

First Amendment Audits

What You Should Know About First Amendment Rights and Limitations

Presented by:
Sheriff (Retired) Thomas Kerss,
LE Consultants' & Training Specialists' Supervisor
Texas Association of Counties Risk Management Pool



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Disclaimer

This training is designed to provide general information about the subject matter covered. Neither TAC nor the trainers are engaged in rendering legal advice. If you need legal advice, TAC recommends that you seek the services of a competent attorney who is familiar with your specific situation.

Video examples used in this presentation are educational aids and are not intended to humiliate or offend the involved parties.



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First Amendment Audits



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What are 1st Amendment Audits?

- **First Amendment audits** are a social movement conducted by individuals eager to test their free speech rights; especially their right to photograph and record from public spaces.
- Some audits link this practice with 2nd Amendment challenges and simultaneously test their right to carry firearms in public spaces. *They especially look for signs improperly posted at governmental buildings displaying PC 30.06 & PC 30.07 warnings.*
- **Amendment Auditors claim their actions help preserve our Constitutional rights, but many seek confrontation.**



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1st Amendment-U.S. Constitution

Freedom of Religion, Speech & Assembly

“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.”



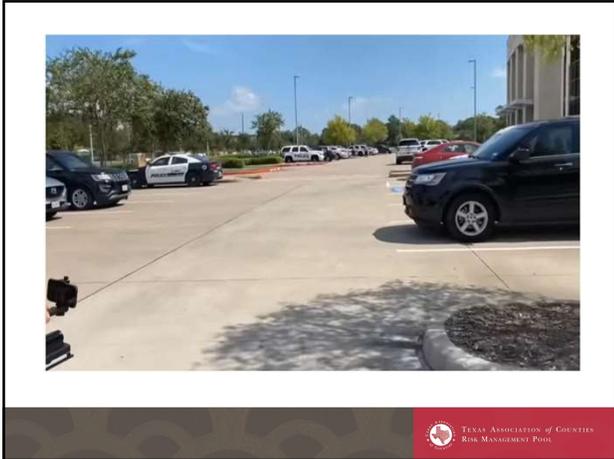
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First Amendment Right to Record

- The recording of public officials is considered “**protected speech**” under the 1st Amendment.
- The ability to observe and photograph or record agents of government, including police conducting business in a public place, is guarded by the Constitution:
- The Supreme Court has also held that the 1st Amendment protects a person’s right to circulate publicly available information they collect or record in any medium they choose.



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1st Amendment Audit Experiences

- Audit experiences may seem awkward; an auditor's behavior often appears suspicious or challenging.
- Auditors are intentionally vague. They often refuse to self-identify and most refuse to answer questions or explain their purpose or actions.
- Many auditors seem aggressive and seek verbal confrontation; they hope for inappropriate employee responses or negative/improper law enforcement intervention.

It is a mistake to think amendment auditors only target law enforcement; no public servant is off limits.



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Tax Office Being Audited Again

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1st Amendment Audit Results

- Poorly handled audits often generate return visits or lead to additional auditors showing up.
- Recordings made during audits are commonly circulated on social media platforms, discussed on blogs, or aired on podcasts.

Remember, you could become a social media sensation overnight by failing to understand their constitutional rights.



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Who are 1st Amendment Auditors?

- **“Constitutional Auditors”** are self-appointed activists; they may act independently or in unison as citizen journalists. Some call themselves “Sovereign Citizens”.
- **First Amendment Auditors** desire to test the limits you will place on their free speech right, mostly the right to occupy and film from public space or in public forums.
- Their goal is to challenge your knowledge and acceptance of their free speech entitlements by testing those limits and gauging your reactions.

Auditors have often researched laws that apply to their practices, and most understand their rights and limitations.



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The Audit Process

- Auditors show up unannounced and photograph or film government buildings, offices, control points, and common or sensitive areas, including parking lots and vehicles.
- Auditors commonly seek access to governmental records, request complaint or grievance forms, or ask for copies of select administrative policies.
- They often record public officials, governmental employees and citizens that are present and may demand the identity of personnel within their view.

Generally, permission is not needed to record anyone, or anything visible from commonly accessible public space.



