BOEHNER V. MCDERMOTT, 484 F.3d 573 (D.C. Cir. 2007): Representative McDermott, a Florida Democrat, leaked the contents of a conference call involving Ohio Congressman John A. Boehner, chairman of the House Republican Conference, and other members of the Republican Party leadership. House Speaker Newt Gingrich, a Republican, was under investigation by the House Ethics Committee, and Representative Boehner and other participants discussed how to deal with an expected Ethics Committee announcement of Gingrich's agreement to accept a reprimand and to pay a fine in exchange for the Committee's promise not to hold a hearing.

Representative Boehner was in Florida when he joined the conference call. He spoke from a cellular telephone in his car. John and Alice Martin, who lived in Florida, used a police radio scanner to eavesdrop on the conversation, in violation of 18 U.S.C. § 2511(1)(a), which forbids unauthorized interception of "wire, oral, or electronic communication." (The Martins were later prosecuted, pled guilty and fined $500.)

The Martins recorded the call and delivered the tape in a sealed envelope to Representative McDermott, the ranking Democrat on the Ethics Committee. After listening to the tape, Mc Dermott called two reporters and let them listen to the tape. The contents of the tape had substantial news value. In particular, the tape revealed information bearing on whether Gingrich had violated his settlement agreement with the Ethics Committee. On January 10, 1997, *The New York Times* published a front-page article by Clymer entitled "Gingrich Is Heard Urging Tactics in Ethics Case." After the Martins told the story of how they obtained the tape and who they gave it to, McDermott resigned from the House Ethics Committee.

Boehner sued McDermott in a civil action for violation of privacy, invoking 18 U.S.C. § 2511(1)(c), which makes intentional disclosure of any illegally intercepted conversation a criminal offense if the person disclosing the communication knew or had "reason to know" that it was so acquired. There was no dispute that McDermott knew or had reason to know that the Martins had obtained the contents of the tape illegally.

RANDOLPH, Circuit Judge: [Judge Randolph, writing for a majority of the D.C. Circuit sitting en banc, assumed that McDermott himself legally obtained the tape from the Martins but argued that he had no right to disclose the information because he had independent professional ethical obligations.]

Whatever the *Bartnicki* majority meant by "lawfully obtain," the decision does not stand for the proposition that anyone who has lawfully obtained truthful information of public importance has a First Amendment right to disclose that information. *Bartnicki* avoided laying down such a broad rule of law, and for good reason.

There are many federal provisions that forbid individuals from disclosing information they have lawfully obtained. The validity of these provisions has long been assumed. Grand jurors, court reporters, and prosecutors, for instance, may "not disclose a matter occurring before the grand jury." FED. R. CRIM. P. 6(e)(2)(B). The Privacy Act imposes criminal penalties on government employees who disclose agency records containing information about identifiable individuals to unauthorized persons. *See* 5 U.S.C. § 552a(i)(1). The Espionage Act punishes officials who willfully disclose sensitive national defense information to persons not entitled to receive it. *See* 18 U.S.C. § 793(d). The Intelligence Identities Protection Act prohibits the disclosure of a covert intelligence agent's identity. *See* 50 U.S.C. § 421. Employees of the Internal Revenue Service, among others, may not disclose tax return information. *See* 26 U.S.C.

§ 6103(a). State motor vehicle department employees may not make public information about an individual's driver's license or registration. *See* 18 U.S.C. § 2721. Employees of the Social Security Administration, as well as other government employees, may not reveal social security numbers or records. *See* 42 U.S.C. § 405(c)(2)(C)(viii)(I), (III).[a] Judicial employees may not reveal confidential information received in the course of their official duties. *See* CODE OF CONDUCT FOR JUDICIAL EMPLOYEES Canon 3D. . . . .

In *United States v. Aguilar*, 515 U.S. 593, 132 L. Ed. 2d 520 (1995) . . . the Supreme Court held that the First Amendment did not give a federal judge, who obtained information about an investigative wiretap from another judge, the right to disclose that information to the subject of the wiretap. The judge challenged his conviction for violating 18 U.S.C. § 2232(c), which prohibits the improper disclosure of an investigative wiretap. In rejecting his First Amendment claim, the Court wrote that the judge 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. Government officials in sensitive confidential positions may have special duties of non-disclosure."

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

All members of the Ethics Committee, including Representative McDermott, were subject to Committee Rule 9, which stated that "Committee members and staff shall not disclose any evidence relating to an investigation to any person or organization outside the Committee unless authorized by the Committee." This rule recognizes the unique role of the Ethics Committee and reflects a desire "to protect the rights of individuals accused of misconduct, preserve the integrity of the investigative process, and cultivate collegiality among Committee members." All members of the House of Representatives were also subject to Rule 23 of the House Rules, which stated that "[a] Member . . . shall adhere to the spirit and the letter of the Rules of the House and to the rules of duly constituted committees thereof." . . . There is no question that the rules themselves are reasonable and raise no First Amendment concerns. Counsel for Representative McDermott conceded that the House could, consistent with the First Amendment, punish Representative McDermott if it determined he had violated its rules by releasing the Martins' tape to the media.

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[a]The government can also limit disclosures by persons who are not its employees without running afoul of the First Amendment. Private attorneys who reveal their clients' confidences may be punished for doing so. And those who sell or rent video tapes or DVDs ordinarily may not reveal "personally identifiable information concerning" their customers. *See* 18 U.S.C. § 2710(b).

