

RECORDING POLICE ENCOUNTERS: CHEAT SHEET



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Executive Summary

Citizens' widespread use of mobile devices to record the police during stops raises important concerns. Well-intentioned bystanders and victims of police violence in some jurisdictions may overestimate their Constitutional rights. Misunderstanding these rights has led to criminal liability in states where the audio or video recording of police interactions is a crime.

State and federal laws differ and it is often difficult to know in the heat of the moment whether it is legal to record the police. The short answer is that it is legal most of the time. However, we thought readers would benefit from a cheat sheet showing which jurisdictions still prohibit recording police misconduct without getting the officer's consent.

We've included a brief background for those who are interested. For those who are only interested in knowing what the law is in a particular state, jump to page 7 for the cheat sheet.

The Limited Scope of the Fourth Amendment

"There is no specific provision in the Fourth Amendment to which a defendant charged with recording law enforcement can refer."

Background

The Fourth Amendment of the United States Constitution secures the "right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures". So defendants can introduce recorded evidence at trial to establish whether an officer has violated their rights. But there's no specific provision in the Fourth Amendment to which a defendant charged with recording law enforcement can refer. Nor has the Supreme Court weighed in to create a nationwide standard.

Further, while the federal Electronic Communications Privacy Act (ECPA) establishes a federal electronic surveillance standard, it does not afford citizens a right to record the police.¹

In the absence of a binding federal precedent, state law controls.

"[S]tate statutes continue to play an enormous role in determining citizens' rights to record police officers in public."

State Standards

Besides the federal surveillance statutes, state legislatures have also developed their own electronic surveillance laws. These state statutes continue to play an enormous role in determining citizens' rights to record police officers in public. However, these laws are subject to the Supremacy Clause of the U.S. Constitution.²

Consent standards

The degree of protection to which a state allows its citizens to record the police in public spaces depends on whether the state uses a "one-party" or "all-party" consent standard. We root both ways of looking at consent in the First Amendment.³

State Power



One-Party Consent Standard

In one-party consent states, citizens may film police with the consent of only one party. This is premised upon officers' First Amendment right to privacy. These states don't require the officer to consent to being recorded.

All-Party Consent Standard

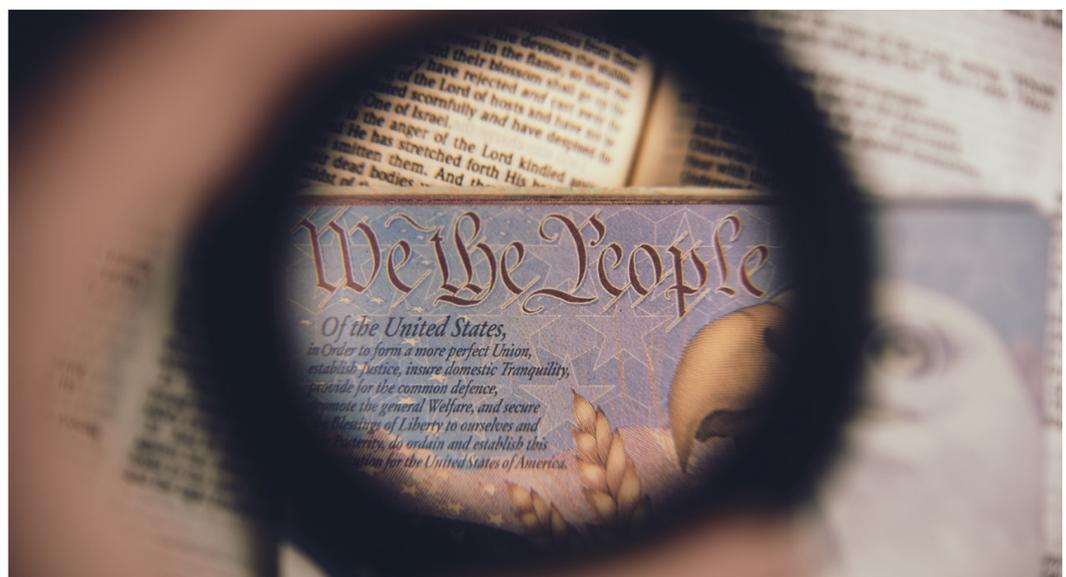
In all-party consent states, the officer must consent to recording. In some states, recording police officers is a crime. For example, the Commonwealth of Massachusetts criminalizes the secret recording of police officers: In *Commonwealth v. Hyde*, the Supreme Judicial Court of Massachusetts upheld the felony conviction of a defendant for secretly filming the police.⁴

All-Party Consent Standard

Since the Supreme Court has not issued an opinion on the right of individuals to record police officers, courts recognize Constitutional protection only in some jurisdictions. For example, in *ACLU v. Alvarez*, a federal case, the 7th Circuit found that the ACLU's First Amendment right to record police activity outweighed the officer's privacy, all but overturning the Illinois law prohibiting the filming of police.⁵ The Supreme Court declined to review this case.

Which Law Applies?

Although the Supremacy Clause of the United States Constitution preempts state law, some states in jurisdictions in which federal courts have afforded negative treatment to two-party consent rules have nevertheless kept two-party consent electronic surveillance statutes in place . The states include California,⁶ Montana,⁷ Nevada,⁸ Washington,⁹ Florida,¹⁰ Illinois,¹¹ Pennsylvania,¹² Massachusetts,¹³ and New Hampshire.¹⁴ These are indicated in yellow on the cheat sheet. In these states, one could still be arrested, charged, and have to endure a lengthy trial process.



Conclusion

We hope the cheat sheet on the next page proves to be a valuable resource as you seek to make sense of the complex implications of recording police interactions in the U.S.

It's important to keep in mind that the law is constantly changing and that you should always seek the advice of an attorney when interpreting this document or if you have specific questions.

As such, this publication is provided for your convenience and does not constitute legal advice.

Notes

1. 18 U.S.C. §§ 2510-2523 (2019).
2. U.S. Const. Art. VI.
3. U.S. Const. Amend. I.
4. *Commonwealth v. Hyde*, 750 N.E.2d 963 (Mass. 2001)(upholding a felony conviction for violating a state law prohibiting the recording of police officers.)
5. *ACLU v. Alvarez*, 679 F.3d 583 (7th Cir. 2012)(striking down the application of an Illinois surveillance law to the recording police officers).
6. Cal. Penal Code § 630 *et seq.*
7. Mont. Code Ann. § 45-8-213.
8. Nev. Rev. Stat. §§ 200.610-20.
9. Wash. Rev. Code § 9.73.030.
10. Fla. Stat. §§ 934.01-.03.
11. 720 Ill. Comp. Stat. 5/14-1,2.
12. 18 Pa. Cons. Stat. § 5701 *et seq.*
13. Mass. Gen. Laws ch. 272, § 99.
14. N.H. Rev. Stat. Ann. §§ 570.