



# 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. Understanding the First Amendment in Different Public Spaces
5. Implicated Issues in Regulating Filming
6. 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



# Auditors Often Monetize Their Videos


TO DONATE TO MR. BAY AREA TRANSPARENCY:

\$peoplesauditor ON CASH APP

transparencybayarea@gmail.com ON VENMO AND PAYPAL OR

@Bay-Area-3 on VENMO

@BayArea557 on PayPal

Instagram page:  / bayareatransparency

Bay Area Transparency merch/apparel: <https://my-store-9d76bb.creator-sprin...>



**venmo**



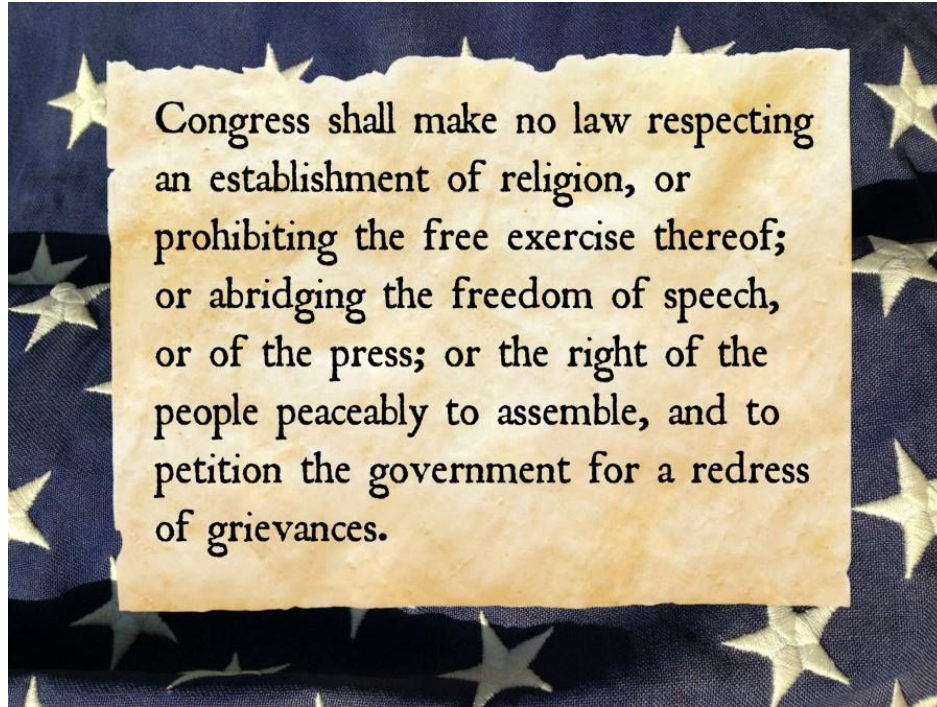
**MERCHANDISING**

2,286,892 views Dec 1, 2020



## 2. What is the First Amendment, Exactly?

# What is the First Amendment?



# 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).

# Unprotected Speech

- 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* (9th Cir. 2010) 621 F.3d 1051, 1061–62**

# Is Video Recording Speech?

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

- “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.”



# Circuits Agree

- “The First Amendment protects the act of making film, as there is no fixed First Amendment line between the act of creating speech and the speech itself.”
  - *Turner v. Lieutenant Driver*, 848 F.3d 678, 688 (5th Cir. 2017)
- “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)



# Circuits Agree

- “Gathering information about government officials in a form that can readily be disseminated to others serves a cardinal First Amendment interest in protecting and promoting the free discussion of governmental affairs.”
  - *Glik v. Cunniffe*, 655 F.3d 78, 81 (1st Cir. 2011)
- “The First Amendment protects actual photos, videos, and recordings, and for this protection to have meaning the Amendment must also protect the act of creating that material.”
  - *Fields v. City of Philadelphia*, 862 F.3d 353, 358 (3<sup>rd</sup> Cir. 2017)

## 4. Understanding the First Amendment in Different Public Spaces

# Locations Being Audited

- District Offices
- Schools
- City Halls
- Public Lots
- Libraries
- 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).
- Two major categories of forums:
  - **traditional public forums or designated public forums,**
  - **nonpublic forums or limited public forums.**  
*Hopper v. City of Pasco*, 241 F.3d 1067, 1074 (9th Cir. 2001).

