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**BOSTON UNIVERSITY LAW REVIEW**

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**THE LANGUAGE OF THE ARMS RACE: SHOULD THE PEOPLE LIMIT GOVERNMENT SPEECH?†****RICHARD DELGADO\***

In the typical free speech case, a private individual or group challenges the government's suppression of private speech. At issue is whether the first amendment prohibits the type of suppression that has occurred.<sup>1</sup> In recent years, the growing scale of the government's persuasion apparatus has prompted a number of scholars to question whether the first amendment has a reverse side: an implied prohibition on the government that may be invoked when the people wish to silence the government or when one part of government seeks to silence another.<sup>2</sup> A prominent theme in this "government speech" debate is that the government's powerful voice<sup>3</sup> can easily

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<sup>1</sup> U.S. CONST. amend. I ("Congress shall make no law . . . Abridging the freedom of speech, or of the press"). Cases arising from governmental suppression of expression are legion. *E.g.*, *New York Times v. United States*, 403 U.S. 713 (1971); *Brandenburg v. Ohio*, 395 U.S. 444 (1969); *Dennis v. United States*, 341 U.S. 494 (1951).

<sup>2</sup> *E.g.*, M. YUDOF, *WHEN GOVERNMENT SPEAKS* (1983); Kamenshine, *The First Amendment's Implied Political Establishment Clause*, 67 CALIF. L. REV. 1104 (1979); Schauer, *Book Review*, 35 STAN. L. REV. 373 (1983); Shiffrin, *Government Speech*, 27 U.C.L.A. L. REV. 565 (1980); Ziegler, *Government Speech and the Constitution: The Limits of Official Partisanship*, 21 B.C.L. REV. 578 (1980); see also T. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 697-716 (1970); Van Alstyne, *The First Amendment and the Suppression of Warmongering Propaganda in the United States: Comments and Footnotes*, 31 L. & CONTEMP. PROBS. 530 (1966).

<sup>3</sup> It should be obvious to the reader that "government" rarely speaks with one "powerful voice." More often, the myriad pronouncements from the Executive and Legislative branches, and from the many different departments of each, produce a veritable cacophony. Nevertheless, even this cacophony, because of the prominence of its source, is quite powerful. Moreover, at least within the Executive branch, there is a certain degree of enforced orthodoxy, so that the "voice" that speaks is, for all

overwhelm weaker private voices, creating a monopoly of ideas and inhibiting the dialectic on which we rely to reach decisions.<sup>4</sup>

This debate is still unresolved. The Supreme Court has yet to decide whether certain forms of government speech themselves abridge the freedom of speech guaranteed by the first amendment. Nor has the Court determined whether or to what extent government speech is protected by the first amendment. Congress also has declined to act on the scholars' invitation by enacting comprehensive legislation regulating the content or the manner of government speech.

This Article examines the case for limiting government speech in an area where the case for regulation seems particularly strong: nuclear armaments and strategy. My thesis is that the Executive branch engages in systematic dissembling in this area,<sup>5</sup> and that the one-sided views that the government propagates are unlikely to be corrected in the marketplace of ideas because of widely shared human response mechanisms<sup>6</sup> and official secrecy.<sup>7</sup> This situation has profound implications for democratic decision theory<sup>8</sup> and suggests that various remedies may be in order.<sup>9</sup>

#### PROLOGUE: THE CURRENT NUCLEAR SITUATION

As everyone knows, the United States and Soviet Union are engaged in a nuclear arms race. Despite their importance and frequency throughout history, not much is known about arms races—how they start or what sustains them.<sup>10</sup> Scholars have even questioned whether the current race between the Soviet Union and the United States is about anything at all.<sup>11</sup> Whatever

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intentions and purposes, monolithic. With the above caveats in mind, the term "government" is used hereinafter to refer generally to the Executive branch, and the term "government speech" to refer to the pronouncements of that branch, unless otherwise noted.

<sup>4</sup> L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 590 (1970); M. YUDOF, *supra* note 2, at 20-37, 71-110, 155-58; Kamenshine, *supra* note 2; see *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). In his dissent, Justice Holmes noted the dialectic-serving function of the first amendment: "that the best test of truth is the power of the thought to get itself accepted in the competition of the market and that truth is the only ground upon which [the people's] wishes safely can be carried out." *Id.*

<sup>5</sup> See Part I-A *infra* (Linguistic Devices).

<sup>6</sup> See Part I-B *infra* (Response Mechanisms).

<sup>7</sup> See Part II *infra* (Difficulties With Self-Correction).

<sup>8</sup> See Part III *infra* (Constitutional Status of Government Speech on Nuclear Weaponry).

<sup>9</sup> See Part IV *infra* (Framing A Remedy).

<sup>10</sup> Gray, *Social Science and the Arms Race*, 29 BULL. ATOM. SCI. 23 (June 1973).

<sup>11</sup> Powers, *What Is It About?*, 254 ATL. MONTHLY 35, 40-41 (Jan. 1984) [hereinafter cited as *What is it About?*]; see J. SCHELL, *THE ABOLITION* (1984) (arms race a dangerous paradox; society's first order of business should be its abolition); see also Powers, *Nuclear Winter and Nuclear Strategy*, 254 ATL. MONTHLY 53, 64 (Nov.

the reason for it, the current arms race has produced a world bristling with nuclear weaponry. The Soviet Union and the United States currently possess, between them, about 50,000 warheads<sup>12</sup> and are each building an additional four to five per day.<sup>13</sup> About 9,000 of the United States' warheads are "strategic," capable of being launched from American soil and reaching the Soviet Union.<sup>14</sup> The remainder are located in Europe or other areas close to the Soviet Union, or are based on submarines.<sup>15</sup> Most strategic warheads have an explosive force in the megaton range, i.e., equivalent to one million tons of TNT.<sup>16</sup> Large American and Soviet cities are probably targeted with

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1984) (U.S. high command unaware of details of country's strategic plan for nuclear war [hereinafter cited as *Nuclear Winter*]).

<sup>12</sup> *Nuclear Winter*, *supra* note 11, at 55; Talbott, *Arguments Against MADness*, TIME, June 11, 1984, at 84; Mahon, *Beyond Rhetoric: Untangling the Logic of the Nuclear Weapons Debate*, ETHICS AND POLICY 3 (Center for Ethics and Social Policy, undated). Estimates of the number of warheads that the superpowers possess vary. Compare U.S. Says Russia Leads in Nuclear Warheads, San Francisco Chronicle, June 18, 1984, at 1, col. 5 (Soviet Union has 34,000 nuclear warheads, U.S. about 26,000), with Tsipsis & Isaacs, *Instruments of War*, in THE FINAL EPIDEMIC: PHYSICIANS AND SCIENTISTS ON NUCLEAR WAR 76, 86-89 (1981) (listing somewhat smaller figures) [hereinafter cited as THE FINAL EPIDEMIC]; and *One Bomb—One City*, 34 F.A.S. PUBLIC INTEREST REPORT 3, 5 (Federation of American Scientists, Feb. 1981) (to the same effect); see also JOINT CHIEFS OF STAFF, U.S. MILITARY POSTURE (1982); INTERNATIONAL INSTITUTE FOR STRATEGIC STUDIES, THE MILITARY BALANCE (1982); S. ZUCKERMAN, NUCLEAR ILLUSION AND REALITY 15-24 (1982); Blackaby, *World Arsenals 1982*, 38 BULL. ATOM. SCI. 21, 24-26 (June 1982).

The American arsenal is divided fairly evenly among three types of weaponry, sometimes spoken of as legs of a triad: land-based weapons, bombers, and submarines. Brown, *Strategic Forces and Deterrence*, ACIS Working Paper No. 42 (U.C.L.A. Center for International and Strategic Affairs, 1983). The land-based missiles are relatively vulnerable to preemptive attack, bombers are somewhat less vulnerable, and submarines are currently invulnerable. S. ZUCKERMAN, *supra*. The United States and the Soviet Union seem poised to add a fourth leg to their arsenals, namely weaponry based in space. Presidential Address of Mar. 28, 1983, reprinted in DEPT. OF STATE BULL. No. 2672, at 82 (Apr. 1983) ("Star Wars" address).

<sup>13</sup> Mahon, *supra* note 12, at 3; see S. ZUCKERMAN, 15-24 (1982). The extent to which these new warheads represent increases in the nuclear stockpile is unclear. In at least some measure, new warheads replace existing warheads which are then retired.

<sup>14</sup> Mahon, *supra* note 12, at 3; see also Tsipsis & Isaacs, *supra* note 12, at 89 (listing slightly smaller figures). But see Bundy, Kennan, McNamara & Smith, *The President's Choice: Star Wars or Arms Control?*, San Francisco Chronicle, Mar. 6, 1985, at A1, col. 1 (10,000 strategic warheads).

<sup>15</sup> Mahon, *supra* note 12, at 3; see also Tsipsis & Isaacs, *supra* note 12, at 89.

<sup>16</sup> See *One Bomb—One City*, *supra* note 12, at 5 (table showing size and explosive capacities of U.S. and Soviet arsenals). The bombs exploded over Hiroshima and Nagasaki were about one-thousandth as powerful as these. *Id.* at 3.

tens of such weapons.<sup>17</sup>

In an all-out thermonuclear war, 100 to 150 million Americans would die from the "prompt" effects of the explosions: blast, heat, and radiation.<sup>18</sup> Others would die of injuries, fallout, starvation, and breakdowns in sanitation and medical care.<sup>19</sup> Comparable numbers would die in Europe and the Soviet Union.<sup>20</sup> The World Health Organization has estimated that a major war would kill approximately 1.1 billion persons worldwide from prompt effects,<sup>21</sup> and a similar number from injuries inflicted in the exchanges.<sup>22</sup> Recent attention has focused on the long-range environmental effects of nuclear warfare, including planetary temperature changes and damage to the earth's ozone layer.<sup>23</sup> A number of investigators have warned that these

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<sup>17</sup> *Id.* at 6 (using only 3,000 warheads the Soviet Union could attack 60% of the United States population by targeting 10 warheads at each of the 300 most populous cities); *Nuclear Winter*, *supra* note 11, at 63 (Moscow targeted with 60 warheads, other Soviet cities with 10 to 40); *see also Nuclear War Is National Suicide*, 34 F.A.S. PUBLIC INTEREST REPORT 1 (Federation of American Scientists, Feb. 1981) (Soviet Union has 100-200 deliverable weapons capable of leveling the largest U.S. cities); *One Bomb—One City*, *supra* note 12, at 5 ("the numbers of weapons available to any of the three arms of either of the two superpowers far exceed the number of cities of consequence on the other side").

<sup>18</sup> Raloff, *Beyond Armageddon*, 124 SCI. NEWS 314 (Nov. 12, 1983) (quoting address by Paul Ehrlich at a conference on "The World after Nuclear War").

<sup>19</sup> Abrams, *Infection and Communicable Diseases*, in *THE FINAL EPIDEMIC*, *supra* note 12, at 192; Feld, *Mechanics of Fallout*, in *THE FINAL EPIDEMIC*, *supra* note 12, at 110; Finch, *Occurrence of Cancer in Atomic Bomb Survivors*, in *THE FINAL EPIDEMIC*, *supra* note 12, at 151; Hiatt, *The Clinical Picture*, in *THE FINAL EPIDEMIC*, *supra* note 12, at 169; Lindop & Rotblat, *Consequences of Radio-Active Fallout*, in *THE FINAL EPIDEMIC*, *supra* note 12, at 117; Raloff, *supra* note 18, at 314-15.

<sup>20</sup> Letter, Physicians for Social Responsibility (Nov. 23, 1983) (on file with author).

<sup>21</sup> Raloff, *supra* note 18, at 314.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*; *Nuclear Winter*, *supra* note 11, at 55-57; Alexander, *Nuclear Winter Scenario Startled Its Discoverers*, Los Angeles Times, Jan. 22, 1984, § I, at 1, col. 5. A scientific team headed by Paul Ehrlich published calculations based on an earlier report on the climatic consequences of a major nuclear exchange. Raloff, *supra* note 18, at 314; *A Cold, Dark Apocalypse*, TIME, Nov. 14, 1983, at 43 [hereinafter cited as *Apocalypse*]. The Ehrlich team found that the dust and soot that would be released into the atmosphere would cause the planet's temperature to fall approximately 72 degrees Fahrenheit (to below freezing in most places). Most farm plants would be killed by frost, and seeds would not germinate. The food cycle of wild animals would be interrupted; most would die. Livestock not moved into heated buildings would also die. The amount of sunlight reaching the planet's surface would be reduced by 90 to 95 percent; most photosynthetic activity in trees and plants would stop. Chemical smog from industrial fires would cover most of Europe, the United States, and the Soviet Union. These effects would last for three to five years. During that time, the

changes could render the planet uninhabitable to human life.<sup>24</sup>

Whether these grim scenarios will materialize is, of course, disputed. Some believe that mutual deterrence<sup>25</sup> will work and that the danger of an accidental launch is low.<sup>26</sup> Others believe that a major war between the superpowers is likely before the end of the century.<sup>27</sup> These disputes aside,

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survivors of a nuclear attack would face an existence of extreme hardship; there would be little food, fuel, medical care, and the climate would be intensely inhospitable. Raloff, *supra* note 18, at 314-15; *Apocalypse*, *supra*.

Other studies have focused on depletion of the earth's ozone layer. Alexander, *supra* (reviewing two studies of soot and ozone effects, one by Swedish Academy of Science, other by Carl Sagan); Mark, *Nuclear Weapons: Characteristics and Capabilities*, in *THE FINAL EPIDEMIC*, *supra* note 12, at 105-06. Located high in the stratosphere, this layer is responsible for screening out much of the sun's ultraviolet radiation. Several nuclear explosions within a short time would deplete this layer, resulting in an intense level of ultraviolet radiation at ground level. Strong ultraviolet radiation has a number of adverse physiological consequences—sunburn, skin cancer, and damage to the retina of the eye. Human survivors would need to wear sunglasses while outdoors to protect against permanent loss of eyesight. Livestock would have to be confined to sheds or shelters. Birds and other wild animals would be blinded; many would starve to death, unable to feed themselves. *Id.* Many of these predictions were recently confirmed by a National Academy of Sciences study commissioned by the Defense Department. Rensberger, *Study Backs Possibility of "Nuclear Winter"*, *Phila. Inquirer*, Dec. 12, 1984, at 6-A, col. 1.

Other scientists have disputed these effects or offered more optimistic estimates of the number of casualties a nuclear war would produce. Edward Teller, for example, has written that "we can survive a nuclear attack, we can dig out of the ruins; we can recover from the catastrophe." E. TELLER, *THE LEGACY OF HIROSHIMA* 244 (1967)

<sup>24</sup> See sources cited *supra* note 23; Harris, *Can't Avoid "Nuclear Winter"* by *Going South*, *Scientist Says*, *San Francisco Examiner & Chronicle*, Feb. 10, 1985, at B5, col. 1 (nuclear winter would engulf southern as well as northern hemisphere).

