's religious speech in certain contexts,<sup>3</sup> for example, the U.S. Supreme Court's government speech doctrine remains incomplete in that it has yet to address the ways in which the government's own speech might affirmatively threaten other constitutional values.<sup>4</sup>

This Article examines how the government's speech in the War on Terror can threaten free speech, equal protection, and due process values.<sup>5</sup> It focuses primarily on the constitutional harms threatened by the government's speech itself (what some call a form of "soft law"),<sup>6</sup> rather than on situations in which the government's speech may be evidence of a constitutionally impermissible motive for its "hard law" actions.<sup>7</sup>

Part I of this Article considers the government's fearmongering speech in wartime—its deliberate expressive effort to instill or exacerbate public fear of certain individuals or communities through stereotyping and scapegoating. Next, Part II considers the government's war-related lies—its deliberately or recklessly false assertions of fact about its wartime conduct made with the intent that its listeners understand them to be true.<sup>8</sup> Finally, Part III outlines a range of constitutional, statutory, structural, and political responses to the government's wartime speech that threaten key constitutional values.

I begin with a few notes about this Article's use of the terms "government speech" and "war." First, this Article considers a wide range of government speakers. Although a great deal of the government's wartime speech

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Brandenburg in a Time of Terror, 84 NOTRE DAME L. REV. 655, 657–61 (2009); Wadie E. Said, Humanitarian Law Project and the Supreme Court's Construction of Terrorism, 2011 BYU L. REV. 1455, 1498–508; Alexander Tsesis, Terrorist Speech on Social Media, 70 VAND. L. REV. 651, 662–75 (2017).

3. *E.g.*, County of Allegheny v. ACLU, 492 U.S. 573, 601–02 (1989) (holding that a county holiday display that included a crèche constituted governmental religious expression in violation of the Establishment Clause).

4. The Supreme Court's government speech doctrine recognizes simply that the government's own expressive choices are exempt from Free Speech Clause claims by private parties who claim a constitutional right to join or change the government's chosen message. *E.g.*, Pleasant Grove City v. Summum, 555 U.S. 460, 467 (2009).

5. Elsewhere, I have addressed the potential harms of government speech more generally. See Helen Norton, *The Government's Lies and the Constitution*, 91 IND. L.J. 73, 89–107 (2015) [hereinafter, Norton, *Government's Lies*] (exploring possible Due Process and Free Speech Clause constraints on certain government speech); Helen Norton, *The Equal Protection Implications of Government's Hateful Speech*, 54 WM. & MARY L. REV. 159, 183–87 (2012) [hereinafter, Norton, *Government's Hateful Speech*] (exploring possible Equal Protection Clause limits on certain government speech).

6. See Jacob E. Gersen & Eric A. Posner, *Soft Law: Lessons from Congressional Practice*, 61 STAN. L. REV. 573, 577 (2008) (defining "soft law" to include government speech that does not have legally coercive status—that is, government expression "that do[es] not have the force of law").

7. *E.g.*, Int'l Refugee Assistance Project v. Trump, 857 F.3d 554, 591–92 (4th Cir.) (relying on President Trump's speech as evidence that his administration's proposed ban on travel from certain primarily Muslim countries—referred to above as "hard law"—was motivated by impermissible anti-Muslim animus in violation of the Establishment Clause), *cert. granted*, 137 S. Ct. 2080 (2017).

8. Fearmongering and lying do not describe mutually exclusive categories of government expression.

emanates from the president and other members of the federal executive branch, this Article also explores the wartime expression of federal legislative and judicial branch actors and state and local government officials. In so doing, this Article considers speech by a government body itself (e.g., reports issued by an executive agency or a legislative committee), as well as speech by a government official empowered to speak for a government body (e.g., the president, the secretary of homeland security, a governor, or a police chief).<sup>9</sup> Second, this Article does not insist upon any particular definition of “war” or “wartime.” Instead, it considers the government’s speech in situations where the government itself asserts emergent threats to national security from an opponent that may or may not take the form of a nation-state.<sup>10</sup>

### I. THE GOVERNMENT’S FEARMONGERING SPEECH IN WARTIME

This Part briefly examines the government’s wartime fearmongering—that is, its deliberate expressive effort to instill or exacerbate public fear of certain individuals or communities through stereotyping and scapegoating.

Of course, the government need not make such expressive choices. Indeed, the government can choose to use its voice in wartime instead to include and unite. The government’s apologies for its misconduct, for example, can help heal and reconcile. Illustrations include Congress’s (belated) apologies to Japanese American citizens wrongly interned during World War II: “For these fundamental violations of the basic civil liberties and constitutional rights of these individuals of Japanese ancestry, the Congress apologizes on behalf of the Nation.”<sup>11</sup>

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9. This Article does not address the very different constitutional issues raised when government employees speak in their personal, rather than official, capacities and can thus assert First Amendment rights of their own. *See generally* Lane v. Franks, 134 S. Ct. 2369, 2377–83 (2014) (discussing the First Amendment rights of individual public employees); Pickering v. Bd. of Educ., 391 U.S. 563, 568–74 (1968) (same).

10. *See* MARY L. DUDZIAK, WAR TIME 5 (2012) (“Built into the very essence of our idea of wartime is the assumption that war is temporary. The beginning of a war is the opening of an era that will, by definition, come to an end. When we look at the full time line of American military conflicts, however, including the ‘small wars’ and the so-called forgotten wars, there are not many years of peacetime. This shows us that war is not an exception to normal peacetime, but instead an enduring condition.”).

11. *See* DAVID COLE, ENGINES OF LIBERTY: THE POWER OF CITIZEN ACTIVISTS TO MAKE CONSTITUTIONAL LAW 169 (2016) (“In 1976, . . . President Gerald Ford issued a proclamation condemning the internment. In 1980, Congress created the Commission on Wartime Relocation and Internment of Civilians to study the issue. Three years later, and nearly forty years after the *Korematsu* decision, the commission unequivocally denounced the internment, and called for an official apology and reparations . . . . In 1988, Congress passed and Reagan signed the Civil Liberties Act, which provided \$20,000 for each interned Japanese American, and contained an extraordinary official apology.”). In 2011, the Office of the Solicitor General acknowledged its own complicity in these events in an admission of error (another type of government speech). *See* Neal Katyal, *Confession of Error: The Solicitor General’s Mistakes During the Japanese-American Internment Cases*, U.S. DEP’T JUST. ARCHIVES (May 20, 2011), <https://www.justice.gov/archives/opa/blog/confession-error-solicitor-general-s-mistakes-during-japanese-american-internment-cases> [https://perma.cc/884T-HP2E].

More important, government speakers can—and sometimes do—affirmatively reject appeals to division and hatred in the midst of war (rather than decades later). As one illustration shows, President George W. Bush repudiated anti-Muslim bigotry in a speech at a mosque immediately after the September 11, 2001, attacks. There, the president emphasized Islam as a religion of peace and the “incredibly valuable contribution[s]” Muslim Americans make to the United States as “doctors, lawyers, law professors, members of the military, entrepreneurs, shopkeepers, moms and dads.”<sup>12</sup> He emphasized the need for Americans to treat their fellow citizens with respect and stated that anything less “represents the worst of humankind” and that “[t]hose who feel like they can intimidate our fellow citizens . . . should be ashamed of that kind of behavior.”<sup>13</sup>

Related examples include New York Mayor Michael Bloomberg’s impassioned defense of plans to build a mosque near the site of the former World Trade Center in lower Manhattan in 2010:

Let us not forget that Muslims were among those murdered on 9/11 and that our Muslim neighbors grieved with us as New Yorkers and as Americans. We would betray our values—and play into our enemies’ hands—if we were to treat Muslims differently than anyone else. In fact, to cave to popular sentiment would be to hand a victory to the terrorists—and we should not stand for that.<sup>14</sup>

For similar reasons, President Barack Obama expressly chose not to use the phrase “radical Islamic terrorism” to avoid associating terrorism with Islam as a religion.<sup>15</sup> In its War on Terror, the Obama administration consistently prioritized a message of tolerance and antidiscrimination for instrumental as well as moral reasons:

[W]e must remember that just as our words and deeds can either fuel or counter violent ideologies abroad, so too can they here at home. Actions and statements that cast suspicion toward entire communities, promote hatred and division, and send messages to certain Americans that they are somehow less American because of their faith or how they look, reinforce violent extremist propaganda and feed the sense of disenchantment and disenfranchisement that may spur violent extremist radicalization.

