
BEFORE THE
ILLINOIS HOUSE OF REPRESENTATIVES
HOUSE JUDICIARY COMMITTEE I (CIVIL LAW)

WRITTEN SUBMISSIONS AND COMMENTS IN SUPPORT OF
CREATING AN EXEMPTION UNDER THE ILLINOIS EAVESDROPPING ACT

HOUSE BILL 3944

**COMMENTS OF THE
NATIONAL PRESS PHOTOGRAPHERS ASSOCIATION**

MICKEY H. OSTERREICHER

HISCOCK & BARCLAY, LLP
1100 M&T Center
3 Fountain Plaza
Buffalo, NY 14203
*GENERAL COUNSEL FOR THE
NATIONAL PRESS PHOTOGRAPHERS ASSOCIATION*

(716) 566-1484
lawyer@nppa.org

February 6, 2012

Summary

As staff photographers and independent visual journalists, members of The National Press Photographers Association (“NPPA”) photograph and record matters of public interest in Illinois and around the country on a daily basis, for publication in newspapers and magazines, broadcast on public airwaves and cable and satellite shows, and Internet postings. In this digital age, even traditional print publications now have websites where they post audio-visual recordings from staff members, freelancers, citizen-journalists, bloggers and the public at large.

Because most if not all of this content includes audio recordings, the NPPA is extremely concerned that the criminal penalties under the Illinois Eavesdropping Act, 720 ILCS 5/14 (“the Act”), as applied to the audio recording of police officers, has created a chilling effect upon free speech and a free press, particularly for photojournalists, who by the very nature of their profession must operate on the front lines of news, in the middle of sometimes highly charged situations.

Recent criminal proceedings have been brought simply because audio and video was recorded in a manner that was otherwise lawful without the consent of the officers, despite the fact that the officers were speaking at a volume audible to the unassisted human, while performing their public duties, in public places. It is because of the totality of these circumstances that we assert the officers had no reasonable expectation of privacy. The NPPA urges members of the General Assembly to recognize and exempt

from criminal prosecution the legitimate exercise of a constitutional right by those engaged in otherwise protected newsgathering activities.

NPPA joined in the [*amicus curiae* brief](#) in [*ACLU v. Alvarez*](#), submitted by news organizations in support of the ACLU position seeking a declaratory judgment and a preliminary injunction against the application of the Act because it violates the First Amendment. Regardless of the Seventh Circuit decision in that case, which in any event may likely be appealed, NPPA is deeply concerned that daily coverage of news events, Occupy Chicago protests and the upcoming G-8 Summit may put those seeking to record these important matters of public concern at risk because of the continued enforcement of the Act. It especially disconcerting for us to think that foreign journalists covering the Summit meeting may be subject to arrest and prosecution for doing something they understandably believe to be a Constitutionally protected right throughout the United States.

Moreover, the worldwide proliferation of cell phone cameras capable of taking high-quality photographs and audio-visual recordings along with the ease in which those files may be wirelessly uploaded to the Internet and instantly disseminated around the globe will certainly be a factor during the expected demonstrations – leading to an increased probability that the recorded sights and sounds emanating from those events will just as likely come from someone with a smartphone or digital camera as from a

credentialed journalist. Such developments make clear why the importance of amending the Act is so time sensitive.

Additionally, the loss of staff positions by long-time photojournalists from newspapers and television stations has led to more freelance journalists who may lack the legal support or ability to obtain press credentials they once had when employed. Their increased exposure to the current criminal penalties under the Act is another reason the current statute must be timely amended.

For these important reasons, the NPPA respectfully submits this comment in support of the immediate enactment of H.B. 3944. Additionally, the NPPA offers the service and vast expertise of its members should the General Assembly or executive branch wish any additional input and advice concerning these matters.

BEFORE THE
ILLINOIS HOUSE OF REPRESENTATIVES
HOUSE JUDICIARY COMMITTEE I (CIVIL LAW)

WRITTEN SUBMISSIONS AND COMMENTS)
IN SUPPORT OF CREATING AN)
EXEMPTION UNDER THE ILLINOIS) HOUSE BILL 3944
EAVESDROPPING ACT)

Comments of the National Press Photographers Association

I. Introduction

Founded in 1946, the National Press Photographers Association (“NPPA”) is a 501(c)(6) non-profit, professional organization dedicated to the advancement of photojournalism, its creation, editing and distribution in all news media. NPPA encourages photojournalists to reflect high standards of quality and ethics in their professional performance, in their business practices and in their comportment. NPPA vigorously promotes freedom of expression in all forms. Its more than 7,000 members include still and television photographers, editors, students and representatives of businesses serving the photojournalism industry.