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No Privacy Expectation When Viewed or Heard from a Public Place

- **Katz v. United States, 389 U.S. 347, 351 (1967)**
(reasoning that "[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection");
- **Vega-Rodriguez v. P.R. Tel. Co., 110 F.3d 174, 181**
(1st Cir. 1997) "persons cannot reasonably maintain an expectation of privacy in that which they display openly";
- **Turner v. Driver, No. 16-10312 (5th Cir. 2017)**
First Amendment principles, controlling authority, and persuasive precedent demonstrate that a First Amendment right to record... is subject only to "reasonable time, place, and manner restrictions."



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"Symbolic Speech" Protections may Extend to Citizens Being Recorded from Public Spaces

Texas v. Johnson, 491 U.S. 397 (1989).
Flag burning constitutes symbolic speech that is protected by the First Amendment.

US Supreme Court ruled that "symbolic speech" is protected by the First Amendment.

- free speech protects actions that society may find very offensive;
- society's outrage alone is not justification for suppressing freedom of speech.

Logical Conclusion: Citizens who find being recorded offensive does not diminish another person's 1st Amendment right to record them from public space.



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No Expectation of Privacy in Public



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Public Space vs Restricted Space

- Public space is an indoor or outdoor area commonly open and accessible to the public by right or invitation.
- Public space includes all unrestricted areas in and around government buildings and offices, including lobbies, hallways, parking lots, sidewalks and other common areas.
- Areas with restricted entry or that exhibit controlled access (locked doors, physical barriers, limiting signage, etc.) would not be considered public space.
- Privacy can be created in restricted access areas in and around governmental buildings.

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Creating Privacy



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Examples of Limited Space Areas

- Private Offices and Work Areas/Break Rooms
- Public Restrooms/Locker Rooms/Exam Rooms
- Courtrooms and Detention Facilities
- Janitorial/Maintenance/IT-System Areas
- Inside polling places during election activities
- Libraries (when not being used for public forums)
- Precinct Bams and heavy equipment storage areas when designated.



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“Stop Recording and Leave the Property”

- A person that is photographing or recording from a public space cannot selectively be told to stop recording or ordered to leave unless other citizens would also be told to leave the space at that time. Criminal Trespass warnings typically would not apply.
- **Sensitive information that is attainable audibly or visually by individuals from open public space is your responsibility to shield, not theirs to avoid.**
- **Saying something like: “You’re free to go” equals “you’re free to stay”.**



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Hindering Free Speech Can Equal a Constitutional Violation

- “[C]hilling a plaintiffs’ speech is a constitutional harm adequate to satisfy the injury-in-fact requirement.”
- “[I]t is not necessary that [a plaintiff] first expose himself to actual arrest or prosecution . . . a credible threat of enforcement is sufficient.” *Id.*

Justice v. Hosemann, 771 F.3d 285, 291 (5th Cir. 2014)



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Show ID or Go To Jail



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Avoid False Arrest Threats or Acts

- **Failure to ID, alone, is not an arrestable offense.** Enforcement action must not be based merely on someone refusing to identify!
- Amendment Auditors that refuse to identify should only be arrested if probable cause first exists to support their arrest for a different criminal offense.

[FAILURE TO IDENTIFY. Texas Penal Code Sec. 38.02.](#)

[“A person commits an offense if he intentionally refuses to give his name, residence address, or date of birth to a peace officer who has lawfully arrested the person and requested the information.”](#)



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**RECORDING OF MEETING BY
PERSON IN ATTENDANCE,
Texas Government Code Sec. 551.023**

(a) A person in attendance may record all or any part of an open meeting of a governmental body (by recorder, video camera, or other means of aural or visual reproduction).

(b) A governmental body may adopt reasonable rules to maintain order at a meeting, including rules relating to:
(1) the location of recording equipment; and
(2) the manner in which the recording is conducted.

(c) A rule may not prevent or unreasonably impair a person from exercising a right granted under (a).



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Blatant Disruptions Not Allowed



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Possible Interference Related Offenses

• Penal Code Sec. 38.13. HINDERING PROCEEDINGS BY DISORDERLY CONDUCT.

(a) A person commits an offense if he intentionally hinders an official proceeding by noise or violent or tumultuous behavior or disturbance.

