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# PAYOLA, PUNDITS, AND THE PRESS: WEIGHING THE PROS AND CONS OF FCC REGULATION

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## INTRODUCTION

It was one of Michael K. Powell's last official acts before announcing in January of 2005 his resignation as chairman of the Federal Communications Commission.<sup>1</sup> At the close of a controversial and contentious four-year reign as head of the FCC that was highlighted by an aggressive new approach to the statutory regulation of indecent content on the airwaves,<sup>2</sup> Powell revealed the

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<sup>1</sup> See Andrew Ratner et al., *FCC's Powell to Step Down as Chairman*, BALT. SUN, Jan. 22, 2005, at A1 (writing that "after a four-year stint that involved seemingly contradictory crusades to censor media outlets while allowing them greater freedom from certain ownership constraints, Federal Communications Commission Chairman Michael K. Powell announced yesterday that he was stepping down from the post").

<sup>2</sup> See Clay Calvert, *Bono, the Culture Wars, and a Profane Decision: The FCC's Reversal of Course on Indecency Determinations and Its New Path on Profanity*, 28 SEATTLE U. L. REV. 61, 62 (2004) (describing the FCC's aggressive new approach as being ushered in by a March 2004 decision in which the Commission declared that the use of the phrase "this is really, really fucking brilliant" by Bono, lead singer for the group U2, during an acceptance speech at the Golden Globe Awards made the entire broadcast both indecent and profane); see 18 U.S.C. §1464 (2004) (providing that "[w]hoever utters any obscene, *indecent*, or profane language by means of radio communication shall be fined under this title or imprisoned not more than two years, or both") (emphasis added); see also *In re Complaints Against Various Licensees Regarding Their Broadcast of the Fox Television Network Program "Married by America" on Apr. 7, 2003, Notice of Apparent Liability for Forfeiture*, 19 FCC Rcd. 20191, para. 7 (2004) (providing that "[t]he Commission defines indecent speech as language that, in context, depicts or describes sexual or excretory activities or organs in

Commission would open up a new investigation into an altogether different but equally troublesome form of content: the alleged government-paid-for television commentary of conservative columnist Armstrong Williams in support of the No Child Left Behind Act.<sup>3</sup> As Powell put it in an FCC press release, the investigation would focus on potential violations of rules that prohibit payola and “govern disclosure and sponsorship identification regarding payments or other consideration in connection with broadcast programs.”<sup>4</sup>

So just what is payola? It typically is thought of as “the practice of bribing disk jockeys to play certain songs [and] has been a classic tool for advancing the pecuniary interests of a highly concentrated music industry throughout the twentieth century and remains a substantial legal problem today.”<sup>5</sup> Payola has been described by other authors as a “widespread practice”<sup>6</sup> in the music industry that represents a “pay-to-play”<sup>7</sup> formula in which recording industry representatives, in basic quid pro quo fashion, pay disc jockeys to play certain songs.

The scenario involving Armstrong Williams, however, has nothing to do with songs, music or disk jockeys. Instead, it centers on whether Williams “may have violated federal laws by not fully disclosing that he had received more than \$240,000 from the Dept. of Education to tout the Bush administration’s No Child Left Behind Act during his broadcast appearances.”<sup>8</sup> It thus is not, to put it mildly, your average payola case. Instead, it involves government funds, funneled through a major public relations firm and paid to a company owned by conservative commentator Williams, to allegedly garner favorable comments by Williams on his own television show and during other TV appearances.<sup>9</sup>

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terms patently offensive as measured by contemporary community standards for the broadcast medium.”); see also Jube Shiver, Jr., *Powell to Resign as FCC Chairman*, L.A. TIMES, Jan. 22, 2005, at A1 (describing Powell’s term as “marked by controversies over indecency on the airwaves” and noting “his fervor for cracking down on sexually explicit content.”).

<sup>3</sup> Brian Blackstone, *FCC to Probe Williams’s Deal*, WALL ST. J., Jan. 17, 2005, at B3.

<sup>4</sup> Press Release, Federal Communications Commission, Statement of FCC Chairman Michael K. Powell, at <http://www.fcc.gov/headlines.html> (Jan. 14, 2005).

<sup>5</sup> Jim Chen, *The Last Picture Show*, 80 MINN. L. REV. 1415, 1432-33 (1996).

<sup>6</sup> Matthew S. DelNero, *Long Overdue?: An Exploration of the Status and Merit of a General Public Performance Right in Sound Recordings*, 6 VAND. J. ENT. L. & PRAC. 181, 197 (2004).

<sup>7</sup> Ronald D. Brown, *The Politics of “Mo’ Money, Mo’ Money” and the Strange Dialectic of Hip Hop*, 5 VAND. J. ENT. L. & PRAC. 59, 63 (2003).

<sup>8</sup> William Triplett, *FCC Sets Pay Probe*, DAILY VARIETY, Jan. 17, 2005, at 8.

<sup>9</sup> See Stuart Elliott, *Agency Admits Errors in Deal With TV Host*, N.Y. TIMES, Jan. 20, 2005, at C10 (describing how the Ketchum public relations agency apologized for “not disclosing that it paid the Graham Williams Group \$240,000 on behalf of a client, the Education Department, to have Mr. Williams praise the No Child Left Behind Act on his television show and in his newspaper column.”).

Williams, who quickly apologized and admitted that “[m]y judgment was not the best,”<sup>10</sup> was just as swiftly lambasted and castigated by many in the press for what *Time* magazine called “his journalistic sins.”<sup>11</sup> For instance, the editorial board of the *San Francisco Chronicle* opined in January of 2005 that “[n]o journalist worthy of the title should ever engage in such a deal.”<sup>12</sup> Columnist Leonard Pitts, Jr. went so far as to say that “the first day I don’t understand that it is an ethical crime to rent this podium to the highest bidder, somebody please take me out in a field and shoot me because I have become too stupid to live.”<sup>13</sup> The incident provided liberal columnists like *The New York Times*’ Frank Rich with an easy conservative punching bag.<sup>14</sup> Politics and political perspectives aside, however, much of the Williams walloping is well deserved and substantially justified. Why? Because it is clear that, if Armstrong Williams is indeed a journalist,<sup>15</sup> he violated notions of objectivity and neutrality that are central to the ethos and practice of the journalism profession. For instance, the Code of Ethics of the Society of Professional Journalists provides that “[j]ournalists should be free of obligation to any interest other than the public’s right to know.”<sup>16</sup> It adds that journalists should “[a]void conflicts of interest, real or perceived”<sup>17</sup> and “[r]efuse gifts, favors, fees, free travel and special treatment.”<sup>18</sup> Similarly, the Code of Ethics and Professional Conduct of the Radio-Television News Directors Association admonishes professional electronic journalists to “[u]nderstand that any commitment other than service to the public undermines trust and credibility”<sup>19</sup> and that they must not

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<sup>10</sup> Perry Bacon Jr., *Fake News*, TIME, Jan. 17, 2005, at 15.

<sup>11</sup> *Id.*

<sup>12</sup> *Leave No Ethics Behind*, S.F. CHRON., Jan. 10, 2005, at B4.

<sup>13</sup> Leonard Pitts, *Strong-Arming Ethics*, PITT. POST-GAZETTE, Jan. 14, 2005, at A17.

<sup>14</sup> See Frank Rich, *All the President’s Newsmen*, N.Y. TIMES, Jan. 16, 2005, at § 2, 1 (criticizing Williams’ actions, calling him “the public face for the fake news,” and linking William’s activities to what Rich calls the “fierce (and often covert) Bush administration propaganda machine.”). Interestingly, Rich’s column was so over-the-top and vitriolic that it even drew criticism from liberal commentator and author Paul Begala. See also Paul Begala, *Too Civil, I Guess*, N.Y. TIMES, Jan. 30, 2005, at § 2, 4 (writing that “Mr. Williams offered an unqualified admission and a heartfelt apology. Perhaps Mr. Rich would have kicked him while he was down. I chose not to. Apparently I was too civil for Mr. Rich’s taste.”).

<sup>15</sup> Whether Williams is a journalist is an important issue discussed later in Part II of this article. For a relatively recent article on how courts determine who is a journalist, see Clay Calvert, *And You Call Yourself a Journalist?: Wrestling with a Definition of “Journalist” in the Law*, 103 DICK. L. REV. 411 (1999).

<sup>16</sup> SOCIETY OF PROFESSIONAL JOURNALISTS, CODE OF ETHICS, at <http://www.spj.org/ethics.asp> (last visited Mar. 20, 2005).

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> RADIO-TELEVISION NEWS DIRECTORS ASSOCIATION, CODE OF ETHICS AND PROFESSIONAL CONDUCT, at <http://www.rtnda.org/ethics/coe.shtml> (last visited Mar. 20, 2005).

