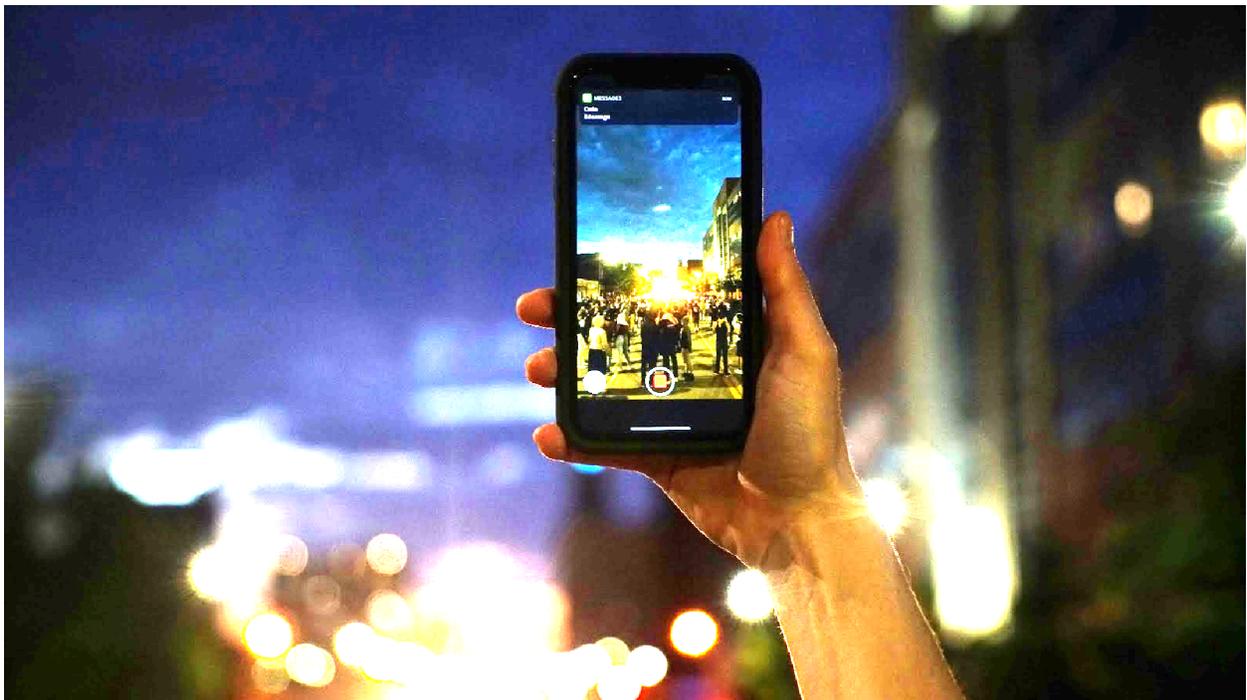


A CITIZEN'S GUIDE TO RECORDING THE POLICE



A protestor records the protest with his phone during a protest against the death in Minneapolis police custody of George Floyd, in St Louis, Missouri, U.S., June 1, 2020. Picture taken June 1,2020 REUTERS/Lawrence Bryant

Recording Police: First Amendment Protections for Journalists and Bystanders

Sixty-one percent of the U.S. population lives in states where federal appeals courts have recognized a First Amendment right to record police officers performing their official duties in public. The U.S. Supreme Court has not ruled on the issue. As a result, legal protections are fully secure only in those jurisdictions where federal circuits have issued a ruling. However, given the resounding support so far for this First Amendment protection, it seems highly likely that the remaining federal appeal courts would reach the same conclusion if the issue appears on their docket.

The Right to Gather Information

The U.S. Supreme Court

Although the U.S. Supreme Court has not ruled on the precise question of recording police activity, in [Branzburg v. Hayes](#) (1972), the High Court held that “without some protection for seeking out the news, freedom of the press could be eviscerated.” And in [First National Bank of Boston v. Bellotti](#) (1978), the Supreme Court held that the First Amendment “goes beyond [the] protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw.” This particular “stock of information”—recordings of police officers carrying out their duties in public—is critically important in enabling citizens to hold the government accountable for its actions, a central tenet of the First Amendment.

Utilizing smart phones and immediate Internet access, vast numbers of people now have the capability to document news in a way that only journalists and film crews could do in the past. But do bystanders have the same First Amendment rights as journalists in gathering the news? The courts have said yes.

The Supreme Court has been reluctant to define what constitutes a newsperson for purposes of constitutional protection, saying in [Branzburg v. Hayes](#) that such an effort “would present practical and conceptual difficulties of a high order.”



Diamond Reynolds recounts the incidents that led to the fatal shooting of her boyfriend Philando Castile by Minneapolis area police. U.S., July 7, 2016. REUTERS/Eric Miller

As the Supreme Court wrote in *Hayes*, the “liberty of the press is the right of the lonely pamphleteer who uses carbon paper or a mimeograph just as much as of the large metropolitan publisher who utilizes the latest photo composition methods.”

