ORAL ARGUMENT NOT YET SCHEDULED

No. 04-7203

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

JOHN A. BOEHNER,

Plaintiff-Appellee,

v.

JAMES A. MCDERMOTT,

Defendant-Appellant.

On Appeal from the United States District Court
for the District of Columbia

BRIEF FOR APPELLEE

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), Plaintiff-Appellee John A. Boehner certifies as follows:

A. Parties and *Amici*

Except for the following, all parties, intervenors, and *amici* appearing before the district court and in this court are listed in the Appellant's Brief: Advance Publications, Inc., The Associated Press, CBS Broadcasting Inc., Daily News, L.P., The Hearst Corporation, Magazine Publishers of America, The McGraw-Hill Companies, Inc., NBC Universal, Inc., Newsweek, Inc., and NYP Holdings, Inc., have appeared as *amici* in this Court.

B. Rulings Under Review

References to the rulings under review appear in the Appellant's Brief. The rulings in the two Memorandum Opinions referenced by Appellant are that (1) "Plaintiff is entitled to judgment as a matter of law with respect to Defendant's disclosure in violation of 18 U.S.C. § 2511(1)(c)," (2) "Plaintiff shall recover a reasonable attorney's fee and other litigation costs reasonably incurred," in an amount to be established through post-judgment proceedings after this appeal is resolved, (3) "Plaintiff is entitled to recover $10,000 in statutory damages," and (4) "an award of punitive damages is appropriate in this case, and Plaintiff shall be awarded $50,000." LO 34 [J.A. 238]; RO 9, 13, 16-17 [J.A. 248, 252, 255-56].

C. Related Cases

The case on review was previously before this Court (*Boehner v. McDermott*, No. 98-7156) and the United States Supreme Court (*McDermott v. Boehner*, No. 99-1709). This Court reversed the district court's decision dismissing the complaint, and remanded to the district court. *Boehner v. McDermott*, 191 F.3d 463 (D.C. Cir. 1999). The Supreme Court vacated this Court's judgment and remanded the case for further consideration in light of *Bartnicki v. Vopper*, 532 U.S. 514 (2001). *McDermott v. Boehner*, 532 U.S. 1050 (2001). On remand from the Supreme Court, this Court again reversed the district court's decision dismissing the complaint, and remanded to the district court. On remand from this Court, the district court issued the orders that are the subject of the instant appeal. Counsel is aware of no other related cases currently pending in this Court or in any other court.

Michael A. Carvin

Counsel for Plaintiff-Appellee
JOHN A. BOEHNER

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TABLE OF AUTHORITIES

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Cases

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* Authorities upon which we chiefly rely are marked with asterisks.

Constitution and Statutes

Other Authorities

GLOSSARY

Abbreviation	Definition
7/17/98 Tr.	Transcript of Hearing Before the Honorable Thomas F. Hogan, United States District Judge, dated July 17, 1998, in *Boehner v. McDermott*, No. 98-594 (TFH) (D.D.C.)
AB	Brief *Amici Curiae* of Dow Jones & Company, Inc., *et al.*, dated June 15, 2005
Committee Transcript	Transcript of Hearing Before the Select Comm. on Ethics in the Matter of Representative Newt Gingrich, 105th Cong. (Jan. 17, 1997)
Committee Report	Report of the Select Comm. on Ethics in the Matter of Representative Newt Gingrich, H.R. Rep. No. 105-1 (1997)
Fisher Decl.	Declaration of Louis K. Fisher, dated January 16, 2003, in *Boehner v. McDermott*, No. 98-594 (TFH) (D.D.C.)
LO	Liability Opinion – Memorandum Opinion, dated August 20, 2004, in *Boehner v. McDermott*, No. 98-594 (TFH) (D.D.C.)
MB	Brief for Appellant James McDermott, dated May 31, 2005
MD	Deposition of Congressman James McDermott, dated July 24, 2002, and December 12, 2002, in *Boehner v. McDermott*, No. 98-594 (TFH) (D.D.C.)
McDermott Decl.	Declaration of James A. McDermott, dated September 16, 2002, in *Boehner v. McDermott*, No. 98-594 (TFH) (D.D.C.)
RO	Remedies Opinion – Memorandum Opinion, dated October 22, 2004, in *Boehner v. McDermott*, No. 98-594 (TFH) (D.D.C.)

COUNTER-STATEMENT OF THE ISSUE

Whether McDermott has a valid First Amendment justification for violating 18 U.S.C. § 2511(1)(c).[1]

RELEVANT STATUTORY PROVISIONS

All applicable statutes are contained in the Appellant's Brief.

COUNTER-STATEMENT OF FACTS

On December 21, 1996, Plaintiff John Boehner, a United States Representative from Ohio who was traveling with his family in Florida, used a cellular telephone to participate in a conference call with then-Speaker of the House Newt Gingrich and other House Republican leaders. LO 1-2 [J.A. 205-06]. The conversation concerned a then-pending House Ethics Committee investigation of allegations against Gingrich. *Id.*

John and Alice Martin, a Florida couple, used a police scanner to intercept and record the call, in violation of 18 U.S.C. § 2511(1)(a). LO 2, 12 [J.A. 206, 216]. The Martins attempted to give the tape to then-Representative Karen Thurman, but she returned it and advised them to deliver it to Defendant James

[1] Originally, McDermott indicated he also would raise the issue of "[w]hether the District Court erred [in its October 22, 2004 decision] in awarding statutory damages, punitive damages, and attorney's fees," but he has provided no reason not to affirm those awards if liability is affirmed. Appellant's Preliminary Statement of Issues. That being so, if the liability ruling is affirmed, the unchallenged ruling on remedies must also be affirmed.

McDermott, who was the Ethics Committee's ranking Democratic member. *Id.* at 2, 34 [J.A. 206, 238].

On the evening of January 8, 1997, in a small anteroom adjacent to the Ethics Committee's hearing room, the Martins personally delivered to McDermott a sealed envelope containing the tape. *Id.* at 2 [J.A. 206]; MD 157:24-158:4, 161:1-4, 163:4-7 [J.A. 73-75]. The Martins told McDermott that they were from northern Florida and that the tape had been recorded with a radio scanner at approximately 9:45 a.m. on December 21. LO 28-33 [J.A. 232-37]. As detailed below at pp. 33-40, *all* of the evidence shows that the Martins told McDermott this—in the cover letter that they handed him *outside* the envelope containing the tape or, at the very least, orally.

The cover letter also made clear that the Martins intended to give the tape to the Ethics Committee by delivering it to McDermott in his official capacity. The cover letter was addressed to "Committee On Standards of Official Conduct . . . Jim McDermott, Ranking Member" and stated that the Martins "felt the information included [was] of importance to the committee" and "pray that [the] committee will consider our sincerity in placing it in your hands." [J.A. 182]

McDermott accepted the tape from the Martins and returned to the Ethics Committee meeting that had been in recess. LO 32 [J.A. 236]; MD 170:13-24 [J.A. 77]. During another recess later that evening, McDermott walked to his

office—located in the far southwest corner of the Rayburn Building, as far as you can be from the Committee hearing room—to listen to the tape. LO 2 [J.A. 206]; MD 162:2-25, 164:8-12 [J.A. 75].

In his office that same evening, McDermott played the tape for Adam Clymer of the *New York Times*. LO 2-3 [J.A. 206-07]; MD 183:15-187:2 [J.A. 80-81]. McDermott told Clymer that he had been given the tape by a couple from northern Florida, and he quoted them as saying that they had recorded the conversation off a police scanner on December 21 at 9:45 a.m. *See New York Times* article [J.A. 168]. McDermott insisted to Clymer that he be identified only as a Democratic Congressman hostile to Mr. Gingrich. *Id.* The next day, McDermott allowed Jeanne Cummings of the *Atlanta Journal-Constitution* to listen to the tape in his office. LO 2-3 [J.A. 206-07], MD 190:4-192:13 [J.A. 82].

McDermott considered the potential illegality of disclosing the tape but failed to consult any authority on the matter. RO 15-16 [J.A. 254-55]; MD 216:16-217:10, 369:10-25 [J.A. 88, 149]. In addition, McDermott was motivated by an intent to embarrass and politically harm the participants on the intercepted call through an invasion of their privacy. RO 14-15 [J.A. 253-54]. As detailed below at pp. 55-57, the participants on the call were engaging in no wrongdoing and, in all events, McDermott knew nothing about the circumstances of the call at the time he made the disclosures. *Id.* at 15 [J.A. 254].

On January 9 or 10, 1997, McDermott sought personal legal advice about the tape from James Cole, the special counsel for the Committee's proceedings against Gingrich. MD 197:4-200:8, 203:14-17 [J.A. 83-84, 85]; McDermott Decl. ¶¶ 2-3 [J.A. 183]. McDermott wanted to keep the discussion confidential from the other members of the Committee, but he still made no inquiry into the legality of the disclosures, his responsibilities as a member of the Committee, or the circumstances of the Committee proceedings discussed in the intercepted conversation. McDermott Decl. ¶ 4 [J.A. 183]; MD 312:19-313:11, 321:2-327:2, 346:6-347:7, 351:18-352:2 [J.A. 134-35, 137-38, 143, 144].

On January 10, 1997, the *New York Times* published an article by Clymer about the illegally intercepted conversation, as well as a transcript of the tape. [J.A. 167-68, 170]. Later that day, McDermott denied to reporters that he knew any more about the tape than was in the paper. LO 32 [J.A. 236]. On Monday, January 13, 1997, however, the Martins publicly revealed that they had given the illegally intercepted tape to McDermott. *Id.* at 3 [J.A. 207]. That same day, after the Martins' revelation, McDermott's chief of staff retrieved the tape from McDermott's bedroom dresser drawer and delivered it, along with the Martins' cover letter, to the Ethics Committee offices. *Id.* at 30 n.7 [J.A. 234]; MD 212:2-213:22 [J.A. 87]. McDermott also resigned from the Committee that same day. LO 3 [J.A. 207].

