

Audio Recording of Police Once Again Found to Be Protected By Right to Free Speech. Author: Trial Lawyer Michelle Funkenbusch



Audio Recordings of Police Protected By First Amendment According to Two Different Courts Of Appeal... U.S. Supreme Court Lets Rulings Stand. The U.S. Supreme Court on Monday delivered a blow to Illinois' 50-year-old anti-eavesdropping law according to trial lawyer Funkenbusch. The Illinois Eavesdropping Act, enacted in 1961, makes it a felony for someone to produce an audio recording of a conversation unless all the parties involved agree. It sets a maximum punishment of 15 years in prison if a law enforcement officer is recorded. In refusing to hear the appeal, the U.S. Supreme Court let stand a lower court finding that major parts of the eavesdropping law violate constitutional protections of free speech.

The 7th Circuit majority found that the Illinois eavesdropping statute restricts a medium of expression commonly used for the preservation and communication of information and ideas, thus triggering First Amendment scrutiny. In particular, the court noted that the statute restricts far more speech than necessary to protect legitimate privacy interests.

THE LAW AT ISSUE: Felony to Record Police Acting in Official Capacity Performing Public Duties

The [provision at issue](#) of the Illinois eavesdropping law is [720 ILCS 5/14-4](#). It imposes a Class 1 felony penalty upon an individual who, in violating § 14-2 of the statute, records an oral conversation of a police officer or certain other public officials in the performance of their official duties. This provision and its explicit effect has long been criticized. In fact, the Illinois State Bar Association proposed legislation, originating through its Intellectual Property Section Council, amending the Illinois Eavesdropping Statute to eliminate the very effect of § 14-4.

In the appeals court ruling in May, the 7th U.S. Circuit Court of Appeals found that [720 ILCS 5/14-4](#)— one of the toughest of its kind in the country — violates the First Amendment.

[Legal Fact of the Day: The First Amendment states; “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”

Civil right’s activists believe the ability to record helps guard against police abuse. The most notorious incident was the infamous 1991 videotaping of LAPD officers beating Rodney King. The taping created a media scurry and national controversy over the effect of racial tensions between police and crime suspects.

The eavesdropping law’s proponents, however, say it protects the privacy rights of officers and civilians, as well as ensures that those wielding recording devices don’t interfere with urgent police work. Officers argue the recordings are often done by harassing paparazzi-like mobs at scenes where they are attempting to make legitimate investigations and arrests. People attempting to You-Tube and Facebook arrests can get in the way of legitimate police business.

Nevertheless, based on the U.S. Supreme Courts denial to hear the appeal, free speech has found a win over the need for police to do their job unaffected by surrounding crowds.

On a historical note, it was not until the flag-burning cases of 1989 ([Texas v. Johnson](#)) and 1990 ([United States v. Eichman](#)), that the Supreme Court accepted that non-speech means of communicating applied to freedom of expression and freedom of speech. **According to St. Louis trial lawyer Michelle Funkenbusch, in the case at hand, we are seeing a new non-speech definition of speech... i.e. the act of recording communications.**

This isn’t the first case on the issue of the “Right to Record”. Just last year, the First Circuit Court of Appeals held that the First Amendment provided and protected the right to record police in their official capacity in [Glik v. Cunniffe, et al.](#), No. 10-1764 (1st Cir. Aug. 26, 2011). The First Circuit held, “A citizen’s right to film government officials ... in the discharge of their duties in a public space is a basic, vital, and well-established liberty safeguarded by the First Amendment.”

The Seventh Circuit Court of Appeals ruling on the Illinois law is consistent with this First Circuit ruling on recording laws in Massachusetts. This lack of conflict in the Circuits may be why the U.S. Supreme Court rejected hearing the case.

-Published November 27, 2012. Authored by Michelle M. Funkenbusch, St. Louis Trial lawyer