. . . .

We must do everything in our power to protect the American people from violent extremism while protecting the civil rights and civil liberties of every American. Protecting our fundamental rights and liberties is an important end in itself, and also helps counter violent extremism by

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12. President George W. Bush, Remarks by the President at Islamic Center of Washington, D.C. (Sept. 17, 2001), <https://georgewbush-whitehouse.archives.gov/news/releases/2001/09/20010917-11.html> [<https://perma.cc/V89B-7SJY>].

13. *Id.*

14. Mayor Michael R. Bloomberg, Defending Religious Tolerance: Remarks at the Mosque Near Ground Zero (Aug. 3, 2010), [http://www.huffingtonpost.com/michael-bloomberg/mayor-bloomberg-on-the-ne\\_b\\_669338.html](http://www.huffingtonpost.com/michael-bloomberg/mayor-bloomberg-on-the-ne_b_669338.html) [<https://perma.cc/F5Q9-9H5R>].

15. See William Cummings, *Why Obama Won't Say 'Radical Islamic Terrorist,'* USA TODAY (Sept. 28, 2016, 7:44 PM), <http://www.usatoday.com/story/news/politics/onpolitics/2016/09/28/obama-town-hall/91245328/> [<https://perma.cc/9CAR-4S8T>].

ensuring nonviolent means for addressing policy concerns; safeguarding equal and fair treatment; and making it more difficult for violent extremists to divide our communities.<sup>16</sup>

At other times, however, the government has asserted its expressive power to instill fear and hatred and to wound, exclude, and divide. In so doing, government speakers in wartime have often targeted immigrants, the government's critics, and others perceived as "outsiders." As Geoffrey Stone observes, "Fear has proved a potent political weapon."<sup>17</sup>

Early examples of the government's wartime fearmongering include Federalists' inflammatory speech and character assassination that exaggerated the danger of war with France. This fearmongering encouraged not only the suppression of speech (through the enactment of the Alien and Sedition Acts) but also acts of violence against those perceived to be disloyal.<sup>18</sup> Government actors during World War I similarly invited hatred of German immigrants in the United States. President Woodrow Wilson, for example, claimed that "the agents and dupes of the Imperial German Government" were actively engaged in a "sinister intrigue" within the United States and that "many of our own people were corrupted."<sup>19</sup>

In World War II, government officials offered stereotypes and falsehoods to support the internment of thousands of Japanese American citizens. Dissenting from the Supreme Court's decision to uphold the internment, Justice Frank Murphy described the government's fearmongering speech in detail:

That this forced exclusion was the result in good measure of this erroneous assumption of racial guilt rather than bona fide military necessity is evidenced by the Commanding General's Final Report on the evacuation from the Pacific Coast area. In it he refers to all individuals of Japanese descent as "subversive," as belonging to "an enemy race" whose "racial strains are undiluted," and as constituting "over 112,000 potential enemies . . . at large today" along the Pacific Coast. In support of this blanket condemnation of all persons of Japanese descent, however, no reliable evidence is cited to show that such individuals were generally disloyal, or had generally so conducted themselves in this area as to constitute a special menace to defense installations or war industries, or had otherwise by their behavior furnished reasonable ground for their exclusion as a group.

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16. *Empowering Local Partners to Prevent Violent Extremism in the United States*, OBAMA WHITE HOUSE ARCHIVES 7 (Aug. 2011), [https://obamawhitehouse.archives.gov/sites/default/files/empowering\\_local\\_partners.pdf](https://obamawhitehouse.archives.gov/sites/default/files/empowering_local_partners.pdf) [<https://perma.cc/K2U2-EHQE>].

17. Geoffrey R. Stone, *Free Speech in the Age of McCarthy: A Cautionary Tale*, 93 CALIF. L. REV. 1387, 1388–89 (2005).

18. See GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME 27–28 (2004); see also *id.* at 74 ("[A]s the events of 1798 illustrate, those in power may exploit a threat to the nation's security to serve their partisan ends. A time-honored strategy for consolidating power is to inflate the public's fears, inflame its patriotism, and then condemn political opponents as 'disloyal.' A national crisis (real, fabricated, or imagined) invites this strategy.")

19. President Woodrow Wilson, Address on Flag Day (June 14, 1917), <http://www.presidency.ucsb.edu/ws/?pid=65400> [<https://perma.cc/8H26-UVKP>].

A military judgment based upon such racial and sociological considerations is not entitled to the great weight ordinarily given the judgments based upon strictly military considerations. Especially is this so when every charge relative to race, religion, culture, geographical location, and legal and economic status has been substantially discredited by independent studies made by experts in these matters.<sup>20</sup>

Shortly thereafter, the Cold War<sup>21</sup> brought an extensive and destructive cycle of the government's fearmongering speech intended to silence political opposition. Examples include the FBI's spread of defamatory falsehoods about the government's critics during the 1950s and 1960s.<sup>22</sup>

As this period illuminates, legislative bodies as well as the executive branch can engage in fearmongering expression. The Senate's Permanent Subcommittee on Investigations, led by Senator Joseph McCarthy, and the House Un-American Activities Committee (HUAC) engaged in expression that encouraged private parties' acts of retaliation against its targets through firing, blacklisting, and even physical violence.<sup>23</sup> One HUAC chair explained that "the committee's goal was to expose Communists and fellow travelers 'before their neighbors and fellow workers,' with the 'confidence' that loyal Americans 'will do the rest of the job.'"<sup>24</sup> Indeed, as Justice Hugo Black explained when he dissented from the Court's decision to uphold the contempt conviction of a witness who declined to answer some of HUAC's questions, the committee sought to punish its targets through "humiliation and public shame. There is nothing strange or novel about this kind of punishment. It is in fact one of the oldest forms of governmental punishment

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20. *Korematsu v. United States*, 323 U.S. 214, 235–40 (1942) (Murphy, J., dissenting); see also *Korematsu v. United States*, 584 F. Supp. 1406, 1418–22 (N.D. Cal. 1984) (granting Mr. Korematsu's *coram nobis* petition and describing evidence of government lies in the earlier proceedings).

21. See DUDZIAK, *supra* note 10, at 73 ("Cold War-era warfare included major wars in Korea and Vietnam, but also smaller-scale military engagements in Asia, Africa, Latin America, and the Middle East.").

22. See STONE, *supra* note 18, at 490 ("In its effort to destabilize and incapacitate the left, FBI agents wrote letters to employers to cause the firing of antiwar activists; . . . sent anonymous letters to campaign contributors and other supporters of antiwar candidates to sabotage their campaigns; mailed anonymous letters to the spouses of antiwar activists, suggesting that their partners were having extramarital affairs; and spread false rumors that individuals were embezzling funds or secretly cooperating with the FBI.").

23. See Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449, 458 (1985) ("The Hollywood Blacklist struggle of 1947–53 left a residue of broken careers, expatriate talents, and extreme reluctance on the part of film studios to address controversial subjects or portray social conditions of potential political significance. The character of the trade union movement was permanently . . . altered by the expulsion during the anti-Communist purges of the 1950s of some of its most skillful, uncompromising, and incorruptible leaders.").

