

WHITE HOUSE ANTI-DRUG POLICY: STATUTORY AND CONSTITUTIONAL IMPLICATIONS

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INTRODUCTION

On January 13, 2000, Salon.com, an Internet-based news organization, uncovered a relatively unknown White House effort to remunerate television networks for inserting anti-drug themes into nationally broadcast programs.¹ Salon.com later discovered that the effort encompassed major magazines as well.² Under this program, the White House Office of National Drug Control Policy ("ONDCP")³ permitted participating television networks to resell advertising time already paid for by Congress and earmarked for legitimate anti-drug messages, if the networks ensured that their programs incorporated dialogue and action displaying negative repercussions from drug use.⁴ Similarly, magazines could resell pre-paid advertising space if their editorials contained anti-drug themes.⁵

Despite the good intentions of ONDCP officials in attempting to reduce drug consumption in the United States, numerous concerns have been raised about the legality, constitutionality, and morality of the ONDCP's program. Section I will provide a comprehensive overview of the congressionally authorized Na-

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¹ See Daniel Forbes, *Prime-Time Propaganda*, SALON.COM NEWS, at <http://www.salon.com/news/feature/2000/01/13/drugs/index3.html> (Jan. 13, 2000) (on file with author) [hereinafter Forbes, *Prime-Time Propaganda*]; see also Daniel Forbes, *Propaganda for Dollars*, SALON.COM NEWS, at <http://www.salon.com/news/feature/2000/01/14/payola/index.html> (Jan. 14, 2000) (on file with author) [hereinafter Forbes, *Propaganda for Dollars*].

² See Daniel Forbes, *The Drug War Gravy Train*, SALON.COM NEWS, at <http://www.salon.com/news/feature/2000/03/31/magazines/index4.html> (Mar. 31, 2000) (on file with author) [hereinafter Forbes, *Gravy Train*].

³ The ONDCP is an executive-branch department that oversees spending of nearly \$18 billion annually for activities such as reducing the growth of coca in Latin America, helping to prevent drugs from entering the United States, and encouraging research and treatment of drug addiction. See Forbes, *Prime-Time Propaganda*, *supra* note 1.

⁴ See *id.*

⁵ See Forbes, *Gravy Train*, *supra* note 2.

tional Youth Anti-Drug Media Campaign. Section II will discuss how the Anti-Drug Media Campaign eventually devolved into what can be termed the “Ad Scheme.” Section III will examine the Ad Scheme’s revelation by Salon.com, as well as the government’s spin control. The paper will then discuss the Ad Scheme’s legal implications. Section IV will discuss how the Ad Scheme violates federal payola laws and Section V will discuss how the Ad Scheme violates the statutory guidelines set forth by the Anti-Drug Media Campaign itself. Section VI will demonstrate how the Ad Scheme is hypocritical, given the statutory prohibition against similar activities by foreign governments. Section VII will discuss how the Ad Scheme violates the Doctrine of Unconstitutional Conditions. Section VIII will consider the various ramifications of the Ad Scheme, including how it has the potential, if left unchecked, to encompass other mediums such as film and Internet communications. Finally, Section IX will conclude that the Ad Scheme threatens to further erode the already diminished trust of the American people in the government and media.

I. THE NATIONAL YOUTH ANTI-DRUG MEDIA CAMPAIGN

In October 1997, Congress approved the National Youth Anti-Drug Media Campaign,⁶ a five-year, \$975 million purchase of anti-drug television advertising.⁷ The Campaign’s primary restriction was that this commercial time could be purchased only from television networks willing to “donate” an equivalent amount of air time for additional anti-drug advertisements—essentially a two-for-the-price-of-one transaction.⁸ The funds could also be used to purchase print media advertising under the same conditions.⁹ In fiscal year 1998, the White House ONDCP, headed by “Drug Czar” General Barry R. McCaffrey, was given its first installment of \$195 million to target both the nation’s youth and “adult influencers.”¹⁰ In a press release that year, the ONDCP called the program “the largest and most complex social marketing campaign ever undertaken.”¹¹

The government’s television advertisements began running on

⁶ 21 U.S.C. §§ 1801-1804 (1998).

⁷ See Forbes, *Prime-Time Propaganda*, *supra* note 1.

⁸ See 21 U.S.C. §§ 1801-1804 (1998).

⁹ See Forbes, *Gravy Train*, *supra* note 2.

¹⁰ See Forbes, *Prime-Time Propaganda*, *supra* note 1.

¹¹ Press Release, Office of National Drug Control Policy, *White House Drug Czar Selects Ogilvy & Mather to Lead Advertising Component of National Youth Anti-Drug Media Campaign*, at <http://www.whitehousedrugpolicy.gov/news/press/1998/123098.html> (Dec. 30, 1998) (on file with author).

the media networks NBC, ABC, CBS, Warner Bros. ("WB"), and Fox during the summer of 1998, with UPN being added the following year.¹² One advertisement featured a teenager who boasted of an excellent academic record before succumbing to the temptations of marijuana and getting thrown out of his home.¹³ Another advertisement shows a young woman destroying her kitchen with a frying pan, demonstrating the supposed consequences of heroin addiction.¹⁴ About twenty-six magazines, including *U.S. News & World Report*, *Sporting News*, *Family Circle*, *Seventeen*, *Parade*, *U.S.A. Weekend*, *Essence*, *Ladies' Home Journal*, *Newsweek*, *Reader's Digest*, *Teen*, *T.V. Guide*, *Vibe*, *Sports Illustrated*, *People En Español*, *Life*, and *Family Life* participated in the print media component of the ONDCP's advertising campaign.¹⁵

Although all of the networks and magazines were eager to obtain revenue from the expanding market category of government-paid advertising, some found participation in the Anti-Drug Media Campaign unappealing given the government's tough two-for-the-price-of-one deal.¹⁶ NBC, the highest rated network in 1998, was the most resistant given the high value of its advertisement slots.¹⁷ Later that year, in an effort to make the program more financially palatable to the networks, the ONDCP, without congressional authorization, offered to forego its contractual right to a portion of the matching advertising time in exchange for inclusion of anti-drug themes in the plots of specific shows.¹⁸ The same offer was made to magazines willing to be rewarded for editorial content matching the government's views on drug control.¹⁹ This program was not given a formal name, but the term "Ad Scheme" best captures its essence.

II. THE AD SCHEME

Under the Ad Scheme, government officials, ONDCP's advertising agency,²⁰ and contractors began examining television shows

¹² See Forbes, *Prime-Time Propaganda*, *supra* note 1.

¹³ See *id.*

¹⁴ See *id.*

¹⁵ See Forbes, *Gravy Train*, *supra* note 2.

¹⁶ See *id.*; see also Forbes, *Prime-Time Propaganda*, *supra* note 1.

¹⁷ See Forbes, *Prime-Time Propaganda*, *supra* note 1.

¹⁸ See *id.*

¹⁹ See Forbes, *Gravy Train*, *supra* note 2.

