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U.S. HOUSE OF REPRESENTATIVES

COMMITTEE ON STANDARDS OF OFFICIAL CONDUCT

IN THE MATTER OF REPRESENTATIVE JAMES McDERMOTT

DECEMBER 6, 2006

Mrs. BIGGERT from the Investigative Subcommittee submitted the following

REPORT

To the Committee on Standards of Official Conduct.

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I. INTRODUCTION

On November 16, 2004, Representative David L. Hobson filed a complaint alleging that Representative James McDermott violated certain laws, rules and standards of conduct in disclosing to the news media the contents of an intercepted telephone conversation in January 1997. The intercepted telephone conversation related to proceedings of the Committee on Standards of Official Conduct (the "Committee") regarding Representative Newt Gingrich, who was a Member of the House at that time. Until mid-January 1997, Representative McDermott served as Ranking Minority Member of the House Select Committee on Ethics, which had been created at the beginning of the 105th Congress for the sole purpose of completing action on the aforementioned matter involving Representative Gingrich.

On December 28, 2004, the Chairman and Ranking Minority Member of the Committee jointly determined to establish an Investigative Subcommittee and to forward portions of Representative Hobson's complaint to that body. The Investigative Subcommittee was charged with conducting an inquiry on allegations that Representative McDermott's conduct violated the House Code of Official Conduct (clause 1 of which provides that Members and staff shall conduct themselves "at all times in a manner which shall reflect creditably on the House of Representatives"), provisions of the Code of Ethics for Government Service, the Committee member non-disclosure agreement, or the Committee confidentiality rules.

On March 20, 2006, the Committee voted to carry over this matter regarding Representative McDermott to the 109th Congress.

A summary and explanation of the Investigative Subcommittee's findings are set forth in this Report.

II. SUMMARY OF EVENTS AND FACTUAL FINDINGS

A. Committee Proceedings Involving Former Representative Newt Gingrich

The relevant Committee proceedings involving former Representative Newt Gingrich are summarized in the Report of the Select Committee on Ethics to the House entitled “In the Matter of Representative Newt Gingrich,” and an additional Committee publication entitled “Sanction Hearing and Related Materials.”¹ As summarized in those materials, the matter involving Representative Gingrich was initiated during the 103rd Congress following a complaint filed with the Committee on September 7, 1994 by Ben Jones. Mr. Jones was Representative Gingrich’s opponent in his 1994 campaign for re-election, and his complaint was filed in accordance with Committee and House rules at that time that permitted formal complaints to be filed by persons other than Members of the House.² The focus of Mr. Jones’ complaint was a course taught by Representative Gingrich called “Renewing American Civilization.”³ The complaint alleged that Representative Gingrich used his congressional staff to work on the course, and that Representative Gingrich created the course under the sponsorship of Section 501(c)(3) organizations “to meet certain political, not educational, objectives,” and by doing so caused a violation of Section 501(c)(3) of the Internal Revenue Code to occur.⁴

The matter was not resolved by the Committee before the end of the 103rd Congress, and on January 26, 1995, Representative David Bonior filed an amended version of the complaint previously filed by Mr. Jones.⁵ On December 6, 1995, the Committee voted to initiate a “Preliminary Inquiry” into the allegations of misuse of tax-

¹ See *In the Matter of Representative Newt Gingrich*, H. Rep. 105-1, 105th Cong., 1st Sess. (Jan. 17, 1997) (“*Rep. Gingrich Report*”); *Sanction and Related Materials, Hearing Before the Select Committee on Ethics, 105th Cong. 1st Sess.* (Comm. Print Jan. 17, 1997) (“*Rep. Gingrich Hearing Materials*”).

² *Rep. Gingrich Report* at 1; Committee on Standards of Official Conduct (“Committee”) Rule 14 (103rd Congress). Mr. Jones was a former Member of the House at the time he filed his complaint. Mr. Jones served in the House during the 101st and 102nd Congresses (1989 to 1993).

³ *Rep. Gingrich Report* at 1.

⁴ *Id.*

⁵ *Id.*

exempt organizations and appointed an investigative subcommittee (hereafter “Gingrich Subcommittee”) to conduct the inquiry.⁶ The Chairman of the Gingrich Subcommittee was Representative Porter J. Goss, and Representative Benjamin L. Cardin served as the Investigative Subcommittee’s Ranking Minority Member. The other two Members of the subcommittee were Representative Steven Schiff and Representative Nancy Pelosi. The Committee also determined to appoint a Special Counsel to assist the Gingrich Subcommittee.

On September 26, 1996, the Gingrich Subcommittee announced that the investigation of Representative Gingrich was being expanded into several additional areas.⁷ The subcommittee concluded its investigative work on December 12, 1996.⁸ On December 15, 1996, the Gingrich Subcommittee and Representative Gingrich, through their respective counsel, initiated discussions towards resolving the matter without proceeding to a formal adjudicatory hearing in accordance with the rules of the Committee at that time.⁹ A negotiated resolution was reached by the parties, and on December 21, 1996, the Gingrich Subcommittee adopted a Statement of Alleged Violation describing conduct by Representative Gingrich which the subcommittee concluded violated then-House Rule 43, Clause 1 of the Rules of the House of Representatives (current House Rule 23, Clause 1).¹⁰ On that same date, Representative Gingrich executed an Answer admitting to the Statement of Alleged Violation.¹¹ The Statement of Alleged Violation adopted by the Gingrich Subcommittee and Representative Gingrich’s Answer were released publicly by the subcommittee on December 21, 1996.¹²

As part of the negotiated resolution of the matter, the subcommittee and Representative Gingrich agreed that “no public comment should be made about this

⁶ *Id.* at 1-2.

⁷ The specific areas of expansion are set forth in *Rep. Gingrich Report* at 2.