“[a]ccept gifts, favors, or compensation from those who might seek to influence coverage.”<sup>20</sup> It is, in brief, extremely difficult to remain unbiased when writing or speaking on a particular subject or topic if one is also receiving monetary compensation from a group that harbors a particular position and definite viewpoint on that same subject or topic. As *Los Angeles Times* media critic David Shaw aptly put it, Williams’ conduct “violates the most basic journalistic ethics.”<sup>21</sup>

Williams’ ethical transgressions did not escape members of the viewing public. According to FCC Commissioner Jonathan Adelstein, the Commission “received 12,000 complaints” prompting him to call for the FCC “to get to the bottom of this . . .”<sup>22</sup>

However, just because a specific journalistic act may be unethical and violate professional norms of conduct, does that necessarily mean that it also should be *illegal* or, under payola laws, subjected to required disclosure? In other words, should the entire Armstrong Williams affair be relegated to the realm of media *ethics* rather than extended, via the federal payola statute,<sup>23</sup> to

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<sup>20</sup> *Id.*

<sup>21</sup> David Shaw, *Media Matters; Subverting the Press With Propaganda on the Rise*, L.A. TIMES, Jan. 16, 2005, at E34.

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

<sup>23</sup> The relevant federal law provides, in pertinent part, that:

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 person: *Provided*, That “service or other valuable consideration” shall not include any service or property furnished without charge or at a nominal charge for use on, or in connection with, a broadcast unless it is so furnished in consideration for an identification in a broadcast of any person, product, service, trademark, or brand name beyond an identification which is reasonably related to the use of such service or property on the broadcast.

47 U.S.C. §317(a)(1) (2000). In addition, federal law provides that:

[A]ny person who, in connection with the production or preparation of any program or program matter which is intended for broadcasting over any radio station, accepts or agrees to accept, or pays or agrees to pay, any money, service or other valuable consideration for the inclusion of any matter as a part of such program or program matter, shall, in advance of such broadcast, disclose the fact of such acceptance or payment or agreement to the payee’s employer, or to the person for whom such program or program matter is being produced, or to the licensee of such station over which such program is broadcast.

47 U.S.C. §508(b) (2000). The FCC’s own rules provide:

When 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 supplied . . .

47 C.F.R. §73.1212(a) (2000).

the arena of media *law*? In addition, if laws like those targeting payola are applied to situations like those centering on Williams' conduct, will they actually prove effective and useful in either mitigating journalistic bias or improving the credibility of the press in the public's eyes?

Improving journalistic credibility – or, more appropriately, preserving what precious little remains of journalistic credibility today<sup>24</sup> – is important. In particular, credibility is important if reporters are to truly fulfill in a meaningful way their First Amendment-protected<sup>25</sup> watchdog role<sup>26</sup> in a democratic society.<sup>27</sup> This article, however, argues that the application of payola laws by the FCC to situations involving individuals like Armstrong Williams represents a very well-intended, but ultimately futile legal attempt to curb conflicts of interest<sup>28</sup> and prevent biased views in the broadcast news media. Although it definitely serves the “public interest”<sup>29</sup> mandate of the FCC to know what Williams did, payola laws will catch only a drop in the bucket of bias.<sup>30</sup> There are, in fact, some solid arguments to be made that they should not even apply to shills like Williams. In particular, this article contends, in a suitably appropriate

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<sup>24</sup> See Mark Jurkowitz, *Public's Cynicism About Media Has Become a Pressing Concern*, BOSTON GLOBE, Apr. 14, 2004, at C1 (writing that “public distrust of the news media appears to be at a dangerously high level . . .”)

<sup>25</sup> The First Amendment to the United States Constitution provides in relevant part that “Congress shall make no law . . . abridging the freedom of speech, or of *the press* . . .” U.S. CONST. amend. I. (emphasis added). The Free Speech and Free Press Clauses have been incorporated through the Fourteenth Amendment Due Process Clause to apply to state and local government entities and officials. See *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

<sup>26</sup> See *Leathers v. Medlock*, 499 U.S. 439, 447 (1991) (observing that “[t]he press plays a unique role as a check on government abuse . . .” and “as a watchdog of government activity”); HERBERT J. GANS, *DEMOCRACY AND THE NEWS* 79 (Oxford University Press 2003) (writing that the watchdog role represents “the journalists’ finest opportunity to show that they are working to advance democracy.”).

<sup>27</sup> See LOUIS ALVIN DAY, *ETHICS IN MEDIA COMMUNICATIONS* 71 (Thomson Wadsworth, 4th ed. 2003) (writing credibility is “a mainstay of the journalistic enterprise . . .”)

<sup>28</sup> A conflict of interest may be thought of as occurring “when a person (the agent) stands in a relationship of trust with another person (the principal) that requires the agent to exercise judgment on behalf of the principal, and where the agent’s judgment is impaired because of another interest of the agent.” W. Bradley Wendel, *The Deep Structure of Conflicts of Interest in American Public Life*, 16 GEO. J. LEGAL ETHICS 473, 477 (2003).

<sup>29</sup> See generally CLAY CALVERT, *VOYEUR NATION: MEDIA, PRIVACY AND PEERING IN MODERN CULTURE* 109-116 (Westlaw Press 2000) (discussing the public interest concept and its enforcement by the FCC).

<sup>30</sup> Bias is a topic that concerns both liberals and conservatives, as reflected by several recent books on the subject. Compare ERIC ALTERMAN, *WHAT LIBERAL MEDIA? THE TRUTH ABOUT BIAS AND THE NEWS* (Basic Books 2003) (attempting to refute allegations that there is a liberal bias in the media and suggesting that, in fact, there is a conservative bias among the news media) with BERNARD GOLDBERG, *BIAS: A CBS INSIDER EXPOSES HOW THE MEDIA DISTORT THE NEWS* (Regnery Publishing, Inc. 2002) (providing examples that the author contends illustrate a liberal bias in the media).

devil's advocate role (Williams, after all, has been cast as a journalistic devil)<sup>31</sup>, that:

- Williams is *not* a journalist and thus he should not be subject to either the ethical norms of objectivity or the legal rules against payola;
- Reasonable readers and viewers recognize that pundits like Williams necessarily stake out positions and take sides on issues from either a liberal or conservative perspective;
- Application of the payola statute to these situations is a thoroughly underinclusive remedy<sup>32</sup> and ineffective approach to stamping out and eradicating bias among both journalists and commentators, given the multiple sources and situations that already create conflicts of interest yet go unregulated because payola laws focus only on the difference between advertising and journalism; and
- Other remedies in the broadcast realm would provide more effective means of informing the viewing audience about the possible biases of those who appear on both news programs and news talk shows.

The question of whether federal payola laws should be applied to situations like those involving Armstrong Williams is not only timely but, more importantly, very likely to arise again and again. As an example, within a matter of only three weeks after the revelation of Williams' possible wrongdoing, two other commentators were exposed in the news media as having allegedly received financial consideration from the government to trumpet particular viewpoints. In particular, columnist Maggie Gallagher was alleged to have received "a \$21,500 contract with the Department of Health and Human Services to help promote the president's proposal [ ]"<sup>33</sup> in 2002 when she called for "a \$300 million initiative encouraging marriage as a way of strengthening families."<sup>34</sup> Although Gallagher has maintained that the contract "did not include promoting the administration's policies in her columns,"<sup>35</sup> the appearance

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<sup>31</sup> See *supra* notes 13–16 and accompanying text (setting forth criticism of Williams' conduct by others in the news media).

<sup>32</sup> *City of Ladue v. Gilleo*, 512 U.S. 43, 51 (1994) (writing that "[w]hile surprising at first glance, the notion that a regulation of speech may be impermissibly *underinclusive* is firmly grounded in basic First Amendment principles.").

<sup>33</sup> Howard Kurtz, *Writer Backing Bush Plan Had Gotten Federal Contract*, WASH. POST, Jan. 26, 2005, at C01.

<sup>34</sup> *Id.*

<sup>35</sup> *Corrections*, N.Y. TIMES, Feb. 1, 2005, at A18 (clarifying the relationship between Gallagher and the Health and Human Services Department and writing that "the department paid Ms. Gallagher \$21,500 as a consultant on marriage policies, including for help in drafting an essay that was published under the name of an assistant secretary. Ms. Gallagher said the contract did not include promoting the administration's policies in her columns").

and perception of a *quid pro quo* was clear. The *Washington Post* reported that “[i]n columns, television appearances and interviews with such newspapers as *The Washington Post*, Gallagher last year defended Bush’s proposal for a constitutional amendment barring same-sex marriage.”<sup>36</sup> Gallagher, however, has vigorously “denied that her work was part of promoting an administration initiative but said it was a mistake not to disclose the payment.”<sup>37</sup> On top of this, it was disclosed that syndicated columnist Michael McManus was paid “at least \$4000 for work on behalf of Bush administration efforts to promote marriage[]”<sup>38</sup> by the Department of Health and Human Services. McManus “writes a weekly syndicated column and is director of a nonprofit group called Marriage Savers.”<sup>39</sup> The problem, in brief, is not going away, and thus merits analysis here.<sup>40</sup>

Part I of this article details the arguments that militate *in favor* of applying payola laws to the Armstrong Williams situation. Among other things, this part demonstrates that payola disclosure laws are supported by the premises of several prominent rationales and theories of free speech and free press. Part II then attempts to counter this perspective by arguing *against* the application of payola laws in the so-called “rent-a-pundit” cases,<sup>41</sup> and it more fully explores and analyzes the reasons set forth above as to why the payola approach is misguided with respect to the Williams case. In the process of arguing against the application of payola laws to scenarios similar to those involving the likes of Williams, Gallagher and McManus, Part II also demonstrates how concerns about news media bias run much deeper than these cases indicate and thus require a very different approach of redress and remedy.<sup>42</sup> Thus, Part II proposes

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<sup>36</sup> Kurtz, *supra* note 33.

