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Blog

The Right of Private Individuals to Video and Photograph Public Employees

6 years ago

In the era of ubiquitous cell phone cameras and social media usage, public employees need to be mindful of the law as it pertains to the rights of citizens to monitor public employees at work. Private individuals have a right to record public employees, including police officers, in the public discharge of their duties. The First Amendment provides private individuals a constitutionally protected right to photograph or video record public employees. This right, however, is not completely unqualified and may be subject to reasonable time, place, and manner restrictions. In *Gilk v. Cuniffe*, 655 F.3d 78, (1st Cir. 2011), the U.S. Court of Appeals for the First Circuit addressed the issue of whether there exists a constitutionally protected right to videotape police carrying out their duties in public. The First Circuit answered this question in the affirmative, holding, "Basic First Amendment principles, along with case law from this and other circuits, unambiguously establish that private individuals possess a constitutionally protected right to videotape police carrying out their duties." *Id.* at 82. Recording governmental officers engaged in public duties is a form of speech through which private individuals may gather and disseminate information of public concern, including the conduct of law enforcement officers. *Id.* In *Gilk*, arrestee Simon Gilk was arrested for using his cell phone's digital video camera to film several police officers arresting a young man on the Boston Common. The Charges against Gilk, which included violations of Massachusetts's wiretap statute, were subsequently judged baseless and dismissed. Gilk then brought suit under §1983, claiming that his arrest for filming police officers arresting a young man constituted a violation of his rights under the First and Fourth Amendments. The First Circuit held that the officers were not entitled to qualified immunity on the First and Fourth Amendment claims and Gilk was awarded \$170,000.

However, the Court in *Gilk* did state that the right to film police officers is not without limitations and is subject to reasonable time, place, and manner restrictions: "In such traditional spaces [as the Boston Common], the rights of the state to limit the exercise of First Amendment activity are 'sharply circumscribed.' Moreover...the complaint indicates that Gilk 'filmed the officers from a comfortable remove' and 'neither spoke nor molested them in anyway' (except in directly responding to the officers when they addressed him). Such 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." *Id.* at 84. Notably, the right to record public officials is not limited to streets and sidewalks-it includes areas where individuals have a legal right to be present, including an individual's home or business, and common areas of public and private facilities and buildings.

Therefore, although a citizen's right to film government officials, including law enforcement officers, in the discharge of their duties in a public space is a basic, vital, and well established liberty safeguarded by the First Amendment, this right is not unqualified. A person may record public police activity unless the person engages in actions that jeopardize the safety of the officer, the suspect, or others in the vicinity, violate the law, or incite others to violate the law. See, e.g., *Chaplinsky v. New Hampshire*, 315 U.S. 568, 573 (1943)(words "likely to cause a fight" are not afforded First Amendment Protection); see also, *Louisiana ex rel. Gremillion v. National Ass'n for the advancement of Colored People*, 366 U.S. 293, 297 (1961)("Criminal conduct...cannot have shelter in the First Amendment"). Courts have held that speech is not protected by the First Amendment if it amounts to actual obstruction of a police officer's investigation-for example, by tampering with a witness or persistently engaging an officer who is in midst of his or her duties. See *Colten v. Commonwealth of Kentucky*, 407 U.S. 104 (1972)(individual's speech not protected by the First Amendment where individual persistently tried to engage an officer in conversation while the officer was issuing a summons to a third party on a congested roadside and refused to depart the scene after at least eight requests from the officers); *King v. Ams*, 519 F.3d 607 (6th Cir. 2008)(individual was not engaged in protected speech when he repeatedly instructed a witness being questioned by a police officer not to respond to questions).

Another example comes by way of the U.S. Supreme Court, which has recognized that traffic stops are inherently dangerous situations for law enforcement. "[T]raffic stops are especially fraught with danger to police officers. The risk of harm to both police and occupants [of a stopped vehicle] is minimized...if the officers routinely exercise unquestioned command of the situation." *Arizona v. Johnson*, ---U.S.---, 129 S.Ct. 781, 786, 172 L.Ed.2d 694 (2009). Based on this rationale, the Third Circuit has held that the right to videotape police officers during traffic stops was not clearly established. *Kelly v. Borough of Carlisle*, 622 F.3d 248, 262 (3rd Cir. 2010)(emphasis added).(In finding that the right to record officers during a traffic stop was not clearly established, the Third Circuit expressly did not reach the question of whether the First Amendment protects the recording of police activity during a traffic stop, because it did not need to reach that question to decide that the officer should receive qualified immunity). Therefore, there may be situations in which a police officer needs to exercise unquestioned command of a situation. If the officer, in the lawful execution of his duties, needs to assert "unquestioned command of a situation," during a criminal investigatory situation, he may feel that it is prudent for all parties involved to order that an individual stop video recording, particularly if the individual is in some manner obstructing the ongoing investigation. If the individual fails to obey the officer in the lawful execution of his duties, the individual could potentially be arrested. However, if the individual is in no way hindering or interfering with the investigation, the individual is free to continue recording police officers in the public discharge of their duties. An individual's recording of police activity from a safe distance without any attendant action intended to obstruct the activity or threaten the safety of others does not amount to interference; nor does an individual's conduct amount to interference if he or she expresses criticism of the police or police activity being observed.

With the ever-increasing use of cell phone cameras and availability of posting videos and photographs on any number of widely accessible social media sites, public employees need to remember that anything they do can end up on a website for the world to view.

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