



What to do When First Amendment Auditors Come to Town

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What We'll be Covering

1. What is a First Amendment Auditor?
2. What is the First Amendment, Exactly?
3. Video Recording as “Protected Speech”
4. Applying the First Amendment to Different Government Locales
5. Practical Pointers When Confronted by an Auditor

1. What is a First Amendment Auditor?

What is a First Amendment Auditor?

- Nov. 3, 2020—two men wearing tactical vests and armed with guns film voters dropping off ballots in Littleton, CO
- Identified themselves as “First Amendment Auditors”



What is a First Amendment Auditor?

- An American social movement categorized by its practitioners as activism and citizen journalism that tests constitutional rights – in particular, the right to photograph and video record in a public space
- Two main classes: (1) auditor-initiated contact with police or public employee; and (2) auditor-initiated intrusion into public space/buildings
- Both are **by design** intended to provoke a response, and auditors frequently hope to escalate the nature of the response

What is a First Amendment Auditor?

- Auditors tend to film or photograph government buildings, equipment, access control points, and sensitive areas, as well as recording law enforcement or military personnel present
- Auditors are often confrontational in nature
- Many times auditors are hoping to get cited or arrested



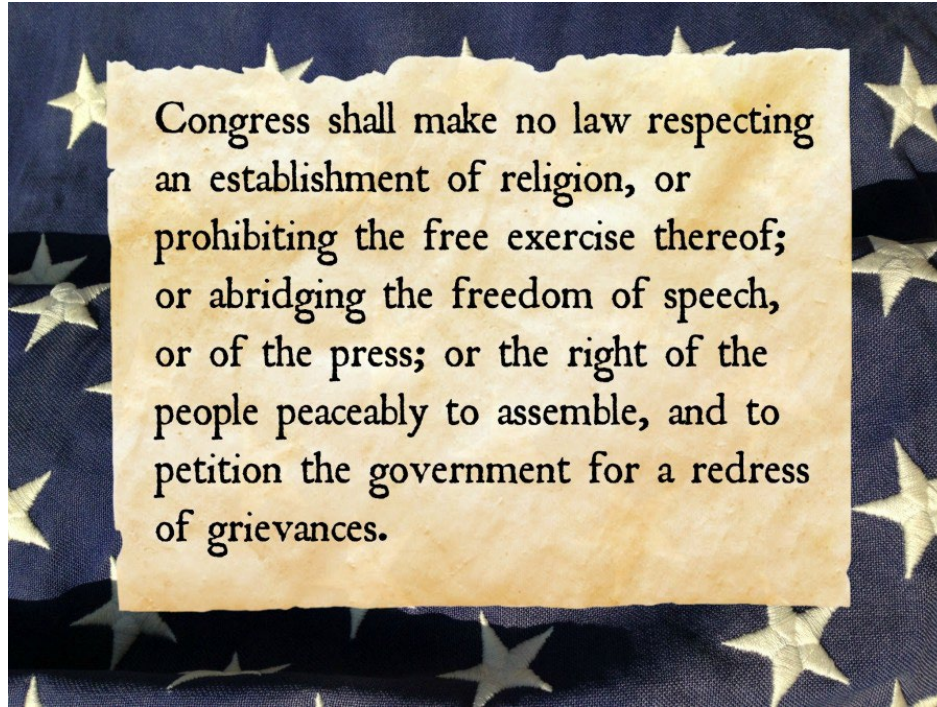
Auditors Live Stream

- Auditors typically live stream on Instagram, YouTube, Facebook, etc.
- Have many followers – nation and world wide – read comments!
- Public, even police supporters following pages
- Your encounter will either support or tarnish city's image
- Auditors may heavily edit their videos



2. What is the First Amendment, Exactly?

What is the First Amendment?



First Amendment

- Key Protections:
 - Speech
 - Press
 - Assembly
 - Petition
 - Religion



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Protected Speech: SCOTUS

Supreme Court has recognized that the First Amendment's protections extend to individual and collective speech "in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends."