If the First Amendment does not protect Representative McDermott from House disciplinary proceedings, it is hard to see why it should protect him from liability in this civil suit. Either he had a First Amendment right to disclose the tape to the media or he did not. If he had the right, neither the House nor the courts could impose sanctions on him for exercising it. If he did not have the right, he has no shield from civil liability or from discipline imposed by the House. In that event, his civil liability would rest not on his breach of some ethical duty, but on his violation of a federal statute for which he had no First Amendment defense. The situation is the same as that in *Aguilar*. There the defendant-judge was punished not for violating his ethical duty to maintain judicial secrecy, but for violating the general prohibition on disclosing investigative searches.

The only remaining question is whether the tape fell within Representative McDermott's duty of confidentiality under the rules of the House and the Ethics Committee. . . . [W]e can be confident that the rules covered Representative McDermott's handling of the tape. [A House Ethics Committee report] 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." The report said Representative McDermott should have "entrust[ed] the Committee at the outset with the information to which he alone on the Committee had access." *Id.* at 17. . . . When Representative McDermott became a member of the Ethics Committee, he voluntarily accepted a duty of confidentiality that covered his receipt and handling of the Martins' illegal recording. He therefore had no First Amendment right to disclose the tape to the media.

GRIFFITH, *Circuit Judge*, concurring

Although I agree that Representative McDermott's actions were not protected by the First Amendment and for that reason join Judge Randolph's opinion, I write separately to explain that I would have found the disclosure of the tape recording protected by the First Amendment under *Bartnicki v. Vopper*, had it not also been a violation of House Ethics Committee Rule 9, which imposed on Representative McDermott a duty not to "disclose any evidence relating to an investigation to any person or organization outside the Committee unless authorized by the Committee." Although the Court does not and need not reach the *Bartnicki* issue to resolve the matter before us, two previous panels in this case have held that the congressman's actions were not protected by the First Amendment. I believe it is worth noting that a majority of the members of the Court– those who join Part I of Judge Sentelle's dissent– would have found his actions protected by the First Amendment. Nonetheless, because Representative McDermott cannot here wield the First Amendment shield that he voluntarily relinquished as a member of the Ethics Committee, I join Judge Randolph's opinion in concluding that his disclosure of the tape recording was not protected by the First Amendment.

SENTELLE, *Circuit Judge, dissenting*, with whom *Circuit Judges* ROGERS, TATEL, and GARLAND join, and with whom *Circuit Judge* GRIFFITH joins as to Part I:

[T]he issue [in this case] is: "Where the punished publisher of information has obtained the

information in question in a manner lawful in itself but from a source who has obtained it unlawfully, may the government punish the ensuing publication of that information based on the defect in a chain?" [Previously] [w]e would have answered that question in the negative. Today I reach that conclusion with confidence, based on the Supreme Court's decision adjudicating the constitutionality of a similar application of this same analysis in *Bartnicki*.

I.

[S]peaking now for a majority of the court, we determine that *Bartnicki* is controlling . . . . The Supreme Court has decided [that] the United States (or Florida) [cannot] constitutionally bar the publication of information originally obtained by unlawful interception but otherwise lawfully received by the communicator. . . . We venture to say that an opposite rule would be fraught with danger. Just as Representative McDermott knew that the information had been unlawfully intercepted, so did the newspapers to whom he passed the information. Representative Boehner has suggested no distinction between the constitutionality of regulating communication of the contents of the tape by McDermott or by *The Washington Post* or *The New York Times* or any other media resource. For that matter, every reader of the information in the newspapers also learned that it had been obtained by unlawful intercept. Under the rule proposed by Representative Boehner, no one in the United States could communicate on this topic of public interest because of the defect in the chain of title. We do not believe the First Amendment permits this interdiction of public information either at the stage of the newspaper-reading public, of the newspaper-publishing communicators, or at the stage of Representative McDermott's disclosure to the news media. Lest someone draw a distinction between the First Amendment rights of the press and the First Amendment speech rights of nonprofessional communicators, we would note that one of the communicators in *Bartnicki* was himself a news commentator, and the Supreme Court placed no reliance on that fact.

II.

[However], the en banc court now [upholds] the judgment in favor of Boehner . . . on a [different] ground, [because] the protections of the First Amendment are not available in an action under § 2511(1)(c) to a public official whose First Amendment rights are otherwise limited by a body of rules unrelated to that statute. . . .

The statute at issue in *Aguilar* was closely connected with the "special duty of nondisclosure" that limited the defendant's First Amendment rights. The Supreme Court concluded that 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," *Aguilar*, 515 U.S. at 606, had no First Amendment defense against a statute prohibiting "the disclosure of information that a wiretap has been sought or authorized," *id.* at 602. It does not follow that Representative McDermott's violation of a House Committee rule deprives him of a First Amendment defense to every other nondisclosure law, including § 2511(c)-which in this case is unrelated to whatever "special duty of nondisclosure" McDermott may have had as a member of Congress. Rather, we are charged with determining the constitutionality of applying § 2511 in circumstances directly paralleling those considered by the Supreme Court in *Bartnicki*.

The Court in *Bartnicki* upheld the constitutional protection of the possessor of information originally obtained through an unlawful eavesdropping by another. *Aguilar* in no way speaks to that question.

[W]ere we considering the validity of the Committee's rule [*45] as applied to McDermott's conduct, the cases relied upon by the majority would be instructive-perhaps compelling. But we are not. If the House Committee rules created a private right of action-a most dubious possibility-those cases would be instructive. But neither of those theories is before us. . . . .

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