24. STONE, *supra* note 18, at 372; see also *id.* at 332 ("We have seen the character of private citizens and of Government employees virtually destroyed by public condemnation on the basis of gossip, distortion, hearsay and deliberate untruths.' [The Tydings Committee] found that the 'methods employed' to give McCarthy's charges of disloyalty in the State Department 'ostensible validity . . . are a fraud and a hoax perpetrated on the Senate . . . and the American people.'" (quoting S. REP. NO. 81-2108, at 151–52 (1950)).

known to mankind; branding, the pillory, ostracism and subjection to public hatred being but a few examples of it.”<sup>25</sup>

McCarthy in particular shamed and muzzled not only his targets but other governmental officials as well. Indeed, the conspicuous absence of counterspeech by other government actors enabled McCarthy to thrive for as long as he did. As one of many examples, President Dwight D. Eisenhower abandoned plans to defend General George Marshall from McCarthy’s verbal assaults.<sup>26</sup> Eisenhower’s silence only encouraged further attacks by McCarthy.<sup>27</sup> For years, Republicans in Congress similarly declined to challenge their fellow party member because they found that his fearmongering worked to their political advantage.<sup>28</sup> Only after Senate oversight hearings finally exposed his overreaching did McCarthy’s popularity drop sufficiently to embolden the Senate to vote to censure him for “contemptuous” and “reprehensible” conduct.<sup>29</sup>

The Trump administration has continued the trend of government fearmongering in its War on Terror through expressive choices that intentionally exclude, divide, and marginalize. As candidate for president, Trump called for the “total and complete shutdown of Muslims” entering the country.<sup>30</sup> As president-elect, he tweeted a threat to dissenters: “Nobody should be allowed to burn the American flag—if they do, there must be consequences—perhaps loss of citizenship or year in jail!”<sup>31</sup> As president, Trump has chosen to use the pejorative term “radical Islam”<sup>32</sup> that Presidents Bush and Obama expressly eschewed.

State and local governments, like the federal government, can also engage in hurtful fearmongering speech in wartime.<sup>33</sup> Recent examples from the

25. *Barenblatt v. United States*, 360 U.S. 109, 154–54 (1959) (Black, J., dissenting).

26. See HAROLD H. BRUFF, *UNTRODDEN GROUND* 285 (2015) (“[Eisenhower] fail[ed] to deliver a planned defense in a campaign speech of his mentor George Marshall, then under a particularly scurrilous attack by Joseph McCarthy. News of the deletion only encouraged the senator.”).

27. See *id.*

28. See Stone, *supra* note 17, at 1396; see also STONE, *supra* note 18, at 389 (“[A]s James Reston noted at the time, although McCarthy’s public support had dwindled, it is a precept of most politicians that ‘you never antagonize any group . . . if you can avoid it,’ and if ‘you have to choose between two groups, you always choose to antagonize the one that is less vindictive.’ In this instance, that was ‘certainly not the pro-McCarthy crowd.’”).

29. See Stone, *supra* note 17, at 1401–03. Such a censure offers another example of government speech—in this case, counterspeech that seeks to influence other governmental actors’ expressive choices.

30. Press Release, Donald J. Trump, Statement on Preventing Muslim Immigration (Dec. 7, 2015), <https://web.archive.org/web/20170301013409/https://www.donaldjtrump.com/press-releases/donald-j.-trump-statement-on-preventing-muslim-immigration> [<https://perma.cc/NW3Q-3CST>].

31. Donald J. Trump (@realDonaldTrump), TWITTER (Nov. 29, 2016, 3:55 AM), <https://twitter.com/realdonaldtrump/status/803567993036754944> [<https://perma.cc/76WS-5PEG>].

32. See Andrew E. Kramer, *The Phrase Putin Never Uses About Terrorism (and Trump Does)*, N.Y. TIMES (Feb. 1, 2017), <https://www.nytimes.com/2017/02/01/world/europe/vladimir-putin-donald-trump-terrorism.html> [<https://perma.cc/T5BM-6KQH>].

33. See, e.g., STONE, *supra* note 18, at 291 (describing inflammatory charges against Japanese American citizens by the California legislature’s Joint Immigration Committee).



War on Terror include the New York Police Department's (NYPD) use of training videos that portrayed Muslims in stereotypically negative and inaccurate ways. One film announced that "the true agenda of much of Islam in America" is "to infiltrate and dominate America."<sup>34</sup> The NYPD eventually abandoned use of the videos in response to public criticism.<sup>35</sup> Attorney General Eric Holder ultimately repudiated the FBI's use of similar training materials and stated that such materials "really have a negative impact on our ability to communicate effectively."<sup>36</sup>

The government has long included the press among the targets of its fearmongering speech.<sup>37</sup> John Adams's Federalist administration infamously employed the Sedition Act in response to "the first mass media in our history, the Republican papers that organized political opposition to the administration and ran inflamed articles condemning its policies."<sup>38</sup> More recent efforts along these lines include those of the Nixon administration, as summarized by journalist David Wise:

To the extent that the public could be persuaded, through such attacks, to doubt the credibility, accuracy, and impartiality of the American press, attention would, of course, be diverted from the question of the administration's own credibility. If the viewer can be goaded to kick the tube when Walter Cronkite appears, he may be less likely to vent his anger at Richard Nixon. This, at any rate, was the administration's theory, and it had a remarkable degree of short-range success. Doubt *was* cast on the credibility of the press, and latent hostility toward the television networks and the news media in general was crystallized and exploited.<sup>39</sup>

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34. See Michael Powell, *In Police Training, a Dark Film on U.S. Muslims*, N.Y. TIMES (Jan. 23, 2012), <http://www.nytimes.com/2012/01/24/nyregion/in-police-training-a-dark-film-on-us-muslims.html> [https://perma.cc/98DV-97K5].

35. See *id.* After a lawsuit alleged that another of its videos encouraged religious profiling, the NYPD settled on terms that required it to remove the materials from its website. See Stipulation of Settlement and Order at 5, *Raza v. City of New York*, No. 1:13-cv-03448-PKC-JO (E.D.N.Y. Mar. 19, 2017).

36. Spencer Ackerman, *Attorney General: FBI Hurt Terror Fight with 'Violent Muslim' Training*, WIRED (Nov. 8, 2011, 2:45 PM), <https://www.wired.com/2011/11/holder-fbi-islamophobia/> [https://perma.cc/F36Y-J7B5]; see also Spencer Ackerman, *FBI 'Islam 101 Guide' Depicted Muslims as 7th Century Simpletons*, WIRED (July 27, 2011, 1:27 PM), <https://www.wired.com/2011/07/fbi-islam-101-guide/> [https://perma.cc/WV4K-YRUH]; Spencer Ackerman, *FBI Teaches Agents: 'Mainstream' Muslims Are 'Violent, Radical,'* WIRED (Sept. 14, 2011, 8:45 PM), <https://www.wired.com/2011/09/fbi-muslims-radical/> [https://perma.cc/6G7M-V4FJ].

37. For a more detailed history of the often antagonistic relationships between presidents and the press, see Ronnell Andersen Jones & Lisa Grow Sun, *Enemy Construction and the Press*, 49 ARIZ. L. REV. (forthcoming Feb. 2018) (manuscript at 28), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2929708](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2929708) [https://perma.cc/HW2J-4W7U]. Despite these longstanding tensions, the authors state that "the current situation [under the Trump administration] is different in kind, and not just in degree, from past press-president hostilities, and thus the risks presented by that situation are more severe." *Id.* at 21.

38. BRUFF, *supra* note 27, at 54.

39. DAVID WISE, *THE POLITICS OF LYING: GOVERNMENT DECEPTION, SECRECY, AND POWER* 17 (1973); see also Jones & Sun, *supra* note 37, at 23 ("Like Trump, Nixon employed war and enemy terminology to characterize [the press].").

