The First Amendment Right to Photograph/Videotape the Police and Confiscating Video Evidence

Robert C. Phillips
DDA (Ret.)
858-395-0302
September, 2022

The Question:

I am periodically asked whether officers can legally seize from private citizens videotaped or photographed evidence depicting criminal acts. Such videos or photos are commonly contained in a private citizen's video camera, cellphone, or iPad. The video or photographic evidence typically is recorded by an uninvolved private citizen (although it may be the suspect himself) who either happened upon the scene of some incident or is a participant in a public protest or demonstration. The video or photo may be of a criminal act in progress or of an officer's use of force upon a suspect, or both.

The question I get is; "*If the citizen objects, can I legally seize such photographic, video or tape-recorded evidence anyway*?" My answer to this question has for a long time been: "*I haven't the faintest idea*."

In analyzing these issues, I see them as requiring a balancing of a law enforcement officer's legal authority (plus a strong governmental interest) to seize evidence of a crime or protect officer safety, with the private citizen's **Fifth** and **Fourteenth Amendment** "due process" rights not to be deprived of his or her property absent a prior judicial hearing on the issue and a court order authorizing such a seizure. Whenever the "culprit" is detained or arrested, **Fourth Amendment** seizure issues also come into play. I am not aware of any appellate court decisions telling us which right might take precedence when it's the seizure of a camera containing photos or videotape of a crime in issue. But where someone is detained or arrested, the weight of authority, although not always consistent, tend to be on the side of the citizen.

Related to this problem is when a person is discovered videotaping or photographing the entrances or exits to a police facility or some on-going police activity. The temptation is to stop that person and find out what he is doing and why, or even impede the person in his videotaping efforts. Because there is case law on this issue, we shall start here.

Photographing or Videotaping Law Enforcement Activity:

We do know that a private citizen has a **First Amendment** right to videotape public officials, including, but not limited to, police officers and other law enforcement officers while in a public place, at least in most federal circuits (***Gericke v. Begin*** (1st Cir.

2014) 753 F.3rd 1; officer denied qualified immunity where plaintiff sued after being arrested for videotaping a police traffic stop.), as well as the Ninth Circuit. (***Askins v. United States Department of Homeland Security*** (9th Cir. 2018) 899 F.3rd 1035, 1043-1044.) In another case out of Massachusetts, the arrest of a citizen for a state wiretapping violation, when he was caught videotaping police activity, was held to be in violation of the citizen's **Fourth Amendment** search and seizure rights. (***Glik v. Cunniffe*** (1st Cir. 2011) 655 F.3rd 78, 82-84.) But in Texas, it was held that at least up until the decision was decided in ***Turner v. Driver*** (5th Cir. 2017) 848 F.3rd 678, whether or not the **First Amendment** protects a person's right to record the police was an undecided issue, providing the officers with qualified immunity when they detained the person and took his video camera. However, following up the detention with an arrest was held to clearly violate the **Fourth Amendment** for which the officers were *not* entitled to qualified immunity.

It has also been held by the First Federal Circuit (again, Massachusetts) that police lack authority to prohibit a citizen from recording commissioners during a town hall meeting "because [the citizen's] activities were peaceful, not performed in derogation of any law, and done in the exercise of his **First Amendment** rights[.]"). ***(Iacobucci v. Boulter*** (1st Cir. 1999) 193 F.3rd 14.)

It is pretty much accepted that a state's eavesdropping statute that attempts to prohibit the recording of another without the consent of all parties, *cannot* be used to prevent the audiovisual-recording of police officers performing their official duties in a public place, at least when the officers are speaking at a volume audible to bystanders. Use of such a statute has been held, under these circumstances, to violate the **First Amendment's** right to free-speech and free-press. (***ACLU v. Alvarez*** (7th Cir. 2012) 679 F.3rd 583; "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." Pg. 595; see also ***Fordyce v. City of Seattle*** (9th Cir. 1995) 55 F.3rd 436, 439-440.) And it has also been held that, "The **First Amendment** protects the right to gather information about what public officials do on public property, and specifically, a right to record matters of public interest." (***Smith v. City of Cumming*** (11th Cir. 2000) 212 F.3rd 1332, 1333.)