²⁰ The original advertising agency, Zenith Media, was later replaced by Ogilvy & Mather Worldwide. See Forbes, *Prime-Time Propaganda*, *supra* note 1. Bates U.S.A. and later Ogilvy & Mather Worldwide were the original advertising agencies for the print-media Ad Scheme. See Forbes, *Gravy Train*, *supra* note 2.

after they were broadcast.²¹ Tapes of the shows were sent to the ONDCP or its advertising agency, which then applied formulas to determine the value of the embedded anti-drug messages.²² A half-hour program deemed sufficiently anti-drug²³ was typically valued at three “units,” with each unit representing the value of one thirty-second advertisement on that show.²⁴ Hour-long shows with approved story lines were valued at five units.²⁵ Unit values also depended on the shows’ ratings.²⁶ The agency subtracted the final tally of units from the commercial time owed by each network.²⁷ The network was then free to resell the reclaimed advertising time at the going rate.²⁸

A similar process occurred with the magazines participating in the Ad Scheme, which included *U.S. News & World Report*, *Sporting News*, *Family Circle*, *Seventeen*, *Parade*, *U.S.A. Weekend*, *Family Life*, *Ladies’ Home Journal*, *Hispanic Magazine*, and *NEA Today*.²⁹ The ONDCP issued “Strategy Platforms” to these magazines, detailing its wishes for editorial content.³⁰

Eventually the ONDCP became dissatisfied with seeing the television programs *after* they were broadcast. Consequently, it began negotiating script changes of certain shows *before* filming in order to make them better conform to the government’s anti-drug stance.³¹ ABC has since revealed that it submitted finished scripts to the ONDCP in the first year of the Ad Scheme.³² However, ABC withdrew from the program in May 1999,³³ after the ONDCP insisted that ABC’s continued participation was contingent on ABC’s submitting scripts *before* airing the shows.³⁴

²¹ See Forbes, *Prime-Time Propaganda*, *supra* note 1.

²² See *id.*

²³ The ONDCP permits up to 10% of the programs qualifying for Ad Scheme credit to be anti-alcohol. See Daniel Forbes, *Washington Script Doctors*, SALON.COM NEWS, at http://www.salon.com/news/feature/2000/01/13/smart_guy/index.html (Jan. 13, 2000) (on file with author) [hereinafter Forbes, *Washington Script Doctors*].

²⁴ See Forbes, *Prime-Time Propaganda*, *supra* note 1.

²⁵ See *id.*

²⁶ See *id.*

²⁷ See *id.*

²⁸ See *id.*

²⁹ See Forbes, *Gravy Train*, *supra* note 2; see also Mark Jurkowitz, *Online Journalist Tangles with Feds Over Antidrug Ad Policy*, BOSTON GLOBE, Apr. 7, 2000, at D12, available at 2000 WL 3321346.

³⁰ See Forbes, *Gravy Train*, *supra* note 2.

³¹ See Forbes, *Prime-Time Propaganda*, *supra* note 1.

³² See *id.*

³³ See *Anti-Drug Media Campaign: Hearing Before the Subcomm. on Telecomm., Trade, and Consumer Protection of the House Comm. on Commerce.*, 106th Cong. (2000) (statement of Alex Wallau, President - Administration and Operations, ABC Television Network), available at 2000 WL 149523.

³⁴ See Elizabeth Jensen & Paul Brownfield, *Federal Officials Sought to Preview Scripts*, ABC SAYS, L.A. TIMES, Jan. 16, 2000, at A8, available at 2000 WL 2201436 [hereinafter Jensen].

The ONDCP's efforts were more successful with WB. The ONDCP referred the producers of *Smart Guy* to George Carey, an expert on effective youth marketing.³⁵ He described various themes that the writers for *Smart Guy* could incorporate into their show, such as parents taking an active role and not just assuming that children can handle drug issues on their own, youths displaying "resistance skills" that enable them to decline drugs or alcohol in a face-saving way, and the overall negative consequences of drugs and under-age alcohol use.³⁶ Based on this feedback, the *Smart Guy* producers changed the original portrayal of two substance-abusing youths at a party.³⁷ They were originally depicted as cool and popular, but after the ONDCP input, they were portrayed as losers consuming their drugs, secretly and ashamedly, in a utility closet.³⁸ The ONDCP has admitted that it reviewed scripts in advance of broadcast in about fifty cases,³⁹ and granted credit to broadcasters for 109 episodes of primetime series.⁴⁰

It does not appear that the six magazines participating in the Ad Scheme submitted their editorials to the ONDCP for feedback prior to publication.⁴¹ However, an account executive from the corporate owner of *U.S.A. Weekend* has acknowledged that "it's not unheard of for editorial material to be indirectly influenced by big clients"⁴² On one occasion, the ONDCP told *U.S.A. Weekend* of a specific kind of anti-drug story that it hoped would be published.⁴³ On another occasion, the ONDCP "actually picked the writer for a story appearing in *Sporting News*."⁴⁴

Media executives quickly realized the potential gold mine associated with Ad Scheme credit, and in some cases specifically requested production of television episodes with anti-drug themes. Though CBS would later deny any causal connection, one executive asked a producer of *Chicago Hope* to create an anti-drug episode that later garnered ONDCP credit.⁴⁵ The result was a story

³⁵ See Forbes, *Washington Script Doctors*, *supra* note 23.

³⁶ See *id.*

³⁷ See Forbes, *Prime-Time Propaganda*, *supra* note 1.

³⁸ See *id.*

³⁹ See Howard Kurtz & Sharon Waxman, *White House Cut Anti-Drug Deal with TV*, WASH. POST, Jan. 14, 2000, at A1, available at 2000 WL 2279857 [hereinafter Kurtz].

⁴⁰ See Lisa de Moraes, *Networks' Bronze Star in War on Drugs*, WASH. POST, Jan. 15, 2000, at C1, available at 2000 WL 2280118 [hereinafter Moraes, *Networks' Bronze Star*].

⁴¹ See Forbes, *Gravy Train*, *supra* note 2.

⁴² *Id.*

⁴³ See *id.*

⁴⁴ *Id.* (noting that the ONDCP asked *Sporting News* to try to get Richard Lapchick, Director of the Northeastern University Center for the Study of Sport in Society, to write an anti-drug editorial).