⁸ *Rep. Gingrich Report* at 3.

⁹ *Id.* at 94.

¹⁰ *Rep. Gingrich Hearing Materials* at 92.

¹¹ *Id.* at 91.

¹² *Id.* at 90.

matter while it is still pending. This includes having surrogates sent out to comment on the matter and attempt to mischaracterize it.”¹³ Further, beyond the press statements agreed to by the parties, “neither Mr. Gingrich nor any Member of the subcommittee may make any further public comment.”¹⁴ The agreement on this topic pertained to “press statements,” and Members of the Gingrich Subcommittee and Representative Gingrich were free to engage in “private conversations with Members of Congress about these matters.”¹⁵

Due to the timing of the Gingrich Subcommittee’s actions regarding Representative Gingrich, that body and the Committee were not able to formally present the subcommittee’s findings and recommendations to the House in accordance with Committee rules prior to the conclusion of the 104th Congress. At the start of the 105th Congress on January 7, 1997, the House established a Select Committee on Ethics, and appointed as Members of that Committee all of the Members who were on the standing Committee on Standards of Official Conduct at the expiration of the 104th Congress. The Select Committee on Ethics was given jurisdiction by the House “only to resolve the Statement issued by the Investigative Subcommittee of the standing Committee on Standards of Official Conduct in the One Hundred Fourth Congress relating to the official conduct of Representative Gingrich of Georgia and otherwise report to the House on the activities of that investigative subcommittee.”¹⁶ The House further provided in the Rules of the House of Representatives for the 105th Congress that in the exercise of its jurisdiction, the Select Committee on Ethics “shall possess the same authority as, and shall conduct its proceedings under the same rules, terms, and conditions . . . as those applicable to the standing Committee on Standards of Official Conduct in the One Hundred Fourth Congress[.]”¹⁷ The House Rules also provided that “the select

¹³ *Rep. Gingrich Report* at 95.

¹⁴ *Id.* at 95.

¹⁵ *Id.* at 95-96.

¹⁶ House Rule 10, Clause 4(e)(3) (105th Congress) (as adopted in H. Res. 5 on January 7, 1997).

¹⁷ *Id.*; see also *Rep. Gingrich Report* at 2. The House could have reestablished the Committee on Standards of Official Conduct as a standing committee at the start of the 105th Congress. However, it was determined during that time period that before reestablishing the Committee as a standing committee, the House

committee shall cease to exist upon final disposition by the House of a report designated by the select committee of its final report on the matter, or at the expiration of January 21, 1997, whichever is earlier.”¹⁸

On January 17, 1997, the Select Committee on Ethics held a sanction hearing in the matter pursuant to then-Committee Rule 20. Following the hearing, the Select Committee on Ethics issued its report to the House, which recommended that Representative Gingrich be reprimanded and ordered to reimburse the House for costs associated with the Committee’s investigation. On January 21, 1997, the House adopted the report of the Select Committee on Ethics *In the Matter of Representative Newt Gingrich*.¹⁹ In a section of the report entitled “*Post-December 21, 1996 Activity*,” the report disclosed that “[i]n the opinion of the Subcommittee Members and the Special Counsel, a number of the press accounts [following release of the Statement of Alleged Violation] indicated that Mr. Gingrich had violated the agreement concerning statements about the matter.” Further, the report stated that

Mr. Gingrich’s counsel was notified of the Subcommittee’s concerns and the Subcommittee met to consider what action to take in light of this apparent violation. The Subcommittee determined that it would not nullify the agreement. While there was serious concern about whether Mr. Gingrich had complied with the agreement, the Subcommittee was of the opinion that the best interests of the House still lay in resolving the matter without a disciplinary hearing and with the recommended sanction that its Members had previously determined was appropriate. However, Mr. Gingrich’s counsel was informed that the Subcommittee believed a violation of the agreement had occurred and retained the right to withdraw from the agreement with appropriate notice to Mr. Gingrich.²⁰

needed to “reassess” its “standards process,” and to empanel a bipartisan task force “to review the existing House standards process and recommend reforms of that process.” *Report of the Ethics Reform Task Force on H. Res. 168*, 105th Cong., 1st Sess. (Comm. Print June 17, 1997) at 1. In brief, interest had developed in the House in “reexamining ways to better ensure that the standards process in the House functions in a manner that is nonpartisan, efficient and fair.” *Id.* In substantial measure, the current Committee on Standards of Official Conduct functions in accordance with the rules of procedure adopted by the House following the report and recommendations of the aforementioned bipartisan task force.

¹⁸ House Rule 10, Clause 4(e)(3) (105th Congress) (as adopted in H. Res. 5 on January 7, 1997).

¹⁹ See H. Res. 31, 105th Cong., 1st Sess. (Jan. 21, 1997).

²⁰ *Rep. Gingrich Report* at 96.

The report did not specify the conduct engaged in by Representative Gingrich that raised concerns with the Gingrich Subcommittee.

B. Conduct of Representative James McDermott

In the instant matter, the focus of the Investigative Subcommittee's inquiry involving Representative McDermott was on the disclosure by Representative McDermott to members of the news media of the contents of an illegally intercepted telephone conference. The conduct of Representative McDermott that is now under review occurred in January 1997 while he was the Ranking Minority Member of the House Select Committee on Ethics. As referenced below, in substantial measure, the factual conclusions made by the Investigative Subcommittee regarding Representative McDermott's conduct are based on admissions made by Representative McDermott during the course of ongoing federal court civil litigation with Representative John A. Boehner. Sources of the referenced admissions include transcribed sworn statements made during a civil deposition of Representative McDermott during the litigation.²¹ Key events in the civil litigation proceedings between Representative McDermott and Representative Boehner are described in a separate section in this Report.

