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The Public Servant

The newsletter of the Illinois State Bar Association's Committee on Government Lawyers

Applying Illinois' eavesdropping law to government practice

BY ROBERT P. OSGOOD

On February 16, 2018, 13-year-old Paul Boron decided to record his interaction with school officials when he was called to the principal's office over missing detention. The Kankakee County state's attorney charged Boron with a Class 4 felony.

Illinois' current eavesdropping law makes it a crime to record a "private conversation" without the consent of all parties, with some exceptions.[1]

History of the Law

Illinois' original eavesdropping law was enacted in 1961.[2] The two-party consent requirement was added in 1976.[3] In 1986, the Illinois Supreme Court took a rather narrow approach to the eavesdropping statute, making audio recordings illegal only if the circumstances entitled the parties to believe that the conversation was

Continued on next page

Applying Illinois' eavesdropping law to government practice
1

Are public sector unions in Illinois on the brink of extinction?
1

In sites: Vendor discounts!
4

Are public sector unions in Illinois on the brink of extinction?

BY EMILY R. VIVIAN

With less than five months until the Illinois gubernatorial election, the United States Supreme Court handed Governor Rauner a significant victory with its decision in *Janus v. AFSCME*, 138 S.Ct. 2448 (2018). During his campaign in 2014, Governor Rauner actively rallied against the unions and has shown very little support for unions since being elected. On Wednesday, June 27, 2018, the U.S. Supreme Court ruled that requiring nonmembers of public unions to pay fees to the union is a violation of free speech.

Specifically, the Court held, "Under Illinois law, public employees are forced to subsidize a union, even if they choose not to join and strongly object to the positions the union takes in collective bargaining and related activities. We conclude that this arrangement violates the free speech rights of nonmembers by compelling them to subsidize private speech on matters of substantial public concern."[1] Prior to this ruling, *Abood v. Detroit Board of Education,* 97 S.Ct. 1782 (1977) was the controlling law. In *Abood*, the Supreme Court held that "insofar as the service charges were used to finance expenditures by the union for collective bargaining, contract administration and grievance adjustment purposes," then the agency shop clause of public teachers' bargaining

Continued on page 4

Applying Illinois' eavesdropping law to government practice

CONTINUED FROM PAGE 1

private and could not be heard by others who were acting in a lawful manner.[4]

In 1994, the Illinois General Assembly overrode the prior case law by amending the statute to apply to "any oral communication between two 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."[5]

The law was struck down in March of 2014 by the Illinois Supreme Court on First Amendment grounds.[6] The previous iteration of the law "deem[ed] all conversations to be private and, thus, not subject to recording absent consent, even if the parties have no expectation of privacy."[7] The court found that the statute burdened substantially more speech than was necessary to serve a legitimate State interest in conversational privacy, and therefore was constitutionally overbroad.[8]

And so, during lame duck session in December of 2014, the new eavesdropping law was passed and signed by Governor Quinn.[9] The new law changed the definition of "conversation" to include communications where one or more parties is reasonably justified in expecting the conversation to be private. This new "reasonable expectation" standard is difficult to apply, as we will see.

What Is a Private Conversation?

What constitutes a "private conversation" is unclear. Sec. 14-1(d) defines "private conversation" as "any oral communication between 2 or more persons, whether in person or transmitted between the parties by wire or other means, when one or more of the parties intended the communication to be of a private nature under circumstances reasonably justifying that expectation. A reasonable expectation shall include any expectation recognized by law, including, but not limited to, an expectation derived from a privilege, immunity, or right established by common law, Supreme Court rule, or the Illinois or United States Constitution."

In Boron's case, at Manteno Middle School, the recorded conversation took place in what is described as the reception area of the secretary's office, with the door open to the hallway.[10] Would any of the parties have had a "reasonable expectation" of privacy in this setting? Does a government employee, performing their government job, even have an expectation of privacy?

In Senate debate, Senator Kwame Raoul was asked to explain the "reasonable expectation" language in the bill.[11] Senator Raoul offered, as an example, that the First Amendment contains the right to petition the government, and that the reasonable expectation language protects those conversations in which individuals are exercising their right to petition their elected officials.[12] He went on to give examples of conversations with legislators involved in legislative activity and attorney-client communications.[13] The principal wasn't exercising any such right in the Manteno case.

When Are You Allowed to Record?

So just when can you record someone? The threshold questions are whether the conversation is private, and whether the recording is done secretly. The law allows recording if the conversation is not private, that is, there is no reasonable expectation of privacy as defined above. Also, there is no violation unless the recording is "surreptitious," defined as "obtained or made by stealth or deception, or executed through secrecy or concealment."[14]

Recordings for various investigatory purposes, such as wiretaps, are exempted, of course; however, some other notable exemptions related to government employees are the police interaction, open meeting, and fear-of-crime exemptions.

The law was amended in 2016 to allow citizens to record police interactions.[15] This amendment cemented the right enunciated

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in the seventh circuit case of *ACLU v. Alvarez* from 2012.[16] The question presented in this case was whether a First Amendment right to film police officers performing official duties in public exists.[17] The court found that there is no government interest in protecting conversational privacy when police officers are performing their duties in public places and engaging in public communications audible to persons who witness the events.[18] The broader implication of this decision is how it might apply to other government employees, such as teachers[19] or judges.[20]

In 2010, Michael Allison was charged with a felony for recording his own court hearing, which he did since he was not entitled to a court reporter for a misdemeanor zoning violation. "You violated my right to privacy," Crawford County Circuit Judge Kimbara Harrell told him in open court.[21] On the eavesdropping charge, the court found that Mr. Allison had a First Amendment right to record public officials performing their public duties (which, in this case, included not only the judge, but police, circuit clerk employees, and city attorney employees) and that the eavesdropping statute unconstitutionally prohibited recording without the public officials' consent. "A statute intended to prevent unwarranted intrusions into a citizen's privacy cannot be used as a shield for public officials who cannot assert a comparable right of privacy in their public duties."[22]