President Trump has doubled down on these efforts with expressive choices that repeatedly seek to demonize, and thus undermine, the credibility of the press. He branded the press not only “the enemy of the American people” but also as incorrigibly dishonest; he stated that “[t]he press has become so dishonest that if we don’t talk about [sic], we are doing a tremendous disservice to the American people. . . . We have to talk to find out what’s going on, because the press honestly is out of control. The level of dishonesty is out of control.”<sup>40</sup> He accused the press of misrepresenting his criticism of intelligence officials; he stated that he has “a running war with the media,” that “[t]hey are among the most dishonest human beings on Earth,”<sup>41</sup> and that “they sort of made it sound like I had a feud with the intelligence community.”<sup>42</sup> He sought to characterize negative press coverage of his administration as inevitably false: “Any negative polls are fake news, just like the CNN, ABC, NBC polls in the election. Sorry, people want border security and extreme vetting.”<sup>43</sup> In short, he has sought to attack and undermine the credibility of the press in an apparent effort to sap it of its power to hold him accountable for his own wartime performance.<sup>44</sup>

Not only has President Trump repeatedly demonized the press, but he has also attacked the legitimacy of the judiciary, specifically in the context of the War on Terror. As just one example, he called the jurist who first issued a preliminary injunction against his travel ban a “so-called judge” and claimed that the judge’s actions impeded the fight against terrorism “[b]ecause the ban was lifted by a judge, many very bad and dangerous people may be pouring into our country. . . . What is our country coming to when a judge can halt a Homeland Security travel ban and anyone, even with bad intentions, can come into U.S.?”<sup>45</sup> In another tweet, he continued that he “[j]ust cannot believe a judge would put our country in such peril. If

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40. Jenna Johnson & Matea Gold, *Trump Calls the Media ‘the Enemy of the American People,’* WASH. POST (Feb. 17, 2017), <https://www.washingtonpost.com/news/post-politics/wp/2017/02/17/trump-calls-the-media-the-enemy-of-the-american-people/> [https://perma.cc/WTS2-94LU].

41. Julie Hirschfeld Davis & Matthew Rosenberg, *With False Claims, Trump Attacks Media on Turnout and Intelligence Rift*, N.Y. TIMES (Jan. 21, 2017), <https://www.nytimes.com/2017/01/21/us/politics/trump-white-house-briefing-inauguration-crowd-size.html> [https://perma.cc/7V8P-FRUV].

42. *Id.*

43. Glenn Kessler & Michelle Ye Hee Lee, *Fact-Checking President Trump’s News Conference*, WASH. POST (Feb. 16, 2017), <https://www.washingtonpost.com/news/fact-checker/wp/2017/02/16/fact-checking-president-trumps-news-conference/> [https://perma.cc/LE4U-L4HT].

44. See Jones & Sun, *supra* note 37, at 1, 39 (“The Trump administration, with a rhetoric that began during the campaign and burgeoned in the earliest days of Donald Trump’s presidency, has engaged in enemy construction of the press, and the risks that accompany that characterization are great. . . . [E]nemy construction of the press can pave the way for the invocation of Schmittian exceptionalism that justifies limitation on press freedoms and thus subverts the important watchdog, educator, and proxy roles of the press.”).

45. See Eugene Scott & Allie Malloy, *Trump Attacks Another Federal Judge*, CNN (Feb. 5, 2017, 7:38 AM), <http://www.cnn.com/2017/02/04/politics/donald-trump-attacks-federal-judge-travel-ban/index.html> [https://perma.cc/2ZQN-QNAW].

something happens blame him and court system. People pouring in. Bad!”<sup>46</sup> As summarized by Curtis Bradley and Neil Siegel, the Trump administration has been unusually willing to engage in a “blame-shifting narrative to reduce the future checking power of institutions like the judiciary and the media, especially in the wake of a terrorist attack.”<sup>47</sup>

To be sure, the government generally defends its fearmongering speech in wartime as a necessary response to emergent threats to national security.<sup>48</sup> But even if demonization of some “enemy” may be inevitable in wartime (and sometimes constructive as a tool for mobilization),<sup>49</sup> vulnerable individuals and groups pay an unacceptably steep price when the government chooses its targets based on stereotypes and falsehoods rather than on evidence.<sup>50</sup>

## II. THE GOVERNMENT’S LIES ABOUT WAR

The preceding Part addressed the government’s fearmongering speech in wartime that threatens harm to the individuals and communities specifically targeted by such expression. This Part turns to the government’s wartime lies that inflict harm upon the American people more generally by frustrating political accountability and eroding public trust.

War usually occurs in situations of great epistemic uncertainty that invite a range of government responses in resolving such confusion.<sup>51</sup> Here too, the government’s expressive choices offer possibilities for both great value and great harm. In some cases, the government’s speech that explains its justifications for war and its wartime decisions can inform and inspire. President Abraham Lincoln’s wartime speech, as an illustration, often

46. See David Lawler, *Donald Trump Travel Ban: ‘Blame Judge and Courts if America Is Attacked’—President Hits Out Ahead of Legal Battle*, TELEGRAPH (Feb. 6, 2017, 11:41 AM), <http://www.telegraph.co.uk/news/2017/02/04/donald-trump-slams-so-called-judge-blocked-ban-vows-overturn/> [https://perma.cc/PVY6-UVD2].

47. Curtis Bradley & Neil S. Siegel, *Judicial and Media Independence After the Next Attack*, LAWFARE (Feb. 9, 2017, 5:41 PM), <https://lawfareblog.com/judicial-and-media-independence-after-next-attack> [https://perma.cc/VP7F-CC2T].

48. JOHN J. MEARSHEIMER, *WHY LEADERS LIE* 7 (2011) (“But the fact is that there are good strategic reasons for leaders to lie to their publics as well as to other countries. These practical logics already override well-known and widely accepted moral strictures against lying. Indeed, leaders sometimes think that they have a moral duty to lie to protect their country.”).

49. See Jones & Sun, *supra* note 37, at 36 (“For many political communities, defining the enemy can be a mechanism for defining the community itself—for clarifying both its values and its boundaries—and thus an important mechanism for increasing social cohesion.”).

50. See Blasi, *supra* note 23, at 464 (“[A]s Zechariah Chafee has demonstrated so well, when the collectivist thinking that is necessary for a war effort takes hold, officials, judges, and the public at large tend to overestimate dramatically either the level of cooperation required to effectuate the goals of the community or the extent to which the achievement of sufficient cooperation requires the stifling of dissent.”).

51. *E.g.*, W.J. West, *Introduction* to GEORGE ORWELL, *ORWELL: THE WAR COMMENTARIES* 11, 17 (W.J. West ed., 1985) (“Since the sea and air wars were wars without frontiers they made highly suitable material for the propaganda war. . . . Japanese radio refers to a sea battle in the Pacific as one of the greatest Japanese naval victories of all time; Orwell quotes American sources describing it as a defeat for Japan which has started a process leading to her ultimate collapse. Only the passage of time would enable listeners to tell which side was right.”).

exemplified expressive deliberation, reflection, and a reluctance to attack others' motives, character, and loyalty.<sup>52</sup> Recall not only Lincoln's plea for "malice toward none, with charity for all" in his second inaugural address,<sup>53</sup> but also his public response to critics of the Emancipation Proclamation in which he explained the wartime rationale for his decision:

You say you will not fight to free negroes. Some of them seem willing to fight for you; but, no matter. Fight you, then, exclusively to save the Union. I issued the proclamation on purpose to aid you in saving the Union. Whenever you shall have conquered all resistance to the Union, if I shall urge you to continue fighting, it will be an apt time, then, for you to declare you will not fight to free negroes.

I thought that in your struggle for the Union, to whatever extent the negroes should cease helping the enemy, to that extent it weakened the enemy in his resistance to you. Do you think differently? I thought that whatever negroes can be got to do as soldiers, leaves just so much less for white soldiers to do, in saving the Union. Does it appear otherwise to you? But negroes, like other people, act upon motives. Why should they do any thing for us, if we will do nothing for them? If they stake their lives for us, they must be prompted by the strongest motive—even the promise of freedom. And the promise being made, must be kept.<sup>54</sup>

At other times, in contrast, the government has lied about its wartime actions and their justifications—that is, it has made deliberately or recklessly false assertions of fact with the intent that its listeners understand them to be true. The government's lies regarding national security and intelligence where it has near-monopoly access pose especially grave instrumental threats to democratic self-governance.<sup>55</sup>

For example, the government at times obscures or conceals the reasons for its decisions about military intervention through false or misleading claims of threats to national security. Illustrations include President James Polk's misrepresentation of the events that led the United States to declare war

52. See JEFFREY K. TULIS, *THE RHETORICAL PRESIDENCY* 83 (1987) ("Lincoln's most specific policy pronouncements are those in which he justifies war activity after the fact. The most important of these are his defenses of suspension of habeas corpus and of martial law in two replies to addresses. Carefully choosing written arguments made to him, he too responds in the written form of a public letter. These documents are extraordinary for both their detail and their power of argument.")

