No. 07-439

IN THE

Supreme Court of the United States

JAMES A. MCDERMOTT,

Petitioner,

v.

JOHN A. BOEHNER,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF IN OPPOSITION FOR RESPONDENT

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QUESTIONS PRESENTED

1. Whether 18 U.S.C. § 2511(1)(c), which prohibits the knowing disclosure of an illegally intercepted communication, is constitutional as applied in this case, where (1) the House Ethics Committee concluded that Rep. McDermott's disclosure violated his obligations as the Committee's then-Ranking Member, (2) McDermott took the tape from the interceptors with knowledge of their illegal conduct, and (3) the participants in the illegally intercepted conversation had particularly strong expectations of privacy.

2. Whether the House Ethics Committee in fact concluded that McDermott's disclosure violated his obligations as the Committee's then-Ranking Member.

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BRIEF IN OPPOSITION FOR RESPONDENT

COUNTERSTATEMENT

Plaintiff John Boehner, a U.S. Representative from Ohio who was vacationing in Florida, used a cellular telephone to participate in a call with then-Speaker of the House Newt Gingrich and other House Republican leaders. Pet. App. 3a. The conversation concerned a House Ethics Committee investigation of 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). Pet. App. 3a.

The Martins delivered their tape recording to the office of then-Rep. Karen Thurman. *Id.* Based on the advice of Stan Brand, a former General Counsel of the House of Representatives, Thurman's office returned the tape to the Martins—in its unopened envelope—and suggested that they give it to the Ethics Committee. *Id.* at 3a-4a.

The Martins then met with Defendant James McDermott, a U.S. Representative from Washington, in an anteroom of the Committee's hearing room. *Id.* at 4a. The Martins handed McDermott the tape in a sealed envelope, along with a letter addressed to "Committee on Standards of Official Conduct . . . Jim McDermott, Ranking Member." *Id.* The letter read:

> 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. We felt the information included were [sic] of importance to the

> committee. We live in the 5th. Congressional District and attempted to give the tape to Congresswoman Karen Thurman. We were advised by her to turn the tape directly over to you. We also understand that we will be granted immunity.
>
> . . . We pray that committee will consider our sincerity in placing it in your hands.
>
> . . .

Id. Regardless whether McDermott read the cover letter, he knew that the Martins had intercepted the call using a scanner. *Id.* at 44a. McDermott knew this because the undisputed evidence establishes that the Martins *told* him so. The *New York Times* reported: "The Congressman . . . quoted the[] [couple] as saying [the tape] had been recorded off a radio scanner, suggesting that one participant was using a cellular telephone." *Id.* at 39a. McDermott does not deny that the Martins, in fact, "told him that they'd gotten the phone call off a radio scanner." Joint Appendix in the Court of Appeals ("J.A.") 73. He says only that, many years later, he "do[es] not remember one way or another." *Id.* Thus, there is literally no dispute over the fact that the Martins told McDermott about the illegal interception.[1]

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[1] Indeed, no judge at any stage of these proceedings found there to be a genuine dispute over the fact that McDermott knew at the time of receiving the tape that it had been recorded with a radio scanner.

After listening to the tape, McDermott invited reporters from the *New York Times* and the *Atlanta Journal-Constitution* to his office, where he allowed them to hear the tape as well. Pet. App. 4a-5a. There was nothing improper about the recorded conversation itself, and McDermott "could not have intended to expose misconduct, since . . . there is no evidence that he was aware of any at the time he made the disclosure." *Id.* at 109a. Instead, McDermott was motivated by an intent to "embarrass" and "politically harm the individuals" on the intercepted call "through an invasion of their privacy." *Id.* at 108a.

McDermott considered the potential illegality of disclosing the tape but failed to consult any authority on the matter. *Id.* at 109a-110a. McDermott insisted to the *Times* reporter that he be identified only as "a Democratic Congressman hostile to Mr. Gingrich." *Id.* at 5a. After the *Times* published a front-page article about the tape, *id.*, McDermott denied to reporters that he knew any more about the tape than was in the newspaper. *Id.* at 88a. But the Martins publicly revealed that they had given the tape to McDermott, and he then sent it to the Ethics Committee and resigned his position on the Committee. *Id.* at 6a.

The Committee's Chairman forwarded the tape to the Department of Justice. *Id.* The Martins were prosecuted under 18 U.S.C. § 2511(1)(a), and they ultimately pled guilty and were fined $500. *Id.* McDermott, on the other hand, sent and publicly released a letter to the 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.* at 177-78.

It is undisputed that McDermott's disclosure violated 18 U.S.C. § 2511(1)(c), and that 18 U.S.C. § 2520 entitles Boehner to recovery from McDermott for the violation. Pet. App. 6a. Initially, the district court held that McDermott's First Amendment defense "exploited a loophole" and required dismissal of Boehner's complaint. *Id.* at 81a. The Court of Appeals reversed, holding that McDermott had not "lawfully obtained" the tape—and, thus, had no First Amendment defense—because he had actively and knowingly participated in the Martins' unlawful transmission of the tape to him. *Boehner v. McDermott*, 191 F.3d 463 (D.C. Cir. 1999).

This Court vacated and remanded for further consideration in light of its intervening decision in *Bartnicki v. Vopper*, 532 U.S. 514 (2001). *Bartnicki* 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. The Court emphasized, among other things, that the tape had been "obtained lawfully" by the defendants because it had been left anonymously in a defendant's mailbox. *Id.* at 525. The Court also distinguished the facts of this case, recognizing that here "the defendant knew both who was responsible for intercepting the conversation and how they had

done it." *Id.* at 522 n.5. The Court of Appeals in turn remanded to the district court for consideration of *Bartnicki's* effect after further development of the record. *Boehner v. McDermott*, 22 F. App'x 16 (D.C. Cir. 2001).

