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# Right to record: Federal court may recognize First Amendment right to document police

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It had been barely 10 seconds since Lakewood Police Agent Ahmed Yehia stepped out of his patrol vehicle before things escalated.
“You got a f---in’ problem, you f---in’ goon? Get the f--k out of my f---in’ line, man,” protested Abade Irizarry, the man holding a video camera, after Yehia stopped roughly 1 foot in front of him and blocked Irizarry’s view of an early morning traffic stop happening yards away.

Irizarry was standing near the corner of Reed Street and West Colfax Avenue, recording two officers perform roadside sobriety maneuvers on a female motorist. He was with fellow cop watcher Eric Brandt — an agitator who received 12 years in prison last year for threatening a judge’s life — and two other amateur videographers.
The video from May 26, 2019, showed Yehia then walking away from Irizarry, but immediately shining his flashlight into both Irizarry's and Brandt’s camera lenses, saturating the sensors. His actions unleashed a torrent of F-bombs from the two videographers, which prompted another officer to walk over and say something to Yehia in the parking lot of the Mexican restaurant where, by now, nine people were standing.

Yehia then walked back to his patrol vehicle and drove off, barely one minute after arriving on the scene. Brandt’s video showed Yehia driving close to both men as he pulled away.

Almost exactly three years later, in contrast to that tense nighttime scene, a well-dressed crowd of lawyers and onlookers filled the benches inside a downtown Denver courtroom, where the words “Reason is the soul of all law” were embossed in gold above the tall columns.

Irizarry's lawsuit against Yehia, which three judges on the 10th Circuit U.S. Court of Appeals heard in mid-May, could serve as the case that establishes for Colorado and five of its neighboring states that the First Amendment protects bystanders' right to record police officers who perform their duties in public. Six of the 11 multistate federal appeals courts — including those dominated by appointees of Republican presidents and those with majorities of Democratic appointees — have already recognized the right to record.
"This court should join those courts in recognizing a clearly established constitutional right to record unobtrusively," Andrew Tutt, Irizarry's Washington, D.C.-based lawyer, told the 10th Circuit judges.

The overriding reason why it matters whether the circuit court recognizes a right to record has to do with qualified immunity, the judicially created shield to civil liability for various types of lawsuits against government workers.

Qualified immunity, in theory, serves to protect officers who are not on notice that their actions may be unreasonable. In practice, judges presiding over civil lawsuits involving the government typically ask whether there is a previous court decision, under very similar circumstances, that labeled a legal right as "clearly established."

If so, the lawsuit may proceed. If not, qualified immunity kicks in, as it did for Irizarry: A trial court judge last year found Yehia's actions were not clearly established as unconstitutional in the 10th Circuit. Consequently, she dismissed the lawsuit.

At some level, Irizarry v. Yehia follows the contours of the handful of civil cases that trickle up to the 10th Circuit implicating qualified immunity for state officials each year. But most of those cases do not have outside groups pushing the circuit to recognize a protected right. And those groups generally do not include, as here, the U.S. government.

"Addressing this issue is timely and it would provide much-needed clarity to district courts. It is also uncontroversial," Natasha N. Babazadeh, a lawyer with the Justice Department's Civil Rights Division, told the 10th Circuit.

But despite heavy advocacy in favor of the right to record — indeed, even Yehia acknowledges the right exists — could the 10th Circuit still decline to recognize it?

**'Liberty Freak'**

Irizarry, whose nickname is "Liberty Freak," has some familiarity with the legal issues underlying his case. He was part of another civil lawsuit — dismissed last year on qualified-immunity grounds — involving a video streaming mission at the Morgan County Sheriff's

Office, which ended in the sheriff chasing Irizarry and fellow cop watcher Brandt out of the building.

"I'd like to be able to make case law and have my last name always mentioned for the cause of freedom. And I never thought that it would ever happen. And here we are," Irizarry said to The Real News Network in an interview about his case in Lakewood.

With a light gray beard and eyeglasses, Irizarry, who told Colorado Politics last year that he has no fixed address, represented himself in filing his own federal lawsuit against Yehia. He claimed that Yehia's actions, which included obstructing the video recording, shining his flashlight and driving "right at" the videographers, interfered with the First Amendment's guarantee of a free press.

In June 2021, U.S. Magistrate Judge Nina Y. Wang dismissed his case using qualified immunity. Although she could not find any previous court decisions that clearly established that Yehia's precise actions violated clearly established law, Wang believed the First Amendment does guarantee a right to record in general.

