

Attorneys blast federal decision disregarding Denver officer training on First Amendment

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Civil rights attorneys are renewing calls to abolish the judicially-created shield for police, after the Colorado-based federal appeals court awarded immunity to Denver officers accused of violating a man's First Amendment rights, even after their training put them on notice about those rights.

In doing so, the U.S. Court of Appeals for the 10th Circuit on Monday disregarded the First Amendment training for Denver police personnel who allegedly attempted to delete a video from a bystander's device — footage that showed them punching a suspect. Instead, a three-judge panel concluded that only judges could say what actions violate constitutional rights.

The "actual knowledge that [officers] purportedly gained from such non-judicial sources," wrote Judge Jerome A. Holmes, does not supersede "judicial decisions [that] concretely and authoritatively define the boundaries of permissible conduct in a way that government-employer training never can."

However, civil rights attorneys in Colorado blasted the panel for deciding to give the officers qualified immunity — a judicially-created doctrine that shields government employees from liability.

"This is pretty brazen, putting on display everything that's wrong with qualified immunity," said Sarah Schielke, an attorney who has litigated use-of-force-cases. "If I didn't know better, I would think the judges that wrote it wanted this to be Exhibit A for why we need to get rid of it."

"This opinion is an illustrative example of why the judge-made doctrine of qualified immunity should be immediately abolished," added Michael Fairhurst of Killmer, Lane & Newman, LLP.

The case gained attention from several free speech advocacy groups, including the First Amendment Legal Scholars, the CATO Institute and The Reporters Committee for Freedom of the Press, who all submitted briefs supporting plaintiff Levi Frasier.

Mark Silverstein, an attorney with the ACLU of Colorado who also weighed in on behalf of Frasier to the court, echoed that the 10th Circuit decision "reminds us once again of the huge gap between the law on the one hand, and common sense and justice on the other."

"The easy way or the hard way"

The case stemmed from an incident on Aug. 14, 2014, when Levi Frasier was in a parking lot close to where a Denver police detective saw a drug deal take place. As the detective called for backup, he ordered the suspect to show his hands. When the man did not, the detective and another police sergeant went hands-on. The suspect stuffed a sock in his mouth, which the officers thought contained narcotics. They ordered him to spit it out.

When the man refused and all three participants fell to the ground in a struggle, the sergeant asked Frasier for help. But promptly, Officers Christopher L. Evans and Charles C. Jones arrived, and Frasier stepped back to record the rest of the police encounter on a tablet.

According to the video, which [KDVR later posted online](#), the suspect refused to eject the sock from his mouth despite orders to do so, prompting Jones to punch him repeatedly in the head. A screaming, pregnant woman who approached the scuffle was pushed away, and then Evans pulled her to the ground. At one point, the police sergeant yelled: “camera.”

After handcuffing the suspect, Evans reportedly approached Frasier and said he needed Frasier’s witness statement. But then Evans referenced the video, and Frasier initially lied about having one.

“Well, we could do this the easy way or we could do this the hard way,” Evans allegedly said. Frasier inferred Evans was threatening him with arrest if he did not hand over the video. Because of this fear, he also lied on the witness statement about whether he observed inappropriate use of force.

Allegedly, five officers encircled Frasier and repeatedly demanded his tablet. Frasier relented, and produced the tablet for Evans. The officer then grabbed the tablet and searched for the video.

“When he took it, I said, ‘Hey! You can’t do that. You need a warrant for that!’ and he said, ‘What program did you take the video with? Where is that?’” Frasier told KDVR.

Evans reportedly announced to his colleagues, “I don’t see the video in here. I can’t find it,” and handed the tablet to Frasier. Twenty-three minutes had passed since Evans first approached Frasier until he was told he could leave. Frasier reportedly could not find the video on his tablet following the interaction, but was able to retrieve it from the cloud. The Denver Police Department’s Internal Affairs Bureau performed a forensic analysis on the device, and concluded the video had always been on the tablet.

One year later, Frasier sued the officers and the city of Denver in federal court. He alleged violations of his Fourth Amendment rights over his detention at the scene and the search of his tablet, and claimed a First Amendment violation for experiencing retaliation as a result of filming the police use of force.

