

A federal criminal law imposes penalties for the intentional publication of communications by individuals who know or have reason to know that the communications were unlawfully recorded.

A teachers' union and school board were engaged in contentious negotiations over a collective-bargaining agreement. One of the members of the teachers' union unlawfully placed a wiretap on the president of the school board's telephone. The teachers' union member anonymously sent the recordings of several of the president's phone conversations about the negotiations to a local radio talk show host. The talk show host received the recordings in a box with no return address, sender information, or label. After listening to the recordings, the talk show host played them on her show. In the conversations, the president made several derogatory and embarrassing remarks.

A prosecutor subsequently filed charges against the radio talk show host for playing the recordings on her show in violation of the federal law. The radio talk show host claims that the federal law is unconstitutional.

Is the prosecution of the radio talk show host under the federal law likely constitutional?

- A. No, because the federal law is a prior restraint.
- B. No, because the host did not unlawfully obtain the recordings and does not know who did.
- C. Yes, because private phone conversations are not a matter of public concern.
- D. Yes, because the host knew that the recordings were unlawfully obtained.

Explanation:

The **First Amendment** shields the media from criminal and civil liability for publishing *lawfully* obtained private facts (eg, crime victim's identity) and other truthful information involving matters of public concern (ie, newsworthy events). This amendment also **shields the media from liability** for **publishing truthful information** that is *unlawfully* obtained **by a third party** if:

- the information involves a **matter of public concern** *and*
- the **publisher neither obtained it unlawfully nor knows who did**.

Here, the federal government prosecuted the radio talk show host for publishing the recordings of the school board president's phone conversations, which were unlawfully obtained by a member of the teachers' union. The conversations involve a matter of public concern since they relate to the ongoing collective-bargaining negotiations. Additionally, the host did not unlawfully obtain the recordings herself and did not know the member who anonymously sent them to her. Therefore, the prosecution is likely unconstitutional.

(Choice A) A prior restraint is a government action (eg, an injunction) that prohibits a publication *before* it occurs. Since the federal law here penalizes a publication *after* it occurs, it is not a prior restraint.

(Choice C) The phone conversations *are* a matter of public concern because public and private statements about collective-bargaining negotiations between a school board and a teachers' union are newsworthy.

(Choice D) The host may have had reason to believe that the recordings were unlawfully obtained. However, she did not unlawfully obtain them herself or know who did because they were sent in box with no return address, sender information, or label. Therefore, she had the right to publish the information without punishment.

Educational objective:

The First Amendment shields the media from liability for publishing truthful information that was unlawfully obtained by a third party if (1) the information involves a matter of public concern and (2) the publisher neither obtained it unlawfully nor knows who did.

References

- *Bartnicki v. Vopper*, 532 U.S. 514, 535 (2001) (holding that the First Amendment prevents liability for the publication of truthful information about a matter of public concern unlawfully obtained by an unknown third party).

