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## Weapons of Mass Distortion: Applying the Principles of the FCC's News Distortion Doctrine to Undisclosed Financial Conflicts of Interest in Corporate News Media's Military Coverage

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# **Weapons of Mass Distortion: Applying the Principles of the FCC's News Distortion Doctrine to Undisclosed Financial Conflicts of Interest in Corporate News Media's Military Coverage**

*Charles L. Bonani\**

## *Abstract*

*This Note offers a new conception of news distortion in mass media. It explores the intentions behind the FCC's News Distortion Doctrine and analyzes its primarily dormant status throughout its existence. This Note then examines televised media coverage of U.S. military actions and identifies undisclosed financial conflicts of interests throughout this coverage. In examining these undisclosed conflicts and the reasons behind them, this Note explains why they constitute news distortion under the FCC's definition, and why the principles behind the Doctrine are implicated. This Note then proposes the FCC promulgate a disclosure rule to remedy the undisclosed financial conflicts of interest. It also proposes that Congress amend the Communications Act of 1934 to authorize this rule promulgation.*

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\* Candidate for J.D., May 2021, Washington and Lee University School of Law. I would like to extend my sincerest appreciation and gratitude to everyone who helped me throughout the Note writing process: my Note Editor Jesse Sharp, Legal Research Professor Franklin Runge, Professors Carliss Chatman, Mona Houck and, most importantly, my faculty advisor Brian Murchison, who spent countless hours assisting me at every step of this process. This Note would not have been published without all of their comments and critiques. Last, I would like to thank my 1L Legal Writing Professor Allison Weiss and Legal Research Professor Andrew Christensen, who equipped me with the tools I needed to be able to write this Note.

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### *I. Introduction*

The Federal Communications Commission (FCC)<sup>1</sup> has made it clear that “[r]igging or slanting the news is a most heinous act against the public interest [and] . . . there is no act more harmful to the public’s ability to handle its affairs.”<sup>2</sup> The agency has developed a policy over many decades, referred to as the News Distortion Doctrine (Doctrine), to address this concern.<sup>3</sup> It applies to licensed broadcast stations and can be enforced only in licensing proceedings.<sup>4</sup> Due to omnipresent First Amendment concerns, the Doctrine’s elements are strict and require an exorbitant amount of evidence before the FCC will investigate distortion allegations.<sup>5</sup>

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1. The Federal Communications Commission will be primarily referred to as the “FCC” throughout this note, but the term “Commission” is commonly used in judicial and FCC opinions.

2. Complaints Covering CBS Program “Hunger in America,” 20 F.C.C.2d 143, 151 (1969).

3. See FEDERAL COMMUNICATIONS COMMISSION, THE MEDIA BUREAU, THE PUBLIC AND BROADCASTING: HOW TO GET THE MOST SERVICE FROM YOUR LOCAL STATION, at 12 (2019) [hereinafter THE PUBLIC AND BROADCASTING] (presenting the News Distortion Doctrine in its entirety).

4. See *id.* (listing the policies applicable to broadcast journalism and noting that “licensees may not intentionally distort the news”); see also Chad Raphael, *The FCC’s Broadcast News Distortion Rules: Regulation by Drooping Eyelid*, 6 COMM. L. & POL’Y 485, 498 (2001) (“Although the Commission sometimes considers distortion complaints on a case-by-case basis, it cannot impose fines for violations, but can only consider them in evaluating the overall character qualifications of broadcasters when they apply for license renewals.”).

5. See Chad Raphael, *The FCC’s Broadcast News Distortion Rules: Regulation by Drooping Eyelid*, 6 COMM. L. & POL’Y 485, 495–96 (2001) (“In the absence of any of the four elements, the Commission has been unwilling to find distortion, or even to investigate a complaint.”).

The rigidity of the Doctrine, the FCC's inconsistent enforcement of it, and the fact that it only applies to a subset of television media, have left the Doctrine unable to address the problem it was designed to solve.<sup>6</sup> Examples of news distortion in corporate media present the same issues that the Doctrine was designed to address, yet extend beyond its reach.<sup>7</sup>

This Note examines the history of the Doctrine, the policy reasons behind it and then, based on this foundation, proposes a new conception and application of news distortion in the modern televised media landscape. Part II analyzes the Doctrine's history and looks at where it stands today.<sup>8</sup> Part III looks at network news discussions on U.S. military actions and analyzes disturbing financial conflicts of interest with the U.S. Defense Department.<sup>9</sup> Part IV makes the case that these conflicts of interest are properly defined as news distortion, that they undermine the First Amendment's ideals, that FCC action can counterintuitively further the First Amendment's objectives, and that the current Doctrine is inadequate to address the issue.<sup>10</sup> Part V proposes a statutory amendment to the Communications Act of 1934 to authorize the FCC to promulgate disclosure rules applicable to cable and satellite providers.<sup>11</sup> It then proposes a model financial disclosure rule to address the issues presented in Part III. Part VI analyzes the proposed rule's constitutionality under the First Amendment.<sup>12</sup>

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6. See *id.* at 488 (“[T]he Commission’s evidentiary requirements, burden of proof, shifting definition of news, and sometimes arbitrary reasoning impose a near-insurmountable burden on complainants.”).

7. See THE PUBLIC AND BROADCASTING, *supra* note 3, at 7 (noting that the FCC only licenses “individual broadcast stations” and not “TV or radio networks”).

8. See *infra* Part II.

9. See *infra* Part III.

10. See *infra* Part IV.

11. See *infra* Part V.

12. See *infra* Part VI.

## II. The FCC's News Distortion Doctrine

### A. Contemporary News Distortion Doctrine

The FCC came into existence with the passage of the Communications Act of 1934.<sup>13</sup> The Act authorized the FCC to license cable and radio broadcast stations and to approve applicants if it determined that “the public interest, convenience, and necessity” would be served by granting the application.<sup>14</sup> The FCC only licenses individual broadcast stations and does “not license TV or radio networks (such as CBS, NBC, ABC or Fox) . . . except if those entities are also station licensees.”<sup>15</sup> In fact, many of these network entities are licensees and thus their stations are subject to the FCC’s jurisdiction.<sup>16</sup> In addition, cable operators that host cable networks (such as CNN, MSNBC, Fox News, etc.) are not licensees but are subject to a different regulatory scheme under the FCC’s jurisdiction.<sup>17</sup>

The FCC’s News Distortion Doctrine applies only to licensed stations as part of the license application process.<sup>18</sup> Licensees must periodically renew their licenses and, during this renewal period, the public can file petitions to deny a license renewal.<sup>19</sup> Any news distortion allegations will be made as part of these petitions and, if the FCC finds that there are “substantial and material

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13. See 47 U.S.C. § 151 (2018) (creating the FCC “[f]or the purpose of regulating interstate and foreign commerce in communication . . .”).

14. 47 U.S.C. § 309(a) (2018).

15. THE PUBLIC AND BROADCASTING, *supra* note 3, at 7.

16. See *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 247 (2012) (addressing indecency violations enforced against Fox and ABC, but striking them down on procedural grounds); see also *Complaints Covering CBS Program “Hunger in America,”* 20 F.C.C.2d 143, 143 (1969) (discussing and concluding a complaint on the merits involving the national CBS broadcast network).

17. See Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779 (authorizing FCC jurisdiction over cable); see also *Turner Broad. Sys. v. FCC (Turner II)*, 520 U.S. 180, 215–16 (1997) (upholding FCC regulations applying to cable).

18. See, e.g., *TVT License, Inc.*, 22 FCC Rcd. 13591, 13591 (2007) (noting that the FCC was reviewing the complainants petition to deny the license renewal of the licensee that allegedly committed news distortion).

19. See 47 U.S.C. § 309(d) (2018) (providing any “party in interest” the right to petition a broadcaster’s license application).

question[s] of fact,” then it will proceed with the investigation by holding a hearing.<sup>20</sup> The FCC may reject the petition and decline to hold a hearing, in which case the petitioner has a right to appeal the case to the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Court of Appeals).<sup>21</sup> Conversely, if the FCC finds that the station is not serving the public interest, then it may reject the station’s license renewal.<sup>22</sup> If the FCC has concluded that the station distorted the news in violation of its policy, then that will be factored into its renewal decision.<sup>23</sup> That is the full extent of the Doctrine’s enforcement authority, as it is not a promulgated rule that can be enforced on its own.<sup>24</sup>

For clarity and orientation, the Doctrine is provided below in its entirety:

The Commission often receives complaints concerning broadcast journalism, such as allegations that stations have aired inaccurate or one-sided news reports or comments, covered stories inadequately, or overly dramatized the events that they cover. For the reasons noted previously, the Commission generally will not intervene in these cases because it would be inconsistent with the First Amendment to replace the journalistic judgment of licensees with our own. However, as public trustees, broadcast licensees may not intentionally distort the news. The FCC has stated that “rigging or slanting the news is a most heinous act against the public interest.” The Commission will investigate a station for news distortion if it

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20. *Id.* § 309(e).

21. *See* FCC v. WJR, Goodwill Station, Inc., 337 U.S. 265, 274 (1949) (holding that the District of Columbia Court of Appeals must review the FCC case before it on the merits).

22. *See* THE PUBLIC AND BROADCASTING, *supra* note 3, at 8 (“Before we can renew a station’s license, we must first determine whether . . . the licensee has served the public interest . . .”).

23. *See* THE PUBLIC AND BROADCASTING, *supra* note 3, at 12 (discussing news distortion); *see also* Raphael, *supra* note 5, at 498 (“Although the Commission sometimes considers distortion complaints on a case-by-case basis, it cannot impose fines for violations, but can only consider them in evaluating the overall character qualifications of broadcasters when they apply for license renewals.”).

24. *See* New World Commc’ns of Tampa, Inc. v. Akre, 866 So. 2d 1231, 1233 (Fla. Dist. Ct. App. 2003) (“The FCC has never published its news distortion policy as a regulation with definitive elements and defenses.”); *see also* Nareissa L. Smith, *Consumer Protection in the Marketplace of Ideas: A Proposal to Extend the News Distortion Doctrine to Cable Television News Programs*, 40 T. MARSHALL L. REV. 223, 261 (2015) (“It is important to note that at this time, the doctrine is merely a policy—it has not been adopted as a rule.”).

receives documented evidence of rigging or slanting, such as testimony or other documentation, from individuals with direct personal knowledge that a licensee or its management engaged in the intentional falsification of the news. Of particular concern would be evidence of the direction to employees from station management to falsify the news. However, absent such a compelling showing, the Commission will not intervene.<sup>25</sup>

Legal scholars have deduced four elements, from the FCC's distortion reports and its above policy statement, that the complainant must satisfy before the FCC will classify it as news distortion.<sup>26</sup> The FCC will only find news distortion if there is (1) an allegation "of deliberate intent to distort the news or mislead the audience," (2) extrinsic evidence (in addition to the broadcast itself) to support the allegation, (3) evidence "that the distortion was initiated by or known to the licensee" or management personnel, and (4) an implication of a "significant event, rather than an incidental part of the news."<sup>27</sup> The extrinsic evidence element is the most decisive as most allegations are unable to meet this burden of proof.<sup>28</sup>

As suggested from the Doctrine's text, the FCC is extremely hesitant to even investigate news distortion allegations unless all four elements are met.<sup>29</sup> This reluctance is understandable when considering the glaring concern that enforcing the Doctrine will lead to government censorship, or even the appearance of

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25. THE PUBLIC AND BROADCASTING, *supra* note 3, at 12.

