COURTSIDE

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United States v. Williams (No. 06-694)

In *United States v. Williams*, the Supreme Court will consider whether § 2252A(a)(3)(B) of the PROTECT (Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today) Act of 2003 is facially unconstitutional under the First Amendment on the basis of substantial overbreadth and vagueness. This case presents the first Supreme Court challenge to the PROTECT Act, legislation that was passed in the wake of the Court's decision in *Ashcroft v. Free Speech Coalition*,[1] which invalidated sections of the Child Pornography Prevention Act of 1996 (CPPA) on the basis of unconstitutional overbreadth; the Court found that those sections criminalized virtual and simulated images of minors engaging in sexually explicit activity, speech that is fully protected by the First Amendment.

Section 2252A(a)(3)(B), which is sometimes referred to as the "pandering" provision, penalizes one who "knowingly . . . advertises, promotes, presents, distributes, or solicits . . .any material or purported material in a manner that reflects the belief, or that is intended to cause another to believe" that the material "is, or contains" either an "obscene visual depiction of a minor engaging in sexually explicit conduct" or "a visual depiction of an actual minor engaging in sexually explicit conduct."[2] Section 2252A(a)(3)(B) thus does not criminalize virtual and simulated images of minors directly, but instead punishes speech about virtual and simulated images of minors.

Respondent Williams was convicted for violations of both §§ 2252A(a)(3)(B) and 2252A(a)(5)(B) (possession of child pornography). Williams pleaded guilty to both counts but reserved his right to challenge the constitutionally of § 2252A(a)(3)(B) on its face. Williams was ultimately sentenced to sixty months' imprisonment on each charge, to be served concurrently; therefore, his sentence would not be affected if the pandering provision were struck down.

On appeal from the district court's denial of Williams's motion to dismiss the § 2252A(a)(3)(B) count on the grounds that it was unconstitutional, the Eleventh Circuit reversed, holding that § 2252A(a)(3)(B) violated the First Amendment and was unconstitutionally vague.[3]

The majority opinion, written by Judge Reavley of the Fifth Circuit (sitting by designation), found that § 2252A(a)(3)(B) was substantially overbroad, holding that because no "regard is given to the actual nature or even the existence of the underlying material, liability can be established based purely on promotional speech reflecting the deluded belief that real children are depicted" or "on promotional or solicitous speech reflecting that an individual finds certain depictions of children lascivious."[4] As such, the Eleventh Circuit found that "the law does not seek to attach liability to the materials, but to the ideas and images communicated to the viewer by those materials,"[5] and thus runs afoul of the First Amendment.

The Eleventh Circuit also found that § 2252A(a)(3)(B) was void for vagueness because the statute is "not at all clear what is meant by promoting or soliciting material 'in a manner that reflects the belief, or that is intended to cause another to believe'"[6] that the material contains illegal child pornography. Thus, the court found that the statute required a "wholly subjective determination by law enforcement personnel" regarding what kind of speech was prohibited by the statute and that it was "devoid of any contextual parameters for the restriction on conduct that might illuminate its meaning and rescue it from vagueness."[7]

The government filed a petition for a writ of certiorari, which was granted on March 26, 2007, arguing that § 2252A(a)(3)(B) is neither overbroad nor vague because it only criminalizes efforts to provide or receive material that is, or purports to be, illegal obscenity or child pornography. According to the government, § 2252A(a)(3)(B) does not run afoul of the Court's decision in *Free Speech Coalition* because the statute does not regulate the underlying materials but only targets the act of pandering materials that are represented to be constitutionally unprotected, i.e., obscenity and actual child pornography.