53. President Abraham Lincoln, Second Inaugural Address (Mar. 4, 1865), [http://avalon.law.yale.edu/19th\\_century/lincoln2.asp](http://avalon.law.yale.edu/19th_century/lincoln2.asp) [<https://perma.cc/F4B2-94JL>].

54. Letter from Abraham Lincoln to James C. Conkling (Aug. 26, 1863), in 6 *COLLECTED WORKS OF ABRAHAM LINCOLN* 407, 409 (Roy P. Basler ed., 1953) (footnotes omitted).

55. See Leslie Gielow Jacobs, *Bush, Obama and Beyond: Observations on the Prospect of Fact Checking Executive Department Threat Claims Before the Use of Force*, 26 *CONST. COMMENT.* 433, 444 (2010) ("[President Bush] and his top officials relied on controlled information release in a number of ways to support their use of force advocacy. That they withheld much information within their control meant that they could rely upon the public's knowledge that they had superior access to the entire body of existing information to characterize the facts with greater certainty than the content of the information reflected, to omit mention of dissent, to suggest that they had more and better quality information than they presented, and to ask the public to embrace the truth of the threat claims based on trust rather than proof." (footnotes omitted)).

against Mexico,<sup>56</sup> the Lyndon B. Johnson administration's misrepresentations of the incidents that triggered broader U.S. involvement in Vietnam<sup>57</sup> as well as its reasons for military intervention in the Dominican Republic,<sup>58</sup> and the George W. Bush administration's misrepresentation of the evidence supporting its invasion of Iraq.<sup>59</sup> As David Wise explained with respect to the Johnson administration's expressive choices, the government's falsehoods to justify its military intervention can threaten death, devastation to natural and financial resources, and other shattering harms:

Often, in the foreign policy and national security area, what the government says *is* the news. The Tonkin Gulf episode was a classic illustration of this. The public was told that on August 4 two American warships on "routine patrol" had, in Defense Secretary Robert McNamara's words, been under "continuous torpedo attack" by North Vietnamese PT boats; in response, Lyndon Johnson ordered the first bombing attack on North Vietnam and pushed the Tonkin Gulf resolution through Congress, thereby acquiring a blank check to escalate the war. Later it became clear that there had been much confusion and considerable doubt within the government as to whether any PT-boat attack had taken place at all. The public, however, had to rely entirely on Lyndon Johnson and Robert McNamara for their news of the incident. If the details seem unimportant in the larger tapestry of the war, we need only recall that at the time 163 Americans had died in Vietnam.<sup>60</sup>

Relatedly, sometimes the government lies about how well its war efforts are going. During World War II, the government misrepresented the extent of its losses at Pearl Harbor and elsewhere.<sup>61</sup> During the Vietnam War, Defense Secretary Robert McNamara told government employee Daniel Ellsberg in private that the addition of 100,000 U.S. troops had resulted in no

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56. See BRUFF, *supra* note 27, at 114.

57. See *id.* at 318–19 ("Johnson's sponsorship of the Tonkin Gulf Resolution to authorize the war involved deception about both the facts and the president's intentions, setting the stage for a repetition of these sins that would eventually destroy his presidency. It is one thing to find oneself in a strategic bind and quite another to try to work out of it behind a bodyguard of lies."); *id.* at 321 ("As he escalated the war, LBJ repeatedly denied doing so, in an effort to protect the viability of his domestic initiatives and to preserve the option of withdrawing without seeming defeated." (footnote omitted)).

58. *Id.* at 323 ("Johnson misled Congress and the public by claiming the intervention [to send troops into the Dominican Republic in 1965] was an attempt to protect American lives, when it was in fact actuated by a concern that the new government might be leftist. This poorly conceived intervention gave way to an authoritarian regime that lasted a quarter century." (footnotes omitted)).

59. See Jacobs, *supra* note 55, at 440–41 ("We know now that these threat claims were not true. . . . With the facts misunderstood, Congress members and the public consented to the use of force based upon a fundamental misunderstanding of the policy choice to be made." (footnotes omitted)).

60. WISE, *supra* note 39, at 27–28.

61. See STONE, *supra* note 18, at 279 ("After Pearl Harbor, Secretary of the Navy Knox gave a flagrantly misleading report of the extent of American losses, and as the Japanese swept through Singapore, Hong Kong, and Manila in the spring of 1942 the military did its best to cover up the magnitude of each defeat.").

military progress—only to report great improvement to an audience of journalists ten minutes later.<sup>62</sup> As the Pentagon Papers eventually revealed,

lying was permitted throughout the ranks of all governmental services [in the Vietnam War], military and civilian—the phony body counts of the “search-and-destroy” missions, the doctored after-damage reports of the air force, the “progress” reports to Washington from the field written by subordinates who knew that their performance would be evaluated by their own reports.<sup>63</sup>

Note too that the Pentagon Papers themselves—commissioned by Secretary McNamara for the government’s use and written by government employees and contractors—offer an example of salutary government expression because of what they exposed about the government’s deceitful wartime speech.

The government sometimes lies about what it is actually doing in wartime. Examples include the Nixon administration’s lies about its decision to bomb Cambodia,<sup>64</sup> the Bush administration’s misrepresentations of its interrogation tactics with respect to suspected terrorists,<sup>65</sup> and Obama administration officials’ falsehoods about the sweep of its domestic surveillance and data collection efforts.<sup>66</sup>

The trend continues. In the contemporary War on Terror, for example, the Trump administration has made inaccurate charges about immigrant involvement in terrorist attacks on U.S. soil to justify its proposed travel ban and related measures.<sup>67</sup> President Trump also claimed that the press had

62. *See id.* at 501.

63. HANNAH ARENDT, *CRISES OF THE REPUBLIC* 4 (1972) (footnotes omitted).

64. *See* BRUFF, *supra* note 27, at 328 (“Nixon tried to solve the legal difficulty by keeping the bombing [of Cambodia] secret and ordering military records falsified to conceal it. This tactic foreclosed any possibility that approval by Congress or the people legitimated the action.” (footnote omitted)).

65. *See* David Cole, *If Those Techniques Were Approved, Why Did the CIA Still Lie About Torture?*, WASH. POST (Dec. 12, 2014), <https://www.washingtonpost.com/opinions/if-the-interrogation-program-was-approved-why-did-the-cia-still-lie-about-it/2014/12/12/e858eeec-8162-11e4-81fd-8c4814dfa9d7> [<https://perma.cc/F79L-KN7K>] (describing then-CIA Director Michael Hayden as “misrepresent[ing] virtually every aspect of the [CIA’s coercive interrogation] program to the [Senate Select] Committee [on Intelligence]” in April 2007 testimony and referencing a committee report listing misrepresentations about the program’s genesis, interrogators’ qualifications and training, the ability to stop interrogation at any time, whether interrogators punched targets or threatened to kill their family members, number of detainees, specific abusive conduct, effectiveness of waterboarding, and other “coercive tactics”).

66. *See* Mary-Rose Papandrea, *Leaker Traitor Whistleblower Spy: National Security Leaks and the First Amendment*, 94 B.U. L. REV. 449, 467 (2014) (describing Director of National Intelligence James Clapper’s testimony to Congress).