Roberts v. U.S. Jaycees, 468 U.S. 609, 622 (1984).

Forms of Protected Speech

- Protests
- Books
- Newspapers
- Leaflets
- Rallies



What is the First Amendment, Exactly?

- Unprotected Speech
 - Obscenity
 - Defamation
 - Fraud
 - Incitement
 - True Threats
 - Fighting Words
 - Child Pornography
- Hate Speech?



3. Video Recording as “Protected Speech”

Is Video Recording Speech?



- Little to no distinction between the act of creation and dissemination for First Amendment purposes
- “[W]e have never seriously questioned that the processes of writing words down on paper, painting a picture, and playing an instrument are purely expressive activities entitled to full First Amendment protection.”

***Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1061–62 (9th Cir. 2010).**

Is Video Recording Speech?

***Animal Legal Defense Fund v. Wasden*, 878 F.3d 1184, 1203 (9th Cir. 2018):**

- “The act of recording is itself an inherently expressive activity; decisions about content, composition, lighting, volume, and angles, among others, are expressive in the same way as the written word or a musical score.”



Other Circuits Agree

- “The act of making an audio or audiovisual recording is necessarily included within the First Amendment’s guarantee of speech.”
 - *ACLU v. Alvarez*, 679 F.3d 583, 595 (7th Cir. 2012).
- “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*, 212 F.3d 1332, 1333 (11th Cir. 2000).

4. Applying the First Amendment to Different Government Locales

Locations Being Audited

- Police stations
- Schools
- Post offices
- City Halls
- Maintenance yards
- Other public buildings



Public Property: How is it Characterized?

- The nature of the forum determines the extent to which the government can constrain free speech
 - *Cornelius v. NAACP Legal Def. and Educ. Fund, Inc.*, 473 U.S. 788, 797 (1985).
- The property is categorized as either a **traditional public forum**, a **designated public forum**, a **limited public forum**, or a **nonpublic forum**
 - *Hopper v. City of Pasco*, 241 F.3d 1067, 1074 (9th Cir. 2001).

Family Feud: Constitutional Edition



Traditional Public Fora

Traditional Public Forum

- Where people have traditionally been able to express their ideas: *town square, park, public street*



Classic Examples



Traditional Public Forum

Content Neutral:

1. **Reasonable** time, place and manner;
2. **Narrowly-tailored** to serve a **significant** government interest; *and*
3. Leaves open ample **alternative channels** of communication

Content Based:

1. Subject to **strict scrutiny**;
2. Must be **least restrictive** means to achieve **compelling** government interest; *and*
3. **Presumptively invalid**

Examples: Designated Fora

- Interior of city hall opened to display art
- Municipal auditorium, or city-leased theater dedicated to expressive activity
- Same standard of review as public fora



Traditional Non-Public Fora

Non-Public Forum

- Government property traditionally not open to the free exchange of ideas: *courthouse lobby, prison, post office, military base*



Non-Public Forums

Governmental regulations of speech in non-public forums:

- Must be **reasonable** in light of the purpose of the forum
- Must be **viewpoint neutral**
- Should convey a **clear intent** that the government designates the property only as a non-public forum
- May allow for the **closure** of the forum at any time

Examples: Limited Fora

- Public library meeting rooms
- Public school property
- Same standard of review as non-public fora



Restrictions – Consider Lawful Access

- Any location the public is allowed to access reasonably (or clearly)
- Sidewalks, streets, driveways, parking lots, lobbies, parks, municipal buildings where public has open access/business



Restrictions – Public Safety

Possibilities to consider:

- Public Safety—critical public infrastructure like water storage, electric plants, public utilities



George Rose/Getty Images

Restrictions – Private Work Areas



- The local government should therefore make sure that essentially “private” work areas – personal offices, workstations, courtrooms, waiting rooms, secure locations, and so on – are marked and treated as **non-public forums**

How Do You Figure It Out?