26. See Raphael, *supra* note 5, at 495 ("The Commission has never laid out a concise statement of what constitutes distortion, but it is possible to fashion a four-part test from its precedent decisions and subsequent actions.").

27. *Id.* at 496; see also Complaints Covering CBS Program "Hunger in America," 20 F.C.C.2d 143, 150 (1969) (concluding that there must be "extrinsic evidence" of "deliberate distortion or staging" that "involves the licensee [and] includes its principals, top management, or news management"); WPIX, Inc. (WPIX), New York, New York for Renewal of License, 68 F.C.C.2d 381, 385 (1978) (concluding that news distortion must involve a "matter of significance" to the public interest).

28. See "Hunger in America," 20 F.C.C.2d at 147 (stating that "intervention by the [FCC] should be limited to cases where there is extrinsic evidence involving the licensee or management").

29. See Raphael, *supra* note 5, at 496 ("In the absence of any of the four elements, the Commission has been unwilling to find distortion, or even to investigate a complaint.").



ensorship, in violation of the First Amendment.<sup>30</sup> These vital First Amendment issues will be addressed at length in Part VI.<sup>31</sup>

The FCC's last substantive discussion of the Doctrine was in 2007, though news distortion allegations have been made as recently as 2017.<sup>32</sup> The last judicial case to mention it was in 2004.<sup>33</sup> However, the Doctrine's merits have not been considered since 1998.<sup>34</sup> In total, the FCC has reviewed eight complaints involving the Doctrine since 1999 but only substantively discussed it two of those times.<sup>35</sup> The FCC concluded in all these cases that there was insufficient evidence of news distortion.<sup>36</sup>

The Doctrine is effectively dormant today, given the high standard of evidence needed to trigger an FCC investigation and the absence of a prescribed regulation.<sup>37</sup> The Doctrine's history, on the other hand, provides an insightful look into both the FCC's reasoning behind its conception and the federal judiciary's interpretation of its requirements.<sup>38</sup>

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30. See "*Hunger in America*," 20 F.C.C.2d at 151 ("[I]n this democracy, no Government agency can authenticate the news, or should try to do so. We will therefore eschew the censor's role, including efforts to establish news distortion in situations where Government intervention would constitute a worse danger than the possible rigging itself.").

31. See *infra* Part VI. First Amendment Constitutional Analysis

32. See TVT License, Inc., 22 FCC Rcd. 13591, 13597 (2007) (finding no prima facie case of news distortion); see also Entercom Comm'n & CBS Radio Seek Approval to Transfer Control of and Assign FCC Authorizations & Licenses, 32 FCC Rcd. 9380, 9384 (2017) (deciding the case without analyzing the distortion complaints on the merits).

33. See *New World Commc'ns. of Tampa, Inc. v. Akre*, 866 So. 2d 1231, 1234 (Fla. Dist. Ct. App. 2003) (finding that a whistleblower statute could not provide a remedy because the plaintiffs alleged a news distortion violation, but the FCC's Doctrine was not a promulgated rule so it could not be enforced in this instance).

34. See *Serafyn v. FCC*, 149 F.3d 1213, 1225 (D.C. Cir. 1998) (concluding that the FCC arbitrarily and capriciously denied the complainant's petition without fully considering the news distortion allegations).

35. See Joel Timmer, *Potential FCC Actions Against "Fake News": The News Distortion Policy and the Broadcast Hoax Rule*, 24 COMM. L. & POL'Y 1, 20 (2019) ("In addition to these three cases, there were five other cases since 1999 in which the Commission considered allegations of news distortion. In only two of the eight cases was there any detailed discussion of news distortion.").

36. See *id.* ("Significantly, in none of the cases was news distortion found to have occurred.").

37. See *id.* at 22 ("[I]t is very difficult and uncommon for the requirements of the news distortion policy to be satisfied.").

38. See Raphael, *supra* note 5, at 496 (describing the various "forms of

*B. History of the News Distortion Doctrine*

The FCC first expressed a concern for news distortion around the middle of the twentieth century.<sup>39</sup> The Doctrine as it exists today originated in 1969 after Congress raised concerns about a particular distortion allegation.<sup>40</sup> A congressman brought a complaint regarding a documentary program titled “*Hunger in America*” that had been broadcast multiple times on the Columbia Broadcasting System’s (CBS) national network.<sup>41</sup> The allegations centered around aired footage of a dying infant claimed to be dying of malnutrition.<sup>42</sup> The complainant alleged that such contention was false and, additionally, that CBS distorted the news by directing doctors’ interview statements.<sup>43</sup> The FCC, finding conflicting evidence on both issues, declined to hold an evidentiary hearing and concluded that further inquiry to resolve the issue was unwarranted.<sup>44</sup>

The FCC, in its reasoning, indicated a general hesitancy to wade into these issues on the ground that “investigat[ing] mere allegations, in the absence of a material indication of extrinsic evidence of staging or distortion, would clearly constitute a venture into a quagmire inappropriate for this Government agency.”<sup>45</sup> The FCC was referring to the First Amendment’s prohibition on

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distortion” where the Commission has applied its distortion test).

39. See *New World Commc’ns. of Tampa, Inc. v. Akre*, 866 So. 2d 1231, 1233 (Fla. Dist. Ct. App. 2003) (“The policy’s roots can be traced to 1949 when the FCC first expressed its concern regarding deceptive news . . .”).

40. See Raphael, *supra* note 5, at 495 (“[I]t was not until a series of 1969-1973 decisions that the Commission began to formalize its definition of distortion. The FCC did not do so on its own initiative, but in response to Congressional pressure.”).

41. See *Complaints Covering CBS Program “Hunger in America,”* 20 F.C.C.2d 143, 143 (1969) (stating that there are several complaints before the FCC concerning the “Hunger in America” documentary program).

42. See *id.* at 144 (“The complaint of Congressman Gonzales charges that segments of the program were ‘totally false in part and erroneous or misleading in other parts’ . . .”).

43. See *id.* (summarizing the complainant’s allegation that CBS “coached” a doctor to ‘make dramatic statements’ on malnutrition in San Antonio”).

44. See *id.* at 147 (concluding that policy concerns regarding editorial discretion superseded the need for further investigation).

45. *Id.* at 150.

government infringement of a free press, which compels significant editorial discretion for news broadcasters.<sup>46</sup>

The FCC went on to state that future complaints with similar evidentiary issues would not warrant further investigation.<sup>47</sup> Instead, it would only consider denying a licensee’s renewal if there was an allegation of “deliberate distortion or staging of the news which is brought to [the FCC’s] attention, involves the licensee, [and] includes its principals, top management, or news management.”<sup>48</sup> The FCC added to the rigor of its distortion test a decade later, declaring that the subject of the distortion allegation must be a “matter of significance” to the public interest.<sup>49</sup> This means that the subject matter at issue must be serious enough that distortion of its reporting warrants agency action, though the FCC has not defined the phrase.<sup>50</sup> This last requirement rounded out the FCC’s four-element distortion policy that exists today.<sup>51</sup>

### 1. *The FCC’s News Distortion Opinions*

According to a thirty-year study analyzing the FCC’s reported decisions between 1969 and 1999, the FCC published 120 decisions on distortion investigations.<sup>52</sup> Of those 120 decisions, it ruled

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46. See U.S. CONST. amend. I (“Congress shall make no law . . . abridging the freedom of . . . the press . . .”); see also *THE PUBLIC AND BROADCASTING*, *supra* note 3, at 12 (“[I]t would be inconsistent with the First Amendment to replace the journalistic judgment of licensees with our own.”); see also *Ark. Educ. Television Comm’n v. Forbes*, 523 U.S. 666, 673 (1998) (noting that broadcasters must “exercise substantial editorial discretion in the selection and presentation of their programming . . .”).

47. See “*Hunger in America*,” 20 F.C.C.2d at 150 (stating that the FCC does “not intend to defer action on license renewals . . . of the kind we have investigated here” in the future).

48. *Id.* at 150.

49. See *WPIX, Inc. (WPIX), New York, New York for Renewal of License*, 68 F.C.C.2d 381, 385 (1978) (concluding that none of the news incidents deceived the public about a matter of significance).

50. See *id.* at 384–85 (noting that there were only incidents of “inaccurate embellishments concerning peripheral aspects” of the news).

51. See *THE PUBLIC AND BROADCASTING*, *supra* note 25 and accompanying text (providing the current News Distortion Doctrine in its entirety).

52. See Raphael, *supra* note 5, at 501 (noting that the FCC only “found against broadcasters in 10%” of the reported decisions).

against the broadcasters on only twelve occasions.<sup>53</sup> Of the twelve adverse rulings, three of them ended with the FCC either revoking or declining to renew the broadcaster's license.<sup>54</sup> Hesitancy to enforce the Doctrine is consistent with the Doctrine itself, which emphasizes the latitude afforded to news editorial discretion under the First Amendment.<sup>55</sup>

In an example of enforcing the Doctrine against a licensee, the FCC removed multiple licenses from Star Stations, Inc. (Star Station), a corporation that owned several broadcast companies across three states.<sup>56</sup> The FCC rejected Star Stations' license renewal after finding that its owner "had used two of his radio stations to promote political candidates through the news, and to make illegal campaign contributions to them."<sup>57</sup> The FCC explained that such an action rose to the level of news distortion because the "newscasts were used as a vehicle to publicize [the owner's] preferred candidate—not as an exercise of news judgment, but as a deception of the public and to further his private interests."<sup>58</sup> The FCC made it clear that this type of conduct warrants action, stating that "[s]uch attempts to use broadcast facilities to subvert the political process cannot be ignored or condoned."<sup>59</sup>

## 2. *The Federal Judiciary's News Doctrine Opinions*

Although there have been a number of FCC memorandum opinions on distortion allegations, federal courts have heard only

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53. *See id.* ("The Commission has rarely held licensees in violation of the distortion rules.")

54. *See id.* at 504 ("Findings of distortion did contribute to three license nonrenewals over the thirty year period [from 1969 to 1999] under study.")

55. *See* THE PUBLIC AND BROADCASTING, *supra* note 3, at 12 ("[I]t would be inconsistent with the First Amendment to replace the journalistic judgment of licensees with our own.")

56. *See* Raphael, *supra* note 5, at 504–05 (noting that the FCC removed several of the corporation's licenses for, among other acts, "committing a felony by making illegal campaign contributions, and distorting news"); *see also* Star Stations of Indiana, Inc., 51 F.C.C.2d 95, 109 (1975) (denying three applications for license renewal).

57. Raphael, *supra* note 5, at 505.

58. *Star Stations*, 51 F.C.C.2d at 107.