67. *See* Linda Qiu, *Fact-Checking Assertions About the President’s Travel Ban*, N.Y. TIMES (Feb. 24, 2017), <https://www.nytimes.com/2017/02/23/us/politics/fact-checking-claims-about-trumps-travel-ban.html> [<https://perma.cc/594M-E9FS>] (“According to the New America Foundation, all 12 jihadist terrorists who have killed people in the United States since Sept. 11, 2001, were American citizens or permanent residents, and none had ties to the seven countries named in Mr. Trump’s [original] executive order.”); *see also* Fred Barbash & Derek Hawkins, *Trump’s Loose Talk About Muslims Gets Weaponized in Court Against Travel Ban*, WASH. POST (Feb. 7, 2017), <https://www.washingtonpost.com/news/morning-mix/wp/2017/02/07/words-matter-trumps-loose-talk-about-muslims-gets-weaponized-in-court-against->

failed to report acts of terrorism: “ISIS is on a campaign of genocide, committing atrocities across world. . . . It’s gotten to a point where it’s not even being reported. And in many cases, the very, very dishonest press doesn’t want to report it.”<sup>68</sup> Along the same lines, then-candidate Trump falsely claimed that Arabs in New Jersey had publicly celebrated the 9/11 attacks.<sup>69</sup>

To be sure, the government sometimes engages in wartime deception to achieve various national security and foreign policy purposes. For example, the John F. Kennedy administration’s deceptions during the Cuban Missile Crisis included not only lies regarding what it knew about the presence of Soviet missiles in Cuba but also lies about the negotiated terms for the missiles’ withdrawal.<sup>70</sup> Kennedy Press Secretary Arthur Sylvester later suggested a governmental duty to lie in certain circumstances:

Government officials as individuals do not have the right to lie politically or to protect themselves, but they do always have the duty to protect their countrymen. . . . Sometimes, and those times are rare indeed, Government officials may be required to fulfill their duty by issuing a false statement to deceive a potential enemy, as in the Cuban missile crisis.<sup>71</sup>

Governmental lies motivated by public purposes are sometimes morally and instrumentally justifiable, as I have suggested elsewhere:

In certain rare circumstances, the government’s decision to lie [in ways that cause or coerce the deprivation of constitutionally protected liberty] may survive strict scrutiny when necessary to achieve compelling government

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travel-ban [<https://perma.cc/RN4M-YFF4>] (“Trump again called for a ‘ban’ after the Pulse nightclub shooting in June, the deadliest mass shooting in U.S. history. He framed the attack as an immigration issue, even though the shooter was a U.S. citizen born in New York to Afghan parents.”).

68. Philip Rucker, *‘If Something Happens’: Trump Points His Finger in Case of a Terrorist Attack*, WASH. POST (Feb. 6, 2017), <http://wapo.st/2jVOJ6S> [<https://perma.cc/9MJV-TL9X>]; see also Julie Hirschfeld Davis, *Trump Says Journalists ‘Have Their Reasons’ to Play Down Terror Threat*, N.Y. TIMES (Feb. 6, 2017), <https://www.nytimes.com/2017/02/06/us/politics/donald-trump-centcom.html> [<https://perma.cc/C495-VWV6>] (“The president’s comments on Monday were reminiscent of his claim during a visit last month to the headquarters of the Central Intelligence Agency in Langley, Va., that the news media had fabricated his feud with the intelligence community. Those remarks came only days after he likened American intelligence officials to Nazis, after several weeks in which he had denigrated their work.”).

69. Glenn Kessler & Michelle Ye Hee Lee, *President Trump’s Cascade of False Claims in Time’s Interview on His Falsehoods*, WASH. POST (Mar. 23, 2017), [https://www.washingtonpost.com/news/fact-checker/wp/2017/03/23/president-trumps-cascade-of-false-claims-in-times-interview-on-his-falsehoods/?utm\\_term=.9c88coacbb51](https://www.washingtonpost.com/news/fact-checker/wp/2017/03/23/president-trumps-cascade-of-false-claims-in-times-interview-on-his-falsehoods/?utm_term=.9c88coacbb51) [<https://perma.cc/VJ8B-4J4N>].

70. See Arthur Sylvester, *The Government Has the Right to Lie*, SATURDAY EVENING POST, Nov. 18, 1967, at 10 (acknowledging that during the Cuban Missile Crisis President Kennedy knowingly approved a press release falsely stating that “the Pentagon has no information indicating the presence of offensive weapons in Cuba”); see also BRUFF, *supra* note 27, at 305 (describing how “[l]ying, [President Kennedy] denied that [the removal of American missiles from Turkey] was a quid pro quo for Cuba” and that “[t]he shield of lies with which President Kennedy hid his trade of missiles in Turkey for missiles in Cuba was constructed to meet both international and domestic political considerations” such as preventing the displeasure of the Administration’s NATO allies and domestic critics).

71. Sylvester, *supra* note 70, at 14.

interests. This may be the case when time permits no other option—for example, where the government’s coercive lies are necessary to calm public panic in a public safety emergency or to prevent a criminal from hurting a victim.<sup>72</sup>

But the government’s lies are rarely necessary to achieve such ends. Lies ostensibly told to mislead military opponents, for example, can instead deceive the American public without any offsetting national security benefit. As Hannah Arendt observed, the government’s lies during the Vietnam War were

hardly ever aimed at the enemy (this is one of the reasons why the [Pentagon P]apers do not reveal any military secrets that could fall under the Espionage Act), but [were] destined chiefly, if not exclusively, for domestic consumption, for propaganda at home, and especially for the purpose of deceiving Congress. The Tonkin incident, where the enemy knew all the facts and the Senate Foreign Relations Committee none, is a case in point.<sup>73</sup>

As David Wise similarly explained:

The excuse for secrecy and deception most frequently given by those in power is that the American people must sometimes be misled in order to mislead the enemy. This justification is unacceptable on moral and philosophic grounds, and often it simply isn’t true. Frequently the “enemy” knows what is going on, but the American public does not.<sup>74</sup>

In short, the government’s wartime lies to achieve public purposes can be justified on moral and instrumental grounds when they are actually necessary to achieving such purposes—but often they are not. Instead, such lies sometimes have the intent or effect of insulating the government from political and legal accountability for its wartime decisions.<sup>75</sup>

### III. ADDRESSING THE GOVERNMENT’S HARMFUL WARTIME SPEECH

This Part discusses possible responses to the government’s fearmongering and deliberately false wartime speech that threaten significant harm, proposing a range of constitutional, structural, political, and expressive suggestions for influencing the government’s expressive choices. In so doing, it addresses a variety of possible actors and audiences that include courts and lawyers, other government officials, the press, and the public more broadly.

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72. Norton, *Government’s Lies*, *supra* note 5, at 115.

73. ARENDT, *supra* note 63, at 14.

74. WISE, *supra* note 39, at 344; *see also* STONE, *supra* note 18, at 393 (“Certainly, the goal of preserving the nation’s security from unlawful espionage, sabotage, and foreign influence is legitimate. Certainly, there were well-justified concerns about these matters during the Cold War. But a democracy is about means as well as ends. It is not enough to say that Joe McCarthy meant well, but went about it the wrong way. McCarthy violated the fundamental norms and the essential values of the American constitutional system. There is simply no excusing, defending, or mitigating that reality.”).

75. *See* SUSAN A. BREWER, WHY AMERICA FIGHTS: PATRIOTIC AND WAR PROPAGANDA FROM THE PHILIPPINES TO IRAQ 282 (2009) (“[T]he more flawed the policy, the more heavily officials have relied on lies and exaggerations to manipulate opinion.”).