The next day, McDermott sent and publicly released a letter to the Ethics Committee Chairman claiming that, by forwarding the tape to the Department of Justice, she had "shameful[ly]" withheld information from the Committee and had violated the House Rules. [J.A. 177] Specifically, McDermott claimed that because the tape had been "transmitted to [her] as Committee Chairman for inclusion in the Committee record," she should have treated it as "relevant evidence" that had been "disclosed in a committee investigation." *Id.*

Boehner subsequently filed this action under 18 U.S.C. § 2520 to recover for McDermott's violations of 18 U.S.C. § 2511(1)(c)'s prohibition against disclosing illegally intercepted communications. Initially, the district court "reluctantly held that Defendant had exploited a loophole"—specifically, the fact that the statute expressly prohibited the Martins' disclosure of the tape but not McDermott's receipt. LO 25 [J.A. 229]. In the district court's view at the time, this meant that McDermott had "[]lawfully obtained" the tape and could not be held liable consistent with the First Amendment. *Id.* This Court reversed because, among other things, McDermott had not "lawfully obtained" the tape where he had actively and knowingly participated in the Martins' unlawful disclosure. *Boehner v. McDermott*, 191 F.3d 463 (D.C. Cir. 1999). The Supreme Court vacated and remanded for further consideration in light of its intervening decision in *Bartnicki v. Vopper*, 532 U.S. 514 (2001), which held that § 2511(1)(c)—though it serves

"interests of the highest order"—was not "valid[] . . . as applied to the specific facts of [that] case[]." *Id.* at 518, 524. This Court in turn remanded to the district court to consider *Bartnicki*'s effect after further development of the record.

On the parties' cross-motions for summary judgment, the district court appeared to recognize that *Bartnicki* and similar cases are wholly inapplicable where, as in *United States v. Aguilar*, 515 U.S. 593 (1995), less stringent First Amendment standards apply because the defendant is in a sensitive confidential position that entails special duties of nondisclosure. In light of facts developed after remand, there is no genuine issue that McDermott received the tape in his official capacity as a member of the Ethics Committee rather than in his "unofficial political capacity." LO 18-21 [J.A. 222-25]. The district court held, however, that it is "outside the realm of the courts" to say that McDermott had any greater obligation than a private citizen to avoid disclosing concededly confidential information about the Committee's proceedings. *Id.* at 21-23 [J.A. 225-27].

The district court nevertheless rejected McDermott's First Amendment defense. McDermott participated in the Martins' transfer of the tape, and "all of the evidence is uncontradicted that at the time he took possession of the tape, Defendant . . . knew of the Martins' illegal activity." *Id.* at 34 [J.A. 238]. Because McDermott "knowingly join[ed] in the Martins' illegal actions," "[t]he case at hand is distinguishable from *Bartnicki*," where one defendant merely "found the

tape in his mailbox" and passed it to the others. *Id.* at 33, 34 [J.A. 237, 238]. Accordingly, "the Court of Appeals' reasoning" that McDermott did not "lawfully obtain" the tape "continues to apply, and Defendant's claimed First Amendment defense fails." *Id.*

The district court subsequently held that even if statutory damages under 18 U.S.C. § 2520 are discretionary rather than mandatory, a $10,000 award is appropriate because McDermott "knowingly participated in an illegal transaction in accepting the tape, subsequently caused the intercepted conversation to be widely disseminated, and is not under any financial circumstances that would make an award futile." RO 13 [J.A. 252]. The court also held that even if the statute does not require an award of attorney's fees and costs in every case, such an award is appropriate here because it will serve its intended purpose "to encourage private enforcement of the statute's prohibitions." *Id.* at 9 [J.A. 248]. Pursuant to Local Civil Rule 54.2(b), the Court decided that "[t]he determination of the fee amount shall be held in abeyance pending the outcome of an[] appeal on liability." *Id.*

Finally, the court held "that an award of punitive damages in the amount of $50,000 is appropriate given Defendant's outrageous conduct in this case." *Id.* at 13 [J.A. 252]. McDermott acted maliciously by seeking to harm his political opponents (his "argument that he was acting in the public interest by exposing official misconduct is unsupported by the evidence"). *Id.* at 14-15 [J.A. 253-54].

McDermott also acted recklessly by considering the potential illegality of his actions but failing to make any inquiry (his claimed belief that he had a First Amendment defense was "less than credible" and at best was based on nothing more than "uninformed guesses"). *Id.* at 15-17 [J.A. 254-56].

SUMMARY OF ARGUMENT

In this appeal, McDermott challenges only the district court's rejection of his First Amendment defense. *See supra* note 1. McDermott's First Amendment argument, moreover, rests entirely on the Supreme Court's decision in *Bartnicki*. Before *Bartnicki*, this Court held that McDermott's acceptance of the tape from the Martins precluded his First Amendment defense. McDermott now argues that this Court's prior decision should be disregarded because, he says, this case is indistinguishable from *Bartnicki*. That argument is demonstrably wrong.

Even McDermott describes the teaching of the fact-specific *Bartnicki* decision as follows: "the First Amendment does not allow a defendant to be punished for disclosing truthful information on a matter of public concern *just* because someone else obtained (and disclosed) that information unlawfully in the first instance." MB 38 (emphasis added and removed); *see Bartnicki*, 532 U.S. at 535 ("a stranger's illegal conduct does not *suffice* to remove the First Amendment shield from speech about a matter of public concern" (emphasis added)). In this case, by contrast, enforcement of the statute against McDermott is warranted by far

more than the disclosure of a conversation that was illegally recorded and disclosed by a stranger.

First, McDermott did not lawfully obtain the tape. He actively participated in the illegal transaction through which he received the tape and, moreover, knew at the time who had made the tape and how they had made it. *Second*, McDermott received the tape in his official capacity as the ranking Democratic member of the House Ethics Committee, and he therefore had a special duty not to disclose the tape's confidential information about a Committee proceeding. *Third*, the government has a strong interest in protecting the privacy of, and thereby fostering, the type of communication disclosed by McDermott—a private conversation among Members of Congress that concerned congressional business and involved no wrongdoing.

Each of these special circumstances was not present in *Bartnicki* and, standing alone, renders that case inapposite. At a minimum, these factors in combination demonstrate that application of the statute here is clearly warranted under *Bartnicki*'s balancing test.

ARGUMENT

I. *BARTNICKI* IS DISTINGUISHABLE BECAUSE McDERMOTT DID NOT LAWFULLY OBTAIN THE TAPE

Renewing an argument that this Court already has expressly rejected, McDermott contends that the First Amendment prohibits restrictions on disclosing

stolen speech unless the discloser participated in the illegal interception. This is purportedly because the discloser has "lawfully obtained" the information unless he participated in the interception, since § 2511(1)(c) does not prohibit receipt of an unlawful tape. MB 32-35.

As in the initial appeal, then, the dispositive, threshold question is whether McDermott "lawfully obtained" the information. If he did not, then all agree that neither *Bartnicki* nor the line of cases culminating in *Florida Star v. B.J.F.*, 491 U.S. 524 (1989),[2] provides him with a basis for asserting a First Amendment right to disclose. But nothing in *Bartnicki* remotely suggests the counter-intuitive rule that someone who actively participates in an illegal transfer of a tape, especially when he knows at the time of transfer that the recording was illegally obtained, somehow has nevertheless "lawfully obtained" the tape. Consequently, there is no basis for this Court to reverse its prior, eminently sensible decision that McDermott did not lawfully acquire the tape of the purloined call.

A. McDermott's Acquisition Of The Tape Was Unlawful Because He Actively Participated In The Transaction He Knew To Be Illegal

In *Bartnicki*, one of the defendants, Yocum, testified that he had found the tape in his mailbox, and the remaining media defendants obtained recordings directly or indirectly from him. *See* 532 U.S. at 519. Because Yocum found the

[2] *Florida Star* and its predecessors were discussed at length in our briefs in the initial appeal.

tape in his mailbox, he gained possession of it without any participation in the transfer. Yocum was merely a passive recipient and the media defendants were even "further down the chain," where the "taint of illegality was [even more] dissipated." *Boehner*, 191 F.3d at 469 n.7.

Justice Breyer's concurrence elaborated on the *Bartnicki* defendants' lack of culpability:

> No one claims that they ordered, counseled, encouraged, or otherwise *aided or abetted* the interception, the *later delivery of the tape by the interceptor to an intermediary*, or the tape's still later delivery by the intermediary to the media.

532 U.S. at 538 (Breyer, J., concurring) (emphasis added).

In *Bartnicki*, therefore, it was clear that the defendants' "access to the information on the tapes was obtained lawfully." *Id.* at 525; *accord id.* at 538 (Breyer, J., concurring). That fact was central to the Supreme Court's decision. Because the culpability of the defendants' disclosures was based solely on "a stranger's illegal conduct," *id.* at 535, the specific issue was: "Where the punished publisher of information *has obtained the information in question in a manner lawful in itself* but from a source who obtained it unlawfully, may the government punish the ensuing publication of that information based on the defect in a chain?" *Id.* at 528 (emphasis added) (quoting 191 F.3d at 484-85 (Sentelle, J., dissenting)).

Unlike the defendant in *Bartnicki*, who found the tape in his mailbox and thus did not transact with the interceptors, McDermott participated in an unlawful transaction with the Martins when he accepted their illegal tape. McDermott thereby "played an essential role in the [Martins' unlawful] disclosure." LO 34 [J.A. 238]. McDermott's power to have thwarted the illegal transaction is illustrated by the fact that another Member of Congress, to whom the Martins first attempted to give the tape, refused to accept it. *Id.* "Put simply, the Martins could not have completed their disclosure without the active assistance of McDermott." *Id.* The defendant Yocum was not such a "but for" cause of the illegal transaction because he was unaware of the tape's delivery when it occurred.

McDermott nonetheless contends that these stark factual differences are meaningless. According to McDermott, *Bartnicki* holds that anyone who did not participate in the *interception* has lawfully obtained the illegal tape, since § 2511(1)(c) does not prohibit receipt, just disclosure by the interceptor. MB 32-35. Thus, there supposedly is no legally cognizable difference between an active and knowing participant in a transaction to acquire goods he knows have been illegally obtained and an unwitting, passive recipient of goods illegally obtained by a stranger. But both law and logic instruct otherwise.