Useful rule of thumb:

- Would you be required to allow traditional speech in the location?
- For example, could protestors gather in an employee's office to demonstrate?

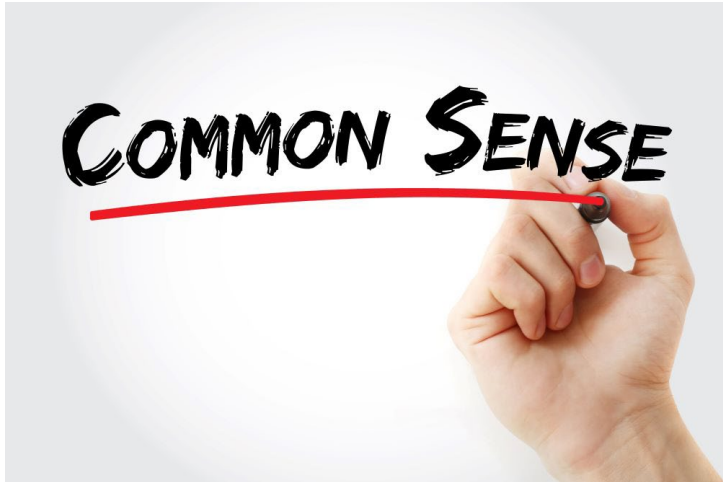
INSIDER



Richard Barnett, a supporter of US President Donald Trump sits inside the office of US Speaker of the House Nancy Pelosi as he protest inside the US Capitol in Washington, DC, January 6, 2021. Photo by SAUL LOEB/AFP via Getty Images

<https://www.businessinsider.com/accused-capitol-rioter-interviewed-on-russian-state-tv-2021-6>

How Do You Figure It Out?



- The Supreme Court emphasized the importance of allowing the government “wide discretion” in controlling its work space and refused to find that rules permitting limited expression opened up the space

Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 805-06 (1985).

Other Restrictions – Loitering

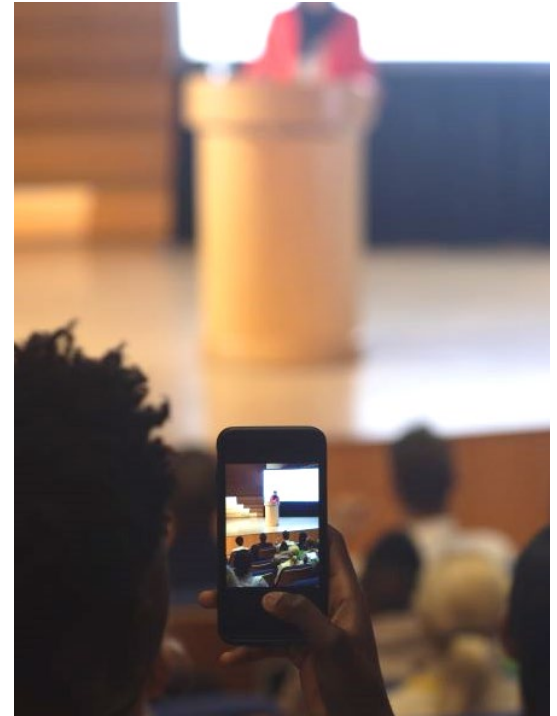
City of Chicago v. Morales, 527 U.S. 41, 42, 56-57 (1999)

- “It is difficult to imagine how any citizen of the city of Chicago standing in a public place with a group of people would know if he or she had an apparent purpose.”