The law also allows recording meetings required to be open under the Open Meetings Act.[23] The Open Meetings Act allows anyone to record a meeting required to be open by the Act, subject to reasonable rules, except in the case of a witness who refuses to testify if recorded.[24] How, then, might the law apply to *closed* sessions? Although the Open Meetings Act requires a closed meeting to be recorded, someone making his or her own recording without the others' consent would violate the law.[25]

There is also an exemption allowing surreptitious recording if a party has "reasonable suspicion that another party to the conversation is committing, is about to commit, or has committed a criminal offense against the person or a member of his or her immediate household, and there is reason to believe that evidence of the criminal offense may be obtained by the recording."[26] This exemption "requires (1) a subjective suspicion that criminal activity is afoot, and (2) that the suspicion be objectively reasonable."[27] It is this exemption the defendant in *People v. Melongo* asserted.[28] Essentially, Melongo noticed a discrepancy in the court transcript in her computer tampering case. When she could not get the court reporter to correct the transcript, she recorded three conversations with a supervisor at the Cook County Court Reporter's Office.[29] At trial, she attempted to argue that the court reporters were part of a criminal conspiracy; however, the court did not address the applicability of the exemption, instead ruling on First Amendment grounds.[30]

Takeaways

It's unclear why Mr. Boron decided to record his conversation with school officials. Could he have had a reasonable suspicion a crime was about to occur? Certainly there have been several recent incidents at schools where students were mistreated or assaulted by school staff.[31] Was the school justified in having Mr. Boron arrested for recording a government employee performing his government job in a public place? Could the law be expanded beyond the police to include other government officials acting in public? In House debate of the eavesdropping bill, Representative Elaine Nekritz stated that the law would no longer make it a crime for a civilian to record a government employee doing their government job.[32] After all, "[g]athering information about government officials in a form that can readily be disseminated to others serves a cardinal First Amendment interest in protecting and promoting 'the free discussion of governmental affairs.'"[33] ■

The author is senior counsel and ethics officer for the Illinois Department of Central Management Services.

1. 720 ILCS 5/Art. 14.
2. 1961 Ill. Laws 1983.
3. P.A 79-1159.
4. *People v. Beardsley,* 503 N.E.2d 346, 351 (1986).
5. P.A. 88-677.
6. *People v. Melongo*, 2014 IL 114852.
7. *Id*. ¶ 28.
8. *Id*. ¶ 31.
9. .A. 98-1142.
10. Austin Berg, *Illinois 13-year-old Charged with Eavesdropping Felony for Recording Meeting with Principal*, Illinois Policy Institute, June 21, 2018.
11. Ill. Sen., 98th Gen. Ass., 141st Leg. Day, Dec. 4, 2014, at 70.
12. *Id*. at 71.
13. *Id*. at 72.
14. 720 ILCS 5/14-1(g).
15. P.A. 99-352.
16. 679 F.3d. 583 (7th Cir. 2012).
17. *Id*. at 587.
18. *Id*. at 587.
19. See generally, Erin Logan, *She was Worried how a 'Teacher of the Year' Treated her 5-year-old Son. So she Made a Secret Recording*, The Washington Post, July 6, 2018; Kristine Phillips, *Charges Dropped against Mom Who Sent Daughter to School with Recorder to Catch Bullies*, The Washington Post, Nov. 29, 2017.
20. *People v. Michael D. Allison*, No 2009-CF-50.
21. Jacob Huebert, *Illinois Supreme Court Strikes Down Eavesdropping Law*, Illinois Policy Institute, March 20, 2014.
22. Helen Gunnarsson, *Is the Illinois Eavesdropping Act Unconstitutional? The Saga Continus ...* , 99 Illinois Bar Journal 604 (2011).
23. 720 ILCS 5/14-3(e).
24. 5 ILCS 120/2.05.
25. Michigan school superintendent charged with recording a closed session of a school board. Jason Ogden, *Eavesdropping Charges against Hale Superintendent Dropped*, Iosco County News Herald, June 5, 2018.
26. 720 ILCS 5/14-3(i).
27. *Carroll v. Merrill Lynch*, 2012 WL 4875456, (7th Cir. 2012).
28. 2014 IL 114852.
29. *Melongo* at ¶ 6.
30. *Id*. ¶ 10.
31. See generally, Joe Malinconico, *Kicking Incident Prompts Removal of Paterson Kennedy Vice Principal*, Northjersey.com, July 11, 2018; Brooke Zauner, *Teacher Fired After Cell Phone Records Him Cursing at Students*, WRDW, Feb. 23, 2018; Rich Van Wyk, *Parents Say Recording Captures Teacher 'Berating, Threatening' Student*, WTHR, Feb. 1, 2018.
32. Ill. House, 98th Gen. Ass., 151st Leg. Day, Dec. 3, 2014, at 137.
33. *Alvarez* at 601.

Are public sector unions in Illinois on the brink of extinction?

CONTINUED FROM PAGE 1

agreement was valid and did not violate the First Amendment.[2] In other words, the Court previously held that it is not a violation of a person's First Amendment rights to require public employees to subsidize a union.

With the recent ruling in *Janus*, the Court overturned long-standing law, the result of which is that Illinois is now a right-to-work state for public sector unions. Obviously, this decision is a major blow to public sector unions, and only time will tell whether public sector unions will continue to survive in Illinois. ■

1. *Janus v. AFSCME*, 138 S.Ct. 2448, 2460 (2018).
2. *Abood v. Detroit Board of Education*, 97 S.Ct. 1782, 1794 (1977).

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