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FOR FREEDOM OF THE PRESS

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In the Illinois House of Representatives Judiciary Committee – Subcommittee on Civil Law

Testimony of the Reporters Committee for Freedom of the Press In support of House Bill 3944

Lucy A. Dalglish, Executive Director

The Reporters Committee for Freedom of the Press strongly endorses House Bill 3944, sponsored by Rep. Elaine Nekritz, which would create an exemption from criminal prosecution under the Illinois Eavesdropping Act for the “[r]ecording 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.”

The Reporters Committee is a not-for-profit association based in Arlington, Va., that has worked to preserve the First Amendment rights of all journalists and citizens since 1970.

This amendment is important to ensure the continued vitality of the news media, to guard against both the actual use of excessive force by police and false allegations of the same by disgruntled arrestees, to provide accurate evidence of wrongdoing by any party in such an action, and to protect the vital First Amendment interests possessed by both reporters and citizens to gather and disseminate information.

The Illinois Eavesdropping Act is the only law of its type in the United States. It criminalizes the use of an audio-recording device “for the purpose of hearing or recording all or any part of any conversation . . . unless [done] with the consent of all of the parties to such conversation or electronic communication” The law defines “conversation” as “any oral communication between 2 [sic] or more persons regardless of whether one or more of the parties intended their communication to be of a private nature under circumstances justifying that expectation.”

While many states prohibit eavesdropping of electronic communications or in clearly private settings, the Illinois law goes further. By criminalizing the nonconsensual recording of conversations to which the participants have *no* reasonable expectation of privacy, the law makes it a crime to audio-record police officers, in public, engaged in their public duties. The practical effect of this excessively broad law is to make it a crime for journalists and citizens alike to audio-record all interactions with police officers, even those in which either the police or the citizen may be engaging in misconduct. This threatens the core values of free speech and a free press enshrined in the First Amendment, and the corresponding rights to gather and disseminate information that the Supreme Court of the United States has held to be implicit in the First Amendment and in our national concept of liberty.

The Reporters Committee believes that *no* audio or video recordings made in a public place where there is no reasonable expectation of privacy should be illegal, whether the subject of the recording is a police officer or any other public official. While H.B. 3944 is an important step in the right direction, we nonetheless believe that the Eavesdropping law should be amended further. *Illinois v. Allison*, a case currently pending before the Supreme Court of Illinois, provides an illustrative example of both the benefits and shortcomings of the current bill. In that case, Mr. Allison was arrested and charged with five counts of violating the Eavesdropping Act. The grounds for these charges were allegations that Mr. Allison had recorded the Oblong, Ill. Chief of Police, an Oblong police officer, an employee of the Crawford County Circuit Court clerk's office, two Oblong city attorneys, and a Crawford County Judge while performing their public duties in public places without their consent. Each of these recordings was protected by the U.S. Constitution (as the Illinois Supreme Court will undoubtedly rule), but H.B. 3944 would decriminalize only Mr. Allison's alleged recordings of the two police officers. The Circuit Court struck down the law as unconstitutional as applied to Mr. Allison, and as a result the Illinois Attorney General has taken an automatic appeal as of right to the Illinois Supreme Court.

House Bill 3944 will ensure accuracy and accountability for all parties involved in police interactions. As Chicago Police Superintendent Garry McCarthy said last week at a panel discussion on police recording at the

Loyola University of Chicago, “There’s no arguments when you can look at a videotape and see what happened.” Superintendent McCarthy endorsed video and audio recording of police interactions at the panel discussion. See Abdon M. Pallasch and Adeshina Emmanuel, *McCarthy: It’s Good to Record Officers*, CHICAGO SUN-TIMES, January 29, 2012, *available at* <http://www.suntimes.com/news/politics/10289970-418/mccarthy-its-goodto-record-officers.html>.

Beyond the clarity audio and video recordings offer to disputes between police and citizens, recording is a critical component of newsgathering more generally, and the changes in the media landscape have only made this reality starker. From the videos taken by Egyptian “citizen journalists” depicting protests and crackdowns in Tahrir Square that flooded the internet last spring, to the coverage of American political candidates on the campaign trail, audio and video recording serves an irreplaceable role in the newsgathering process.

With the ever-increasing proliferation of inexpensive and high quality recording devices on the cell phones of the citizens of Illinois and the rise of user-submitted video websites like YouTube, the traditional boundaries between the institutional media and their audience have become blurred. Indeed, as the First U.S. Circuit Court of Appeals noted last year in the case of *Glik v. Cunniffe*, 655 F.3d 78 (1st Cir. 2011), “news stories are now just as likely to be broken by a blogger at her computer as a reporter at a major

newspaper.” The long-recognized role of the press to serve as a watchdog both of police excess *and* of frivolous lawsuits against police now belongs as much to the bystander on the street as to the reporter on the beat.

The Eavesdropping Act as it exists today has been subject to a rash of abuses – many of which will be cured by House Bill 3944. Last year, Tiawanda Moore, a 20 year-old resident of Chicago, was arrested and tried for violating the Eavesdropping law when she recorded two police officers who were obfuscating her attempts to file a sexual harassment complaint against another officer. She faced 15 years in prison for attempting to force accountability on the police. The fact that she was ultimately acquitted by a jury indicates the distaste that the people of Illinois feel for this law. Ms. Moore has now filed a civil rights lawsuit against the Chicago police department for violation of her constitutional rights.

As committee members undoubtedly know, the law is under direct constitutional challenge in two pending cases. *ACLU of Illinois v. Alvarez*, under advisement before the Seventh U.S. Circuit Court of Appeals, is a pre-enforcement challenge seeking to strike the law on First Amendment grounds. And *Illinois v. Allison*, as noted above, is currently before the Supreme Court of Illinois. The state trial court struck down the law as unconstitutional. Passage of H.B. 3944 would likely moot two of the charges at issue in *Allison*, but important constitutional questions would remain.

Moreover, the law as it is currently drafted creates an unjust double standard. Police officers are specifically exempted from liability for recording traffic stops and uses of nonviolent force. Under the law, these recordings must be retained for a minimum of 90 days unless they are made as part of an arrest or are to be used as evidence in a criminal, civil, or administrative proceeding. Police are thus given the statutory right to record events, recordings which may prove exculpatory to officers accused of misconduct, while citizens of Illinois are given no opportunity to create a comparable record.

Illinois' current law is the strictest in the nation. It is the only such law in the United States that criminalizes the nonconsensual recording of conversations regardless of whether the participants to the recording have a reasonable expectation of privacy in their conversations. While the question of whether the First Amendment creates a right to record public officials, in public, engaged in their public duties, has arisen in multiple states, only in Illinois is it clear that such conduct is expressly forbidden by law. In other cases where police have arrested people for recording, the charges have generally been thrown out because they were not covered under the relevant statute. But in Illinois, the law is broad, it is all encompassing, and it is bad policy.

With the G8 and NATO Summits to be held in Chicago this coming May, the world's eyes will be on Illinois. There will be protests, and there will

be arrests. Now is the time to reform Illinois' law so that America's reputation as a bastion of a vibrant and robust press and of police forces with nothing to hide will be affirmed before the thousands of visitors who will come from all over the world.

The Reporters Committee respectfully asks this committee to recognize the strong public policy interests – for both police and citizens – in being able to record police interactions.

Respectfully Submitted,

Lucy A. Dalglish
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