⁴⁵ See Kurtz, *supra* note 39.

depicting drug-induced death, rape, psychosis, a car crash, a broken nose, and a doctor's threat to withhold life-saving surgery unless the patient agreed to an incriminating urine test.⁴⁶ A cancelled flight on the space shuttle was thrown in for good measure.⁴⁷

Since the Ad Scheme's inception, the ONDCP has assigned a monetary value to the anti-drug themes contained in twenty-three shows spanning thirty-nine episodes. These shows include NBC's *ER*, *Trinity*, *Providence*, *Hang Time*, *Saved by the Bell*, *One World*, and *City Guys*; Fox's *Beverly Hills 90210* and *America's Most Wanted*; CBS's *LA Docs*, *Promised Land*, *Touched by an Angel*, and *Cosby*; WB's *Seventh Heaven*, *Smart Guy*, and *The Wayans Bros*; and ABC's *Home Improvement*, *Sports Night*, *The Drew Carey Show*, *Sabrina the Teenage Witch*, *Boy Meets World*, *General Hospital*, and *The Practice*.⁴⁸ The ONDCP also gave credit to VH1 for airing biographies about rock stars who abused drugs, and to ESPN for covering the drug problems of New York Yankee Darrell Strawberry and University of Connecticut basketball player Khalid El-Amin.⁴⁹

Altogether, the networks reaped an additional \$21.8 million in revenues in fiscal year 1999.⁵⁰ The figure for the magazines is still unclear, though it is known that *U.S.A. Weekend* alone received a rebate of nearly \$418,000 in 1999.⁵¹ The White House, in return, obtained a new form of social engineering that would have impressed B.F. Skinner.⁵²

III. REVELATION OF THE AD SCHEME AND SPIN CONTROL

Daniel Forbes, a freelance reporter for the Internet-based news agency Salon.com, revealed the Ad Scheme to the general

⁴⁶ See Forbes, *Prime-Time Propaganda*, *supra* note 1.

⁴⁷ See *id.*

⁴⁸ See *id.*; see also Kurtz, *supra* note 39; see also *Anti-Drug Media Campaign: Hearing Before the Subcomm. on Telecomm., Trade, and Consumer Protection of the House Comm. on Commerce*, 106th Cong. (2000) (statement of Martin D. Franks, Senior V.P., CBS Corp.) available at 2000 WL 11067873; *Oversight Hearing on the Office of Nat'l Drug Control Policy Anti-Drug Campaign: Hearing Before the Subcomm. on Treasury and Gen. Gov't.*, 106th Cong. (2000) (statement of Daniel Forbes, Journalist), available at <http://www.senate.gov/~appropriations/treasury/testimony/dforbes.htm> (Feb. 3, 2000) [hereinafter *Treasury Subcomm. Hearing - Forbes*].

⁴⁹ See Lisa de Moraes, *VH1, ESPN Are Also Drug Office Beneficiaries*, WASH. POST, Feb. 4, 2000, at C7, available at 2000 WL 2283749 [hereinafter Moraes, *VH1*].

⁵⁰ See *Anti-Drug Media Campaign: Hearing Before the Subcomm. on Telecomm., Trade, and Consumer Protection of the House Comm. on Commerce*, 106th Cong. (2000) (statement of Donald R. Vereen, Dep. Dir., ONDCP) available at 2000 WL 11067889 [hereinafter *Telecomm. Subcomm. Hearing - Vereen*].

⁵¹ See Forbes, *Gravy Train*, *supra* note 2.

⁵² See generally B.F. SKINNER, *BEYOND FREEDOM AND DIGNITY* (4th ed. 1971) (postulating that people prefer to be controlled by forces they cannot directly observe rather than by forces they can directly observe).

public on January 13, 2000.⁵³ The news was greeted with shock from media executives, politicians, journalists, and free speech advocates around the country.⁵⁴ Some Congressmen noted, with dismay, that the Anti-Drug Media Campaign never authorized the ONDCP to make expenditures for embedded propaganda in television programs.⁵⁵ Max Frankel of the *New York Times* wrote:

Not even during the Cold War, with our faith in democracy at stake, did federal authorities dare so to subsidize and subvert our media. Back then, Congress explicitly forbade the agencies promoting anti-Communism—notably the United States Information Agency, its Voice of America and even the Central Intelligence Agency—to aim their propaganda at Americans.⁵⁶

Initially, the ONDCP vigorously defended its actions, with spokesperson Robert Weiner unapologetically stating that “[w]e plead guilty to using every lawful means to save America’s children.”⁵⁷ On January 14, 2000, unwilling to let the scandal interfere with its propaganda efforts, the ONDCP released a study entitled *Substance Use in Popular Prime-Time Television*. This study praised television networks for their treatment of drug, tobacco, and alcohol use—essentially applauding its own success at buying influence with the networks.⁵⁸

As questions about the legality, constitutionality, and ethical implications of the ONDCP’s activities continued to mount, the ONDCP made an attempt at spin control with a press release designed to “eliminate any confusion” about its activities.⁵⁹ The release stated that ONDCP policy was not to review programs before they were aired, only afterwards.⁶⁰ The ONDCP also denied any influence over the networks’ creative freedom,⁶¹ despite ABC’s acknowledgment that it had withdrawn from the Ad Scheme after

⁵³ See Forbes, *Prime-Time Propaganda*, *supra* note 1.

⁵⁴ See Jensen, *supra* note 34.

⁵⁵ See Treasury Subcomm. Hearing – Forbes, *supra* note 48.

⁵⁶ Max Frankel, *Plots for Hire*, N.Y. TIMES MAG., Feb. 6, 2000, at 32.

⁵⁷ Kurtz, *supra* note 39.

⁵⁸ See *Bad Review for this Soap Opera*, L.A. TIMES, Jan. 16, 2000, at M4, available at 2000 WL 2201214; see also Moraes, *Networks’ Bronze Star*, *supra* note 40; Press Release, Office of National Drug Control Policy, *New Study Finds Little Depiction of Illicit Drugs on Network Prime Time Television*, at <http://www.whitehousedrugpolicy.gov/news/press/2000/011400.html> (Jan. 14, 2001); Forbes, *Prime-Time Propaganda*, *supra* note 1 (noting an ONDCP report that the number of television shows with anti-drug themes had risen from thirty-two in March 1999 to 109 by early 2000).

⁵⁹ See Press Release, Office of National Drug Control Policy, *Statement of White House Drug Czar McCaffrey: New Guidelines Issued to Clarify Pro Bono Match Component of Anti-Drug Media Campaign*, at <http://www.whitehousedrugpolicy.gov/news/press/2000/011800.html> (Jan. 18, 2000).

⁶⁰ See *id.*

⁶¹ See *id.*

being specifically required to provide scripts *prior* to broadcast,⁶² despite a WB executive's admission that the ONDCP signed off on his network's programs,⁶³ and despite the multi-million dollar carrot the ONDCP continued to wave in front of the networks to steer them to the desired kind of programming.