*A. Constitutional Constraints*

Government expression in wartime may sometimes violate specific constitutional guarantees. This can be so even if the contested government speech is otherwise consistent with the principles of separation of powers and federalism. For example, even if the executive's speech is consistent with Article II of the Constitution, that does not mean that it is necessarily consistent with the First Amendment, Due Process Clause, and Equal Protection Clause since those provisions have very different purposes.<sup>76</sup>

More specifically, as I have described elsewhere, the government's lies and other speech can violate the Due Process Clause when they coerce the deprivation of their targets' life, liberty, or property. Examples include government officials' lies that coerce their targets' involuntary waiver of constitutional rights, government lies that deprive their subjects of the ability to meaningfully exercise voting or other protected rights, and government lies to individuals about their constitutionally protected rights (which are often the functional equivalent of the government's refusal to honor those rights altogether).<sup>77</sup>

Relatedly, I have proposed that the government's speech can violate the Free Speech Clause of the First Amendment when it is sufficiently coercive of its targets' beliefs or expression to constitute the functional equivalent of the government's direct regulation of that expressive activity. Just as a government's criminal sanction or economic reprisal designed to silence dissent clearly frustrate First Amendment values, so too can government lies and fearmongering squelch critics' speech.<sup>78</sup>

Moreover, government speech at times threatens equal protection values by dividing or excluding its targets based on protected-class status. This danger is especially acute in wartime, where possibilities for fearmongering and scapegoating abound. As I have urged elsewhere, we can understand the government's hateful speech as violating the Equal Protection Clause when it facilitates or encourages private parties' discrimination or acts of violence against its targets or when it discourages its targets from exercising protected rights or pursuing key opportunities.<sup>79</sup>

Although I have argued that the government's speech by itself may sometimes run afoul of the Constitution, I also recognize that efforts to enforce constitutional constraints on the government's expression pose obstacles and trigger concerns of their own. These efforts not only invite worries about courts' institutional competence to evaluate such claims but

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76. See *Hamdi v. Rumsfeld*, 542 U.S. 507, 534–35 (2004) (holding that certain executive branch actions found to be consistent with the Executive's Article II powers may nonetheless violate the Due Process Clause); see also *Korematsu v. United States*, 323 U.S. 214, 234 (1944) (Murphy, J., dissenting) (“Individuals must not be left impoverished of their constitutional rights on a plea of military necessity that has neither substance nor support. Thus, like other claims conflicting with the asserted constitutional rights of the individual, the military claim must subject itself to the judicial process of having its reasonableness determined and its conflicts with other interests reconciled.”).

77. See Norton, *Government's Lies*, *supra* note 5, at 89–99.

78. *Id.* at 99–107.

79. Norton, *Government's Hateful Speech*, *supra* note 5, at 194–98.

also may be more readily applied to government expression that inflicts individualized harm on specific targets than to government speech that threatens more collective harms to the general public.<sup>80</sup> They may also encourage attacks by the government's critics for partisan rather than principled reasons and thus chill the government's important wartime expression.

These challenges invite us also to consider nonconstitutional means for addressing harmful government expression, such as the counterspeech and oversight opportunities available to other government officials specifically and to the public more generally. The remainder of this Part sketches a range of possibilities.

### B. Nonconstitutional Constraints

The president is not the only government speaker with a bully pulpit; other governmental leaders can use their public platforms to challenge fearmongering and lies. Indeed, separation of powers principles offer structural means for other governmental actors to shape the government's expressive choices through oversight and counterspeech. For example, legislative oversight of the executive's expressive choices can include requiring relevant officials to testify under oath (or in other settings where truthfulness is required by law) and denying funding to government agencies engaged in lying or other harmful expression.<sup>81</sup>

Legislatures can also contribute to the development of what some call "internal separation of powers" checks on the executive.<sup>82</sup> For example, Congress has enacted statutes establishing inspector general (IG) positions

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80. Related concerns in other settings have led courts to develop various justiciability doctrines that limit the circumstances under which the judiciary is empowered to review the legality of the other branches' choices. At the same time, courts have recognized limits on and exceptions to these doctrines to help ensure that an independent judiciary remains available to check the government in appropriate circumstances. *See Norton, Government's Lies*, *supra* note 5, at 85; *see also* JAMES E. PFANDER, CONSTITUTIONAL TORTS AND THE WAR ON TERROR xviii (2017) ("[T]he federal courts should focus on the narrow (but supremely important) task of evaluating the legality of official conduct. Once that understanding of the judicial role has been accepted, existing law furnishes ample tools with which to reach the merits of misconduct claims. . . . One way to accomplish such a return to the merits would be to allow litigants to limit themselves to a claim for nominal damages. Such nominal claims would enable the court to reach the constitutional issue in a world of legal uncertainty without confronting the officer with a threat of personal liability and triggering the qualified immunity defense.").

81. *See* Louis Fisher, *When Wars Begin: Misleading Statements by Presidents*, 40 PRESIDENTIAL STUD. Q. 171, 182 (2010) ("Congressional committees need to call executive officials to testify, under oath, to defend their public statements about going to war. To do that effectively, lawmakers and their staffs must arm themselves in advance with information obtained from executive agencies and from experts outside of government." (footnote omitted)); *see also* Jacobs, *supra* note 55, at 480 ("When intelligence lapses happen, Congress members with responsibility for oversight should be named and asked to identify and explain the oversight actions engaged in on their watch.").

82. *See generally* Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 YALE L.J. 2314 (2006).

charged with monitoring various agencies for misconduct.<sup>83</sup> These statutes broadly empower the IGs to “undertake and carry out audits and investigations without interference from agency leadership[,] . . . to access documents within and beyond their agencies[,]” and to serve and inform Congress along with their agencies.<sup>84</sup> Along the same lines, presidents can appoint or otherwise establish civil liberties defenders at high levels.<sup>85</sup>

In addition, legislatures can enact statutes that prohibit governmental lies or otherwise constrain government speech in certain contexts. Examples include the Federal False Statements Act (which prohibits speakers, including but not limited to governmental speakers, from lying to federal officials) and other statutes that impose affirmative disclosure requirements upon government speakers.<sup>86</sup> Moreover, legislatures can enact and strengthen statutory protections for whistleblowers who can help expose government lies and other misconduct.<sup>87</sup> Executive branch actors at all levels of government can then play a valuable role in vigorously enforcing these measures.

Federalism principles offer similar structural means for governmental officials to influence other governmental actors’ expressive choices through counterspeech and public pressure. State attorneys general, for example, can reject federal fearmongering not only through litigation but also through their own forceful expression.<sup>88</sup> Other illustrations include California Supreme

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83. See Shirin Sinnar, *Protecting Rights from Within? Inspectors General and National Security Oversight*, 65 STAN. L. REV. 1027, 1027 (2013) (describing inspectors general as “playing a significant role in monitoring national security practices curtailing individual rights”).

84. *Id.* at 1035 (footnote omitted); see also Mark Mazzetti & Michael S. Schmidt, *Pentagon Clears Officials of Skewing Data in ISIS Reports*, N.Y. TIMES (Feb. 1, 2017), <https://www.nytimes.com/2017/02/01/world/middleeast/pentagon-isis-reports.html> [<https://perma.cc/8Z35-8ZXJ>] (describing the inspector general’s internal investigation of claims that agency reports “were manipulated to present a distorted view of the military campaign’s progress”).

85. See STONE, *supra* note 18, at 542; see also Sinnar, *supra* note 83, at 1036–37 (“Congress also made explicit a civil rights role for the new [Department of Homeland Security (DHS)] IG, requiring the IG to designate a senior official to investigate civil rights allegations and to work with the DHS Officer for Civil Rights and Civil Liberties on policy recommendations.” (footnote omitted)).

86. See David E. Pozen, *Freedom of Information Beyond the Freedom of Information Act*, 165 U. PA. L. REV. 1097, 1101 (2017) (“One alternative model for producing executive branch transparency involves affirmative disclosure requirements, which can be tailored in a variety of ways and enforced by agents such as inspectors general, ombudspersons, and auditors.”).

87. Such statutory protections are especially important in light of the Supreme Court’s failure to protect many government whistleblowers as a matter of constitutional law. See *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006) (holding that the First Amendment does not protect public employees’ speech pursuant to their jobs—including their truthful reports of government lies and other forms of misconduct—when those reports are part of their official duties); see also Helen Norton, *Constraining Public Employee Speech: Government’s Control of Its Workers’ Speech to Protect Its Own Expression*, 59 DUKE L.J. 1, 4 (2009) (describing multiple cases in which lower courts have invoked *Garcetti* to permit government employers to punish employees who sought to expose the government’s lies and other misconduct).