After discovery, the district court granted summary judgment for Boehner. The court ruled that McDermott had received the tape in his official capacity as a Member of the Ethics Committee rather than in his "unofficial political capacity." Pet. App. 74a-77a. The court therefore considered applying *United States v. Aguilar*, 515 U.S. 593 (1995), which held that less stringent First Amendment standards govern prohibitions on disclosure by defendants in sensitive confidential positions. The district court, however, did not rest its decision on *Aguilar*, because it declined to resolve a perceived ambiguity as to whether McDermott had violated his duties as an Ethics Committee member. Pet. App. 78a-79a. The court held instead that McDermott had not "lawfully obtained" the tape, based on the reasoning of the prior Court of Appeals decision, and that "[t]he case at hand is distinguishable from *Bartnicki*" for that reason. *Id.* at 90a.

The district court awarded Boehner $10,000 in statutory damages, $50,000 in punitive damages, and attorneys' fees and costs in an amount to be determined. *Id.* at 111a. The court explained that punitive damages are "appropriate given Defendant's outrageous conduct" in "recklessly" disregarding the law and "malicious[ly]" invading Boehner's privacy in an attempt to inflict political harm. *Id.* at 108a-109a.

A panel of the Court of Appeals affirmed. *Id.* at 42a. The panel reasoned: "[I]t does not follow [from *Bartnicki*] that anyone who receives a copy of [an illegally intercepted] conversation has obtained it legally and has a First Amendment right to disclose it. If that were the case, then the holding in *Bartnicki* is not 'narrow' as the Court stressed, but very broad indeed." *Id.* "On the other hand, to hold that a person who knowingly receives a tape from an illegal interceptor" can be distinguished from the *Bartnicki* defendants "would be to take the Court at its word." *Id.* "It also helps to explain why the Court thought it so significant that the illegal interceptor in *Bartnicki* was unknown, and why the Court distinguished this case on that ground." *Id.* at 42a. (citations omitted). Here, because "McDermott knew the Martins had illegally intercepted the conversation, he did not lawfully obtain the tape from them." *Id.* at 45a.

Judge Sentelle dissented, finding *Bartnicki* controlling. *Id.* at 47a-56a. Judge Sentelle saw no "distinction . . . of constitutional significance" between a person who discovers in his mailbox a tape containing an unlawfully intercepted conversation, as in *Bartnicki*, and a person who willingly accepts a tape from the interceptors with the knowledge that they illegally recorded it, as in this case. *Id.* at 52a-56a.

As the case was pending before the en banc Court of Appeals, the Investigative Subcommittee of the House Ethics Committee issued its Report addressing an ethics complaint filed against McDermott, which was predicated on his disclosure of the tape. *Id.* at

113a. In the detailed, 25-page Report, the bipartisan Committee unanimously stated that it had

> reviewed the applicable Committee rules related to the confidentiality of Committee proceedings and concluded that Representative McDermott's conduct, *i.e.*, his disclosure to the news media of the contents of the tape furnished to him by the Martins, was inconsistent with the spirit of the applicable rules and represented a failure on his part to meet his obligations as Ranking Minority Member of the House Select Committee on Ethics.

Id. at 142a. The Report emphasized that violating the "spirit" of the Committee's rules is a violation of the House rules, because the House rules state that "'[a] Member . . . *shall adhere* to the *spirit* and letter of the Rules of the House and to the rules of the duly constituted Committees thereof.'" *Id.* at 144a n.78 (quoting House Rule 23, clause 2) (emphasis added; alterations in original). The Report further explained that "'a narrow technical reading of a House rule should not overcome its spirit and the intent of the House in adopting that and other rules of conduct.'" *Id.* (quoting House Ethics Manual at 15). The full Committee on Standards of Official Conduct voted to adopt the Report. *Id.* at 146a.

McDermott's brief to the en banc Court of Appeals was due shortly after the Report issued. In his brief, McDermott himself put the Report in issue before the en banc court, and affirmatively argued that the

court should accept the Report's conclusions as he viewed them. D.C. Cir. Appellant's Supp. Br. at 12 (Dec. 22, 2006). McDermott did not contend that the Court of Appeals, in rendering its decision, was barred from adopting the Ethics Committee's findings set forth in the Report.

The en banc Court of Appeals affirmed the judgment against McDermott. Pet. App. 13a. The majority "assume[d] *arguendo* that Representative McDermott lawfully obtained the tape from the Martins." *Id.* at 7a. The majority nonetheless recognized that, under *Aguilar*, "those who accept positions of trust involving a duty not to disclose information they lawfully acquire while performing their responsibilities have no First Amendment right to disclose that information." *Id.* at 10a. This case therefore falls squarely within the framework of *Aguilar*, since McDermott, as a Member of the Ethics Committee, was under a "duty [not] 'to disclose any evidence relating to an investigation to any person or organization outside the Committee unless authorized by the Committee.'" *Id.* (quoting House Ethics Committee Rule 9). Because the House Ethics Committee's Report clearly stated that McDermott's conduct "'was inconsistent with the spirit of the applicable rules and represented a failure on his part to meet his obligations as Ranking Member of the House Select Committee on Ethics,'" *Aguilar* precluded McDermott from using the First Amendment as a shield to liability under the wiretapping statute. *Id.* at 12a-13a (quoting Ethics Committee Report at 17).