First, this Court already has held that one who participates in an illegal transaction, particularly when he knows that the tape was acquired illegally, has

not "lawfully obtained" that information. Thus, "McDermott did not in fact lawfully obtain the tape" because "[n]ot only was the transaction in which McDermott obtained the tape . . . illegal—albeit only the Martins could be punished for effectuating it—but McDermott knew the transaction was illegal at the time he entered into it." 191 F.3d at 479 (Ginsburg, J., concurring); *accord id.* at 476 (opinion of Randolph, J.) ("By accepting the tape from the Martins, McDermott participated in their illegal conduct. . . . [I]n receiving the tape, McDermott took part in an illegal transaction."). In doing so, the Court expressly rejected McDermott's facile assertion that "he lawfully obtained the tape from [the Martins] because no federal statute prohibits receiving the contents of an illegal wiretap." *Id.* at 479 (Ginsburg, J. concurring); *accord id.* at 475-76 (opinion of Randolph, J.). A minor who participates in an illegal transaction to purchase cigarettes in a convenience store has not "lawfully obtained" them, even if the law prohibits only "furnishing of tobacco" to minors, not receipt or possession. *See also* 191 F.3d at 479 n.** (Ginsburg, J., concurring) (a "John" has not "lawfully obtained" sex from a prostitute, even though the law does not "criminalize prostitution itself"). The issue is not whether the defendant *himself* has *violated* a statute; the issue is whether he "obtained the information in question in a *manner* lawful in itself" or whether the information has "lawfully come[] into [his] hands." *Bartnicki*, 532 U.S. at 528 (emphasis added); *United States v. Aguilar*, 515 U.S.

593, 605 (1995). Information has not been obtained in a *lawful manner* when the defendant is an active, essential and knowing participant in the illegal transaction providing him with the information. *See* 191 F.3d at 479 (Ginsburg, J., concurring) ("One who obtains information in an illegal transaction, with full knowledge the transaction is illegal, has not 'lawfully obtain[ed]' that information in a meaningful sense.").

A contrary conclusion would render the "lawfully obtained" concept a mere "exercise in empty formalism." *Id.* The impropriety of assessing the "lawfully obtained" inquiry pursuant to such formalistic nitpicking is strongly confirmed by the Supreme Court's decision in *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991). It was not illegal for the reporters in that case to *receive* the source's name that they subsequently disclosed. The Court nonetheless found it doubtful that the reporters had "obtained Cohen's name 'lawfully'" for purposes of the *Florida Star* line of cases, because they had "obtained Cohen's name only by making a promise that they did not honor." *Id.* at 671. Thus, in assessing the question of lawful acquisition under *Florida Star*, the Court clearly did *not* deem it significant that "no law purported to make it unlawful for the recipient to obtain" the disclosed information. MB 35.

Second, this Court's prior, well-supported holding on illegal acquisition was in no way undermined by *Bartnicki*'s conclusion that one who unknowingly

receives a tape from an anonymous interceptor has lawfully obtained that information. To the contrary, *both Bartnicki* opinions expressly recognized that there is an obvious distinction between one who unwittingly receives the tape and one who actively and knowingly participates in an illegal transaction to obtain the tape. The Third Circuit's *Bartnicki* decision emphasized this distinction: "McDermott was more than merely an innocent conduit. Indeed, McDermott, unlike Yocum, knew who intercepted the conversation because he 'accepted' the tape from the interceptors . . . . In contrast, Yocum has not been shown to have entered into any transaction with the interceptors." *Bartnicki v. Vopper*, 200 F.3d 109, 128-29 (3d Cir. 1999). Similarly, the Supreme Court's *Bartnicki* decision noted that the *Boehner* case was different precisely because McDermott "knew both who was responsible for intercepting the conversation and how they had done it." 532 U.S. at 522 n.5. The Court then immediately noted, without any hint of disagreement, this Court's conclusion that "the defendant acted unlawfully in accepting the tape in order to provide it to the media." *Id.* Thus, *every* court to address the issue agrees with the district court that "[t]he case at hand is distinguishable from *Bartnicki* on a very important point: . . . McDermott actively accepted the tape from the people who had illegally recorded it." LO 33 [J.A. 237]; *see also United States v. Riggs*, 743 F. Supp. 556, 559 (N.D. Ill. 1990) (cases involving "publishing information which had been *lawfully* obtained" were

"clearly distinguishable" because, "even though [the defendant] did not actually steal [the information], he was completely aware that it was stolen when he received it" (emphasis in original)).

Third, contrary to McDermott's conclusory assertion, the distinction recognized by all courts is important and sensible. There is an obvious and significant difference between a "fence" who actively conspires with a thief to transmit stolen compact discs and an unwitting stranger who finds compact discs in a mailbox, even if he has reason to know that they are stolen. A minor who finds cigarettes in a mailbox can be said to have "lawfully obtained" them because, unlike the minor who purchased them in the store, he did not participate in an illegal transaction to obtain them. One cannot lawfully obtain information if one's participation is a necessary component of the illicit transaction providing the information.

The fact that the illegal transaction could not have been consummated absent McDermott's active and knowing participation is key, because it is undisputed that "the Martins could have been punished not only for intercepting the conference call, but also for giving the tape to [McDermott]." 191 F.3d at 469. Congress therefore has a constitutionally sufficient interest in stopping an illegal transaction where an interceptor discloses the stolen conversation. Nothing in logic or law suggests that the government may effectuate this important interest only by

punishing the interceptor. Rather, it may also impose liability on other necessary participants in the illegal transaction.

For this reason, the law can constitutionally punish those who aid or abet the interceptor in his disclosure. *See* 18 U.S.C. § 2. For example, if Mr. Martin alone had intercepted the call, Mrs. Martin could be punished if she facilitated his disclosure. By the same token, Congress may impose a duty of nondisclosure on those who, like McDermott, are knowing and necessary conspirators in completing the illegal disclosure. In short, since both the fence and thief have conspired in disclosure for mutual gain, there is no reason to exempt the fence from the punishment that can constitutionally be visited on the thief.

Indeed, the aiding and abetting statute contradicts McDermott's central thesis that he violated no law. MB 35. McDermott clearly was an aider and abettor because he had a "shared intent" with the Martins to effectuate the illegal disclosure from them to him. *United States v. Walker*, 99 F.3d 439, 442 (D.C. Cir. 1996); *see also United States v. Yakou*, 393 F.3d 231, 242 (D.C. Cir. 2005) (defendant "can be convicted of aiding and abetting another person's violation of a statute even if it would be impossible to convict the [defendant] as a principal"). Defendant Yocum, by contrast, could not have aided or abetted the unlawful transfer because he did not even know that a tape was being placed in his mailbox.

McDermott nonetheless insists that the right to disclose must be unaffected by the circumstances surrounding acquisition, because the "act to which the law seeks to attach liability . . . is the disclosure, not the receipt." MB 38. But the "lawfully obtained" requirement focuses precisely on *how* the information was *acquired* and, similarly, all agree that an interceptor may be separately punished for disclosure precisely because of the manner in which he obtained the tape.

In sum, while it is true that *Bartnicki* did reject a blanket rule that information was unlawfully acquired "simply because it was unlawful for [the interceptor] to disclose that information" to the defendant (MB 32), the opinion plainly did not go any farther or suggest the converse. That is, contrary to McDermott's basic premise, *Bartnicki* did not say that *all* information is lawfully obtained *if* the defendant did not participate in the interception. Rather, *Bartnicki* plainly treated the question whether the defendant participated in the illegal interception and the question whether the information was lawfully obtained as two distinct and separate issues: "First, respondents played no part in the illegal interception. . . . Second, their access to the information on the tape was obtained lawfully . . . ." 532 U.S. at 525. The fact that "a *stranger's* illegal conduct" in intercepting a tape "does not *suffice*" to uphold application of the statute to an unwitting recipient in no way suggests that a defendant who actively and knowingly participates in a transaction with the interceptor, to complete the

interceptor's illegal disclosure, is similarly immune from the statute's permissible reach. *Id.* at 535. Moreover, expanding *Bartnicki*'s holding into a blanket rule that all "non-interceptors" have lawfully obtained tapes would conflict with both *Bartnicki*'s express reservation of the factual issue presented in *Boehner* and its repeated refrain that it was deciding only the issue presented by the "specific facts." *Id.* at 524.

McDermott nonetheless contends that *Bartnicki* simply must have resolved this question *sub silentio* because it might be inferred that the media defendant in *Bartnicki,* Vopper, could have known that the tape was illegally intercepted when he received it from Yocum. MB 33. But even if that were true (*but see* 532 U.S. at 538 (Breyer, J., concurring)), the fact that Vopper had a right to disclose the tape would say nothing about whether a defendant who knowingly participates in an illegal transaction with the interceptor has such a right, since Vopper did not receive the tape from the interceptor and received it pursuant to a constitutionally-protected transaction. Vopper, like the *New York Times* reporter here, was "further down the chain" where the "taint of illegality was . . . dissipated." *Boehner*, 191 F.3d at 469 n.7. Moreover, unlike the Martins and other interceptors, Yocum had a constitutional *right* to give the tape to Vopper. Needless to say, since Congress had no constitutionally sufficient interest in preventing Yocum's disclosure of the tape, *a fortiori* it had no sufficient interest in prohibiting disclosure by one who

received the tape as a consequence of that constitutional exercise and who himself had no contact with the interceptor. In contrast, here it is conceded that Congress has a constitutionally sufficient interest in preventing the *initial* disclosure by the *interceptors*. *See id.* at 469; *id.* at 479 (Ginsburg, J., concurring). At a minimum, there is nothing in the *Bartnicki* Court's treatment of Vopper which reflects some unstated conclusion that a tape is lawfully obtained unless the defendant participates in the interception.

McDermott even argues that pre-*Bartnicki* precedents—*Florida Star* and *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978)—somehow demonstrate that an active and knowing participant in an illegal transaction has "lawfully acquired" the stolen information, even though this Court has already expressly rejected precisely these arguments. Contrary to McDermott's argument, the reporter in *Florida Star* plainly did not knowingly participate in an illegal transaction in acquiring the rape victim's name. Rather, as the Supreme Court has squarely instructed, "the rape victim's name was obtained through *lawful* access to a police report." *Cohen*, 501 U.S. at 671 (emphasis added). This Court also has already stated that the police department "violated no law" in providing the name, so the "transaction in which the newspaper obtained the name was not illegal *per se*." 191 F.3d at 480 (Ginsburg, J., concurring). Rather, Florida law simply said that "state officials are not *required* to disclose" such names, 491 U.S. at 536

(emphasis added), but nothing suggested that state officials were not *permitted* to disclose them. McDermott seeks to confuse this issue by saying that the *Florida Star* "reporter knew at the time she received the information that the police department was not supposed to disclose it." MB 36. As the *Florida Star* brief appended to McDermott's brief confirms, nothing proscribed disclosure of the name. Rather, McDermott's assertion is based on the *recanted* deposition excerpt of the reporter-trainee's *perception* of what *reporters* were "not supposed to" do. Br. for Appellee at 6-7 & n.3, *Florida Star v. B.J.F.* (U.S. filed Jan. 17, 1989) (No. 87-329).