<sup>37</sup> Tom Hamburger, *Federal Contracts With Columnists Prompt Change in Policy*, L.A. TIMES, Jan. 28, 2005, at A30.

<sup>38</sup> Jim Drinkard & Mark Memmott, *HHS Says It Paid Columnist For Help*, USA TODAY, Jan. 28, 2005, at 1A.

<sup>39</sup> Anne E. Kornblut, *Third Journalist was Paid to Promote Bush Policies*, N.Y. TIMES, Jan. 29, 2005, at A17.

<sup>40</sup> Analysis of the Bush Administration’s own actions also merits consideration, although this is beyond the scope of this article which concentrates only on the payee side of the equation – Williams as the payee – rather than on the government as the payor.

<sup>41</sup> This aptly descriptive term was used in the headline of a newspaper editorial. See *Bush Right To Quash Rent-A-Pundit*, ROCKY MOUNTAIN NEWS (Denver, Colo.), Jan. 28, 2005, at 42A (opining that “President Bush has rightly ordered his Cabinet departments to end the practice of quietly paying opinion columnists to promote the administration’s agenda.”).

<sup>42</sup> For instance, syndicated columnist Charles Krauthammer and *Weekly Standard* Editor Bill Kristol “privately offered advice to top White House aides” prior to President George W. Bush’s second inaugural address but both maintained that such a role “is perfectly proper for commentators.” Howard Kurtz, *Journalists Say Their White House Advice Crossed No Line*, WASH. POST, Jan. 29, 2005, at C1. Kristol was later quoted in a newspaper story characterizing Bush’s inaugural address as ““a rare inaugural speech”” that will be

a more inclusive remedy for FCC adoption – the author’s hypothetical “*Broadcast Credibility Enhancement Act of 2005*” – that is designed to serve as a potentially more effective disclosure mechanism in the broadcast news medium. Finally, the article concludes by contending that the real problem to be addressed is the indirect use of taxpayer dollars to covertly fund the espousal of particular viewpoints. A federal law requiring the government to disclose the use of such funds is what merits legal regulation.<sup>43</sup>

#### I. BOUGHT AND SOLD: THE CASE FOR USING PAYOLA LAWS TO PUNISH ARMSTRONG WILLIAMS

The government’s laws targeting payola focus on the concept of *disclosure*.<sup>44</sup> As the FCC states on its web site, “[b]oth the person making the payment and the recipient are *obligated to disclose the payment* so that the station may make the sponsorship identification announcement required by” the payola laws.<sup>45</sup> They also require that “when anyone pays someone to include program matter in a broadcast, the fact of payment must be disclosed in advance of the broadcast to the station over which the matter is to be carried.”<sup>46</sup>

The benefits of such disclosure are many. The rules are designed to provide “audiences contextual information, such as labels or disclosure announcements, to evaluate the messages they consume, while only mildly constraining broadcasters’ programming discretion. Nothing is prohibited; the rules simply require public disclosure.”<sup>47</sup> As Professors Richard Kielbowicz and Linda Lawson observed in a recent law journal article, payola laws, focusing on

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“historic.” Michael Getler, *Gaps in Disclosure, and in Satire*, WASH. POST, Jan. 30, 2005, at B6. What’s more, both Krauthammer and Kristol reportedly “praised the speech in appearances during Fox News TV coverage of the inauguration.” *Id.* Is this action – consulting on a speech and then offering favorable commentary without revealing the relationship – a violation of journalism ethics? Should it be a legal violation? It appears that conflict-of-interest scenarios that affect media credibility are much more complex than the cash-for-commentary scenarios involving Williams and his ilk.

<sup>43</sup> Federal law currently provides that “[a]ppropriated funds may not be used to pay a publicity expert unless specifically appropriated for that purpose.” 5 U.S.C. §3107 (2000). That law, however, “has been difficult to enforce, rarely applied and interpreted in such a way that many agency public relations efforts are considered acceptable.” Christopher Lee, *Law Cautions Against Outside PR Spending*, WASH. POST, Jan. 31, 2005, at A19.

<sup>44</sup> See *supra* note 23 and accompanying text (setting forth the laws and rules targeting payola).

<sup>45</sup> FEDERAL COMMUNICATIONS COMMISSION, PAYOLA AND SPONSORSHIP IDENTIFICATION at <http://www.fcc.gov/eb/broadcast/sponsid.html> (last visited Feb. 23, 2005) (emphasis added).

<sup>46</sup> *Id.*

<sup>47</sup> Richard Kielbowicz & Linda Lawson, *Unmasking Hidden Commercials in Broadcasting: Origins of the Sponsorship Identification Regulations, 1927-1963*, 56 FED. COMM. L.J. 329, 332 (2004).

sponsorship identification, originated for the “modest purpose” of “informing the audience when and by whom it was being persuaded.”<sup>48</sup> Put differently, the more information the public has about an individual (Armstrong Williams, for example) or group (the Department of Education, in Williams’ case) supporting a particular viewpoint, the better it may evaluate that viewpoint and the possible motivations of the individual or group touting it.

The values of source disclosure – in the Williams situation, the disclosure of the source of the money behind the messages he was espousing – can help viewers to make critical credibility evaluations and determinations. As attorney Michael Kang argued in a recent law journal article:

[W]hen people are aware of a speaker’s credibility while they listen to a persuasive communication, they are more likely to reach reasoned conclusions about the information they learn. For instance, if alerted that a speaker intends to persuade them, people are more likely to think of counterarguments and deliberate about what is being said.<sup>49</sup>

As applied to the Armstrong Williams incident, this logic means that if audience members were aware that Williams was being paid for espousing a certain viewpoint – a fact that would seem to undermine his credibility by suggesting his opinion was purchased, as it were, by the Department of Education – then they could better evaluate and counter-argue with the information conveyed. All of this clearly militates in favor of applying payola disclosure laws to the Williams fiasco.

Closely related to the concept of disclosure is the issue of *deception* and the notion that the public has an unenumerated First Amendment right to know when it is being deceived by someone who is keeping a secret on a matter of political concern.<sup>50</sup> In this case, the secret-keeper was Williams; he was deceiving the viewing public and his readers by keeping private the payments he was receiving.

Core principles of several important First Amendment-based theories of free speech also are relevant here. In particular, as set forth below in Section A, application of the payola laws to the Williams situation is justified by reference and relationship to the marketplace of ideas metaphor, which is “perhaps the most powerful metaphor in the free speech tradition.”<sup>51</sup> Under this metaphor, the right of free speech is analogized “to a marketplace in which contrasting ideas compete for acceptance among a consuming public.”<sup>52</sup> For many televi-

<sup>48</sup> *Id.* at 374.

<sup>49</sup> Michael S. Kang, *Democratizing Direct Democracy: Restoring Voter Competence Through Heuristic Cues and “Disclosure Plus,”* 50 UCLA L. REV. 1141, 1179 (2003).

<sup>50</sup> See generally Eric B. Easton, *Public Importance: Balancing Proprietary Interests And The Right To Know*, 21 CARDOZO ARTS & ENT. L.J. 139 (2003) (discussing the First Amendment and its implied right to know).

<sup>51</sup> RODNEY A. SMOLLA, *FREE SPEECH IN AN OPEN SOCIETY* 6 (Alfred A. Knopf 1992).

<sup>52</sup> Martin H. Redish & Kirk J. Kaludis, *The Right of Expressive Access in First Amendment Theory: Redistributive Values and the Democratic Dilemma*, 93 NW. U. L. REV. 1083,

sion viewers, of course, the notion that a person is being paid to support a view may represent a contrasting idea to, or added perspective on, that person's viewpoint.

Section B then demonstrates how another powerful rationale for protecting expression – the watchdog role of the press – likewise supports the application of payola laws. Simply put, disclosure of payments allows the viewing audience to know when a journalist is playing a watchdog role and when he or she is playing a lapdog role. Finally, Section C demonstrates how the free speech theory of democratic self-governance embraced by philosopher-educator Alexander Meiklejohn<sup>53</sup> buttresses arguments in favor of the FCC's investigation of payola payments.

#### A. Payola Laws Must Apply to Serve the Goals of the Marketplace of Ideas

A major theory of free speech is the marketplace of ideas. It “consistently dominates the Supreme Court’s discussions of freedom of speech.”<sup>54</sup> This is especially so in the realm of broadcasting where the FCC’s payola laws apply. As the Supreme Court wrote more than thirty-five years ago while upholding the Fairness Doctrine in *Red Lion Broadcasting Co. v. FCC*,<sup>55</sup> “[i]t is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail.”<sup>56</sup> The Court emphasized in *Red Lion* that, in the broadcast marketplace, “[i]t is the right of the viewers and listeners, not the right of the broadcasters, which is paramount.”<sup>57</sup>

Disclosure requirements embodied in payola regulations add more speech to the marketplace of ideas – more speech that allows the audience to better deci-

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1083 (1999).