The Investigative Subcommittee also requested and obtained materials from the Department of Justice related to that agency's investigation of this matter, and additionally subpoenaed documents from Representative McDermott. By letter dated July 19, 2006, Representative McDermott was invited by the Investigative Subcommittee to present a statement to the Investigative Subcommittee in accordance with Committee Rule 19(a)(3). Representative McDermott declined to make a statement in accordance with that rule.

²¹ Representative McDermott was deposed in the civil case on July 24, 2002 and December 12, 2002.

Representative McDermott has been a Member of the House representing the Seventh District of Washington since 1989. Representative McDermott was Ranking Minority Member of the Committee on Standards of Official Conduct during the 104th Congress.²² As such, he became Ranking Minority Member of the House Select Committee on Ethics on January 7, 1997, in accordance with House Rule 10, Clause 4(e)(3) (105th Congress) (as adopted in H. Res. 5 on January 7, 1997).

On December 21, 1996, two individuals, John Martin and Alice Martin, while near Lake City in Columbia County, Florida, used a scanner to intentionally intercept a wire communication in the form of a cellular telephone call.²³ The intercepted telephone call was a conference call whose participants included Representative Gingrich, Representative Boehner and others.²⁴ The record indicates that Mr. and Mrs. Martin, while traveling, overheard a telephone conversation using a scanning device that was purchased at Radio Shack. They recognized some of the voices in the conversation. Mr. Martin, using a handheld tape recorder that was in his car, recorded the conversation.²⁵

According to a *New York Times* article by Adam Clymer published on January 10, 1997 (discussed in more detail below), the participants in the telephone call recorded by the Martins included Representative Boehner, Representative Gingrich, Representative Richard Armey, Ed Bethune (a former Member of the House then serving as Representative Gingrich's lawyer), Ed Gillespie (reported in the *New York Times* article

²² Representative McDermott was Chairman of the Committee on Standards of Official Conduct during the 103rd Congress, and he also served as a Member of the Committee during the 102nd Congress.

²³ See Transcript of Sentencing Proceedings before the Honorable Harvey E. Schlesinger in *United States v. Alice Martin and John Martin*, (M.D. Fla. April 25, 1997) at 23. An investigation of the Martins' conduct was conducted by the Department of Justice, and, as reflected by the cited transcript of court proceedings, on April 25, 1997, John and Alice Martin pleaded guilty to violating 18 U.S.C. §§ 2511(1)(a) and 2511(4)(b)(ii), provisions of law which prohibit the intentional interception of the radio portion of a cellular telephone call. John and Alice Martin were each sentenced to pay a fine of \$500. *Id.* at 52. A press statement of the Department of Justice dated April 23, 1997 regarding the investigation of the Martins states that "[b]ecause the interception involved the radio portion of a cellular telephone communication, and because there is no evidence that the interception was for a tortious or illegal purpose or for purposes of direct or indirect commercial advantage or private financial gain, the U.S. Code classifies [the Martins'] offense as an infraction. The maximum penalty is a \$5,000 fine." See Exhibit 1.

²⁴ *Id.* at 23.

²⁵ *Id.* at 38-39.

as communications director of the Republican National Committee), Representative Bill Paxon, and Representative Tom DeLay.²⁶ Representative Boehner participated in the conference call on a cellular phone inside his car while parked outside a restaurant in northern Florida.²⁷ The subject of the telephone conference call, as far as can be gleaned from the *New York Times* article, was the content of statements that may be made publicly related to the inquiry of the Investigative Subcommittee involving Representative Gingrich.²⁸

On January 8, 1997, Mr. and Mrs. Martin personally delivered a copy of a tape in an envelope to Representative McDermott in one of the rooms of the Committee on Standards of Official Conduct, which is located in Suite HT-2 in the United States Capitol Building.²⁹

The record supports a finding that the tape the Martins delivered to Representative McDermott was accompanied by a letter to Representative McDermott. Representative McDermott testified in his deposition that he has no recollection of seeing a letter from the Martins at the time they delivered the tape to him, or whether the tape was accompanied by a letter.³⁰ A copy of a letter from the Martins addressed to Representative McDermott was obtained by the Investigative Subcommittee from records filed in the United States District Court in connection with the *Boehner v. McDermott* civil litigation. The transcript of the deposition of Representative McDermott taken during the litigation indicates that Representative McDermott obtained a copy of the letter from the Department of Justice, and that Representative McDermott subsequently

²⁶ “*Gingrich Is Heard Urging Tactics in Ethics Case*,” *N.Y. Times* (Jan. 10, 1997) (Exhibit 2).

²⁷ Rep. Boehner Dep. at 9.

²⁸ See Exhibit 2. The Investigative Subcommittee does not have a copy of the tape at issue, nor a complete or verifiable transcript thereof. The last known location of the tape was the Department of Justice, which received it from Chairman Johnson of the House Select Committee on Ethics on or about January 13, 1997. See Exhibit 3.

²⁹ Rep. McDermott Dep. at 157-58.

³⁰ *Id.* at 150, 153.

produced that copy of the letter to Representative Boehner during the discovery phase of the litigation.³¹

The letter, dated January 8, 1997, and addressed to “Jim McDermott, Ranking Member,” contained the following text:

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. [sic] 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.

My husband and I work for Columbia County Schools in Columbia County Florida. We pray that committee [sic] will consider our sincerity in placing it in your hands.

We will return to our home today.

Thank you for your consideration.

John and Alice Martin³²

At his deposition, Representative McDermott described the circumstances of his receiving the tape from the Martins as follows:

During a break of the Ethics Committee, I was standing in the anteroom by the door to the hallway and someone asked if I was Congressman McDermott and I said yes. And this couple came up to me and said they had, they wanted to give me something that they thought I would be interested in.