In dissent, Judge Sentelle, joined by three other judges, conceded that he could "do little to improve on

the majority's description of" *Aguilar*, but he viewed that decision as "not on point." *Id.* at 27a. The dissent also concluded that the judgment could not be affirmed on the ground that McDermott had not lawfully obtained the tape. *Id.* at 17a-24a. Judge Griffith joined the four dissenters on the "lawfully obtained" issue, but he wrote a concurring opinion to emphasize that "the Court does not and need not reach th[e] issue to resolve the matter before us." *Id.* at 14a. That is because Judge Griffith joined the majority's affirmance based on *Aguilar*, explaining that "McDermott cannot here wield the First Amendment shield that he voluntarily relinquished as a member of the Ethics Committee." *Id.*

REASONS FOR DENYING THE WRIT

I. THE ISSUES IN THIS CASE ARE NEITHER IMPORTANT NOR THE SUBJECT OF CONFLICTING DECISIONS

The Court of Appeals' decision is narrow, fact-bound, and unworthy of review. Indeed, the petition does not even suggest that any of the usual reasons for granting certiorari are present in this case. There is neither a circuit split nor any confusion in the lower courts as to the governing principles. The opinion below did not purport to set forth any generally applicable principle of law, and there is no reason to believe that the decision in this *sui generis* case will affect or govern any cases in the foreseeable future. Thus, even assuming *arguendo* that the reasoning below is erroneous, that fact-bound

decision in circumstances unlikely to recur does not warrant this Court's intervention.

The Court of Appeals resolved McDermott's as-applied challenge to 18 U.S.C. § 2511(1)(c) by focusing on the facts of this case, without relying on any new rule of law or even any rule of general applicability. In the lower court's own words, "[t]he question . . . is whether Representative McDermott had a First Amendment right to disclose to the media this particular tape at this particular time given the circumstances of his receipt of the tape, the ongoing proceedings before the Ethics Committee, and his position as a member of the Committee." Pet. App. 7a. Even under McDermott's broadest characterization, the Court of Appeals relied on an extremely limited principle—that a defendant in a sensitive confidential position not only accepts job-related nondisclosure rules, but also has a diminished First Amendment defense to a general nondisclosure statute. This principle stretches no further than the facts of this case, which are unique on many levels, and are therefore extraordinarily unlikely to recur.

To begin with, the number of people in sensitive confidential positions is quite small. Of that group, only a miniscule subset will deliberately violate special duties of nondisclosure as to information received in those positions. And, within this much smaller group, the category of cases where the disclosure *also* violates a statutory prohibition like the eavesdropping provision is virtually a null set. There have been *no* other such cases in the 40-year history of the eavesdropping statute. In fact, the only other decision involving this scenario under *any*

statute is *United States v. Aguilar*, 515 U.S. 593 (1995). In that case, as explained below, this Court already resolved the narrow question presented here. *See* Pet. App. 11a ("The situation is the same as that in *Aguilar*.").

Moreover, in his unsuccessful attempt to avoid *Aguilar*, McDermott necessarily narrows the issue even further. McDermott "distinguishes" *Aguilar* on the ground that *Aguilar*'s diminution of First Amendment rights for certain public officials applies only if the statute being enforced is "closely connected" (whatever that may mean) to the defendant's sensitive confidential position. Pet. 20 (quoting Pet. App. 28a). The issue argued by McDermott only would be implicated, therefore, if all the above criteria were met *and* the defendant's statutory liability was not "closely connected" to his sensitive confidential position. And, even in this situation, the relevance of the defendant's sensitive confidential position would only potentially need to be reached if the statute's enforceability against private citizens was in doubt.

McDermott does not, and could not, suggest any likelihood that such a confluence of highly unusual facts will materialize again in the future. The Court of Appeals, therefore, was correct in describing the First Amendment issue as unique to this case. The judgment below is "like a restricted railroad ticket, good for this day and train only." *Washington County v. Gunther*, 452 U.S. 161, 183 (1981) (Rehnquist, J., dissenting) (citation and internal quotation marks omitted); *see also Rice v. Sioux City Mem. Park Cemetery*, 349 U.S. 70, 74 (1955) (a case

is only potentially worthy of certiorari if it is "beyond the academic or the episodic").

It is obvious even to McDermott's allies below that the narrowness of the Court of Appeals' decision drains this case of any First Amendment significance. Far from supporting McDermott's rhetoric that the Court of Appeals "blasted a gaping hole into" the First Amendment (Pet. 1), the *amici* below "greeted the decision with relief and enthusiasm," claiming that "[i]t's a huge win in terms of the free speech and free press interests." Adam Liptak, *Court Says Congressman Must Pay Damages*, N.Y. TIMES, May 2, 2007, at A1 (internal quotation marks omitted); *accord The McDermott Affair*, WALL ST. J., May 12, 2007, at A10 (editorial by media *amicus*) ("[W]e're pleased to report that an appellate court decision last week left all of us a little freer."). The Court of Appeals' fact-bound rejection of McDermott's First Amendment defense would therefore be unworthy of certiorari even if it were not demonstrably correct (*see infra* Part II).

McDermott's separation-of-powers argument also is unworthy of review. Most importantly, McDermott failed to raise the argument below. He *now* argues that it is "an affront to the separation of powers" to attach "adverse collateral consequences" to the "Ethics Committee Report" determining that he violated a special duty of nondisclosure imposed by House rules. Pet. 24, 28. In the court below, however, he never suggested any problem with examining or attaching consequences to the Report. To the contrary, McDermott *himself* presented the Report to the court and affirmatively argued that his defense should be evaluated based on the Report's

conclusions *as he viewed them*. D.C. Cir. Appellant's Supp. Br. at 11-12 (Dec. 22, 2006). He cannot now be heard to argue that the court below was constitutionally compelled to ignore the Ethics Committee Report that he introduced.

Specifically, in the Court of Appeals, McDermott asserted that, under the circuit precedent of *United States v. Rostenkowski*, 59 F.3d 1291 (D.C. Cir. 1995), the Court should not "construe the scope of ambiguous duties imposed under Congress' internal rules." D.C. Cir. Appellant's Supp. Br. at 11 (Dec. 22, 2006). Neither McDermott nor the dissenting opinion, however, suggested that it was improper to review a report of Congress concerning its own internal rules; the disagreement was simply over whether the majority was correct in concluding that the "Ethics Committee report on McDermott's conduct removes all ambiguity" about whether he violated House rules. Pet. App. 29a. Accordingly, the question whether it was improper under the separation of powers for a court to interpret a congressional committee's interpretation of congressional rules was never presented or discussed in any way below, and therefore is not properly presented here. *See, e.g., Travelers Cas. & Sur. Co. of Am. v. Pac. Gas & Elec. Co.*, 127 S. Ct. 1199, 1207 (2007).

