


First Amendment Audits

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Background; Origins

- On March 3, 1991, Rodney King was beaten by LAPD officers after a high-speed chase.
- George Holliday, an uninvolved bystander, filmed the incident from a nearby balcony and sent the footage to a local news station.
- The footage was captured on a traditional, large, bulky camcorder – which would have been difficult to transport for regular usage.
- The incident was covered by news media around the world and caused a public furor.



The Modern Context



What Is the Legal Issue?

- First Amendment: Congress shall make no law “abridging the freedom of speech, or of the press”
- Is recording speech?
- Remember that this question has been primarily considered in the context of “Bystander Videos” – footage captured by an uninvolved bystander of an encounter between the police and a suspect. The courts are highly protective of the right to film such videos.



Current / Majority View: Recording Police Conduct is Speech

- “[R]ecording police activity in public falls squarely within the First Amendment right of access to information. As no doubt the press has this right, so does the public.... Bystander videos provide different perspectives than police and dashboard cameras, portraying circumstances and surroundings that police videos often do not capture. Civilian video also fills the gaps created when police choose not to record video or withhold their footage from the public.” *Fields v. City of Philadelphia*, 862 F.3d 353, 359 (3d Cir. 2017).
- This is the view of every federal court to consider the issue in the context of police-initiated encounters.



Difficult Applications of the Rule

- What about intentional provocation of police officers while recording?
- What about interactions with government employees other than public safety officers?
- What about the rights of third parties, who merely happen to be interacting with government employees?
- What about filming security-sensitive government property?



Thus: The So-Called “First Amendment Audit”

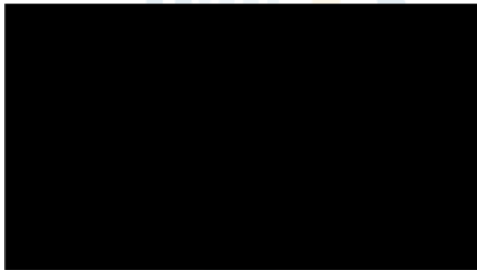
- An American social movement categorized by its practitioners as activism and citizen journalism that tests constitutional rights – in particular, the right to photograph and video record in a public space.
- Two main classes: (1) auditor-initiated contact with police; and (2) auditor-initiated intrusion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



Provocation Example



Facilities Audit Example



What Can Local Governments Do?

- Most important: Employee education.
- Create guidelines for the government's property to establish the nature of the public forum involved.
- Creates guidelines for conduct that regulate only "time, place, and manner" – not content.
- Make sure that the guidelines – both forum guidelines and conduct guidelines – are transparent to the public and known by employees.





Forum Guidelines

- Traditional Public forums – streets, sidewalks, common areas inside and outside public buildings
- Designated or limited public forums – courtrooms, council rooms
- Nonpublic forums – private offices, secure locations, areas marked "authorized personnel only"



Forum Guidelines

- "In a *traditional public forum* – parks, streets, sidewalks, and the like – the government may impose reasonable time, place, and manner restrictions on private speech, but restrictions based on content must satisfy strict scrutiny, and those based on viewpoint are prohibited."
- "The same standards apply in *designated public forums* – spaces that have not traditionally been regarded as a public forum but which the government has intentionally opened up for that purpose."
- "In a *nonpublic forum*, on the other hand – a space that is not by tradition or designation a forum for public communication – the government has much more flexibility to craft rules limiting speech. The government may reserve such a forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view."

Minnesota Voters Alliance v. Mansky, 138 S. Ct. 1876, 1885, 201 L. Ed. 2d 201 (2018)



Nonpublic Forums

It is "black-letter law that, when the government permits speech on government property that is a nonpublic forum, it can exclude speakers on the basis of their subject matter, so long as the distinctions drawn are viewpoint neutral and reasonable in light of the purpose served by the forum." *Davenport v. Washington Educ. Ass'n*, 551 U.S. 177, 189 (2007).



Identifying Nonpublic Forums

- Essentially "private" work areas – personal offices, workstations, courtrooms, waiting rooms, secure locations, and so on – can be marked and treated as nonpublic forums.
- Useful rule of thumb: Would you be required to allow traditional speech in the location?



Regulating Nonpublic Forums

Reasonable justifications for excluding First Amendment auditors from designated government property:

- Protecting the privacy rights of citizens
- Preventing disruption of government business
- Public safety



Regulating Nonpublic Forums

- Identify and designate nonpublic forums by signs, doors, ropes, etc.
- Have a policy for activity in nonpublic forums.
- It is permissible to forbid video recording in a properly identified and designated nonpublic forum.
- It is also permissible to allow but regulate video recording in nonpublic forums, as long as the regulations are reasonable and viewpoint neutral.



Public Property vs. Public Forum





Conduct Regulation



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Conduct Rules


- Governments may impose content-neutral regulations on “time, place, and manner” of speech, even in public forums.
- In public forums, these regulations cannot discriminate based on content or on viewpoint.
- But these regulations can require generally applicable standards.



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Special Case: 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. This is likely a product of more precedent.
- It seems likely that you could create “privacy zones,” comparable to the standing points in pharmacy lines.
- And recent Florida case – no recording of third parties without their consent.



