AMERICAN CONSTITUTIONALISM

VOLUME II: RIGHTS AND LIBERTIES

Howard Gillman • Mark A. Graber • Keith E. Whittington

Supplementary Material

Chapter 11: The Contemporary Era – Democratic Rights/Free Speech

**Boehner v. McDermott, 484 F.3d 573** (D.C. Cir. 2007)

*In 1996, Republican U.S. Representative John Boehner participated in a conference call with other leaders of the House Republican caucus, including House Speaker Newt Gingrich, to discuss strategy on how to handle the ongoing ethics investigation of the Gingrich. Boehner participated via cell phone while driving in Florida, and his call was intercepted by a radio scanner operated by John and Alice Martin. The Martins recorded the call and delivered the tape to their U.S. Representative, the Democrat Karen Thurman. Thurman directed them to Representative James McDermott, the senior Democratic member of the House ethics committee that was investigating Gingrich. McDermott promptly gave the tape to several newspapers, including the* New York Times *which published a front-page story on the phone call, including a transcript.*

*The source of the recording became public. McDermott resigned from the ethics committee, and the Martins pleaded guilty to the federal crime of intentionally intercepting an electronic communication. Boehner filed a civil suit against McDermott under the Electronic Communications Privacy Act, which allowed for damages against those who intentionally disclose the contents of intercepted electronic communications. The district court ruled in favor of McDermott and held that the federal law could not be constitutionally applied in these circumstances, and a divided panel of the D.C. circuit court reversed that ruling with Judge Raymond Randolph writing for the majority, Judge Ruth Bader Ginsburg concurring in part, and Judge David Sentelle dissenting.*

*The U.S. Supreme Court vacated that decision in light of its recent decision in* Bartnicki v. Vopper *(2001). On remand, the district court found in favor of Boehner and rewarded him monetary damages. On appeal, a panel of the Court of Appeals for the District of Columbia divided 2-1 to affirm that decision. The case was heard* en banc*, with the circuit court judges divided 5-4 to affirm the decision of the panel. Judge Randolph wrote the majority opinion for both the panel and the full circuit. Judge Sentelle wrote the dissent for both himself on the panel and for three other judges on the full panel. Judge Thomas Griffith dissented in part, but concurred in the judgment to affirm.*

CHIEF JUDGE RANDOLPH.

. . . .

. . . . The question therefore is whether Representative McDermott had a First Amendment right to disclose to the media this particular tape at this particular time given the circumstances of his receipt of the tape, the ongoing proceedings before the Ethics Committee, and his position as a member of the Committee. In answering this question we shall assume arguendo that Representative McDermott lawfully obtained the tape from the Martins.

Whatever the *Bartnicki* majority meant by "lawfully obtain," the decision does not stand for the proposition that anyone who has lawfully obtained truthful information of public importance has a First Amendment right to disclose that information. *Bartnicki* avoided laying down such a broad rule of law, and for good reason. There are many federal provisions that forbid individuals from disclosing information they have lawfully obtained. The validity of these provisions has long been assumed. Grand jurors, court reporters, and prosecutors, for instance, may "not disclose a matter occurring before the grand jury." The Privacy Act imposes criminal penalties on government employees who disclose agency records containing information about identifiable individuals to unauthorized persons. The Espionage Act punishes officials who willfully disclose sensitive national defense information to persons not entitled to receive it. . . .

In analogous contexts the Supreme Court has sustained restrictions on disclosure of information even though the information was lawfully obtained. The First Amendment did not shield a television station from liability under the common law right of publicity when it filmed a plaintiff's "human cannonball" act and broadcast the film without his permission. *Zacchini v. Scripps-Howard Broadcasting Co*. (1977). When a newspaper divulged the identity of an individual who provided information to it under a promise of confidentiality, the First Amendment did not provide the paper with a defense to a breach of contract claim. *Cohen v. Cowles Media Co*. (1991). The First Amendment did not prevent the government from enforcing reasonable confidentiality restrictions on former employees of the CIA. *Snepp v. United States* (1980). . . .

. . . . .

*United States v. Aguilar* (1995) stands for the principle that those who accept positions of trust involving a duty not to disclose information they lawfully acquire while performing their responsibilities have no First Amendment right to disclose that information. The question thus becomes whether, in the words of *Aguilar,* Representative McDermott's position on the Ethics Committee imposed a "special" duty on him not to disclose this tape in these circumstances. *Bartnicki* has little to say about that issue. The individuals who disclosed the tape in that case were private citizens who did not occupy positions of trust.

