

Challenge to Illinois Eavesdropping Law May Face Uphill Battle in the 7th Circuit

RTDNA Communicator

January 27, 2012

In *ACLU v. Alvarez*, the American Civil Liberties Union of Illinois (ACLU) filed a lawsuit in district court challenging the constitutionality of the Illinois Eavesdropping Act, as applied to the audio recording of police officers when they are performing their public duties in public places and speaking at a volume audible to the unassisted human ear. Illinois has a very stringent eavesdropping law, making it a criminal act with significant jail time to record the audio of certain non-private conversations. The ACLU brought the lawsuit as an organization that frequently monitors police conduct and practices, citing numerous instances in which individuals were charged with violating the statute for making audio recordings of public conversations with police officers.

The district court rejected the ACLU's request for declaratory judgment and injunctive relief, and the ACLU appealed to the U.S. Court of Appeals for the Seventh Circuit. RTDNA along with a group of associations representing newsgatherers and journalists participated as *amici curiae* in support of the ACLU. Oral arguments were heard on September 13, 2011 by a panel including Circuit Judges Richard A. Posner, Diane S. Sykes and David F. Hamilton. Judge Posner was particularly dubious of the ACLU's contention that the Illinois law infringes on First Amendment rights and seemed overly concerned that recognizing a right to make audio recordings of police officers would result in "both an invasion of privacy and a potential disruption of police operations" if such recordings could be "broadcast all over the world."

Although counsel for the ACLU asserted that the right applies to

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police officers performing public duties in a public place and speaking at an audible volume, Judge Posner indicated that “[o]nce all of this stuff can be recorded, there is going to be a lot more of this snooping around by reporters and bloggers. . . . Yes, it is a bad thing. There is such a thing as privacy.” Posing the hypothetical of a police officer talking to a confidential informant, Judge Posner was troubled by the possibility that gangs will be able to eavesdrop more effectively on such conversations and interfere with police investigations, opining that “gangs will rejoice in [the ACLU’s] case if you prevail.”

Notably, the U.S. Court of Appeals for the First Circuit recently held that a private citizen’s right to videotape police officers performing their duties in a public space is “unambiguously” protected by the First Amendment, see *Glik v. Cunniffe, et al.*, No. 10-1764 (1st Cir. Aug. 26, 2011), thereby setting the stage for a potential circuit split if the Seventh Circuit finds, to the contrary, that there is no such First Amendment right.