Finally, the ONDCP claimed that it had actually been "very open" about the Ad Scheme all along.⁶⁴ It made reference to General McCaffrey's cryptic report to Congress during the most recent annual appropriations meetings, contending that "the media [is] matching paid advertisements' with other ads 'and pro-bono programming content.'"⁶⁵ This implied that the networks were donating the programming content rather than receiving financial rewards for it.⁶⁶ With disclosure like this, it is clear why most Congressmen, even those on committees responsible for overseeing the ONDCP's activities, were unaware of the Ad Scheme.⁶⁷

IV. THE AD SCHEME AND THE LAW OF PAYOLA

Payola is the practice of making undisclosed payments or providing other forms of compensation to radio or television station personnel⁶⁸ or owners in exchange for the inclusion of material in broadcasts. The press first reported on payola in the 1930s in connection with radio broadcasts.⁶⁹ During this "big band" era, music publishers often gave gifts to band leaders and performers to induce them into including specific songs in their programs and radio broadcasts.⁷⁰ The motivation behind this practice was the realization that greater radio exposure of songs led to increased sales of the publishers' sheet music.⁷¹

⁶² See Jensen, *supra* note 34 (citing remarks by then ABC Television Network President Pat Fili-Krushel).

⁶³ See *id.* Rich Mater, WB's Senior VP for Broadcast Standards, acknowledged that, "the White House did view scripts. They did sign off on them." *Id.*; see also *Treasury Subcomm. Hearings - Forbes*, *supra* note 48 ("FYI, See WB's *Smart Guy* . . . episode on underage drinking - we worked a lot on that script . . .") (quoting E-mail from Alan Levitt, Director, ONDCP Anti-Drug Media Campaign, to ONDCP Staff Members).

⁶⁴ See *When is a Scoop Not Really a Scoop?*, at http://www.salon.com/feed/screaming_media/577501.html (last visited Apr. 17, 2001).

⁶⁵ *Treasury Subcomm. Hearings—Forbes*, *supra* note 48.

⁶⁶ See *id.*

⁶⁷ See, e.g., *id.*; see also Moraes *VH1*, *supra* note 49.

⁶⁸ Though § 317 of the Communications Act of 1934, see 47 U.S.C. § 317 (1994), refers only to radio broadcasts, the FCC's sponsorship identification rules state that they apply to all "AM, FM, TV and class A broadcast services, commercial and noncommercial." FCC Sponsorship Identification Rules, 47 C.F.R. § 73.1001(a) (2000).

⁶⁹ See R.H. Coase, *Payola in Radio and Television Broadcasting*, 22 J.L. & ECON. 269, 270 (1979).

⁷⁰ See *id.* (citing VARIETY, Feb. 9, 1938, at 1).

⁷¹ See *id.*

During the 1930s, acting on the belief that payola was anti-competitive and harmful to small businesses that lacked the resources to make such payments, the Federal Trade Commission and private associations such as the Music Publishers' Contract Employees Union tried to establish rules to end the practice.⁷² Although these efforts were largely unsuccessful due to substantial opposition from the bigger music publishers,⁷³ Congress did respond to one aspect of the problem—secret payments to station owners—by enacting § 317 of the Communications Act of 1934.⁷⁴ Section 317 requires radio and television stations to publicly disclose any compensation they receive in exchange for broadcasting any material over the airwaves.⁷⁵ Its basic premise is that unlike typical advertisements, in which the identity and commercial interest of the sponsor are apparent from the content of the advertisement itself, ads that do not clearly communicate an underlying commercial message impose a duty on broadcasters to make the public aware of compensation given in exchange for that broadcast.⁷⁶ As the FCC would later declare, “the public is entitled to know by whom it is persuaded.”⁷⁷

By the late 1950s, congressional investigations of payola payments to radio disk jockeys and television employees had convinced Congress and the FCC that the industry needed more regulation.⁷⁸ In response, Congress modified § 317, producing a regulation that could be effectively enforced while retaining the broadcast industry's support.⁷⁹ Section 317(a)(1) now provides the following:

All matter broadcast by any radio station for which any money, service[,] or other valuable consideration is directly or indirectly paid, or promised to or charged or accepted by, the station so broadcasting, from any person, shall, at the time the same is so broadcast, be announced as paid for or furnished, as the case may be, by such person⁸⁰

⁷² See *id.* at 274-86.

⁷³ See *id.*

⁷⁴ See *id.* at 296.

⁷⁵ See 47 U.S.C. § 317 (1994).

⁷⁶ See J. Gregory Sidak and David E. Kronemyer, *The 'New Payola' and the American Record Industry: Transactions Costs and Precautionary Ignorance in Contracts for Illicit Services*, 10 HARV. J.L. & PUB. POL'Y 521, 522 (1987).

⁷⁷ In re Termination of “Plugola” Rulemaking and Affirmation of Disclosure Requirement, 76 F.C.C.2d 227 (1980), available at 1980 FCC LEXIS 120, at *2 (internal citation omitted).

⁷⁸ See Coase, *supra* note 69, at 296.

⁷⁹ See *id.* at 298-99.

⁸⁰ 47 U.S.C. § 317(a)(1).

§ 317(a)(2) states that:

Nothing in this section shall preclude the Commission from requiring that an appropriate announcement shall be made at the time of the broadcast in the case of any political program or any program involving the discussion of any controversial issue for which any films, records, transcriptions, talent, scripts, or other material or service of any kind have been furnished, without charge or at a nominal charge, directly or indirectly, as an inducement to the broadcast of such program.⁸¹

In an effort to provide even more guidance to the networks, the FCC developed its Sponsorship Identification Rules, which state in relevant part that:

[W]hen a broadcast station transmits any matter for which money, service, or other valuable consideration is either directly or indirectly paid or promised to, or charged or accepted by such station, the station, at the time of the broadcast, shall announce[:] (1) That such matter is sponsored, paid for, or furnished, either in whole or in part, and (2) By whom or on whose behalf such consideration was supplied⁸²

The announcement required by this section shall, in addition to stating the fact that the broadcast matter was sponsored, paid for, or furnished, fully and fairly disclose the true identity of the person or persons, or corporation, committee, association, or other unincorporated group, or other entity by whom or on whose behalf such payment is made or promised, or from whom or on whose behalf such services or other valuable consideration is received, or by whom the material or services referred to in paragraph (d) of this section are furnished.⁸³

By encouraging network participation in the Ad Scheme, ONDCP officials appear to have caused media executives to become their unwitting accomplices in violations of federal payola laws. The networks failed to inform the viewing public that they received financial benefits from the government in exchange for creating and airing programs with story lines containing anti-drug messages,⁸⁴ thus violating both § 317 of the Federal Communications Act⁸⁵ and the FCC's Sponsorship Identification Rules. This

⁸¹ *Id.* § 317(a)(2).

⁸² 47 C.F.R. § 73.1212(a) (2000).

⁸³ *Id.* § 73.1212(e).

⁸⁴ See *Treasury Subcomm. Hearings—Forbes*, *supra* note 48.

⁸⁵ See *Anti-Drug Media Campaign: Hearing Before the Subcomm. on Telecomm., Trade, and Consumer Protection of the House Comm. on Commerce*, 106th Cong. (2000) (statement of Robert Corn-Revere, Partner, Hogan & Hartson, former FCC Chief Counsel), available at 2000 WL 11067874 [hereinafter *Telecomm. Subcomm. Hearings—Corn-Revere*].

applies to both the Ad Scheme's original form involving ONDCP review and modification of television scripts, and its current form that assigns point values to shows after broadcast.