<sup>53</sup> See generally ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE* 27 (Oxford University Press 1960) (setting forth an early perspective of Meiklejohn’s views about the importance of free speech in a democratic society).

<sup>54</sup> C. EDWIN BAKER, *HUMAN LIBERTY AND FREEDOM OF SPEECH* 7 (Oxford University Press 1989); e.g., *Virginia v. Hicks*, 539 U.S. 113, 119 (2003) (using the concept of “an uninhibited marketplace of ideas”); *Reno v. ACLU*, 521 U.S. 844, 885 (1997) (describing the Internet as “this new marketplace of ideas”).

<sup>55</sup> 395 U.S. 367 (1969).

<sup>56</sup> *Id.* at 390. The Fairness Doctrine “required broadcasters to give sufficient coverage to opposing views on public issues.” Blake Morant, *Democracy, Choice, and The Importance of Voice in Contemporary Media*, 53 DEPAUL L. REV. 943, 966 (2004). In particular, it “consisted of two interrelated obligations: First, broadcasters were required to cover vitally important controversies in their communities; and second, in doing so, broadcasters were required to provide a reasonable opportunity for the presentation of contrasting viewpoints.” Anthony E. Varona, *Changing Channels and Bridging Divides: The Failure and Redemption of American Broadcast Television Regulation*, 6 MINN. J.L. SCI. & TECH. 1, 26 (2004). The FCC eliminated its enforcement of the Fairness Doctrine in 1987 in the wake of the FCC’s shift in the 1980s to free marketplace model of regulation. *Id.* at 28-29.

<sup>57</sup> *Red Lion Broad. Co.*, 395 U.S. at 390.

pher for itself the value and truth of the idea being disseminated. Because “the right[s] of viewers and listeners” are entitled to significant protection in the broadcast realm,<sup>58</sup> disclosure of payments is required to provide the audience with important information. If production of the truth is the central goal of the marketplace metaphor,<sup>59</sup> then viewers are entitled to know the truth about who or what organization is sponsoring the remarks of a commentator. Parsed differently, the mandatory disclosure of payments can be thought of as a form of counterspeech – another well-established First Amendment doctrine – because such disclosure reveals a possible conflict of interest that actually counters the view being conveyed by the paid pundit.<sup>60</sup> In essence, a message of payment counters a message of political viewpoint.

Yale University constitutional law scholar Robert Post recently wrote that the marketplace theory “extends the shelter of constitutional protection to speech so that we can better understand the world in which we live.”<sup>61</sup> That notion is fittingly appropriate here. Mandatory disclosure to the television viewing audience of payments like those received by Armstrong Williams clearly allows us to better understand the world of political viewpoints.

#### B. Watchdog or Lapdog?: Disclosure Fosters a Functioning Fourth Estate

A fundamental reason the First Amendment protects the news media from government control and censorship is to allow the press to “serve in checking the abuse of power by public officials.”<sup>62</sup> In order for the news media to function effectively as a “Fourth Estate”<sup>63</sup> and “as a watchdog of government activity,”<sup>64</sup> journalists must be *independent* of the government.<sup>65</sup> As the late United

<sup>58</sup> *Id.*

<sup>59</sup> See Clay Calvert & Robert D. Richards, *Alan Isaacman And The First Amendment: A Candid Interview With Larry Flynt's Attorney*, 19 CARDOZO ARTS & ENT. L.J. 313, 318 (2001) (writing that “[t]he premise of this idealistically free and fair competition of ideas is that truth will be discovered or, at the very least, conceptions of the truth will be tested and challenged.”).

<sup>60</sup> See generally Robert D. Richards & Clay Calvert, *Counterspeech 2000: A New Look at the Old Remedy for “Bad” Speech*, 2000 BYU L. REV. 553 (2000) (analyzing the counterspeech doctrine and describing some relatively recent examples and applications of it).

<sup>61</sup> Robert C. Post, *Symposium On Law In The Twentieth Century: Reconciling Theory and Doctrine in First Amendment Jurisprudence*, 88 CAL. L. REV. 2353, 2363 (2000).

<sup>62</sup> Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521, 527.

<sup>63</sup> See Martin E. Halstuk, *Policy of Secrecy – Pattern of Deception: What Federalist Leaders Thought About a Public Right to Know, 1794-98*, 7 COMM. L. & POL’Y 51, 55-56 (2002) (discussing the Fourth Estate function of the press).

<sup>64</sup> *Leathers v. Medlock*, 499 U.S. 439, 447 (1991).

<sup>65</sup> Deborah Potter, *Maybe It's Not So Obvious*, AM. JOURNALISM REV., at <http://ajr.org/article.asp?id=3025> (June 2005) (writing that “[i]ndependence is one of those bedrock journalism principles, right up there with telling the truth.”).

States Supreme Court Justice Potter Stewart once wrote, there is a “critical role of an *independent press* in our society.”<sup>66</sup> A free press, as the Court observed nearly seventy years ago, “stands as one of the great interpreters *between* the government and the people.”<sup>67</sup>

When a journalist is paid money by the government, however, he or she is no longer independent of it. The government-paid journalist does not stand *between* the government and the people as interpreter but, instead, becomes the voice of the government and the spokesperson for its views. Or to put it more vividly, as *USA Today* columnist DeWayne Wickham wrote about the Maggie Gallagher and Mike McManus incidents,<sup>68</sup> “when someone who assumes the role of a journalist also works to promote the interests of others outside the media, he or she blurs the line that separates journalists from carnival barkers.”<sup>69</sup>

The application of payola laws, with their emphasis on disclosure, allows members of the television audience to better determine for themselves whether someone who appears to be a neutral journalist and an objective watchdog is, in fact, something more akin to a lapdog. The “outing,” as it were, of Williams revealed that he is not a conservative-journalist watchdog, but rather a conservative-spokesperson lapdog. Payola laws thus serve the watchdog role of the press and the public by exposing journalists who pretend to take on one role but, in fact, perform another. The public has a First Amendment right to know<sup>70</sup> who the real watchdogs are, and payola laws serve this function.

### C. Political Speech and Wise Decision-Making Require Payola Laws

For Alexander Meiklejohn, the ultimate goal of protecting expression in a democratic society was “the voting of wise decisions.”<sup>71</sup> He “anchor[ed] the First Amendment firmly to the value of self-government.”<sup>72</sup> As Professor G. Edward White observes, Meiklejohn distinguished between public and private speech, with the former category sweeping up political speech and meriting

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<sup>66</sup> *Branzburg v. Hayes*, 408 U.S. 665, 725 (Stewart, J., dissenting) (emphasis added).

<sup>67</sup> *Grosjean v. Am. Press Co.*, 297 U.S. 233, 250 (1936) (emphasis added).

<sup>68</sup> See *supra* notes 37–43 and accompanying text (describing the Gallagher and McManus situations).

<sup>69</sup> DeWayne Wickham, *Defiant Columnists Shouldn't Be Able To Brush Off Transgressions*, USA TODAY, Feb. 1, 2005, at 13A.

<sup>70</sup> See Thomas I. Emerson, *Legal Foundations of the Right to Know*, 1976 WASH. U. L.Q. 1, 2 (contending that “the right to know” is an essential aspect of the system of free expression embodied in the First Amendment).

<sup>71</sup> ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE* 26 (Harper & Brothers 1960).

<sup>72</sup> ROBERT C. POST, *CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT* 270 (Harvard University Press 1995).

absolute protection in contrast to his “tacit relegation of private expressions to a lower-value category of speech . . .”<sup>73</sup> For Meiklejohn, the distinction between “public (unabridgable) and private (abridgable) speech” was central to his bifurcated theory of free expression.<sup>74</sup>

Application of the “Meiklejohnian” free-speech approach dictates that the public has a right to know that Williams was paid for his commentary.<sup>75</sup> Williams’ speech was about a matter of public concern and government policy – namely, the No Child Left Behind Act.<sup>76</sup> In order for citizens to determine their own thoughts about this matter of public concern, it is imperative that they have as much information as possible. If, in turn, those citizens know that some individuals who support the law are being paid to do so, it may change both their thinking on the public issue that is No Child Left Behind and, subsequently, their voting behavior. Even more broadly, the revelation that a government department, under the control of a Republican president, paid conservative commentators to support its initiatives may alter some conservative voters’ opinions on issues far beyond the realm of No Child Left Behind. The matter indirectly calls into question the integrity of the Bush administration.