And I said, who are you? And they said John and whatever his wife’s name Martin is. And I said where are you from? And they, I have, I mean there were eight or nine people standing around

³¹ *Id.* at 151.

³² *See* Exhibit 4.

there and I don't remember exactly whether they told me they were from Karen Thurman's district or – I don't remember exactly. But they told me they were in North Florida and then he gave me a card, and I said thank you, I'll listen to it.³³

It couldn't have been more than 30 seconds. I mean, I was just trying to get rid of them. Take whatever they had, whoever they were, put it in my pocket and go on with my business. Because I had enough on my mind at that point.³⁴

Representative McDermott also described his encounter with the Martins in a separate declaration he executed on December 11, 2002 in connection with the *Boehner v. McDermott* litigation. Representative McDermott stated in that document that:

On or about January 8, 1997, I was approached by a man and woman in the anteroom of the House Ethics Committee. They asked me whether I was Congressman McDermott. After I acknowledged who I was, the man and woman identified themselves as Mr. and Mrs. Martin and handed me an envelope. The Martins said that the envelope contained a tape recording that they thought would be of interest to me and asked me to listen to it. I said that I would.

Until that encounter, neither I, nor my staff, nor anyone acting on my behalf had any knowledge of the Martins or their tape. I had no idea what the tape contained when the Martins handed it to me, because they never discussed its contents with me. I did not learn of the contents of the tape until I returned to my office later and listened to the tape. No one else was present when I listened to the tape.

I have never had any communications with the Martins other than during that single encounter on or about January 8, 1997. I have never asked anyone to communicate with the Martins, directly or indirectly, at any time or for any reason. Neither I, nor my staff, nor anyone on my behalf, has ever talked about the subject of immunity with the Martins.³⁵

³³ Rep. McDermott Dep. at 157-158.

³⁴ *Id.* at 176.

³⁵ Declaration of James A. McDermott dated December 11, 2002 (filed in *Boehner v. McDermott* civil litigation as Exhibit F to Rep. McDermott's Opposition to Rep. Boehner's Motion for Summary Judgment).

Rep. McDermott estimated that he received the package containing the tape from the Martins at approximately 5:00 p.m.³⁶ He described the envelope as an “8½ by 11 envelope,” and the tape as “one of those little tiny tapes like you have in a hand-held recorder or a telephone answering machine.”³⁷ He also testified that he was present at the offices of the Committee to participate in a Committee meeting related to the Committee’s consideration of the matter involving Representative Gingrich.³⁸

Representative McDermott returned to his personal office in the Rayburn House Office Building at approximately 7:00 p.m. and listened to the tape on a handheld tape recording device that he had in his office.³⁹ Representative McDermott recognized some of the voices on the tape, including those of Representative Gingrich and Representative Richard Armey.⁴⁰ Subsequent to listening to the tape, Representative McDermott contacted Jeanne Cummings of the *Atlanta Journal-Constitution* and left a voicemail for her.⁴¹ Representative McDermott also contacted Adam Clymer of the *New York Times* and invited him to Representative McDermott’s office that evening. Mr. Clymer accepted Representative McDermott’s invitation.⁴² During their meeting, Representative McDermott played the tape he received from the Martins for Mr. Clymer and he permitted Mr. Clymer to make a recording of the tape.⁴³

Ms. Cummings of the *Atlanta Journal-Constitution* returned Representative McDermott’s telephone call the next morning and subsequently came to his office in the

³⁶ Rep. McDermott Dep. at 160.

³⁷ *Id.* at 159.

³⁸ *Id.* at 160.

³⁹ *Id.* at 162, 163.

⁴⁰ Response of Rep. McDermott to Rep. Boehner’s Statement of Undisputed Facts in Support of His Motion For Summary Judgment (hereafter “Rep. McDermott Response to SUF”) at ¶ 18.

⁴¹ *Id.* at ¶ 21.

⁴² Rep. McDermott Dep. at 183-84.

⁴³ *Id.* at 186-187.

Rayburn House Office Building. Ms. Cummings listened to the tape, doing so in the bathroom in Representative McDermott's office.⁴⁴

As noted above, on January 10, 1997, the *New York Times* published an article by Mr. Clymer about the tape and its contents, and the article included a reported transcript of at least part of the tape.⁴⁵ The article references an anonymous Congressional source for the tape, but Representative McDermott subsequently acknowledged that he was the source for the newspaper.⁴⁶ On the morning of January 10, 1997, after he "read the newspaper," Representative McDermott met, at Representative McDermott's request, with James Cole, the Special Counsel to the House Select Committee on Ethics. According to Representative McDermott, he "realized, from the way [the newspaper article] was written and from the placement in the paper, that it was going to be an issue of public controversy and I thought I ought to talk to a lawyer. And, as I saw it, the perfect person was Jim Cole, if he would talk to me, because he knew the case, he knew everything. And I wanted to talk to him and see what he would say. So I contacted him."⁴⁷ The record does not indicate that Mr. Cole actually rendered any legal advice to Representative McDermott when they met.⁴⁸

On January 13, 1997, the Martins held a press conference stating that they had given a copy of the taped intercepted telephone conversation to Representative McDermott.⁴⁹ On that same day, Representative McDermott transmitted his copy of the

⁴⁴ *Id.* at 92; Rep. McDermott Response to SUF at ¶¶ 28, 29.

⁴⁵ *See* Exhibit 2.

⁴⁶ Rep. McDermott Dep. at 220-221.

⁴⁷ *Id.* at 307.

⁴⁸ *See id.* at 331.