V. THE AD SCHEME AND 21 U.S.C. § 1802(B)(4)

General McCaffrey, Director of the ONDCP, appeared on two separate episodes of the television program *America's Most Wanted*, once in 1998 and again on September 25, 1999.⁸⁶ Both hour-long episodes dealt with the dangers of drug use and the crime it engenders.⁸⁷ Fox received Ad Scheme credit for these episodes.⁸⁸ Likewise, a May 24, 1999 editorial in *The Sporting News* extolled General McCaffrey and also later received ONDCP financial credit.⁸⁹

Though the ONDCP claims that the television episodes and magazine editorial would have received ONDCP credit even in the absence of General McCaffrey, it is not clear if this is true or just more spin control.⁹⁰ If a financial *quid pro quo* resulted from McCaffrey's television appearances or references to him in magazine editorials, this would have violated 21 U.S.C. § 1802(b)(4),⁹¹ a part of the codification of the National Youth Anti-Drug Media Campaign. This section states in relevant part that:

None of the amounts made available under § 1804 of this title may be . . . expended . . . to fund media campaigns that feature any . . . cabinet level officials . . . unless the [ONDCP] Director provides advance notice to the Committees on Appropriations of the House of Representatives and the Senate, the Committee on Government Reform and Oversight of the House of Representatives, and the Committee on the Judiciary of the Senate.⁹²

There is no record that these advance notifications were ever made.

VI. THE AD SCHEME AND DOUBLE STANDARDS

If a foreign government had perpetrated a scheme such as the

⁸⁶ See Telephone Interview with Gina Long, Hotline Director, *America's Most Wanted* (Mar. 14, 2000) (confirming McCaffrey's Sep. 25, 1999 appearance) [hereinafter Telephone Interview—Long]; see also Telephone Interview with Robert Weiner, Chief of Press Relations, ONDCP (Mar. 20, 2000) (confirming that one McCaffrey appearance was in 1998) [hereinafter Telephone Interview—Weiner] (on file with author).

⁸⁷ See Telephone Interview—Weiner, *supra* note 86.

⁸⁸ See *id.*

⁸⁹ See Forbes, *Gravy Train*, *supra* note 2 (referring to John Rawlings, *The Fight Against Drugs*, THE SPORTING NEWS, May 24, 1999, at 6).

⁹⁰ See Telephone Interview—Weiner, *supra* note 86.

⁹¹ 21 U.S.C. § 1802(b)(4) (1994).

⁹² *Id.*

ONDCP's Ad Scheme, "federal law would have required full disclosure on the theory that the American public has a right to know the source of the persuasion."⁹³ The Foreign Agents Registration Act⁹⁴ requires that any foreign agent who engages in political activities register with the Justice Department and notify it within forty-eight hours after it transmits into the United States any informational materials "for or in the interests of . . . [its] foreign principal," disclosing the "places, times, and extent of transmission."⁹⁵ "Political activities" are defined as any form of communication designed to influence "any section of the public within the United States . . . with reference to the political or public interests, policies, or relations of a government of a foreign country or a foreign political party."⁹⁶

The Foreign Agents Registration Act was promulgated with the belief that knowing the source of foreign propaganda would enable Americans to make informed decisions about the accuracy of information in such propaganda.⁹⁷ It was felt that viewers, hearers, and readers might be deceived if they were led to believe, erroneously, that the information came from a disinterested source.⁹⁸ For this reason, propaganda notices are required for foreign films dealing with topics such as nuclear war and acid rain.⁹⁹ It is hard to distinguish the propaganda contained in these films from the propaganda devised by the ONDCP, other than the ONDCP being an American entity.

VII. THE AD SCHEME AND THE DOCTRINE OF UNCONSTITUTIONAL CONDITIONS

A. *The Doctrine of Unconstitutional Conditions*

The United States government may, under the Constitution, use funding to implement its policy preferences.¹⁰⁰ The Supreme Court's holdings show that unequal subsidization does not violate the Constitution, and that the government may make and imple-

⁹³ *Telecomm. Subcomm. Hearings - Corn-Revere*, *supra* note 85.

⁹⁴ 22 U.S.C. §§ 611-621 (1938).

⁹⁵ *Id.* § 614(a).

⁹⁶ *Id.* § 611(o).

⁹⁷ See Michael I. Spak, *America for Sale: When Well-Connected Former Federal Officials Peddle Their Influence to the Highest Bidder*, 78 Ky. L.J. 237, 242-43 (1990).

⁹⁸ See Brian C. Castello, *The Voice of Government as an Abridgement of First Amendment Rights of Speakers: Rethinking Meese v. Keene*, 1989 DUKE L.J. 654, 659 (1989).

⁹⁹ See *Block v. Meese*, 793 F.2d 1303, 1306 (D.C. Cir. 1986) (requiring the classification as political propaganda of the Canadian films *If You Love This Planet*, *Acid Rain: Requiem or Recovery*, and *Acid From Heaven* under 22 U.S.C. §§ 611-621 (1995)).

¹⁰⁰ See DANIEL A. FARBER ET AL., *CONSTITUTIONAL LAW: THEMES FOR THE CONSTITUTION'S THIRD CENTURY* 682 (2d ed. 1998) [hereinafter FARBER].

ment value judgments through the allocation of public funds.¹⁰¹ Thus the federal government could, if it wanted to, condition a grant to a farmer on the requirement that the farmer not plant more than a particular amount of a commodity. This is true because Congress may already place specific limits on agricultural production under its commerce power.¹⁰² Similarly, Congress may choose to fund medical care for childbirth, yet deny funding for abortions.¹⁰³

Despite the government's discretion to decide which activities to fund, it is limited by the doctrine of "unconstitutional conditions." This doctrine prevents the government from conditioning a benefit on the requirement that a person give up a constitutional right.¹⁰⁴ In other words, an unconstitutional conditions problem arises when the "government offers a benefit on the condition that the recipient perform or forego an activity that a preferred constitutional right normally protects from government interference."¹⁰⁵ For example, the Supreme Court has stated that the government is permitted to place certain conditions on the receipt of federal subsidies, but may not "discriminate invidiously in its subsidies in such a way as to 'ai[m] at the suppression of dangerous ideas.'"¹⁰⁶ Thus, an agricultural grant that is conditioned on a farmer's promise not to criticize government policies would be an unconstitutional condition because it penalizes speech protected by the First Amendment.¹⁰⁷ Similarly, a woman cannot legally be denied food stamps because she has had an abortion.¹⁰⁸

There are various approaches to understanding why government benefits conditioned on the waiver of certain constitutional rights are as suspect as direct burdens on those rights. The first approach holds that there can be coercion even in an apparently consensual bargain in which rights are foregone in exchange for a government benefit, and thus all such bargains should be prohib-

¹⁰¹ See, e.g., *Maier v. Roe*, 432 U.S. 464, 474 (1977).