59. *Id.*

two distortion cases.<sup>60</sup> In *Galloway v. FCC*, the petitioner filed a complaint with the FCC alleging that the *60 Minutes* program on CBS deliberately distorted a report on insurance fraud by having its subjects stage interviews and present misleading facts.<sup>61</sup> The FCC dismissed the complaint, reasoning that the staged interviews were a matter of “editorial judgment.”<sup>62</sup> The D.C. Court of Appeals disagreed in part, finding that the allegations provided circumstantial evidence of a staged, or distorted, report.<sup>63</sup> The court upheld the FCC’s dismissal because it found that the event’s “basic accuracy” had not been distorted and thus there was no actionable news distortion.<sup>64</sup>

In *Serafyn v. FCC*, the petitioner filed a license renewal complaint to the FCC, alleging that CBS acted against the public interest by intentionally distorting a story about Ukraine that depicted a majority of Ukrainians as anti-Semitic.<sup>65</sup> The petitioner brought the complaint under Section 309(d) of the Communications Act of 1934<sup>66</sup> and, after the FCC rejected his petition, sought review in the D.C. Court of Appeals.<sup>67</sup> The court outlined a two-step analysis that the FCC should apply in these cases.<sup>68</sup> First, the FCC must analyze whether there is a *prima facie* case of news distortion.<sup>69</sup> Second, the FCC must analyze “both the

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60. See *Galloway v. FCC*, 778 F.2d 16, 23 (D.C. Cir. 1985) (concluding that the complainant’s allegations did not rise to the level of an FCC rule violation); see also *Serafyn v. FCC*, 149 F.3d 1213, 1225 (D.C. Cir. 1998) (concluding that the FCC arbitrarily and capriciously denied the complainants petition without fully considering the evidence).

61. See *Galloway*, 778 F.2d at 18 (stating the petitioner’s claim “that his name had been forged on the fraudulent bill . . .”).

62. *Id.* at 21.

63. See *id.* (noting that the FCC “is unlikely to find better circumstantial evidence that an interview is staged”).

64. *Id.* at 20–21.

65. See *Serafyn*, 149 F.3d at 1213, 1216 (noting that “Serafyn objected that CBS was not fit to receive a license . . .”).

66. See 47 U.S.C. § 309(d) (2018) (granting interested persons the right to petition the FCC to deny a broadcast license application).

67. See *Serafyn*, 149 F.3d at 1213, 1216 (noting the FCC denied the petition on the ground Serafyn did not allege the matter was intentionally misrepresented).

68. See *id.* at 1219 (“[W]e note that the Commission never explained under which step of the inquiry it resolved this case.”).

69. See *id.* at 1220 (highlighting the “appropriate questions for the

substantiality and the materiality of the allegation” to determine whether the broadcaster can sufficiently serve the public interest.<sup>70</sup> Materiality will only be found where “the licensee itself is said to have participated in, directed, or at least acquiesced in a pattern of news distortion.”<sup>71</sup> The court found that the FCC conflated these two steps when it dismissed the petitioner’s complaint.<sup>72</sup>

Both *Galloway* and *Serafyn* illustrate the judiciary’s view that the FCC has been unduly passive when reviewing allegations of news distortion.<sup>73</sup> Moreover, the FCC’s distortion decisions since these cases indicate that it remains hesitant to find prima facie evidence of news distortion.<sup>74</sup> For example, in a 2013 case, the FCC declined to further investigate allegations that General Communications, Inc. (GCI), the corporate owner of multiple Alaskan broadcast stations, was threatening to distort the news to serve its business interests.<sup>75</sup> The distortion allegations, among a number of complaints, were brought by nine television licensees, collectively referred to as the Alaska Broadcasters.<sup>76</sup> The Alaska Broadcasters alleged that GCI threatened to distort the news in violation of the public interest when it “explicitly told other stations and potential employees that it plan[ned] to tailor the news to be more ‘business-friendly’ [in order to] assure viewpoints favorable to GCI’s corporate interests.”<sup>77</sup> The FCC stated in response that the allegations, “even if true, would be insufficient

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Commission to ask at the threshold stage”).

70. *Id.* at 1216.

71. *Id.*

72. *See id.* at 1220 (“[T]he Commission has misapplied its standard . . .”).

73. *See Galloway v. FCC*, 778 F.2d 16, 20–21 (D.C. Cir. 1985) (“[T]he [FCC’s] practice in this respect has given its policy against news distortion an extremely limited scope.”).

74. *See Timmer, supra* note 35, at 20 (observing that the FCC has reviewed eight distortion cases since 1999 but concluded in all of them that there was insufficient evidence of news distortion).

75. *See Affiliated Media, Inc.*, 28 FCC Rcd. 14873, 14881 (2013) (concluding that the distortion allegations, if true, would only amount to protected editorial discretion).

76. *See id.* at 14873 (describing the particular group of complainants as “licensees of nine television stations in Anchorage, Fairbanks, Juneau, and Sitka”).

77. *Id.* at 14881.

to make out a *prima facie* showing that grant of the Applications would be inconsistent with the public interest.”<sup>78</sup> The FCC’s reasoning was that “[t]he First Amendment and section 326 of the Communications Act bar us from withholding approval of a transaction based on a *change in editorial perspective*.”<sup>79</sup>

The FCC thus implied that agency action here would amount to censorship, as that is what section 326 expressly prohibits.<sup>80</sup> This example illustrates the FCC’s broad interpretation of what qualifies as editorial discretion, subject only to the requirement that the licensee operate in good faith.<sup>81</sup> Based on this interpretation, it is hard to see what would cross the line from editorial discretion to news distortion under the FCC’s current policy.<sup>82</sup> With this interpretation in mind, the FCC’s hesitancy to enforce the news distortion policy can be properly understood.<sup>83</sup> Any licensee action considered to be within the scope of editorial discretion is awarded full First Amendment protection, which in turn leaves limited room for the FCC to enforce its current news distortion policy.<sup>84</sup> The Doctrine’s rigidity, combined with the FCC’s reluctance to investigate cases appearing to be news distortion on their face, necessitates a new approach to accomplishing the FCC’s goal of protecting the “public’s ability to handle its affairs.”<sup>85</sup> Part III will highlight news distortion

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78. *Id.*

79. *Id.* (emphasis added).

80. See 47 U.S.C. § 326 (2018) (“Nothing in this chapter shall be understood or construed to give the [FCC] the power of censorship . . . , and no regulation or condition shall be promulgated or fixed by the [FCC] which shall interfere with the right of free speech by means of radio communication.”).

81. See *Affiliated Media, Inc.*, 28 FCC Rcd. 14873, 14881 (2013) (ending the opinion by stating that “[l]icensees are entitled to exercise ‘good faith’ editorial discretion” without indicating what might violate that standard).

82. See *THE PUBLIC AND BROADCASTING*, *supra* note 3, at 12 (stating that broadcasters may not intentionally slant news presentation).

83. See Raphael, *supra* note 5, at 501 (noting that the FCC only “found against broadcasters in 10%” of the reported decisions).

84. See *Ark. Educ. Television Comm’n v. Forbes*, 523 U.S. 666, 673 (1998) (“As a general rule, the nature of editorial discretion counsels against subjecting broadcasters to claims of viewpoint discrimination.”).

85. See *Complaints Covering CBS Program “Hunger in America,”* 20 F.C.C.2d 143, 151 (1969) (discussing how the rigging of news is the most harmful act against the public interest).

examples, in line with the Alaska Broadcasters case, that further emphasizes the need for a new doctrinal approach.

*III. A New Kind of News Distortion: A Focus on Undisclosed  
Financial Conflicts of Interest in Corporate Media Coverage of  
U.S. Military Actions*

Corporate media ownership has become increasingly consolidated over the past several decades.<sup>86</sup> From 1983 to 2011, ninety percent of U.S. media went from being owned by fifty companies to six.<sup>87</sup> This was primarily due to consistent deregulations from both the FCC and Congress.<sup>88</sup> Analysis of this deregulation is beyond the scope of this Note but provides important context for discussing the prevalence of financial conflicts of interest in corporate media.<sup>89</sup>

*A. The First Case Study: GE, NBC, and the Iraq War*

General Electric Company (GE) purchased the National Broadcasting Company (NBC) in 1985.<sup>90</sup> It owned a majority share

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86. See Sean M. McGuire, *Media Influence and the Modern American Democracy: Why the First Amendment Compels Regulation of Media Ownership*, 4 CARDOZO PUB. L. POL'Y & ETHICS J. 689, 703 (2006) ("Perhaps the most dominant characteristic of the media industry is the tendency toward larger, fewer, and more centralized ownership groups.").

87. See Ashley Lutz, *These 6 Corporations Control 90% of the Media in America*, BUSINESS INSIDER (June 14, 2012, 9:49 AM), <https://www.businessinsider.com/these-6-corporations-control-90-of-the-media-in-america-2012-6> (last visited Sept. 25, 2020) (showing an infographic illustrating "that almost all media comes from the same six sources") [perma.cc/EB62-PXQV].

88. See McGuire, *supra* note 86, at 702 ("Then, in 1996, Congress joined the deregulation frenzy, passing the Telecommunications Act of 1996 . . . [which] eliminated all caps on national radio station ownership.").

89. See *id.* at 704 (noting that "five companies control eighty percent of the [television] viewing audience").

90. See David Goldman & Julianne Pepitone, *GE, Comcast Announce Joint NBC Deal*, CNN MONEY (Dec. 3, 2009, 9:57 AM), [https://money.cnn.com/2009/12/03/news/companies/comcast\\_nbc/index.htm](https://money.cnn.com/2009/12/03/news/companies/comcast_nbc/index.htm) (last visited Sept 27, 2019) (stating that GE bought NBC "for \$6.3 billion to act as a hedge against its industrial businesses") [perma.cc/XF39-9GBS].



in the company until 2009 and a minority share until 2013.<sup>91</sup> At the same time, GE was also a major Defense Department contractor that manufactured and supplied equipment to the U.S. military.<sup>92</sup> “In 2004, when the Pentagon released its list of top military contractors for the latest fiscal year, [GE] ranked eighth with \$2.8 billion in contracts.”<sup>93</sup> Authors Martin E. Lee and Norman Solomon defined the financial relationship this way: “[W]hen correspondents and paid consultants on NBC television praised the performance of U.S. weapons, they were extolling equipment made by GE, the corporation that pays their salaries.”<sup>94</sup>

Leading up to the Iraq war, the national political discussion was consumed over whether the United States should declare war upon and invade Iraq, so the national news heavily revolved around this central issue.<sup>95</sup> NBC and its 24/7 cable news channel, MSNBC, frequently reported on this issue.<sup>96</sup> In 2003—three weeks before the U.S. military invaded Iraq—MSNBC television host Phil Donahue had his regularly programmed show cancelled by network executives.<sup>97</sup> Evidence presented in a leaked internal

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91. See *id.* (“Comcast will take a controlling 51% stake in the [NBC] joint venture, and GE will control 49%.”); see also David Lieberman, *Comcast Completes Acquisition of GE’s 49% Stake in NBCUniversal*, DEADLINE (Mar. 19, 2013, 2:15 PM), <https://deadline.com/2012/03/comcast-completes-acquisition-nbcuniversal-457181/> (last visited on Sept. 27, 2019) (stating that GE is “out of the NBCUniversal business”) [perma.cc/CC48-UQTL].

92. See Norman Solomon, *The Military-Industrial-Media Complex*, FAIRNESS & ACCURACY IN REPORTING (Aug. 1, 2005), <https://fair.org/extra/the-military-industrial-media-complex/> (last visited on Sept. 27, 2019) (stating that “NBC’s owner General Electric designed, manufactured or supplied parts or maintenance for nearly every major weapon system used by the U.S. during the Gulf War”) [perma.cc/V942-AP6P].