⁴⁹ *2 Floridians Talk of How They Taped The Speaker*, *N.Y. Times* (Jan. 14, 1997) (Exhibit 5). *See also* Rep. McDermott Response to SUF at ¶ 40. According to the *New York Times* article, the Martins stated that they were responsible for intercepting Rep. Bohner's conversation, and they identified Rep. McDermott as the person to whom they delivered the tape:

The middle-aged couple – he is a maintenance man at a school and she is a teacher's aide – are active in both the National Education Association and the Democratic Party in their home county of Columbia in northern Florida, so

tape in its original envelope to Chairman Nancy Johnson of the House Select Committee on Ethics.⁵⁰ In response to this action, the Chief Counsel of the House Select Committee on Ethics transmitted a letter to Representative McDermott, dated January 13, 1997, that stated:

This is to notify you that the material you sent to the Committee at 4:33 p.m. this afternoon was not accepted. By direction of the Chair and after consultation with the Chief Counsel of the Criminal Division of the Department of Justice, the contents of the envelope including the audio cassette tape and the cover letter were hand delivered to the Department of Justice early this evening.⁵¹

Representative McDermott resigned from the House Select Committee on Ethics on January 13, 1997. Representative McDermott's answer to Representative Boehner's amended civil complaint states that "Congressman McDermott concluded that the political controversy over the Tape might impede the House Ethics Committee from completing its work if he continued to serve on it."⁵² Representative McDermott further testified in his deposition that "I recognized that this was going to be a distraction and I wanted to get it out of the way."⁵³ Representative McDermott also testified that he does not remember if at the time he determined to resign from the House Select Committee on Ethics if he was aware that the Martins had publicly disclosed their giving of the tape to him.⁵⁴

they have a keen interest in politics. Mr. Martin said they had used a small tape recorder to record the conversation, planning to play back the voice of the famous politician someday for their grandson, who is expected to be born in three weeks. But as they listened, they changed their mind. They took the tape to their Representative, Karen L. Thurman, a Democrat, and later, on her advice, took the tape to the senior Democrat on the House ethics committee, Representative Jim McDermott. . . . Mrs. Martin said she and her husband had hand-delivered the tape to Mr. McDermott. "He took the envelope in his hand and said he would listen to it," she said.

⁵⁰ Rep. McDermott Dep. at 213.

⁵¹ See Exhibit 3.

⁵² Rep. McDermott's Answer to Rep. Boehner's Amended Complaint at ¶ 26.

⁵³ Rep. McDermott Dep. at 137.

⁵⁴ *Id.* at 133.

On or about January 14, 1997, Representative McDermott transmitted a letter to the Chairman of the House Select Committee on Ethics to communicate his objection to her forwarding of the copy of the taped intercepted telephone conversation to the Department of Justice. Representative McDermott's letter expressed his "considerable chagrin" at this course of action, and also his view that the Chairman's action violated House Rule X, cl. 4(e)(1)(C) of the Rules of the House for the 105th Congress.⁵⁵

Representative McDermott testified during his deposition that based on the tape he received from the Martins, he understood that Representative Gingrich reached an agreement with the Gingrich Subcommittee that Representative Gingrich "was entitled to make a public statement, but [Representative Gingrich] apparently had agreed not to orchestrate any kind of response to undermine the statement or to undermine the work of the committee."⁵⁶ In Representative McDermott's view, based on the recorded telephone call, Representative Gingrich was "participating in orchestration and violating the agreement."⁵⁷ In his testimony, Representative McDermott indicated his view that the "public had a right to know" about the information contained on the tape.⁵⁸ He stated: "I came into politics during the Vietnam era And I knew about the Pentagon Papers. And there are some things the people are entitled to know, one of which is what the person who's third in line to be President of the United States, how he deals with issues."⁵⁹ He also indicated in his court filings that he believed that "the First Amendment entitled him to share the tape with the press as truthful information of public concern that he had lawfully obtained from another,"⁶⁰ and that "if a member of the House Ethics Committee received information from sources outside the Committee and

⁵⁵ See Exhibit 6.

⁵⁶ Rep. McDermott Dep. at 33.

⁵⁷ *Id.* at 45; Rep. McDermott Response to SUF at ¶ 76.

⁵⁸ Rep. McDermott Dep. at 61.

⁵⁹ *Id.*; see also *id.* at 271-72 ("My disclosure was done because I felt the people had a right to know about the behavior of a public official.").

⁶⁰ Rep. McDermott Response to SUF at ¶ 78.

outside the context of Committee proceedings, then he would have been free to disclose it under the House Ethics Committee Rules in effect in January, 1997.”⁶¹

C. Representative Boehner’s Lawsuit Against Representative McDermott

As referenced in the foregoing discussion, Representative McDermott’s conduct in disclosing to the media the copy of the tape furnished to him by John and Alice Martin became the subject of a lawsuit filed in the United States District Court for the District of Columbia by Representative John A. Boehner. Representative Boehner, the plaintiff, initiated the lawsuit in a complaint he filed on March 9, 1998. Representative Boehner’s complaint alleged that Representative McDermott, the defendant, knowingly disclosed an unlawfully intercepted communication in violation of the federal wiretapping statute, 18 U.S.C. § 2511(1)(c) and a Florida wiretapping statute, Fla. Stat. § 934.01(1)(c). 18 U.S.C. § 2511 provides, in pertinent part, that:

(1) Except as otherwise specifically provided in this chapter any person who—

(c) intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection;

shall be punished as provided in subsection (4) or shall be subject to suit as provided in subsection (5).

Section 2520 permits “any person whose wire, oral, or electronic communication is intercepted, disclosed, or intentionally used in violation of” 18 U.S.C. § 2511 to initiate a civil suit to recover equitable and declaratory relief and monetary damages. The cited Florida statute contains language substantially similar to that of 18 U.S.C. § 2511(1)(c).

⁶¹ *Id.* at ¶ 79.