¹⁰² See JOHN E. NOWAK & RONALD D. ROTUNDA, *CONSTITUTIONAL LAW* 1005 (5th ed. 1995) [hereinafter NOWAK].

¹⁰³ See FARBER, *supra* note 100, at 682; see also *Maier & Harris v. McRae*, 448 U.S. 297, 310 (1980) (upholding the government's right to subsidize family planning services which will lead to conception and childbirth and to decline the promotion or encouragement of abortion).

¹⁰⁴ See ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 429 (1997) [hereinafter CHERMERINSKY].

¹⁰⁵ Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1421 (1989) [hereinafter Sullivan].

¹⁰⁶ *Regan v. Taxation with Representation of Washington*, 461 U.S. 540, 548 (1983) (quoting *Cammarano v. United States*, 358 U.S. 498 (1959)).

¹⁰⁷ See NOWAK, *supra* note 102, at 1005.

¹⁰⁸ See FARBER, *supra* note 100, at 682.

ited.¹⁰⁹ The second approach holds that certain conditioned benefits are constitutionally defective not because of the effects they have on beneficiaries or whether such beneficiaries are free to refuse these offers, but instead because the government should not be free to make such offers in the first place.¹¹⁰ The third approach sees the harm of conditioned benefits being the commodification of constitutional rights as “alienable objects that may be traded for government benefits.”¹¹¹ A fourth approach, posited by Constitutional scholar Kathleen Sullivan, maintains that granting government benefits in exchange for foregoing otherwise constitutionally held rights is prohibited because it permits the “circumvention of existing constitutional restraints on direct regulation”; it foregoes the maintenance of government evenhandedness among right holders; and it also creates “constitutional castes” in which right holders, who would otherwise have made the same constitutional choices, are discriminated against depending on their reliance on a government benefit.¹¹²

Given the disagreement over whether certain governmental conditions are unconstitutional, it should come as no surprise that the Supreme Court’s rulings in these unconstitutional conditions cases have been inconsistent.¹¹³ In an early unconstitutional conditions case, *Hannegan v. Esquire*,¹¹⁴ the Court held that the Postmaster General may not deny the right to use the cheaper second-class postal rate to certain periodicals on the grounds that they are “morally improper and not for the public welfare and the public good.”¹¹⁵ Twelve years later, in *Speiser v. Randall*,¹¹⁶ the Court stated that the government may not condition tax exemptions on a person’s agreement to utter approved speech.¹¹⁷ In that case, the appellants were veterans entitled to a special property-tax exemption from the State of California.¹¹⁸ When they refused to sign a loyalty oath required for receipt of the exemption, the exemption was denied.¹¹⁹ The Court held this to be an unconstitutional condition.¹²⁰

¹⁰⁹ See Sullivan, *supra* note 105, at 1420.

¹¹⁰ See *id.*

¹¹¹ *Id.* at 1421.

¹¹² *Id.*

¹¹³ See CHEMERINSKY, *supra* note 104, at 430; see also Sullivan, *supra* note 105, at 1413.

¹¹⁴ 327 U.S. 146 (1946)

¹¹⁵ *Id.* at 149.

¹¹⁶ 357 U.S. 513 (1958).

¹¹⁷ See *id.* at 519.

¹¹⁸ See *id.* at 514.

¹¹⁹ See *id.*

¹²⁰ See *id.* at 519.

The Supreme Court reversed its course in *Rust v. Sullivan*,¹²¹ where it held that the federal government may condition Title X grants to planned parenthood clinics on the requirement that they refrain from providing counseling or referrals for abortion as a method of family planning.¹²² Recipients of federal aid were prohibited from referring pregnant women to abortion providers, even upon specific request.¹²³ The Court stated that "when the Government appropriates public funds to establish a program it is entitled to define the limits of that program,"¹²⁴ and that Congress may selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way.¹²⁵

The Court shifted its direction once again in *Rosenberger v. Rec-tor & Visitors of the University of Virginia*.¹²⁶ In *Rosenberger*, a University of Virginia policy authorized payment from the Student Activities Fund for the printing costs of various student publications, but prohibited payment for any student publication that primarily promoted a particular belief in a deity or an ultimate reality.¹²⁷ Holding the state school's policy unconstitutional, the Court stated that the government is permitted to regulate the content of what is expressed when it is the speaker or when it enlists private entities to convey its message.¹²⁸ It does not follow that viewpoint-based restrictions are proper when the government does not itself speak. Having offered to pay the printing costs of private speakers who convey their own messages, the University of Virginia could not now be permitted to silence the expression of selected viewpoints.¹²⁹

Erwin Chemerinsky has noted some of the inconsistencies among these cases.¹³⁰ Discussing *Rust*, Chemerinsky writes that "it is difficult to explain why this is not an impermissible unconstitutional condition; the government is conditioning the receipt of government aid on the requirement that health professionals in the clinics relinquish their right to speak about abortion."¹³¹

¹²¹ 500 U.S. 173 (1991).

¹²² *See id.* at 192-93.

¹²³ *See id.* at 179-80.

¹²⁴ *Id.* at 194.

¹²⁵ *See id.*

¹²⁶ 515 U.S. 819 (1995).

¹²⁷ *See id.*

¹²⁸ *See id.* at 820.

¹²⁹ *See id.*

¹³⁰ *See* CHEMERINSKY, *supra* note 104, at 430.

¹³¹ *Id.*

The *Rust* decision is even more difficult to understand when compared with *Rosenberger*. Chemerinsky notes:

Whether the government has created the program to encourage private speech or is relying on existing private speakers, the issue is the same: Can the government condition funds on the content of the speech? In *Rust*, the Court said yes if the speech is abortion counseling and referrals; in *Rosenberger*, the Court said no if the speech has religious content.¹³²

Chemerinsky and others have tried to reconcile the inconsistencies in the Supreme Court's unconstitutional conditions cases.¹³³ Chemerinsky suggests that these cases "reflect an implicit balancing by the Court, with the Justices weighing the burden on speech imposed by a condition against the government's justification for the requirement."¹³⁴ This methodology succeeds in explaining one of the Supreme Court's most recent unconstitutional conditions holdings—*National Endowment for the Arts v. Finley*.¹³⁵

In *Finley*, the Court upheld 20 U.S.C. § 954(d)(1),¹³⁶ which requires the NEA to ensure that "artistic excellence and artistic merit are the criteria by which [grant] applications are judged, taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public."¹³⁷ The respondents in this case were performance artists who were denied funding.¹³⁸ The Court held that 20 U.S.C. § 954(d)(1) did not interfere with their First Amendment rights because, given its limited resources, the NEA must make aesthetic judgments about what kind of art to fund.¹³⁹ The government is permitted to allocate competitive funding according to criteria that would be impermissible were direct regulation of speech or a criminal penalty at stake.¹⁴⁰ The Court stated that Congress has wide latitude to set spending priorities, and when the government is acting as patron rather than as sovereign, the consequences of imprecision are not constitutionally severe.¹⁴¹

Applying the Chemerinsky framework, the burden on speech in *Finley* was minimal given that the artists were free to engage in

¹³² *Id.* at 798.