<sup>25</sup> "Deterrence" is the name for the strategic approach, followed by both the U.S. and U.S.S.R., that assumes that military might can prevent war by making an attack too costly for the attacker. See P. GREEN, *DEADLY LOGIC: THE THEORY OF NUCLEAR DETERRENCE* (1966); R. SCHEER, *WITH ENOUGH SHOVELS* 123 (1982); S. ZUCKERMAN, *supra* note 12, at 41-58; Brown, *supra* note 12; Nitze, *Assuring Strategic Stability in an Era of Detente*, 54 *FOREIGN AFF.* 207 (1976). The U.S. position may be moving in the direction of defense against nuclear attack, in the form of space-based weapons able to shoot down incoming missiles shortly after launch. See Presidential Address of Mar. 23, 1983, reprinted in *DEPT. OF STATE BULL.* No. 2672, at 82 (April 1983) ("Star Wars" Address).

<sup>26</sup> R. SCHEER, *supra* note 25, at 3-26 (summarizing views of military establishment and Reagan administration); see also *infra* note 27 (discussing accidents and close calls).

<sup>27</sup> See, e.g., Kistiakowsky, *Carrying the Message*, 37 *BULL. ATOM. SCI.* 10 (Mar. 1981) (war before end of century "highly probable"); Steel, *The Statesman of Survival*, *ESQUIRE*, Jan. 1985, at 68, 72 ("I see the situation now with an almost total pessimism . . . I'm afraid that the cards today are lined up for a war, a dreadful and final war.") (interview with George Kennan) [hereinafter cited as *Kennan Interview*];

the nuclear arms race itself is alleged to exact a psychological toll, particularly on children and young adults.<sup>28</sup> Investigators have found that many young children suffer from fears and nightmares about the destruction of the world.<sup>29</sup> Older children may show skepticism about the future, and a ten-

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*see also Is Nuclear Warfare Inevitable?*, Sacramento Bee, Sept. 12, 1984, at A14, col. 1 (Stanford professor Martin Hellman uses a statistic principle, the Borel Zero-One Law, to show that nuclear confrontation is inevitable). Atomic bombs *have* been dropped on enemy targets, on Hiroshima and Nagasaki, but of course deterrence was not a factor then—the Japanese lacked nuclear weapons, and the United States risked little in using them. Since the Soviet Union's development of nuclear weapons, there have been a number of alerts and close calls that, according to some, could have resulted in a conflagration but were caught in time. *E.g.*, Hansen, *Rising Risks of Missile Accidents*, Phila. Inquirer, Jan. 4, 1985, at 7-A, col. 1; *In Northern Darkness, Finns Look for Mystery Missile*, Phila. Inquirer, Jan. 4, 1985, at 7-A, col. 1; *see also* Colby, *There's No Need for the Risky MX: Missile Would Promote Hair-Trigger Posture Dangerous to All*, Los Angeles Times, May 14, 1984, § 2 at 5, col. 1 (reporting that the Pentagon has already received more than 100 false alerts). In 1946, President Truman explicitly threatened the Soviets with atomic bombing if they did not comply with demands to withdraw from Iran. *What is it About?*, *supra* note 11, at 35, 43. In 1979, a practice tape was inserted by mistake in a computer in the Defense Command Center, with the result that the operators believed the Soviets had launched a massive attack on the United States. The bombers almost took off. Molander, *How I Learned to Start Worrying and Hate The Bomb*, Wash. Post, Mar. 2, 1982, § D (Outlook), at D-1, D-5. In 1980 a microchip failed in a computer at the Strategic Air Command, with the same result. *Id.*

<sup>28</sup> Amer. Psych. Ass'n, Task Force Rep. #20, *Psychosocial Aspects of Nuclear Developments* (1982) [hereinafter cited as Task Force Report]; Lifton, *False God*, 226 ATL. MONTHLY 104 (Oct. 1970). Although the effects of the arms race are most pronounced on children, adults, too, suffer. One psychiatrist attributed a current increase in personality disorders, irresponsible behavior, and drug use in part to the sense of hopelessness induced by the possibility of nuclear annihilation. Adults lose a sense of the continuity of life, through children or accomplishments; all could be wiped out at a single stroke. Citizens withdraw from involvement, stop volunteering for pollution patrols or unpaid work at hospitals. They cease working on long-term projects. Address by Robert Gorney, M.D., Professor of Psychiatry, at U.C.L.A. Law School, Nov. 9, 1983; *see also* Frank, *Psychological Aspects of the Nuclear Arms Race*, 32 BULL. ATOM. SCI. 22 (April 1976) (discussing psychological impacts of arms race on leaders).

<sup>29</sup> Yudkin, *When Kids Think the Unthinkable*, PSYCHOLOGY TODAY, Apr. 1984, at 18 (nightmares, fears of being blown up, and belief that there is no future common in sample of 10-18 year old American school children); *see also* Chan, *The Nuclear Syndrome*, USA Today, Aug. 1, 1983, at 4-D, col. 6; Mack, *Psychosocial Effects of the Nuclear Arms Race*, 37 BULL. ATOM. SCI. 18, 18-19 (1981) (Boston grammar and high school students do not want to raise their children in a world of horror, fear that the world could blow up tomorrow, and fear that the human race is running out of time).

dency to plan in hypothetical terms, viz., "If I finish high school . . ."<sup>30</sup> Even if predictions of nuclear disaster prove to be alarmist, therefore, the arms race exacts a significant cost in current anxiety.

# I. THE LANGUAGE OF THE ARMS RACE: LINGUISTIC DEVICES AND PSYCHOLOGICAL RESPONSE MECHANISMS

The nuclear reality just reviewed is, if nothing else, unsettling. Left to its own devices, the citizenry thus might well press for measures to reduce the magnitude of the threat, such as reduction in the number of existing warheads and enactment of international agreements limiting deployment of new weapons systems. Government communication on nuclear arms, however, has included a number of psycholinguistic devices whose practical effect is to check the flow of information and silence effective dissent. Part A of this section reviews those devices; part B examines response mechanisms that give the devices unusual power and effect.

## A. Linguistic Devices

### 1. Euphemism and Metaphor

As author George Orwell and others have pointed out, governments often use euphemisms—words that put a positive gloss on a frightening object or event—to justify their actions and rally the citizenry.<sup>31</sup> When successful, euphemisms cause the reader to respond to a word's innocent or positive connotations, rather than the threatening reality it conceals. Euphemisms heighten and facilitate a psychological mechanism, *denial*, discussed in the next section.

Metaphors and similes serve similar functions—they borrow meanings and attitudes from one context and apply them to another. Like euphemisms, metaphors and similes may reinforce the audience's unconscious response mechanisms that block out the threat. Some euphemisms and metaphors may be coined unconsciously, as a means for the speaker to avoid confronting a terrible reality. Other euphemisms seem to have been designed deliberately to mislead the public. For example, in the early days of nuclear power, publicists urged that reports be "word-engineered" to reas-

<sup>30</sup> See sources cited *supra* note 29; address of Robert Gorney, M.D., Professor of Psychiatry, at U.C.L.A. Law School, Nov. 9, 1983.

<sup>31</sup> G. ORWELL, 1984, at 246 (Signet ed. 1971) (Appendix: The Principles of Newspeak); Orwell, *Politics and the English Language*, in SHOOTING AN ELEPHANT 77 (1950); see also D. GRABER, VERBAL BEHAVIOR AND POLITICS 305-08 (1976); S. HILGARTNER; R. BELL & R. O'CONNOR, NUKESPEAK, NUCLEAR LANGUAGE, VISIONS, AND MINDSET (1982); Gambino, *Public Doublespeak: A Glossary of Evasive Language in Government*, 63 ENG. J. 24 (1974); GREEN, *supra* note 25, at 222-23; Nash, *The Bureaucratization of Homicide*, in PROTEST AND SURVIVE 149 (1981).



sure the public.<sup>32</sup> Units of radiation became "sunshine units."<sup>33</sup> Publicists and government officials spoke of presenting the "sunny side" of the atom.<sup>34</sup>

Euphemism proliferates in times of war.<sup>35</sup> Thus, in Vietnam, bombers gave "close air support"<sup>36</sup> and carried out "protective reaction strikes" or "reconnaissance by fire."<sup>37</sup> Regions were "pacified," targets were "taken out," and our side sustained "casualties."<sup>38</sup> The recent American invasion of Grenada was called a "rescue mission."<sup>39</sup> The Soviets also use euphemism—their 100,000 troop force that invaded Afghanistan was described as a "limited contingent."<sup>40</sup>

Nuclear strategy and weaponry are also prime breeding grounds for euphemism. Apocalyptic weapons promote "deterrence" (the ability to react to an enemy nation's political or military initiatives with nuclear force),<sup>41</sup> are used as "bargaining chips," or help avoid a "window of vulnerability."<sup>42</sup> Potentially cataclysmic nuclear attacks are "surgical strikes" aimed at "counterforce" targets and inflicting "collateral damage."<sup>43</sup> Cities are to be "interdicted," not "destroyed."<sup>44</sup> "Tactical" weapons are devised for "theater" wars.<sup>45</sup> A huge, deadly missile was initially named "Peacemaker."<sup>46</sup> The Pentagon called the neutron bomb a

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<sup>32</sup> S. HILGARTNER, R. BELL AND R. O'CONNOR, *supra* note 31, at 159 (report on the leave or retrieve decision on nuclear waste containers released only after being "word engineered").

<sup>33</sup> *Id.* at 219.

<sup>34</sup> *Id.* at 33, 38. See also *infra* notes 73 and 118.

<sup>35</sup> See Hechinger, *Down with Doublespeak*, San Francisco Examiner & Chronicle, Feb. 24, 1985, "This World" Section, at 19, col. 2 (doublespeak and euphemism "kill[] people's sensitivity to violations of human rights"); Rubin, *State Dept. "Doublespeak" Wins Bad-Language Award*, Phila. Inquirer, Nov. 18, 1984, at 5-C, (giving examples, including Pentagon's redefinition of "peace" as "permanent pre-hostility," and "combat" as "violence processing").

<sup>36</sup> Friedrich, *Of Words that Ravage, Pillage, Spoil*, TIME, Jan. 9, 1984, at 76.

<sup>37</sup> Nash, *supra* note 31, at 150.

<sup>38</sup> D. GRABER, *supra* note 31, at 305-08.

<sup>39</sup> Friedrich, *supra* note 36; Skelton, *No Other Invasion "On Horizon," Reagan Says*, Los Angeles Times, Nov. 4, 1983, § I, at 1, col. 1. A strategic retreat of American troops in Lebanon to a safer position in offshore ships was called a "redeployment." Rubin, *supra* note 35.

<sup>40</sup> Address by Mitties McDonald, "Nukespeak: Language, Values and Control," at U.C.L.A., Jan. 24, 1984.

<sup>41</sup> Thompson, *A Letter to America*, in PROTEST AND SURVIVE 45 (1981).

<sup>42</sup> Address by Mitties McDonald, *supra* note 40.

<sup>43</sup> *Id.*; Thompson, *supra* note 41, at 13.

<sup>44</sup> S. ZUCKERMAN, *supra* note 12, at 41.

<sup>45</sup> Thompson, *supra* note 41, at 32.

<sup>46</sup> Rubin, *supra* note 35. The missile was subsequently renamed the "MX." Other missiles have lyrical or heroic-sounding names, e.g., "Trident" and "Minuteman."

"radiation enhancement weapon," a designation which won the agency an award from the Committee on Public Doublespeak.<sup>47</sup> Nuclear bombs are simple "devices." Nuclear attacks are "exchanges" (like Christmas presents) or "flexible responses."<sup>48</sup> New weapons are members of a "nuclear family."<sup>49</sup>

Metaphors and similes also figure prominently in the nuclear lexicon. Military talk is often couched in the language of sports: the Pentagon develops a "game plan," making plans to "take out" enemy cities and installations.<sup>50</sup> As in sports, mistakes are admitted "in hindsight."<sup>51</sup> Historical and physical analogies are also common. The government compares the Soviets to past enemies and urges the people to avoid repeating the error of appeasement.<sup>52</sup> Our strategic aim is to preserve "equilibrium" and avoid a "power vacuum."<sup>53</sup> These analogies convey the idea that the events they describe are regular and predictable, even law-like.<sup>54</sup> The disaster that may be only one miscalculation or misjudgment away remains hidden.<sup>55</sup>

## 2. Fear-Appeals

When they deem it necessary to rouse rather than lull, governments may use fear-appeals and depictions of a terrifying enemy.<sup>56</sup> This practice may be

<sup>47</sup> *Doublespeaking, Telling It Like It Isn't*, TIME, Dec. 5, 1977, at 33. The U.S. State Department won the 1984 award for redefining the word "killing" as "unlawful or arbitrary deprivation of life." Rubin, *supra* note 35.

<sup>48</sup> S. HILGARTNER, R. BELL & R. O'CONNOR, *supra* note 31, at 218.

<sup>49</sup> Nash, *supra* note 31, at 158.

<sup>50</sup> Gambino, *supra* note 31.

<sup>51</sup> *Id.*

<sup>52</sup> R. SCHEER, *supra* note 25, at 44; Moyer, *The Enemy Within*, PSYCH. TODAY, Jan. 1985, at 30, 33. Some would agree, of course, with the metaphor, believing it an apt description of the Soviet threat. See *infra* note 198 (euphemism sometimes lies in eye of the beholder).

<sup>53</sup> Nash, *supra* note 31, at 157-160.

<sup>54</sup> *Id.*

<sup>55</sup> The policy of nuclear deterrence, for example, requires the maintenance of an enormous arsenal, which contains enough warheads to end the world several times over. This policy, while dictating that each side possess such a destructive capacity and profess a willingness to unleash it, is defended as an avenue to peace through strength. This phrase conjures up images of castle walls and moats, or a guard in a security building, and masks the ominous threat inherent in such a policy. See Nash, *supra* note 31, at 152-54; Beardslee & Mack, *The Impact on Children and Adolescents of Nuclear Developments*, in Task Force Report, *supra* note 28, at 64.

<sup>56</sup> Frank, *Survival in a Nuclear World—Some Psychological Considerations*, in DISARMAMENT: THE HUMAN FACTOR 63, 64 (1978); Nash, *supra* note 31, at 152-53, 156; see N. CHOMSKY, TOWARDS A NEW COLD WAR: ESSAYS ON THE CURRENT CRISIS AND HOW WE GOT THERE 192 (1982); R. LIFTON & R. FALK, INDEFENSIBLE WEAPONS 208-225 (1982); H. MARCUSE, ONE DIMENSIONAL MAN 51 (1961); Frank, *Sociopsychological Aspects of the Nuclear Arms Race*, in Task Force Report, *supra*

a near-universal psychosocial activity. Students of myths note that all societies invent legends of evil enemy forces to increase solidarity and mobilize collective action.<sup>57</sup> Bomber gaps, missile gaps, and windows of vulnerability generate fear and uncertainty and justify military spending.<sup>58</sup> President Reagan's "focus of evil" speech<sup>59</sup> was a patent attempt to elicit support for continuing the arms race. Such fear appeals are most effective when they contain an element of truth. For example, during the period when the missile gap was being created and publicized, the U.S. lagged behind the Soviets in land-based missiles. The U.S. held a large lead, however, in submarine-based and cruise missiles. There is serious disagreement about whether the U.S. was ever in a position worse than parity.<sup>60</sup>

Fear appeals are sometimes alternated with rhetorical devices aimed at soothing and reassuring. At other times these functions are carried out simultaneously. Fear and reassurance must be kept in balance; a citizenry presented only with horror pictures might refuse to cooperate with war preparations or become so paralyzed that it ceases to function.

