

Racial Justice Movement and COVID-19 Pandemic Highlight Importance of Police Oversight and Access to Judicial Proceedings

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Two important government institutions—police departments and the judicial system—largely function in a black box. Police conduct most of their day-to-day activities outside the watchful eye of the public. Judges, too, typically operate in empty courtrooms with limited public oversight. But since March 2020, the sunlight on these two government bodies has started shining brighter.

The COVID-19 pandemic and the racial justice uprising following George Floyd’s murder provided new opportunities to observe government in action. Police body-worn cameras (BWCs) and videos taken by 17-year-old Darnella Frazier captured Floyd’s brutal murder at the hands of the Minneapolis Police Department, raising awareness about the importance of a robust right to record police and the need for public access to BWC recordings. Social distancing requirements forced courts to revisit decades-old policies banning recording devices in courtrooms and accelerated live audio and video technology, providing the public a peek inside courts.

For these and other reasons, the issues of access to BWC recordings, the right to record police, and cameras in courts have received heightened attention the past two years. This article addresses recent events surrounding these three important issues, the current state of the law, and what it means for the future of police transparency and court access.

Access to police body-worn camera (BWC) recordings

Access to BWC recordings has lagged behind the drastic rise in BWC use over the past decade. As of 2016, nearly half of U.S. law enforcement agencies required BWCs, and police departments in many states, including California, Colorado, and New York, are required to use them. Yet access to BWC recordings is restricted in many jurisdictions. State legislatures have enacted a wide range of laws to determine whether and when BWC recordings are released publicly.

In Texas, for example, the public can submit written requests for BWC recordings, but there are many exceptions to disclosure under the state’s Public Information Act, and police cannot release any portion of a recording made in a private space or a recording involving the investigation of a misdemeanor punishable by fine only and that does not lead to an arrest without permission from the person who is the subject of the recording. Other states feature a range of policies:

- California requires BWC recordings be released within 45 days of an incident.
- Colorado requires BWC recordings be released within 21 days after a complaint is received. That time can be increased to 45 days if the recording’s release may compromise an investigation.
- Florida generally releases BWC recordings under the state’s public records law, but there are exceptions, such as when the recordings capture private residences, health care and social services facilities, or places where there is a reasonable expectation of privacy.

- Maryland allows BWC recordings be released under the state’s open records law.
- New Jersey releases BWC recordings to those involved in an incident (or their attorneys) and when the public interest outweighs the privacy interests.
- South Carolina requires recordings to be preserved for at least 14 days.

[The Reporters Committee for Freedom of the Press](#) and [Brennan Center for Justice](#) maintain databases showing the patchwork of BWC policies.

BWC recordings played a pivotal role in the Derek Chauvin trial, as the public and jurors saw up-close the violence of the Minneapolis Police Department. This month, BWC recordings changed the narrative surrounding the death of Amir Locke during the execution of a no-knock search warrant. Minneapolis PD [initially claimed](#) Locke had pointed his gun at officers. But [BWC recordings](#) released days later contradicted those allegations, showing that Locke did not target officers with his gun. Five days later, police [arrested](#) the actual murder suspect.

As the Amir Locke case shows, BWC recordings can be powerful tools in providing a check on police, but this oversight can only occur if the recordings are released publicly.

Right to record police

The First Amendment protects the right to publicly record the police conducting their duties in public in 61 percent of the country. Five federal appellate courts—the First, Third, Fifth, Seventh, and Ninth Circuits—have recognized this right, while the other circuits have yet to decide the issue. This fall, the U.S. Supreme Court dodged the opportunity to adopt a national right to record police. See *Frasier v. Evans*, 992 F.3d 1003 (10th Cir. 2021), *cert denied*, No. 21-57.

During protests after the murder of George Floyd and other incidents of police violence, the public and press exercised their right to record police in record numbers. But police officers often failed to respect this right. The U.S. Press Freedom Foundation found that 80 percent of the record [438 assaults](#) and [142 arrests](#) of journalists in 2020 occurred during protests. As of December 16, 2021, journalists had filed [45 lawsuits](#) against police officers across 24 cities for First and Fourth Amendment violations following arrests and assaults at protests.

Many of these lawsuits are still pending. In August 2021, five news photographers sued the New York Police Department under 42 U.S.C. § 1983 for allegedly targeting them while peacefully recording police activity from a public street and sidewalk. [Gray v. City of New York](#), No. 21-cv-06610 (S.D.N.Y.). The case is currently in the discovery phase of litigation. But other lawsuits have been resolved. In February 2022, the ACLU of Minnesota [settled](#) a lawsuit brought by journalists injured while covering protests in Minnesota. The state agreed to pay \$825,000, change several policies, and cease acts of violence against journalists. A list of other lawsuits filed by journalists against police officers is maintained by the [U.S. Press Freedom Foundation](#).

The doctrine of qualified immunity has also seen recent reforms. When bringing a civil rights lawsuit, a plaintiff must prove that the police violated a “clearly established” constitutional right. Because the U.S. Supreme Court has set a high bar for when a right is “clearly established,” state legislatures have stepped in and passed qualified immunity laws. [New Mexico](#) and [Colorado](#), for example, have banned qualified immunity. Still, prevailing on a civil rights lawsuit remains an uphill—and an expensive—endeavor.

Besides civil lawsuits, criminal charges have been brought against police for violence against the public and press during protests. For example, a Travis County grand jury indicted 19 Austin police

officers on excessive force charges after around 30 protestors sustained injuries during the George Floyd protests, according to the [Austin American-Statesman](#). Officers allegedly used beanbag ammunition and rubber bullets against protestors, causing brain injuries and broken bones. Austin officials have already agreed to a \$10 million [settlement](#) relating to two of those injured protestors.

Cameras in courts

Courts have recognized a First Amendment right to access court proceedings and documents, but this right has not been extended to the use of audio or video recording devices in courts. Instead, courts have largely prohibited the public and press from recording court proceedings. For example, Federal Rule of Criminal Procedure 53 bans photography in or the broadcasting of federal criminal hearings. State courts vary on whether audio or video recordings are permitted.

Because of strict capacity limits during the COVID-19 pandemic, many courts implemented new policies offering electronic or telephonic access to parties through platforms such as Zoom and YouTube, and most courts extended that remote access to the public.

The pandemic provided the public and press a front-row seat to the Derek Chauvin trial in Minnesota. Hennepin County District Courts had traditionally only allowed cameras in criminal trials with the consent of all parties. In the Chauvin case, his attorneys consented to cameras, but prosecutors did not. But because of social distancing requirements limiting the number of people who could be in the courtroom, the court [ruled](#) that cameras should be allowed to preserve Chauvin's Sixth Amendment right to a public trial and First Amendment right of access. The court wrote: "The press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism." (quoting *Sheppard v. Maxwell*, 384 U.S. 333, 350 (1966)). A coalition of media organizations banded together to implement the court's ruling. Court TV aired the trial live, while two pool print reporters and two pool broadcast reporters served as the eyes and ears of the public in the courtroom.

The pandemic also improved public access to the U.S. Supreme Court. While the Court had previously made audio recordings of oral arguments available on a delayed basis, beginning in May 2020, the Court live-streamed audio of oral arguments while the Justices and advocates participated remotely. Once in-person proceedings resumed, the Court continued to permit the live streaming of audio. The Court has not announced whether this access will remain going forward.