Some might contend here, however, that the unenumerated or implied First Amendment right not to speak<sup>77</sup> – what has been called “the First Amendment freedom from compelled expression”<sup>78</sup> – protects Williams from being forced to speak and to disclose the fact that his commentary was bought by the government. But under the aforementioned “Meiklejohnian” theory, the specific fact that Williams was keeping secret the private financial consideration that he was receiving for his comments can be compelled because disclosure hurts only Williams’ *private* speech rights and private financial gain yet, at the same time, serves the greater public interest on a matter of public concern.<sup>79</sup>

In summary, there are multiple reasons grounded in the overriding principle

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<sup>73</sup> G. Edward White, *The First Amendment Comes Of Age: The Emergence Of Free Speech In Twentieth-Century America*, 95 MICH. L. REV. 299, 348 (1996).

<sup>74</sup> *Id.* at 368.

<sup>75</sup> It is important to understand here that Meiklejohn’s theory of free speech “provided the political underpinning of later claims of a ‘right to know.’” Jonathan L. Hafetz, *The First Amendment and the Right of Access to Deportation Proceedings*, 40 CAL. W. L. REV. 265, 271 (2004).

<sup>76</sup> Blackstone, *supra* note 3.

<sup>77</sup> See *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (writing that “the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and *the right to refrain from speaking at all*” and calling “[t]he right to speak and the right to refrain from speaking . . .” complementary components of a broader right to a free mind) (emphasis added).

<sup>78</sup> Howard M. Wasserman, *Compelled Expression and the Public Forum Doctrine*, 77 TUL. L. REV. 163, 168 (2002).

<sup>79</sup> Blackstone, *supra* note 3.

of disclosure and the danger of the ills of deceptive journalism, as well as at least three major theories of free speech, that support the application of payola laws compelling paid commentators to disclose the nature of such payments when appearing on television or speaking on the radio. Part II of this article attempts to illustrate the other side of the issue by articulating multiple reasons why the FCC payola laws should not apply to Williams and their limitations in eliminating and exposing conflicts of interest.

## II. PUNDITS, BIAS AND VIEWERS' EXPECTATIONS: QUESTIONING THE RELEVANCE AND LIMITATIONS OF PAYOLA LAWS

"I'm not a journalist, I'm a pundit."<sup>80</sup>

That was the short-and-sweet, bottom-line excuse – perhaps, more gently put, justification – from Armstrong Williams after the story about his paid-for commentary story initially broke in the mainstream news media.

Although clearly a self-serving defense for his actions, Williams' simple seven-word statement nonetheless raises an important and more complex point: journalists and pundits are *not* the same thing and, in turn, reasonable viewers and readers should expect different things from them. Consider some basic differences, including how facts are used. This year *New York Times* columnist William Safire wrote that "[r]eporters are required to put what's happened up top, but the practiced pundit places a nugget of news, even a startling insight, halfway down the column, directed at the politiscenti."<sup>81</sup> In a column in the *Baltimore Sun*, Linda Chavez also wrote this year that "[w]e expect pundits to be biased – opinion is their stock in trade. Columnists are paid to state their opinions; reporters are paid not to reveal them. Reporters deal in facts, and the collection and reporting of those facts are supposed to be apolitical, impartial and unbiased."<sup>82</sup>

Indeed, the mainstream media tend *not* to identify Armstrong Williams as a journalist but, instead, refer to him as a:

- "conservative pundit"<sup>83</sup>

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<sup>80</sup> Robert Friedman, *Was That Wrong?*, ST. PETERSBURG TIMES (Fla.), Jan. 23, 2005, at 7P.

<sup>81</sup> William Safire, *How to Read a Column*, N.Y. TIMES, Jan. 24, 2005, at A17.

<sup>82</sup> Linda Chavez, *Bias Stories Show Lack of Balance in Media Universe*, BALT. SUN, Jan. 13, 2005, at 19A.

<sup>83</sup> See, e.g., *Pretend Punditry*, L.A. TIMES, Jan. 15, 2005, at B18 (opining against Williams' conduct, and identifying him, on first reference, as "conservative pundit Armstrong Williams"); Eric Deggans, *Media Losing Their Credibility with Consumers on All Sides*, ST. PETERSBURG TIMES (Fla.), Jan. 15, 2005, at 14A (identifying Williams, on first reference, as "conservative pundit Armstrong Williams"); Errol Louis, *Time To Put An End To Pay-To-Play Journalism*, DAILY NEWS (N.Y.), Jan. 11, 2005, at 33 (identifying Williams, on first reference, as "conservative pundit Armstrong Williams").

- “conservative commentator”<sup>84</sup>
- “conservative columnist”<sup>85</sup>

Each of these modifiers is not reserved exclusively for Armstrong Williams. Rather each is similarly applied to others who take Republican-based positions in the media, such as Ann Coulter<sup>86</sup> and George Will.<sup>87</sup> It serves as a signal or heuristic cue to readers, letting them know of the bias or perspective that Armstrong Williams conveys in his column and on television. His loyal followers obviously know the perspective from which he writes and pontificates. In this sense, Williams is more akin to an Internet blogger who operates free from the strictures of traditional journalism.<sup>88</sup> Indeed, a court battle was waged in Cali-

<sup>84</sup> See, e.g., Jim Drinkard, *President Criticizes Education Dept.'s Payout to Williams*, USA TODAY, Jan. 14, 2005, at A9 (identifying Williams, on first reference and in the lead paragraph, as “conservative commentator Armstrong Williams”); Tom Hamburger et al., *Tax-Funded White House PR Effort Questioned*, L.A. TIMES, Jan. 8, 2005, at A1 (identifying Williams, on first reference, as “conservative commentator Armstrong Williams”); David D. Kirkpatrick, *TV Host Says U.S. Paid Him To Back Policy*, N.Y. TIMES, Jan. 8, 2005, at A1 (calling Williams, on first reference and in the lead paragraph, “a prominent conservative commentator who was a protégé of Senator Strom Thurmond and Justice Clarence Thomas of the Supreme Court”); Alexandra Marks, *Media Mea Culpas Don't Defuse Public Discontent*, CHRISTIAN SCI. MONITOR, Jan. 12, 2005, at 3 (identifying Williams, on first reference, as “conservative commentator Armstrong Williams”).

<sup>85</sup> Robert Joiner, *Something's Fishy About Reaction to Williams Controversy*, ST. LOUIS POST-DISPATCH, Jan. 17, 2005, at B7 (identifying Williams, on first reference, as “conservative columnist Armstrong Williams”).

<sup>86</sup> See, e.g., Carlos Campos, *Legislature '05: Political Furniture Rearranged*, ATLANTA J. CONST., Jan. 13, 2005, at C1 (identifying Coulter as “conservative commentator Ann Coulter”); Steve Hymon, *Films Seek to Counterbalance Liberal Fare*, L.A. TIMES, Oct. 3, 2004, at B3 (referring to Coulter as “conservative pundit Ann Coulter”); Tamar Lytle, *Ousted by GOP, Cleland Fights Back*, SEATTLE TIMES, June 15, 2004, at A6 (identifying Coulter as “[c]onservative columnist Ann Coulter”); Kevin McDermott, *Keyes' Comment on Gays Widens Gap in State Party*, ST. LOUIS POST-DISPATCH, Sept. 2, 2004, at A10 (identifying Coulter as “nationally syndicated conservative columnist Ann Coulter”); Dana Milbank, *Tying Kerry to Terror Tests Rhetorical Limits*, WASH. POST, Sept. 24, 2004, at A1 (identifying Coulter as “conservative commentator Ann Coulter”); Michael O'Sullivan, *'Hunting' Hits Its Target*, WASH. POST, June 25, 2004, at Weekend T33 (identifying Coulter as “conservative pundit Ann Coulter”).

<sup>87</sup> See, e.g., Lou Cannon, *Actor, Governor, President, Icon*, WASH. POST, June 6, 2004, at A28 (identifying Will as “[c]onservative columnist George Will, a friend and confidant of Reagan”); Jonathan Chait, *Why Academia Shuns Republicans*, L.A. TIMES, Dec. 10, 2004, at B11 (identifying Will as “[c]onservative pundit George Will”); Gwen Florio, *Stress Vote Has 'Em Talking: Anti-Anxiety Ballot Measure Elicits Commentary From Near and Far*, DENVER POST, Aug. 21, 2003, at A1 (identifying Will as “[c]onservative commentator George Will”); Peter Hartlaub, *Springsteen's Misinterpreted Lyrics*, S.F. CHRON., July 23, 2004, at E21 (identifying Will as “conservative columnist George Will”); Mark Leibovich, *For Republicans, a House (And Senate) Divided*, WASH. POST, May 23, 2004, at D01 (using the phrase “[c]onservative pundits George Will and Robert Novak”); Charlie Savage, *Frank Sees Referendum For Ruling On Gay Marriage*, BOSTON GLOBE, Nov. 24, 2003, at B4 (identifying Will as “conservative commentator George Will”).

<sup>88</sup> See J.D. Lasica, *Blogs and Journalism Need Each Other*, NIEMAN REPORTS, Fall

ifornia in 2005 precisely over the issue of whether bloggers should be treated as journalists;<sup>89</sup> one may raise the similar question whether a columnist who dispenses quotes for hire is really a journalist.