Similarly, the *Landmark* decision cannot possibly suggest that one who participated in an illegal transfer of confidential information has "lawfully obtained" that information because "[t]he record in *Landmark* contained no evidence regarding who supplied the newspaper with the information or how they obtained it." 191 F.3d at 475 (opinion of Randolph, J.). Moreover, notwithstanding McDermott's misleading quotation marks, *Landmark* nowhere suggests that the information was "lawfully obtained" or otherwise invoked any part of the test adopted in *Florida Star* and *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97 (1979), but resolved that case through a fact-specific balancing test. *See* 191 F.3d at 474-75 (opinion of Randolph, J.). Thus, there is no reasonable basis for inferring that the *Landmark* opinion in 1978 somehow magically resolved

the question of what *Florida Star* meant by "lawfully obtained" eleven years later, especially since *Landmark* never discussed that issue and *Florida Star* did not even cite *Landmark* as providing general guidance on this issue. *See Florida Star*, 491 U.S. at 536.

In all events, *Landmark* and the *Florida Star/Daily Mail* line of cases are all inapposite on this question because, unlike here, none of the information disclosed in those cases was unlawfully *acquired*, but involved disclosure by the *government* of information that was lawfully obtained but supposed to remain confidential. *See* 191 F.3d at 475 & n.16 (opinion of Randolph, J.). As this Court's initial opinion correctly noted, cases describing the circumstances where government can punish *republication* of facts provided by the *government* itself provide little guidance on whether the government can prevent disclosure of an illegally intercepted private conversation. *Id.* at 473-74 & n.13. Where the government's own information is not involved, "the Government has at once less power to prevent nonconsensual acquisition of the information and more need to prohibit its subsequent dissemination, whether by the thief or one such as McDermott who received it from the thief." *Id.* at 480 (Ginsburg, J., concurring).

Finally, contrary to McDermott's assertion, the district court did not suggest that information was obtained unlawfully because "it has been unlawfully intercepted by someone else" or that § 2511(1)(c) "proscribe[s] the *receipt* of

information." MB 32 (emphasis in original). It simply recognized, based on this Court's initial holding, that although receipt is not proscribed and unwitting acquisition from an interceptor does not suffice to render information unlawfully obtained, it is still the case that one who acquires information only through active and knowing participation in an illegal transaction has obtained it unlawfully. Nor did the district court rule that a defendant who has "reason to know" that a tape was illegally intercepted has, for that reason, unlawfully obtained the tape. Again, it was the fact of McDermott's "knowingly *joining in the Martins' illegal actions*" that plainly distinguishes *Bartnicki* and renders McDermott's acquisition unlawful. LO 34 [J.A. 238] (emphasis added).

B. There Is No "Chilling Effect" That Precludes Holding McDermott Liable

Predictably, McDermott and his media *amici* make the slippery slope argument that imposing liability on a "sworn servant of the law" who knowingly "dealt with . . . felons" "solely for the purpose of using the contents of the communications in the pursuit of the politics of personal destruction," 191 F.3d at 481 (Sentelle, J., dissenting), might "chill" similar behavior in the future. They suggest, apparently without any intended irony, that this would be a *bad* result.

Most specifically, McDermott and his *amici* argue that attaching significance to whether a defendant was a knowing participant in an illegal transaction, or was an unwitting recipient, would have a "chilling effect" because it

is not a "bright-line rule," but "a particularized inquiry" into a defendant's knowledge. MB 36. Passing the point that it is his knowing *participation* in an illegal transaction that distinguishes McDermott's conduct from the *Bartnicki* defendants, it is clear that extending more favorable treatment to disclosers without contemporaneous, guilty knowledge of the tape's illegality furthers, rather than inhibits, expressive freedom. This point is made most clearly by the only case upon which McDermott relies for his "chilling effect" assertion. In *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), the Court, immediately after expressing its concern about chilling protected speech, held that the defendant's "knowledge"—in that case, knowledge of a defamatory statement's falsehood—was dispositive of the First Amendment defense. *Id.* at 279-80. Similarly, *Florida Star* made clear that inquiry into a defendant's scienter, or knowledge, is a very *positive* safeguard of free expression and that "case-by-case findings" are preferable to a bright-line, "*per se* standard." 491 U.S. at 539. Finally, McDermott's assertion that bright-line rules are somehow required by *Bartnicki* is particularly baffling since that opinion repeatedly emphasized that it was engaging in a fact-specific balancing test which resolved only "the validity of the statute[] as applied to the specific facts of [this] case[]." 532 U.S. at 524.

More generally, *amici* contend that unless liability for disclosure is limited to interceptors, this will chill disclosure of illegally intercepted calls, which is

purportedly bad because the press often actively conspires with government officials to "violate[] a statute" by leaking "secret or classified information." AB 15-17.

First, these arguments are simply a rehash of the same slippery slope contentions the Court previously found insufficient to extend First Amendment immunity to a defendant who knowingly and actively participated in the interceptor's illegal disclosure. Indeed, even *amici* seem to accept that the First Amendment right to publish is presumed only "once truthful information regarding matters of public concern is *lawfully obtained* by the press." AB 23 (emphasis added). Since *amici* accept that those publishing unlawfully obtained information can be punished, and since they provide no reason for the Court to depart from its eminently sensible decision on when information is lawfully obtained, their rhetoric about "chilling" press watchdogs is, ultimately, beside the point.

Second, as *Bartnicki* plainly establishes, it is the *failure* to vigorously protect private conversations under § 2511(1)(c) that will have a profound "chilling effect on private speech." 532 U.S. at 533. Thus, chilling effect needs to be "considered on *both* sides of the constitutional calculus." *Id.* (emphasis in original). As the Supreme Court stated in *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539 (1985), in response to a similar argument about press freedom, "[i]n our haste to disseminate news, it should not be forgotten that the Framers intended

[protections against outside surveillance of private conversations] to be [an] engine of free expression." *Id.* at 558. Freedom of the press does not include any power to trump others' right to free expression by appropriating their speech—copyrighted or private—and presenting it to an unwanted audience. This negative effect on other private citizens' speech fundamentally distinguishes this situation from the "whistleblower" situations cited by *amici*, where disclosure may implicate important governmental interests such as national security, but do not implicate private, constitutionally protected interests, such as free speech.[3] Moreover, unlike in *amici*'s "whistleblower" hypotheticals, the restriction here is not content-based. *See Bartnicki*, 532 U.S. at 526; *Boehner* 191 F.3d at 478.

Third, *amici*'s hyperbolic suggestion that the district court's straightforward view of what information is lawfully obtained can somehow have a "dramatic[]" effect on public exposure of official wrongdoing is completely counter-intuitive and counter-factual. AB 14. As an empirical matter, save for *Bartnicki* itself, *amici* cannot point to a single case where any official wrongdoing or unlawful

[3] Of course, non-constitutional interests such as those in *amici*'s "whistleblower" examples can warrant liability for disclosure of confidential information. In *New York Times Co. v. United States*, 403 U.S. 713 (1971), every Justice who addressed the issue endorsed *post-publication* remedies as fully constitutional. *See Boehner*, 191 F.3d at 473-74 & nn. 11-12 (opinion of Randolph, J.).

activity has been reported by the press as a consequence of an illegal wiretap[4] or, for that matter, a single example of the media refraining from reporting the contents of a wiretap for *any* reason. To the contrary, as *Bartnicki* noted, "[w]ith only a handful of exceptions," interceptions of communications have been "motivated by either financial gain or domestic disputes." 532 U.S. at 530.

More generally, although § 2511(1)(c) has been the unquestioned law for 37 years, the media, to say the least, has not been notably more "timid" during that period in exposing private activity or public wrongdoing. *Amici*'s timidity argument rings particularly hollow because, unlike the statute in *Florida Star*, § 2511(1)(c) contains an explicit scienter requirement that immunizes all those without reason to know that the call was illegally intercepted. *See Florida Star*, 491 U.S. at 539.

Logically, moreover, application of the statute to defendants like McDermott will have no effect on the extent to which intercepted calls are disclosed by "whistleblowers." An interceptor's decision to disclose, after all, will be governed by whether it exposes *him* to liability—not on whether a reporter's disclosure will affect the reporter. And even *amici* seem to concede that the law may constitutionally punish the "interceptor's own use of [illegally obtained]

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[4] *Amici*'s invocation of the Monica Lewinsky case is misplaced because there the person taping the conversation made her disclosure not to the press but, quite properly, to law enforcement officials.

information." AB 9 (quoting *Bartnicki*, 532 U.S. at 529). Consequently, the willingness of "whistleblowers" to provide information to the press will turn on whether they will risk such constitutional punishment, not on any rule governing defendants like McDermott. Indeed, *Bartnicki* concluded that there is no evidence that the punishment inflicted on disclosers will have any effect on interceptors' disclosure to others. *Bartnicki*, 532 U.S. at 529-30.[5] Accordingly, there is (unfortunately) no reason to believe *amici*'s suggestion that the district court's modest finger in the dike can affect the tsunami of leaks in Washington.