We assert the Illinois Eavesdropping Act (“the Act”) has been used as a sword against citizens and journalists recording police activity rather than a shield to protect law enforcement officers. This has led to several highly publicized cases where those acquitted of charges under the Act are now [filing suit](#) claiming civil rights violations.

While we believe the Act will ultimately be held unconstitutional. We are deeply concerned more journalists and citizens will be subject to arrest and prosecution in the interim.

In order to avoid more inevitable arrests under what we believe is a uniquely unconstitutional statute, the NPPA fully supports House Bill 3944, sponsored by Rep. Elaine Nekritz, creating an exemption under the Act, whereby the “recording of a peace officer who is performing a public duty in a public place and speaking at a volume audible to the unassisted human ear,” would not be subject to criminal prosecution.

NPPA cannot overstate its concern about the threat posed by the Act (as it is now written) to the First Amendment rights of our members. The potential for harm to newsgathering abilities is also impacted because there are fewer news organizations with less staff and resources to report on important stories. Many of these organizations have become more reliant on content supplied by “citizen-journalists” and “contract” or “freelance” photographers. It is therefore crucial that those visual journalists are able to cover news and other matters of public concern in an unfettered manner, free from the draconian penalties imposed by the Act.

Additionally, the ever-present tension between the police and the press has only been exacerbated by the Occupy Wall Street movement, wherein scores of journalists nationwide have been subject to interference, harassment and arrest for such catch-all misdemeanors and violations as disorderly conduct, obstruction of governmental

administration and resisting arrest. And while prosecutors nationwide have shown, for the most-part, the good sense to either void or dismiss those charges, NPPA fears that having the authority to enforce the Act as it now stands will only bring about more wrongful arrests in Chicago during the G-8 Summit demonstrations and in daily news coverage.

That Summit will take place in three months, where thousands of reporters and photographers from around the world will arrive to cover not only the actual news event but also the protests and police response that have accompanied each of these meetings. Imagine the surprise of those foreign journalists who have come to the land of liberty when they realize that in Illinois the right to record in public is severely curtailed and punishable by 15 years in jail.

According to recent news reports, “groups associated with the Chicago arm of the Occupy Wall Street movement have already applied for permits, and the organization of protests will be aided with the ever-increasing use of social media.” That will without doubt include hundreds of people using cellphones capable of recording audio and video. In anticipation of those protests, it is no surprise that federal, state and city law enforcement agencies are planning to take extraordinary measures to protect visiting dignitaries and the public. Once again, it would be a denial of reality to think these events and potential clashes between police and protesters are not matters of public concern to the citizens of Chicago and the rest of the world.

It is just as unrealistic to think these events will only be photographed or recorded without audio. Unless the Act is amended, NPPA fears the potential for the mass arrest of citizens and journalists under the Act will become not only a nightmare for all involved but will generate headlines of its own. Given that Chicago is the hometown of newly elected Mayor Rahm Emanuel and President Obama, we imagine that protesters will be intent on making news while government officials will be just as determined to maintain safety and security. If legislators fail to approve the amending language of H.B. 3944, it may only lead to embarrassment for everyone from the President on down, not to mention an undue tax on an already overburdened Illinois court system.

Ben Rhodes, deputy national security adviser for strategic communications, said at a recent media briefing, “we are fully confident Chicago has more than the capability to deal with that [the protest].” NPPA urges Illinois legislators ensure that “capability” is constitutionally correct by timely amending the Act.

II. This Committee Should Consider the Holding in *Glik v. Cunniffe*

Lawmakers might well take some guidance from the language found in *Glik v. Cunniffe*, 655 F.3d 78 (1st Cir. 2011) (denying qualified immunity to officer on arrestee’s First and Fourth Amendment claims). It is because NPPA so strongly believes the recent and well-founded 24 page bellweather decision in *Glik* is so important that we cite to it liberally.

The *Glik* Court centered upon a narrow First Amendment question: “Is there a constitutionally protected right to videotape police carrying out their duties in public?” The answer was an unambiguous and resounding: “Yes.” In its analysis, the Court noted the First Amendment’s protection extends beyond the prohibition against governmental abridgment of freedom of speech, or of the press. Such protection “encompasses a range of conduct related to the gathering and dissemination of information.”

The opinion cites cases establishing that “the Constitution protects the right to receive information and ideas” and that “there is an undoubted right to gather news ‘from any source by means within the law.’” Having previously recognized that “the videotaping of public officials is an exercise of First Amendment liberties,” the Court observed that the “state has a special incentive to repress opposition and often wields a more effective power of suppression;” and the same can be said of police officers, “who are granted substantial discretion that may be misused to deprive individuals of their liberties.” Because Glik’s activities were clearly protected by the First Amendment, the officers had no authority to stop them, and therefore, were not entitled to protection under qualified immunity.