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note 28, at 6-7; Lazere, *Camus on Doublespeak*, 66 ENG. J. 24, 25 (Oct. 1977); Thompson, *supra* note 41, at 15, 42-43.

<sup>57</sup> G. CUTHBERTSON, POLITICAL MYTH AND REALITY 121-28, 157-160, 187 (1975); see Thompson, *supra* note 41, at 42-43; see also Johnson & La Rocque, *The Mythology of National Defense*, 30 BULL. ATOM. SCI. 21 (Sept. 1974) (discussing myths underlying demands for increased defense spending).

Myths of evil enemies are often accompanied by myths portraying one's own group in a positive light. See H. LANDON & A. WEEKS, MYTHS THAT RULE AMERICA (1980); see also *Reagan Says God Backs Budget*, San Francisco Chronicle, Feb. 5, 1985, at 1, col. 1 ("Beginning a campaign to sell his new budget proposal, President Reagan asserted yesterday that the Lord and the Scriptures are on his side in his struggle . . . to continue the U.S. defense buildup.").

<sup>58</sup> R. SCHEER, *supra* note 26, at 66-67; see Kennan Interview, *supra* note 28, at 70 ("image of the Soviet opponent in his most terrible, desperate, and inhuman aspect: an implacable monster"); *id.* at 73 (scare pictures used to inflate military estimates).

<sup>59</sup> Address to National Association of Evangelicals, March 8, 1983, at Orlando, Florida, reprinted in 19 WEEKLY COMP. PRES. DOC. 364, 369 (Mar. 14, 1983). In a recent article in PSYCHOLOGY TODAY, Professor Robert Moyer hypothesized that the President's remarks were a natural product of two widely used psychological defense mechanisms: dehumanization and projection. By dehumanizing our enemies and projecting our own undesirable characteristics onto them, Moyer suggests, we make it "easy to see ourselves as good, peace-loving and self-defense oriented, and portray our enemies as evil, aggressive and warlike. . . . Almost any Soviet or American foreign-policy statement will illustrate this point." Moyer, *supra* note 52, at 33. Professor Moyer cites the "focus of evil" speech as an example of this phenomenon. *Id.*

<sup>60</sup> See sources cited *supra* notes 12-13; see also *Negotiation by the Numbers*, TIME, Jan. 7, 1985, at 66.

### 3. Abstraction and Technical Detail: the Nuclear Priesthood

A third device the government uses in its communication is abstraction and technical obfuscation. This device, in turn, aids in creating a caste of nuclear experts or priests.<sup>61</sup> Government's use of arcane language, graphs, acronyms, and other insider speech makes relatively simple strategic concepts difficult to understand. Sterile or abstract terms also blunt the horror of the reality they depict. As one author stated: "The quality of universal death grows stale partly because the arguments are unnecessarily complex . . . and use terms that pointedly mute just what it is these bombs will do, which is to start with, to kill the people one loves and nearly everyone else as well."<sup>62</sup>

Technical talk has a soothing sound. The thought that someone has made a deadly subject a science comforts the listener; it implies that the problem is under control.<sup>63</sup> Technical talk serves similar functions for the expert, enabling him or her to divorce himself or herself from the human consequences of nuclear warfare. Technical talk may also render effective criticisms impossible, and reinforce the audience's impression that the expert's task is esoteric and important.<sup>64</sup>

<sup>61</sup> N. CHOMSKY, *supra* note 56, at 66; S. HILGARTNER, R. BELL & R. O'CONNOR *supra* note 31, at 58, 142.

<sup>62</sup> R. SCHEER, *supra* note 26, at 15; see Mack, *supra* note 29, at 23 (criticizing this sterile approach, and emphasizing the need for honest confrontation of the weapon's destructive potential). In a nonnuclear context, Albert Camus commented on the contemporary euphemizing of murder. In *THE PLAGUE*, Tarrou, the principal character, says, "I'd come to realize that all our troubles [with murder] spring from our failure to use plain, clean-cut language. So I resolved always to speak—and to act—quite clearly." Lazere, *supra* note 56, at 24 (quoting A. CAMUS, *THE PLAGUE*). In another work, a spokesman for the dictatorial government explains that government's use of legalistic jargon: "It's intended to get them used to that touch of obscurity which gives all government regulations their peculiar charm and efficacy. The less these people understand, the better they'll behave." Camus, *State of Siege*, in *CALIGULA AND THREE OTHER PLAYS* 165 (S. Gilbert trans. 1962).

<sup>63</sup> R. LIFTON & R. FALK, *supra* note 56, at 107; Mack, *Psychosocial Trauma*, in *THE FINAL EPIDEMIC*, *supra* note 12, at 22; Nash, *supra* note 31, at 153; Thompson, *supra* note 41, at 3, 9-11, 14.

<sup>64</sup> See *infra* notes 97-102 and accompanying text; Nash, *supra* note 31, at 150-152; Thompson, *supra* note 41, at 10; see also P. LOEB, *NUCLEAR CULTURE* 189, 192 (1982); *What is It About?*, *supra* note 11, at 36, 42; Molander, *supra* note 27, at D-5. A nuclear priesthood need not promote deception; it may exist to promulgate the truth. For example, one member of the Human Interference Task Force, a study panel contracted by the Department of Energy, proposed "the creation of an 'atomic priesthood' to pass along, over the millennia, rituals and legends that would explain the dangers of waste dumps." *Warning Symbols*, *TIME*, Nov. 26, 1984, at 44.

#### 4. Doublespeak, Weasel-Words, and Lies

Government speech frequently contains language that is deceptive in various degrees. Orwell wrote of doublespeak;<sup>65</sup> lawyers speak of weasel words, which enable the speaker to seem to answer a question without really doing so. When first presenting the neutron bomb to the public, the defense department acted and spoke as though the weapon were not a nuclear bomb.<sup>66</sup> President Reagan recently explained that United States marines in Lebanon were not engaged in "hostilities" because incoming artillery fire was not directed specifically at them, but merely at the area in which they were encamped.<sup>67</sup> During the 1960's and 1970's, thousands of pounds of plutonium and uranium were discovered to be missing from nuclear sites.<sup>68</sup> Despite strong circumstantial evidence that some of this was stolen, nuclear developers and agencies have repeatedly claimed that there is no evidence of theft.<sup>69</sup> The SALT II agreement, which the current administration has agreed to abide by, obliges countries not to build additional fixed ICBM launchers. Asked whether a proposal to build new bases for the MX missile would not violate the Salt II agreement, the Secretary of Defense replied that it would not. When pressed, he explained that "a silo is not a launcher."<sup>70</sup>

Doublespeak sometimes approaches self-parody, as when General William Westmoreland justified manipulation of the news on the ground that "[w]ithout censorship things can get terribly confused in the public mind."<sup>71</sup> A Secretary of State declared that American arms buildup is "absolutely essential to . . . hopes for meaningful arms reduction."<sup>72</sup> During the early days of nuclear power, the Atomic Energy Commission (AEC) suppressed a

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<sup>65</sup> G. ORWELL, *supra* note 31, at Appendix; Dietrich & Isaacson, *ERIC/RCS Report: Doublespeak*, 62 ENGL. J. 1053 (Oct. 1973); Orwell, *supra* note 31; see Slater, *Orwell, Marcuse, and the Language of Politics*, 23 POL. STUD. 459 (Dec. 1975) (Orwell's writings reflect his concern that language can be corrupted to justify political and other events).

<sup>66</sup> See S. ZUCKERMAN, *supra* note 12, at 67 (defense department spread impression that neutron bomb is in a category of weapons totally different from nuclear devices).

<sup>67</sup> This was more than a semantic quibble; at issue was whether the deployment of troops triggered the provisions of the War Powers Resolution. Glennon, *Abiding by This Law Is Necessary for Our National Unity*, Los Angeles Times, Sept. 15, 1983, § II, at 7, col. 1.

<sup>68</sup> S. HILGARTNER, R. BELL & R. O'CONNOR, *supra* note 31, at 169.

<sup>69</sup> *Id.* at 169, 171, 172; cf. Knoll, *Censors at Work*, THE PROGRESSIVE, Apr. 1984, at 4 (federal government warned newspaper chain it faced prosecution for receiving documents showing that enough uranium is missing to make 85 nuclear bombs).

<sup>70</sup> Phila. Inquirer, Nov. 21, 1982, at 4-A, col. 1.

<sup>71</sup> Humphrey, *Four Minutes to Midnight*, 130 THE OTHER SIDE 10, 12 (July 1982) (quoting Gen. William Westmoreland).

<sup>72</sup> Phila. Inquirer, May 12, 1982, at I-A, col. 1.

key report showing need for caution on the ground that "[w]e thought it would be misunderstood by the public."<sup>73</sup>

At times, the government has resorted to deceptive use of statistics or outright misstatements of fact to win public support or avoid criticism. When fallout from a hydrogen bomb test drifted outside the test range, the AEC chairman denied that Japanese fishermen had suffered radiation burns or that fish had been contaminated, although both were known to have happened.<sup>74</sup> In making his case for increased defense spending, President Reagan recently asserted that the Soviet Union is ahead of the United States in "virtually every measure of military power."<sup>75</sup> What he neglected to mention was that the U.S. holds a commanding lead in nuclear warheads launched from submarines, cruise missiles, and bombers,<sup>76</sup> and is ahead in total deliverable warheads.<sup>77</sup>

### B. *Response Mechanisms*

By means of such devices as euphemism, abstraction, and doublespeak, the government fosters a world view in which its assumptions and aims are unlikely to be seriously questioned. Because of the way government defines reality, certain thoughts do not come to mind. Through a kind of mass taboo-formation, ideas and options are placed out of bounds.<sup>78</sup> In many

<sup>73</sup> S. HILGARTNER, R. BELL & R. O'CONNOR, *supra* note 31, at 119; *cf. id.* at 77-78 (AEC suppressed a damaging nuclear energy study at the request of public relations officer of Pacific Gas & Electric).

<sup>74</sup> *Id.* at 97-100; *see* Allen v. United States, 588 F. Supp. 247, 346 (D. Utah 1984) (U.S. government downplayed hazards of radiation); *see also* Anderson, *Atomic Test Case: For Radiation Victims Justice A Generation Later*, TIME, May 21, 1984, at 40 (government found to have failed to warn Utah and Arizona residents of known danger of radioactive fallout from 102 atomic bomb tests); Curry, *U.S. Is Ordered to Pay Victims of Nuclear Tests*, L.A. Times, May 11, 1984, at 1, col. 5 (quoting judge in Allen: "There is just nothing wrong with telling the American people the truth.").

<sup>75</sup> Phila. Inquirer, Nov. 21, 1982, at 4-A, col. 1.

<sup>76</sup> *See supra* note 60 and accompanying text.

<sup>77</sup> The import of such comparisons is subject to much debate. *See Negotiation by the Numbers*, TIME, Jan. 7, 1985, at 66. What is troubling, however, is the President's apparent attempt to dismiss this debate and create the impression that the U.S. is on the losing side of "virtually every" comparison. Another troubling example is the frequent use of comparisons with Soviet defense budgets to justify continued U.S. defense spending at high levels. Because of the very different natures of the two economies, estimates for the Soviet Union are extremely difficult and comparisons inexact. *See* N. CHOMSKY, *supra* note 56, at 193 & n.105 (accusing government of using false bases for comparison); *Slowdown Reported in Soviet Buildup*, San Francisco Chronicle, Feb. 23, 1985, at 10, col. 1 (Soviet defense expenditures smaller than previously reported).

<sup>78</sup> Gambino, *supra* note 31, at 24 (government has evolved a stock language that acts as a conceptual contraceptive, preventing the discussion of personal responsibility).

cases, the means used to attain this result are not agitational; the language is not perceived to be political.<sup>79</sup>

In addition to their generalized discourse-shaping effect, government communications in the area of weaponry may acquire peculiar potency by tapping unconscious response mechanisms. These mechanisms include denial and numbness, identification with the source of danger, and submission to a strong leader.<sup>80</sup> Leaders may be equally affected; the language used enables them to maintain a collective illusion of safety while denying their individual responsibility for the threat.<sup>81</sup>

### 1. Denial and Numbness

One mechanism that enables individuals to deal with life-threatening events is denial.<sup>82</sup> The mind cannot easily comprehend a threat so huge as

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ity); see N. CHOMSKY, *supra* note 56, at 84, 102 (the American educational system has socialized scholars to ignore documentary records contrary to accepted opinion); D. GRABER, *supra* note 31, at 305 (the name given an object or concept places it within a group for comparison purposes; audience reactions can be controlled by avoiding names with negative connotations); S. HILGARTNER, R. BELL & R. O'CONNOR, *supra* note 31, *passim* (nukespeak renders atrocities invisible through the use of sterile words); Tushnet, *Book Review*, 1984 WIS. L. REV. 129, 134-44 (governmental communications have an enormous impact on the public).

<sup>79</sup> See M. EDELMAN, *POLITICAL LANGUAGE: WORDS THAT SUCCEED AND POLICIES THAT FAIL* 21 (1977) (fundamental influences upon political beliefs flow from categorizations based on unacknowledged ideological premises contained in language that structures perceptions of status, authority, merit, deviance, and the causes of social problems); Pocock, *Verbalizing a Political Act: Towards a Theory of Speech*, 1 POL. THEORY 27 (1973) (communication control by government can lead to political enslavement, as those whose language is controlled must communicate through meanings dictated by others); see also Schlesinger, *Politics and the American Language*, 43 AM. SCHOLAR 553, 557, (1973-7) (language shapes development of ideas). The manner in which government speech attains particular prominence is discussed *infra*, at notes 133-41, 183-88 and accompanying text.

<sup>80</sup> Lifton, *supra* note 28, at 104, 106, 109-10.

<sup>81</sup> See *infra* notes 97-102 and accompanying text; see also Kennan Interview, *supra* note 27, at 70 ("the view of the Soviet Union that prevails today in large portions of our governmental . . . establishment [is so] extreme, so subjective, so far removed from . . . reality . . . that it is not only ineffective but dangerous as a guide to political action").