To be sure, the *media's* willingness to disclose a purloined phone call might be affected by whether the First Amendment immunized their publication. But, as noted, even *amici* seem to agree that the press has no right to disclose *unlawfully* obtained material. *See supra* p. 25. Consequently, even under *amici*'s reasoning, if the Court's previous opinion correctly concluded that McDermott had unlawfully obtained the tape, there is no constitutional concern with imposing

[5] For this reason, *amici*'s unsupported speculation that the district court's treatment of McDermott will somehow "encourage anonymous disclosure" by interceptors is especially far-fetched. AB 20. As noted, an interceptor who will disclose his identity though it directly subjects him to criminal prosecution will not rationally be influenced by whether the defendant will face civil liability if he knows the interceptor. *Amici*'s assertion is also contrary to fact because, as the *Bartnicki* Court noted, "[i]n virtually all . . . cases, the identity of the person . . . intercepting the communication has been known." 532 U.S. at 530. As for the notion that our careful media guardians need to know the interceptor so as to directly assess his credibility and the circumstances of interception, we note that *amicus New York Times* made *no* effort to talk to the Martins before disclosing their purloined tape on the front page of the "paper of record."

liability on him or similarly-situated media defendants. This does not make liability turn on the "morals of the source," but directly on the *defendant's* own knowing participation in an illegal transaction that all agree may constitutionally be prohibited (at least by proscribing the interceptor's disclosure). AB 19. And, as *Bartnicki* itself noted, it "would be frivolous to assert . . . that the First Amendment, in the interest of securing news or otherwise, confers a license on either the reporter or his news sources to violate valid criminal laws." 532 U.S. at 532 n.19 (quoting *Branzburg v. Hayes*, 408 U.S. 665, 691 (1972)). Since § 2511(1)(c) is a "valid" criminal law under which the source can be prosecuted, it simply makes no sense to say that the reporter has a "license" to actively facilitate and fulfill the source's punishable disclosure.

While it is, as always, possible to hypothesize a situation where illegal disclosure of a wiretap's contents, like illegal disclosure of a wiretap's *existence* (*see United States v. Aguilar*, 515 U.S. 593 (1995)), could be done to expose actual governmental wrongdoing, such hypotheticals cannot support some blanket First Amendment right of unlawful disclosure. As this Court has already aptly put it in rejecting precisely this argument:

> This is the old ends-justifies-the-means rationale. Worse still, is a rationale willing to sacrifice everyone's freedom not to have their private conversations revealed to the world, because some criminal at some time might

> illegally "seize" some politician's incriminating conversation.

191 F.3d at 478.

As this passage reflects, *every* protection of privacy and private speech—from attorney-client privilege to the Act's prohibition against *intercepting* private communications—may discourage discovery of genuine wrongdoing in a handful of cases. This is the small price we pay for having a private sphere of communication. Nothing in the First Amendment requires American citizens to surrender this sacred freedom and subject themselves to the Orwellian nightmare of having their most private conversations broadcast over the Nation's airwaves.

For these reasons, even when private speech is not chilled through media disclosure, there is a "well-established line of decisions holding that generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news." *Cohen*, 501 U.S. at 669. Indeed, there are a legion of cases upholding the government's power to prohibit disclosure of information that was, unlike here, "legally acquired by the person who revealed it." 191 F.3d at 476-77 & n.18 (opinion of Randolph, J.). Similarly, even where, unlike here, the government's action will clearly deter "whistleblowers" and impede news gathering—such as requiring the disclosure of confidential sources—the First Amendment erects no protection against mandating such disclosure. *See In re*

Grand Jury Subpoena, Judith Miller, 397 F.3d 964 (D.C. Cir.), *reh'g en banc denied*, 405 F.3d 17, *cert. denied*, Nos. 04-1507, 1508 (U.S. June 27, 2005); *Lee v. Dep't of Justice*, No. 04-5301, 2005 WL 1513086 (D.C. Cir. June 28, 2005).

In sum, there is no First Amendment right for government "whistleblowers" to disclose with impunity the confidential information entrusted to their care and, even if there were, this provides no basis for extending that protection to those, like McDermott, who acquired the information through knowing and active participation in an illegal transaction.

C. McDermott Knew At The Time That The Martins Had Made The Recording Illegally

The district court correctly concluded that there is no genuine issue as to McDermott's knowledge of the transaction's illegality at the time he entered into it. As a threshold matter, it bears emphasis that McDermott's repeated invocation of the summary judgment standard ignores the practicalities of this case. Summary judgment should be affirmed where "[g]oing through the motions of trial would have been futile." *Fox v. Johnson & Wimsatt, Inc.*, 127 F.2d 729, 737 (D.C. Cir. 1942); *accord Greene v. Dalton*, 164 F.3d 671, 675 (D.C. Cir. 1999). Here, a trial would have been futile for McDermott because "both the record and the factfinder [we]re the same in the summary judgment proceedings as they would be in a trial," since neither party demanded a jury. *Connors v. Incoal, Inc.*, 995 F.2d 245, 251

(D.C. Cir. 1993) (internal quotation marks omitted).[6] *See also Int'l Bancorp, LLC v. Societe des Bains de Mer*, 329 F.3d 359, 362-63 & n.4 (4th Cir. 2003) (argument that "'a fact-finder could well infer' differently . . . misses the whole point [because the] court, by the agreement of the parties (who agreed to a *bench* trial), was the fact finder" (emphasis in original)), *cert. denied*, 540 U.S. 1106 (2004); *accord FEC v. Toledano*, 317 F.3d 939, 950 n.7 (9th Cir. 2003). The record is the same as it would have been in a trial because, apart from undisputed documents, the *only* evidence is the affidavits and deposition testimony of McDermott himself. Nor can McDermott now claim that he would present additional evidence if allowed to go to trial, since he made no such claim below. *See, e.g., Farmland Indus. v. Grain Board of Iraq*, 904 F.2d 732, 736 n.6 (D.C. Cir. 1990). Accordingly, "a trial on the merits will not enhance the court's ability to draw inferences and conclusions." *Int'l Bancorp*, 329 F.3d at 362 (internal quotation marks omitted). It would be a complete waste of time and resources in this already-delayed case to remand so the district court can enter a pre-ordained "final" judgment based on precisely the same "inferences" it has already found.

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[6] This statement superseded the Court's earlier *dictum* that "the law of summary judgment does not vary" when no jury is available. *Farmland Indus. v. Grain Board of Iraq*, 904 F.2d 732, 738 (D.C. Cir. 1990) (affirming grant of summary judgment). Even in *Farmland* itself, moreover, the Court recognized that when no jury has been requested, it is "artificial[]" to argue on appeal that the district court drew improper inferences. *Id.*

In any event, the summary judgment record demonstrates that *no* reasonable trier of fact would disagree with the district court's conclusion that McDermott knew the transaction was illegal when he entered into it. McDermott knew this because the undisputed evidence establishes that the Martins *told* him so. The *New York Times* reported: "The Congressman said the tape had been given to him on Wednesday by a couple who said they were from northern Florida. He quoted them as saying it had been recorded off a radio scanner, suggesting that one participant was using a cellular telephone. They said it was recorded about 9:45 A.M. on Dec. 21." [J.A. 167-68] And the Martins' cover letter to McDermott—which he eventually handed over to the Ethics Committee Chairman, along with the tape (LO 30 n.7 [J.A. 234])—confirms that they told him how they had made the recording: "Enclosed in the envelope you will find a tape of a conversation heard December 21, 1996 at about 9:45 a.m. The call was a conference call heard over a scanner." [J.A. 182]

McDermott, moreover, does not deny that the Martins told him of the tape's illegality:

> Q. Well, in light of [the *New York Times* report], do you affirmatively deny that the Martins told you that they'd gotten the phone call off a radio scanner?
>
> A. I think I already said I don't remember that.
>
> Q. You don't remember one way or another?
>
> A. I do not remember one way or another.

MD 157:4-10 [J.A. 73]. As the district court correctly held, McDermott's "reliance on faulty memory in the face of direct contrary evidence fails to create a genuine issue of material fact." LO 33 [J.A. 237] (citing *Toledano*, 317 F.3d at 950; *FDIC v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 205 F.3d 66, 75 (2d Cir. 2000)).

In short, there is direct, contemporaneous evidence establishing that McDermott had "quoted" the Martins "as saying" that the call had been illegally intercepted over a police scanner. We know that the *New York Times* reporter could not have misunderstood or falsified what McDermott said because McDermott was the only potential source of information about what the Martins said and the circumstances surrounding their interception of the call. And, in the face of this, McDermott does not deny that the Martins, in fact, "told [McDermott] that they'd gotten the phone call off a radio scanner." MD 157:5-6 [J.A. 73]. He says only that, at the time of the deposition six and a half years later, he cannot remember whether they told him this. Thus, there is literally no dispute over the fact that the Martins told McDermott about the illegal interception.

For this reason, there is nothing to McDermott's protestations that knowledge is a state-of-mind issue and cannot properly be resolved on a motion for summary judgment. If, as here, there is no genuine issue that a person was *told* a specific fact, then there also is no difficulty concluding that the person *knew* that

fact at that moment. In all events, "the district court was entitled to draw negative inferences about his state of mind based on [McDermott's] suspicious memory lapses and the undisputed evidence presented by [Boehner]." *Toledano*, 317 F.3d at 951.

For the same reason, contrary to McDermott's central argument, no genuine issue of fact is created by his deposition testimony that he "knew" nothing about the tape. MB 21; MD 181:11-182:11 [J.A. 79-80]. This does not suffice to create a genuine issue because his general denial is "certainly inconsistent" with McDermott's inability to "remember one way or another" whether the Martins told him they had recorded the tape from a radio scanner. *Unterreiner v. Volkswagen of Am., Inc.*, 8 F.3d 1206, 1210 (7th Cir. 1993) (employee's testimony that "there definitely was no ADEA notice posted on the bulletin board" was inconsistent with his testimony that he did not recall which notices were posted); MD 157:4-10 [J.A. 73]. McDermott's denials of knowledge about the tape "are not sufficiently probative" because they "are founded upon what [McDermott] admits to be a faulty recollection." 8 F.3d at 1210. "[C]onsidering the earlier revelations concerning a lack of recall[,] . . . the later statement is sufficiently unlikely—to the point of unreliable—[that] it cannot be used to create a 'genuine issue of material fact.'" *Id.*; *accord Pyramid Sec. Ltd. v. IB Resolution, Inc.*, 924 F.2d 1114, 1123 (D.C. Cir. 1991) ("Courts have long held that a party may not create a material

issue of fact simply by contradicting its prior sworn testimony."). In short, McDermott's general "I knew nothing" assertion does not create a dispute about the fact that the *New York Times* article accurately quoted McDermott conceding that the Martins had told him about the tape's illegal origin.