In any event, even if McDermott previously raised the issue that he now seeks to present, it would not be suitable for certiorari. It is exceedingly rare that a court will have any occasion to review congressional rules or determine whether a Member of Congress violated those rules. Nor are the principles governing such judicial review subject to either conflicting

decisions or confusion in the lower courts. In this case, moreover, the Court of Appeals relied upon the Ethics Report rather than its own reading of the rules themselves. Needless to say, a court will rarely, if ever, have an opportunity to review Congress's interpretation of its own rules.

Finally, the issue that *was* preserved below—whether this particular Report leaves any ambiguity concerning this particular defendant's violation of House rules—could not be more case-specific. The majority's disagreement with McDermott and the dissenting opinion concerning whether there is "ambiguity" surrounding McDermott's rules violation is a textbook example of an alleged "error" that is narrow and factual, and thus not reviewed by this Court. *See* SUP. CT. R. 10 (2007) ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."); *Graver Tank & Mfg. Co. v. Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949) ("A court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional show of error."); *United States v. Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant certiorari to review evidence and discuss specific facts.").

McDermott has identified no aspect of the law that needs to be—or even would be—developed or clarified by this Court's review of the decision below. And his desire to avoid paying $60,000 in damages, plus attorneys' fees, would be an insufficient basis for certiorari even if there were doubt about the

correctness of the Court of Appeals' narrow, fact-bound decision. Accordingly, the petition should be denied. In any event, for the reasons explained below, there was no error. The Court of Appeals properly applied the law to the particularized facts of this case and correctly held that McDermott could not escape liability under the eavesdropping statute.

II. THE COURT OF APPEALS' JUDGMENT IS CORRECT

A. The Statute Is Enforceable Against McDermott Under *United States v. Aguilar*

Unable to identify an issue worthy of review, McDermott resorts to hyperbole and *ad hominem* attacks on the Court of Appeals. Specifically, he contends that *Bartnicki v. Vopper*, 532 U.S. 514 (2001), although not presented with the question, definitively resolved that officials in sensitive confidential positions have precisely the same First Amendment right to disclose illegally intercepted phone calls as the private defendants in that case. Pet. 15-22. That being so, McDermott argues, it is constitutionally irrelevant whether the illicit disclosure was made by an FBI agent or a federal prosecutor or, as here, the Ranking Member of the House Ethics Committee who received the purloined tape in connection with his role in an official investigation. Indeed, McDermott claims that the Court of Appeals' use of this supposedly flimsy distinction actually "flout[s] . . . this Court's authority over constitutional law" and "thereby threatens the hierarchy of the federal court system created by the Constitution and Congress." *Id.* at 15, 23 (internal quotation marks omitted).

Notwithstanding these apocalyptic pronouncements, the rule that illegal disclosures by officials in "sensitive confidential positions" are judged by less "stringent" First Amendment "standards" than disclosures by "unwilling members of the public" is, in fact, mandated by this Court's unanimous opinion in *United States v. Aguilar,* 515 U.S. 593, 606 (1995). The court below's application of this principle hardly "flouts" the fact-specific *Bartnicki* decision; it is, indeed, necessary to avoid "flouting" this Court's decision in *Aguilar.*

Aguilar involved a First Amendment challenge by a federal judge to his conviction under 18 U.S.C. § 2232(c)—a sister provision of § 2511(1)(c)—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. 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. This was significant because "[g]overnment officials in sensitive confidential positions may have special duties of nondisclosure." *Id.* at 606.

Specifically, "[a]s to one who voluntarily assumed a duty of confidentiality, governmental restrictions on disclosure are not subject to the same stringent standards [established in *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97 (1979)] that would apply to efforts to impose restrictions on unwilling members of the public." 515 U.S. at 606. Thus, even

though 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).

Here, "[t]he situation is the same as that in *Aguilar*." Pet. App. 11a. That is because "[w]hen Representative McDermott became a member of the Ethics Committee, he voluntarily accepted a duty of confidentiality that covered his receipt and handling of the Martins' illegal recording." *Id.* at 13a; *see infra* Part II.B. In *Bartnicki*, by contrast, "[t]he individuals who disclosed the tape . . . were private citizens who did not occupy positions of trust." *Id.* at 10a. As a consequence, application of the eavesdropping statute in this case is "not subject to the same stringent standards that . . . appl[ied in *Bartnicki*] to efforts to impose restrictions on unwilling members of the public." *Aguilar*, 515 U.S. at 606. And it is undisputed that enforcement here of the statute, which serves "interests of the highest order," *Bartnicki*, 532 U.S. at 518, easily satisfies the less "stringent" First Amendment test dictated by *Aguilar*.

In short, since the "stringent standards" established by *Daily Mail* for private citizens did not govern Judge Aguilar's violation of 18 U.S.C. § 2232(c), it inexorably follows that the "stringent standards" established by *Bartnicki*'s application of

Daily Mail for private citizens do not govern Rep. McDermott's violation of 18 U.S.C. § 2511(1)(c). In the face of this, Petitioner nevertheless argues that disclosure by sensitive confidential officials are subject to the same "stringent" First Amendment "standards" applied to private citizens if the speech restriction is contained in a generally applicable statute. This is purportedly so because a sensitive confidential official's First Amendment right to disclose is diminished only with respect to the statute or regulation *creating* the nondisclosure duty, but such officials have the same First Amendment rights as private citizens with respect to *other* governmental restrictions on disclosure. This analysis is plainly wrong for a number of obvious reasons.