The ongoing litigation is now proceeding on its second round of appellate level review, having once already been addressed by United States Supreme Court and remanded back to the lower courts. The presiding United States District Judge in this matter is Chief Judge Thomas F. Hogan. In the early stages of the litigation, Judge Hogan granted a motion to dismiss the litigation filed by Representative McDermott, holding that the First Amendment protected disclosure of lawfully obtained information.⁶² The United States Court of Appeals for the District of Columbia Circuit reversed Judge Hogan's decision and held that the federal wiretapping statute was not unconstitutional as applied to Representative McDermott.⁶³ The Supreme Court granted certiorari, vacated the judgment of the Court of Appeals, and remanded the case in light of the Supreme Court's decision in *Bartnicki v. Vopper*, 532 U.S. 514, 121 S. Ct. 1753, 149 L. Ed. 2d 787 (2001).⁶⁴ On remand from the Supreme Court, the Court of Appeals remanded the matter back to the United States District Court, concluding that it "would benefit from having the district court pass upon the arguments that have taken on newfound importance after *Bartnicki*."⁶⁵

After the matter returned to the district court in 2001, the parties in the litigation engaged in discovery and filed cross-motions for summary judgment. On August 20, 2004, Judge Hogan held that Representative McDermott violated 18 U.S.C. § 2511(1)(c) when he disclosed the tape furnished to him by the Martins to members of the news media. *Boehner v. McDermott*, 332 F. Supp. 2d 149, 158 (D.D.C. 2004). In a subsequent order on October 22, 2004, Judge Hogan ordered that Representative McDermott pay Representative Boehner \$10,000 in statutory damages, \$50,000 in punitive damages, and reasonable attorneys fees and costs. In the same order, Judge Hogan held the matter of the amount of attorneys fees in abeyance pending resolution of appeals in the litigation.

⁶² See *Boehner v. McDermott*, No. 98-594, 1998 WL 436897, at *7 (D.D.C. July 28, 1998), *rev'd*, 191 F.3d 463 (D.C.Cir.1999).

⁶³ *Boehner*, 191 F.3d at 478.

⁶⁴ See *McDermott v. Boehner*, 532 U.S. 1050, 121 S. Ct. 2190, 149 L. Ed. 2d 1022 (2001).

⁶⁵ *Boehner v. McDermott*, 22 Fed. Appx. 16, 2001 WL 1699420 (D.C. Cir. 2001).

On March 28, 2006, a 2-1 decision by a three judge panel of the United States Court of Appeals for the District of Columbia upheld Judge Hogan's ruling in favor of Representative Boehner. The essential disagreement between the majority and the dissenting judge was whether the First Amendment of the Constitution protected Representative McDermott from prosecution for his disclosure of the taped telephone conversation he received from the Martins. *See Boehner v. McDermott*, 441 F.3d 1010, 1017 (D.C. Cir. 2006).

On June 23, 2006, Representative McDermott's petition for a rehearing en banc was granted by the United States Court of Appeals for the District of Columbia Circuit. The Court vacated the judgment of the three judge panel that was filed on March 28, 2006.⁶⁶ The case was reheard by the court sitting en banc on October 31, 2006, and no decision has yet been rendered.

D. Representative Hobson's Complaint and the Jurisdiction of the Investigative Subcommittee

As noted previously, on December 28, 2004, the Chairman and Ranking Minority Member of the Committee determined to forward portions of Representative Hobson's complaint to the Investigative Subcommittee. In a public statement on that same date, the Chairman and Ranking Minority Member of the Committee announced that "the subcommittee will conduct an inquiry on allegations that Representative McDermott's conduct violated the House Code of Official Conduct (clause 1 of which provides that Members and staff shall conduct themselves "at all times in a manner which shall reflect creditably on the House of Representatives"), provisions of the Code of Ethics for Government Service, the committee member non-disclosure agreement, or the Committee confidentiality rules."⁶⁷ As noted below, the Investigative Subcommittee interpreted this announcement as limiting its inquiry to violations of House and

⁶⁶ *See Boehner v. McDermott*, No. 04-7203 (D.C. Cir. Order filed June 23, 2006).

⁶⁷ *See Exhibit 7* (Statement of Chairman Joel Hefley and Ranking Minority Member Alan B. Mollohan dated December 28, 2004).

Committee rules, and not requiring the Investigative Subcommittee to reach an independent judgment as to whether Representative McDermott violated a federal statute, *i.e.*, 18 U.S.C. § 2511, a question pending before the United States Court of Appeals for the District of Columbia Circuit. In other words, the Investigative Subcommittee's charge was to determine whether Representative McDermott's conduct, which might or might not support a finding of a violation of federal law, was a violation of House and Committee rules applicable to him as a Member of the House and as Ranking Minority Member of the House Select Committee on Ethics. The Investigative Subcommittee also addressed specifically the question of the applicability of House Rule 23, Clause 10 to Representative McDermott, because that was one of the matters in Representative Hobson's complaint that was referred to the Subcommittee.

E. Applicable Confidentiality Rules During the 104th Congress

During the 104th Congress (1995-1996) and during the temporary existence in January 1997 of the House Select Committee in the 105th Congress, two rules of the Committee on Standards of Official Conduct – Rule 9 and Rule 10(b) – addressed the topic of confidentiality by Members and staff of the Committee.⁶⁸

⁶⁸ As explained earlier in this Report, the relevant rules in effect during the 104th Congress are implicated in this matter even though the conduct under review occurred during the 105th Congress. *See* House Rule 10, Clause 4(e)(3) (105th Congress) (as adopted in H. Res. 5 on January 7, 1997) (The Select Committee on Ethics “shall possess the same authority as, and shall conduct its proceedings under the same rules, terms, and conditions . . . as those applicable to the standing Committee on Standards of Official Conduct in the One Hundred Fourth Congress[.]”). We further note that Committee Rules 9 and 10(b) for the 104th Congress appear to implement House Rule X, Clause 4(e)(2)(F) (104th Congress), which provided with regard to the Committee that “[n]o information or testimony received, or the contents of a complaint or the fact of its filing, shall be publicly disclosed by any committee or staff member unless specifically authorized in each instance by a vote of the full committee.”