And in *U.S. v. Hastings* (1983), the Eleventh Circuit Court of Appeals interpreted the U.S. Supreme Court ruling in *Hayes* to mean that “the press generally has no right to information superior to that of the general public.”

Updating the “lonely pamphleteer” to the “lonely bystander” metaphor, the U.S. Court of Appeals for the First Circuit ruled in *Glik v. Cunniffe* (2011): “The First Amendment right to gather news is... not one that inures solely to the benefit of the news media; rather, the public’s right of access to information is coextensive with that of the [incorporated] press.”

“Ensuring the public’s right to gather information about their officials not only aids in the uncovering of abuses, but also may have a salutary effect on the functioning of government more generally,” said the unanimous First Circuit Court of Appeals in *Glik*. Indeed, videos have stimulated widespread debate about how to reform harmful policing practices, especially concerning minority communities.

“And just the act of recording, regardless of what is recorded, may improve policing,” the United States Court of Appeals for the Third Circuit said in *Fields v. Philadelphia* (2017). The Third Circuit also pointed to the value of recordings to corroborate information. “To record what there is the right for the eye to see or the ear to hear corroborates or lays aside subjective impressions for objective facts,” the judges said. “Hence to record is to see and hear more

accurately. Recordings also facilitate [public] discussion because of the ease in which they can be widely distributed via different forms of media.”

The Right to Record and Share

Corollary Rights

The First Amendment protects the act of recording as a necessary corollary to the right to publish and distribute the recording. Dissemination of video and audio information is clearly protected by the First Amendment. But what about the action of recording? Is the act of recording protected as well? Courts have had to deal with arguments that only dissemination is protected—not the act of recording itself. Courts recognize that the recording of video and audio is closely intertwined with the eventual dissemination of the information. Use of recording technology enables protected speech to occur, and thus the First Amendment must shield both.

“A freelance reporter may write a story, but he will rarely edit, print, and deliver it to subscribers. To a government bent on suppressing speech, this mode of organization presents opportunities: Control any cog in the machine, and you can halt the whole apparatus.” ~ Justice Antonin Scalia, *McConnell v. FEC* (2003).

As the Seventh Circuit Court of Appeals wrote in [ACLU v. Alvarez](#) (2012): “The act of *making* an audio or audiovisual recording is necessarily included within the First Amendment’s guarantee of speech and press rights as a corollary of the right to disseminate the resulting recording. The right to publish or broadcast an audio or audiovisual recording would be insecure, or largely ineffective, if the antecedent act of *making* the recording is wholly unprotected. By way of a simple analogy, banning photography or note taking at a public event would raise serious First Amendment concerns; a law of that sort would obviously affect the right to publish the resulting photograph or disseminate a report derived from the notes. The same is true of a ban on audio and audiovisual recording.” The court concluded: “Restricting the use of an audio or audiovisual recording device suppresses speech just as effectively as restricting the dissemination of the resulting recording.”

Time, Place, and Manner Restrictions—And Other Limitations

Although the courts have recognized a First Amendment right to record the work of police officers in public, that right is not absolute. It is important to understand that recording in public is subject to time, place, and manner restrictions.

These are restrictions imposed on expression that are designed to maintain public safety and other valid concerns. Courts use a three-part test to assess whether they are consistent with the First Amendment. Restrictions must be [content-neutral](#)—meaning that they cannot be aimed at speech based on the subject matter. They must be narrowly tailored to serve a significant government interest, and leave open alternative channels of communication. For example, a local government could prohibit a protest taking place at 1 a.m. in a residential neighborhood in order to preserve peace and quiet during a time when people seek rest.

As applied to the recording of police officers, the Seventh Circuit Court of Appeals said in *ACLU v. Alvarez*: “It goes without saying that the police may take all reasonable steps to maintain safety and control, secure crime scenes and accident sites, and protect the integrity and confidentiality of investigations. While an officer surely cannot issue a ‘move on’ order to a person because he is recording, the police may order bystanders to disperse for reasons related to public safety and order and other legitimate law-enforcement needs.”



A man records the protestors marching during a protest against the death in Minneapolis police custody of George Floyd, in St Louis, Missouri, U.S. June 1, 2020. Picture taken June 1,2020 REUTERS/Lawrence Bryant

What kinds of time, place, and manner restrictions could a court find reasonable? It would depend on the situation. Police have wide discretion to take reasonable steps to protect the public and their own safety, such as keeping people a reasonable distance (e.g., 20 to 30 feet)

from an incident, and limiting traffic around the incident. A journalist or bystander who crossed police barriers set up to protect public safety, or at a crime scene in order to get a better angle from which to record, might reasonably be asked to move, as would someone who got in the way of police officers and vehicles moving in and out of the area. Police dealing with an active shooter situation would obviously have even broader discretion.

However, as the First Circuit in *Glik* held, “peaceful recording of an arrest in a public space that does not interfere with the police officers’ performance of their duties is not reasonably subject to limitation.”

In [King v. Ambs](#), the U.S. Court of Appeals for the Sixth Circuit ruled in 2008 that free speech rights are not protected when a bystander is interfering with an arrest by instructing a suspect not to cooperate with police.