The three judge panel went further, finding that these First Amendment protections applied to both the press and the public, stating that “the public’s right of access to information is coextensive with that of the press.” The court also took judicial notice of the current ubiquity of electronic recording devices:

[T]he proliferation of electronic devices with video-recording capability means that many of our images of current events come from bystanders with a ready cell phone or digital camera rather than a traditional film crew, and news stories are now just as likely to be broken by a blogger at her computer as a reporter at a major newspaper. Such developments make clear why the news-gathering protections of the First Amendment cannot turn on professional credentials or status.

The Court also pointed out that the police “are expected to endure significant burdens caused by citizens’ exercise of their First Amendment rights” in the nature of “verbal criticism and challenge directed at police officers;” and went on to state that “the same restraint demanded of law enforcement officers in the face of ‘provocative and challenging’ speech must be expected when they are merely the subject of videotaping that memorializes, without impairing, their work in public spaces” (emphasis added). Therefore, “such peaceful recording of an arrest in a public space that does not interfere with the police officers’ performance of their duties is not reasonably subject to limitation.”

In reviewing a long line of similar cases, the court also recognized “the fundamental and virtually self-evident nature of the First Amendment’s protections” of the “right to film government officials or matters of public interest in public space.” The court concluded that “the state of the law at the time of the alleged violation” provided a reasonable police officer in a similar situation with “fair warning” that the defendants’ course of conduct in arresting and charging Glik was clearly unconstitutional. For this reason, the court held that the officers were not entitled to qualified immunity.

The Court also found that the police infringed upon Glik's constitutional right against unreasonable search and seizure when they confiscated his cell phone/camera and arrested him. According to the *Glik* Court, there was no probable cause to suspect that the plaintiff had committed a crime, because Glik's recording was in "plain view" and not "secret" within the meaning of Massachusetts's wiretap statute. Thus, the Court affirmed the District Court's order denying the officers' claim of qualified immunity from Glik's Fourth Amendment claim – recognizing that in a similar situation – a reasonable officer would have known that probable cause for arrest under the wiretapping law was absent.

III. Incidents that Support the Need for the Amendment

There have been a number of incidents in Chicago where police, rather than arrest someone for violating the Act, have apparently circumvented the law entirely. In one such case, which occurred on Nov. 12, 2011, involving an NPPA member, Chicago Police officers allegedly interfered with Ralph Braseth, a journalism professor at Loyola University and a credentialed Chicago journalist, as he recorded the detention of a young black male at the Red Line subway stop at Chicago and State streets. Professor Braseth had been working on a documentary regarding the subway migration of Southside teenagers into Chicago on Saturday nights.

According to his complaint filed with the City of Chicago Independent Police Review Authority on Nov. 14, 2011, Braseth was approximately 40 feet away from the incident and on the other side of the turnstile (well out of hearing range) when one of the

officers approached him, twisted his arms behind his back, handcuffed him and then placed him in a nearby police car for about 20 minutes.

In a subsequent interview with an officer in the Chicago Police Internal Affairs Bureau Investigation Division on Jan. 12, 2012, Professor Braseth stated, “he [the police officer] told me why I shouldn't be doing that kind of activity. He told me it interferes with what police are trying to do. He said that stuff usually ends up on YouTube making police look dumb and in a bad light.” Professor Braseth then related how after being asked to play his tape “the shorter officer then said now you’re gonna erase it.” “He reached over with his right hand and deleted the video. There was a command that came up asking, ‘are you sure you want to delete?’ He touched the option on the screen again. He said ‘have a good evening,’ and walked away.”

This extrajudicial procedure is not an isolated incident, but rather a self-help remedy used by police to achieve their goals without the need for paperwork. It is also what often gets officers and their departments into trouble. On Jan. 27, 2012, [a civil jury](#) in the U.S. District Court for the District of Oregon found that a police sergeant violated an environmental activist’s Fourth Amendment rights in 2009 when he arrested him without probable cause, used excessive force, and illegally seized and searched the plaintiff’s video camera without a warrant. The charges were intercepting communications and resisting arrest.

Under Oregon law § 165.543, “Interception of Communications,” provides in pertinent part, “any person who willfully intercepts, attempts to intercept or procures any

other person to intercept or attempt to intercept any wire or oral communication where such person is not a party to the communication and where none of the parties to the communication has given prior consent to the interception, is guilty of a Class A misdemeanor.” The term “oral communication is further defined under § 133.721(7)(a) “Any oral communication, other than a wire or electronic communication, uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation” (emphasis added).