Moreover, McDermott's statement that he did not "*know* anything about where [the tape] came from" is particularly implausible because McDermott's professed lack of knowledge was offered in response to a question about what he knew *after* he had "listened to the tape" and recognized the voice of Gingrich and other participants on the call. MD 180:24-182:11 [J.A. 79-80]. Just as McDermott's professed lack of knowledge concerning the Martins' illicit acquisition *after* he listened to the tape does not create a genuine factual issue about whether he knew of its illegal origin at that time, even though it is theoretically possible that Speaker Gingrich invited the Martins to participate on the call and their taping was therefore legal, McDermott's general assertion that he "knows nothing" cannot create a genuine factual issue in the face of the *New York Times'* contemporaneous account.

Because there is no genuine issue that the Martins told McDermott how they had made the tape, it is unimportant whether they told him orally or whether he read the letter. To the extent it matters at all, the district court correctly concluded that "all of the evidence is uncontradicted that at the time he took possession of the

tape, Defendant was aware of the cover letter" because it was handed to him *outside* the envelope. LO 34 [J.A. 238]. Indeed, "[t]he wording of the cover letter itself . . . indicates that the cover letter was outside the envelope." *Id.* at 31 [J.A. 235]. Had the letter been sealed inside the envelope, it would not have stated: "Enclosed in the envelope you will find a tape . . . ." [J.A. 182] Notwithstanding McDermott's incomprehensible attempt to avoid this language, if a note reads, "behind the door you will find either a lady or a tiger," then the inescapable inference is that the note was left in front of, not behind, the door.[7]

Moreover, there is *no* evidence from which a reasonable inference in McDermott's favor can be drawn. Again, McDermott is unable to deny that the letter was outside the envelope:

> Q. . . . Do you not recall seeing the cover letter or are you denying – do you have a recollection that there was *no* cover letter?
>
> A. No, I can't remember. I can't remember seeing the letter.

[7] In addition, the evidence is undisputed that the tape was sealed in an envelope *before* the Martins wrote the cover letter. The Martins first delivered the tape in a sealed envelope to the Florida office of Rep. Karen Thurman, and Thurman's chief of staff returned it to them in Washington in the same sealed envelope. Fisher Decl. ¶¶ 4-5, 10 [J.A. 202-03]. The obvious inference is that the Martins left the envelope sealed and gave it to McDermott with the cover letter on the outside, rather than opening the envelope and then enclosing both the tape and the letter in a new or re-sealed envelope.

> Q. Okay. And just so I'm clear, you can't remember seeing it on January 8th, when you met with the Martins, correct?
>
> A. Yes.

MD 150:14-22 [J.A. 72] (emphasis added). As discussed, this lack of recollection prevents McDermott's general denials from raising a genuine issue as to the fact that the letter was outside the envelope.

McDermott's attorneys now speculate, for the first time, that he might have read the letter outside the envelope after accepting the tape from the Martins. By failing to make this argument in the district court, McDermott either waived it or, at the very least, demonstrated its complete lack of plausibility. In any event, there is not a scintilla of evidence supporting McDermott's attorneys' hypothetical. As they emphasize elsewhere, McDermott's "position is that . . . he does not recall *ever* seeing the letter." MB 24 n.2. Thus, McDermott himself cannot suggest, and therefore no reasonable fact-finder could conclude, that McDermott read the letter after he met with the Martins. Again, there is direct, uncontroverted evidence that the Martins told McDermott that they had obtained the call over a police scanner; there is the (undisputed) fact that McDermott had this knowledge prior to the meeting with the *New York Times* reporter (because there was no other way the reporter could have learned of the tape's origin); and there is *no* factual support for the hypothesis that McDermott learned of the tape's origin after meeting with the

Martins. Accordingly, the undisputed facts establish that the Martins told McDermott of the tape's origin at the time of their meeting with him, either through the letter or orally.

In any event, "common sense dictate[s] that one who accepts from strangers a package with a short accompanying letter is likely to read the letter." LO 29 [J.A. 233]. McDermott criticizes the district court for relying on "its own notions of 'common sense.'" MB 23. But the court was not substituting "common sense" for *facts* potentially indicating McDermott read the letter after meeting the Martins because, again, there is no evidence supporting this theory. Moreover, the district court could exercise common sense. "Because it is the judge, not a jury, who [would find facts at any trial], this is not a case where the judge's drawing of inferences based on the undisputed facts might have usurped the jury's prerogatives." *Toledano*, 317 F.3d at 951 n.7; *see Int'l Bancorp*, 329 F.3d at 362.

In addition, to the extent it matters, the surrounding circumstances also establish that McDermott read the letter at the time of the meeting. McDermott admits knowing that he was receiving a *tape* (MD 158:11-20 [J.A. 74]) and he could not say that, in over thirty years of public life, he ever before had been handed a tape by a stranger. MD 176:23-177:3 [J.A. 78]. And McDermott was so eager to listen to the tape that, shortly after he accepted it from the Martins, he walked to his office—which is "[a]s far as you can be" from the Committee

hearing room—to do so. MD 162:2-25, 164:8-12 [J.A. 75]. Based on these undisputed facts, the only reasonable inference is that McDermott at least glanced at the first two lines of the cover letter before pocketing a mysterious tape handed to him by two strangers from Florida.

In all events, there are three independent reasons why, even if there were a genuine issue about whether McDermott actually knew of the tape's illegality during his meeting with the Martins, he still would not have lawfully obtained the information he disclosed.

First, McDermott at least read the cover letter before he *listened* to the tape. The relevant point is not whether McDermott obtained the *tape* lawfully but, rather, whether his "access to the *information on the tape[]* was obtained lawfully." *Bartnicki*, 532 U.S. at 525 (emphasis added). Thus, the illegal transaction was not completed when McDermott accepted the tape but, rather, when he listened to it. Until that moment he could have thwarted the illegal transaction by returning the tape to the Martins (as Rep. Thurman did), forwarding it to the authorities, or simply discarding it as trash. *Cf. Cohen*, 501 U.S. at 671 ("[I]t is not at all clear that respondents obtained Cohen's name 'lawfully' . . . , *at least for purposes of publishing it*." (emphasis added)).

Second, McDermott concedes that, with respect to his claim that he lawfully obtained the tape, reason to know of the tape's illegality is equivalent to actual

knowledge of that fact. *See, e.g.*, MB 4. For example, actual and constructive knowledge are legally indistinguishable: (1) under 18 U.S.C. § 2511(1)(c); (2) under statutes criminalizing receipt of stolen property, *see, e.g.*, D.C. Code § 22-3232; and (3) under the First Amendment's standards for defamation claims, *see, e.g., Sullivan*, 376 U.S. at 279-80. And McDermott certainly had good "*reason* to know" the tape was illegal. A failure by McDermott to look at the cover letter from the Martins (or to make any inquiry of them) would have made him just as culpable as did the actual knowledge.

Finally, McDermott would not have obtained the tape lawfully even if he had no actual *or* constructive knowledge, because knowledge merely *reinforces* the absence of First Amendment protection for one who actively participates in another's unlawful disclosure. "It is enough to point out, as Boehner does, that in receiving the tape, McDermott took part in an illegal transaction." *Boehner*, 191 F.3d at 476 (opinion of Randolph, J.).

II. *AGUILAR* AUTHORIZES APPLICATION OF THE STATUTE IN THIS CASE

Even assuming that the tape was "lawfully obtained," such that *Bartnicki* would apply if McDermott were a private citizen, that case still does not govern because far less "stringent standards" apply to public officials in sensitive positions. *See United States v. Aguilar*, 515 U.S. 593, 606 (1995). Just as *Aguilar* held that the *Daily Mail/Florida Star* test was inapplicable to disclosures by public

officials in sensitive positions, so too is *Bartnicki*'s discussion of the rules governing private citizens' disclosures inapposite here.

As discussed in the briefs on the prior appeal, *Aguilar* involved a First Amendment challenge by a federal judge to a sister provision of § 2511(1)(c), under which he was convicted for disclosing to an acquaintance that he had been listed as a potential interceptee on a wiretap application. *See* 515 U.S. at 595-96; *see also* 18 U.S.C. § 2232(c). The Court unanimously determined that the "stringent standards" governing private citizens' disclosure of truthful information did not apply in Judge Aguilar's case. 515 U.S. at 606. The Court emphasized that Judge Aguilar was not

> simply a member of the general public who happened to lawfully acquire possession of information about the wiretap; he was a Federal District Court Judge who learned of a confidential wiretap application from the judge who had authorized the interception, and who wished to preserve the integrity of the court.

Id. at 605-06. The Court explained that "[g]overnment officials in sensitive confidential positions may have special duties of nondisclosure," and, therefore, imposition of nondisclosure requirements on them must be judged more leniently than "efforts to impose restrictions on unwilling members of the public." *Id.* at 606. Thus, notwithstanding the fact that the wiretap statute prohibited Judge Aguilar's disclosure of truthful, lawfully obtained information of public importance, the Court unanimously concluded that his claim was so lacking in

merit that it did not even raise a "First Amendment concern[]" sufficient to warrant a "narrowing" construction of the statute. *Id.* *See also id.* at 606-07 (Stevens, J., concurring in part and dissenting in part); *id.* at 609 (Scalia, J., concurring in part and dissenting in part).

Aguilar's recognition of the different First Amendment standards governing public officers and private citizens is hardly unusual. A related line of Supreme Court "cases make clear that—even in the absence of an express agreement—the [government may act] to protect substantial government interests by imposing reasonable restrictions on employee activities that in other contexts might be protected by the First Amendment." *Snepp v. United States*, 444 U.S. 507, 509 n.3 (1980); *accord United States v. Nat'l Treasury Employees Union*, 513 U.S. 454, 465 (1995) ("Congress may impose restraints on the job-related speech of public employees that would be plainly unconstitutional if applied to the public at large."); *see, e.g.*, *CSC v. Nat'l Ass'n of Letter Carriers*, 413 U.S. 548 (1973); *Boehner*, 191 F.3d at 477 n.18 (opinion of Randolph, J.).