Rule 9 of the Rules of the Committee on Standards of Official Conduct provided:

Communications by Committee Members and Staff

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, nor shall any evidence in the possession of an investigative subcommittee be disclosed to Committee members who are not members of the subcommittee prior to the filing of a Statement of Alleged Violation with the Committee.

Rule 10(b) of the Rules of the Committee on Standards of Official Conduct provided:

Committee Records

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: (i) the fact of or nature of any complaints; (ii) executive session proceedings; (iii) information pertaining to or copies of any Committee or subcommittee report, study, or other document which purports to express the views, findings, conclusions, or recommendations of the Committee or subcommittee in connection with any of its activities or proceedings; or (iv) any other information or allegation respecting the conduct of a Member, officer, or employee.

Neither Committee nor House rules during the 104th Congress mandated the execution of a formal confidentiality oath by Members of the Committee. However, during the 104th Congress, the Committee determined to implement a policy under which its Members would sign a "Nondisclosure Agreement" containing the following text:

The purpose of this Nondisclosure Agreement is to ensure the confidentiality of all information received or processed by the Committee on Standards of Official Conduct (the Committee).

I do solemnly swear (or affirm) that I will not disclose any information received in the course of my service with the Committee in accordance with Committee Rule 10, except when authorized by the Committee or the House of Representatives.

Committee records do not contain a copy of any such agreement executed by Representative McDermott, although there are copies of the agreement signed by all other Members of the Committee during the 104th Congress. The record does not indicate that the House Select Committee on Ethics, established in January 1997, implemented a requirement that Members of that body sign nondisclosure agreements, although arguably formal action implementing such a policy was not necessary due to the instructions of the House that the House Select Committee on Ethics “shall possess the same authority as, and shall conduct its proceedings under the same rules, terms, and conditions . . . as those applicable to the standing Committee on Standards of Official Conduct in the One Hundred Fourth Congress[.]”⁶⁹

For the purpose of completeness, the Investigative Subcommittee notes that it was not until the adoption of H. Res. 168 (September 18, 1997) during 105th Congress (1996-1997) – implementing the recommendations of the bipartisan House Ethics Reform Task Force – that a confidentiality oath requirement for Members of the Committee was added to House rules.

Specifically, the 1997 Report of the Ethics Reform Task Force stated that “[e]nsuring the confidentiality of Standards Committee deliberations and matters pending before the Committee is essential to protect the rights of individuals accused of misconduct, preserve the integrity of the investigative process, and cultivate collegiality among Committee members.”⁷⁰ Towards this end, it was recommended that House rules require that Committee Members, “pool” Members, and Committee staff execute a confidentiality oath before they have access to information that is confidential under Committee rules.⁷¹

⁶⁹ See House Rule 10, Clause 4(e)(3) (105th Congress) (as adopted in H. Res. 5 on January 7, 1997).

⁷⁰ See Report of the Ethics Reform Task Force on H. Res. 168, 105th Cong., 1st Sess., at 10-11 (June 17, 1997).

⁷¹ *Id.*

The text of the proposed oath was as follows: “I do solemnly swear (or affirm) that I will not disclose, to any person or entity outside the Committee on Standards of Official Conduct, any information received in the course of my service with the committee, except as authorized by the Committee or in accordance with its rules.” In accordance with the recommendations of the Task Force, breaches of confidentiality would be investigated by the Committee and a proven violation of the confidentiality oath by a Member or employee of the Committee would be a violation of House rules.⁷² A formal oath requirement was added to the Committee’s rules on September 30, 1997, and is currently codified as Committee Rule 7(a).

III. CONCLUSIONS AND RECOMMENDATIONS

A. Federal Statute Prohibiting Disclosure of Illegally Intercepted Electronic Communications (18 U.S.C. § 2511)

The Investigative Subcommittee reached no conclusion as to whether Representative McDermott violated 18 U.S.C. § 2511 in connection with his disclosure to the news media of the contents of a taped intercepted telephone conversation furnished to him by the Martins, as it was not the mandate of the Investigative Subcommittee to resolve this question. Rather, the focus of the Investigative Subcommittee’s inquiry was whether, by the same conduct which may or may not establish a violation of law in the federal court proceedings between Representative McDermott and Representative Boehner, Representative McDermott also violated “the House Code of Official Conduct (Clause 1 of which provides that Members and staff shall conduct themselves “at all times in a manner which shall reflect creditably on the House of Representatives”), provisions of the Code of Ethics for Government Service, the committee member non-disclosure agreement, or the Committee confidentiality rules.”⁷³ In any event, given the important and novel issues of First Amendment law involved in the *Boehner v. McDermott* litigation – as evidenced by the appellate and Supreme Court interest in the

⁷² *Id.* The floor debate on H. Res. 168 also addressed the importance of improving the confidentiality of the Committee’s work as means to “maintain the integrity of the process.” 143 Cong. Rec. H7546 (daily ed. Sept. 18, 1997) (statement of Rep. Cardin).

⁷³ See Exhibit 7.

case – the Investigative Subcommittee concluded that the question of law should be left to the judicial branch.