93. *Id.*

94. *Id.*

95. See Robert Bejesky, *Press Clause Aspirations and the Iraq War*, 48 WILLAMETTE L. REV. 343, 349 (2012) (“PBS reported that there were ‘414 Iraq stories broadcast on NBC, ABC and CBS nightly news, from September 2002 until February 2003 . . . .”).

96. See *id.* at 370 (mentioning that MSNBC hosted a program titled “Countdown: Iraq with Lester Holt”).

97. See *Some Critical Media Voices Face Censorship*, FAIRNESS & ACCURACY IN REPORTING (Apr. 3, 2003), <https://fair.org/press-release/some-critical-media-voices-face-censorship/> (last visited Feb. 21, 2020) (“Starting before the [Iraq] war began, several national and local media figures have had their work jeopardized, either explicitly or implicitly because of the critical views they expressed on the war.”) [perma.cc/2BG5-BRTE].

NBC memorandum indicated that the show was cancelled due to Donahue's tendency to present viewpoints opposing the government's official position, meaning viewpoints expressing opposition to the Iraq war.<sup>98</sup> Even before the show's cancellation, network executives "imposed a quota system on the Donahue staff requiring two pro-war guests if [the show] booked one anti-war advocate."<sup>99</sup> In an interview years later, Donahue contextualized his firing, stating, "If you're GE, you certainly don't want an anti-war voice on a cable channel that you own . . . . We weren't good for business."<sup>100</sup>

Around this same time, former pundit and MSNBC producer Jeff Cohen was removed from MSNBC's airwaves for reasons he claims were related to his opposition to military conflict.<sup>101</sup> Cohen claimed that he "argued vigorously against invading Iraq in debates televised on MSNBC . . . . But as the war neared, [his] debates were terminated."<sup>102</sup> He described the executives' editorial decision-making as follows: "In the land of the First Amendment, it was [the executives'] choice to shut down debate and journalism."<sup>103</sup>

### *B. The Second Case Study: The Pentagon Pundit Program*

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98. See *id.* (quoting that Donahue's show presented a "difficult public face for NBC in a time of war . . . [because he] seems to delight in presenting guests who are anti-war, anti-Bush and skeptical of the administration's motives").

99. Jeff Cohen, *Military Propaganda Pushed Me Off TV*, HUFFINGTON POST, [https://www.huffpost.com/entry/military-propaganda-pushe\\_b\\_98925](https://www.huffpost.com/entry/military-propaganda-pushe_b_98925) (last updated May 25, 2011) (last visited Nov. 16, 2019) [perma.cc/F9NQ-SRMT].

100. Democracy Now!, *Phil Donahue on His 2003 Firing From MSNBC, When Liberal Network Couldn't Tolerate Antiwar Voices*, YOUTUBE (Mar. 21, 2013), <https://www.youtube.com/watch?v=ozxzNjRqCiE&t=7s> (last visited Feb. 21, 2020) [perma.cc/E2MJ-3V7X].

101. See JEFF COHEN, CABLE NEWS CONFIDENTIAL: MY MISADVENTURES IN CORPORATE MEDIA 135 (2006) ("There was no room for me after MSNBC launched *Countdown: Iraq*—a daily one-hour show that seemed more keen on glamorizing a potential war than scrutinizing or debating it.").

102. Jeff Cohen, *Military Propaganda Pushed Me Off TV*, HUFFINGTON POST (last updated May 25, 2011) [https://www.huffpost.com/entry/military-propaganda-pushe\\_b\\_98925](https://www.huffpost.com/entry/military-propaganda-pushe_b_98925) (last visited Nov. 16, 2019) [perma.cc/2FT3-ZTWS].

103. *Id.*

NBC is not the only major media corporation with this type of financial conflict of interest: In 2010, four out of the top ten media corporations shared board director positions with major Defense Department contractors.<sup>104</sup>

The most pervasive type of financial conflict of interest, however, came from the so-called Pentagon Pundit Program (Program), in which about seventy-five retired military officers worked as media analysts as part of a concerted Pentagon effort “to generate favorable news coverage of the administration’s wartime performance.”<sup>105</sup> These analysts would appear on all of the national media networks to commentate on U.S. military policy, and “[m]ost of the analysts ha[d] ties to military contractors vested in the very war policies they are asked to assess on air.”<sup>106</sup> The networks had occasional awareness of these financial relationships but the viewers were almost never aware.<sup>107</sup> This program generated considerable controversy and led to a U.S. Government Accountability Office (GAO) investigation to determine whether the Defense Department had inappropriately engaged in propaganda activities.<sup>108</sup>

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104. See Peter Phillips & Mickey Huff, *Inside the Military Media Industrial Complex: Impacts on Movements for Peace and Social Justice*, PROJECT CENSORED (May 3, 2010), <https://www.projectcensored.org/inside-the-military-media-industrial-complex-impacts-on-movements-for-peace/> (last visited Feb. 21, 2020) (listing two board members of Disney, which owns ABC, who are also board members for Boeing and Halliburton, two major Defense Department contractors) [perma.cc/AE42-HF24]; see also Justin Schlosberg, *The Media-Technology-Military Industrial Complex*, OPENDEMOCRACY (Jan. 27, 2017), <https://www.opendemocracy.net/en/media-technology-military-industrial-complex/> (last visited Nov. 16, 2019) (“[L]ess prominent is the interlocking directorate between media, the state and the defence industry. William Kennard, for instance, has served on the boards of the *New York Times*, AT&T and a number of companies owned by the Carlyle Group, a major US defense contractor.”) [perma.cc/9MJU-NVQF].

105. David Barstow, *Behind TV Analysts, Pentagon’s Hidden Hand*, N.Y. TIMES (Apr. 20, 2008), <https://www.nytimes.com/2008/04/20/us/20generals.html> (last visited Sept. 23, 2020) [hereinafter *Pentagon’s Hidden Hand*] (describing the Pentagon’s covert, coordinated program of having retired military generals go on cable networks as analysts and advocate for their pro-war position, often to the acquiescence of the media outlets) [perma.cc/EM6Y-5AKL].

106. *Id.*

107. See *id.* (noting that the “business relationships are hardly ever disclosed to the viewers, and sometimes not even to the networks themselves.”).

108. See U.S. DEPARTMENT OF DEFENSE, B-316443, RETIRED MILITARY OFFICERS AS MEDIA ANALYSTS (2009) (concluding that the financial relationships

The story of one of these retired military officers, General Barry R. McCaffrey, helps provide some insight into how this entanglement of financial interests operates.<sup>109</sup> General McCaffrey was a retired four-star Army general and NBC News military analyst.<sup>110</sup> He had significant governmental influence, “such that President [George W.] Bush and Congressional leaders from both parties have invited him for war consultations.”<sup>111</sup> In addition, his “access is such that . . . the Pentagon has arranged numerous trips to Iraq, Afghanistan and other hotspots solely for his benefit.”<sup>112</sup> General McCaffrey simultaneously did business with a number of companies that had financial relationships with the Defense Department.<sup>113</sup> Then, in his role as an NBC military analyst, General McCaffrey would advocate for “wartime policies and spending priorities that are in line with his corporate interests,” despite the fact that “those interests are not described to NBC’s viewers.”<sup>114</sup> As a military analyst, he is presented “as a dispassionate expert, not someone who helps companies win contracts related to the wars he discusses on television.”<sup>115</sup> General McCaffrey’s financial ties were never disclosed on air, but “NBC executives asserted that the general’s relationships with military contractors are indirectly disclosed” because his biography is on NBC’s website, which links to his consulting firm’s website that provides all the relevant disclosures.<sup>116</sup> His website, however,

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raised important questions but did not “implicate the prohibition on the use of appropriations for publicity or propaganda purposes . . .”).

109. See David Barstow, *One Man’s Military-Industrial-Media Complex*, N.Y. TIMES (Nov. 29, 2008), <https://www.nytimes.com/2008/11/30/washington/30general.html> (last visited Nov. 16, 2019) [hereinafter *One Man’s Military-Industrial-Media Complex*] (detailing how General McCaffrey used his role as a military analyst to promote his financial interests with the Defense Department) [perma.cc/QB2J-6W83].

110. See *id.* (describing General McCaffrey’s influence on network news programs).

111. *Id.*

112. *Id.*

113. See *id.* (noting that “General McCaffrey has immersed himself in businesses that have grown with the fight against terrorism,” such as Defense Department contractors Defense Solutions and HNTB Federal Services, as well as the private equity firm Veritas Capital, which owns equity in contractors).

114. *Id.*

115. *Id.*

116. *Id.*

listed “his board memberships” but did “not name his clients.”<sup>117</sup> NBC News’ president at the time, Steve Capus, maintained that “he was unaware of General McCaffrey’s connection” to a Defense Department contract awarded to Veritas Capital, a private equity firm that General McCaffrey was working for at the time.<sup>118</sup> “Mr. Capus declined to comment on whether this information should have been disclosed.”<sup>119</sup>

*C. Undisclosed Financial Conflicts of Interest in Corporate Media  
Continue to Take Place*

Similar undisclosed financial conflicts of interest have continued to this day.<sup>120</sup> For example, on January 5, 2020, NBC had former Homeland Security Secretary Jeh Johnson on its *Meet the Press* program to discuss the U.S. military strike that killed Iranian General Qassem Soleimani.<sup>121</sup> NBC failed to disclose, however, that Johnson, at the time of his appearance, was a board member of Defense Department contractor Lockheed Martin.<sup>122</sup> In fact, nine other analysts brought on cable news to discuss this military action were revealed to have undisclosed financial relationships to the Defense Department.<sup>123</sup>

117. *Id.*

118. *Id.*

119. *Id.*

120. See Robert Parry, *Ukraine, through the US Looking Glass*, CONSORTIUM NEWS (Apr. 16, 2014), <http://consortiumnews.com/2014/04/16/ukraine-through-the-us-looking-glass/> (last visited Feb. 21, 2020) (providing instances of the U.S. media allegedly distorting coverage of the Ukraine-Russia tensions) [perma.cc/57F3-RAQ8].

121. See *Meet the Press – January 5, 2020*, NBC NEWS (Jan. 5, 2020), <https://www.nbcnews.com/meet-the-press/meet-press-january-5-2020-n1110181> (last visited Feb. 21, 2020) (providing the full transcript of the day’s *Meet the Press* program) [perma.cc/WP9F-3FCX].

122. See Judd Legum (@JuddLegum), TWITTER (Jan. 5, 2020, 2:34 PM), <https://twitter.com/JuddLegum/status/1213906520359997440> (last visited Feb. 21, 2020) (quoting Jeh Johnson’s *Meet the Press* statements and providing a screenshot of his Lockheed Martin biography) [perma.cc/2EGU-4DKU].

123. See Judd Legum, *9 Iran Pundits With Undisclosed Ties to the Defense Industry*, POPULAR INFORMATION (Jan. 9, 2020), [popular.info/p/9-iran-pundits-with-undisclosed-ties](http://popular.info/p/9-iran-pundits-with-undisclosed-ties) (last visited Feb. 17, 2020) (noting that “[v]iewers are not told of the pundits’ current role in the private sector or their defense industry ties.”) [perma.cc/XT6J-QFUZ].