<sup>82</sup> R. LIFTON & R. FALK, *supra* note 56, at 100-02 (in order to protect itself, the psyche will limit what it feels; this numbing enables person to deny threat); *id.* at 6 (the mind sees, but suppresses, the nuclear threat); Frank, *Psychological Aspects of the Nuclear Arms Race*, 32 BULL. ATOM. SCI. 22 (1976) (relative unconcern for dangers inherent in nuclear proliferation stems from inability to comprehend, and therefore to admit, the threat); Lifton, *supra* note 28, at 104-05 (man achieves a sense of immortality in the face of inevitable death through his offspring, theology, creations, and experiential transcendence); Moyer, *supra* note 52, at 30 (to cope with the

nuclear holocaust; it therefore shuts it out, ceasing entirely to respond. A recent American Psychiatric Association Task Force found that many adults responded to the threat of nuclear annihilation by distancing, numbness, or "psychic shutdown."<sup>83</sup> Children and adolescents showed a similar reaction.<sup>84</sup> The government's use of technical jargon accentuates this response; one author called government publicists "hired anesthetists."<sup>85</sup> Once numbness and denial set in, psycholinguistic devices like those discussed in Section A help maintain these mechanisms in place.

An extreme form of denial has been observed in some nuclear workers and strategic analysts. Workers in nuclear weapons plants gave shallow responses when questioned about their work; the work was "just a job" that "pays the bills;" and weapons were "just a part of life" that will always be with us.<sup>86</sup> Many workers lost themselves in technical details, or rationalized that weapons are necessary because it is human nature to be cruel and warlike.<sup>87</sup> Many use drugs.<sup>88</sup> Nuclear strategists who have left their positions have written that the only way they could carry out their tasks was to numb themselves, to see only numbers and symbols on a map.<sup>89</sup>

## 2. Embracing the Threat

While some deal with life threatening events by denying them, a smaller group copes with the possibility of nuclear destruction by embracing the

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threat of nuclear weapons, people often refuse to acknowledge the possibility of nuclear war or they deny that nuclear war would have terrible consequences); *see also* J. KOVEL, *AGAINST THE STATE OF NUCLEAR TERROR* (1983) (passivity and denial enable mankind to do nothing in face of threat to species greater than that anyone would tolerate if aimed at himself or herself alone).

<sup>83</sup> Introduction, in Task Force Report, *supra* note 28, at vi, ii; *see* Frank, *Socio-psychological Aspects of the Nuclear Arms Race*, in Task Force Report, *supra* note 28, at 1.

<sup>84</sup> Beardslee & Mack, *The Impact on Children and Adolescents of Nuclear Developments*, in Task Force Report, *supra* note 28, at 64, 67 (citing *Psychiatric Aspects of the Prevention of Nuclear War* (Group for the Advancement of Psychiatry, 1964)). *But see* Yudkin, *supra* note 29, at 25 (very young children are unable to use this defense against nuclear fear; they develop the denial mechanism only at about age twelve).

<sup>85</sup> R. LIFTON & R. FALK, *supra* note 56, at 107; *cf.* 4 G. ORWELL, *COLLECTED ESSAYS, JOURNALISM AND LETTERS* 167 (1971) (repetition used by government to instill "gramophone mind").

<sup>86</sup> P. LOEB, *NUCLEAR CULTURE* 39, 44, 102, 192 (1983); *see id.* at 78-79 (practice alerts at nuclear plants likened to routine fire drills); *id.* at 203-04 (to some, atomic weapons are "just another step in human progress").

<sup>87</sup> *Id.* at 203-04 (without civilization and the fear of retribution, people become animalistic).

<sup>88</sup> *Id.* at 44, 204, 206.

<sup>89</sup> *See, e.g.,* Molander, *supra* note 27; Nash, *supra* note 31, at 149, 160.



threat. These individuals become fascinated with and absorbed in the details of strategic planning, warhead counts, and weapons systems.<sup>90</sup> Robert Lifton calls this syndrome, which he purports to find in some military decision-makers and strategists, "nuclearism."<sup>91</sup> The nuclearist views the bomb as akin to a deity: all-powerful, vengeful, destructive, and arbitrary. Nuclear weapons, like a god, must not be limited.<sup>92</sup> As with the opposite response, numbing, the preoccupation of nuclearism disables the individual from acting constructively to improve his or her situation.<sup>93</sup> Nuclearists are uncritical advocates of new weaponry: they resist questioning the need for more weapons because the weapons are self-validating.<sup>94</sup>

### 3. Desire for a Strong Leader

A final response to situations of anxiety is desire for a strong leader—someone who, like a father, will protect his charges and set everything right.<sup>95</sup> This desire is part of a generalized human reaction to crisis: in times of stress, one wants a strong person to take charge and reduce the stress.<sup>96</sup>

This propensity facilitates development of a nuclear priesthood, a group of experts who are invested with wide-ranging powers and are beyond ordinary accountability.<sup>97</sup> That the priests speak in arcane language and work in

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<sup>90</sup> Lifton, *supra* note 28, at 105, 109; see R. LIFTON & R. FALK, *supra* note 56, at 80-90 (many are fascinated with nuclear destruction, and embrace nuclear power as something close to a deity).

<sup>91</sup> R. LIFTON & R. FALK, *supra* note 56, at ix, 87; Lifton, *supra* note 28, at 106, 109.

<sup>92</sup> R. LIFTON & R. FALK, *supra* note 56, at 80-92; Lifton, *supra* note 28, *passim*.

<sup>93</sup> Lifton, *supra* note 28, at 109-10; see R. LIFTON & R. FALK *supra* note 56, at 31 (nuclearism prevents the informed exchanges and realistic appraisals necessary for constructive policies).

<sup>94</sup> See R. LIFTON & R. FALK, *supra* note 56, at 91 ("[S]cientific duty demand[s] exploration of . . . making [the hydrogen bomb]. . . . We . . . must not try to limit the use of weapons."); Lifton, *supra* note 28, at 109 ("To those who would have us stop our tests . . . I would therefore say, 'These tests . . . serve as an effective substitute for war.'"); see also Nash, *supra* note 31, at 149 (writer who worked in the Air Targets Division of the Air Force helping select Soviet targets for nuclear warheads wrote that he and his co-workers spoke of "nominating" cities and industrial facilities for destruction; they were pleased when their "nominees" were selected for inclusion in the strategic plan).

<sup>95</sup> Introduction, in Task Force Report, *supra* note 28, at vi, 1, 2; see R. LIFTON & R. FALK, *supra* note 56, at 147 (citizens are requested to leave nuclear policy to the president, who knows more than anyone else); Mack, *supra* note 29, at 18 (people resist involvement in nuclear issue; they tend to want to "leave it to the experts").

<sup>96</sup> See M. EDELMAN, *supra* note 79, at 77 (although agencies and administrators actually control citizen's lives, individuals tend to pin all hopes and fears on the president's actions); Frank, *Survival in a Nuclear World—Some Psychological Considerations*, in DISARMAMENT: THE HUMAN FACTOR 88 (1978).

<sup>97</sup> See R. LIFTON & R. FALK, *supra* note 56, at 31 (mythology surrounding the

secrecy only heightens their appeal.<sup>98</sup> Their isolation and special vocabulary may also encourage arbitrariness and a diminished sense of moral responsibility on their part.<sup>99</sup> One ex-strategist reported that "[t]here were no people in these [fictional] 'exchanges,' only calculations. It was a curious fiction, never discussing the humans at the military installations or the industries or the cities. I guess that made it easier on the targeters in Omaha, the people there in charge of launching the missiles . . . and the analysts like me."<sup>100</sup> The ex-analyst comforted himself with the thought that others above him were responsible for the human dimension of war planning.<sup>101</sup> It was not until years later that he discovered, to his shock, that, like him, his superiors lived in a vague world of figures and symbols.<sup>102</sup>

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bomb guarantees the perpetuation of dangerous self-deception and prevents informed exchange); S. HILGARTNER, R. BELL & R. O'CONNOR, *supra* note 31, at 58, 142 (government classification of information creates a secret society whose members control flow of information through the principle of compartmentalization and the need to know doctrine); *see also* Moyer, *supra* note 52, at 34-35 (leaders' mindset constrained by rigid preconceptions).

<sup>98</sup> R. LIFTON & R. FALK, *supra* note 56, at 31. The citizenry's attitude may, in turn, enhance the leaders' own sense of mission and infallibility. *See supra* notes 95-96 and accompanying text. The leaders' peer group is generally composed of like-minded persons who generate further pressures to conform to the prevailing mind-set. Their command of secrecy and their power to classify information as secret emphasizes their priestlike status, both in their own minds and those of their followers. *See* R. LIFTON & R. FALK, *supra* note 56, at 31 (general public and president both sense heightened importance of "priests" and president); R. SCHEER, *supra* note 25, at 70 (ability to exclude others from the secret society creates a sense of power).

<sup>99</sup> M. EDELMAN, *supra* note 79, at 94-95 (loyalty to the group becomes the highest form of morality, preventing groups without corrective feedback from raising social issues); R. LIFTON & R. FALK, *supra* note 56, at 31-36 (nuclear powers become either mass murderers or self-deceivers who fluctuate between feelings of omnipotence and impotence); *see* R. SCHEER, *supra* note 25, at 76-79, 105 (instead of admitting that the "window of vulnerability," like the "missile gap" of the 1960's, was a misplaced fear, the President has pursued a policy entangled in contradictions); Gambino, *supra* note 78, at 24-25 (the stock language that the government has evolved makes questions of personal responsibility impossible to discuss, much less evaluate); Mack, *supra* note 29, at 20-21 (decision makers live in a world where reality and imagination are intertwined; they make decisions based on worst case scenarios without even questioning underlying assumptions).

<sup>100</sup> Molander, *supra* note 27.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*; *see* S. HILGARTNER, R. BELL & R. O'CONNOR, *supra* note 31, at 135-36 (attitude of complacency pervaded the nuclear industry and the NRC—an accident was not a "credible event"). *See generally* I. JANIS, VICTIMS OF GROUPTHINK: A PSYCHOLOGICAL STUDY OF FOREIGN POLICY DECISIONS (1972).

## II. DIFFICULTIES WITH SELF-CORRECTION

A. *Censorship, Secrecy, and News Management*

Communications on nuclear armaments may thus have psychological impact exceeding that of most other forms of speech. The ability of weapons talk to still or bypass rational thought processes suggests that the messages conveyed are less likely than are other communications to be challenged effectively in the marketplace of ideas.<sup>103</sup> As Parts III and IV suggest, this observation is constitutionally and politically troublesome; remedial action may be in order.

An additional group of concerns stems from the government's power to maintain secrets and manipulate the news. The usual, and constitutionally preferable, solution to most problems of offensive speech is not censorship, but "more speech."<sup>104</sup> The rationale is that in the "marketplace of ideas," the evils of offensive speech will be exposed by responsive messages, and the truth will emerge.<sup>105</sup> In the areas of armaments and national security, however, the marketplace may be an uncertain means of determining truth. The government's power to classify secrets severely hampers the ability of a critic to marshal an effective response. The government may classify the critic's message, preventing its dissemination entirely.<sup>106</sup> Alter-

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<sup>103</sup> This is not to say that government weapons talk stills all dissent. The many critical articles and books cited in these footnotes are evidence that it does not. Rather, the features described in Part B give a marked competitive *advantage* to discourse structured in the ways described in Part A, making the task of the critic much more difficult than it is in other areas.

<sup>104</sup> *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring). The approach urged by Justices Brandeis and Holmes in *Whitney* and other early free speech cases, e.g., *Gitlow v. New York*, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting); *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting), has emerged as the majority approach to the first amendment. See *Brandenburg v. Ohio*, 395 U.S. 444, 449 (1969) (overruling *Whitney*); *id.* at 452 (citing Holmes dissent in *Gitlow* as "mov[ing] closer to the First Amendment ideal") (Douglas, J., concurring); *Dennis v. United States*, 341 U.S. 494, 507 (1951) ("there is little doubt that subsequent opinions have inclined toward the Holmes-Brandeis rationale"). See generally L. TRIBE, *supra* note 4 at 603-606.

<sup>105</sup> *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). In his dissent in *Abrams*, Justice Holmes gave the classic statement of "marketplace" theory:

But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself tested in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution.

*Id.*

<sup>106</sup> See *infra* note 118 and accompanying text.

natively, the government may simply prevent access to the data necessary to support a contrary opinion. Both impediments undermine the effectiveness of a "more speech" solution.<sup>107</sup>

Secrecy and news management have characterized the government's approach to nuclear weapons from the beginning. This approach began with the Manhattan Project, which was conceived and built in total secrecy.<sup>108</sup> The press in rural New Mexico learned that top-secret installations were being built in Los Alamos, but the government forbade them to report anything.<sup>109</sup> The term "nuclear energy" did not appear in the American press at all during the war years; nor did the term "uranium."<sup>110</sup> After the first atomic bomb was dropped on Hiroshima, the U.S. government con-

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<sup>107</sup> Ordinarily, excessive or exaggerated government speech is mitigated by a number of marketplace forces. The dangers of drowning out opposing voices are mitigated by a vigorous press and broadcast media. *See* M. YUDOF, *supra* note 2, at 91 (suggesting that pluralism in modern communications may prevent any one viewpoint from gaining ideological dominance). Federal/state separation of powers and the existence of multiple agencies at the state and federal level fragment power to the point at which a monopoly of ideas is difficult to achieve. *Id.* at 114-16. Moreover, many citizens are skeptical of governmental claims and predisposed to view official declarations with a grain of salt. Schauer, *supra* note 2, at 381. Finally, while technology aids the government in the promulgation of its message, it also aids the dissenter, giving him or her a forum on the evening news, on public-access programs, and on the Op. Ed. page. *Id.* at 380-81.

Although each of these channels is open to the opponent of governmental nuclear policies, their effectiveness is markedly diminished by the psycholinguistic devices and responses described in this Article. Government speech in the area of nuclear weaponry evokes powerful images that terrify and numb the listener, or make him or her an insecure, compliant follower. *See supra* notes 79-100 and accompanying text. The government also disables critics by news management, secrecy, classification of data, and selective release of information that serves the government's interest. *See infra* notes 108-32 and accompanying text. *Cf.* *Holtzman v. Schlesinger*, 484 F.2d 1307, 1316 (2d Cir. 1973) (Oakes, J., dissenting) ("incredibly enough, it appears that neither the American people nor the Congress . . . were given the facts . . . . Air Force B-52 bombers were secretly attacking Cambodia in 1969, 1970 and even later while the United States was publicly proclaiming respect for Cambodian neutrality."); *Allen v. United States*, 588 F.Supp. 247, 403 (D. Utah 1984) ("At the most fundamental level, the Government's failure to educate, to inform, and to warn deprived those people living in [the vicinity of nuclear test site] of an *opportunity* . . . to protect themselves.") (emphasis in original). Thus, the factors that ordinarily serve to undermine the government's monopoly of ideas are themselves weakened or negated by government efforts, or by virtue of psychological characteristics of the debate itself.

<sup>108</sup> *See* S. HILGARTNER, R. BELL & R. O'CONNOR, *supra* note 31, at 25-26.