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Special Case: Stalking & Harassment

S.C. Code Ann. § 16-3-1700. Definitions. As used in this article:

(A) "Harassment in the first degree" means a pattern of intentional, substantial, and unreasonable intrusion into the private life of a targeted person that serves no legitimate purpose and causes the person and would cause a reasonable person in his position to suffer mental or emotional distress. Harassment in the first degree may include, but is not limited to:

- (1) following the targeted person as he moves from location to location;
- (2) visual or physical contact that is initiated, maintained, or repeated after a person has been provided oral or written notice that the contact is unwanted or after the victim has filed an incident report with a law enforcement agency;
- (3) surveillance of or the maintenance of a presence near the targeted person's ... (b) place of work...



Administrative Order 2023-03-10-01

E. Prohibited Uses: Taking photographs, making audio and/or video recordings, and broadcasting audio and/or video from within a courthouse or courtroom is generally prohibited. Court proceedings may only be photographed, recorded, or broadcast in accordance with Rule 605 of the South Carolina Appellate Court Rules. Photographing, recording, or broadcasting in common areas of the courthouse, or in the courtrooms when court is not in session, may be allowed at the discretion of the Clerk of Court.



Rule 605, SC Appellate Ct. Rules

(b) General Rule. Except as provided ... below, the broadcasting, televising, recording, or taking photographs in the courtroom and areas immediately adjacent thereto during sessions of court or recesses between sessions is prohibited.



Rule 605, SC Appellate Ct. Rules

(f) Media Coverage. (1) General Provisions. (i) Subject to the requirements of this Rule, representatives of the media may use video, still cameras or recorders to cover proceedings in the courts of this State. (ii) Media representatives must give reasonable notice to the presiding judge of a request to cover a proceeding.... (iii) The presiding judge may refuse, limit, or terminate media coverage of an entire case, portions thereof, or testimony of particular witnesses as may be required in the interests of justice.... (v) Nothing in this Rule shall prevent a judge from placing additional reasonable restrictions, or prohibiting altogether, photographing, recording, or broadcasting in court facilities other than the courtroom.



Rule 605, SC Appellate Ct. Rules

(f)(3) Equipment and Personnel. (i) No more than two television cameras, operated by no more than one camera person each, shall be permitted in any proceeding. (ii) No more than one radio recorder, operated by no more than one person, shall be permitted in any proceeding. (iii) No more than two still photographers, utilizing no more than two cameras and related equipment each, shall be permitted in any proceeding. (iv) If two or more media representatives have given notice ... the presiding judge shall notify the applicants that no coverage may begin until all the representatives have agreed upon a pooling arrangement for their respective news media.



Rule 605, SC Appellate Ct. Rules

(f)(2) Limitations. The members of the jury may not be photographed except when they happen to be in the background of other subjects being photographed. Camera and audio coverage of prospective jurors during selection is prohibited.



Model Policy: Limited Access

- “Limited Access Area” means any designated area on Municipality Property that is not generally open to or occupied by the public; is open to or occupied by the public on only a limited, as-needed, or by-invitation basis; or is in an area generally open to or occupied by the public in close proximity to private third parties conducting business with Municipality employees. Limited Access Areas may be designated by doors, physical barriers, building design features, signage, reception desks or stations, stanchions, ropes, fencing, bollards, or other visible indications... The Municipality shall retain the right to verbally instruct third parties that an area is a Limited Access Area.



Model Policy: Limited Access

- Limited Access Areas shall be accessible only to the following: (i) employees, elected officials, and appointed officials of the Municipality; and (ii) private parties but only on a limited, as-needed, or by-invitation basis, to include those private parties accessing a Limited Access Area for the express purpose of conducting business with Municipality employees.
- Photography, audio recording, and video recording is prohibited in Limited Access Areas, except as follows....



Model Policy: Rules of Conduct

- No person shall engage in activity that disrupts or interferes with the normal operation or administration of business at Municipality Property, lawful use by employees and authorized users at Municipality Property, or Municipality-permitted activities.
- No person shall stalk, harass, threaten, intimidate, or otherwise compromise the wellbeing and safety of employees or private third parties lawfully using Municipality Property.



Model Policy: Employee Guidance

- Employees should refrain from engaging with auditors wherever possible. Municipality employees should monitor auditors on Municipality Property, but should refrain from engaging them unless they violate any Rule of Conduct. In the event that engagement is necessary, every effort should be made to respond calmly without escalating the encounter.
- An employee who does not wish to be photographed or recorded may retire to a Limited Access Area.
- Employees are not required to respond to questions or demands from an auditor, and should refrain from doing so if possible.
- Employees may invite a private third party conducting business with the Municipality and who do not wish to be filmed to retire to a more private Limited Access Area in order to complete any business or transaction.



General Guidelines for ALL Employees

- Know your legal authority; EDUCATION
- Know the difference between public property and public forums
- If regulations apply (either to the forum or to the conduct), clearly articulate them – and then be willing to politely enforce those regulations
- Strive to remain calm and rational
- Deflect or defuse inflammatory statements
- Always remember that you may end up on Youtube!