. . . .

If the First Amendment does not protect Representative McDermott from House disciplinary proceedings, it is hard to see why it should protect him from liability in this civil suit. Either he had a First Amendment right to disclose the tape to the media or he did not. If he had the right, neither the House nor the courts could impose sanctions on him for exercising it. If he did not have the right, he has no shield from civil liability or from discipline imposed by the House. . . .

. . . .

When Representative McDermott became a member of the Ethics Committee, he voluntarily accepted a duty of confidentiality that covered his receipt and handling of the Martins' illegal recording. He therefore had no First Amendment right to disclose the tape to the media.

*Affirmed*.

JUDGE GRIFFITH, concurring.

Although I agree that Representative McDermott's actions were not protected by the First Amendment and for that reason join Judge Randolph's opinion, I write separately to explain that I would have found the disclosure of the tape recording protected by the First Amendment under *Bartnicki* had it not also been a violation of House Ethics Committee Rule 9, which imposed on Representative McDermott a duty not to "disclose any evidence relating to an investigation to any person or organization outside the Committee unless authorized by the Committee." . . . Because Representative McDermott cannot here wield the First Amendment shield that he voluntarily relinquished as a member of the Ethics Committee, I join Judge Randolph's opinion in concluding that his disclosure of the tape recording was not protected by the First Amendment.

JUDGE SENTELLE, with JUDGE ROGERS, JUDGE TATEL, JUDGE GARLAND, and JUDGE GRIFFITH, dissenting.

. . . .

The Supreme Court has decided the first issue of this case, that is, whether the United States (or Florida) can constitutionally bar the publication of information originally obtained by unlawful interception but otherwise lawfully received by the communicator, in the negative. We venture to say that an opposite rule would be fraught with danger. Just as Representative McDermott knew that the information had been unlawfully intercepted, so did the newspapers to whom he passed the information. Representative Boehner has suggested no distinction between the constitutionality of regulating communication of the contents of the tape by McDermott or by *The Washington Post* or *The New York Times* or any other media resource. For that matter, every reader of the information in the newspapers also learned that it had been obtained by unlawful intercept. Under the rule proposed by Representative Boehner, no one in the United States could communicate on this topic of public interest because of the defect in the chain of title. We do not believe the First Amendment permits this interdiction of public information either at the stage of the newspaper-reading public, of the newspaper-publishing communicators, or at the stage of Representative McDermott's disclosure to the news media. . . .

Therefore, as to the first issue, we now determine that the district court decision in favor of Boehner was incorrect as to this issue.

Notwithstanding the majority's view that the district court was incorrect as to the *Bartnicki* issue, the *en banc* court now holds that the judgment in favor of Boehner will be upheld on a ground different than that relied upon by the district court, arising from an issue not addressed in the previous majority opinions of this court. Boehner's argument, accepted as the basis of the majority's holding that the district court should be affirmed, is that McDermott's speech was not entitled to the First Amendment protection recognized in *Bartnicki* and the cases upon which it relies, but not because the First Amendment provides no protection against the imposition of liability under 18 U.S.C. § 2511(1)(c) to the receiver of information unlawfully obtained by the transferor of the information. Rather, Boehner argues, the protections of the First Amendment are not available in an action under § 2511(1)(c) to a public official whose First Amendment rights are otherwise limited by a body of rules unrelated to that statute. . . . I find this reasoning to be a *non sequitur.*

. . . .

To the extent the court holds that Representative McDermott forfeited his First Amendment protection either by conducting himself inconsistently with the "spirit" of Rule 9 or by violating the terms of House Rule 23 — which states that "[a] Member ... shall adhere to the spirit and the letter of the Rules of the House and to the rules of duly constituted committees thereof" — its holding suffers from a separate defect. Abrogating Representative McDermott's First Amendment protections because he violated the "spirit" of a rule contravenes the well-established principle that vague restrictions on speech are impermissible because of their chilling effect and because of "the need to eliminate the impermissible risk of discriminatory enforcement." Plainly, subjecting a Member of Congress to liability for violating the "spirit" of a rule burdens political speech in the vaguest of ways, leaving the Member to "guess at [the] contours" of the prohibition. Nothing in *Aguilar* countenances such a result.

. . . .