First, Petitioner's rule is utterly irreconcilable with *Aguilar*. There, Judge Aguilar asserted a First Amendment right to trump application of a generally applicable statute; it was not asserted against application of the judicial regulation that created his special duty of nondisclosure. Thus, it is as clear as can be that the First Amendment rights of sensitive confidential officials are diminished relative to statutes distinct from the regulation prohibiting disclosure and that the constitutionality of such statute's application is to be assessed pursuant to less "stringent standards" than those that normally apply.

Apparently recognizing this, Petitioner beats a tactical retreat and acknowledges that sensitive confidential officials *do*, in fact, have diminished First Amendment rights, not only with respect to the regulation creating the nondisclosure duty, but also

to "*other*" generally applicable laws. Pet. 20. But, we are told, this is true only when the generally applicable "'statute at issue . . . [is] closely connected with the 'special duty of nondisclosure' that limited the defendants' First Amendment rights.'" *Id.* (quoting Pet. App. 28(a)). This attempted narrowing of *Aguilar*, however, is completely without merit.

In the first place, Petitioner's "closely connected" rule is fashioned out of whole cloth—there is no hint in *Aguilar* that relaxation of the "stringent standards" depends on a close nexus between the statute being enforced and the rule creating the nondisclosure duty. Moreover, Petitioner and the dissent below make no attempt to explain what they mean by "closely connected," much less demonstrate its presence in *Aguilar* or its absence here.

To the extent Petitioner's proposed standard is comprehensible, the illegal tape here was very "closely connected" to McDermott's official position. The tape contained a discussion of pending Ethics Committee proceedings against then-Speaker Gingrich. That is why the interceptors gave it to McDermott, the Committee's Ranking Member, in an anteroom off the Committee's hearing room. Indeed, their cover letter stated: "We felt the information included [was] of importance to the committee. . . . We pray that [the] committee will consider our sincerity in placing it in your hands." Pet. App. 4a. In *Aguilar*, by contrast, the wiretap had no connection, close or otherwise, to any official duty of Judge Aguilar; he was told about it at a cocktail party because he had a personal connection to the wiretap's target. *See United States v. Aguilar*, 994 F.2d 609, 612 (9th Cir. 1993). Application of the *Aguilar* rule is

thus even more compelling here than in *Aguilar* itself.

Furthermore, the general purpose of the statutory prohibition in *Aguilar* was no more "closely connected" to the special nondisclosure duty than it is here. The statute in *Aguilar* prohibited disclosure of a wiretap by anyone, not just a judge or other court officer, and was obviously designed to avoid "imped[ing] ongoing undercover investigations." *Id.* at 615. The special nondisclosure duty, on the other hand, applied broadly to all "communications among judges relating to official judicial business," not just wiretap applications or other secret investigative procedures, and was meant to avoid "stifl[ing] discussion among the members of the federal judiciary." *Id.* at 616 (internal quotation marks omitted). These two nondisclosure obligations were thus quite different in purpose and scope, so they were not "closely connected" at all. *Aguilar*, therefore, cannot be distinguished away pursuant to Petitioner's newly invented standard.[2]

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[2] *Aguilar* also cannot be limited on the basis of the Court's observation that: "'[T]he statute here in question does not impose [a] restriction generally, but only upon those who disclose wiretap information in order to obstruct, impede, or prevent the interception.'" Pet. 19 (quoting 515 U.S. at 605); *see* Pet. App. 27a. The statute at issue here likewise does not impose a restriction generally, but only on those who disclose intercepted communications with knowledge or reason to know of the unlawful interception. 18 U.S.C. § 2511(1)(c). More important, *Aguilar* makes clear that First Amendment standards are *always* less stringent when disclosure restrictions are applied to those who acquire information through their sensitive confidential positions. 515 U.S. at 606.

More generally, Petitioner's assertion that the same First Amendment standards governing "unwilling members of the public" should be applied to confidential public officials conflicts with the Court's general First Amendment approach, makes no sense, and would substantially frustrate important privacy interests. It makes perfect sense to find that public officials have less "freedom" to disclose confidential material than private citizens, regardless of whether the issue arises in connection with enforcement of the specific nondisclosure duty or of a generally applicable statute. Sensitive confidential officials have voluntarily relinquished any "right" to disclose information that comes to them in the course of their job because, by accepting the position of trust, they have willingly subjected themselves to the requirement that such information cannot be disclosed. Since people like McDermott therefore have no First Amendment right to disclose, "he has no shield from [the] civil liability" imposed by the statute any more than he has a shield from "discipline imposed by the House." Pet. App. 11(a); *see id.* at 14(a) (Griffith, J., concurring) ("[B]ecause Rep. McDermott cannot here wield the First Amendment shield that he voluntarily relinquished as a member of the Ethics Committee, . . . his disclosure of the tape-recording was not protected by the First Amendment."). One cannot trump imposition of a federal statute if one does not possess a constitutional right superior to that statute. In short, since confidential public officials are not similarly situated to "unwilling members of the public" with respect to *access* to confidential information, they should not be treated the same

with respect to their willful *disclosure* of such information.

Contrary to McDermott's unsupported hyperbole, nothing in logic or law requires courts to ignore a defendant's independent nondisclosure duties in assessing whether a federal statute may be constitutionally applied to the official. Even McDermott acknowledges elsewhere that First Amendment analysis *is supposed to* turn on the individual defendant's circumstances, such that "a particular restriction [may be] unconstitutional as applied to [one defendant], even if that restriction would not be unconstitutional as applied to someone else." Pet. 18. One key factor in that individualized inquiry is whether the particular defendant voluntarily assumed a responsibility not to disclose the information at issue.

