

Minimizing the Risk of Liability and Going Viral: Responding to First Amendment Auditors

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#FirstAmendment



To Record or Not to Record?



- Policies regarding Employees recording one another

What is a First Amendment Auditor?

- Activists or citizen journalists targeting a government facility, employee or event
- Likely demanding answers and attempting to explore a building or crime scene
- Encounters are recorded



- Purpose is a test of the 1A
- Encounter is broadcast to the public via social media + YouTube
- Primary goal is to provoke a reaction, even a lawsuit

Legal Background

- What is protected by the First Amendment?
 - Visual
 - Audio



Legal Rights

- Forum – Where can this happen?
 - Traditional
 - e.g. park
- Designated
 - e.g. meeting facilities
- Limited
 - e.g. Open space for limited uses/topics
- Non-public
 - e.g. spaces not open to the public

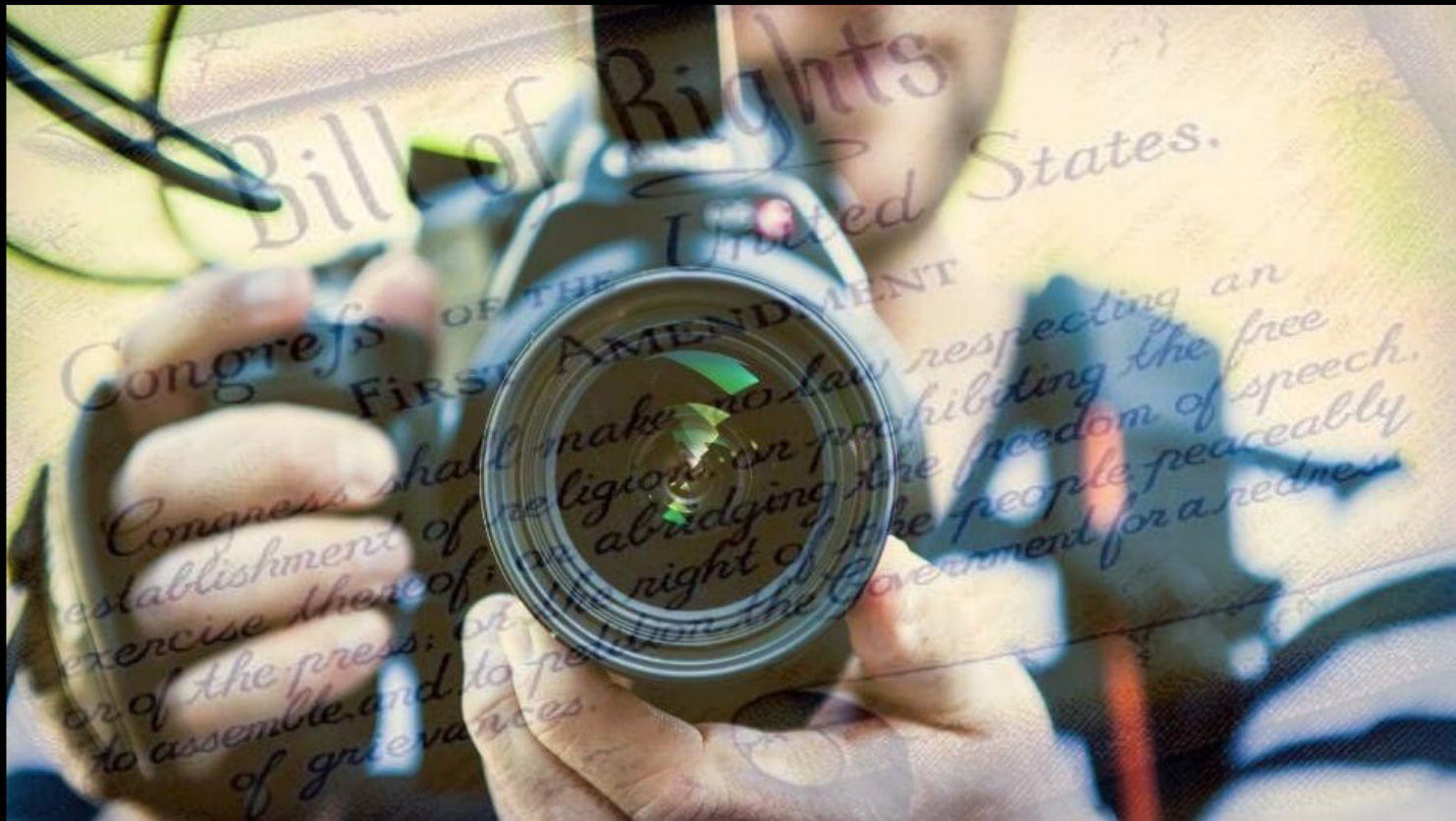


Legal Rights

- Restrictions?
 - Time
 - Place
 - Manner
 - Viewpoint neutral
 - Reasonable



First Amendment Auditors— Do They Have the Right?



What are First Amendment Auditors Recording?

- Public buildings
- Parking lots
- Individuals on a public sidewalks
- Parks
- Public Vehicles (including confirming locked while parked)
- Personal Vehicles

First Amendment Auditors— Do They Have the Right?

First Amendment Auditor tells officer “You are dismissed.”



Can Someone Lawfully Video in a Public Space?

- Generally, if in a public space, an individual has the ability to photograph/video anything in plain view.
- What about audio?
- Ohio is a one-party state, but...consent is not required where speaker does not have an ordinary expectation of privacy.

Can Someone Lawfully Video in a Public Space?



Legal Considerations

➤ Freedom of the press includes the right to record video and audio.

- *Am. Civil Liberties Union of IL v. Alvarez*, No. 11-1286 (7th Cir. 2012).

The act of *making* an audio or audiovisual recording is necessarily included within the First Amendment's guarantee of speech and press rights.

- *Lovell v. City of Griffin*, 303 U.S. 444 (1938).

The press comprehends every sort of publication which affords a vehicle of information and opinion.

Legal Considerations

➤ *Branzburg v. Hayes*, 408 U.S. 665 (1972).

- The First Amendment does not provide the press a right of special access to information not otherwise available to the public, generally.

➤ *Glik v. Cunniffe*, No. 10-1764 (1st Cir. 2011).

- Recording police and other government officials in the discharge of their duties is explicitly allowed.

How to Respond?

How to Prepare

- Know how to recognize auditors
- Ensure public areas of building are clearly marked
- Educate your employees
- Establish guidelines
- Ensure police personnel are prepared for out-of-building encounters

- Consult with your attorney
- Know the law and their rights
- When in doubt...contact law enforcement

Gov communicator taking the bait and getting frustrated



First Amendment Auditor posting your reaction to YouTube



How to Respond?

How to Respond

- Don't overreact- acknowledge their right to record
- Be prepared to be provoked
 - Repeated questions
 - Not satisfied with answers
 - Profanity
- Know when you need help from a worker/supervisor
- Keep it short – continue business as usual
- Boring is good
- Understand anything that you do may end up on YouTube or in a 1st Amendment Lawsuit



Are There Any Limitations?

- Cannot interfere/disrupt services
- Block access
- Secure areas where video recording is prohibited
- No greater access to facility
- Establish policies
- Limit business in public areas

Thank You!

IF YOU HAVE ANY QUESTIONS, PLEASE ASK!

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