If, as a pundit/commentator, Armstrong Williams is not a journalist, then he is not bound by the rules of journalism, including what have been called the strategic rituals of objectivity.<sup>90</sup> Objectivity can be defined as “a mechanism that allows journalists to divorce fact from opinion. Journalists view objectivity as refusing to allow individual bias to influence what they report or how they cover it.”<sup>91</sup> But because Williams is a commentator, he is completely free to ignore the tenet of objectivity and its processes, such as the presentation of conflicting truth claims in a balanced manner, and he is allowed to express, both in print and over the airwaves, his own biases and predilections.

This renders the application of payola laws, with their emphasis on the disclosure of facts that reveal conflicts of interest, far less relevant and important as applied to pundits/commentators. Television viewers should reasonably expect and know that pundits like Williams necessarily have biases and that they stake out positions without pretending to be neutral. Whether their biases come from a payment from a government agency or from their own deep-seated and truly held beliefs, reasonable members of the television audience should not expect neutrality when pundits/commentators speak. Put differently, Williams’ political biases have already been exposed and disclosed to viewers by: 1) his previous commentaries and writings, in which he has repeatedly established his conservative positions; and 2) by the labels such as “conservative commentator” that others in the news media frequently use to describe and introduce him.<sup>92</sup> While it might come as a surprise that Williams’

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2003, at 70 (writing that “[a]mateur bloggers typically have no editorial oversight, no training in the craft, and no respect for the news media’s rules and standards.”); Rachel Smolkin, *The Expanding Blogosphere*, AM. JOURNALISM REV., at <http://www.ajr.org/Article.asp?id=3682> (June-July 2004) (writing that “[p]olitical bloggers chew over the news of the day, frequently skewering journalists’ coverage or spotlighting what they feel are under-covered stories. *Objectivity is generally verboten in the blogosphere*, although ideology tends to be less rigid than the partisan debates that play out so repetitiously in newspapers and on television.”) (emphasis added).

<sup>89</sup> See Benny Evangelista, *Net Buzzing on Bloggers’ Status; First Amendment Issues Become Hot Topic in Chat Rooms*, S.F. CHRON., Mar. 9, 2005, at C1 (discussing how a superior court judge in Santa Clara County, Calif., is “weighing the issue of whether bloggers and online publishers can be considered journalists”); David Shaw, *Media Matters; Do Bloggers Deserve Basic Journalistic Protections*, L.A. TIMES, Mar. 27, 2005, at E14 (noting how Santa Clara County Superior Court Judge James Kleinberg failed to address the issue of whether bloggers are journalists in a March 2005 ruling).

<sup>90</sup> Gaye Tuchman, *Objectivity as Strategic Ritual: An Examination of Newsmen’s Notions of Objectivity*, 77 AMERICAN JOURNAL OF SOCIOLOGY 660, 665-70 (1972).

<sup>91</sup> PHILIP PATTERSON & LEE WILKINS, *MEDIA ETHICS: ISSUES & CASES* 22 (3d ed. 1998).

<sup>92</sup> See *supra* notes 83-85 and accompanying text (discussing the monikers that are applied to Williams).

company received payments related to his commentary on the No Child Left Behind Act, it should come as no surprise to his audience that he would support the President Bush-backed Act. Payola laws do little to expose bias in Williams' positions because political bias is concomitant with his role as a political pundit/commentator.

Payola laws, which would certainly seem to catch and to cover direct payments like those received by Williams, fail to sweep up and address a more pervasive and insidious form of payment that journalists (not just pundits and commentators) receive and that may influence not only their opinions but also their news judgment and reporting. Consider the following query:

“If a columnist accepts a speaking fee, does that amount to disclosure of a bias?”<sup>93</sup>

That question, posed by the editorial page editor of the *Seattle Times* to his newspaper's readers in response to the Armstrong Williams situation, is far from rhetorical.<sup>94</sup> Indeed, it illustrates the complexity of the bias issue and suggests that direct payments to tout programs or initiatives like those received by Williams are merely the tip of the bias iceberg.<sup>95</sup> Indeed, “[n]aked partisanship in news coverage is actually rare . . .”<sup>96</sup> But there are many other situations lying below the surface that may also create conflicts of interest and bias – situations that payola laws fail to address. A few examples of these situations are useful here to illustrate the problem.

The wife-and-husband journalistic duo of Cokie and Steve Roberts, “[w]ith no concern for the niceties of conflicts of interest . . . accepted together as much as \$45,000 in speaking fees from the very corporations that were affected by the legislation she was allegedly covering in Congress.”<sup>97</sup> In fact, by some accounts Cokie Roberts “earned more than \$300,000 for speaking fees in 1993.”<sup>98</sup> But she was not alone. In the late 1990s, the speaking fee for ABC News' Sam Donaldson was “said to be in the \$30,000 range,”<sup>99</sup> and there are many more examples.<sup>100</sup>

An article in *USA Today* pointed out that acceptance of such fees by journal-

<sup>93</sup> JAMES F. VESELY, *Mainstream: Is Anyone in the Middle?*, SEATTLE TIMES, Jan. 30, 2005, at D1.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> Vincent Carroll, *News Flash! Liberals Hold Sway In The Media*, ROCKY MOUNTAIN NEWS (Denver, Colo.), June 19, 2004, at 12C.

<sup>97</sup> Eric Alterman, *Farewell, My Cokie*, THE NATION, Aug. 5, 2002, at 10.

<sup>98</sup> Elizabeth Bennett, *News Media Get Uncomfortable When the Tables are Turned*, PITT. POST-GAZETTE, Jan. 11, 2004, at E5.

<sup>99</sup> Cal Thomas, *Masses Seem to Tune Out Washington Insiders*, TAMPA TRIB. (Fla.), Dec. 8, 1997, at 7.

<sup>100</sup> See generally JAMES FALLOWS, *BREAKING THE NEWS: HOW THE MEDIA UNDERMINE AMERICAN DEMOCRACY*, 83-126 (Pantheon Books 1996) (describing what the author calls buck-raking journalists who accept high fees for speaking engagements).

ists “can lead to conflict-of-interest charges.”<sup>101</sup> As *Washington Post* media critic Howard Kurtz explains, “[s]ome big-name media people routinely receive \$15,000, \$30,000, even \$50,000 for a single speech. And the bulk of that money comes from corporations and lobbying organizations with more than a passing interest in the issues the journalists write about and yak about for a living.”<sup>102</sup> The corruption that results can be “more subtle than that.”<sup>103</sup> As Kurtz writes:

The more time you spend with lobbyists and corporate officials, the more you come to identify with their world view. It may be easier not to pursue a complicated story about an industry after you have taken the industry’s money, if only to avoid potential criticism. At \$10,000 or \$20,000 or \$30,000 a pop, your lecture schedule becomes as vital as your journalistic duties.<sup>104</sup>

He adds that:

The essence of journalism, even for the fiercest opinion-mongers, is supposed to be professional detachment. The public has a right to expect that those who pontificate for a living are not in financial cahoots with the industries and lobbies they analyze on the air. Too many reporters and pundits simply have a blind spot on this issue.<sup>105</sup>

Consider a relatively recent example that illustrates the point. CNN’s Lou Dobbs received speaking fees from accounting firm Arthur Andersen, and he chaired a firm that Andersen audits.<sup>106</sup> When the U.S. Department of Justice prosecuted Arthur Andersen in 2002, Dobbs was quick to criticize the prosecution.<sup>107</sup> Dobbs claimed his on-air defense of Andersen had nothing to do with the payments that he had received from the company, but his other defense was strikingly similar to the “pundit-not-a-journalist” defense employed by Armstrong Williams.<sup>108</sup> Said Dobbs, “I’m not a traditional network anchor.”<sup>109</sup>

Speaking fees to journalists are not the end of the problem. There is still another layer of paid-for bias in broadcast journalism that appears to escape the reach of the underinclusive payola laws. This kind of bias does not involve payments to journalists, pundits or commentators, but rather implicates the very sources on whom journalists so often rely and depend for their information. As the *Wall Street Journal* reported in December of 2004, “[s]ome companies have been paying professors to promote their points of view on TV shows, in newspaper and magazine articles and in letters to the editor. In many

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<sup>101</sup> Matt Roush, *How the Media Pay Price for Celebrity Status*, USA TODAY, Oct. 22, 1996, at 3D.

<sup>102</sup> Howard Kurtz, *Money Talks*, WASH. POST, Jan. 21, 1996, Magazine, at W11.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> Russell Grantham, *Dobbs’ Link to Andersen Decried*, ATLANTA J. CONST., Apr. 5, 2002, at F1.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

cases the arrangement between the professor and the company isn't disclosed."<sup>110</sup> Such payments are far more problematic than those to pundits such as Williams because journalists constantly use professors as "expert" sources, and the audience reasonably expects scholarly views, premised and founded upon research and study. No one expects such expertise or scholarship from Williams and pundits – they are merely talking heads. As the *Wall Street Journal* noted, academics are "perceived to be more independent sources, and it is far less common for journalists to ask them about potential conflicts."<sup>111</sup>

A recent article in the *Sacramento Bee* provided a specific example of the problem, writing that:

More than 20 [University of California at] Davis professors have earned outside income providing advice to biotechnology companies through consulting. In one instance, two UC Davis professors purchased stock in a biotech startup company that funded their research. Often, those *financial ties are not disclosed in academic articles and public forums*.<sup>112</sup>

One can assume that these public forums include television and newspapers.

