



Restrictions on “Filming, Recording, Photographing, or Documenting” Police Officers

House Bill 2918

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Summary

The restrictions placed on the filming, recording, photographing, and documenting of police officers in HB 2918 are unconstitutional and unwise policy. Legislators should oppose the bill.

HB 2918 proposes to amend section 38.15 of the Texas Penal Code by criminalizing the “filming, recording, photographing, or documenting” a police officer within 25 feet of his performance of his official duties.¹ Additionally, it criminalizes the “filming, recording, photographing, or documenting” of a police officer within 100 feet if the individual is carrying a concealed handgun.²

The bill appears to be an effort to address the concerns of police officers who have become frustrated with citizen groups that film police activities such as arrests and traffic stops.

The Texas Public Policy Foundation opposes the proposed legislation on both legal and policy grounds. As a legal matter, the bill likely violates the First Amendment and would not withstand scrutiny in state or federal court. As a policy matter, the proposed legislation is an example of unwise overcriminalization.

The Legal Argument against HB 2918

The First Amendment to the U.S. Constitution provides that “Congress shall make no law...abridging the freedom of speech or of the press,” and this prohibition has repeatedly been incorporated against the states. The First Circuit Court of Appeals has interpreted the First Amendment to protect the right of individuals to videotape police officers performing their duties in public—although they have also noted that reasonable time, place and manner restrictions apply.³ HB 2918 contains language that, apparently, tries to address these constitutional concerns. The effort, however, is insufficient.

First, while the bill does exempt members of the news media from the prohibition against filming officers within the 25- or 100-foot radius, the term “news media” is poorly defined. Traditional media (e.g., newspapers, magazines) are clearly included, but non-traditional media (bloggers, on-line news sites, or even individuals who disseminate news via social media) are ignored. More importantly, it is not clear that First Amendment concerns are eliminated merely by acknowledging the news media’s right to record. After all, individuals who are not members of the media also have First Amendment rights.

Secondly, the 25- and 100-foot radius designations are not reasonable restrictions. One could imagine a dozen hypotheticals in which these restrictions would certainly be unreasonable. Consider, for example, a person sitting in the passenger seat or backseat of a car who films an officer during a traffic stop. The filming would clearly take place within a 25- foot radius, but the filming would in no way interfere with the officer’s discharge of his duties.

If this bill were to become law, there is little doubt that its constitutionality would be challenged in court and many lengthy briefs would be filed developing arguments against its constitutionality. Legislators need not let the issue get that far. They also have a role in assessing the constitutionality of legislation, and they ought to recognize HB 2918 as unconstitutional on its face.

The Policy Argument against HB 2918

Even if HB 2918 were to be found constitutional (a highly unlikely prospect), the bill should be rejected by Texas legislators because it is bad policy.

The bill is a consummate example of overcriminalization, the increasing tendency of government to use criminal law to regulate behavior that is not traditionally criminal.⁴

Precious law enforcement resources must be directed toward the things that preserve and enhance public safety. HB 2918 proposes Class A and Class B misdemeanor charges for persons who engage in the proscribed conduct, punishable by up to one year in jail and 180 days in jail, respectively.⁵ Using jail space on people who record police officers on their cell phones does nothing to preserve or enhance public safety, and it is not a wise use of law enforcement resources. It is inadequate to argue (as some might) that most offenders are not given maximum jail sentences. That is because it can reasonably be assumed that the prospect of a lengthy sentence will be used as a cudgel against defendants during plea bargaining.

It is also worth considering the onerous cost of putting these individuals in jail. In Texas, one day in county jail costs approximately \$59, and in the state's largest county, Harris, where jail space is increasingly limited, taxpayers spend approximately half a million dollars per day on jail. Jail costs should not be increased in Texas merely to punish people who record police arrests on their cellular phones.

Of course, even the overcriminalization and spending arguments are not the end of the policy analysis. That is because filming police officers in the course of their official duties is arguably *desirable* and should in fact be encouraged. When Texans are able to see what police officers do and how they do it, they can make better-informed critiques of law enforcement procedures. Some procedures will be rejected as unwise, others will be judged as sensible. In some important cases, police procedures that may seem harsh or unnecessary when described in writing will appear reasonable when viewed on camera. In these instances, the recordings actually serve to protect police officers from public disapproval.

Conclusion

Recordings of police officers in the routine course of their duties help the public remove bad practices (and bad police officers) and encourage good practices (and good police officers). HB 2918's constitutionality is suspect, and the policies it advances are especially unwise. Texas legislators should oppose the bill. ★

Notes

¹ [H.B. No. 2918](#), 84th Session (2015).

² Ibid.

³ *Gericke v. Begin*, 753 F.3d 1, 15 (1st Cir. 2014); see also *Glik v. Cunniffe*, 655 F.3d 78 (1st Cir. Mass. 2011) (citing *Mills v. Alabama*, 384 U.S. 214, 218 (1966)).

⁴ Marc A. Levin and Vikrant P. Reddy, [Twelve Steps for Overcoming Overcriminalization](#), Texas Public Policy Foundation (2012)

⁵ [H.B. No. 2918](#), 84th Session (2015).