(b) A person commits an offense if he recklessly hinders an official proceeding by noise or violent or tumultuous behavior or disturbance and continues after explicit official request to desist. (Class A Misd).



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Possible Disruptive Offenses

Sec. 42.01. DISORDERLY CONDUCT. (a) A person commits an offense if in a public place he intentionally or knowingly:

(1) uses abusive, indecent, profane, or vulgar language that tends to incite an immediate breach of the peace;

(2) makes an offensive gesture or display that tends to incite an immediate breach of the peace;

(5) makes unreasonable noise (*warning to stop required*)

(11) for a lewd or unlawful purpose: (c) while on the premises of a public place, looks into an area such as a restroom or shower stall or changing or dressing room that is designed to provide privacy to a person using the area.



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Possible Interference Related Offenses

- **PC Sec. 42.03. OBSTRUCTING HIGHWAY OR OTHER PASSAGEWAY.** (a) A person commits an offense if without legal privilege or authority, he intentionally, knowingly, or recklessly: (1) obstructs a highway, street, sidewalk, railway, waterway, **elevator, aisle, hallway, entrance, or exit** to which the public or a substantial group of the public has access, ...
(b) "obstruct" means to render impassable or to render passage unreasonably inconvenient or hazardous.
- **PC Sec. 42.05. DISRUPTING MEETING OR PROCESSION.** (a) A person commits an offense if **with intent to prevent or disrupt a lawful meeting, procession, or gathering**, he obstructs or interferes with the meeting, procession, or gathering by physical action or verbal utterance (Class B misdemeanor)



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How to Produce Successful Outcomes



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Awareness and Preparedness By Officials and Employees Can Help Create Positive Outcomes



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Prepare for Audits in Advance

- Hold training or discussions about how audits should be handled in your office or workspace.
- Identify and mark any publicly restricted areas (*fencing or signage barring entry beyond a certain point, etc.*)
- Ensure that sensitive information is shielded from view in public spaces.
- Adopt reasonable policies or procedures for employees to follow when engaged with auditors:
 - *identity requirements;*
 - *rules for addressing policy and public records requests;*
 - *filing grievances and complaints, etc.*

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Deflection and Disengagement

- Educate yourself and train your co-workers. Gain confidence in your ability to interact with auditors by understanding their rights and their limitations.
 - Develop disengagement techniques (create privacy or separation, pass them off to a supervisor, etc.)
 - Prepare programmed responses to common requests or demands made by Constitutional Auditors.
 - Remain professional and courteous
 - Deflect any inflammatory comments

As Mark Twain said, "Never wrestle with a pig – it gets mud all over you and the pig likes it."

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Develop Programmed Responses

- “I know that you have a right to record in this area.”
- “Public access stops here”: _____ (*identify the boundaries*).
- “Complete this form to obtain a copy of public records” (*or our policy, etc.; explain the process*).
- “My name and title (or rank) is _____”; *or,*
- “Our office policy does not require me to identify to you and I prefer to withhold my identity”.
- “Would you like to speak to my supervisor?”



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THINGS TO AVOID, DO NOT:

- Order them to stop recording from public spaces
- Demand that they identify, state a purpose, or provide explanation for their activities
- Insist they leave, or stop recording other persons, items, or information that is within plain view
- Inform them you are about to call law enforcement (*even if you do*)
- Do not touch them, threaten them or exchange insults

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Examine Buildings & Floor Plans, ID and Mark Limited Space Areas

Does the public have a need to be there? If not:

- Is the space protected by a locked door, or restricted by signage or physical barrier?
- Does the area contain confidential records or files that are visible from public space?
- Does the area contain:
 - cash or financial data,
 - critical infrastructure, such as servers, phone lines or emergency communications equipment,
 - hazardous supplies or materials, or equipment?



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Law Enforcement Consultants

	Northwest Region Carmen Napp (512) 964-6572 carmenn@county.org
	Northeast Region Kenny Lemons, Jr. (940) 636-8378 kennyl@county.org
	Southwest Region David Whitis (512) 517-2547 davidw@county.org
	Southeast Region Darren Jackson (512) 872-0519 darrenj@county.org

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		Don Courtney Driving Simulator & EVOC Training Consultant II (512) 914-9870 donc@county.org
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