<sup>109</sup> *Id.* at 29, 30

<sup>110</sup> Address by Robert Manoff, M.D., Stanford Univ. School of Medicine, at conference sponsored by Physicians for Social Responsibility, "Prescription for Prevention," at Stanford University, Oct. 7-8, 1983.

trolled all press coverage of the event.<sup>111</sup> When reporters gained admission to Hiroshima and reported lingering deaths resulting from radiation disease, the occupation army ordered them expelled and placed the city off limits. Reports of radiation poisoning were denied or explained as Japanese propaganda. The existence of censorship was itself censored; the press was not permitted even to mention the limitations placed on its coverage. Medical research and exchanges about the biological effects of nuclear explosions were not permitted; doctors worked among the victims of Hiroshima and Nagasaki unaware of what they were treating. Japanese citizens concluded that radiation illness was contagious and avoided contact with the sick.<sup>112</sup>

The preoccupation with secrecy did not end with the war. Scientists who expressed reservations about nuclear weapons research were reassigned<sup>113</sup> or found their testimony blocked by executive privilege.<sup>114</sup> Critics found their jobs threatened; most employees feared that by discussing safety, they risked being fired.<sup>115</sup> In *United States v. The Progressive, Inc.*,<sup>116</sup> defense lawyers were prepared to introduce affidavits of leading scientists to show that any competent physicist working from public sources could have prepared the magazine's story on how to build a nuclear bomb. The government ordered the affidavits classified.<sup>117</sup> The same occurred when a critic of nuclear energy wrote to the Department of Energy with questions about nuclear policies and safety: the Department ordered his letter classified.<sup>118</sup>

The present administration has, if anything, intensified the preoccupation with secrecy and news management that has existed since the early days of atomic power.<sup>119</sup> The Reagan administration has exercised its discretion to

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<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> S. HILGARTNER, R. BELL & R. O'CONNOR, *supra* note 31, at 120.

<sup>114</sup> *Id.*

<sup>115</sup> *See id.* at 120-21; *cf.* Knoll, *supra* note 69 (former Air Force communications intelligence officers were warned that they violated espionage laws when they publicly challenged the Reagan administration's version of the Korean Airlines incident).

<sup>116</sup> 467 F. Supp. 990 (W.D. Wis.), *appeal dismissed*, 610 F.2d 819 (7th Cir. 1979).

<sup>117</sup> S. HILGARTNER, R. BELL & R. O'CONNOR, *supra* note 31, at 68; *see also* Knoll, *supra* note 69 (government warned newspaper chain that they could face federal prosecution for receiving documents showing enough uranium missing to make 85 nuclear bombs).

<sup>118</sup> *Id.* at 64. Studies and reports were classified or cancelled on the ground that they would interfere with the "public understanding." *See id.* at 77-78 (AEC suppressed study on hazards of reactor incidents at suggestion of public relations strategist); *id.* at 97 (AEC agreed to permit publication of study of fallout only after some sections were deleted for public relations reasons).

<sup>119</sup> *See* Abrams, *The New Effort to Control Information*, N.Y. Times, Sept. 25, 1983, § G (Magazine), at 22-27; Grunewald, *Trying to Censor Reality*, TIME, Nov. 7, 1983, at 102; *see also* Emerson, *The State of the First Amendment as We Enter "1984,"* 2 COM. LAW. 3 (Winter 1984).

block public access to unclassified nuclear information.<sup>120</sup> Recently, the President issued a national security directive authorizing lie detector tests to counter leaks on sensitive subjects.<sup>121</sup> The administration also issued an order subjecting present and former senior government officials to lifetime prepublication review of any speeches or articles containing material that *might* be classified.<sup>122</sup> The administration has excluded foreign speakers and films with points of view that deviate from its own, and attempted to limit the scope of the Freedom of Information Act.<sup>123</sup> When the National Education Association proposed a junior high school course on nuclear arms, to be prepared by the Union of Concerned Scientists, the Reagan administration accused the Association of "brain-washing America's school children."<sup>124</sup>

At the same time that it suppresses or discourages critical messages, the government aggressively markets its own viewpoint. The government has offered free trips and other rewards to "loyal" journalists,<sup>125</sup> while creating obstacles for those with critical views.<sup>126</sup> The government also provides

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<sup>120</sup> Norman, *Universities Denounce DOE's Secrecy Rules*, SCIENCE, Sept. 2, 1983, at 932.

<sup>121</sup> *Making Government Clam Up*, TIME, Oct. 31, 1983, at 40; *see also* Samuels, *What If the Lie Detector Lies?*, THE NATION, Dec. 3, 1983, at 566 (presidential directive of Mar. 11, 1983 requiring federal employees with access to classified information to submit to polygraph tests threatens to provide a cloak of respectability to a procedure best described as a strip search); *Loose Lips*, TIME, Dec. 5, 1983, at 44 (directive permitting use of polygraph on 215,000 federal employees has not ended information leaks and has provoked considerable discontent).

<sup>122</sup> Abrams, *supra* note 119, at 23-25; *Making Government Clam Up*, *supra* note 121.

<sup>123</sup> Abrams, *supra* note 119, *passim*; Emerson, *supra* note 119; Grunewald, *supra* note 119; *USIA Blacklisted 84 from Speaking Program*, Los Angeles Times, Feb. 10, 1984, § 1, at 15, col. 6. Fear of governmental retaliation allegedly caused a television network to postpone the airing of a film concerning the effects of a thermonuclear attack on an American city; the network had a number of license renewal petitions pending and feared that they would be held up if it presented the film. Preston, *What Happened to TV's H-Bomb Epic?*, San Francisco Examiner & Chronicle, June 5, 1983, "Scene" Section, at 9, col. 1.

<sup>124</sup> *NEA Upholds Stance of Race over Seniority in Layoffs*, Seattle Times, July 6, 1983, at 3, col. 3.

<sup>125</sup> *E.g.*, Nelson, *U.S. Financed Grenada, Latin Trips of 22 Journalists*, Los Angeles Times, Nov. 14 1983, § 1, at 4, col. 1.

<sup>126</sup> For example, when UPI named a liberal reporter from the Christian Science Monitor to head a bureau in a strategically sensitive area, the administration exerted pressure to have a more loyal reporter reappointed in his place. N. CHOMSKY, *supra* note 56, at 199. When journalists reported nuclear developments in ways critical of the government, they were accused of disloyalty. Knoll, *supra* note 69. Leslie Gelb, former director of the State Department's Bureau of Politico-Military Affairs, wrote recently of a U.S. contingency plan to deploy nuclear weapons in Canada, Iceland, Bermuda, and Puerto Rico. An Administration official pressured the N.Y. Times to suppress the story. When, in spite of these efforts, the story appeared, Lt. Col. John

selected reports and data to reporters who, under the pressure of deadlines, often do not have time to verify them or seek out opposing views.<sup>127</sup> Government publicists attempt to reassure or frighten the public, as different policies dictate.<sup>128</sup> On one occasion, the Secretary of Defense objected to a publication of the Arms Control and Disarmament Agency, "World Military Expenditures," as overstating the size and nature of U.S. and NATO defense budgets. The pressure was effective; the Agency discontinued the reports, then resumed them, but with more statistics and tables and less comparative analysis.<sup>129</sup>

In addition to blocking criticism, secrecy augments the power of the subconscious defense mechanisms described earlier.<sup>130</sup> Secrecy and denial synergize each other. The government's use of secrecy implies that the truth would be gruesome and terrifying; the audience is almost grateful for being spared the frightening information.<sup>131</sup> Secrecy can also fortify the image of the nuclear strategist, in both his own and the public's eyes, as all-powerful and above ordinary obligations of responsibility and honesty. Why was he given the extraordinary power to operate in secret if not deserving of obedience and discretion?<sup>132</sup>

### B. Agenda Setting

Even short of censorship and secrecy, government controls the content of news by working with the mass media to set social agendas. According to

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Chain, the current director of the Bureau, ordered Gelb's picture removed from the wall where it had hung and forbade the Bureau staff to speak with Gelb. Lewis, *Apologize to Leslie Gelb*, San Francisco Chronicle, Mar. 11, 1985, at 37, col. 5.

<sup>127</sup> See, e.g., C. STEINBERG, *THE INFORMATION ESTABLISHMENT* 38-122, 147-191 (1980); *White House Computer Line to Provide "Unfiltered" News*, N.Y. Times, Jan. 7, 1985, at A14, col. 3 (White House established press service, similar to AP and UPI, to convey its own messages to American people); cf. *Taking Aim at CBS*, TIME, Mar. 11, 1985, at 53 (conservative group endorsed by Sen. Jesse Helms wants to purchase CBS to counter liberal bias).

<sup>128</sup> See, e.g., S. HILGARTNER, R. BELL & R. O'CONNOR, *supra* note 31, at 225 (discussing a 1950 paperback, *HOW TO SURVIVE AN ATOMIC BOMB*, that outlines a series of rules designed to downplay the hazards of radiation); Conine, *Loose Lips Sink More Than Ships*, Los Angeles Times, Oct. 17, 1983, § II, at 5, col. 4 (Reagan administration has stopped making off-the-cuff remarks that hurt its image at home or abroad in first year of administration); see also *Allen v. United States*, 588 F. Supp. 247, 404 (D. Utah 1984) (public pronouncements on danger to off-site residents of fallout from nuclear tests "do not really warn . . . They reassure.").

<sup>129</sup> D. CLARKE, *POLITICS OF ARMS CONTROL* 136-37 (1979).

<sup>130</sup> See *supra* notes 92-102 and accompanying text.

<sup>131</sup> Carson, *Nuclear Weapons and Secrecy*, in Task Force Report, *supra* note 28, at 34, 38. But see Yudkin, *supra* note 29, at 24 (children's fears compounded by adult's reluctance to discuss nuclear issues with them).

<sup>132</sup> S. HILGARTNER, R. BELL & R. O'CONNOR, *supra* note 31, at 58-59, 142; see also *supra* notes 98, 102 and accompanying text.

some communications scholars, the crucial characteristic of mass media is their capacity to shape social reality by setting the agenda for public discourse.<sup>133</sup> The media may not always succeed in telling people what to think, but they are highly successful in telling them what to think about.<sup>134</sup>

This capacity for agenda-setting can become pernicious if the media are subject to manipulation. Research in communications theory suggests that when the media construct social reality, they do so according to relatively predictable patterns.<sup>135</sup> The news net cast by the media traps primarily big fish; the institutional and professional values of reporters lead them to rely heavily on legitimated institutions and high-ranking officials for their subject matter.<sup>136</sup> The journalistic convention of objectivity ensures that the messages of institutional speakers get through relatively unscathed,<sup>137</sup> thereby reaffirming the legitimacy of those institutions and their communications.

The news net largely determines media content.<sup>138</sup> Government speech, because it emanates from legitimated institutions, is likely to be caught in the news net. Speech from unofficial sources is likely to slip through the net. The media do report the speech of a Nobel Prize winner, or the occasional mass demonstration against nuclear weaponry. These events are not caught because of their subject matter, but because public figures and mass gatherings are considered intersections in the news net; they are newsworthy in their own right. Such sporadic coverage of speech from unofficial sources cannot match the institutionalized reporting of government sources.

The government, therefore, plays an important role in determining media content and thus in setting the agenda for public discourse. As has been

<sup>133</sup> See McCombs & Shaw, *The Agenda-Setting Function of Mass Media*, 36 PUB. OPINION Q. 176, 177 (1972) (mass media set agenda by influencing attitudes toward issues); see generally D. GRABER, *supra* note 31; D. SHAW & M. MCCOMBS, *THE EMERGENCE OF AMERICAN POLITICAL ISSUES: THE AGENDA-SETTING FUNCTION OF THE PRESS* (1977).

<sup>134</sup> See B. COHEN, *THE PRESS AND FOREIGN POLICY* 13 (1963) (the press "may not be successful much of the time in telling people what to think, but it is strongly successful in telling its readers what to think about") (emphasis in original); McCombs & Shaw, *The Agenda-Setting Function of the Press*, in D. SHAW & MCCOMBS, *supra* note 133, at 4-8 (1977) (discussing effects of agenda-setting); Shaw & Clemmer, *News and the Public Response*, in D. SHAW & M. MCCOMBS, *supra* note 133, at 46-49 (findings of study indicating effectiveness of agenda-setting); see also H. GANS, *DECIDING WHAT'S NEWS* 297-98 (1979) (discussing role of press as "constructors of nation and society").

<sup>135</sup> See H. GANS, *supra* note 134, at 5, *passim*; cf. Shaw & Clemmer, *supra* note 134, at 34-40 (suggesting that media generally agree on what issues to be reported).

<sup>136</sup> See H. GANS, *supra* note 134, at 8-13 (approximately 80% of news reports focus on "known" figures); 281-84 (most reports deal with speech and activity of prominent public figures and institutions).

<sup>137</sup> See *id.* at 182-213 (discussing roles of objectivity, values, and ideology in reporting).

<sup>138</sup> See *supra* notes 135-37 and accompanying text.



seen, government speech on nuclear matters is often distorted or euphemistic, and frequently untruthful.<sup>139</sup> Yet the agenda-setting hypothesis suggests that such slanted communications will nevertheless have a profound effect on the way people think about nuclear matters.<sup>140</sup> If this effect occurs, the government may succeed in controlling attitudes and behaviors with respect to nuclear weapons simply because it dictates the terms of debate. An individual may have an intuitive revulsion toward nuclearism, for example, but be unable to articulate opposition; the language and structure of the debate may render such beliefs unsayable.<sup>141</sup>

Communications theory, then, further explains the means through which government speech on nuclear arms achieves dominance. When the government's own powers of secrecy and news management are added to the equation, government speech not only shapes the contours of the debate, but also renders opposition ineffectual. It is therefore critical that government communications dealing with nuclear weaponry and policy be held to the highest standards of probity. The next two sections examine whether this objective can be accomplished consistently with the first amendment.

### III. CONSTITUTIONAL STATUS OF GOVERNMENTAL SPEECH ON NUCLEAR WEAPONRY

In the American political system, government relies for its legitimacy on the consent of the governed.<sup>142</sup> We are committed, at least in theory, to a political system in which vital decisions are made through a collective examination that probes the tensions, contradictions, and alternatives inherent in our life together.<sup>143</sup> Any serious impairment of this process undermines a principal mechanism by which democratic government functions. Although all governments use language to some extent to enhance their own

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<sup>139</sup> See *supra* notes 21-77 and accompanying text.

<sup>140</sup> See *supra* notes 127, 133-34 and accompanying text.

<sup>141</sup> See Pocock, *supra* note 79, at 27 (those whose language is controlled communicate only through meanings dictated by others); Schlesinger, *supra* note 79, at 557 (language shapes development of ideas); Tushnet, *supra* note 78, at 134-44 (discussing impact of governmental communications on public).