Then, the prominent international law firm Arnold & Porter got involved. It agreed to represent Irizarry on appeal, filing his opening brief in November 2021. Irizarry's attorney and the lawyers for Yehia declined to speak to Colorado Politics on the record for this article.

"You have to make them pay. If you don't make them pay publicly, then they don't learn their lessons," Irizarry told his viewers in a video, live-streamed to YouTube last year, about his dispute with the city of Lakewood. "Don't be in this if you're not gonna go to the end."

His 10th Circuit appeal drew the attention of other entities: the National Police Accountability Project, the libertarian Cato Institute, the Electronic Frontier Foundation and several First Amendment professors, all of whom submitted supportive briefs to the court. In a major development on the day before Thanksgiving, a brief from the Justice Department supported the recognition of a right to record.

"The U.S. Department of Justice frequently relies on photos and videos of police misconduct — including photos and videos taken by members of the public — when investigating and prosecuting police officers" for violations of constitutional rights, the Civil Rights Division wrote.

The government referred to the lesson increasingly etched into Americans' consciousness in recent history: Bystander video, whether of the beating of Rodney King or the killing of George Floyd, illuminates police behavior that affects the public's trust in law enforcement. Bystander footage of law enforcement in Uvalde, Texas, stationed outside an elementary school while a

massacre occurred inside late in May, reinforced reports that police delayed their response to the shooting in progress.

Despite those endorsements in the appeal, the 10th Circuit had already heard from — and rejected — many of those groups' positions before. Just last year, the appellate court looked at an arguably more serious case of police retaliation in Colorado, but chose not to recognize a right to record.

**Levi Frasier**

Levi Frasier was a bystander on Aug. 14, 2014, when he witnessed Denver police officers attempting to arrest a man suspected of stuffing a sock full of drugs into his mouth. With his tablet, Frasier recorded one officer punching the man's face multiple times and another officer grabbing the man's pregnant girlfriend, causing her to fall to the ground.

"There wasn't a need for the second or the third (punch); for sure the fourth, fifth or sixth. Each one seemed to get more violent and powerful," Frasier said later.

In Frasier's telling, Officer Christopher Evans then followed Frasier to his car and asked about the video. Frasier, worried the police would make it "disappear," lied and said he had only taken a self-deleting Snapchat photo.

Eventually, the other officers encircled Frasier and "demanded" the video. Frasier retrieved his tablet, which Evans allegedly grabbed and began looking through. He reportedly announced that he could not find the video, handed Frasier back his tablet, and Frasier left. While Frasier claimed afterward the video was gone from the device, the Denver Police Department's Internal Affairs Bureau determined through a forensic analysis that the video had never left the tablet.

One year after the encounter, Frasier filed a federal lawsuit alleging police retaliated against him for exercising his First Amendment right to gather and disseminate information. Although a magistrate judge recommended that the officers not receive qualified immunity because the right to record was clearly established elsewhere in the country by August 2014, U.S. District Court Senior Judge Robert E. Blackburn disagreed, believing the other right-to-record cases were too dissimilar from Frasier's.

As such, the law was not clearly established, Blackburn concluded, granting the officers immunity.

However, the case took an unusual turn. Nearly a year later, Frasier's attorneys asked Blackburn to reconsider his decision in favor of the defendants. The officers had acknowledged in

depositions that they knew bystanders had the right to record them, and the Denver Police Department advised officers of that right at least as far back as 2007.

In November 2018, six months before Irizarry's police encounter in Lakewood, Blackburn ordered the reinstatement of Frasier's retaliation claim based on this new information.

Although qualified immunity's focus on reasonable officers in the abstract "is a useful device in attempting to discern what an individual officer should know," wrote Blackburn, "it must give way when the reality shows the actual officer was better informed than his fictional colleague."

Denver appealed to the 10th Circuit on behalf of the officers, and a three-judge panel ruled that Blackburn was wrong to consider what the defendants actually knew about the First Amendment rights of bystanders.
"Judicial decisions are the only valid interpretive source of the content of clearly established law; whatever training the officers received concerning the First Amendment was irrelevant to the clearly established law inquiry," Judge Jerome A. Holmes wrote sternly in March 2021 in the Frasier v. Evans decision.

At the same time that the 10th Circuit made clear that it had the sole authority to say whether the First Amendment protects the right to record, the panel refused to decide that such a right existed. Civil liberties advocates reacted angrily to the decision and its implications for the doctrine of qualified immunity.

"The point, at least when they came up with it," said attorney said Sarah Schielke, "is to protect officers that are acting in good faith. Cut to now, and you have Judge Holmes saying, 'We don't care if the officer knew he was acting in bad faith.' Qualified immunity is really absolute immunity."