¹³³ *See, e.g.,* CHEMERINSKY, *supra* note 104, at 798; Sullivan, *supra* note 95, at 1413.

¹³⁴ CHEMERINSKY, *supra* note 104, at 798.

¹³⁵ 524 U.S. 569 (1998).

¹³⁶ 20 U.S.C. § 954(d)(1) (1990).

¹³⁷ *See id.*; *Finley*, 524 U.S. at 572.

¹³⁸ *See Finley*, 524 U.S. at 577.

¹³⁹ *See id.* at 571.

¹⁴⁰ *See id.*

¹⁴¹ *See id.* at 571.

their artistic expression in the absence of government funding. Furthermore, the government appears justified in requiring, as a condition for granting its funds, a certain minimal degree of decency as defined by society's ethical standards.

B. *The Ad Scheme as an Unconstitutional Condition*

The government's direct purchase of public service advertisements through the Anti-Drug Media Campaign raises no constitutional concerns. As Constitutional scholar Laurence Tribe has noted, freedom of speech "does not mean that government must be ideologically neutral" or prevent the government from "add[ing] its own voice to the many that it must tolerate."¹⁴²

The Ad Scheme, however, goes too far. It violates the doctrine of unconstitutional conditions because it provides networks and magazines with the privilege of financial rewards in exchange for foregoing their First Amendment right to free speech. The privilege granted to participating media companies is the ability to resell commercial airtime and magazine advertising space that they have already sold to the government. This is a privilege that is no different from a cash payment because it achieves the same result—financially enriching the networks. The fact that the cash itself is being generated by resales to commercial entities is immaterial because these sales would not be possible in the first place were the government not relinquishing its right to use the television airtime and magazine advertising space in exchange for anti-drug commercials.

In exchange for obtaining this privilege, participating media companies forego a constitutional right even more extensive than has been typically seen in unconstitutional conditions cases. As in the traditional cases, Ad Scheme participants forego their "positive" right to *engage* in a constitutionally protected activity—in this case, rights such as the ability to question the illegality of drugs, to discuss the inconsistency between the illegality of drugs and the legality of alcohol and tobacco, and to portray any positive aspects of drugs such as marijuana's medicinal benefits.¹⁴³ Furthermore, participating media companies must also give up their "negative" right to *refrain* from advocating a specific viewpoint—in this case, they must broadcast programs and write editorials that specifically portray drug use in a negative light.

¹⁴² LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 804, 807 (2d ed. 1988).

¹⁴³ It is logical to assume that any television programming portraying drug use in a positive light would not receive financial rewards from the ONDCP.

Despite the wide latitude granted to the government in *Finley*, that case does not support the constitutionality of the ONDCP's Ad Scheme.¹⁴⁴ First, in *Finley*, 20 U.S.C. § 954(d)(1) only permitted the NEA to deny funding to artistic expression that fell below a certain ethical standard.¹⁴⁵ No specific content was required of the artistic expression of grant recipients and the NEA was only given a vague exhortation in 20 U.S.C. § 954(d)(1) to take "decency and respect" into consideration.¹⁴⁶ By contrast, the ONDCP specifically based its decision on whether to provide rebates to networks on whether the networks and magazines *promoted* the anti-drug message supported by the ONDCP, and even gauged the intensity of the messages with a rating system. Second, it is the NEA's mandate to make aesthetic judgments.¹⁴⁷ Again in contrast, the ONDCP is mandated through the Anti-Drug Media Campaign only to produce anti-drug commercials and print advertisements, not to judge the anti-drug content of television programs and magazine editorials, nor to financially reward media companies for this content. Third, *Finley* made clear that 20 U.S.C. § 954(d)(1) was implemented under the guidance of an advisory panel comprised of members chosen for their geographic, ethnic, and aesthetic diversity.¹⁴⁸ Once again in contrast, the Ad Scheme was implemented by a handful of ONDCP officials concerned primarily with embedding specific messages into television programming and magazine editorials.

VIII. IMPLICATIONS FOR THE FUTURE

ONDCP officials appeared to believe sincerely that the Ad Scheme was an appropriate method to combat escalating drug use in this country.¹⁴⁹ They must have recognized that "[w]hat we see and hear in the entertainment media influences our beliefs about the world around us,"¹⁵⁰ yet felt stymied by traditional advertisements, given that the youth "reject messages specifically targeted at them in the form of thirty-second TV spots or magazine ad[vertisement]s."¹⁵¹ The ONDCP's solution was to send covert

¹⁴⁴ See *Finley*, 524 U.S. at 569.

¹⁴⁵ See *id.* at 570.

¹⁴⁶ See *id.*

¹⁴⁷ See *id.* at 571.

¹⁴⁸ See *id.* at 569.

¹⁴⁹ See *Telecomm. Subcomm. Hearings - Vereen*, *supra* note 50.

¹⁵⁰ *Id.*

¹⁵¹ *Anti-Drug Media Campaign: Hearings Before the Subcomm. on Telecomm., Trade, and Consumer Protection of the House Comm. on Commerce*, 106th Cong. (2000) (statement of Jef Loeb, Chairman of Katsin/Loeb Advertising, Inc.) available at 2000 WL 11067875.

and ultimately more powerful messages about the repercussions of drug use.

Despite the ONDCP's good intentions, it failed to consider that "as a nation dedicated to freedom of expression, the United States should resist embracing the use of propaganda as an acceptable policy, regardless of the merits of any particular message."¹⁵² Propaganda activities must be resisted because they have broad negative implications for the freedom of the media in this country and, ultimately, our liberty. Charles Krauthammer of the *Washington Post* noted that "where liberty is preserved by the separation and diffusion of power, we rightly refuse to grant government even more power through control of the content of free media."¹⁵³ The Ad Scheme's tactics give our government too much of this power.

If left unchecked, the Ad Scheme's methods could easily be applied to other forms of expression. In fact, Donald Vereen, Deputy Director of the ONDCP, alluded to the ONDCP's readiness to infuse its anti-drug message into other realms during his recent testimony before the House Subcommittee on Telecommunication, Trade, and Consumer Protection.¹⁵⁴ He stated that "[t]he role of television, music and film in carrying accurate depictions of youth drug use issues, and enlisting their support in making substance abuse prevention strategies better understood has been an important aspect of the campaign since its inception."¹⁵⁵ Mr. Vereen also noted that youth receive information about illicit drugs from the Internet as well.¹⁵⁶ Perhaps the ONDCP will next decide to remunerate the film industry for embedding anti-drug messages in movies, or pay radio stations to emphasize negative stories about drugs in their hourly news broadcasts.