The Ninth Circuit has also recognized, without discussing the issue, the **First Amendment's** protections for one who records bystanders who happened to be viewing public demonstrations, even without their consent. (See ***Fordyce v. City of Seattle***, *supra*, at p. 439; finding the applicability of the state's eavesdropping statute to be an undecided issue.) Citing ***Fordyce*** in an unpublished opinion, the Ninth Circuit further recognized the **First Amendment** right to photograph the scene of a traffic accident. (***Adkins v. Limtiaco*** (9th Cir. 2013) 537 Fed. Appx. 721 [2013 U.S. App. LEXIS 16643].)

The federal Third Circuit Court of Appeal has held in two separate cases, where plaintiffs alleged that police officers illegally retaliated against them for exercising their **First Amendment** right to record public police activity, that private individuals have a **First Amendment** right to observe and record police officers engaged in the public

discharge of their duties, although the defendant police officers were held to have qualified immunity in that the rule was, per the Court, not well-settled at the time. (***Fields v. City of Philadelphia*** (3rd Cir. 2017) 862 F.3rd 353.)

The Ninth Circuit Court of Appeal has recognized that private individuals have a right to photograph and film government officials in public spaces, such as U.S. Customs and Border Patrol (CBP) agents at a United States-Mexico port of entry. (***Askins v. United States Department of Homeland Security*** (9th Cir. 2018) 899 F.3rd 1035.) "The **First Amendment** protects the right to gather information about what public officials do on public property, and specifically, a right to record matters of public interest." (***Id.***, quoting ***Smith v. City of Cumming*** (11th Cir. 2000) 212 F.3rd 1332, 1333.) The issue may be whether the complained of filming was done in a public place, or of government officials working on public property. That's an issue that must be decided by the trial court. If so, then the seizure and destruction of the plaintiffs' photos is a violation of their **First Amendment** rights.

Further noting that it is the government's burden to prove that these specific restrictions are the least restrictive means available to further its compelling interest, and that it cannot do so through general assertions of national security, particularly where plaintiffs have alleged that CBP is restricting **First Amendment** activities in a traditional public fora such as streets and sidewalks, the Ninth Circuit remanded the case back to the trial court for further factual development so it can be determined what restrictions, if any, the government may impose in these public, outdoors areas. (***Askins v. United States Department of Homeland Security***, *supra*, at pp. 1043-1047.)

The federal Tenth Circuit Court of Appeal upheld a citizen's right to videotape the police while performing their duties in public. In ***Irizarry v. Yehia*** (10th Cir. July 11, 2022) 38 F.4th 1282, plaintiff Abade Irizarry, a self-proclaimed YouTube journalist, and others, attempted to use their cellphones to videotape a police DUI stop in the City of Lakewood, Colorado. An officer involved in the stop, Ahmed Yehia, took offense to this and attempted to impede Irizarry's videotaping efforts by shinning a bright light into his cellphone/camera and "gunning" his patrol car directly him (and the other photographers), blasting an air horn as he did so. Irizarry sued in federal court, alleging a violation of his **First Amendment** rights. The federal district (trial) court threw the case out, ruling that because this issue was not a settled area of the law, the officer was entitled to qualified immunity. The Tenth Circuit Court of Appeal reversed, however, finding that the right of a private citizen to film police "falls squarely within the **First Amendment's** core purposes to protect free and robust discussion of public affairs, hold government officials accountable, and check abuse of power."

Also note that as of January 1, 2016, California's resisting arrest statutes (i.e., **P.C. §§ 69** and **148**) specifically state that photographing, videotaping, or audio recording, is *not* an interference with the officer's performance of his duties. (**Subdivisions (b)** and **(g)**, respectively.)

Most recently, the Arizona Legislature attempted to enact a new statute on June 23, 2022, codified at **A.R.S. § 13-3732**, making it "unlawful for a person to knowingly make a video recording of law enforcement activity if the person making the video recording is within eight feet" of the activity and has been directed to stop recording by law enforcement. A violation was to be a class 3 misdemeanor and set to take effect on September 24, 2022. With the Arizona Attorney General declining to defendant the new statute, the Ninth Circuit Court of Appeal issued a preliminary injunction in ***Arizona Broadcasters Association v. Brnovich*** (9th Cir. Sep. 9, 2022) __ F.4th __ [2022 U.S.App. LEXIS 163140], preventing the enforcement of the statute, ruling that "there is a clearly delineated right under the **First Amendment** to record law enforcement activity." In so ruling, the Court cited the Third Circuit where that court ruled in ***Fields v. City of Philadelphia*** (3rd Cir 2017) 862 F.3rd 353, at pages 357 to 358, that videos of police interactions with the public have "contributed greatly to our national discussion of proper policing."