Frasier quickly appealed to the U.S. Supreme Court, asking it to rein in the 10th Circuit's holding that police training was irrelevant to qualified immunity and to recognize a clearly established right to record. Several groups stepped up in support of Frasier, ranging from free-speech scholars and media organizations to advocates for curbing qualified immunity.

Frasier argued to the Supreme Court that the 10th Circuit was out of step with the other six circuit courts that had decided in favor of a right to record.

"Sometimes, the facts in cases of people retaliated against for recording the police are less clean: For instance, they might involve a traffic stop, which police officers view as a dangerous activity, or they might involve someone who is himself being arrested, or someone who is

possibly interfering with the officers," Elizabeth Wang, Frasier's attorney, told Colorado Politics. "This case did not have any of those issues."

"The First Amendment protects the right to photograph and record matters of public interest. … This includes the right to record law enforcement officers engaged in the exercise of their official duties in public places," briefly concluded the San Francisco-based 9th Circuit in a pair of cases about federal law enforcement personnel at the border.

In contrast, the Philadelphia-based 3rd Circuit issued a long analysis of the right to record, praising the ability of bystander video to "fill the gaps" when police withhold their own video footage and to both exonerate and incriminate officers of professional misconduct.

While the three-judge panel, in its 2017 decision, ultimately granted qualified immunity to the defendant officers in the case, Senior Judge Richard L. Nygaard dissented from the ruling for not going far enough. Cellphones had become so ubiquitous that "the officers' own lived experience with personal electronic devices" made their retaliation for being recorded inherently unreasonable, the Ronald Reagan appointee argued.

The finding of a right to record police has not differed greatly based on partisan considerations. On the Boston-based 1st Circuit, where all active judges are currently appointees of Democratic presidents, a panel allowed Simon Glik to sue the city of Boston for a constitutional violation. An officer had told Glik, "I think you have taken enough pictures," after Glik made a cellphone recording of police using force to arrest a man in Boston Common. Officers in turn arrested Glik for violating the state's wiretapping law.

"The First Amendment right to gather news is, as the (Supreme) Court has often noted, not one that inures solely to the benefit of the news media," wrote Judge Kermit Lipez, adding that the right to record police in public was a "basic, vital, and well-established liberty safeguarded by the First Amendment."

The New Orleans-based 5th Circuit, a majority of whose judges are appointees of Republican presidents, came to the same conclusion in a 2-1 ruling in 2017. Instead of a bystander recording police, Fort Worth officers detained Phillip Turner while he was recording the police station itself from a public sidewalk.

While the majority's analysis closely tracked that of the 1st Circuit in determining that the First Amendment's protection of newsgathering also encompassed Turner's recordings, the dissenting judge pointed out that Turner's was the first case to focus on filming police stations, rather than police officers.

The most unusual right-to-record case arose from the 7th Circuit, based in Chicago. The ACLU in Illinois planned to create a police accountability program to encourage bystander recordings of police in public areas. However, the group feared prosecution under what may have been the most restrictive eavesdropping law in the country.

Illinois forbade audio recordings between two or more parties where consent had not been given, regardless of whether the parties expected their conversation to be private. Police, on the other hand, were allowed to record encounters without consent.

The ACLU challenged the constitutionality of the law and the prosecutor for Cook County took the position that bystander recordings in public areas had no First Amendment protection. The 7th Circuit, by 2-1, called that argument "extreme."

"We have no trouble rejecting that premise. Audio recording is entitled to First Amendment protection," pointed out Judge Diane S. Sykes. She added that if Illinois lawmakers wanted to protect the privacy of civilian-police encounters, an unconstitutionally broad eavesdropping law was not the way to do it.

**The only contested issue**

Although Irizarry's encounter with Yehia did not align completely with the other circuit courts' precedents, the basic sequence of an officer reacting negatively to a bystander who is recording police activity was hardly unique by the time of the 10th Circuit's oral arguments in mid-May 2022. Officially, Irizarry's appeal of the district court's order centered on whether the First Amendment right to record was clearly established as of May 2019.

"It's really the only contested issue on appeal," observed Judge Scott M. Matheson Jr. on the morning of May 18.

Neither Irizarry nor Yehia disputed that the First Amendment protects the right to record police. It was a repeat of the parties' positions in Levi Frasier's case — and their agreement on the right to record was why the 10th Circuit declined to address the issue in that case. The panel in Irizarry's case could conceivably go the same route, leaving the right to record in further limbo.

Irizarry reiterated that six other circuit courts had recognized the right to record, but Irizarry's lawyers also attempted to bait the 10th Circuit into following suit, in case the judges are again inclined to sidestep the question of whether the right to record exists in the first place.

