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Federal Court Upholds First Amendment Right to Secretly Record Public Officials in Public

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Last week, in Martin v. Gross, Chief Judge Patti B. Saris of the U.S. District Court for the District of Massachusetts granted summary judgment in favor of our clients, finding the Massachusetts Wiretap Statute (Mass. Gen. L. ch. 272, § 99) unconstitutional when applied to secret recordings of government officials performing their duties in public. The decision is significant for its clarification of protections under the First Amendment.

The Massachusetts Wiretap Statute makes it a felony to "secretly" record oral communications writ large, regardless of the other circumstances of the recording. Our clients—two civil-rights activists in Boston and the plaintiffs in this case—challenged the Massachusetts Wiretap Statute as unconstitutional under the First Amendment as applied to secret recordings of police officers performing their duties in public. While both plaintiffs have openly recorded law enforcement officials performing their duties in public, both believe secret recording would protect their safety and more accurately document officials' behavior in public.

The plaintiffs filed their complaint in federal court against the Commissioner of the Boston Police Department and the District Attorney for the Count of Suffolk, seeking declaratory and injunctive relief. Proskauer joined the ACLU of Massachusetts as co-counsel shortly after the case began. After successfully opposing the defendants' motions to dismiss and engaging in significant discovery (including motion practice during the discovery phase and multiple depositions), the parties filed cross-motions for summary judgment. In a thorough 44-page decision, Chief Judge Saris granted summary judgment in favor of our clients, concluding that the Massachusetts Wiretap Statute could not constitutionally prohibit the secret audio recording of government officials, including law enforcement officials, performing their duties in public.

Proskauer has long worked with the ACLU to ensure government transparency and accountability. The decision in this case will advance both of those goals by enjoining arrests and prosecutions for constitutionally protected activity.

It was my privilege to lead this Proskauer litigation team which included senior counsel Safraz Ishmael and John Roberts; and associates Jim Anderson, Lucy Wolf and Hena Vora.

Related Professionals

- **William D. Dalsen**
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