# Town Squares, Parks





# Roadways, Sidewalks, Medians



# Courthouses, Prisons, Military Bases



# Public Schools, Public Library Meeting Rooms





# Offices/Workspaces of Government Employees



# Confusion Over Forums

- “It is a bad sign if the doctrine is so confused that reasonable observers cannot even agree on how many categories of forum exist.”
  - Aaron H. Caplan, *Invasion of the Public Forum Doctrine*, 46 Willamette L. Rev. 647, 654 (2010)

# Traditional Public Forum – The Test

## 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**

# Non-Public Forums – The Test

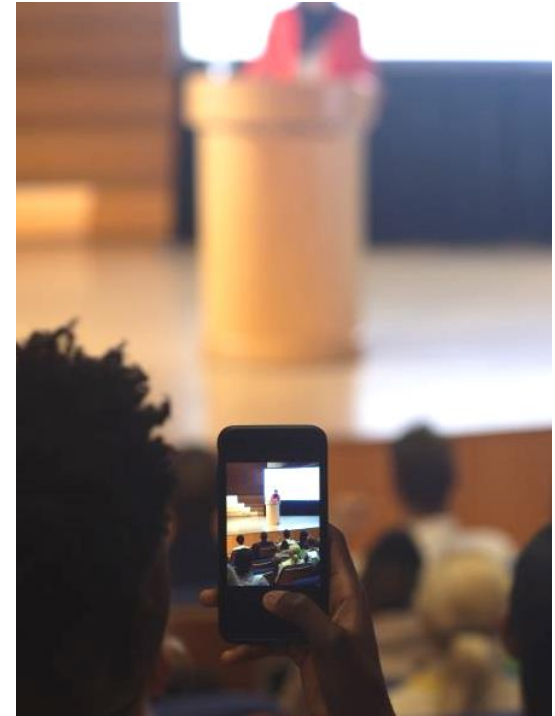
Governmental regulations of speech in nonpublic forums:

- 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 nonpublic forum.
- May allow for the **closure** of the forum at any time.

## 5. Implicated Issues in Regulating Filming

# Restrictions – Recording Third Parties / Privacy

- 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.



# Restrictions – Private Work Areas



- 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).**

# Restrictions – 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
- The Supreme Court has recognized that the government, “no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated.” *Perry Educ. Ass’n v. Perry Loc. Educators’ Ass’n*, 460 U.S. 37, 46 (1983).





# Loitering

## ***City of Chicago v. Morales, 527 U.S. 41, 42 (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.”



# 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?



# 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.

## 6. Practical Pointers When Confronted by an Auditor

# Preferred Approach: No Contact

- Once clear identification that an audit is underway, the best practice is no contact
- Allow the auditor(s) to videotape publicly accessible areas
- Try to deescalate situation – remember seeking attention/reaction
- If you suspect criminal conduct - then take action



# Practice Pointers

- Strive to remain calm and rational
- Deflect or defuse inflammatory statements
- If regulations or code of conduct applies – provide copy
- Have on-hand the contact information to reach your city attorney or designated police liaison



**Do Not Suspend  
Your Judgement**

# Practice Pointers

- Consider creating written guidelines
- Consider “time, place, and manner” provisions
- Make sure that the guidelines are transparent to the public and known by employees

# Preventative Workplace Measures

- Cleanse your publicly accessible work desk
- Security screening, block walls, window tint, posted signs
- Lock doors – use key card
- Train all personnel – sworn and non-sworn





# Thank you!!



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