*IV. The Case for FCC Regulation of Undisclosed Financial  
Conflicts of Interest*

In order to get a sense of why undisclosed financial conflicts of interest in corporate media are aptly defined as news distortion, it is essential to (1) look to the FCC's own interpretation of and intention behind its news distortion policy, and (2) examine the U.S. Supreme Court's (Supreme Court) view of the FCC's regulatory function.<sup>124</sup>

*A. The Policy Reasons Behind the News Distortion Doctrine*

The FCC has been saddled with the arduous task of creating regulations that serve the “public interest.”<sup>125</sup> Two primary regulatory purposes can be fashioned out of this standard: (1) To protect the public's interest in consuming factually based news and information, and (2) to ensure that the broadcasting framework furthers citizen self-governance.<sup>126</sup> The News Distortion Doctrine arose out of these purposes, with the FCC stating in 1949, in its first on-the-record statement addressing news distortion, that “[t]he basis for any fair consideration of public issues, and particularly those of a controversial nature, is the presentation of news and information concerning the basic facts of the controversy in as complete and impartial a manner as possible.”<sup>127</sup> It went on to assert that the “licensee would be abusing his position as public trustee . . . were he to withhold from expression over his facilities relevant news or facts concerning a controversy or to slant or

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124. See Bejesky, *supra* note 95, at 359–60 (describing how the government's official position dominated Iraq war media coverage at the expense of other sources and viewpoints).

125. 47 U.S.C. § 309(a) (2018).

126. See Complaints Covering CBS Program “Hunger in America,” 20 F.C.C.2d 143, 151 (1969) (asserting that “[i]n all cases where way may appropriately do so, we shall act to protect the public interest in” consuming news that has not been intentionally distorted); see also Complaint Concerning the CBS Program “The Selling of the Pentagon,” 30 F.C.C.2d 150, 153 (1971) (“[The FCC has] allocated so much spectrum space to broadcasting precisely because of the contribution it can make to an informed public.”).

127. Report on Editorializing by Broadcast Licensees, 13 F.C.C. 1246, 1254 (1949).

distort the presentation [of] the news.”<sup>128</sup> The FCC asserted that licensee regulation is appropriate as a means of “ensuring the conditions for free-wheeling coverage of public affairs and the contribution [broadcasting] could make to citizen self-governance.”<sup>129</sup> It has gone further in recognizing a concern for the public good, stating that “[r]igging or slanting the news is a most heinous act against the public interest [and] . . . there is no act more harmful to the public’s ability to handle its affairs.”<sup>130</sup>

The FCC has interpreted its distortion policy to apply “to a wide range of forms of distortion, including staging (or rigging), slanting, falsification, deception (or misrepresentation) and suppression.”<sup>131</sup> The two most relevant forms for the purposes of this Note are deception (or misrepresentation) and slanting.<sup>132</sup> The former is concerned with “misleading the public about the source of information, such as presenting questions and suggestions written by news staff as if they were posed by viewers.”<sup>133</sup> Slanting is concerned with “the use of deliberate inaccuracy to favor one viewpoint, or disfavor another, on a matter of public significance.”<sup>134</sup> This can encompass “the systematic promotion or suppression of stories or viewpoints to serve the licensee’s ideological views or business interests.”<sup>135</sup> The FCC is “willing to discipline broadcasters for this type of speech” because it considers it to be “less worthy of First Amendment protection.”<sup>136</sup> It reasons that since “the danger is manipulation of the news to further the licensee’s business interests, rather than manipulation of the news

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128. *Id.* at 1254–55.

129. Raphael, *supra* note 5, at 494.

130. “*Hunger in America*,” 20 F.C.C.2d at 151.

131. Raphael, *supra* note 5, at 496.

132. *See id.* at 497 (listing the FCC’s various applications of its News Distortion Doctrine but clarifying that it “has not attempted any comparably clear definition” of these terms).

133. *Id.*

134. *Id.*

135. *Id.* at 497–98; *see also* Michael D. Bramble Complaint Against Paul Bunyan Broad. Co., 58 F.C.C.2d 565, 572 (1976) (“[T]he Commission believes that the deliberate suppression or attempted suppression of news because of the licensee’s private interests, personal opinions or prejudices is a form of ‘rigging,’ ‘slanting,’ or ‘deliberate distortion’ of the overall news presentation of the station.”).

136. Raphael, *supra* note 5, at 529.

to create a biased or one-sided impression on public issues,” the FCC “need not be as hesitant in imposing a sanction” because “there is less potential for [government] censorship.”<sup>137</sup>

The undisclosed financial conflicts of interest presented in Part III effectively misrepresent the information and slant its presentation in furtherance of financial interests, thus qualifying as news distortion.<sup>138</sup> In both case studies, viewers were not told throughout its Iraq war coverage of the network’s financial relationship to the Defense Department, thus having no context to understand the lens through which the news was being presented.<sup>139</sup> A network’s or analyst’s financial relationship to the Defense Department is certainly relevant when the discussion is centered around whether that department should take military action.<sup>140</sup> On-air disclosure of this information would likely provide the viewers with a better understanding of why the news was slanted in the way that it was or why Phil Donahue was summarily fired.<sup>141</sup> This Note does not propose a revival of the Fairness Doctrine, which mandated networks to present both sides of a news story, but seeks rather to provide viewers with the relevant information to allow them to decide for themselves whether news coverage is slanted or not.<sup>142</sup>

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137. Application of WMJX, Inc., 85 F.C.C.2d 251, 266 (1981).

138. See Bejesky, *supra* note 95, at 353 (observing that “[n]inety-five percent of citizens were wrong” about whether Iraq had, or was trying to develop, weapons of mass destruction, “perhaps because they did not possess a satisfactory understanding to make an objective and informed assessment with the information they received from the media”).

139. See *supra* Part III (detailing these conflicts of interest and the networks’ failures to disclose them on-air).

140. See *Conflict of Interest*, MERRIAM-WEBSTER <https://www.merriam-webster.com/dictionary/conflict%20of%20interest> (last visited Feb. 21, 2020) (defining a conflict of interest as “a conflict between the private interests and the official responsibilities of a person in a position of trust.”) [perma.cc/EBZ8-6WGB].

141. See *supra* note 100 and accompanying text (providing footage of Phil Donahue contextualizing his firing from MSNBC and describing how his show was bad for the network’s business).

142. See *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 369 (1969) (describing the mandates of the FCC’s Fairness Doctrine).



*B. The Supreme Court's Position on the FCC's Regulatory Role*

The Supreme Court has made it clear that “[i]t is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the government itself or a private licensee.”<sup>143</sup> Justice Stephen Breyer observed that “democratic government presupposes and the First Amendment seeks to achieve” the facilitation of “public discussion and informed deliberation.”<sup>144</sup>

In this spirit, the Court has stated that FCC policy should be crafted to foster “the widest possible dissemination of information from diverse and antagonistic sources” because this is “essential to the welfare of the public.”<sup>145</sup> It has afforded the FCC significant regulatory discretion to promote this public interest standard.<sup>146</sup> This regulatory role is considered vital because “freedom of speech from governmental interference under the First Amendment does not sanction repression of that freedom by private interests.”<sup>147</sup>

The Supreme Court reiterated its concern for speech suppression by private interests when it reviewed the constitutionality of the now-repealed Fairness Doctrine, which required broadcast stations to discuss public issues and ensure “that each side of those issues [is] . . . given fair coverage.”<sup>148</sup> The Supreme Court held the doctrine to be constitutional, stating that “[t]here is no sanctuary in the First Amendment for unlimited private censorship operating in a medium not open to all.”<sup>149</sup> The

143. *Id.* at 390.

144. *Turner Broad. Sys. v. FCC (Turner II)*, 520 U.S. 180, 227 (1997) (Breyer, J., concurring).

145. *Turner Broad. Sys. v. FCC (Turner I)*, 512 U.S. 622, 663 (1994) (quoting *Associated Press v. United States*, 326 U.S. 1, 20 (1945)).

146. *See FCC v. WNCN Listeners Guild*, 450 U.S. 582, 596 (1981) (“Our opinions have repeatedly emphasized that the Commission’s judgment regarding how the public interest is best served is entitled to substantial judicial deference.”).

147. *Associated Press v. United States*, 326 U.S. 1, 20 (1945); *see also Turner I*, 512 U.S. at 657 (“[F]reedom of speech does not disable the government from taking steps to ensure that private interests not restrict . . . the free flow of information and ideas.”).

148. *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 369 (1969).

149. *Id.* at 392.

Supreme Court based its reasoning primarily on the scarcity rationale, which is the theory that more restrictive regulation is justified in broadcast media because it is a limited access platform.<sup>150</sup> This rationale is given less weight today due to the rapid evolution of the internet and alternative media forms, but the Supreme Court has also used other theories to uphold broadcast media regulations, such as the pervasive presence theory.<sup>151</sup> This theory proffers that broadcast media is so prevalent and hard to avoid at times that government regulation will not offend First Amendment principles the way similar regulation of print media would.<sup>152</sup> The Supreme Court invoked this theory when it upheld FCC indecency regulations against broadcast media.<sup>153</sup> Indeed, the Supreme Court believes that the FCC “is entitled to take into account the reality that in a very real sense listeners and viewers constitute a ‘captive audience.’”<sup>154</sup>

While these Supreme Court opinions support FCC regulation, the complexity for the News Distortion Doctrine arises when the editorial discretion standard is considered.<sup>155</sup> The Supreme Court has stated that “[p]ublic and private broadcasters alike are not only permitted, but indeed required, to exercise substantial editorial discretion in the selection and presentation of their programming.”<sup>156</sup> Broadcasters are afforded “the widest possible journalistic freedom consistent with its public obligations,” and the FCC may only regulate them under the authority of the

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150. *See id.* at 390 (“Because of the scarcity of radio frequencies, the Government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium.”).

151. *See FCC v. Pacifica Found.*, 438 U.S. 726, 748 (1978) (“[T]he broadcast media have established a uniquely pervasive presence in the lives of all Americans.”).

152. *See id.* (noting that the “broadcast audience is constantly tuning in and out” which makes it hard to protect the “viewer from unexpected program content”).

153. *See id.* (reasoning that “offensive, indecent material presented over the airwaves confronts the citizen, not only in public, but in the privacy of the home . . .”).

154. *CBS, Inc. v. Democratic Nat’l Comm.*, 412 U.S. 94, 127 (1973).

155. *See Affiliated Media, Inc.*, 28 FCC Rcd 14873, 14881 (2013) (declining to take action against a license assignment applicant because, even if the distortion allegations were found to be true, the actions were considered to be within the applicant’s editorial discretion).

156. *Ark. Educ. Television Comm’n v. Forbes*, 523 U.S. 666, 674 (1998).