Finally, fees and monetary payments are not even necessary to create the conflict of interest biases that may taint journalism. As *Los Angeles Times* media critic Howard Rosenberg writes, "newscasting's celebrity journalists" often are "on a cozy first-name basis with many of their interview subjects, including those occupying the loftiest towers of government."<sup>113</sup> For Rosenberg, this situation is indicative of "something dangerous that is edging forward nationally: a blurring of lines separating news media and newsmakers in television. It's a growing trend that threatens to erode the independence of journalists working on the small screen."<sup>114</sup> Payola laws, of course, only address financial payments or what the law describes as "valuable consideration"<sup>115</sup>; they have no way of addressing the types of bias that are created, much more subtly, by close access and friendship with government officials. The general public has no way of knowing which journalists hob-knob and huddle with which politicians at exclusive and swanky Georgetown-area soirees.

Finally, many journalists today were once themselves actively involved in

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<sup>110</sup> Michael Schroeder, *Some Professors Take Payments to Express Views*, WALL ST. J., Dec. 10, 2004, at B1.

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

<sup>112</sup> Tom Knudson & Mike Lee, *Biotech Industry Funds Bumper Crop of UC Davis Research*, SACRAMENTO BEE, June 8, 2004, at A1 (emphasis added).

<sup>113</sup> Howard Rosenberg, *Television; A Journalist Breaks the Golden Rule*, L.A. TIMES, Sept. 6, 2002, at F1.

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

<sup>115</sup> See 47 U.S.C. §317(a) (1) (2000).

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 person.

*Id.*

partisan politics, such as ABC News' George Stephanopolous and columnist and commentator David Gergen.<sup>116</sup> While many television viewers today will remember and know that Stephanopolous (and Gergen) worked for President Bill Clinton before switching to the field of journalism, his prior profession and position create a distinct possibility of bias in his work for ABC News. *Los Angeles Times* media critic David Shaw, in fact, doesn't "think the media – already faced with an increasingly skeptical public – can afford to further undermine their shaky standing by providing a forum for political-operatives-turned-opinion-mongers whose very presence bespeaks bias."<sup>117</sup> How many younger viewers would remember that NBC News' Tim Russert once worked for Democratic politicians Daniel Patrick Moynihan and Mario Cuomo?<sup>118</sup> Probably not as many as recall that Stephanopolous worked for former President Clinton.

All of this leads to another factor that may create a conflict of interest for mainstream journalists (not pundits or commentators), and it is a potential conflict of interest that they *never* disclose to the viewing public: their own political party affiliations and voting behavior. Television journalists never reveal to viewers the political party to which they belong, and they never disclose the candidates for whom they vote in local and national elections. Payola laws, of course, focus only on disclosure of financial payments or valuable consideration that may create bias; they completely ignore the political party affiliations of journalists that may also taint and bias journalists' reporting.<sup>119</sup>

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<sup>116</sup> See David Shaw, *Media Matters; War Horse Analysts Come Saddled with Image of Bias*, L.A. TIMES, Oct. 3, 2004, at E14. Here, Shaw describes "the men and women in the revolving door of the media/politics echo chamber," including among them:

George Stephanopoulos going from the Clinton White House to ABC; Peggy Noonan going from writing speeches for President Reagan to offering commentary on MSNBC and in the *Wall Street Journal*; Joe Trippi going from Howard Dean's presidential campaign to MSNBC; David Gergen going back and forth between and among four administrations and so many media outposts that even he probably can't remember them all.

*Id.*

<sup>117</sup> *Id.*

<sup>118</sup> See Rem Rieder, *Both Sides of the Street*, AM. JOURNALISM REV. at [http://www.ajr.org/article\\_printable.asp?id=2808](http://www.ajr.org/article_printable.asp?id=2808) (Mar. 2003) (describing "the revolving-door syndrome, in which Washington figures go back and forth between government and politics on the one hand and journalism on the other" and writing that "Tim Russert come[s] to mind" as one current journalists who made the switch from politics); see also TIM RUSSERT, *BIG RUSS AND ME* 236-270 (Miramax Books / Hyperion 2004) (describing Russert's work for, and relationship with, Daniel Patrick Moynihan).

<sup>119</sup> For instance, the most relevant disclosure provision of a payola statute provides:

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 person: *Provided*, that "service or other valuable consideration" shall not include any

The television audience does know, however, that far more journalists identify themselves as liberals than conservatives. A survey conducted by the non-partisan Pew Research Center of 547 journalists in 2004 revealed that “only 12 percent of local reporters, editors, and media executives are self-described conservatives, while twice as many call themselves liberal. At national news organizations, the gap is even wider – 7 percent conservative vs. 34 percent liberal.”<sup>120</sup> These numbers and percentages, of course, never tell the public which particular and individual journalists are self-described conservatives or liberals. The data seem to confirm the feelings that many Americans already have, as a Gallup poll conducted in 2003 found that “45 percent of Americans [surveyed] said the news media are too liberal, while 14 percent said too conservative.”<sup>121</sup> Based on these data, one may infer that journalists’ personal political affiliations do affect their reporting of the news.

The danger, of course, is that “ideological uniformity impacts coverage.”<sup>122</sup> As Bernard Goldberg contends in making his case that there is a liberal bias in news coverage, “the problem is groupthink”<sup>123</sup> to the extent that liberals in the newsroom “surround themselves with still more like-minded people.”<sup>124</sup> This, in turn, affects what is covered and how it is covered.

With this in mind, this article proposes that the FCC implement a new system that, like the current payola laws, focuses on the all-important concept of disclosure and the obligation to reveal certain information to the viewing public. This new system requires something different than disclosure of *quid pro quo*, cash-for-commentary transactions by broadcast journalists.

In particular, it is argued here that Congress and the FCC should adopt new rules that require all on-air broadcast journalists and news anchors to openly identify their political party affiliations and, if not registered with a particular party, whether they consider themselves to be liberal, moderate or conservative. A bill supporting such a measure might well be called “*The Broadcast Credibility Enhancement Act of 2005*.” Put differently, this is a one-word compelled speech<sup>125</sup> obligation; all that would be necessary for compliance is

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service or property furnished without charge or at a nominal charge for use on, or in connection with, a broadcast unless it is so furnished in consideration for an identification in a broadcast of any person, product, service, trademark, or brand name beyond an identification which is reasonably related to the use of such service or property on the broadcast.

47 U.S.C. §317(a)(1) (2000) (emphasis added).

<sup>120</sup> Randy Dotinga, *Newsroom Conservatives Are a Rare Breed*, CHRISTIAN SCI. MONITOR, June 3, 2004, at 2.

<sup>121</sup> *Id.*

<sup>122</sup> Carroll, *supra* note 96.

<sup>123</sup> GOLDBERG, *supra* note 30, at 15.

<sup>124</sup> *Id.* at 15-16.

<sup>125</sup> It is true that “the Court has made clear that the First Amendment prohibition against

the addition of one word, such as “Democrat” or “Republican” or “Liberal” or “Conservative” underneath the reporter’s or anchor’s name when it appears on the television screen or, if on the radio, immediately after the name of the reporter or anchor is spoken.

This requirement, it should be emphasized, in no way instructs broadcast journalists about what stories to cover or how they should be covered. Journalists are free to be as biased as they want when reporting; the editorial control and discretion that is vested in broadcast journalists is not altered or affected by the proposal.

Political party disclosure has become necessary in light of recent transgressions. First, it provides the viewing audience with more information about who is producing and reporting the story in question, thus providing viewers with an additional fact to use in judging the credibility and potential bias of the story. The maxim here is simple: the more information the viewer has, the better off he or she is. That, after all, is the theory behind the payola laws – the public is better off if it is informed of payments. A conservative viewer, for instance, who knows that the journalist who covers a particular story is a Democrat may now assess the credibility of the story in the context of the political affiliation of its reporter. The same holds true for a liberal viewer who watches a story by an on-air reporter identified as a Republican.

Many today believe that journalists are biased, either to the left or to the right. In fact, there have been a number of top-selling books written recently on the subject, such as veteran CBS News journalist Bernard Goldberg’s *Bias*<sup>126</sup> and media critic Eric Alterman’s *What Liberal Media?*<sup>127</sup> Moreover, the very idea that journalists can be completely objective in their reporting is viewed with substantial skepticism today. Journalism Professor Ron F. Smith writes, in a leading media ethics textbook, that:

Few people anymore accept the idea of a journalist as an opinionless, emotionless entity that passes news from its sources to the public. Most accept that journalists, like everyone else, are shaped by their background, training and social experiences. They can see the world only through their own subjective vantage points. When they decide that one thing is newsworthy and another is not, their culture, beliefs and social heritage play a major

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compelled speech is extremely robust.” Gabriel Chin & Saira Rao, *Pledging Allegiance to the Constitution: The First Amendment and Loyalty Oaths for Faculty at Private Universities*, 64 U. PITT. L. REV. 431, 434 (2003). However, compelled speech in the realm of broadcasting is not a new phenomenon as evidenced by the fact that current FCC rules compel broadcasters, in line with the Children’s Television Act of 1990, to carry educational content for children. See Federal Communications Comm’n, Children’s Educational Television, at <http://www.fcc.gov/cgb/consumerfacts/childtv.html> (last visited Feb. 26, 2005) (“CTA requires each broadcast television station in the United States [is] to serve the educational and informational needs of children through its overall programming, including programming specifically designed to serve these needs (‘core programming’).”).