<sup>142</sup> Declaration of Independence para. 2 (U.S. 1776); see also C. FRANKEL, *THE DEMOCRATIC PROSPECT* 34 (1962) (government by consent expresses the hope that ordinary people can influence the actions of their leaders); Lipsky, *Introduction*, in M. EDELMAN, *supra* note 79, at xviii-xx (while pluralists see a high participation rate as a sign of health, low participation can mean either mass satisfaction or despair and suppression); Carson, *Nuclear Weapons and Secrecy*, in Task Force Report, *supra* note 28, at 34, 40.

<sup>143</sup> White, *The Ethics of Argument: Plato's Gorgias and the Modern Lawyer*, 50 U. CHI. L. REV. 849, 894-95 (1983).

authority,<sup>144</sup> this practice seems more exaggerated, and more pernicious, in connection with the arms race than it does in other contexts.<sup>145</sup>

These considerations suggest that some measures to limit government dishonesty concerning armaments should be considered. A principal difficulty for any such effort is the traditional deference our society gives to free speech values. This Part, accordingly, examines the extent of protection due government weapons speech. Part IV discusses remedies that may be applied when such speech goes beyond acceptable bounds and limitations on such remedies.

#### A. *Does The First Amendment Require a Remedy?*

A few commentators have suggested that certain types of government speech violate the first amendment and affirmatively call for a remedy.<sup>146</sup> One commentator boldly asserts that government speech in support of controversial political premises offends an implied establishment clause in the first amendment.<sup>147</sup> Although he draws analogous support from case law,<sup>148</sup> no court has adopted his theory directly.<sup>149</sup> Were courts to adopt an

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<sup>144</sup> See generally D. GRABER *supra* note 31; N. CHOMSKY, *supra* note 56, at 5-6.

<sup>145</sup> Quantitative data are hard to come by, but the proposition seems intuitively plausible. See *infra* notes 173-74 and accompanying text (heavy government spending for publicity in support of nuclear policies); *infra* notes 177-78 and accompanying text (probable falsification of consent); *supra* notes 10-28 and accompanying text (current nuclear situation and risk of war); *supra* notes 31-77 and accompanying text (devices used by government to promote nuclear policies); *supra* notes 82-91 and accompanying text (psychological response mechanisms); *supra* notes 104-32 and accompanying text (obstacles to self-correction). Certainly, government speech with respect to nuclear weaponry and policy is no less troublesome than other types of speech that have aroused concern. See *infra* note 178.

<sup>146</sup> E.g., M. YUDOF, *supra* note 2, at 165, 238-40; Kamenshine, *supra* note 2, *passim*; Yudof, *When Governments Speak: Toward a Theory of Government Expression and the First Amendment*, 57 Tex. L. Rev. 863, 871-72, 897-906 (1979).

<sup>147</sup> Kamenshine, *supra* note 2, at 1104-11.

<sup>148</sup> *Id.* at 1119-24. Professor Kamenshine relies almost entirely on an analogy to cases arising under the religious establishment clause. He also relies in part on the cases striking down indirect government aid to private speech, such as *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977). He uses the latter, however, not as precedent for an establishment clause, but rather to suggest their inadequacy in protecting first amendment interests. *Id.* at 1107-09. Nevertheless, such cases, although based on the impairment of self-expression, may tacitly support the proposition that government may not engage in certain forms of speech, regardless of the impact on individual self-expression.

<sup>149</sup> At least one case, decided by the First Circuit, suggests the possibility that certain forms of government speech may be constitutionally offensive. *Bonner-Lyons v. School Comm.*, 480 F.2d 442 (1st Cir. 1973). In *Bonner-Lyons*, the court drew support from the open forum cases, e.g., *Police Dep't of Chicago v. Mosley*,

establishment clause approach, however, government speech on nuclear arms would be a good candidate for unconstitutionality. The types of publicity and news control described earlier pose all the principal dangers that government speech analysis seeks to avert: they promote controversial political premises,<sup>150</sup> enforce orthodoxy,<sup>151</sup> and threaten to drown out opposing voices and views.<sup>152</sup>

A second set of considerations suggesting that government arms-race talk is unconstitutional stems from doctrines dealing with censorship and the rights of captive audiences. Ordinarily, these doctrines apply in quite different factual circumstances and have opposite effects. The first amendment forbids government censorship of private speech. Censorship is offensive because it silences communications that the people might wish to hear and establishes government as the judge of what shall be heard.<sup>153</sup> Captive audience doctrine, by contrast, allows, and perhaps mandates, government interference with private speech.<sup>154</sup> In the case of government speech on nuclear arms, however, these paths converge. The government's use of psycholinguistic devices to manipulate the people on nuclear issues, coupled with its ability to control information, presents the dangers of imposed

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408 U.S. 92 (1972), in forbidding the Boston School Committee from using public facilities "to support a particular viewpoint." 480 F.2d at 444. The remedy in *Bonner-Lyons* was an injunction against any further speech by the School Committee unless the Committee made the same channels of speech available to those holding differing views. *See also* Board of Educ. v. Pico, 457 U.S. 853, 872 (1982): "school boards may not remove books from school library shelves simply because they dislike the ideas contained in those books and seek by their removal 'to prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion' " (quoting *West Virginia v. Barnette*, 319 U.S. 624, 642 (1943)).

<sup>150</sup> *See* Kamenshine, *supra* note 2, at 1113-15 (government speech in support of controversial matters of partisan politics violates implied establishment clause of first amendment).

<sup>151</sup> *See supra* notes 103-41 and accompanying text; *infra* notes 173-82 and accompanying text.

<sup>152</sup> *See infra* notes 173-79 and accompanying text.

<sup>153</sup> *E.g.*, *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-40 (1974); *West Virginia State Bd. of Ed. v. Barnette*, 319 U.S. 624, 642 (1943); *Lovel v. Griffin*, 303 U.S. 444, 451 (1938); *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J. dissenting); *see also* 2 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 1880-92 (5th ed. 1891) (liberty of the press); J.S. MILL, ON LIBERTY Ch. II (1859) (Of the Liberty of Thought and Discussion).

<sup>154</sup> *Lehman v. City of Shaker Heights*, 418 U.S. 298, 307 (1974) (Douglas, J. concurring) (commuters on municipal buses deemed captive audiences for messages transmitted on bus); *Campbell v. Cauthron*, 623 F.2d 503 (8th Cir. 1980) (inmates may not be subjected to forced religious indoctrination); *Mailloux v. Kiley*, 323 F. Supp. 1387, 1392 (D. Mass. 1970) (school systems may restrict secondary school teachers to acceptable teaching methods). *See generally* L. TRIBE, *supra* note 4, at 678 n.18.

orthodoxy;<sup>155</sup> such speech can become the functional equivalent of censorship. Similar considerations apply in the case of the trapped-audience comparison. The listener is bombarded with one-sided, terrifying messages on nuclear weaponry, with little opportunity to escape them.<sup>156</sup> Both considerations argue for controls.

Considerations of constitutional structure supply a further ground for limiting government speech of the types described in this article.<sup>157</sup> The governmental model laid out in the Constitution is a form of representative and participatory democracy.<sup>158</sup> The first amendment reflects the judgment of the Framers that free trade in ideas is essential both to effective participation and to emergence of the ultimate good.<sup>159</sup> The first amendment, therefore, "embodies more than a commitment to free expression and communicative interchange for their own sakes; it has a *structural* role to play in securing and fostering our republican system of self-government."<sup>160</sup>

The structural argument suggests that the first amendment guarantees not only the right to communicate, but also the right to the information and means necessary to communicate effectively. If, however, the government is permitted to curtail the flow of information necessary to effective speech, the structural role of the first amendment is undermined. When the government goes further, itself using powerful, distorted speech that may effectively render the listener incapable of meaningful response, it threatens impairment of popular participation in the political arena.<sup>161</sup> Protection of our form of constitutional government, then, requires that government speech on nuclear arms, which has the potential effect of stilling intelligent response, be subject to restraint.

<sup>155</sup> See *supra* notes 63-64, 80-81, 101-02, 130-32 and accompanying text.

<sup>156</sup> See *supra* notes 31-141 and accompanying text.

<sup>157</sup> See *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 587-88 (1980) (Brennan, J., concurring) (postulating a structural role of the first amendment—as guarantee that public debate on important issues be informed); M. YUDOF, *supra* note 2, at 158-73 (arguments from history and structure); see also *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 604 (1982) ("Underlying the First Amendment right of access to criminal trials is the common understanding that 'a major purpose of that Amendment was to protect the free discussion of governmental affairs.'") (quoting *Mills v. Alabama*, 384 U.S. 214, 218 (1966)).

<sup>158</sup> U.S. CONST. art. §§ 1-4; *id.* amends. 12, 14, 15, 17, 19, 24.

<sup>159</sup> *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969); *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964); *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). See generally A. MEIKLEJOHN, *POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE* (1965); Brennan, *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1 (1965).

<sup>160</sup> *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 587-88 (1980) (Brennan, J., concurring) (emphasis in original).

<sup>161</sup> See *supra* notes 36-132 and accompanying text.

These three sets of considerations suggest that unremitting government weapons talk may constitute, in itself, a violation of the first amendment. If so, remedies would be not merely permissible but affirmatively compelled; the only restraints would be political. The evils of government speech can be remedied by a less drastic route, however—by a finding that government speech is not per se unconstitutional, but nevertheless regulable.

B. *Does the First Amendment Permit a Remedy?*

1. Analytical Approaches

A sizable body of government-speech commentary argues that official speech, if not affirmatively violative of the first amendment, is at least regulable consistently with that amendment.<sup>162</sup> Courts are more likely to adopt this latter position; it is less radical doctrinally, and poses fewer enforcement difficulties than the approach under which official speech is found affirmatively unconstitutional. The remainder of this article therefore evaluates weapons speech from this perspective.

Two analytical routes converge on the conclusion that government speech of certain types is constitutionally regulable. The first asserts that government, *qua* government, has no first amendment right to speak. The second holds that government may have some such right, but this right may be restricted on a lesser showing of necessity than that applicable to private speech.

The case for nonprotection was first made more than 200 years ago. James Madison wrote that government speech stood on a different footing from private speech, was a potential threat to representative democracy, and could be limited or censored as the people wished.<sup>163</sup> His argument, albeit in less sweeping form, has been echoed by a number of current commentators, most notably Mark Yudof.<sup>164</sup> Yudof asserts that government speech poses special dangers and was not intended by the Framers to receive constitutional protection. He urges, however, that as a matter of policy only some,

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<sup>162</sup> M. YUDOF, *supra* note 2, at 200-07 (advocating indirect application of the first amendment to foster pluralism and vindicate traditional free speech rights); Shiffrin, *supra* note 2, at 609-12 (suggesting an eclectic approach drawing on a variety of differing models to balance values restricting government speech against legitimate government interests in communication); Ziegler, *supra* note 2, at 598-600, 604 (asserting the need for comprehensive legislation to prohibit partisanship in public agencies); *see also* Yudof, *supra* note 146, at 912-17 (proposing the technique of judicial remand to the legislature, similar to the technique used with the dormant commerce clause, to control questionable government speech).

<sup>163</sup> "If we advert to the nature of Republican Government, we shall find that the censorial power is in the people over the government, and not in the government over the people." Van Alstyne, *supra* note 2, at 532 n.5 (quoting 4 ANNALS OF CONG. 934 (1774)).

<sup>164</sup> M. YUDOF, *supra* note 2; Yudof, *supra* note 146.

not all, government speech be closely regulated.<sup>165</sup> Much that government wishes to say is harmless or is necessary for effective government functioning. For example, government needs to educate, to promote industry and commerce, and to marshal support for its policies.<sup>166</sup>

Particular types of government speech are problematical, however. For example, the commentators agree that government has no business expending public resources on speech aimed at reelecting itself,<sup>167</sup> or at creating, as opposed to effectuating, consensus.<sup>168</sup> Similarly, government speech that is untruthful or misleading has little claim to protection.<sup>169</sup> It has also been suggested that government speech that is so powerful as to "drown out" smaller voices, and thus coerce orthodoxy, should be toned down.<sup>170</sup>

Other commentators seem to concede that the government does have some right to speak, but reason that government speech is entitled to less protection than most private speech.<sup>171</sup> These writers raise virtually the

<sup>165</sup> M. YUDOF, *supra* note 2, at 42-50 (the power to facilitate and enlarge public discussion also creates the threat of domination and distortion of majoritarian processes); Yudof, *supra* note 146, at 867-72 (first amendment control of government speech should be based on the right of the people to information rather than on the right of government to speak).

<sup>166</sup> M. YUDOF, *supra* note 2, at 38-42; Yudof, *supra* note 146, at 865-67. Government also should, arguably, be able to propose policy and engage in dialogue with citizens about the formation of policy.

The principal case cited for the proposition that government (particularly federal) speech is not protected by the Constitution—at least to the full extent—is *City of Boston v. Anderson*, 439 U.S. 1060 (1979) (dismissing for want of a substantial federal question an appeal from state decision enjoining municipal advocacy). Not all rights under the Constitution are assertable by government. *E.g.*, *Williams v. Mayor of Baltimore*, 289 U.S. 36, 40 (1933). Commentators who take the view that the government does not have full rights of free speech argue that the first amendment was intended as a limitation on government's power to silence the people, and not as a source of government power to speak. *See supra* note 163.

<sup>167</sup> T. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 699 (1970); M. YUDOF, *supra* note 2, at 8-9; Shiffrin, *supra* note 2, at 612-40; *see also* *United States Civil Service Commission v. National Association of Letter Carriers*, 413 U.S. 548, 557 (1973) (upholding limitations on political activities of federal employees).

<sup>168</sup> M. YUDOF, *supra* note 2, at 15, 31-37, 152-57; Kamenshine, *supra* note 2, at 1110.

<sup>169</sup> *E.g.*, *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 344 (1974).

<sup>170</sup> 2 Z. CHAFEE, *GOVERNMENT AND MASS COMMUNICATION* 723, 796 (1947); L. TRIBE, *supra* note 4, at 590; M. YUDOF, *supra* note 2, at 17, 20-37, 71-110, 155-58; Kamenshine, *supra* note 2, at 1110; Van Alstyne, *supra* note 2, at 533. *But cf.* *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam) (limitations on private expenditures for election campaign held unconstitutional); Schauer, *supra* note 2, at 381-85 (government speech generally does not "drown out" private speech and hence is not a first amendment problem).

<sup>171</sup> *E.g.*, Van Alstyne, *supra* note 2; Ziegler, *supra* note 2.

same arguments as the no-protection school: official speech is peripheral to core first amendment values, was not intended by the Framers to receive protection, and poses dangers for representative democracy. These considerations lead to the conclusion that government speech occupies a middle position in the hierarchy of first amendment values—comparable perhaps to the status of commercial speech.<sup>172</sup>

The no-protection school and the lesser-protection school come to similar conclusions: government speech may be regulated on a lesser showing of need than that required for other categories of speech. The considerations that lead each school to this conclusion are also similar. Accordingly, the remainder of this section examines these concerns and the extent to which they arise in government speech on nuclear weaponry.