Because the officer defendants in neither the Irizarry nor the Frasier cases disputed the right to record, that should be proof that the right is not simply established, but clearly established in the 10th Circuit, Irizarry contended.

“I think this is a fantastic argument,” said Wang, the attorney who represented Frasier. While she acknowledged it is possible the 10th Circuit could again refuse to weigh in, logically, “if the defendant doesn’t even bother to debate the issue, then the proposition is beyond debate.”

The panel hearing Irizarry’s case consisted of Matheson and Judge Carolyn B. McHugh, both appointees of Barack Obama, and Senior Judge Paul J. Kelly Jr., a George H.W. Bush appointee who sat on the panel that decided Frasier v. Evans.

Irizarry “was not physically interfering with the stop at all and was, as I understand it, many feet away,” Tutt argued on behalf of his client. He claimed that a reasonable officer would have known the right to record was clearly established because the other circuit courts had said so.

“Would a police office in Lakewood, Colorado, be aware of what happened even on the other side of Denver?” let alone in the other circuit courts, Kelly asked skeptically.

“Don’t we have to somehow come up with a reason why it’s different now than it was when Frasier was decided?” added McHugh.

She appeared to answer her own question shortly afterward, observing that conduct by government officials can sometimes be so egregious as to violate clearly established rights, even if no virtually identical circuit case exists. Irizarry’s allegations of Yehia’s retaliation included not just the officer’s physical attempts to block the camera, but driving his car so close to Irizarry and the other cop watchers.

“Obviously, a police officer knows you can’t assault somebody with your vehicle,” McHugh said.

Alex Dorotik, an attorney for Lakewood, agreed McHugh’s observation was accurate, but the key question was not the degree of Yehia’s reaction, but whether Yehia was aware that Irizarry was engaging in a constitutionally protected activity.

“If Agent Yehia is not on notice that he’s violating Mr. Irizarry’s constitutional rights, then there’s no cause of action,” Dorotik said.

**What about privacy?**

The First Amendment does not shield all speech from reaction by the government, and the right to record police is no different.

Irizarry's lawsuit has not progressed beyond the motion-to-dismiss stage, a very early step that typically precedes the extensive discovery of evidence used to build a case. Although the 10th Circuit could recognize a right to record, or possibly go as far as say the right was clearly established as of Irizarry's encounter with Lakewood police, he may end up losing the battle.

Video on that night from Irizarry's fellow cop watcher, Eric Brandt, depicted a group of people that, in reality, behaved obtrusively while documenting government officials at work.

"You're not required to answer any questions or perform any tests," Brandt yelled to the female motorist undergoing the DUI stop — a misstatement of Colorado law that does, in fact, impose consequences for refusing to take a blood-alcohol test.

"Can you guys do me a favor? I don't have a problem with you guys standing over here watching it," said one Lakewood officer, pointing to a bright white light that Brandt shined toward the driver while recording. "But we need you to kill that light so we can do our roadsides, 'K?"

Brandt neither responded nor extinguished the light. The officer politely repeated the request — again to no response. Yehia then arrived, distracting the cop watchers with his own reaction.

If Irizarry's case were to proceed, a judge or jury could conceivably find that such interference with a traffic stop no longer falls into the category of First Amendment-protected behavior. David Milton, the attorney who represented Simon Glik before the 1st Circuit and who filed a supportive brief in Irizarry's case, said that once the right to record becomes clearly established, the question then shifts to how the government may regulate that activity in a reasonable manner.

"Flashing the light on them during the middle of a police operation, that might be different," Milton said. "What constitutes interference is context-dependent."

Interference and, more specifically, its effect on any civilians who are being incidentally recorded in a police interaction, were a major concern of at least one circuit judge in a right-to-record case.

"Police may have no right to privacy in carrying out official duties in public. But the civilians they interact with do," wrote Judge Richard A. Posner, the dissenting member of the 7th Circuit's panel in the Illinois eavesdropping case.

Brandt's video of the DUI stop, with over 6,000 views on YouTube, seemed to fit within Posner's fear that the "social costs" of the right to record are imposed not just on the officers themselves.

“A person who is talking with a police officer on duty may be a suspect whom the officer wants to question; he may be a bystander whom the police are shooing away from the scene of a crime or an accident; he may be an injured person seeking help; he may be a crime victim seeking police intervention; he may be asking for directions,” Posner explained.

“In many of these encounters, the person conversing with the police officer may be very averse to the conversation’s being broadcast on the evening news or blogged throughout the world.”