

# Newsweek

## Is Video-Recording Police Protected by the First Amendment?

Adam Bates

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In a confounding ruling that breaks with a consensus among federal courts, U.S. District Court Judge Mark Kearney of the Eastern District of Pennsylvania has ruled that recording police officers is not protected by the First Amendment unless the recorders are making an effort to “challenge or criticize” the police.

According to Kearney’s logic, standing silently and recording the police is not sufficiently expressive to warrant First Amendment protection.

The reasoning behind this distinction is bizarre and is out of step with rulings in several federal circuits that recording police in public is constitutionally protected without regard for whether the recorder is attempting to make a statement or issue a challenge to law enforcement.

A couple of quick takes from civil liberties scholars disputing Kearney’s attempt to distinguish the facts of this case:

Radley Balko’s take in [The Washington Post](#):

Under Kearney’s standard, most of the citizen-shot videos of police abuse and shootings we’ve seen over the past several years would not have been protected by the First Amendment.

In the overwhelming majority of these videos, there’s none of the “expressive conduct” Kearney apparently wants to see from the camera-wielder. In many of them, the police officers are never made aware that they’re being recorded. That’s how some of these videos were able to catch the officers lying about the incident in subsequent police reports.

I suppose you could argue that recording something as noteworthy as a police shooting or an incident of clear brutality would be self-evidently an act of either expression or news-

gathering. But judging from his opinion, it's far from clear that Kearney would make this distinction.

It's also hard to see how he could. It would mean that whether or not your decision to record the police is covered by the First Amendment would be dependent on whether the recording itself captures the police violating someone's rights or doing something newsworthy. Even the courts often disagree over what is and isn't a violation of someone's constitutional rights (this ruling itself is as good an example as any).

And "newsworthiness" is of course a highly subjective standard. You could make a strong argument that both of the events in these two cases—an anti-fracking protest and a 20+ officer police response to a house party— are plenty newsworthy.

And over at Volokh Conspiracy, Eugene Volokh [notes](#):

The court held [that] simply "photograph[ing] approximately twenty police officers standing outside a home hosting a party" and "carr[ying] a camera" to a public protest to videotape "interaction between police and civilians during civil disobedience or protests" wasn't protected by the First Amendment.

I don't think that's right, though. Whether one is physically speaking (to challenge or criticize the police or to praise them or to say something else) is relevant to whether one is engaged in expression. But it's not relevant to whether one is gathering information, and the First Amendment protects silent gathering of information (at least by recording in public) for possible future publication as much as it protects loud gathering of information.

Your being able to spend money to express your views is protected even when you don't say anything while writing the check (since your plan is to use the funds to support speech that takes place later). Your being able to associate with others for expressive purposes, for instance by signing a membership form or paying your membership dues, is protected even when you aren't actually challenging or criticizing anyone while associating (since your plan is for your association to facilitate speech that takes place later). The same should be true of your recording events in public places.

The American Civil Liberties Union has already announced an appeal, which would give the 3rd U.S. Circuit Court of Appeals an opportunity to knock down the strange distinction drawn by Kearney.

The ability of individuals to record police in public without fear of reprisal is an essential mechanism for injecting transparency where it is sorely lacking, for holding the government accountable for misconduct, and in many cases for protecting good police officers from misattributed blame.

*Adam Bates is a policy analyst with the Cato Institute's Project on Criminal Justice.*