Proving retaliation under the First Amendment requires evidence that a person was engaging in constitutionally-protected activity, and that the actions of police were in response that activity and sought to deter others from engaging in it.

David Cooperstein, at the time an attorney with the Denver City Attorney's Office, argued to the 10th Circuit in 2019 that the law was unclear about how the First Amendment applied to the specific behavior of Frasier.

“These officers were faced with an outwardly-cooperated but ultimately deceptive witness who deliberately and unlawfully misled them about the existence of evidence,” Cooperstein said.

A reversal on qualified immunity

U.S. District Court Senior Judge Robert E. Blackburn dismissed Frasier’s claim against the city, finding Denver did train its officers about the First Amendment’s protection for individuals

recording police. However, in January 2019 he allowed Frasier's retaliation claim to proceed, believing Frasier could plausibly make a case about each element of the allegation.

"A jury could reasonably conclude that a person of ordinary firmness would have thought twice about publishing a similar recording, or recording subsequent interactions with the police, had he been detained under the circumstances Mr. Frasier found himself in here," Blackburn concluded.

The judge's order was a reversal of his previous position, in which he granted qualified immunity to the officers. Qualified immunity generally protects officers from civil liability unless they violate a clearly-established legal right. For something to be clearly-established, there generally must be a court decision with virtually the same circumstances that establishes a violation. Critics of that process point out that it reduces accountability for law enforcement in particular, and erodes public trust.

Amid last summer's racial justice protests against police violence, Colorado legislators eliminated qualified immunity as a defense for state-level civil rights claims, and since then federal lawmakers have also sought to terminate the court doctrine.

In Blackburn's first assessment of Frasier's case, he ruled the public has a right to record the actions of police officers, but it was not clearly established at the time. However, he later recognized it was illogical to note on the one hand that Denver trained its officers about the right to record officers, while simultaneously finding the officers could not have reasonably known about it.

"The court would be loath to sanction this type of 'head's I win, tails you lose' strategy simply because it smacks of gamesmanship," Blackburn conceded.

The officers appealed, leading the three-member panel for the 10th Circuit to overturn Blackburn's ruling on the grounds that police officers' actual knowledge of the First Amendment did not matter.

Judicial decisions, Holmes wrote in the March 29 opinion, "are the only valid interpretive source of the content of clearly established law, and, consequently, whatever training the officers received concerning the nature of Mr. Frasier's First Amendment rights was irrelevant to the clearly-established-law inquiry."

Holmes, a nominee of President George W. Bush, and the other members of the panel declined to answer the question of whether a First Amendment right to record police officers even existed at the time, although all parties in the case believed that it did.

The refusal to confront the issue at the heart of Frasier's case was a source of irritation for plaintiff's attorneys.

"Isn't a person entitled to know if he has a right to record the police without being arrested?" New Mexico-based lawyer Owen Barcala wrote on Twitter. "It's absurd that a person has to risk a felony and incarceration to find out, and even then 9 times out of 10 the courts decide it doesn't merit consideration."

Schielke agreed that police departments within the six-state region of the 10th Circuit would lose an incentive to provide First Amendment training on bystander recordings in the absence of a formal prohibition drawn by the court. While she believed there is a right to record police, the

specific requirement that the 10th Circuit ordain it as a "clearly established" right is where the doctrine of qualified immunity is deficient, in her opinion.

"The point, at least when they came up with it," Schielke explained, "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."

Even some members of the 10th Circuit have signaled an anxiety about the pace of qualified immunity grants. Last year, Senior Judge Carlos F. Lucero and Judge Gregory A. Phillips published a dissent after the members of the court declined to review a panel's decision that immunized a Clear Creek County sheriff's deputy who shot and paralyzed a motorist.

"By continuing to await addressing deep and troubling qualified immunity issues brought to our attention time and again, we are complicit in this denial," wrote Lucero.

For the same reasons as his First Amendment allegation, the appellate panel in Frasier's case also granted qualified immunity to the officers on Frasier's claim that they conspired to retaliate against him.

The Denver City Attorney's Office and Frasier's attorney did not immediately respond to a request for comment on the decision.

The case is *Frasier v. Evans et al.*