Despite the above, there is some authority for the argument that an airport security check point constitutes a "uniquely sensitive setting" where "order and security are of obvious importance," and is thus entitled to greater protection than out on the street. But whether or not law enforcement officers may prohibit an uncooperative (i.e., refusing to provide evidence of his identity) suspect from recording TSA agents and other law enforcement officers at an airport security checkpoint remains an open question, at least providing officers with qualified immunity from civil liability when they seize the suspect's camera over his objection and delete (or attempt to do so) the contents. (***Mocek v. City of Albuquerque*** (10th Cir. 2015) 813 F.3rd 912; while defendant was acquitted of all criminal charges after a jury trial, the officers were found to have qualified immunity in the ensuing civil case.)

Also, another possible restriction on a private citizen's right to photograph or videotape law enforcement is when it is done at the scene of an emergency. Pursuant to **P.C. § 402(a)(1)**, it is a misdemeanor when a "person who goes to the scene of an emergency, or stops at the scene of an emergency, for the purpose of viewing the scene or the activities of police officers, firefighters, emergency medical, or other emergency personnel, or military personnel coping with the emergency in the course of their duties during the time it is necessary for emergency vehicles or those personnel to be at the scene of the emergency or to be moving to or from the scene of the emergency for the purpose of protecting lives or property, unless it is part of the duties of that person's employment to view that scene or those activities, and thereby impedes police officers, firefighters, emergency medical, or other emergency personnel or military personnel, in the performance of their duties in coping with the emergency."

An "*emergency*" is defined in **subdivision (c)** to include "a condition or situation involving injury to persons, damage to property, or peril to the safety of persons or property, which results from a fire, an explosion, an airplane crash, flooding, windstorm damage, a railroad accident, a traffic accident, a powerplant accident, a toxic chemical or biological spill, or any other natural or human-caused event."

Subdivision (b) adds the use of a drone, regardless of where the drone's operator is located, to the restrictions on being at (whether photographing or merely viewing) the scene of an emergency.

The only case law discussing **section 402** is an attorney general opinion (*67 Ops.Cal.Atty.Gen. 535*) where the A.G. determined that local law enforcement officers have independent emergency powers under **402** to restrict entry to an area damaged by an earthquake while a threat exists to public health and safety as reasonably determined on a case by case basis. Based upon this, where all the elements of **section 402** are present, and while employing the general rules of "*reasonableness*," it may be assumed until some court holds otherwise that the important governmental interest in maintaining control of, and to function efficiently at, the scene of an emergency outweighs any individual's **First Amendment** rights to take photographs of law enforcement or other emergency personnel in action at such a scene.

Warrantless Seizures of Photographic Evidence and Detention of the Owner:

None of the above cases, however, answer the question whether we can unilaterally, without court authorization, take the citizen's recordings or videotape for evidentiary purposes even when there is cause to believe that a recording is itself, or contains, evidence of an on-going criminal act.

So when asked about this issue, my suggestion (based solely on how I might decide the issue if I were a judge) has always been to go ahead and seize the camera, cellphone or iPad, immediately seek a search warrant for the contents of the item (based upon the requirements of ***Riley v. California*** (June 25, 2014) 573 U.S. 373 [134 S.Ct. 2473; 189 L.Ed.2nd 430], copy the relevant contents, and then immediately return the camera, etc. *with* its video or photographs intact, to the owner. Even if held to be an unconstitutional seizure, the criminal defendant (so long as he's someone other than the owner of the seized evidence) isn't going to have standing to challenge its admissibility against him in his criminal case.

But also know that even such a minimal, temporary interference with a citizen's property rights might get you sued by the owner of the camera unless and until some appellate court case upholding such a procedure is published. While the below-discussed case comes close to answering the questions for us (See ***People v. Tran***, *infra*.), it does not guarantee you won't get sued when seizing a non-involved bystander's video device. Recognizing the likelihood of such a civil suit, the San Diego Sheriff's Department Legal Advisor has clearly and unequivocally warned its officers *not* to even attempt to seize a person's camera in such a circumstance, absent that person's voluntary compliance. (See *Legal Affairs Update, San Diego Sheriff's Department*, Number 2014-8, 11/14/14.)