## 2. Dangers of Government Speech

The dangers that government speech theorists identify as justifying special treatment of official speech center around subversion of first amendment values. These values fall into two groups: extrinsic values, mainly those concerned with the role of speech in democratic government; and intrinsic values of self-expression and self-realization.

(a) "*Drowning out, falsification of consent, and self-perpetuation.*" Concerns related to the drowning out of private voices, and to the monopoly on ideas that results, are easily and compellingly substantiated in the area under examination. The government devotes substantial resources to promoting its own viewpoints, especially with respect to defense policy. Although the actual figures are difficult to ascertain, the Pentagon probably spends more money spreading its message than all opposing private speakers combined.<sup>173</sup> In addition, the government can count on the publicity efforts of defense contractors, whose viewpoint generally coincides with its own.<sup>174</sup> The result is a flood of reports, releases, films, commercials, and press conferences all promoting a single viewpoint.<sup>175</sup> Faced with this publicity barrage, opposing voices operate at a marked disadvantage.<sup>176</sup>

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<sup>172</sup> Van Alstyne, *supra* note 2, at 604-17; Ziegler, *supra* note 2, at 531-36.

<sup>173</sup> E.g., M. YUDOF, *supra* note 2, at 7, 56-58, 61-66, 78, 122-23; J. FULBRIGHT, *THE PENTAGON PROPAGANDA MACHINE* (1970); Kosterlitz, *The Money Behind the MX*, COMMON CAUSE, Mar./Apr. 1985, at 15.

<sup>174</sup> See Anderson, *Pentagon and Public Relations*, San Francisco Chronicle, July 20, 1984, at 69, col. 1 (criticizing Pentagon's willingness to condone defense contractors' charging taxpayers for public relations expenditures); see also Kosterlitz, *supra* note 173, at 15-18 (defense contractors lobbied hard for MX missile).

<sup>175</sup> See sources cited *supra* note 173. See generally A. WINKLER, *THE POLITICS OF PROPAGANDA: THE OFFICE OF WAR INFORMATION* (1978).

<sup>176</sup> Thus, although private speech may not have been "drowned out" in a literal sense, it operates at a marked disadvantage vis-a-vis government speech. The disadvantage is accentuated by government efforts to manage news, hector and silence

The imbalance between government's powerful voice, magnified by communications technology, and less powerful private voices can result in *falsification of consent*. According to government-speech theorists, falsification of consent problems arise when government uses speech, not to effectuate the will of the people, but to manufacture that will without popular consent or conscious participation.<sup>177</sup> The manipulative strategies described earlier plainly have the potential to falsify consent, and probably have already done so to a considerable extent.<sup>178</sup> The combination of loaded messages, news manipulation, and arcane technical language, all of which trigger subconscious defense mechanisms that disable effective response, presents unique dangers for a political system based on consent: it undermines the processes by which the citizenry exercise political choice at the same time that it decreases their range of choices and dictates the terms in which those choices are understood.<sup>179</sup>

For the same reasons, government speech on nuclear arms also presents dangers of self-perpetuation. As early as 1961, President Eisenhower warned of the dangers to democracy posed by a growing alliance between the military and government that would work to maintain a constant state of military readiness, high expenditures for the armed forces, and foreign policy shaped by military concerns.<sup>180</sup> To some extent, Eisenhower's predictions have come true. The exigencies of the world situation may explain this phenomenon, at least in part. But the continued existence of a govern-

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critics, and present the opposition as uninformed or neurotic. *See supra* notes 119-30 and accompanying text.

<sup>177</sup> *See supra* notes 31-77 and accompanying text. One obvious exception is the case of children, who may be subjected to the teaching of civic and other values in public school.

<sup>178</sup> *See supra* notes 29-31, 78-102 and accompanying text (psychological effect of arms messages); cf. M. YUDOF, *supra* note 2, at 20-37, 71-110 (extensive review of cybernetics, communications theory, and political science literature, concluding that government speech, *in general*, has the capacity to affect choice and falsify consent).

The threatening, highly emotion-laden language discussed in this Article seems even more likely to have these effects than ordinary government speech. Yudof writes that the efficacy of government speech is tempered by a number of factors: a vigorous private media, the existence of multiple branches and agencies, and an attitude of skepticism toward government speech. *See supra* note 107. In the case of nuclear weapons speech, however, these corrective forces are greatly weakened. *See supra* notes 29-31, 78-102 and accompanying text (psychological effect of arms messages); *see also supra* notes 104-141 and accompanying text (difficulties with self-correction).

<sup>179</sup> *See* N. CHOMSKY, *supra* note 56, at 101-02; M. YUDOF, *supra* note 2, at 20-37, 71-110; Schlesinger, *supra* note 79, at 553, 557; *see also* M. EDELMAN, *supra* note 96, at 21, 23-41; S. HILGARTNER, R. BELL & R. O'CONNOR, *supra* note 31, at xiii-xiv.

<sup>180</sup> Farewell Radio and Television Address to the American People, *reprinted in* PUBLIC PAPERS OF THE PRESIDENT, DWIGHT D. EISENHOWER, Item 421, at 1038 (Jan. 17, 1961).



ment attuned to military concerns may result equally from conscious propaganda and information control efforts by the military-industrial complex.<sup>181</sup> Government speech aimed at such self-perpetuation has little claim for first amendment protection.<sup>182</sup>

(b) *Nonpolitical values.* Curtailing government weapons speech would also serve certain nonpolitical, or intrinsic, first amendment values. On an individual level, freedom of expression promotes personal development.<sup>183</sup> At a societal level, it serves a role in creating the social world.<sup>184</sup> Through speech, individuals express and define themselves. Societies, too, create the world as they talk about it.<sup>185</sup> Thus, speech restrictions,<sup>186</sup> excessively domineering speech,<sup>187</sup> or speech that dictates the terms of debate,<sup>188</sup> all reduce the scope of creative conversation. In so doing, they arbitrarily reduce the realm of the possible. Individuals may wish to actualize themselves by advocating new approaches to the nuclear dilemma; society may wish to engage in conversation about the same issues. To the extent that government weapons speech impairs these possibilities, individuals and society are diminished.

### 3. Summary: Concerns Supporting Regulation

The above discussion suggests that government speech on nuclear weapons should be regulable, either as a matter of constitutional necessity or social policy, when all or many of the following concerns are present:

(a) *Concerns dealing with falsification of consent.* The government speech is unremitting, monolithic, and accompanied by measures, such as secrecy and news management, that eliminate competition. The speech is

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<sup>181</sup> See *supra* notes 31-102 and accompanying text.

<sup>182</sup> In applying the self-perpetuation model, scope would have to be allowed for advocacy during political campaigns and also for presidential communications necessary to the conduct of foreign policy and affairs. In either context, military advocacy (like its opposite—disarmament or pacifism) would be proper. One practical problem with this model is the difficulty of deciding when government speech has moved outside these regions.

<sup>183</sup> E.g., Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 879-80 (1963) (freedom of expression derives from the widely accepted premise of western thought that the proper goal is to realize each individual's potential as a human being).

<sup>184</sup> Chevigny, *Philosophy of Language and Free Expression*, 55 N.Y.U. L. REV. 157, 176-77 (1980) (words, whether expressing norms, values, or scientific facts, have meaning for society only when presented in a context determined by discourse).

<sup>185</sup> *Id.* at 163-76.

<sup>186</sup> See *supra* notes 103-141 and accompanying text (secrecy, censorship, and news manipulation).

<sup>187</sup> See *supra* notes 173-76 and accompanying text (danger of "drowning out").

<sup>188</sup> See *supra* notes 78-79, 133-141 and accompanying text (dictating terms of debate; agenda-setting).

calculated to trigger unconscious response mechanisms. The effect of the communication is to limit, not broaden, citizens' powers of choice on nuclear issues.

(b) *Concerns dealing with self-perpetuation.* The speech threatens perpetuation of government based on military spending and values.

(c) *Concerns related to "drowning out."* The speech is persistent and powerful; other voices have little opportunity to be heard.

(d) *Concerns based on parallels to trapped audiences and censorship.* The audience has no effective means of escaping the speech and internalizing the message it conveys. The speech institutionalizes orthodoxy.

(e) *Concerns based on nonmarketplace values.* The speech devalues the autonomy of the listener and society and limits opportunities for growth or experimentation.

The items on this checklist should apply cumulatively. When many of the concerns are present, courts and legislatures should act to moderate the threat to democratic decisionmaking. When few are present, the case for intervention weakens. The identity and rank of the speaker, as well as the context of the communication, are also relevant; for example, they may be factors in the determination that certain speech is self-serving and aimed at personal or institutional aggrandizement.<sup>189</sup>

#### IV. FRAMING A REMEDY

Much government speech on nuclear issues presents the dangers summarized above. Remedies designed to prevent these dangers should thus be constitutionally permissible. Any remedy should be narrowly tailored to avoid undue interference with legitimate government functions and concerns. In crafting the remedy, Congress and the courts should also consider political and institutional feasibility. Three basic types of approach are possible: judicial, legislative and shared. Because of the difficulty of the problem, and the delicacy and flexibility demanded of the solution, it seems probable that a combination of the three will be necessary.

##### A. *Judicial Remedies*

Judicial remedies would attempt to cure the problems of government weapons speech without the aid of express legislation. Such approaches could be either direct or indirect. Direct approaches would be possible

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<sup>189</sup> For example, government agents (particularly lower-level ones) speaking in their *private* capacities—i.e., as citizens rather than governmental representatives of the government—should not be subject to regulation. See *infra* note 202 and accompanying text. Ostensibly factual speech timed to coincide with an election campaign or congressional vote on military spending, on the other hand, should be viewed with greater suspicion than messages delivered at other times. See *supra* notes 179-82 and accompanying text (danger of governmental self-perpetuation).

should the Supreme Court find certain types of government speech directly violative of the first amendment.<sup>190</sup> The remedy would take the form of an injunction against further violations. It seems unlikely, however, that the courts will conclude that government speech directly violates the first amendment; much the same result could be achieved, without such radical doctrinal change, simply by finding it regulable.<sup>191</sup>

Indirect judicial remedies would not deal head-on with the evils of nuclear propaganda. Instead, these remedies would attempt to strengthen mechanisms that enhance citizens' exercise of independent choice. Thus, courts could broaden and strengthen such doctrines as academic freedom and reporters' privilege.<sup>192</sup> They could give narrow construction to rules pertaining to secrecy and executive privilege, and could resolve FOIA cases in favor of access.<sup>193</sup> They could uphold, in the face of challenges, grade school and high school courses dealing with nuclear issues.<sup>194</sup> Courts could also continue to mandate open forums, wherever the government is using a forum to promulgate only one perspective on nuclear arms.<sup>195</sup> These approaches would lessen government's near-monopoly on nuclear issues and assure that a fairer marketplace of ideas existed.

In contrast to direct judicial approaches, this indirect approach seems quite feasible. The courts would not make significant doctrinal changes; rather, they would adapt existing doctrine to new conditions. The judicial role would also be relatively nonconfrontational toward other branches of government. Thus, indirect judicial remedies would be both institutionally feasible and politically acceptable. As the examples above suggest, however, these remedies would also be quite limited, both in scope and effect. Alone, they could not solve the problem of offensive government speech on nuclear arms.

#### B. *Legislative Remedies*

Legislative remedies could also be direct or indirect. Indirect remedies would take the form of ad hoc sanctions against the offending branch or agency. Such remedies would not be unprecedented; Congress has on several occasions responded to overzealous communications activities of government agencies by abolishing public-relations offices, cutting appropriations, or influencing the selection of personnel.<sup>196</sup> There is no reason why

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<sup>190</sup> See *supra* notes 144-50 and accompanying text.

<sup>191</sup> See *supra* text following note 161.

<sup>192</sup> See M. YUDOF, *supra* note 2, at 213-33, 246-58.

<sup>193</sup> See *id.* at 213-58.

<sup>194</sup> See *id.* at 213-33.

<sup>195</sup> Cf. *Bonner-Lyons v. School Comm.*, 480 F.2d 442, 444 (1st Cir. 1973); see *supra* note 149 (discussing *Bonner-Lyons* and other open forum cases).

<sup>196</sup> M. YUDOF, *supra* note 2, at 185.

Congress could not use the same means to curb improper speech on nuclear weaponry.<sup>197</sup>

Congress could also use direct approaches, such as a federal statute (designated, perhaps, The Truth in Governmental Communications on Armaments Act) directing the Executive branch to communicate truthfully and fully to Congress on all matters connected with nuclear weaponry. Specific psycholinguistic devices, such as euphemism, scare-words, and misleading metaphors could be illustrated and forbidden.<sup>198</sup> There is some precedent for such a statute in perjury laws<sup>199</sup> and other information-forcing legislation.<sup>200</sup> A more ambitious approach would extend the requirement of candor to government communications to the people at large on nuclear arms. Arguably, restrictions on government speech to the public are more defensible than restrictions on communications addressed to Congress; members of

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<sup>197</sup> It might be argued that Congress is a poor choice for the job of limiting nuclear propaganda because Congress itself is part of the military-industrial complex. Still, Congress has an interest in curbing excessive military expenditures, so that the money can be spent on domestic programs that more directly benefit its constituents. Moreover, Congress, compared to the Executive branch, engages relatively infrequently in public relations or propaganda; nor does it speak with a single voice. See M. YUDOF, *supra* note 2, at 181. Congress also has a tradition of suspicion toward Executive branch propaganda. See *infra* notes 199-202 and accompanying text. Congress thus seems institutionally well suited for the job of restraining Executive branch weapons talk.

<sup>198</sup> As with any such effort, a statute like the one proposed would encounter line-drawing problems. See Friedrich, *supra* note 36, at 76 (linguistic sin lies in eye of beholder—"One nation's freedom fighter is another nation's terrorist"). The line-drawing problem should not end the search for a solution. Our legal system has opted for a system of simply stated rules, trading a certain amount of uncertainty at the fringes for moral clarity at the center of the regions in which rules operate. It should be no different with legislation controlling government speech. The difficulty of deciding whether the mildly euphemistic "silo" is an impermissible term for *fixed, underground launcher of thermonuclear missiles* is worth incurring, as a euphemism-barring statute would control plainly impermissible uses of words like those illustrated in Part I of this Article. *Supra* notes 31-55 and accompanying text. Moreover, many current statutes and regulations proscribe "misleading" advertising and corporate statements, generally leaving the term undefined. The only difference between those contexts and government weapons speech is that the former involve protected speech, while the speech involved in the latter is unprotected, or at least not highly protected.

<sup>199</sup> 18 U.S.C. §§ 1622, 6002 (1982); 50 U.S.C. 792 (1982).

<sup>200</sup> For example, the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-61 (1982), requires that certain proposals and reports affecting the environment be accompanied by an environmental impact statement. *Id.* § 4332(2)(C). The Arms Control and Disarmament Act, 22 U.S.C. §§ 2551-90 (1982), requires that programs of research, developing, testing, and employment of weapons be preceded by the filing of a statement of their impact on arms control and disarmament policy. *Id.* § 2576(a)(1).