Communications Act of 1934 “when the interests of the public are found to outweigh the private journalistic interests of the broadcasters.”<sup>157</sup> Under this framework, the government’s regulatory role is to ensure that editorial discretion remains in furtherance of the public interest, not in conflict with it.<sup>158</sup>

*C. Regulation in this Area Furthers FCC Objectives and First Amendment Principles*

FCC regulation of corporate media’s financial conflicts of interest would further the FCC’s dual purpose of ensuring that broadcasters (1) present factually based news and (2) promote an informed citizenry.<sup>159</sup> The undisclosed conflicts undermine this dual purpose and are inconsistent with the First Amendment’s ideals.<sup>160</sup>

The FCC is most comfortable regulating a broadcaster when that broadcaster has slanted or misrepresented the news in order “to further the [broadcaster’s] business interests.”<sup>161</sup> The examples provided in Part III fit comfortably within this description.<sup>162</sup> Consider the GE/NBC example discussed above.<sup>163</sup> The leaked internal NBC memorandum highlighted a direct link between NBC’s actions related to Phil Donahue’s show and GE’s business interests with the U.S. Defense Department.<sup>164</sup> Next, consider the Pentagon Pundit Program example.<sup>165</sup> The military analysts’ financial relationships to the Defense Department presented

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157. *CBS, Inc. v. Democratic Nat’l Comm.*, 412 U.S. 94, 110 (1973).

158. *See id.* at 111 (discussing the FCC’s now-repealed Fairness Doctrine and noting that the broadcaster’s “discretion is bounded by rules designed to assure that the public interest in fairness is furthered”).

159. *See cases cited supra* note 127 and accompanying text.

160. *See discussion supra* Part III (presenting numerous examples of undisclosed conflicts on television networks).

161. *See case cited supra* note 137 and accompanying text.

162. *See supra* Part III (providing examples of news distortion and financial conflicts of interest on television networks).

163. *See supra* Section III.A (describing NBC’s financial ties to the Defense Department and its cancellation of Phil Donahue’s show).

164. *See supra* note 98 and accompanying text.

165. *See supra* Section III.B (detailing the coordinated Defense Department efforts to have media analysts advocate for the Iraq war).

financial conflict of interests that, while not directly sourced to the networks, raise the same misrepresentation problem.<sup>166</sup> The media has an immensely powerful role in shaping public opinion, and thus the viewing public's ability to develop informed opinions is harmed when crucial information is omitted.<sup>167</sup>

Moreover, these undisclosed financial conflicts of interest are inconsistent with the First Amendment's purpose of "preserv[ing] an uninhibited marketplace of ideas."<sup>168</sup> This is evidenced by the disproportionate amount of time media networks have spent presenting the government's official position at the expense of other viewpoints, specifically in times of war.<sup>169</sup> This reality compromises the "dominant paradigm" of the marketplace of ideas and necessitates fresh thinking on how that marketplace can actually be achieved.<sup>170</sup>

Although it appears counterintuitive, compelling arguments have been made that government regulation is sometimes necessary to further democratic values of free speech.<sup>171</sup> All government action relating to speech is understandably suspect

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166. *See id.* (describing the Pentagon Pundit Program and the multitude of incidents in which broadcast networks hosted military analysts without disclosing their financial conflicts of interest).

167. *See* ROBERT ENTMAN, PROJECTIONS OF POWER: FRAMING NEWS, PUBLIC OPINION, AND U.S. FOREIGN POLICY 6 (2004) (describing the phenomenon of "substantive framing" in mass media and the impact that it has on public opinion); *see also* EDWARD S. HERMAN & NOAM CHOMSKY, MANUFACTURING CONSENT: THE POLITICAL ECONOMY OF THE MASS MEDIA 2 (2d ed. 2002) (analyzing mass media's corporate structures and the outsized role they play in influencing public opinion).

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

169. *See* Bejesky, *supra* note 124, at 361–62 (noting study findings conducted over a one-week period that "of the 267 on-camera sources, [75%] were current or former government officials, just [6%] were skeptics about the need for war, and less than [1%] were identified with anti-war activism"); *see also id.* at 359 (citing a University of Maryland study that found a "symbiotic relationship between policymakers and the press" during coverage of the Iraq war); Hannibal Travis, *Media Self-Censorship: Postmodern Censorship of Pacifist Content on Television and the Internet*, 25 N.D. J. L. ETHICS & PUB. POL'Y 47, 62 (noting that, during the Gulf War of 1991, "[n]ational anti-war leaders appeared on television about [99%] less often than national leaders in support of the war.>").

170. Bejesky, *supra* note 124, at 357.

171. *See* CASS SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH xix (1st ed. 1993) (devoting "particular attention to the possibility that government controls on the broadcast media, designed to ensure diversity of view and attention to public affairs, would help the system of free expression").

and “thought to compromise First Amendment principles,” but these particular financial conflicts of interest present a unique case where government action has the ability to “actually promote those very principles.”<sup>172</sup> According to legal theorist Thomas I. Emerson, there are four primary functions of democratic freedom of expression, two of which are to “advance knowledge and discover[] truth,” and “to provide for participation in decision making by all members of society.”<sup>173</sup> These functions echo both the FCC’s and Supreme Court’s statements on free expression.<sup>174</sup> The conflicts of interest presented in Part III are incompatible with these fundamental principles.<sup>175</sup> Such vital First Amendment issues command their own discussion and will be explored at length in Part VI.<sup>176</sup>

*D. The News Distortion Doctrine Cannot Address These Issues,  
but the Principles Behind It Can*

The New Distortion Doctrine is unable to address the distortion issues presented in Part III.<sup>177</sup> First, it only applies to licensed broadcast stations.<sup>178</sup> It thus does not reach any undisclosed financial conflicts of interest on cable networks such as MSNBC, CNN, and Fox News. Second, the FCC’s inability to independently enforce the Doctrine renders it largely “symbolic” as “suggested by the paucity of distortion decisions against broadcasters, and of significant penalties assessed.”<sup>179</sup> This presumably does little to discourage broadcasters from engaging in this type of behavior.<sup>180</sup> Third, the distortion issues identified in

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172. *Id.*

173. THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 6–9 (1970).

174. See discussion *supra* Section IV (outlining both the Supreme Court’s and FCC’s views on freedom of expression).

175. See *supra* Part III (providing examples of news distortion and financial conflicts of interest on television networks).

176. See *infra* Part IV.

177. See *supra* Part III.

178. See case cited *supra* note 18 and accompanying text.

179. Raphael, *supra* note 5, at 510.

180. See Timmer *supra* note 35, at 22 (providing examples of news distortion allegations from as recently as 2016).

Part III would not fall under the current Doctrine.<sup>181</sup> While the fourth element (implication of a significant news event) of the FCC's policy will presumably be met, the first three impose higher burdens of proof that are rarely met, as evidenced by the FCC's inability to reach a finding of news distortion on the overwhelming majority of occasions.<sup>182</sup> Fourth, the FCC's caselaw indicates that it seems unsure of what is and is not actionable news distortion under its own policy.<sup>183</sup> For example, the FCC has stated that broadcaster news manipulations that are intended to serve their business interests are more worthy of FCC intervention than other types of distortion.<sup>184</sup> However, the FCC contradicted this assertion in the previously discussed *Affiliated Media, Inc.* case, in which it said that evidence of news manipulation intended to serve the broadcaster's business interests would not rise to the level of distortion.<sup>185</sup> This inconsistency can be attributed to the amorphous construction of the policy which enables the FCC's interpretation to vary from case to case.<sup>186</sup> This can make it hard for the broadcasters to determine whether they will face FCC scrutiny the next time they have to apply for a license renewal.<sup>187</sup>

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181. See *supra* Section II.A (deducing the four elements of news distortion under current policy as (1) intent to slant or mislead, (2) extrinsic evidence to support the allegation, (3) knowledge from management or upper-level personnel, and (4) implication of a significant news event).

182. See *supra* notes 52–53 and accompanying text.

183. See *supra* Section II.B (analyzing the FCC's distortion cases over the last several decades).

184. See *supra* notes 126–129 and accompanying text.

185. See *Affiliated Media, Inc.*, 28 FCC Rcd. 14873, 14881 (2013) (stating that allegations of a corporate owner of multiple Alaskan broadcast stations “tailor[ing] the news” in order to be more “favorable to [its] corporate interests . . . even if true, would be insufficient to make out a *prima facie* showing” of news distortion).

186. See *supra* Section II.B (analyzing the FCC's distortion cases over the last several decades).

187. See Michael D. Bramble Complaint Against Paul Bunyan Broad. Co., 58 F.C.C.2d 565, 572 (1976) (asserting that “that the deliberate suppression or attempted suppression of news because of the licensee's private interests” constitutes “a form of ‘rigging,’ ‘slanting,’ or ‘deliberate distortion’ of the overall news presentation of the station.”). *But see Affiliated Media*, 28 FCC Rcd. at 14881 (stating that allegations of distortion expressly motivated by business interests “would be insufficient” to constitute news distortion).

*V. Authorizing and Proposing a Financial Conflict of Interest Disclosure Rule*

*A. The Proposed Disclosure Rule Should Apply to Networks Hosted on Cable and Satellite*

The FCC’s rationale behind its news distortion policy is straightforward: It considers news distortion to be a “heinous act against the public interest” that harms “the public’s ability to handle its affairs.”<sup>188</sup> The policy’s purpose of reducing news distortion will be furthered by its application to cable networks, due to their “outsized” impact on public perception.<sup>189</sup> While cable news garners the least number of viewers among the three primary television news mediums (local television news, national networks such as CBS and NBC, and cable networks), its viewership group spends significantly more time watching than the other two viewership groups.<sup>190</sup> Even heavy viewers of local television news and network news have been found to spend more time watching cable news than these other news mediums.<sup>191</sup> This “deeper level of viewer engagement” helps explain why cable news is perceived as having “an outsized ability to influence the national debate and news agenda.”<sup>192</sup> The reality of this influence heightens the importance of applying the news distortion policy to cable.<sup>193</sup>

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188. Complaints Covering CBS Program “Hunger in America,” 20 F.C.C.2d 143, 151 (1969).

189. See Nareissa L. Smith, *Consumer Protection in the Marketplace of Ideas: A Proposal to Extend the News Distortion Doctrine to Cable Television News Programs*, 40 T. MARSHALL L. REV. 223, 235–37 (2015) (examining studies on cable news and noting that these outlets have a significant, and at times “outsized,” ability to influence the public).

190. See Mark Jurkowitz & Amy Mitchell, *How Americans Get TV News at Home*, PEW RESEARCH CENTER: JOURNALISM & MEDIA (Oct. 11, 2013), <https://www.journalism.org/2013/10/11/how-americans-get-tv-news-at-home/> (last visited Feb. 21, 2020) (“On average, the cable news audience devotes twice as much time to that news source as local and network viewers spend on those platforms.”) [perma.cc/TS5Q-46KN].

191. See *id.* (“The heaviest local news viewers spend, on average, 11 more minutes watching cable news than local news. The heaviest network news viewers spend about one more minute watching cable news than they do network news.”).