The ONDCP's behaviorist methods could also be applied to other undesirable activities besides drug use. It is not a great leap to envision a day when government officials regularly infiltrate Internet chat rooms to embed messages opposing abortion, or encouraging it, depending on the viewpoint of those who occupy the executive branch at that particular moment. Or perhaps our government, with noble intentions, will set aside funds to encourage movies like *Fatal Attraction*¹⁵⁷ in an effort to discourage adultery by dramatizing its negative consequences. How will Americans be

¹⁵² *Telecomm. Subcomm. Hearings* - Corn-Revere, *supra* note 85.

¹⁵³ Charles Krauthammer, *A Network Sellout*, WASH. POST, Jan. 21, 2000, at A29.

¹⁵⁴ See *Telecomm. Subcomm. Hearings* - Vereen, *supra* note 50.

¹⁵⁵ *Id.*

¹⁵⁶ See *id.*

¹⁵⁷ See *FATAL ATTRACTION* (Paramount Pictures 1987).

able to say that we live in a free society if our government tries surreptitiously to modify our behavior?

Another troubling scenario is the government's ability to use its financial muscle to encourage certain beliefs or political viewpoints rather than to discourage behavior it perceives as negative. This would resemble the tactics employed during the 1950s. For example, the Central Intelligence Agency (CIA) purchased the film rights to *Animal Farm* from George Orwell's widow after his death in 1950, anticipating that the classic book would eventually be produced as a movie.¹⁵⁸ The book's concluding chapter posed a problem: "the farm animals looked back and forth at the tyrannical pigs and the exploitative human farmers but found it 'impossible to say which was which.'" ¹⁵⁹ Concerned about the message this might send about the moral equivalence of capitalism and communism, the CIA wanted to ensure that the movie version of *Animal Farm* portrayed communism in a more negative light.¹⁶⁰ Ultimately, the 1955 animated film version removed the humans and left only the tyrannical pigs.¹⁶¹ However, the CIA was not through with modifying Orwell's works. Laurence Zuckerman of the *New York Times* wrote that:

The agency also changed the ending of the movie version of *1984*, disregarding Orwell's specific instructions that the story not be altered. In the book, the protagonist, Winston Smith, is entirely defeated by the nightmarish totalitarian regime. In the very last line, Orwell writes of Winston, "He loved Big Brother." In the movie, Winston and his lover, Julia, are gunned down after Winston defiantly shouts: "Down with Big Brother!"¹⁶²

Extrapolating from the above, if the Ad Scheme is permitted to continue unchecked, might our government someday engage in activities such as remunerating studios like Paramount Pictures for producing films like *Deep Impact*,¹⁶³ which depicts the dangers of asteroid impacts upon the Earth, in order to subliminally win popular approval for NASA's expensive asteroid space probes? Or perhaps if the President and the State Department want to gain support for nuclear arms reduction negotiations, might they provide extra funding to produce a remake of the apocalyptic movie

¹⁵⁸ See Laurence Zuckerman, *How the C.I.A. Played Dirty Tricks with Culture*, N.Y. TIMES, Mar. 18, 2000, at A15 [hereinafter Zuckerman].

¹⁵⁹ *Id.*

¹⁶⁰ *See id.*

¹⁶¹ *See ANIMAL FARM* (Halas & Batchelor Production 1955).

¹⁶² Zuckerman, *supra* note 158, at A17.

¹⁶³ *See DEEP IMPACT* (Paramount Pictures 1998).

On The Beach,¹⁶⁴ which depicts humanity's destruction following a nuclear war? The list of such troubling scenarios is endless.

CONCLUSION

Whatever the merits of our government's long-running battle against psychotropic drugs might be, few could deny the high cost imposed on American society. These costs include the expense of drug enforcement,¹⁶⁵ expense of incarceration,¹⁶⁶ erosion of Fourth Amendment protections due to drug testing¹⁶⁷ and asset forfeitures of suspects,¹⁶⁸ criminal penalties that fall disproportionately upon minorities,¹⁶⁹ inability to use drugs such as marijuana for proven medical treatments,¹⁷⁰ deaths of innocent civilians,¹⁷¹ and strained relations with several foreign governments.¹⁷² The ONDCP's Ad Scheme further increased these costs by impinging upon the First Amendment's guarantee of freedom of the press and by further eroding American society's trust in the government and the media.

The Ad Scheme paves the road to a day when the media acts as a tool of government propaganda and relinquishes its role as an "independent participant in the formation of public opinion."¹⁷³ The integrity of the media is priceless for a free, democratic, and socially progressive society. It is the media's legal duty and, indeed, its moral responsibility to resist encroachment upon this integrity.

¹⁶⁴ See *ON THE BEACH* (United Artists and Lomitas Productions 1959).

¹⁶⁵ In 1999, drug enforcement cost the federal government \$17.9 billion, roughly the same amount of money that state and local governments spent combating drugs. See P.J. O'Rourke, *My Problem With the War on Drugs*, *ROLLING STONE*, Jan. 20, 2000, available at 2000 WL 31846002.

¹⁶⁶ The expense is estimated to be \$8.6 billion in 1999. See *id.*

¹⁶⁷ See Phyllis T. Bookspan, *In the U.S. Supreme Court: Can States Require Drug Tests for Office-Seekers?*, *WEST'S LEGAL NEWS*, Jan. 13, 1997, at 1997 WL 8494.

¹⁶⁸ See Rob Norton, *The Unremarked Victims of the War on Drugs*, *FORTUNE*, Feb. 21, 2000, at 74, available at 2000 WL 3461721; see also *American Civil Liberties Union Freedom Network*, at <http://www.aclu.org/features/nytimesas121198.html> (Dec. 11, 1998) (arguing that seizing the assets of suspected drug offenders prior to trial violates the Fourth Amendment).

¹⁶⁹ See Rep. Charles B. Rangel, *Letter to the Editor: Crack Law is Biased and Flawed*, *WALL ST. J.*, May 13, 1997, at A23, available at 1997 WL-WSJ 2420477 (noting that current law mandates that persons convicted of possessing five grams of crack cocaine receive the same five-year sentence as those convicted of possessing 500 grams of powder cocaine, with a resulting disproportionate impact on the African-American community).

¹⁷⁰ See *Marijuana, Pain and Cruelty*, *ST. LOUIS POST-DISPATCH*, Jan. 24, 2000, at B6, available at 2000 WL 3503987 (noting a 1991 report by the National Academy of Sciences concluding that marijuana's active ingredients can ease pain, nausea, and vomiting, especially in chemotherapy patients).

¹⁷¹ See James Risen, *Tape Said to Show that U.S. Jet Tried to Warn Peruvians of Error*, *N.Y. TIMES*, Apr. 26, 2001, at A1.

¹⁷² See Ethan A. Nadelmann, *U.S. Drug Policy: A Bad Export*, *FOREIGN POL'Y*, Spring 1988, at 83.

¹⁷³ Robert C. Post, *Subsidized Speech*, 106 *YALE L.J.* 151, 152 (1996).