Certainly, the San Diego Sheriff's edict dictates the safest course of action, at least from a potential civil liability standpoint. I would think, however, that being an unsettled issue, qualified immunity would protect you from civil suit. A case out of the Tenth Circuit (although not binding on the Ninth Circuit) has held that whether or not it is

illegal for officers to seize a person's video camera (a "tablet computer," in this case) with information that it contains a video of officers possibly using unnecessary force, is an unsettled issued, justifying a court's determination that the officers have qualified immunity should they be sued. (See ***Frasier v. Evans*** (10th Cir. Mar. 29, 2021) 992 F.3rd 1003.) But whether or not your supervisors wish to endure the costs and publicity of being a test case is something you need to settle with your own department's supervisors first. From my vantage point, albeit as selfish as it might be, it would at least provide us with the necessary appellate court precedent so that the next time I'm asked this question, I can give a more definitive response. But be forwarded: Taking advantage of such an opportunity to get judicial guidance will not keep you from being sued.

I have also been asked whether you can detain the citizen, or even use force, if necessary, in order to affect the seizure of his camera. Again, I don't know. And again, your department's legal advisors are likely to be telling you *not* to do so. (See San Diego Sheriff's Department *Legal Affairs Update*, Number 2014-8, *supra*.)

At least generally, a lawful detention requires that the detainee be suspected of being involved in a criminal act himself. (***Terry v. Ohio*** (1968) 392 U.S. 1.) Merely recording some criminal act with one's video camera is not a criminal act (***Glik v. Cunniffe***, *supra*.), nor is photographing or videotaping the outside of a law enforcement facility. (***Turner v. Driver***, *supra*.) Authority authorizing the temporary detention of a victim or a witness is scarce, and a minority position at best. (See ***Illinois v. Lidster*** (2004) 540 U.S. 419: When the governmental need is strong and the intrusion upon the victim or witness is minimal, a temporary stop or detention of the victim or witness *may* be justifiable. See also ***Metzker v. State*** (Ak. 1990) 797 P.2nd 1219: "It appears the police are justified in stopping witnesses only where exigent circumstances are present, such as where a crime has recently been reported." But also see ***Walker v. City of Orem*** (10th Cir. 2006) 451 F.3rd 1139, 1148-1149; 90 minute detention of witnesses held to be excessive.)

I would strongly suggest that you *not* aggravate the situation by detaining the private citizen in such a circumstance, particularly if to do so requires the use of force. The likelihood of avoiding a lawsuit in such a case, and the payment of significant damages, is probably slim at best. A purposeful detention, and even more so the use of force, will greatly enhance the damages should a court eventually rule that you are not constitutionally allowed to detain the person, let alone take his camera.

A relatively new case on the issue of confiscating a one's cellphone video bears some consideration, coming close to answering the above. That case is ***People v. Tran*** **(**2019) 42 Cal.App.5th 1.

In a trial for reckless driving, it was held that the **Fourth Amendment** did not require suppression of evidence obtained from defendant's dashboard camera which was seized following a collision between his vehicle and a motorcycle. The officer's belief that defendant was driving recklessly was supported by friction marks at the scene. Also, the officer's belief that defendant might seek to destroy the evidence was supported by

his experience dealing with high-performance cars with dashboard cameras. The fact that defendant removed the camera and placed it in his backpack, and defendant's hesitancy to provide the camera, supported the officer's belief on that issue, justifying the immediate seizure of the camera pending the obtaining of a search warrant to search it.

In ***Tran***, on the issue of the constitutionality of the immediate seizure of defendant's dash-cam, the Court noted the following: "A seizure is 'far less intrusive than a search.' (***United States v. Payton*** (9th Cir. 2009) 573 F.3rd 859, 863.) . . . . Whereas a search implicates a person's right to keep the contents of his or her belongings private, a seizure only affects their right to possess the particular item in question. (***Segura v. United States*** (1984) 468 U.S. 796, 806, 104 S. Ct. 3380, 82 L.Ed.2nd 599) . . . . Consequently, the police generally have greater leeway in terms of conducting a warrantless seizure than they do in carrying out a warrantless search. The United States Supreme Court has 'frequently approved warrantless seizures of property . . . for the time necessary to secure a warrant, where a warrantless search was either held to be or likely would have been impermissible.' (***Ibid***.)" (***Id***., at p. 8.)

Tran, however, and as noted above, involved the suspect himself, as opposed to a mere non-involved witness or bystander. Until we get an appellate court ruling on the lawfulness of the seizure of a cellphone or camera from a non-involved witness, and/or the temporary detention of the owner of the device, it's probably best to make the contact as non-intrusive as possible.

If anyone is aware of any court (or statutory) authority on these issues, or has any other helpful comments ("*Phillips, you're full of crap*," is not helpful.), please forward it to me and I'll publish an update of this memo.