192. *Id.*

193. See Smith, *supra* note 188, at 237 (“In sum, cable news is more popular

*B. The FCC Has Authority to Regulate Cable and Satellite, but It Is Limited*

In this administrative area, the courts have given Congress and the FCC significant latitude to determine the extent of the FCC's jurisdiction.<sup>194</sup> With regard to cable networks in particular, the Supreme Court held in *United States v. Southwestern Cable Co.*<sup>195</sup> that the FCC's jurisdiction extends to cable.<sup>196</sup> In that case, the FCC issued rules limiting the extent to which cable television operators could expand their service, and the issue was whether the FCC had the authority to make this rule and issue a prohibitory order to enforce it.<sup>197</sup> Holding in favor of the FCC, the Supreme Court determined that the FCC had "reasonably concluded that regulatory authority over [cable television] is imperative if it is to perform with appropriate effectiveness certain of its other responsibilities."<sup>198</sup> The Court concluded that the FCC's authority to regulate cable extended only to actions considered to be "reasonably ancillary to the effective performance of the [FCC's] various responsibilities for the regulation of television broadcasting."<sup>199</sup> In light of this decision, the FCC proceeded to promulgate rules governing cable television in 1972.<sup>200</sup> This included rules such as "equal time, sponsorship identification and other provisions similar to [those] applicable to broadcasters."<sup>201</sup>

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than its counterparts, its viewers are more engaged, and cable news is the most accepted source of news for politics, business, and social issues.").

194. See *Galloway v. FCC*, 778 F.2d 16, 21 (D.C. Cir. 1985) ("[W]ithin the constraints of the Constitution, Congress and the [FCC] may set the scope of broadcast regulation . . .").

195. See *United States v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968) (holding that the FCC's jurisdiction extends to cable).

196. See *id.* ("[W]e therefore hold that the [FCC's] authority over 'all interstate . . . communication by wire or radio' permits the regulation of CATV [or cable] systems.").

197. See *id.* at 166–67 (describing the factual history behind the FCC's rule proposals and the subsequent legal issues that arose from those actions).

198. See *id.* at 173.

199. *Id.* at 178.

200. See *Cable Television*, FEDERAL COMMUNICATIONS COMMISSION (last updated Dec. 15, 2015), <https://www.fcc.gov/media/engineering/cable-television> (last visited Feb. 21, 2020) (describing the extensive history of the FCC's cable television regulation) [perma.cc/9Q3K-W6AV].

201. *Id.*



Congress later passed the Cable Communications Policy Act of 1984, which affirmatively established the FCC's authority to regulate cable television.<sup>202</sup> The FCC's regulatory authority over satellite is similar to that of cable.<sup>203</sup>

Legal scholars have proposed to extend the News Distortion Doctrine to cable television, and that proposal is adopted here for the disclosure rule.<sup>204</sup> The scope of this regulatory authority, however, is limited.<sup>205</sup> Therefore, this Note proposes that Congress amend the Communications Act of 1934 to give the FCC explicit statutory authorization to promulgate disclosure requirements applicable to cable and satellite providers, in addition to licensed broadcasters.

*C. Applying the Disclosure Rule to Cable and Satellite: Proposing a Statutory Amendment to the Communications Act of 1934*

Section 612 of the Communications Act of 1934, which is codified as 47 U.S.C. § 532 and governs the use of “cable channels for commercial use,” should be amended to expressly authorize and direct the FCC to promulgate disclosure requirements for video programming provided through multichannel video programming distributors.<sup>206</sup> The term “multichannel video programming distributors” is proposed in order to encompass both cable and satellite providers, which host the network channels.<sup>207</sup> The model statutory amendment will read as follows:

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202. See Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779 (“To amend the Communications Act of 1934 to provide a national policy regarding cable television.”).

203. See *Time Warner Entm’t Co. v. FCC*, 93 F.3d 957, 977 (D.C. Cir. 1996) (upholding § 25 of the 1992 Cable Act which required direct broadcast satellite (DBS) providers to allocate channels for noncommercial and educational programming).

204. See Smith, *supra* note 188, at 263–64 (proposing to extend the News Distortion Doctrine’s application to cable news).

205. See *Turner Broad. Sys. v. FCC (Turner II)*, 520 U.S. 180, 223–25 (1997) (upholding the FCC’s content-neutral must-carry rules but declining to address the scope of the decision’s applicability to content-based regulations).

206. 47 U.S.C. § 532 (2018).

207. See 47 U.S.C. § 522(13) (2018) (“[T]he term ‘multichannel video programming distributor’ means a person such as, but not limited to, a cable operator, . . . a direct broadcast satellite service, or a television receive-only

Synopsis. “An Act to amend the Communications Act of 1934 to provide increased transparency for viewers and to promote the public’s interest in enhanced public discussion and an informed citizenry.”

Section 1. Financial Conflict of Interest Disclosure Requirement.

(a) Authority to Enforce. Section 612 of the Communications Act of 1934 (47 U.S.C. § 532) is amended in the following ways:

(1) subsection (c)(2) is amended by adding the following clause at the end of its paragraph: “and may require disclosure regulations pursuant only to the requirements of subsection (k)”;

(2) subsection (h) is amended by adding the following sentence at the end: “This subsection shall also permit a multichannel video programming distributor, as defined under 47 U.S.C. § 522, to enforce a written and published financial disclosure policy in accordance with subsection (k).”

(b) Commission Regulations. Subsection 612 of the Communications Act of 1934 (47 U.S.C. § 532) is amended by inserting after subsection (j) the following new subsection:

“(k) Within 120 days following the date of the enactment of this subsection, the Commission shall initiate a rulemaking proceeding to prescribe regulations requiring on-air financial disclosures of an on-air person’s or entity’s financial conflict(s) of interest, during any discussion of U.S. military action or proposed U.S. military action. The regulations shall define financial conflicts of interest for the purposes of this subsection and provide clear disclosure guidelines with which multichannel video programming distributors must comply.”<sup>208</sup>

The statutory language is modeled after amendments that were made to this same section as part of the Cable Television Consumer Protection and Competition Act of 1992 (Cable Act of 1992).<sup>209</sup> The framework authorizes cable and satellite providers to

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satellite program distributor, who makes available for purchase, by subscribers or customers, multiple channels of video programming[.]”).

208. See 47 U.S.C. § 532 (2018); see *generally* Cable Television Consumer Protection and Competition Act of 1992, § 10, Pub. L. No. 102-385, 106 Stat. 1460 (providing the textual template for the statutory amendment proposal).

209. See 47 U.S.C. § 532 (2018) (authorizing both cable operators and the FCC to regulate indecent programming).

publish and enforce the disclosure rules themselves, in the same way that the Cable Act of 1992 authorized cable operators to publish and enforce indecency regulations.<sup>210</sup> This amendment will provide the express congressional authority necessary for the FCC to promulgate the financial conflicts of interest disclosure requirement presented in the following subsection.

*D. Proposing a Financial Conflicts of Interest Disclosure Requirement*

To address the news distortion issues presented in Part III, the following model regulation is proposed to be promulgated by the FCC:

Financial Conflicts of Interest Disclosure Requirement.

(a) A financial conflict of interest, for the purpose of this rule, is defined as a financial relationship in which a person or entity who will appear on-air to discuss an ongoing, proposed, or potential U.S. military action, has, either directly or through a third party, a personal financial interest in the affairs of the U.S. Defense Department.

(b) On-air disclosure of a financial conflict of interest is required if the following two elements are met: (1) An ongoing, proposed, or potential U.S. military action is being discussed on-air, and (2) a person on-air to discuss the action, or the multichannel video programming distributor or television network, has a financial conflict of interest as defined by subsection (a).

(c) The disclosure required by subsection (b) shall be provided for the entirety of the on-air discussion and shall fully disclose the identity of the third party, if such third party exists, that is the source of the financial conflict of interest.

The rule must be promulgated in accordance with the requirements set forth by the Administrative Procedure Act (APA).<sup>211</sup> It will apply to all network channels hosted by cable and satellite providers, as authorized by the proposed statutory authorization. The disclosure rule should also be applied to

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210. See *id.* (authorizing cable operators to enforce “a written and published policy” regulating indecent programming).

211. See 5 U.S.C. § 553 (2018) (prescribing the rule making procedures for agency action).

licensed broadcasters in addition to, not in place of, the current News Distortion Doctrine.<sup>212</sup> This ensures the rule's applicability to all networks addressed in Part III.<sup>213</sup> The FCC shall have the authority to enforce fines for the violations of the rule, as it does for other promulgated regulations.<sup>214</sup>

The proposed rule follows the principle of current FCC rules requiring on-air disclosure of any programming that the station has been paid to air.<sup>215</sup> In addition, the proposal is in effect a codification of transparency principles that exist in ethical codes for both journalism and television news.<sup>216</sup> For example, the Public Broadcasting Service, in its Editorial Standards and Practices, states that "transparency requires that producers disclose to the audience all sources of funding for the production and distribution of content."<sup>217</sup>

This rule imposes an affirmative duty on broadcasters and television networks to be aware of any existing financial conflicts of interest before they air programming related to U.S. military action. This duty will ensure that the viewing public is provided

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212. See *supra* note 3 and accompanying text. (discussing the News Distortion Doctrine).

213. See *supra* Part III (providing detailed examples of undisclosed financial conflicts of interest in both broadcast and cable media).

214. See *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 258 (2012) (striking down fines, levied against Fox and ABC for violations of the FCC's indecency rules, on "fair notice grounds," not on the FCC's authority to impose the fines).

215. See 47 U.S.C. § 317 (2018) ("All matter broadcast by any radio station for which any money . . . is directly or indirectly paid [to] . . . the station so broadcasting, from any person, shall . . . be announced as paid or furnished, as the case may be, by such person . . .").

216. See *Code of Ethics*, RADIO TELEVISION DIGITAL NEWS ASS'N (June 11, 2015), [https://www.rtdna.org/content/rtdna\\_code\\_of\\_ethics](https://www.rtdna.org/content/rtdna_code_of_ethics) (last visited Feb. 21, 2020) ("[I]ndependence from influences that conflict with [the] public interest remains an essential ideal of journalism. Transparency provides the public with the means to assess credibility and to determine who deserves trust.") [perma.cc/7QAV-2RPB]; see also *SPJ Code of Ethics*, SOC'Y OF PRO. JOURNALISTS (Sept. 6, 2014), <https://www.spj.org/ethicscode.asp> (last visited Feb. 21, 2020) (stating that journalists should "[d]isclose unavoidable conflicts" and "[i]dentify content provided by outside sources, whether paid or not.") [perma.cc/EL48-R3BF].

217. *PBS Editorial Standards and Practices*, PUBLIC BROADCASTING SERVICE (last updated Aug. 2018), <https://www.pbs.org/about/producing-pbs/editorial-standards/> (last visited Feb. 21, 2020) [perma.cc/8ZS3-4YT6].

with vital context when receiving information on an incredibly sensitive news topic.<sup>218</sup>

### VI. First Amendment Constitutional Analysis

There are, of course, serious First Amendment concerns raised by any proposal to the government to regulate the media.<sup>219</sup> This Part addresses those concerns and argues that the rule does not chill, suppress, or compel speech, but rather promotes speech in the spirit of the First Amendment.

It is worth noting at the outset that the statutory amendment proposal raises the preliminary constitutional issue of Congress' authority to pass the law and delegate responsibilities to the FCC.<sup>220</sup> The Communications Act of 1934 was passed under the constitutional authority of the Commerce Clause, and Congress has long had the authority to delegate certain powers to government agencies, so these issues will not be addressed here.<sup>221</sup>

In the FCC regulatory context, there are two separate groups with competing First Amendment interests that must be balanced: The viewing public on one hand and networks, cable operators, broadcasters, and other media entities on the other.<sup>222</sup> The Supreme Court has stated that it “is the right of the viewers and listeners, not the right of broadcasters, which is paramount.”<sup>223</sup> The forthcoming constitutional analysis necessarily focuses on the interests of the latter groups, considering that they bear the

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218. See Report on Editorializing by Broadcast Licensees, 13 F.C.C. 1246, 1254 (1949) (emphasizing the importance of presenting news and information “in as complete and impartial a manner as possible”).

