

# SECRET AUDIO RECORDINGS



- Two recent highly publicized cases
- Martin, et al. v. District Attorney of Suffolk County  
Project Veritas Action Fund v. District Attorney of Suffolk County
- Consolidated for purposes of decision
- December 10, 2018 Decision of the United States District Court for the District of Massachusetts
- Re: Massachusetts General Laws Chapter 272, §99 (“Section 99”) – A felony
- In short, Section 99 prohibits all secret audio recording of any encounter with a law enforcement official or any other government official
- Punishment by a fine up to \$10,000 and imprisonment for up to five years
- The main issue in the case was whether the right to secretly record was protected by the First Amendment

## ISSUES

- Section 99, in relevant part, criminalizes the willful “interception” of any “communication.” An “interception” occurs when one is able “to secretly hear, secretly record, or aid another to secretly hear or secretly record the contents of any wire or oral communication through the use of any intercepting device” without the consent of “all parties to such communication.” Thus, the statute does not apply to open (or non-secret) recording or to video recording (without audio).
- The plaintiffs in Martin argued that Section 99 violates the First Amendment insofar as it prohibits the secret audio recording of police officers performing their duties in public. The plaintiffs in Project Veritas make a similar, though broader, argument: that Section 99 violates the First Amendment insofar as it prohibits the secret audio recording of government officials performing their duties in public.
- **Decision**: The Court held that secret audio recording of government officials, including law enforcement officials, performing their duties in public spaces is protected by the First Amendment, subject only to reasonable time, place, and manner restrictions.
- With regard to those restrictions the Court held that police are free to “take all reasonable steps to maintain safety and control, secure crime scenes and accident sites, and protect the integrity and confidentiality of investigations.” . . . If an officer needs to protect the safety of an informant or her fellow officers, or seeks to preserve conversational privacy with a victim, the officer may order the recording to stop or to conduct the conversation at a safe remove from bystanders or in a private (i.e., non-public) setting.

## LOOSE ENDS

- Some difficult questions remain about what constitutes a “public space” and who is considered a “government official” for purposes of the right to record.
- Public Space
  - Probably includes the Boston Common, and many of the police-involved scenarios that the plaintiffs in Martin desire to secretly record would occur in similar locations -- traditional public forums like parks, streets, and sidewalks.
  - However, the plaintiffs in Martin believe the right to secretly record the police extends to private property that is open to the general public, such as a restaurant. For example, one of Martin’s recordings of police activity occurred at the Arizona BBQ restaurant from a vantage point on the sidewalk outside the restaurant.
- Government Official
  - Cases cited by the Court teach that a police officer falls within the ambit of “government official.” But who are these other “government officials?”

## NO DEFINITIVE ANSWER TO THE LOOSE ENDS

- The Court stated:

“The parties did not focus on defining “public space” or “government official,” and it is not prudential . . . to do so now. While Glik’s use of the term “public space” seems to indicate something broader than “public forum,” and its use of the term “government official” includes a broader scope of public official than “law enforcement officer,” the Court leaves it to subsequent cases to define these terms on a better record.”

- **Advice on a Worst Case Scenario:** Elected representatives and municipal employees should assume they are included in the category of “government officials” who can be secretly recorded in a public space.