Congress may be better informed and less susceptible to manipulation than the average citizen.<sup>201</sup> Some precedent for this approach exists in the form of a few federal statutes forbidding government agencies from communicating to the people in certain ways.<sup>202</sup>

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<sup>201</sup> See *False Promises: Doubts About Salvador Aid*, TIME, Feb. 25, 1985, at 21 (bipartisan congressional group published a 65 page report refuting Administration claim that three-fourths of aid sent to El Salvador was allotted for social and economic problems).

<sup>202</sup> For example, 18 U.S.C. § 1913 (1982), criminalizes the expenditure of agency appropriations for the purpose of influencing the vote on bills pending before Congress; the 1984 Continuing Resolution, P.L. 98-151, 97 Stat. 964, 973 (Nov. 14, 1983), forbids the Department of Justice and FTC from using any part of their appropriations for any activity, the purpose of which is to overturn or alter prohibitions on resale price maintenance under the antitrust laws. See also 47 U.S.C. § 399 (1982) (public TV and radio may not support or oppose candidates for office); 22 U.S.C. 1461 (1982) (U.S. Information Agency may not release for domestic broadcast material made for foreign audiences); 39 U.S.C. § 3210(a)(5)(A) & (C) (1982) (members of Congress may not use franking privilege to send self-laudatory or electioneering mail).

On the agency level, the FTC prohibits false and misleading advertising; the SEC prohibits deceptive statements in connection with corporate reports and statements. Cf. *Medicare Must Write Letters in Plain English*, San Francisco Chronicle, July 12, 1984, at 12, col. 1 (federal judge found letters sent to Medicare recipients "incomprehensible" and "misleading;" ordered letters rewritten in simple English).

Legislation of any of the types proposed in this Part would be enforced by suits, generally brought in federal court. The prospect of such suits raises two problems not raised by the remedies discussed to this point: delay and separation of powers. The problem of delay could be solved by providing for an expedited hearing on a governmental communication to enable corrective action before the harm occurs. Alternatively, Congress could create a watchdog agency, like the General Accounting Office, to monitor governmental communications—much as the FTC monitors commercial corporate communications. This agency could be empowered to publicize and unravel official prevarication, issue a countervailing communication, or simply report the prevarication to Congress. Although such an agency raises the spectre of an Orwellian "truth squad," if its functions were confined to instances of serious dissembling, it would probably survive criticism. See *A State Agency's Anti-Nuclear War Film*, San Francisco Chronicle, March 29, 1984, at 61, col. 6, reporting the decision of the Massachusetts Department of Public Health to air a television commercial on "what could be the 'last epidemic'—nuclear war." The commercial, which was described as "nonpolitical," was distributed free to TV stations in the state. Cf. *Humbug Patrol*, NEWSWEEK, Mar. 25, 1974, at 108 (describing Nat'l Council of Teachers of English Committee on Public Doublespeak).

The second problem concerns the extent of protection due to communications from the President or other high-level executive officers. These separation-of-power questions are discussed *infra*, at notes 205-32 and accompanying text.

### C. *Shared Remedy*

The final type of remedy blends judicial and nonjudicial approaches. In this approach courts would, on their own, identify categories of government propaganda and information control that most threaten democratic values.<sup>203</sup> The categories set out in Part I might serve as a starting point for such a list.<sup>204</sup> Within these categories, courts would insist on express agency approval for each communication. In the absence of such approval, the courts would declare the communication unlawful. By means of such "remands," courts could ensure open and advertent decisions on the dissemination of speech that threatens processes of representative government. This approach allows the courts to attack problems of government excesses directly, rather than indirectly, and also to invite explicit consideration by government agencies of some of the problems posed by their own speech.

### D. *Separation of Powers*

Remedies in which one branch of government coerces another to take or refrain from action raise issues of separation of powers. Separation of powers, along with related doctrines such as political question and executive privilege, generally ensure that the three branches of government do not overstep their bounds and interfere with each other's proper functions.<sup>205</sup> It

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<sup>203</sup> See *Stanson v. Mott*, 17 Cal. 3d 206, 551 P.2d 1, 130 Cal. Rptr. 697 (1976) (Director of Parks and Recreation had no warrant, statutory or otherwise, to spend public funds to promote a parks bond measure); see also M. YUDOF, *supra* note 146, at 913 (discussing an ultra vires approach to the general problem of government speech).

Yudof concludes that an ultra vires approach would be open to a number of objections: (i) courts might use it to increase their power over other branches of government; (ii) courts themselves traditionally engage in rhetoric and persuasion and thus might not be well situated to call others to account for their sins; and (iii) judicial intervention, even of the relatively mild sort contemplated by the shared model, would run the risk of interfering with legitimate government speech, see *supra* notes 163-66 and accompanying text. Yudof, *supra* note 146, at 913. None of these objections seems very forceful when applied to remedies for abusive weapons talk. There is little danger of judicial aggrandizement; the courts are not currently engaged in a tug-of-war with other branches of government over nuclear policy. Further, the defects of current arms speech noted in this Article seem glaring; they go far beyond the occasional excess of a strongly worded judicial opinion. Finally, there seems little risk that accepting such a role will lead courts to invalidate government expression needed to educate children, promote commerce, or carry out any other legitimate function of government. Consequently, the shared model appears to be a reasonable approach to controlling government arms speech.

<sup>204</sup> See *supra* notes 31-77 and accompanying text (linguistic devices); *supra* notes 78-102 and accompanying text (psychological mechanisms).

<sup>205</sup> L. TRIBE, *supra* note 4, at 15, 157-58.

might be urged that direct remedies, by which the judiciary or Congress orders the executive branch to discontinue deceptive talk about armaments, violate this constitutional principle. Similarly, although the indirect remedies suggested in sections A and B might not be unconstitutional, they may nevertheless be assailed as imprudent on quasi-constitutional grounds. The remainder of this sections examines the impact of separation of powers principles on the remedies proposed above.<sup>206</sup>

Rules limiting weapons speech could, arguably, interfere with the national defense<sup>207</sup> and foreign relations<sup>208</sup> functions of the executive branch. In these areas, the Constitution gives the President broad authority. Article II, section 2 provides that the President shall serve as commander in chief of the armed forces.<sup>209</sup> This power arguably encompasses communicating to the nation about military matters, including nuclear arms and strategy. The President's military powers, however, are shared with Congress, which controls the appropriations process through its authority "to raise and support Armies" and "to provide and maintain a Navy." Congress is also empowered "to make Rules for the Government and Regulation" of the armed forces, and "to provide for calling forth the Militia to . . . repel Invasions."<sup>210</sup> It also has sole authority to declare war,<sup>211</sup> a power recently reaffirmed and made specific by the War Powers Resolution of 1973,<sup>212</sup> which limits presidential power to deploy troops abroad.<sup>213</sup> Article I, section 8 of the Constitution imposes a further curb on presidential authority, limiting military appropriations to a two-year period.<sup>214</sup>

Presidential authority with respect to military matters is thus limited. These limits are drawn even more tightly when the President seeks to act domestically in furtherance of international military policy. In the Steel Seizure Case,<sup>215</sup> President Truman tried to seize and operate the nation's steel mills to avert strikes and assure an adequate supply of steel for the Korean War. The Supreme Court ruled his action an unconstitutional usurpation of legislative authority.<sup>216</sup>

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<sup>206</sup> The following discussion of executive powers is patterned after L. TRIBE, *supra* note 4, ch. 4 (Federal Executive Power), at 157-223.

<sup>207</sup> U.S. CONST. art. II, § 2. *See generally* L. TRIBE, *supra* note 4, § 4-6, at 172-81.

<sup>208</sup> *See generally* L. TRIBE, *supra* note 4, § 4-5, at 163-67.

<sup>209</sup> U.S. CONST. art. II, § 2.

<sup>210</sup> *Id.* art. II, § 8.

<sup>211</sup> *Id.* art. II, § 8, cl. 11.

<sup>212</sup> 50 U.S.C. §§ 1541-48 (1982).

<sup>213</sup> *Id.*

<sup>214</sup> U.S. CONST. art. I § 8 cl.

<sup>215</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

<sup>216</sup> *Id.* at 587. From this, Tribe draws the conclusion that the President's role as Commander-in-Chief affords him only a diminished scope for domestic action. L. TRIBE, *supra* note 4, at 174-84.

The President's military authority is further limited in areas where Congress articulates an intention to limit Presidential power. In such areas, which might include publicity and communications on nuclear matters, the Presidential power "is at its lowest ebb."<sup>217</sup> Congress might plausibly assert an interest in accurate depiction, to both Congress and the people, of the current military situation. Shared information is a prerequisite for the exercise of Congress's shared power in military matters. The people need truthful information, as well, to form opinions on matters of war, peace, and weaponry, and to communicate these opinions to their elected representatives.

Similar limits exist with respect to the conduct of foreign affairs. Although the President has traditionally been accorded wide latitude in matters of diplomacy,<sup>218</sup> he is not the sole actor in foreign affairs. The President must seek the "advice and consent" of Congress with respect to treaty-making and diplomatic appointments.<sup>219</sup> Moreover, Congress retains the power of the purse, and may use it to shape presidential action in foreign affairs.<sup>220</sup> Congress's authority to regulate foreign commerce may impose a similar limit. For example, when President Nixon imposed a surcharge on many articles imported into the United States, his action was declared an unconstitutional usurpation of the latter power.<sup>221</sup> As in the area of military policy, the President's foreign affairs power becomes attenuated when invoked as a ground for domestic action. In the Watergate case,<sup>222</sup> the Supreme Court held that the President has no inherent authority to conduct warrantless electronic surveillance within the nation's borders. It would seem, then, that the President's foreign policy power, like his power in military affairs, offers little basis for resisting reasonable rules regulating domestic communications on matters of nuclear policy.

One area where some of the broad rules and policies pertaining to presidential prerogatives have been tested, with close ties to the subject under consideration, is executive privilege.<sup>223</sup> Executive privilege is generally invoked to enable the President or other high-ranking members of the executive branch to *refuse* to speak. Nevertheless the concerns raised in support of such a refusal are similar to those that might be invoked to justify dishonest or manipulative speech. Twice in the last 32 years, the Supreme

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<sup>217</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

<sup>218</sup> L. TRIBE, *supra* note 4, at 158-63.

<sup>219</sup> U.S. CONST. art. 2 § 2.

<sup>220</sup> L. TRIBE, *supra* note 4, at 166.

<sup>221</sup> *Yoshida International, Inc. v. United States*, 378 F. Supp. 1155 (Cust. Ct. 1974). The Court of Customs and Patent Appeals reversed, finding implied delegation in the federal trading-with-the-enemy statute. 526 F.2d 560 (C.C.P.A. 1975).

<sup>222</sup> *United States v. United States District Court*, 407 U.S. 297 (1972).

<sup>223</sup> See generally L. TRIBE, *supra* note 4, § 4-14, at 202-12.



Court has confronted claims of executive privilege by a sitting President.<sup>224</sup> Each time, the Court has recognized that the privilege exists, while holding that courts may determine the factual predicates that support the privilege.<sup>225</sup> The courts also have the power to decide whether countervailing considerations outweigh those underlying the claim of privilege.<sup>226</sup> When courts have found against the President on a claim of privilege, he has acquiesced. On the three occasions when presidents have been subpoenaed, each has complied.<sup>227</sup>

In the most recent Supreme Court decision concerning executive privilege, *United States v. Nixon*,<sup>228</sup> the Court acknowledged the desirability of preserving the confidentiality of high-level executive conversations. The Court concluded, however, that the need to preserve the integrity of the judicial system decisively outweighed the privilege.<sup>229</sup> The Nixon case arose in the context of the criminal prosecution of some of the Watergate defendants. Other cases have held that executive privilege may also have to yield in civil trials. In *Halperin v. Kissinger*,<sup>230</sup> a federal district court held that the plaintiffs, who were suing for civil damages for the illegal wiretapping of their telephones, were entitled to take the deposition of former President Nixon.<sup>231</sup>

Protection of the integrity of the political processes and congressional decisionmaking would seem to be an interest at least as strong as the protection of the judiciary in a criminal or civil trial. Moreover, it would seem that an executive's claim to a privilege to dissemble can rarely if ever be as strong as the claims to a privilege to remain silent that were overridden in recent cases. Consequently, considerations drawn from executive privilege would seem to pose little obstacle to rules limiting executive branch dissembling.<sup>232</sup>

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<sup>224</sup> *United States v. Nixon*, 418 U.S. 683 (1974); *United States v. Reynolds*, 345 U.S. (1953), discussed in L. TRIBE, *supra* note 4, at 202-06.

<sup>225</sup> L. TRIBE, *supra* note 4, at 204-05.

<sup>226</sup> *Id.*

<sup>227</sup> *Id.* at 206. The three Presidents were Jefferson, Monroe, and Nixon. *Id.*

<sup>228</sup> 418 U.S. 683 (1974).

<sup>229</sup> *Id.* at 709.

<sup>230</sup> 401 F. Supp. 272 (D.D.C. 1975).

<sup>231</sup> *Id.* at 275.

<sup>232</sup> This conclusion is drawn from leading case law on presidential separation of powers issues. The same conclusion follows from consideration of the policies underlying separation of powers principles. According to Tribe, new patterns of interaction among the branches of federal government should be judged by two criteria: (i) their tendency to swell federal power in unaccountable ways; and (ii) their tendency to leave either Congress or the Executive at the mercy of the other or to reduce either's flexibility and independence unacceptably. L. TRIBE, *supra* note 4, at 163. The first criterion would obviously not be violated by any of the suggestions made in this section; all would limit, not swell, federal power. It might be argued that rules curtailing the executive branch's ability to misrepresent nuclear matters to the

## CONCLUSION

This Article has suggested that government has systematically used deceptive, manipulative language to influence the American people on matters of nuclear strategy and weaponry. Such language is particularly effective because of the nature of the threat of nuclear destruction and the ways in which normal human minds react to that threat. Effective countercommunications are made difficult by government news management and official secrecy. The combined effect is to falsify consent and insure perpetuation of a military-political alliance based on heavy weapons spending and a policy of nuclear deterrence.

Recent commentary has proposed that government speech may be regulated on a lesser showing of need than that required to abridge private speech. The fears that support special treatment for government speech are particularly acute in connection with nuclear weaponry. To restore the integrity of the political process and ensure full and informed debate on the vital issue of nuclear policy, Congress and the courts may—in fact they should—undertake remedial action. Narrowly tailored measures that draw on the resources of both these branches could alleviate the threat to democratic decisionmaking, while respecting the legitimate functions of the executive branch.

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American people reduce that branch's flexibility and range of options, but the argument does not withstand examination. Active misrepresentation of the types described in this article have no legitimate place in the government of a nation such as ours. Thus, rules limiting such misrepresentation diminish only a range of action that the government should not have in the first place.