88. See, e.g., Press Release, Lisa Madigan, Ill. Attorney Gen., Attorney General Madigan & 15 Other Attorneys General Condemn the Unconstitutional Executive Order on Immigration, Vow to Uphold Constitution (Jan. 29, 2017),

Court Chief Justice Tani Cantil-Sakauye’s letter to Attorney General Jeff Sessions and Homeland Security Secretary John Kelly requesting that federal agents cease arresting undocumented immigrants at courthouses for fear that such arrests “may deter immigrants from coming to court for legal matters, such as testifying or seeking protective orders from alleged abusers.”<sup>89</sup>

In rare circumstances, impeachment may provide a response to certain presidential lies or other speech that inflicts egregious democratic harms. As Curtis Bradley and Neil Siegel suggest in response to President Trump’s efforts to undermine the credibility of checking institutions:

Another step would be to give more concrete consideration to the conditions under which attempts to undermine the judiciary or the media should be considered grounds for impeachment. Ideally, the very act of thinking this through and specifying lines that should not be crossed might help stave off potential abuses.<sup>90</sup>

Relatedly, government and nongovernment lawyers, as well as other actors in civil society, can help police and thus shape the government’s especially harmful expressive choices. So too can a vigorous press.<sup>91</sup>

Finally, of course, we the people have a substantial role to play in responding to the government’s harmful expression, especially during (but not limited to) wartime. Our political and expressive options include voting, campaigning, lobbying, petitioning, and protesting. To be sure, such remedies seem especially limited at a time when expressive choices involving generosity, nuance, and humility do not appear to reap political rewards. But the public can seek to cultivate habits of mind as both speakers and listeners to help influence our leaders’ expressive choices. On one hand, for example, Leslie Gielow Jacobs urges us to remember that “the President speaks as an advocate when he presents threat claims,” which means that “listeners must evaluate the claims [they] make[], and the evidence [they] present[], as advocacy.”<sup>92</sup> Thus, they “must attempt, through congressional or media inquiry or otherwise, to verify the threat claims that are made.”<sup>93</sup> On the other hand, as an aspirational matter, Jason Stanley suggests the following:

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[http://www.illinoisattorneygeneral.gov/pressroom/2017\\_01/20170129.html](http://www.illinoisattorneygeneral.gov/pressroom/2017_01/20170129.html)  
[<https://perma.cc/JT3M-2FVL>].

89. See Kristine Phillips, *California Chief Justice to ICE: Stop ‘Stalking’ Immigrants at Courthouses*, WASH. POST (Mar. 17, 2017), <https://www.washingtonpost.com/news/post-nation/wp/2017/03/17/california-chief-justice-to-ice-stop-stalking-immigrants-at-courthouses/> [<https://perma.cc/S9MD-HSWD>]; see also *id.* (quoting the letter as saying, “[m]ost Americans have more daily contact with their state and local governments than with the federal government, and I am concerned about the impact on public trust and confidence in our state court system if the public feels that our state institutions are being used to facilitate other goals and objectives, no matter how expedient they may be”).

90. Bradley & Siegel, *supra* note 47; see also *id.* (“[I]t is essential to continue resisting any suggestion that, by doing their jobs, these institutions are to blame for the security failings of this administration.”).

91. See Jones & Sun, *supra* note 37, at 48–58 (explaining the press’s multiple functions, including its fact-checking, informational, and educational roles).

92. Jacobs, *supra* note 55, at 476.

93. *Id.* at 477.

A democratic culture is one in which citizens assume that their fellow citizens have good reasons for acting as they do. It involves, for example, questioning one's own perspective, if one cannot make rational sense out of the actions of one's fellow citizens. It involves, as Du Bois argues, being open to the "respectful presentation" of other perspectives.<sup>94</sup>

In sum, we can be both more skeptical of our leaders' speech and simultaneously more open to the possibility that we ourselves (and our trusted proxies) may be vulnerable to mistake and error.

#### CONCLUSION

Our history and continuing experience show that the government's expressive choices during wartime sometimes threaten grave democratic and constitutional harm. We can teach ourselves to recognize these pathological patterns in our government's wartime expression—such as the fearmongering speech that wreaks life-changing damage on those branded as dangerous outsiders and the military lies told for the government's political self-interest.

These threats may be exacerbated in the contemporary War on Terror given its potentially unbounded scope in time and space: the enemy's identity is something other than a traditional nation-state, the battlefield's location includes the homeland as well as the rest of the globe, and the conflict has no clear temporal stopping point.<sup>95</sup> Indeed, although the government's especially harmful wartime expression in the past generally dissipated with the resolution of the military crisis of the day (or its perceived political advantage),<sup>96</sup> whether and when the current War on Terror will ever be resolved remains unclear.<sup>97</sup> The Trump administration's contemporary expressive choices also appear unusual not only in the degree to which they undermine and destabilize truth-seeking institutions like the media and the judiciary but also in the ferocity of their attacks on the concept of truth itself.<sup>98</sup> Finally, the power of the government's speech today is intensified—for better and for worse—by changes in expressive technologies that magnify the speed and reach of such expression, increasingly permit the government

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94. JASON STANLEY, *HOW PROPAGANDA WORKS* 104 (2015).

95. See DUDZIAK, *supra* note 10, at 114 ("By the end of the twentieth century, the state had dropped out of many definitions of war. A war on terror was more expansive still: it was a war against a tactic or an ideology, not a single, easily identifiable entity. And as the boundaries of territory and identity expanded, this conflict also seemed to defy the idea that war was limited in time.")

96. See *id.* at 82–83 (suggesting that the end to the government's repressive speech-related activities during the Cold War came not with an end to military conflict or threat but instead with the end of the perceived domestic political advantages of Red baiting).

97. See *id.* at 5 ("My aim is to illuminate a conundrum: we imagine wars to be bound in time, but the American experience is to the contrary. Since 9/11, war has been framed in a boundless way, extending anywhere in the world that the specter of terrorism resides, even as some of the country's political leaders—on the left and right—denounce its seeming endlessness.")

98. See, e.g., Eric Bradner, *Conway: Trump White House Offered 'Alternative Facts' on Crowd Size*, CNN (Jan. 23, 2017, 12:38 PM), <http://www.cnn.com/2017/01/22/politics/kellyanne-conway-alternative-facts/> [<https://perma.cc/YZ5L-4KJ8>].

to bypass the media and speak directly to the public,<sup>99</sup> and encourage the public's political polarization.<sup>100</sup>

The government's wartime speech packs great power. With that power comes great responsibility. Even—and perhaps especially—in times of grave crisis, the government's speech can be soaring in its inspiration, its humanity, and in its success in achieving essential public purposes. At times, however, the government's wartime speech instead threatens, bullies, divides, and deceives for self-interested reasons, with sometimes crushingly destructive results. Either way, the government's expressive choices are just that—choices—with especially significant effects. This Article has sought to identify some of the motivations for and consequences of those choices, as well as possible means for constructively influencing them. Persistent and passionate expressive pushback by other governmental actors and by the public more generally has been among the more effective antidotes to the government's especially harmful wartime speech in the past. As we have seen, however, success has rarely been quick or easy—and it remains far from inevitable.

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99. See Jones & Sun, *supra* note 37, at 34 (“Today, for the first time in modern history, a president appears to have made the calculation that . . . go-betweens are no longer necessary links to the citizenry. He is emboldened by shifts in the communications landscape and the delivery of news that permit the direct, unfiltered communication with the populace.”).

100. See *id.* at 35 (“The strong majority of Americans who are now getting their news from social media represent a change not only in news distribution, but also in news content. Social media feeds allow the user to curate news consumption, and users now consume mostly material that aligns with and reinforces their ideologies and world views.” (footnotes omitted)).