Many of the government's arguments defending § 2252A(a)(3)(B) are the same as those raised, and rejected, in *Free Speech Coalition*. Thus, the government argues that it may criminalize speech about constitutionally protected material (works featuring virtual or simulated minors) in order to eradicate the market for unprotected speech (actual child pornography). But the Supreme Court specifically rejected this argument in *Free Speech Coalition*, holding that "[t]he Government may not suppress lawful speech as the means to suppress unlawful speech. Protected speech does not become unprotected merely because it resembles the latter. The Constitution requires the reverse."[8] Further, as the government admits in its briefing, § 2252A(a)(3)(B) could be used to punish speech about mainstream materials, such as the movies *Fast Times at Ridgemont High* and *Y tu mamá también*, depending on how those materials are presented or promoted. The problems with the statute are exacerbated by the absence of an affirmative defense that the materials actually presented or distributed are not actual child pornography.

The Court heard oral argument in the case on October 30, 2007. The five Justices that represented the majority in *Free Speech Coalition* are still on the Court, but it is far from clear that this case will have the same result. Although the government relies on

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many of the same arguments that were rejected in *Free Speech Coalition*, that case primarily focused on the materials themselves rather than the manner in which the materials were presented or distributed. A reversal of the Eleventh Circuit's decision, and any narrowing of the Court's precedent in *Free Speech Coalition*, could very well change the focus of child pornography prosecutions in this country from the possession of actual child pornography to tawdry speech about materials, regardless of whether those materials are actual child pornography or not.

Boehner v. McDermott (No. 07-439)

An interesting and potentially significant petition for certiorari was filed on September 28 in the long-running dispute over Congressman James McDermott's release to the press of a tape of a conference call that had been illegally intercepted by third parties. The call involved then-Speaker Newt Gingrich and other Republican House members' discussion of how to "spin" Gingrich's recent settlement of ethics charges. This conversation was a matter of public interest because Gingrich had agreed, in his settlement, not to attempt to spin the agreement in a favorable light. The tape was literally thrust into McDermott's hands by individuals he did not know previously. At the time, McDermott was the ranking Democratic member of the House Ethics Committee.

One of the participants in the call, Congressman John Boehner, sued McDermott under the federal wiretapping statute[9] for allowing the press to hear the tape rather than turning it over to the Ethics Committee. The complaint was dismissed on the theory that the First Amendment protected a public release of truthful information on a matter of public interest. The D.C. Circuit reversed, but the Supreme Court vacated that decision and remanded for reconsideration in light of *Bartnicki v. Vopper*.[10] In *Bartnicki*, the Court held that the public release of a tape of a call illegally intercepted by third parties was protected by the First Amendment, where the content involved union leaders threatening violence in a labor dispute.

On remand, the district court ruled for Boehner, and a divided panel of the D.C. Circuit affirmed. The court of appeals then granted en banc review. While that review was pending, the House Ethics Committee issued a report by an investigative subcommittee in which McDermott was not charged with any violation of House rules, but the subcommittee concluded that the release of the tape was not consistent with the "spirit" of rules governing the confidentiality of ethics proceedings and McDermott's "obligations as Ranking Minority Member."

Ultimately, the D.C. Circuit ruled en banc, by a vote of 5-4, that *Bartnicki* did not protect McDermott from liability under the wiretap statute because, under the majority's reading, the release of the tape violated rules of the House Ethics Committee by which McDermott had agreed to abide.[11]

Judge Sentelle, joined by Judges Rogers, Tatel, and Garland on this point, dissented. He argued that even if the conduct of McDermott violated any House rule, that fact would not deprive him of First Amendment protection as to other laws like the wiretap statute. He further argued that the courts should not get involved in interpreting ambiguous internal rules of the legislative branch.

Those arguments have now formed the basis for a petition for certiorari that raises very interesting First Amendment issues. The petition will likely be considered by the Court in November or December.

Endnotes

1. 535 U.S. 234 (2002).
2. 18 U.S.C. § 2252A(a)(3)(B).
3. United States v. Williams, 444 F.3d 1286 (11th Cir. 2006).
4. *Id.* at 1298–99.
5. *Id.* at 1299.
6. *Id.* at 1306.
7. *Id.*
8. 535 U.S. 234, 255 (2002).
9. 18 U.S.C. §§ 2511(1)(c), 2520.
10. 532 U.S. 514 (2001).
11. Boehner v. McDermott, 484 F.3d 573 (D.C. Cir. 2007).