According to reports, the jury awarded the plaintiff \$4,083 for injuries suffered as a result of the sergeant’s use of excessive force, \$1,500 for pain and suffering and \$200,000 for legal fees. Although an internal affairs investigation at the time of the incident determined that the officer’s actions were within departmental policy, that policy has now been changed and according to the police chief “police are discouraged from arresting people for the same offense.”

In a similar case (*Sharp v. Baltimore City Police, et al*) where Baltimore police allegedly seized the camera and deleted the recordings made by a citizen of their arrest of another individual, the U.S. Department of Justice recently filed a Statement of Interest, saying among other things:

This litigation presents constitutional questions of great moment in this digital age: whether private citizens have a First Amendment right to record police officers in the public discharge of their duties, and whether officers violate citizens’ Fourth and Fourteenth Amendment rights when they seize and destroy such recordings without a warrant or due process. The United States urges this Court to answer both of those questions in the affirmative. The right to record police officers while performing

duties in a public place, as well as the right to be protected from the warrantless seizure and destruction of those recordings, are not only required by the Constitution, they are consistent with our fundamental notions of liberty, promote the accountability of our governmental officers, and instill public confidence in the police officers who serve us daily.

The NPPA strongly urges legislators to heed those words regarding public confidence in both law enforcement and legislative intent when considering this bill.

IV. Similar Measures

By amending the Act, Illinois would be joining efforts around the country aimed at clarifying the important constitutional right to record police officers performing their duties in a in public where there is no reasonable expectation of privacy.

Just recently, the Illinois Supreme Court approved a program permitting news cameras into state trial courtrooms for the first time. In announcing the new policy, Illinois Chief Justice Thomas Kilbride said he wanted “to promote greater openness and accountability” in the courtroom, which is also what H.B. 3944 will do on Illinois streets.

My esteemed colleague, Lucy Dalglish, Executive Director of the Reporters Committee for Freedom of the Press, has already provided her excellent testimony in support of this bill and there is no reason to restate some of the other points she has so articulately made, other than to say NPPA fully adopts and supports them and encourages legislators to do the same.

V. Conclusion

At a time when a recent [study](#) showed that 27% of all photos and videos are now captured on smartphones, when more people charged under the Act (or similar acts in other states) are being exonerated and choosing to sue, when the Illinois Supreme Court has permitted cameras at the trial court level, when the First Circuit Court of Appeals has issued an unambiguous decision regarding a similar Massachusetts law and when the U.S Department of Justice (DOJ) has weighed in on a related civil case with a Statement of Interest, NPPA believes (paraphrasing Justice Harlan in *Estes v. Texas*, the 1965 Supreme Court decision regarding courtroom cameras) the day has long since passed when recording officers performing their duty in public should be such a commonplace affair in the daily life of the average person so as to dissipate all reasonable likelihood that such recordings might disparage, impede or endanger a police officer in the performance of his or her duty.

As NPPA has seen firsthand, the widespread mistrust by police officers of the media (or anyone with a camera) and their misguided belief that photography and the recording of their conduct in public places interferes with or impedes their ability to carry out their duties, will only come about through proper police guidelines and training. But cultural change is a slow process, especially when it is enabled by an Act that criminalizes a “self-evident” First Amendment right.

In a time of technology and terrorism, citizens and photojournalists throughout the

world have risked, and in some cases given their lives, to provide visual proof of governmental activities. Sadly, what is viewed as heroic abroad is often considered as suspect or criminal at home. It is therefore incumbent upon the 97th General Assembly of the State of Illinois to immediately enact H.B. 3944.

The NPPA appreciates the opportunity to make these comments in support of a bill that “[e]xempts from an eavesdropping violation the recording of a peace officer who is performing a public duty in a public place and speaking at a volume audible to the unassisted human ear.” Therefore, the NPPA looks forward to the immediate passage of legislation that will address our concerns and protect the rights of the journalists and the people of Illinois. We are available to respond to any questions or concerns should that be necessary. Thank you for your consideration of this important issue.

Respectfully submitted,

NATIONAL PRESS PHOTOGRAPHERS ASSOCIATION

By *Mickey H. Osterreicher*

Mickey H. Osterreicher
Hiscock & Barclay, LLP
1100 M&T Plaza
3 Fountain Plaza
Buffalo, NY 14203
*General Counsel for the National Press
Photographers Association*

(716) 566-1484
lawyer@nppa.org