Most directly, this Court held that a CIA historian had no "first amendment" right to "publish" an unclassified report on historical matters he prepared while employed by the CIA, because he was "invested" with an "extremely high degree of trust" by virtue of his sensitive position. *Pfeiffer v. CIA*, 60 F.3d 861, 865-66 (D.C. Cir. 1995). The plaintiff's "fiduciary duty to the CIA" distinguished him

from a "third-party" "such as a journalist" and therefore the government had a greater power to bar the plaintiff from publishing or keeping the report. *Id.* Although the Court acknowledged that the plaintiff would have had a First Amendment right to publish an unclassified "report created on his own time," he had no right "to keep—and therefore . . . to publish" information created as a part of his official duties. *Id.* at 866. *See also United States v. Morison*, 844 F.2d 1057, 1069-70 (4th Cir. 1988).

By virtue of McDermott's position as ranking member of the Ethics Committee, then, general nondisclosure statutes may be applied to him pursuant to far less "stringent standards" than applied to the private citizens in *Bartnicki*. This is true regardless of whether there was a particular House rule specifically prohibiting disclosure of this information. In *Aguilar*, there was no particular regulation or oath which prohibited Judge Aguilar from disclosing the existence of the wiretap, yet a criminal law which imposed such a specific, content-based duty on all people could be constitutionally applied to him, without in any way triggering the demanding standards of the *Daily Mail/Florida Star* cases, because of the position of trust that Judge Aguilar enjoyed. Similarly, in *Snepp*, both the majority and the dissent agreed that, because Snepp "enter[ed] a trust relationship," this created a duty of non-disclosure wholly apart from the duty created through the agreement he signed with the CIA. *See* 444 U.S. at 510, 515 n.11; *id.* at 518

(Stevens, J., dissenting) ("[T]he employee possesses fiduciary obligations arising out of his duty of loyalty to his employer. One of those obligations, long recognized by the common law even in the absence of a written employment agreement, is the duty to protect confidential or 'classified' information.").

This is particularly obvious where, as here, the information was plainly received in connection with the official's public duties. The district court correctly found that McDermott received the tape in his official capacity, based on "the cover letter itself and the documents produced by McDermott in discovery." LO 18 [J.A. 222]. Quoting the cover letter, the district court emphasized that "it is undisputed that the Martins were told to and did seek out McDermott because he was Ranking Member of the House Ethics Committee and because the information on the tape pertained to that Committee's pending investigation of Newt Gingrich." *Id.* at 19 [J.A. 223]. In addition, as the district court explained, "[t]he materials sent out as part of this fundraising campaign show that McDermott himself believes he was acting in his official capacity as a member of the Ethics Committee." *Id.* Thus, Rep. McDermott received the tape in a manner far more closely connected to his official duties than Judge Aguilar. Judge Aguilar was not the judge to whom federal agents applied for wiretap authorization; instead, he obtained the information through an informal conversation with the authorizing judge. By contrast, the Martins were directed to McDermott by another member of

Congress precisely because he was the ranking member of that Committee, *see* 191 F.3d at 465, and gave him the tape precisely so "the [C]ommittee" could review it. [J.A. 182].

McDermott previously argued, and the district court seemed to accept (LO 23-24 [J.A. 227-28]), that while the First Amendment does not preclude direct enforcement of a "pre-existing" or "concomitant" "duty of nondisclosure" derived from workplace rules, it does prohibit application of a *general statutory* duty of nondisclosure even to one who has accepted an independent duty. This argument, however, was rejected by this Court as "no distinction at all." 191 F.3d at 477 (opinion of Randolph, J.). As Judge Randolph noted, "McDermott too obtained the tape under a duty of non-disclosure." *Id.* The fact that the "duty arose from a statute—§ 2511(1)(c)" is of no moment. *Id.* If a public official may be punished or fined for violating a duty of nondisclosure imposed by a nonstatutory requirement unique to public officials in "sensitive" positions, it necessarily follows that he may be punished in the same way by applying a general statutory duty to him, even if the statute could not be applied to private citizens without such special duties. Judge Aguilar was not punished by the government as employer for violating any workplace confidentiality requirement (assuming there was one). He was punished by the government as prosecutor for violating a criminal statute that

imposed a confidentiality requirement distinct from any specific workplace regulation.

In short, public officials may constitutionally be punished under a general statute for disclosing confidential information related to their duties, regardless of whether there is a specific employment contract or rule barring disclosure.

1. In any event, the House rules did, in fact, unambiguously require nondisclosure of the information on the tape. The House Ethics Committee's rules provide that:

> Members and staff of the Committee shall not disclose to any person or organization outside the Committee, unless authorized by the Committee, *any information regarding the Committee's* or a subcommittee's *investigative, adjudicatory or other proceedings*, including, but not limited to:
>
> * * *
>
> (iv) *Any other information or allegation respecting the conduct of a Member, officer, or employee.*

Rules of Committee on Standards of Official Conduct of U.S. House of Representatives 10(b) [J.A. 180] (emphasis added).[8]

These express duties of nondisclosure apply to the particular material at issue here. McDermott concedes that the Martins gave him the tape "precisely because it dealt with the issue of the Ethics Committee Settlement Concessions the

[8] Rule 10 subsequently was renumbered as Rule 12.

Speaker had made" and that the taped "conversation pertained specifically to . . . the actions of the House Ethics Committee." 7/17/98 Tr. at 16 [J.A. 198]; Br. for Appellee at 4, *Boehner v. McDermott* (D.C. Cir. filed Jan. 28, 1999) (No. 98-7156) (internal quotation marks omitted). Both the general subject matter of the cell phone conversation (the then-pending Ethics Committee proceedings against Gingrich) and the specific focus of that discussion (Gingrich's confidential "no spin" understanding with special counsel James Cole and the investigative subcommittee) plainly constituted "information regarding the Committee's or a subcommittee's investigative, adjudicatory or other proceedings" under then-Rule 10 of the Committee. As noted in the Committee report in the Gingrich matter, the subcommittee's understanding with Gingrich "was put on the record on December 21, 1996 by Mr. Cole." Committee Report at 94, 95-96 [J.A. 193-95]. Thus, the tape also contained "information . . . respecting the conduct of a Member," which could not properly be disclosed. Committee Rule 10(b).

Indeed, McDermott has repeatedly *conceded* that he knew that, under the House rules, he was not supposed to possess, much less reveal, the information on the tape. McDermott candidly concedes that this information was subject to the Committee's confidentiality requirements and could not be disclosed to those Committee members not on the Gingrich *subcommittee*, much less to the public,

without the Committee's authorization.[9] McDermott conceded that his purpose in disclosing the tape was to make public this confidential Committee proceeding. Specifically, he agreed that the information revealed on the tape "certainly was, to me, an example of what was going on *in that committee*, and the public needed to know that." MD 108:22-109:7 [J.A. 61] (emphasis added).

Moreover, McDermott conceded *at the time* that the tape contained information regarding Committee proceedings, and thus could not be disclosed without authorization. Just days after his disclosure, he publicly claimed that the tape was so important to the Committee's investigation of Gingrich that it was improper, even *after* a transcript was published in the *New York Times*, for Committee Chairman Nancy Johnson to forward this evidence of criminal eavesdropping to the Justice Department. In a letter to Johnson the day after she transmitted the tape to the Justice Department, McDermott stated that the tape "b[ore] upon the matter under consideration" and contained "evidence . . . disclosed in a committee investigation" that should have been treated as part of the

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[9] Because "the subcommittee was still in control of that information," "it would have been improper for them to tell me until they told me in the format of the committee," MD 59:1-18 [J.A. 49]; *id.* 26:18-27:8 [J.A. 41], and they "clear[ly]" could not tell the public, *id.* 27:9-14 [J.A. 41]. On these points, McDermott was in full agreement with special counsel Cole's hearing testimony that subcommittee members "would have problems even talking to other members of the committee while the matter was still pending about some of the more salient facts of the matter," and "certainly wouldn't be able to talk outside of the committee about the salient facts." *Id.* 69:13-23 [J.A. 51]; Committee Transcript at 60 [J.A. 176].

"Committee record." [J.A. 177-78] Specifically, he highlighted the evidence on the tape concerning Gingrich's "solemn commitments to this Committee," regarding the (previously) confidential "no spin" understanding. *Id.*; MD 72:6-17 [J.A. 52]. Thus, McDermott himself contemporaneously acknowledged that the conversation on the tape was directly "relevant" to, and was therefore "information regarding," the pending Ethics Committee investigation.

2. The district court refused to find that the rules prohibited disclosure of the tape because the House rules were allegedly ambiguous and because *United States v. Rostenkowski*, 59 F.3d 1291 (D.C. Cir. 1995), purportedly prohibits, under separation of powers principles, judicial interpretation of ambiguous House rules. In addition to the fact that *Aguilar*'s more lenient standard applies *regardless* of whether there is a particularized nondisclosure rule, *Rostenkowski* did not prohibit interpreting coordinate branches' nondisclosure rules in this context and, in any event, there is no genuine ambiguity in the House rules.

First, with respect to separation of powers concerns, *Aguilar* found a duty of nondisclosure on the basis of an unwritten—and therefore inherently ambiguous—nondisclosure duty and *Pfeiffer* carefully reviewed the CIA's internal policies to conclude that the plaintiff had no right to publish the report. As the legion of cases interpreting governmental nondisclosure rules to resolve First Amendment issues reflect, construing the House rules here would no more violate Article I than did

Pfeiffer's interpretation of the CIA rules violate Article II or the Executive Branch's prosecution of Aguilar violate Article III.

Rostenkowski does not suggest otherwise. That case involved a criminal prosecution for using congressional staff for "personal services," rather than "official work"—a line that, given "the life of a congressman," was "particularly difficult to draw." 59 F.3d at 1312. Moreover, unlike here, the House rules in that case were an integral component of the *prima facie* criminal case. Here, the rules arise only to resolve a First Amendment affirmative defense raised by McDermott himself, in the civil context. Given these stark differences, *Rostenkowski*'s disinclination to resolve ambiguous House rules has never been thought relevant to resolving governmental nondisclosure requirements to address First Amendment interests—which is why *Pfeiffer* did not even flag *Rostenkowski*'s "separation of powers" concerns, although the opinions were authored by the same judge only one week apart.

