

First Circuit Upholds Right to Secretly Record Police in Public

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On December 15, 2020, the U.S. Court of Appeals for the First Circuit [affirmed the grant of summary judgment](#) in favor of our clients, holding the Massachusetts Wiretap Statute (Mass. Gen. L. ch. 272, § 99) unconstitutional when applied to secret recordings of police officers discharging their official duties in public spaces. This decision is the first appellate-level decision recognizing First Amendment protection for this conduct.

The Massachusetts Wiretap Statute: This statute makes it a felony to secretly record oral communications, 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 police officers' behavior in public.

The Decision: The plaintiffs filed their complaint in federal court against the Commissioner of the Boston Police Department and the District Attorney for the County of Suffolk, seeking declaratory and injunctive relief. 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. The District Court granted summary judgment in favor of our clients, holding the Massachusetts Wiretap Statute could not constitutionally prohibit the secret audio recording of government officials, including police officers, performing their official duties in public. The District Attorney appealed.

In an extensive 72-page decision written by Circuit Judge David Barron (and joined by retired Associate Justice David Souter, and Circuit Judge Bruce Selya), the First Circuit affirmed the District Court's grant of summary judgment to our clients, finding that the Massachusetts Wiretap Statute violates the First Amendment by prohibiting the secret, nonconsensual audio recording of police officers discharging their official duties in public spaces.

The Impact: Proskauer has long worked with the ACLU of Massachusetts to ensure government transparency and accountability. The decision in this case will advance both of those goals not only by enjoining arrests and prosecutions for constitutionally protected activity in Massachusetts, but by establishing important appellate precedent to protect civil liberties throughout the United States.

It was my privilege to lead the Proskauer team on this appeal, which included Partner [John E. Roberts](#), and to lead the Proskauer litigation team at the District Court, which included associates [Jim Anderson](#), [Lucy Wolf](#), and [Hena Vora](#).

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