219. See U.S. CONST. amend. I (“Congress shall make no law . . . abridging the freedom of . . . the press . . .”).

220. See *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928) (requiring Congress to articulate an “intelligible principle” before it delegates authority to a government agency).

221. See *id.* (holding that Congress may delegate its authority subject to certain limitations); see also 47 U.S.C. § 151 (2018) (creating the FCC for “the purpose of regulating interstate and foreign commerce in communication”).

222. See *CBS, Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 102–03, 110 (1973) (discussing the need to weigh the “interests of the public” with the “private journalistic interests of the broadcasters” to determine when regulatory action is appropriate).

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

burden of compliance with the proposed regulation.<sup>224</sup> The viewing public's First Amendment interests, however, are the motivating factor behind this rule proposal, and the objective here is to demonstrate that the furtherance of one does not require the constraint of the other.<sup>225</sup>

### A. *The Standard of Review for Media Regulations*

Although broadcast media regulations receive less constitutional scrutiny than print media regulations, cable media is subject to more demanding scrutiny than broadcast.<sup>226</sup> These legal distinctions have become increasingly questioned in recent years by Supreme Court Justices and legal scholars alike.<sup>227</sup> This debate is beyond the scope of this Note and is ultimately immaterial, because the standard of review analysis here will rest solely on whether the challenged regulations are content-based or content-neutral.<sup>228</sup>

In *Turner I*, the Supreme Court held that when reviewing the constitutionality of government regulations imposed on cable, intermediate scrutiny will be applied to content-neutral regulations while strict scrutiny will be applied to content-based regulations.<sup>229</sup> The Court's reason for the distinction was straightforward and has been a settled First Amendment principle

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224. See *supra* Section V.D. Proposing a Financial Conflicts of Interest Disclosure Requirement (applying the proposed rule to broadcasters, cable operators, and satellite providers).

225. See *supra* Section IV.C (arguing that FCC regulation would promote First Amendment principles).

226. See *Red Lion*, 395 U.S. at 748 (highlighting broadcast's more "limited First Amendment protection" compared to print); see also *Turner Broad. Sys. v. F.C.C. (Turner I)*, 512 U.S. 622, 637 (1994) ("[T]he rationale for applying a less rigorous standard of First Amendment scrutiny to broadcast regulation . . . does not apply in the context of cable regulation.").

227. See *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 532–33 (2009) (Thomas, J., concurring) ("The justifications relied on by the Court in *Red Lion* and *Pacifica* . . . neither distinguish broadcast from cable, nor explain the relaxed application of the principles of the First Amendment to broadcast.").

228. See *Turner I*, 512 U.S. at 662 (concluding that intermediate scrutiny, as opposed to strict scrutiny, will apply to content-neutral cable regulations).

229. See *Turner Broad. Sys. v. FCC (Turner II)*, 520 U.S. 180, 213 (1997) ("Content-neutral regulations do not pose the same 'inherent dangers to free expression' . . . that content-based regulations do . . .").

for some time: Content-based speech regulations are constitutionally suspect because they are more likely to have the effect of unconstitutionally suppressing speech, while content-neutral rules that only regulate the time, place, or manner of speech do not carry that same risk.<sup>230</sup>

The Supreme Court in *Turner I* reviewed the constitutionality of the FCC’s “so-called must-carry” rules, “which require cable operators to carry the signals of a specified number of local broadcast television stations.”<sup>231</sup> The Court found these rules to be content-neutral, reasoning that they did not “impose[] a restriction, penalty, or burden by reason of the views, programs, or stations the cable operator has selected or will select.”<sup>232</sup> In its second hearing of the case, the Court ultimately held these rules to be constitutional under the intermediate scrutiny standard of review.<sup>233</sup>

### *B. Constitutional Analysis of Financial Conflicts of Interest Rule Proposal*

There may be a strained argument that the proposed disclosure rule is content-neutral but, based on the Supreme Court’s *Turner I* precedent, a court will likely find it to be content-based.<sup>234</sup> The rule expressly applies to discussions of “U.S. military actions” so its application is contingent on the content of the speech.<sup>235</sup> Thus, a court would apply strict scrutiny when reviewing a constitutional challenge to this rule.<sup>236</sup>

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230. See *Turner I*, 512 U.S. at 676 (“The government does have the power to impose content-neutral time, place, and manner restrictions . . .”).

231. *Id.* at 630.

232. *Id.* at 644.

233. See *Turner II*, 520 U.S. at 224 (concluding that it will not “displace Congress’ judgment respecting content-neutral regulations with our own.”).

234. See *Turner Broad. Sys. v. F.C.C. (Turner D)*, 512 U.S. 622, 644 (1994) (finding the must-carry rules to be content-neutral because they do not impose “a restriction, penalty, or burden by reason of the views, programs, or stations the cable operator has selected or will select.”).

235. See *supra* Section V.D (proposing financial disclosure rule).

236. See *Turner I*, 512 U.S. at 643 (stating that “laws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content-based . . .”).

It does not follow, however, that any content-based law will fail, as content-based laws have passed strict scrutiny before.<sup>237</sup> In fact, the FCC has a number of content-based regulations applicable to licensed broadcasters, such as access requirements for political candidates, station identification requirements, and restrictions on obscene and indecent programming.<sup>238</sup> The indecency restrictions currently apply to cable but, regardless, the proposed statutory amendment unambiguously extends content-based regulatory authority to cable and satellite providers.<sup>239</sup>

A content-based law is constitutional if the government can prove to the court that it has a compelling interest, or purpose, for regulating the content and that the means chosen were narrowly tailored to achieve that purpose.<sup>240</sup>

First, the government has a compelling interest in promoting an informed citizenry able “to handle its affairs,” especially when it comes to an issue as consequential as military action.<sup>241</sup> The purpose thus promotes the public’s First Amendment “right to form and hold beliefs” in furtherance of “a system of freedom of expression.”<sup>242</sup> The Supreme Court has recognized the importance of this interest, stating that the “First Amendment’s command that government not impede the freedom of speech does not disable the government from taking steps to ensure that private interests [do] not restrict . . . the free flow of information and ideas.”<sup>243</sup>

Second, the disclosure requirement is narrowly tailored to serve the public’s First Amendment interests. It applies only to

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237. See *Burson v. Freeman*, 504 U.S. 191, 211 (1992) (holding that a state law, which prohibits vote solicitation at polling places on election days, survives strict scrutiny); see also *Holder v. Humanitarian L. Project*, 561 U.S. 1, 26–29 (2010) (upholding a law under a strict scrutiny analysis which prohibited the provision of support to designated foreign terrorist organizations).

238. See THE PUBLIC AND BROADCASTING, *supra* note 3, at 12–19 (listing the regulations applicable to all broadcasters).

239. See Cable Television Consumer Protection and Competition Act of 1992, § 10, Pub. L. No. 102-385, 106 Stat. 1460 (authorizing both cable operators and the FCC to regulate indecent programming).

240. See *Burson*, 504 U.S. at 199 (stating that the government “must demonstrate that its law is necessary to serve the asserted interest”).

241. Complaints Covering CBS Program “Hunger in America,” 20 F.C.C.2d 143, 151 (1969).

242. EMERSON, *supra* note 173, at 21–22.

243. *Turner Broad. Sys. v. FCC (Turner I)*, 512 U.S. 622, 657 (1994).



discussions about U.S. military action, preventing potential overreach into unintended areas and ensuring that networks are able to clearly comply with its requirements.<sup>244</sup> In addition, the rule does not suppress or censor speech but only requires public disclosure.<sup>245</sup> Challengers to this rule would argue that this is not a mild disclosure requirement but a form of compelled speech.<sup>246</sup> The Supreme Court disagrees, however, as it addressed this issue in *Citizens United v. FEC*<sup>247</sup> and held that a disclosure requirement for political campaign advertisements was constitutional.<sup>248</sup> The Court reasoned that the requirement did not violate the First Amendment because it “insure[s] that the voters are fully informed about who is speaking” and is “the less restrictive alternative to more comprehensive speech regulations.”<sup>249</sup>

Here, the FCC could seek to prohibit or limit on-air discussions where financial conflicts of interest exist, which would quite clearly be speech suppression.<sup>250</sup> A second alternative is to do nothing and leave the issue unaddressed, in which case the public’s First Amendment interest in a fully informed citizenry would be undermined.<sup>251</sup>

For these reasons, the proposed financial conflicts of interest disclosure rule should be upheld as constitutional under a strict scrutiny standard of review.

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244. See *supra* Section V.D (proposing financial disclosure rule).

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246. See *Riley v. Nat’l Fed’n of Blind*, 487 U.S. 781, 796 (noting that the First Amendment protects both “compelled speech and compelled silence”).

247. *Citizens United v. FEC*, 558 U.S. 310, 315 (2010) (holding that the disclaimer and disclosure requirements are constitutional because they do not “prevent anyone from speaking . . .”).

248. See *id.* at 16 (stating that the advertisements in question “avoid confusion by making clear that the ads are not funded by a candidate or political party”).

249. *Id.* at 315–16.

250. See *Bates v. City of Little Rock*, 361 U.S. 516, 528 (1960) (Black, J. concurring) (emphasizing that “First Amendment rights are beyond abridgment” whether it is through direct restraint or suppression).

251. See *supra* note 127 and accompanying text (discussing the FCC’s statement against news distortion).

### VII. Conclusion

The FCC created the News Distortion Doctrine in response to a recognition that news can be manipulated by broadcasters in a way that misleads the public and undermines its ability to “handle its affairs.”<sup>252</sup> The policy reasons behind the Doctrine are compelling and seek to further the First Amendment’s ideals, but the Doctrine itself has failed to do so.<sup>253</sup> The Doctrine is unduly hard to satisfy, the FCC has rarely enforced it when it appears it has been satisfied, and it only applies to a subset of mass media.<sup>254</sup> This Note has proposed a novel way of thinking about news distortion in order to advance the objectives behind the Doctrine.<sup>255</sup> As shown in Part III, serious distortion issues persist throughout televised media, in which central information on vital public matters are not disclosed to the public.<sup>256</sup> The FCC should promulgate disclosure rules applicable to media networks in broadcast, cable, and satellite in order to address these issues, and Congress should pass a statutory amendment to the Communications Act of 1934 to authorize this regulation.<sup>257</sup> This issue presents the rare situation where government regulation will further the First Amendment’s ideals to the public’s benefit.<sup>258</sup>

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252. Complaints Covering CBS Program “Hunger in America,” 20 F.C.C. 2d 143, 151 (1969).

253. See *supra* Section IV.D (proposing financial disclosure rule).

254. See *id.* (proposing financial disclosure rule).

255. See *supra* Part IV (explaining why undisclosed financial conflicts of interest should be thought of as news distortion).

256. See *supra* Part III (providing examples of how undisclosed financial conflicts of interest misled the public).

257. See *supra* Section V.C (applying the disclosure rule to cable and satellite: proposing a statutory amendment to the communications act of 1934).

258. See cases cited *supra* note 126 and accompanying text (discussing news distortion).