Second, as noted, McDermott was concededly aware that he was not to disclose the information on the tape under the rules, which eliminates any potential "separation of powers" concern that the Court will unfairly "resolve against a Member of Congress an ambiguity in the Rules." *Rostenkowski*, 59 F.3d at 1312. *See id.* at 1309 (distinguishing *United States v. Diggs*, 613 F.2d 988 (D.C. Cir.

1979), because Representative Diggs "conceded that the services performed by the members of his staff were 'personal'").

Third, there simply is no serious ambiguity here. The conclusion that McDermott had a duty not to disclose is just as straightforward as the conclusion that he received the information in his "official" capacity, which the district court properly saw no problem in resolving. Indeed, the district court correctly found that "the information on the tape pertained to th[e] Committee's pending investigation of Newt Gingrich." LO 19 [J.A. 223]. While "political *responses* to a committee ruling may not be 'information regarding the Committee's . . . proceedings'" (*id.* at 22 [J.A. 226] (emphasis added)), the Committee's action itself was extensively discussed on the call and is, quite unambiguously, a "Committee proceeding." Moreover, the subsequent revision of House rules to require oaths against disclosing information "received in the course of one's service with the Committee" (*see id.*) does not create a *post hoc* ambiguity about whether the content of the phone call related to "Committee proceedings." The new regulation simply imposed a straightforward blanket rule that all information received in connection with "service with the Committee" could not be disclosed. It in no way creates a negative pregnant about the scope of information encompassed within the prior rule or what is meant by "Committee proceedings."

For all these reasons, *Aguilar*'s lenient test applies and § 2511(1)(c) clearly satisfies that test, because it is established that the statute's protection of private speech serves an "interest[] of the highest order" and a "compelling state interest." *Bartnicki*, 532 U.S. at 518; *Boehner*, 191 F.3d at 485 (Sentelle, J., dissenting).

III. THE INTEREST IN PROTECTING THE DISCLOSED CONVERSATION IS STRONGER IN THIS CASE THAN IN *BARTNICKI*

Even if *Bartnicki* did apply fully to public officials such as McDermott, and to intercepted tapes obtained in the manner McDermott acquired this one, application of § 2511(1)(c) is nonetheless constitutional here under the fact-specific balancing test set forth in that opinion.

In *Bartnicki*, the Court consciously eschewed any broad-based standard: "The constitutional question before us concerns the validity of the statutes *as applied to the specific facts of these cases*" and, in keeping with First Amendment decisions resolving similar issues, was decided based on "limited principles that sweep no more broadly than the appropriate context of the instant case." 532 U.S. at 524, 529 (internal quotation marks omitted). Accordingly, the Court concluded only that "*[i]n these cases*, privacy concerns give way when balanced against the interest in publishing matters of public importance." *Id.* at 534 (emphasis added).

The case-specific nature of *Bartnicki* is reinforced by the concurring opinion of Justice Breyer, who was joined by Justice O'Connor. *See McKoy v. North*

Carolina, 494 U.S. 433, 462 n.3 (1990) (Scalia, J., joined by Rehnquist, C.J., and O'Connor, J., dissenting) (separate opinion "can assuredly narrow what the majority opinion holds, by explaining the more limited interpretation adopted by a necessary member of that majority"). The concurrence confirmed that the Court's "narrow holding" was "limited to the special circumstances present here." 532 U.S. at 535. "As a general matter, despite the statute's direct restrictions on speech, the Federal Constitution must tolerate laws of this kind because of the importance of the[ir] privacy and speech-related objectives." *Id.* at 537-38. The concurrence expressly rejected, moreover, the notion that the public significance of an intercepted conversation is sufficient to override the interest in protecting its privacy: "[T]he Court does not create a 'public interest' exception that swallows up the statutes' privacy-protecting general rule." *Id.* at 540. Instead, the issue is whether, under the circumstances of each case, "the statutes strike a reasonable balance between their speech-restricting and speech-enhancing consequences." *Id.* at 536.

Here, unlike in *Bartnicki*, the balance tips decidedly in favor of upholding the statute's application to McDermott's disclosure. Any interest in protecting the disclosure is minimal in this case because McDermott, unlike the *Bartnicki* defendants, dealt with the interceptors and, in addition, received the tape in his official capacity as Ranking Member of the Ethics Committee. Moreover,

McDermott "recklessly" converted this official information for personal, "political" gain. RO 15 [J.A. 254].

Furthermore, the interest in protecting the privacy of the disclosed communication is far greater in this case than in *Bartnicki*. The speakers in *Bartnicki* "had little or no *legitimate* interest in maintaining the privacy of the particular conversation," which "involved a suggestion about 'blow[ing] off . . . front porches' and 'do[ing] some work on some of those guys,' thereby raising a significant concern for the safety of others." 532 U.S. at 539 (Breyer, J., concurring) (emphasis and ellipses in original). In these unusual circumstances, the disclosed conversation had heightened public importance and yet there was no interest in fostering similar communications. By contrast, Boehner's private conversation involved no wrongdoing, much less the type of imminent, physical threat that would vitiate the interest in protecting its privacy.

In an attempt to eliminate this distinction, McDermott makes the naked assertion that the communication here "involv[ed] apparent impropriety by . . . [Gingrich]"—namely, Gingrich's alleged violation of his understanding with the ethics subcommittee. MB 40. This is demonstrably untrue. McDermott admits that, as plainly stated in the intercepted conversation, Gingrich's understanding with the subcommittee was that he would not "orchestrate any attempt to spin this *in such a way that it belies what he is admitting* today in the statement of alleged

violations." MD 34:5-9 [J.A. 43]; *accord id.* at 33:1-34:9 [J.A. 42-43]; *New York Times* transcript [J.A. 168]; Committee Report at 95 [J.A. 194]. The public statement allegedly "orchestrated" by Gingrich on the call—"Although there is no charge that Newt intentionally misled the committee, Newt was responsible for the mistakes that were made[.]" (*New York Times* transcript [J.A. 168])—clearly did not belie his admissions to the Statement of Alleged Violation. That document alleged only that Gingrich "*should have* known" of inaccuracies in information submitted to the Committee under his name. Statement of Alleged Violation ¶ 52 [J.A. 190-91]. In fact, special counsel Cole *pre-approved* Gingrich's own December 21, 1996 press release, which contained language substantively identical to that suggested on the call: "I did not intend to mislead the Committee. I accept responsibility for this, and I deeply regret it." Statement of Newt Gingrich [J.A. 172]. *See* Committee Report at 95 [J.A. 194]. McDermott himself admits that such approval by Cole refutes any claim that the intercepted call constituted impermissible "orchestration" by Gingrich. MD 45:7-49:13 [J.A. 45-46].[10]

[10] In addition, the subcommittee did not suggest that Gingrich's conference call with the Republican leadership was in any way inconsistent with the "no spin" understanding, although they looked at the matter carefully. Committee Report at 96 [J.A. 195]; Committee Transcript at 61 [J.A. 176]. Rather, the subcommittee was concerned about an apparent leak about the subcommittee's intention to recommend a $300,000 sanction, but there was no mention of this sanction on the call, and the articles containing the leak "culminated probably on January 6," before Cole or the subcommittee members knew about the call. Committee Transcript at 61 [J.A. 176].

More important, McDermott concedes that, at the time of the disclosure, he had no reasonable basis for believing that Gingrich's actions violated the "no spin" agreement, since McDermott knew *nothing* about the contours of any such agreement and made *no* effort to determine the contours or Gingrich's compliance with it.[11] As the district court concluded, "Defendant's argument that he was acting in the public interest by exposing official misconduct is unsupported by the evidence." RO 15 [J.A. 254].

Moreover, since the intercepted call was a private communication among leaders of Congress about congressional business, its heightened importance weighs *against* McDermott's First Amendment defense. Such important conversations must be *encouraged*, by protecting their privacy. Indeed, the interest in protecting the privacy of these communications is so fundamental that it is

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[11] McDermott had no "inkling" of the understanding between Gingrich and the subcommittee, apart from what he heard on the tape. MD 14:13-16:20 [J.A. 38]. McDermott testified: "It was just a bit of information that came in about something that I was essentially unaware of." MD 322:11-16 [J.A. 137]. Yet McDermott made a conscious decision *not* to obtain more information. MD 61:5-65:21, 321:2-327:2 [J.A. 49-50, 137-38]. Though the call itself referenced a Committee briefing on the Gingrich settlement while McDermott was "on vacation," McDermott did not attempt to find out what he had missed, or otherwise attempt to gain the "framework" that he lacked. MD 61:5-64:16, 322:11-13 [J.A. 49-50, 137]. Indeed, even when sitting in Cole's office on January 9 or 10, 1997, McDermott did not ask for or receive any opinion or information from Cole regarding the subcommittee's understanding with Gingrich or any other aspect of the Gingrich proceedings. MD 321:2-327:2 [J.A. 137-38]. McDermott did not even review any news reports or public statements regarding the Committee's charges. MD 63:19-65:1 [J.A. 50].

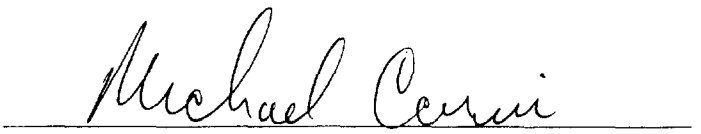
enshrined in the Speech or Debate Clause, U.S. Const. art. I, § 6, cl. 1, which absolutely bars forced disclosure of such communications in order to avoid "a chilling effect on Congressional freedom of speech." *MINPECO S.A. v. Conticommodity Servs., Inc.*, 844 F.2d 856, 860 (D.C. Cir. 1988); *see also Brown & Williamson Tobacco Corp. v. Williams*, 62 F.3d 408, 420 (D.C. Cir. 1995). The protections of the Speech or Debate Clause confirm that the interest in maintaining the privacy of these communications, like other privileged conversations, surpasses any interest in public disclosure. *See Bartnicki*, 532 U.S. at 533 (stating that holding did not extend to disclosure of illegally intercepted discussion of "trade secrets").

CONCLUSION

The judgment of the district court on both liability and remedies should be affirmed.

Dated: August 12, 2005

Respectfully submitted,



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Pursuant to and in accordance with the provisions of Fed. R. App. P. 32(a)(7)(C), I hereby certify that the Brief for Appellee contains 13,887 words, on the basis of a word count made by Jones Day's word processing software that counts words in both text and footnotes.

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