



Written by [Jack Kenny](#) on August 31, 2011

Court Denies Police Immunity in Video Arrest

Glik's suit claims police violated his First Amendment rights by stopping him from recording and his Fourth Amendment rights by arresting him without probable cause. The officers appealed a district court ruling denying them qualified immunity from the suit. A ruling by a three-judge panel of the appeals circuit on Friday of last week upheld the lower court's decision.



"The First Amendment issue here is, as the parties frame it, fairly narrow," wrote Judge Kermit Lipez for the unanimous panel; "Is there a constitutionally protected right to videotape police carrying out their duties in public? Basic First Amendment principles, along with case law from this and other circuits, answer that question unambiguously in the affirmative."

According to court records, Glik was walking by when he saw Boston police officers John Cuniffiee, Peter J. Savalis, and Jerome Hall-Brewster arresting a young man on the Boston Common. He heard another bystander calling out to the police that they were hurting the man and telling them to stop. Suspecting the police may have been using excessive force, Glik stood roughly 10 feet away and began recording the arrest on his cellphone, when one of the officers approached and told him, "I think you have taken enough pictures."

"I am recording this," Glik replied. "I saw you punch him." When asked if his cellphone recorded audio, Glik said it did. At that point he was handcuffed and arrested for unlawful audio recording in violation of the Massachusetts wiretap statute. Police confiscated his cellphone and computer flash drive and held them as evidence. Glik was charged with violating the wiretap law, disturbing the peace, and aiding in the escape of a prisoner. The state dropped the aiding in the escape charge, and the Boston Municipal Court dismissed the other two, observing that the fact that the "officers were unhappy they were being recorded during an arrest ... does not make a lawful exercise of a First Amendment right a crime."

Glik next filed an internal affairs complaint with the Boston Police Department, which the department never investigated. In February 2010, he filed a civil rights action, claiming violations of his First and Fourth Amendment rights and of the Massachusetts Civil Rights Act, also claiming malicious prosecution. The defendants moved for dismissal arguing that the allegations of the complaint failed to support Glik's claims and that the officers were entitled to qualified immunity "because it is not well settled that he had a constitutional right to record the officers." The district court disagreed, holding that in the First Circuit, "this First Amendment right to publicly record the activities of police officers on public business is well established."

In upholding that ruling, the appeals court pointed out that the incident occurred in a public place and



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concluded that Glik's recording of it in no way interfered with or hindered the police in making their arrest.

"Glik's exercise of his First Amendment rights fell well within the bounds of the Constitution's protections," Judge Lipez wrote. "Glik filmed the defendant police officers in the Boston Common, the oldest city park in the United States and the apotheosis of a public forum. In such traditional public spaces, the rights of the state to limit the exercise of First Amendment activity are 'sharply circumscribed.'" The court also denied the appeal for immunity from Glik's Fourth Amendment claim, finding the police lacked probable cause to believe that the recording violated the wiretapping law. The statute bans a secret recording or intercepting of wire or oral communications, and Glik's action was in the open and evident to the police at the time he was recording, the court ruled.

"Simply put, a straightforward reading of the statute and case law cannot support the suggestion that a recording made with a device known to record audio and held in plain view is 'secret,'" Lipez wrote.

The court cited as precedent rulings in previous cases, including one in which a cable TV producer was found to be acting within his First Amendment rights when he recorded public officials conversing in a hallway at the Pembroke (Mass.) Town Hall following a meeting of the town's Historic District Commission. The newsgathering value protected by the First Amendment does not apply only to newspapers or over-the-air broadcast stations, the court said.

Moreover, changes in technology and society have made the lines between private citizen and journalist exceedingly difficult to draw. The proliferation of electronic devices with video-recording capability means that many of our images of current events come from bystanders with a ready cell phone or digital camera rather than a traditional film crew, and news stories are now just as likely to be broken by a blogger at her computer as a reporter at a major newspaper. Such developments make clear why the newsgathering protections of the First Amendment cannot turn on professional credentials or status.

It remains to be seen what effect the ruling will have in Massachusetts and in other states on what has become a common police practice. The [New Hampshire Union Leader](#) noted Wednesday that arrests for recording police actions in public have been made in a number of New Hampshire communities, including Manchester, Nashua, Portsmouth, Keene, and Weare. In June of this year, a Rochester, New York, woman was charged with obstructing governmental administration for videotaping a police traffic stop [from her own front yard](#). She was arrested when she continued to stay outside and tape after a police officer had told her to go inside. The state withdrew the charge and a judge dismissed the case.

In some cases the arrests are made after the video is posted on the Internet. Stopped outside of Baltimore, Maryland, for speeding and reckless driving, motorcyclist Anthony Graber posted a video on YouTube a week later showing a plainclothes state trooper cutting him off and drawing a gun. Graber recorded the stop with a camera on his helmet. In April, police raided Graber's parents' home. "They confiscated his camera computers and external hard drives," [ABC News reported](#). "Graber was indicted for allegedly violating state wiretap laws by recording the trooper without his consent."

Police arrested Sharron Tasha Ford in Boynton Beach, Florida, two years ago for videotaping an encounter between police and her teenage son at a movie theater. Prosecutors chose not to file charges. Her lawyer, James Green, told ABC a video and/or audio recording is often the only evidence of police abuse or of a defendant's innocence. "Judges and juries want to believe law enforcement," Green said. "They want to believe police officers and unless you have credible evidence to contradict police



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officers, it's often very difficult to get judges or juries to believe the word of a citizen over a police officer."



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