B. Refraining from Legislative Activity (House Rule 23, Clause 10)

The Investigative Subcommittee concluded that there was no violation by Representative McDermott of House Rule 23, Clause 10. The findings of Judge Hogan on August 20, 2004 in the *Boehner v. McDermott* civil litigation do not implicate House Rule 23, Clause 10, which only applies where a Member of the House is “convicted by a court of record for the commission of a crime for which a sentence of two or more years’ imprisonment may be imposed”; *i.e.*, upon a plea of guilty by a Member in a criminal proceeding, or upon a court finding of guilty by judge or jury in a criminal proceeding. Regardless of the outcome of *Boehner v. McDermott* after all the appeal options are exhausted, that case is a civil matter between two private parties and does not implicate House Rule 23, Clause 10. The fact that the same statute may also establish a basis for criminal prosecution – using different procedures and a far more stringent burden of proof – does not alter this conclusion. Many statutes, including the Federal Election Campaign Act, contain options for both criminal and civil enforcement;⁷⁴ however, there was never any intention by the House to apply House Rule 23, clause 10 and thereby restrain “the maximum freedom of Members to represent their constituencies” in any circumstances other than those involving conviction in a criminal proceeding.⁷⁵ Regarding a proposal that the House amend the Code of Official Conduct to include the prohibition now encompassed in House Rule 23, Clause 10, the Committee reported to the House that it “recognizes a very distinguishable link in the chain of due process – that is, the point at which the defendant no longer has claim to the presumption of innocence. This point is reached in a criminal prosecution upon a plea of guilty or upon conviction

⁷⁴ See 2 U.S.C. § 437g.

⁷⁵ *House Committee on Standards of Official Conduct, Policy of the House of Representatives With Respect to Actions by Members Convicted of Certain Crimes*, H. Rep. 94-76, 94th Cong., 1st Sess. (1975) at 4.

by a jury or by a judge (or judges) if jury trial is waived. *It is to this condition, and only to this condition, that the proposed resolution is directed.*”⁷⁶

C. Committee Rules Related to Confidentiality of Committee Proceedings and to the Obligations of a Ranking Minority Member of the Committee

The Investigative Subcommittee 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.

As noted, Rule 9 of the Rules of the Committee on Standards of Official Conduct for the 104th Congress prohibited disclosure by a Member of “any evidence relating to an investigation to any person or organization outside the Committee unless authorized by the Committee,” and further prohibited “evidence in the possession of an investigative subcommittee [from] be[ing] disclosed to Committee members who are not members of the subcommittee prior to the filing of a Statement of Alleged Violation with the Committee. In addition, Rule 10(b) of the Rules of the Committee on Standards of Official Conduct for the 104th Congress prohibited disclosure by a Member, “unless authorized by the Committee” of “any information regarding the Committee’s or a subcommittee’s investigative, adjudicatory or other proceedings, including, but not limited to: (i) the fact of or nature of any complaints; (ii) executive session proceedings; (iii) information pertaining to or copies of any Committee or subcommittee report, study, or other document which purports to express the views, findings, conclusions, or recommendations of the Committee or subcommittee in connection with any of its activities or proceedings; or (iv) any other information or allegation respecting the conduct of a Member, officer, or employee.”

⁷⁶ *Id.* at 2 (emphasis added).

The aforementioned rules support the House ethics processes by protecting the integrity and confidentiality of Committee and Investigative Subcommittee proceedings and deliberations, and protecting the rights of individuals accused of misconduct and subject to ethics proceedings.

Indeed, the purpose of the Committee's rules is emphasized in the foreword to the Rules of the Committee on Standards of Official Conduct for the 104th Congress, adopted by the Committee on February 9, 1995, which states:

The Committee on Standards of Official Conduct is unique in the House of Representatives. Consistent with the duty to carry out its advisory and enforcement responsibilities in an impartial manner, the Committee is the only standing committee of the House of Representatives the membership of which is divided evenly by party. These rules are intended to provide a fair procedural framework for the conduct of the Committee's activities and to help insure that the Committee serves well the people of the United States, the House of Representatives, and the Members, officers, and employees of the House of Representatives.⁷⁷

The foreword reflects the unique charter of the Committee to conduct its work in a non-partisan manner, and the threat posed to the integrity of the House *of even the appearance of unfairness* to Members under investigation or of bias or impartiality by Members of the Committee in fulfilling their responsibilities.

By his conduct in January 1997, Representative McDermott failed to meet this standard. Representative McDermott's secretive disclosures to the news media as to the alleged conduct of Representative Gingrich risked undermining the ethics process regarding that Member. Representative McDermott's actions were not consistent with the spirit of the Committee's rules.⁷⁸ In reaching this conclusion, the Investigative

⁷⁷ The identical foreword is contained in the Rules of the Committee for the current Congress.

⁷⁸ See House Rule 23, clause 2, providing 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." House Rule 23, Clause 2, "has been interpreted to mean that *Members, officers, and employees may not do indirectly what they would be barred from doing directly*, House Ethics Manual at 15 (italics original), and that "a narrow technical

Subcommittee did not give weight to Representative McDermott's stated excuse for his conduct: the public's entitlement to be informed. This is not a justification for potentially undermining the House ethics process. In the normal course, Members entrusted to serve on the Committee have their first obligation to the integrity of the House ethics process, which itself supports public confidence in the institution of the House. A better course of action would have been for Representative McDermott to entrust the Committee *at the outset* with the information to which he alone on the Committee had access, and for that body, *collectively*, to make determinations, consistent with its rules, as it deemed appropriate.

The Investigative Subcommittee decided against further proceedings in this matter. The Investigative Subcommittee additionally recommends that the Report of the Investigative Subcommittee be released to the public with no further statement by the Committee beyond announcing release of this Report.

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.* (citing Final Report of House Select Committee on Ethics, H. Rep. No. 95-1837, 95th Cong., 2d Sess. (1979) app. at 61).