Thus, the principles established for private citizens have never been thought to apply to people in sensitive confidential positions. For example, the fact that a private citizen has a First Amendment right to disclose a rape victim's name hardly suggests that *police officers*, who obtain such information by virtue of their sensitive confidential positions, have an analogous right. *See Florida Star v. B.J.F.*, 491 U.S. 524, 534 (1989) (the "government *may* . . . extend a damages remedy *against* the government or its *officials* where the government's mishandling of sensitive information leads to its dissemination") (emphasis added). Similarly, the fact that a grand jury *witness* has a right to disclose grand jury testimony, *see Butterworth v. Smith*, 494 U.S. 624 (1990), hardly suggests that a grand juror or prosecutor has a similar right, *see id.* at 631-32. And

if *Aguilar* had been preceded by a decision invalidating the wiretap statute's application to an "unwilling member[] of the public," the Court still would have held that Judge Aguilar had no such right to disclose. 515 U.S. at 605.

By the same token, *Bartnicki*'s resolution of the First Amendment rights of the private defendants there hardly governs the rights of a sensitive confidential official like McDermott. This is particularly obvious because, at every turn, *Bartnicki* emphasized that it was not formulating generally applicable principles, but rather, "'limited principles that sweep no more broadly than the appropriate context of the instant case.'" 532 U.S. at 529 (quoting *Florida Star*, 491 U.S. at 532-33); *accord id.* at 524; *id.* at 529 ("[W]e consider whether, given the facts of these [consolidated] cases, the interests served by § 2511(1)(c) can justify its restrictions on speech."). Moreover, two of the six Justices in the *Bartnicki* majority stated that they "agree[d] with the Court's holding that the statutes as applied here violate the Constitution, but [they] would not extend that holding beyond these present circumstances." *Id.* at 541 (Breyer, J., concurring). On its face, therefore, *Bartnicki's* invalidation of the eavesdropping statute's application did not extend beyond the circumstances of that case, which involved only private defendants.

Indeed, *Bartnicki* affirmatively stated that it was not resolving whether information protected by another nondisclosure duty, independent of § 2511(1)(c), such as "trade secrets," could constitutionally be protected from disclosure under that statute. *Bartnicki*, 532 U.S. at 533-34. Even

more obviously, the opinion did not apply to all defendants regardless of how they obtained the intercepted phone call; it certainly did not purport to protect disclosures by persons, such as the Martins, who obtained the information through an illegal interception. *A fortiori*, *Bartnicki* did not resolve whether information protected by a nondisclosure duty, far more important than "trade secrets," could be disclosed by a defendant like McDermott, who obtained the information because of a sensitive confidential position and in circumstances where he was obliged to keep that information confidential.

All agree that a public official's voluntary acceptance of special responsibilities and the government's strong interest in conducting important investigatory and other functions in confidence, standing alone, suffices to allow draconian punishment of such officials when done to enforce the nondisclosure duty itself. There is simply no reason that those same compelling public interests and equitable concerns should be ignored in assessing the constitutionality of enforcing a statute against sensitive confidential officials.

In sum, the Court of Appeals' faithful application of *Aguilar* is perfectly consistent with this Court's decision in *Bartnicki*.

B. McDermott's Separation-Of-Powers Arguments Are Meritless

As stated above, McDermott's separation-of-powers arguments are unworthy of review. His current challenge to judicial recognition of a House rules violation was not presented below, and his disagreement with the Court of Appeals' reading of

the Ethics Report applies only to this one case. Furthermore, even assuming away these defects in the petition, there is no merit in McDermott's challenge to the Court of Appeals' recognition of a special nondisclosure duty here. Any concern about interpreting ambiguous rules is irrelevant because the Court of Appeals did nothing more than adopt the conclusions of the Ethics Report. And the court's reading of the Report was entirely correct.

McDermott's assertion that "the Judicial Branch is not in the business of adjudicating—much less punishing—violations of the internal rules of the Legislative Branch" (Pet. 2) is a non sequitur. There was no occasion in this case for the court below to interpret the House rules or adjudicate a violation, because the House Ethics Committee *already* concluded in the Report that McDermott violated his ethical obligations. *See infra* pp. 28-32. Nor did the court "punish" McDermott for *that* violation. As the court made clear, McDermott's "civil liability . . . rest[s] not on his breach of some ethical duty, but on his violation of a federal statute for which he had no First Amendment defense." Pet. App. 12a; *accord* Pet. 16 ("No one here is trying to punish Rep. McDermott under the House Ethics Committee Rules . . . Rep. Boehner is trying to punish Rep. McDermott for violating the duty of nondisclosure in [a] statute.").

In short, the court below adjudicated and enforced a federal statute, not any House rule. In the course of that analysis, it resolved McDermott's affirmative First Amendment defense, which necessitated determining whether he was subject to special nondisclosure duties under the Ethics Committee

rules. Nothing in the separation of powers prevents a court from taking cognizance of House rules, much less the House's interpretation of its own rules, to resolve a case properly before it.

As this Court explained in *Yellin v. United States*, 374 U.S. 109, 114 (1963), "[i]t has long been settled . . . that rules of Congress and its committees are judicially cognizable." Thus, "it is perfectly clear that the Rulemaking Clause is not an absolute bar to judicial interpretation of the House Rules." *Rostenkowski*, 59 F.3d at 1305. For example, where a defendant's liability for embezzlement turns on whether his use of funds was authorized by his employer, "the House Rules are necessary and proper evidence to make that showing" against a Member of Congress. *Id.* It is no different if a defendant's statutory liability turns on whether he accepted diminished First Amendment protections by assuming a sensitive confidential position.

In a variety of other contexts, one unit of government accepts or interprets another's rules without overstepping the lines that delineate their separate domains. The Executive Branch did not invade the judiciary's Article III domain when it prosecuted Judge Aguilar under a wiretap statute and took account of judicial confidentiality rules to refute his First Amendment defense. Similarly, no affront to coordinate branches has occurred in the legion of cases where the courts, in deciding whether a public employee's speech is protected by the First Amendment, have considered nondisclosure obligations, other workplace rules, and the scope of official duties. *See, e.g.*, *United States v. Nat'l Treasury Employees Union*, 513 U.S. 454, 465 (1995);

see also Garcetti v. Ceballos, 126 S. Ct. 1951, 1961-62 (2006).

