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Is There a First Amendment Right to Record Police? Not All Circuits Agree

By: Henry Thomas



America has long grappled with police brutality, but the issue has arguably never been more publicized than in the last decade. Of particular note was the 2020 murder of George Floyd by police. The murder set off nationwide protests over police brutality when a video of the killing was posted on the internet.[1] In years past, an incident like this may have been brushed off or even ignored altogether. The initial report issued by the Minneapolis Police Department, since retracted, appears to place the blame for the “critical incident” on Mr. Floyd.[2] It notes he “appeared to be under the influence” and “physically resisted officers” who then called for an ambulance after the suspect “appeared to be suffering medical distress.”[3] A charitable account of that report would be to characterize it as obfuscating the truth. Instead, it’s more like an outright lie—one that was only discovered because cell phone footage surfaced. Cell phone footage could play an essential role in auditing police conduct and keeping police accountable. Yet, not every circuit court has held that a right to record the police in public is clearly established.

Some circuits, like the Ninth and the First, have held that the First Amendment supports a right to record. For example, in *Fordyce v. City of Seattle* the Ninth Circuit wrote that citizens have a First Amendment right to film matters of public interest.[4] The court came to this conclusion after Fordyce brought a suit against the city and individual police officers who assaulted him as he tried to videotape a protest for a local television production.[5] Similarly, in *Glik v. Cunniffe*, the First Circuit denied police officers' qualified immunity defense because Glik was "exercising clearly-established First Amendment rights in filming [police] officers in a public space." [6] Notably, the court held that recording the police in public first within the broad array of rights protected by the First Amendment, which exists in part to "gather information about [public] officials" and promote free discussion of government affairs.[7]

However, the Tenth Circuit recently confronted a case with very similar facts to the ones discussed above and decided that the right to record is not clearly established.[8] In *Frasier v. Evans*, the court wrote that the right to record was not clearly established in large part because it found a split in out-of-circuit authorities and because the court thought that the right to record might be too abstract to recognize.[9]

And although the Tenth Circuit held that the right is not established, even some circuits that have recognized the right to record imply that it is limited in significant ways. For example, the Third Circuit has held that for citizens to record the police, officers must be on fair notice that stopping someone from recording in public is a violation of that person's First Amendment rights and that there is no clear rule that exists for determining whether someone of public concern can be recorded.[10] The Eleventh Circuit, in 2021, determined that although a broad right to record exists, it has not been explored in-depth and does not apply to the facts at issue in all cases regarding citizens recording the police in public.[11] Also of note, even though the Maryland District Court has upheld a right to record, the Fourth Circuit itself has never ruled on the issue. [12]

Despite the circuit split, there are many Supreme Court cases to ground a right to record the police in public. For one thing, speech is understood broadly and extends beyond someone's written or spoken words, implying that photos and videos can be speech.[13] Also, matters of public concern are of exceptionally high First Amendment value because they are the "essence of government" and relate to "*any matter* of political, social, or other concern to the community." [14] Indeed, the First Amendment was chiefly ratified "to serve as a powerful antidote to any abuses of [government] power" and "to protect the free discussion of governmental affairs." [15] Even offensive speech can be a matter of public concern and high First Amendment value.[16] More abstractly, the Supreme Court has noted that openness with regard to governmental actions promotes fairness and gives the public more confidence in the results of governmental action.[17] This is particularly true about allegations of police or prosecutorial misconduct.[18]

Recording the police is an important First Amendment adjacent right that the Supreme Court should affirmatively hold exists. Allowing citizens to record police officers as they discharge their duties in public is an effective way to hold them accountable to the public they ostensibly serve and prevent indiscretions.

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[1] *How George Floyd Died and What Happened Next*, N.Y. Times (Nov. 1, 2021), <https://www.nytimes.com/article/george-floyd.html> [<https://perma.cc/BFW8-BAPV>].

[2] *Investigative Update on Critical Incident*, Minneapolis Police Dep't (May 26, 2020) <https://web.archive.org/web/20210331182901/https://www.insidempd.com/2020/05/26/man-dies-after-medical-incident-during-police-interaction/>.

[3] *Id.*

[4] *Fordyce v. City of Seattle*, 55 F.3d 436, 439 (9th Cir. 1994).

[5] *Id.* at 438.

[6] Glik v. Cunniffe, 655 F.3d 78, 87 (1st Cir. 2011).

[7] *Id.* at 82.

[8] *See* Frasier v. Evans, 992 F.3d 1003, 1023 (10th Cir. 2021).

[9] *Id.* The court does later note that it “assume[s]” a right to record the police exists, but this comes only after a lengthy discussion wherein the court expresses doubt that the out-of-circuit authorities support that conclusion. *Id.*

[10] Kelly v. Borough of Carlisle, 622 F.3d 248, 261-62 (3rd Cir. 2010).

[11] Crocker v. Beatty, 995 F.3d 1232, 1240-41 (11th Cir. 2021).

[12] Hulbert v. Pope, 2021 U.S. Dist. LEXIS 77897, at *31 (D. Md. 2021).

[13] *See* Hurley v. Irish-American Gay, 515 U.S. 557, 569 (1995).

[14] Snyder v. Phelps, 562 U.S. 443, 452-53 (2011).

[15] Mills v. Alabama, 384 U.S. 214, 218-19 (1966).

[16] *Phelps*, 562 U.S. at 460-61.

[17] Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 13 (1986)

[18] *See* Gentile v. State Bar of Nev., 501 U.S. 1030 (1991); *Butterworth v. Smith*, 494 U.S. 624 (1990).