

Notes Regarding 11-1286 ACLU v. Alvarez Ruling

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JUDGE STEVEN J. GOEBEL-1954
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CLERK OF THE CIRCUIT COURT
CRIMINAL DIVISION

Page 3:

- a. 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.
- b. The Illinois Eavesdropping statute restricts far more speech than necessary to protect legitimate privacy interests.

Page 23:

- * * a. Audio and audiovisual recording are media of expression commonly used for the preservation and dissemination of information and ideas and thus are "included within the free speech and free press guaranty of the First and Fourteenth Amendments."
- b. Laws that restrict the use of expressive media have obvious effects on speech and press rights; the Supreme Court has "voiced particular concern with laws that foreclose an entire medium of expression."
- c. Recognizing that the internet is a "dynamic, multifaceted category of communication" and that there is "no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium."

Page 23-24:

- * * a. The act of making an audio or audiovisual recording is necessarily included within the First Amendment's guarantee of speech and press rights as a corollary of the right to disseminate the resulting recording.

Page 24:

- * a. The Illinois eavesdropping statute regulates the use of a medium of expression; the Supreme Court has recognized that "regulation of a medium [of expression] inevitably affects communication itself."
- * b. Put differently, the eavesdropping statute operates at the front end of the speech process by restricting the use of a common, indeed ubiquitous, instrument of communication. Restricting the use of an audio or audiovisual recording device suppresses speech just as effectively as restricting the dissemination of the resulting recording.

Page 26:

- a. So too with laws that restrict audio recording. Audio and audiovisual recording are communication technologies, and as such, they enable speech. Criminalizing all non-consensual audio recording necessarily limits the information that might later be published or broadcast – whether to the general public or to a single family member or friend – and thus burdens First Amendment rights.

Page 27:

- a. This agreement “reflects our profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.”
- b. Moreover, “the first Amendment goes beyond protection of the press and self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw.”
- c. The freedom of speech and press “embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment.”

Page 34:

- a. As applied here, it interferes with the gathering and dissemination of information about government officials performing their duties in public. Any way you look at it, the eavesdropping statute burdens speech and press rights and is subject to heightened First Amendment scrutiny.

Page 39:

- a. Either way, it should be clear by now that its effect on First Amendment interests is far from incidental. To the contrary, the statute specifically targets a communication technology; the use of an audio recorder – a medium of expression – triggers criminal liability. The law’s legal sanction is directly leveled against the expressive element of an expressive activity. As such, the statute burdens First Amendment right directly, not incidentally.

Page 47:

- a. Rather than attempting to tailor the statutory prohibition to the important goal of protecting personal privacy, Illinois has banned nearly all audio recording without consent of the parties - including audio recording that implicates no privacy interests at all.

Page 48:

- a. But in terms of the privacy interests at stake, the difference is not sufficient to justify criminalizing this particular method of preserving and publishing the public communications of these public officials.

Page 50:

- ~~16-17~~ a. We note, however, that audio and audiovisual recording are uniquely reliable and powerful methods of preserving and disseminating news and information about events that occur in public. Their self-authenticating character makes it highly unlikely that other methods could be considered reasonably adequate substitutes.

Page 51:

- ~~16-17~~ a. But the Illinois eavesdropping statute obliterates the distinction between private and non-private by criminalizing all nonconsensual audio recording regardless of whether the communication is private in any sense. If protecting privacy is the justification for this law, the law must be more closely tailored to serve that interest in order to avoid trampling on speech and press rights.