Nor does McDermott's proposed rule make any sense or in any way further respect for a coordinate branch. Under his view, even if it is conceded or absolutely clear that congressional rules prohibited a defendant's conduct, a court must act as if the rules plainly *authorized* the conduct. It is difficult to imagine a more perverse form of deference to a coordinate branch. Judicially approving or permitting behavior that the House rules condemn reflects just as much disrespect to Congress as condemning behavior that the House rules approve or permit.

Members of Congress do not have a special exemption under which they, unlike anyone else, can compel courts to act as if their misconduct was internally authorized. *See Rostenkowski*, 59 F.3d at 1305 ("Indeed, if Rostenkowski's argument were accepted it would effectively insulate every Member of Congress from liability under certain criminal laws."); *United States v. Durenberger*, 48 F.3d 1239, 1244 (D.C. Cir. 1995); *United States v. Diggs*, 613 F.2d 988, 994-96, 1001 (D.C. Cir. 1979). The particular circumstances of this case serve to emphasize the point. Congress's need to ensure that officials preserve its secrets and deliberations would be extremely *frustrated* if the judiciary abdicated its responsibility to enforce laws prohibiting disclosure, simply because the defendant was a Member of Congress.

In any event, any conceivable separation-of-powers concern disappears altogether where, as here, the

court defers to a specific determination by Congress of the internal rules' applicability. To the extent that courts should be reluctant to interpret ambiguous House rules, it is because "there is too great a chance that it will interpret the Rule differently than would the [House] itself." *Rostenkowski*, 59 F.3d at 1306. Such a divergence in interpretations is obviously impossible when the court simply adopts the findings of Congress. Thus, in *Powell v. McCormack*, 395 U.S. 486 (1969), the Court did not undermine legislative autonomy when it accepted the Speaker of the House's ruling that the resolution at issue was for exclusion rather than expulsion, emphasizing that "[w]e must reject respondents' suggestion that we overrule the Speaker." *Id.* at 511-12. Analogously, federal courts do not interfere with state courts' plenary authority to interpret state law by examining and applying those courts' decisions. *See, e.g.*, *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 464 (1981).

Here, there was no need for the Court of Appeals to interpret the rules, because the entity specifically charged with determining compliance—the Ethics Committee—had already done so with respect to McDermott's disclosure. The issuance of the Report "thereby eliminate[d] the concerns" about interpreting ambiguous House rules. Pet. App. 13a. Respect for a co-equal branch obviously does not counsel in favor of *rejecting* the coordinate branch's conclusions regarding its own internal affairs.

Nor was there any flaw in the Court of Appeals' reading of the Report, even assuming this case-specific fact were of interest to this Court. In its

Report, the bipartisan Committee unanimously stated that it had

> reviewed the applicable Committee rules related to the confidentiality of Committee proceedings and concluded that Representative McDermott's conduct, *i.e.*, his disclosure to the news media of the contents of the tape furnished to him by the Martins, was inconsistent with the spirit of the applicable rules and represented a failure on his part to meet his obligations as Ranking Minority Member of the House Select Committee on Ethics.

Pet. App. 142a.

Thus, the Report squarely found that McDermott, by engaging in "disclosure to the news media," failed "to meet his *obligations* as Ranking Minority Member of the House Select Committee on Ethics." *Id.* (emphasis added).[3] If, as McDermott maintains, he had no obligation to keep the tape confidential, then his "disclosure" could not have demonstrated his "failure . . . to meet his obligations" "related to the confidentiality of Committee proceedings." Of course, a Member has an "obligation" to engage in conduct only if that conduct is *required* by the Committee's rules.

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[3] McDermott's attempt to distinguish between his obligations as Member and Ranking Member (Pet. 26) is meritless. His nondisclosure obligations as Ranking Member were no different than his obligations as a Member.

Contrary to Petitioner's central premise, the fact that the Committee stated that he had also violated the "spirit of applicable rules" in no way suggests that it believed McDermott innocent of a rules violation. As the Ethics Committee Report expressly noted, the House rules plainly state that "'[a] Member . . . *shall adhere* to the *spirit* and letter of the Rules of the House and to the rules of the duly constituted Committees thereof.'" *Id.* at 144a n.78 (quoting House Rule 23, clause 2) (emphasis added; alterations in original). Thus, McDermott's violation of the "spirit of the . . . rules" was a violation of those rules under House Rule 23. Any delicacy in the Committee's phrasing of McDermott's rules violation—perhaps in order to ensure the support of all of McDermott's Democratic colleagues on the Committee—at most reflects that it was simply immaterial whether the letter or spirit was violated.[4]

In all events, there is no ambiguity even in the text of the rules. McDermott now alleges that "the tape at issue here was not 'evidence' in the Gingrich investigation," Pet. 26 n.2, but he previously admitted in a public letter to the Committee Chairman that the tape contained "evidence . . . disclosed in a committee investigation." J.A. 177-78.

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[4] By analogy, judicial ethics or recusal opinions simply state that the challenged judge's actions create an "*appearance* of impropriety" because that standard, like the "spirit" standard in the House, is the relevant test. In such circumstances, the failure to affirmatively find that the judge's actions were *actually* improper does not constitute an implicit finding that the judge's actions were "proper," but reflects only that there was no need to use stronger language because an apparent impropriety is just as much a violation as an actual impropriety.