Other Restrictions – Recording Third Parties

- Generally speaking, it is legal to video record a private citizen as long as they do not have a reasonable expectation of privacy
- Note that audio recording is more limited than video recording – wiretapping laws, reasonable expectations of privacy, and so on



Examples of Filming Restrictions

Sheets v. City of Punta Gorda, Fla., **415 F. Supp. 3d 1115 (M.D. Fla. 2019)**

- Classic First Amendment Auditor situation
- According to the City's affidavits, prior unconsented recording created disruptions for employees conducting City business
- Videos of City employees circulated on the internet, leading to death threats, suspicious packages in the mail, and so many threatening calls that the City had to shut down its phone lines



Examples of Filming Restrictions

- There was no signage or other indication of a policy prohibiting the public from taking photographs, and in fact there is no policy regarding photographing in public areas of government buildings in Fort Valley, Georgia
- Self-described citizen-journalist broadcasting on YouTube
- Dunn was arrested after recording in public areas of City Hall
- Indefinitely barred from the City Hall and Police Department without escort

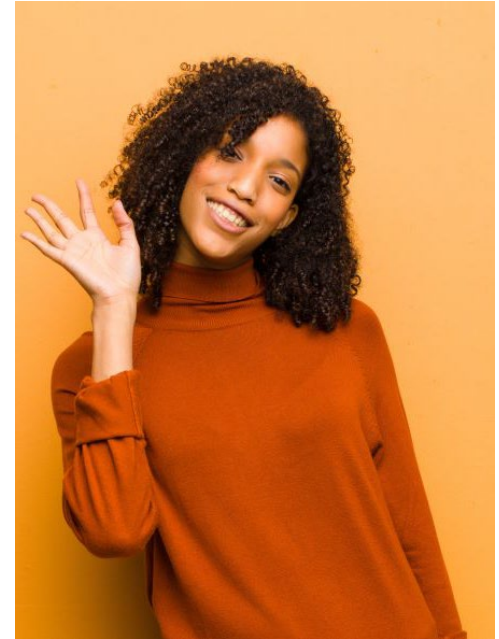


***Dunn v. City of Fort Valley*, 464 F. Supp. 3d 1347, 1366 (M.D. Ga. 2020).**

5. Practical Pointers When Confronted by an Auditor

Favorite Approach? No Contact

- Once clear identification that an audit is underway, the best practice is no contact
- Allow the auditor(s) to conduct their business
- Be friendly! Smile, wave, accommodate
- Just be human!
- As long as it is not criminally disrupting business or harassing citizens
- If you reasonably suspect criminal conduct, then . . .



Excuse Me, What Are You Doing?

The Consensual Encounter

- Consensual encounters – often the start of contact for auditors
- Best practice is determining what is occurring
- Auditors often reply politely (just shooting some footage)
- Some give silent treatment
- Some react hostile/negative
- Be prepared to be on film
- No cam-backs
(recording the auditor recording you)



Practice Pointers: Public Entity

- Consider creating guidelines for the government's property to establish the nature of the *public forum* involved
- Consider adopting guidelines for *conduct* that regulate only “time, place, and manner” – *not content*
- Make sure that the guidelines calling out nature of public property and regulations are transparent to the public and known by employees

Practice Pointers: Public Entity

- Even handed application of guidelines
- Employee education
- Provide contact information to employees so they know who to contact when situations develop

Review Other Jurisdictions' Guidelines

- Portland enacted rules of conduct on City property in 2017, due to the upward trend of public frustration against government and elected officials
 - Portland City Code 3.18.020 Rules of Conduct at City Property.
- Municipal Association of South Carolina promulgated a model policy online to address issues relating to public access, and video and audio recording, on municipal property
 - Municipal Association of South Carolina's Model Policy.

Practice Pointers: Employees

- Know the general legal authority
- Strive to remain calm and rational
- Deflect or defuse inflammatory statements
- If regulations apply (either to the forum or to the conduct), clearly articulate them
- Always assume that the audit may end up on YouTube
- Have on-hand the contact information to reach your city attorney or designated police liaison



**Do Not Suspend
Your Judgement**

What Can We Do?

- Audits can and will continue – so accept it and move on
- We have to allow them, and should even welcome them
- If an area is so secretive and needs to be secure, then secure it!
- Security screening, block walls, window tint, clearly posted signs
- Doors to secure areas should be key card or keyed and locked
- Train all personnel – sworn and non-sworn
- Consider social media blast to train your community

Thank you!!



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