Demonstrations in public places like streets and parks are another situation in which people enjoy a strong First Amendment right to make recordings of police. However, the right to record can be impacted by police actions during a protest—law enforcement may be able to order an individual to stop videotaping under certain circumstances. These might include, for example, if the police issue a broad-scale dispersal order that applies across the board and is not targeted at the person recording the police. It may also include situations in which the person recording is in violation of a generally applicable curfew law, or if the individual recording is too close to an officer arresting a disruptive protester. Some police dispersal orders and [curfews](#), of course, might later be challenged by affected individuals on First Amendment grounds.

Public Versus Private Places

The court decisions discussed here relate to the recording of police officers performing their duties in public—on streets, on sidewalks, and in public parks. Journalists and bystanders do not have First Amendment protection to follow police officers when they go onto private property. They can record from a street or sidewalk, but entering private property without permission of the person who owns or occupies the property may be trespassing. Also, police cannot grant valid permission to reporters and other people to follow them onto private property. To summarize the spirit of this legal principle, you cannot break a law in pursuit of exercising your First Amendment rights.

Nonconsensual Recordings

What about wiretapping and eavesdropping statutes—do not newsgatherers break those laws when exercising their First Amendment rights? [ACLU of Illinois v. Alvarez](#) (2012) answered this question. It was about whether an Illinois eavesdropping statute that prohibited nonconsensual audio recordings applied to secret recordings of police working in public. The U.S. Court of Appeals for the Seventh Circuit concluded that the statute protects the privacy of conversations; however, “that interest is not implicated when police officers are performing their duties in public places and engaging in public communications audible to persons who witness the events.” Why? Because the police, by the nature of their office, are public servants and the recording is done on public property (or from one’s own private property, as did George Holliday when recording the beating of Rodney King in 1991). Recording police in the line of duty does not, the court held, violate privacy laws meant for private citizens. In issuing a preliminary injunction against the enforcement in Illinois, the court said the application of an eavesdropping statute to the recording of police activity “likely violates the First Amendment’s free-speech and free-press guarantees.”

Police Cannot Seize or View Smartphone Recordings



Susan Greene was handcuffed and detained by Denver police officers on Colfax Avenue on July 5, 2019.
(Screenshot via body-cam footage provided by city of Denver)

It is critical to understand that search and seizure laws also apply to the question of recording police. In the landmark case [Riley v. California](#) (2014), the U.S. Supreme Court said that the Fourth Amendment prohibits police from seizing a person’s recording device or later searching through its contents. The only legal way for police to seize a phone is through an arrest and the only way to access its contents is to acquire a warrant. In writing for a unanimous Court, Chief Justice Roberts said, “Modern cell phones are not just another technological convenience. With all they contain and all they may reveal, they hold for many Americans ‘the privacies of life.’ The fact that technology now allows an individual to carry such information in his hand does not make the information any less worthy of the protection for which the Founders fought.”

Court Cases

Decisions by United Circuit Court of Appeals

1. [Askins v. U.S. Department of Homeland Security](#), No. 16-55719 (9th Cir. 2018) First Amendment protects the photographing of patrol officers at ports of entry.
2. [Fields v. Philadelphia](#), 862 F.3d 353 (8th Cir. 2017) “First Amendment protects the act of photographing, filming, or recording police conducting official duties in public”.
3. [Akins v. Knight](#), 863 F.3d 1084, 1088 (8th Cir. 2017) Has been mistakenly identified in the press as ruling against citizens’ First Amendment rights to film police in public. Akins was primarily ruled on procedural grounds, seeking the judge’s recusal. It did not analyze the merits of the constitutional claims, therefore cannot be categorized as either a pro- or anti-recording police case.
4. [Turner v. Driver](#), 848 F.3d 678 (5th Cir. 2017) “A First Amendment right to record the police does exist, subject only to reasonable time, place, and manner restrictions”.
5. [Gericke v. Begin](#), 753 F.3d 1 (1st Cir. 2014) Under the First Amendment, “private individuals possess a constitutionally protected right to videotape police carrying out their duties.”
6. [ACLU of Illinois v. Alvarez](#), 679 F.3d 583 (7th Cir. 2012) The Illinois’ eavesdropping statute did not apply to the recording of police activities in public.
7. [Glik v. Cunniffe](#), 655 F. 3d 1 (1st Cir. 2011) There is “a constitutionally protected right to videotape police carrying out their duties in public” and that right was “fundamental.”
8. [King v. Ambs](#), 519 F.3d 607 (6th Cir. 2008) Free speech rights are not protected when a bystander is interfering with an arrest by instructing a suspect not to cooperate with police.
9. [Smith v. City of Cumming](#), 212 F.3d 1332, 1333 (11th Cir. 2000) Affirmed “a First Amendment right, subject to reasonable time, place, and manner restrictions, to photograph or videotape police conduct.”
10. [Fordyce v. City of Seattle](#), 55 F.3d 436 (9th Cir. 1995) “First Amendment right to film matters of public interest,” as when Jerry Fordyce filmed police activity during a public protest.

Masthead

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances. ~ The First Amendment to the U.S. Constitution (1791)

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