<sup>126</sup> GOLDBERG, *supra* note 30.

<sup>127</sup> ALTERMAN, *supra* note 30.

role.<sup>128</sup>

By exposing their political party affiliations to the public, broadcast journalists and anchors would build credibility and respect with the public. The implicit message sent by the broadcast journalist or news anchor is quite simple: “Here’s my story. Here’s my party affiliation. Now you have more information on which to evaluate my reportage. I’m not hiding anything.”

The bottom line is that journalists expose facts about *other people* all the time. Perhaps it would serve the public interest, as enforced by the FCC, to expose some facts about journalists beyond the narrow confines of the payola scenarios.

A second aspect of the proposed Broadcast Credibility Enhancement Act of 2005 would target the problem described above of journalists who use, as their sources, professors that receive payments from corporations and other business entities in exchange for media soundbites on their behalf.<sup>129</sup> In particular, the Act would require broadcast journalists to disclose to the public whether any source they use has received or is receiving financial remuneration in exchange for commentary. The only burden this places on broadcast journalists is to ask the professors they interview about any financially entangling alliances they might have related to the subject matter in question. Journalists pose questions to sources all of the time; adding one more is only minimally burdensome. Just as many scholarly publications require (or should require) professorial authors to disclose financial consideration and funding they have received in support of their published research,<sup>130</sup> journalists should ask professors for such disclosure. Providing these facts to viewers makes for a more informed public that can better root out bias in the stories it sees on the television news.

## CONCLUSION

“The key thing for journalists is their credibility . . . If they do anything that appears to look like they’re being bought off, they’ll lose it.”<sup>131</sup>

That’s the observation of Aly Colon, an ethics group leader at the Poynter Institute journalism think tank, and it certainly held true in the case of Arm-

<sup>128</sup> RON F. SMITH, *GROPING FOR ETHICS IN JOURNALISM* 77 (Iowa State Press 2003).

<sup>129</sup> See *supra* notes 110–112 and accompanying text (describing this practice).

<sup>130</sup> This is a particularly important issue in the area of medical research, where many studies are funded by drug companies. See generally David Willman, *The National Institutes of Health: Public Servant or Private Marketer?*, L.A. TIMES, Dec. 22, 2004, at A1 (describing private financial interests that affect supposedly neutral and objective medical research); see also NEW ENGLAND JOURNAL OF MEDICINE, AUTHOR CENTER FREQUENTLY ASKED QUESTIONS, at <http://authors.nejm.org/Misc/SubFAQ.asp> (last visited Feb. 26, 2005) (the site includes disclosure rules and forms).

<sup>131</sup> Thom Weidlich, *The Ethics of Entertaining Journalists*, PR WEEK, Aug. 23, 2004, at 20.

strong Williams, at least to the extent that one considers him a journalist. But Williams is not the only journalist to suffer a credibility problem today. As *Los Angeles Times* media critic David Shaw wrote in late 2004, “the media seem so partisan to so many Americans.”<sup>132</sup>

It’s not just the public that holds this perception. Even journalists themselves believe they are not always objective in reporting. As the *Boston Globe* reported in 2004,

A recent survey of 500 journalists found that the issue of biased campaign coverage has emerged as a major concern within the industry. And a new Pew Research Center poll of public attitudes reveals that 90 percent of the respondents believe that journalists often or sometimes ‘let their own political preferences influence the way they report the news.’<sup>133</sup>

Journalistic credibility, it should be pointed out, is not simply a matter of ethics; it is a concept that has been recognized by the judiciary as central to the role of the press and tied to the First Amendment. As the Supreme Court of Washington recognized in 1997, “editorial integrity and *credibility* are core objectives of editorial control and thus merit protection under the free press clauses.”<sup>134</sup> It also is a premise recognized by the United States Court of Appeals for the District of Columbia Circuit, which wrote in 1980 that “at least with respect to most news publications, *credibility* is central to their ultimate product and to the conduct of the enterprise.”<sup>135</sup>

Armstrong Williams thus is an easy target because what he did is so transparently wrong, if one considers him to be a journalist. But there are so many other sources of potential bias and conflicts of interest in the broadcast news media that are far from transparent.

Payola laws, as this article has argued, can only go so far in improving journalism credibility and exposing the supposed government watchdogs in the broadcast news business that are, in fact, biased. A better remedy is needed to help expose far broader and more pervasive sources of potential bias and conflicts of interest in the news media.

Parsed differently, it is only the very rare journalist (not the pundit or commentator) who will actually accept a *quid-pro-quo* cash payment in return for the favorable framing and slanting of a news story. Payola laws are fine for addressing such few-and-far-between cases. This article thus has suggested a new remedy – the Broadcast Credibility Enhancement Act of 2005 – to sweep

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<sup>132</sup> Shaw, *supra* note 89, at E14.

<sup>133</sup> Mark Jurkowitz, *Two Sides to Every Story*, BOSTON GLOBE, Oct. 25, 2004, at B6.

<sup>134</sup> *Nelson v. McClatchy Newspapers, Inc.*, 936 P.2d 1123, 1131 (Wash. 1997) (emphasis added). The language from *McClatchy* was later cited favorably by U.S. District Court Judge H. Franklin Waters in *Manson v. Little Rock Newspapers, Inc.*, 42 F. Supp. 2d 856, 866 (E.D. Ark. 1999).

<sup>135</sup> *Newspaper Guild of Greater Philadelphia v. Nat’l Labor Relations Bd.*, 636 F.2d 550, 560 (D.C. Cir. 1980) (emphasis added).

up other sources of potential bias in the broadcast news media.

Broadcast journalists will undoubtedly object to the measure, claiming that it somehow violates an unenumerated right to privacy that surrounds their own political choices. But recall that, under United States Supreme Court precedent, in the realm of broadcasting, it is the right of the audience and viewers that takes precedence over the rights of broadcasters and their employees.<sup>136</sup>

Finally, perhaps it is the Bush Administration and federal government agencies, not so much Armstrong Williams, on which the FCC should focus its current attention.<sup>137</sup> Williams was only the pitchman for the product; for such payola payments to stop in the future, they must be cut off at their source. In Williams' case, that source was the U.S. Department of Education, and Congress must now aggressively investigate this matter. Williams certainly was the shill, but the payment that flowed his way could easily run to others like him unless action is taken now. It is heartening to see the current bi-partisan Congressional support into this matter.<sup>138</sup> It is further heartening to see that the Bush administration's repeated use of so-called video news releases (VNRs)<sup>139</sup> captured the FCC's attention in April 2005, as the Commission issued a public notice that month noting that it would apply the same payola laws discussed in this article to stations that air VNRs and fail to disclose their source.<sup>140</sup> While the topic of VNRs is fodder for another law journal article, the parallel to the government payments to the likes of Williams is striking. Both VNRs and

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<sup>136</sup> Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390 (1969).

<sup>137</sup> A discussion of the Bush administration's accountability is beyond the scope of this article, which instead focuses on the payee (the commentator) side of the quid pro quo transactions with the likes of Armstrong Williams rather than on the payer (the government).

<sup>138</sup> See *Unethical Deal Ends Column, Credibility*, DENVER POST, Jan. 11, 2005, at B8 (writing that "Rep. George Miller, the top Democrat on the House Education committee, asked for an investigation into whether the deal with Williams was legal. The Republican chairman of the committee, Rep. John Boehner, supported the request.").

<sup>139</sup> See generally Richard W. Stevenson, *Bush Defends the Offering Of Videotaped News Releases*, N.Y. TIMES, Mar. 17, 2005, at A28 (describing how President Bush has "defended his administration's practice of providing television stations with video news releases that resemble actual news reports, saying that the practice was legal and that it was up to broadcasters to make clear that any of the releases they used on the air were produced by the government").

<sup>140</sup> See Commission Reminds Broadcast Licensees, Cable Operators And Others Of Requirements Applicable To Video News Releases And Seeks Comment On The Use Of Video News Releases By Broadcast Licensees And Cable Operators, *Public Notice*, MB Docket No. 05-171, at 2-3 (Apr. 13, 2005) (noting that "whenever broadcast stations and cable operators air VNRs, licensees and operators generally must clearly disclose to members of their audiences the nature, source and sponsorship of the material that they are viewing. We will take appropriate enforcement action against entities that do not comply with these rules").

paid-for commentary are tantamount to advertising, in the opinion of this author, and the use of VNRs merits its own academic attention in future articles.