Furthermore, the rules prohibit disclosure not only of "evidence," but of "*any* information regarding the Committee's or a subcommittee's . . . proceedings" and "*[a]ny* other information or allegation respecting the conduct of a Member." Rule 10(b), Committee on Standards of Official Conduct, U.S. House of Representatives (1995) (J.A. 180) (emphasis added). Finally, contrary to McDermott's other argument, the rules' prohibition on disclosure *to* persons "outside the Committee" in no way creates a bizarrely limited nondisclosure requirement that somehow exempts information received *from* persons "outside the Committee," *i.e.*, virtually all information used by the Committee. Thus, the Report could not have reached any other conclusion because the rules are clear.[5]

Finally, it is irrelevant that the Committee decided against "further proceedings." Pet. App. 145a. This reflects only a decision to refrain from imposing sanctions for the violation found; it does not suggest that a violation was not found.[6]

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[5] The rules' lack of ambiguity also shows that even if no Report had been issued, the separation of powers would not be violated by recognition that the rules prohibited McDermott's disclosure. Thus, assuming *arguendo* that the Ethics Report for some reason should be disregarded, there is an alternative ground for affirming the judgment below, which makes this case a particularly poor vehicle for considering a separation-of-powers challenge.

[6] McDermott is wrong in claiming (Pet. 26) that the Subcommittee lacked authority to find a violation without issuing a Statement of Alleged Violation. It is clear that a formal Statement of Alleged Violation is a purely discretionary document that an investigative subcommittee "*may* adopt" when it finds a violation. Rule 19(f), Committee on Standards of Official Conduct, U.S. House of Representatives, 109th Congress

In sum, McDermott's separation-of-powers argument, like his First Amendment argument, neither warrants this Court's review nor is meritorious.

C. The Court of Appeals' Judgment Also Is Correct On Other Grounds

Even if the issues presented in the petition were worthy of review, this case would be a poor vehicle for resolving them because the rationale below is only one of three meritorious grounds for rejecting McDermott's First Amendment defense.

In addition to the reason adopted below, *Bartnicki*'s analysis is inapposite because, unlike the *Bartnicki* defendants, McDermott did not "lawfully obtain" the tape. *Bartnicki*, 532 U.S. at 525. In *Bartnicki*, the Court emphasized that "respondents played no part in the illegal interception," and, *in*

(2005-06) (emphasis added). Indeed, the Committee may, without even convening an investigative subcommittee, adopt a conclusion of the Chairman and Ranking Member that "the respondent's conduct . . . violates . . . House Rules or standards of conduct, but the circumstances . . . indicate that a formal investigation is not warranted." Memorandum to Committee from Chairman and Ranking Member, *available at* http://www.house.gov/ethics/DeLay_memo.htm (last visited Oct. 25, 2007); *see* Rule 16, Committee on Standards of Official Conduct, U.S. House of Representatives, 109th Congress (2005-06). Even if there were ambiguity on this point, moreover, "[t]he Committee necessarily believed that it had authority to act as it did," and "the rules of a particular committee are for that committee to interpret." Pet. App. 13a n.7 (internal quotation marks omitted).

addition, "their access to the information on the tape was obtained lawfully." *Id.* One of the defendants had found the tape in his mailbox, and the remaining media defendants obtained recordings directly or indirectly from him. *Id.* at 519. Thus, "[n]o one claim[ed] 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." *Id.* at 538 (Breyer, J., concurring) (emphasis added).

Here, by contrast, the Martins "could not have completed their disclosure without the active assistance of McDermott," who not only directly participated in their illegal disclosure, but also did so at a time when he "knew the Martins had illegally intercepted the conversation." Pet. App. 90a; *id.* at 45a. On this basis, the *Bartnicki* Court expressly distinguished this case: "In the *Boehner* case, as in this suit, a conversation over a car cell phone was intercepted, but in that case the defendant knew both who was responsible for intercepting the conversation and how they had done it." 532 U.S. at 522 n.5.

As the Court of Appeals panel recognized, the distinction between McDermott and the *Bartnicki* defendants is important, sensible, and "plain to see":

> It is the difference between someone who discovers a bag containing a diamond ring on the sidewalk and someone who accepts the same bag from a thief, knowing the ring inside to have been stolen. The former has committed no offense; the latter is

> guilty of receiving stolen property, even if the ring was intended only as a gift.

Pet. App. 46a-47a. Moreover, "Representative McDermott's complicity constituted aiding and abetting [the Martins'] criminal act [of disclosure], or the formation of a conspiracy with them, or," at the very least, "amounted to participating in an illegal transaction." *Id.* at 45a-46a (footnotes omitted). Under any of these characterizations, McDermott did not "lawfully obtain" information in any meaningful sense. Accordingly, even if McDermott were a private citizen, the *Bartnicki* standard would not apply here.

In any event, even if *Bartnicki*'s more stringent test governed here, McDermott would still lose under it. Even if not independently dispositive, McDermott's direct participation in the illegal transaction with the interceptors and his status as a sensitive confidential official would enhance the government's interest in prohibiting his disclosure. Equally important, the content of the intercepted conversation, in stark contrast to the threats of physical harm in *Bartnicki*, demonstrates that application of the statute here furthers a particularized and compelling interest. The intercepted call was a private conversation among leaders of Congress about congressional business, so the Speech or Debate Clause prohibits its disclosure in any forum. U.S. CONST. art. I, § 6, cl. 1. That clause confirms that the interest in maintaining the privacy of these communications, like other privileged information such as "trade secrets" or attorney-client communications, surpasses any interest in public disclosure. *See Bartnicki*, 532 U.S.

at 533 (stating that the holding did not extend to disclosure of "trade secrets"). These factors in combination certainly distinguish the fact-specific *Bartnicki* holding and decisively tip the balance in favor of upholding the application of the statute in these unusual circumstances.

In addition to confirming the correctness of the Court of Appeals' judgment, these points highlight that the questions presented in the petition do not resolve this case and might well not even be reached. At the very least, because there are several different, fatal flaws in McDermott's First Amendment defense, there would be a real possibility of affirmance without agreement by a majority of the Court on the appropriate rationale—especially given the Chief Justice's recusal. This provides yet another reason to deny certiorari here.

CONCLUSION

The petition should be denied.

Respectfully submitted,

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October 31, 2007