Surviving First Amendment Audits and Citizen Journalist Encounters

Master Sergeant Leith Harrell (Ret.)

DeLand Police Department - 5 years
Orlando Police Department - 23 years

CJSTC Instructor - 30 years

M.S. in Counseling and Psychology

Served as a Sergeant 16 years

TED Talk Pacing

25 Minutes → 25 Minutes → 25 Minutes → 25 Minutes → 25 Minutes → 25 Minutes → 25 Minutes → Q&A Discussion

What's the Deal With These 1st Amendment Audits?

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What's the Law Got to Say About it?

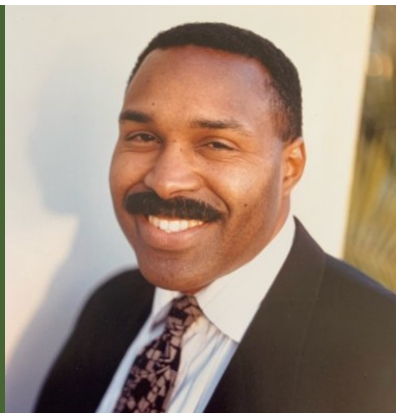
What's the Deal With These 1st Amendment Audits?

What's the Law Got to Say About it?

Strategies and Tactics



Don Jackson
(Diop Kamau)



March 3, 1991





2007 Rise of the Smartphone



What is a First Amendment Audit?



876.05 Public employees; oath.—

(1) All persons who now or hereafter are employed by or who now or hereafter are on the payroll of the state, or any of its departments and agencies, subdivisions, counties, cities, school boards and districts of the free public school system of the state or counties, or institutions of higher learning, except candidates for federal office, are required to take an oath before any person duly authorized to take acknowledgments of instruments for public record in the state in the following form:

I, (your name), a citizen of the State of Florida and of the United States of America, and being employed by or an officer of and a recipient of public funds as such employee or officer, do hereby solemnly swear or affirm that I will support the Constitution of the United States and of the State of Florida.

(2) Said oath shall be filed with the records of the governing official or employing governmental agency prior to the approval of any voucher for the payment of salary, expenses, or other compensation.

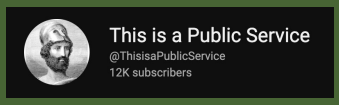
History.—s. 1, ch. 25046, 1949; s. 22, ch. 83-214; s. 55, ch. 2007-30; s. 77, ch. 2011-40.

The First Amendment to the United States Constitution

Congress shall make no law respecting an establishment of ***religion***, or prohibiting the free exercise thereof; or abridging the 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.

What Five Freedoms are ensured by the First Amendment?

R - Religion
A - Assembly
P - Press
P - Petition
S - Speech



What is a First Amendment Audit?

"... a largely American social movement that usually involves *photographing* or *filming* from a *public space*."

What is a First Amendment Audit?

"It is often categorized by its practitioners, known as *auditors*, as activism and *citizen journalism* that tests constitutional rights."

What is a First Amendment Audit?

"Auditors believe that the movement promotes transparency and open government."









Forget motives.

Focus on behavior.

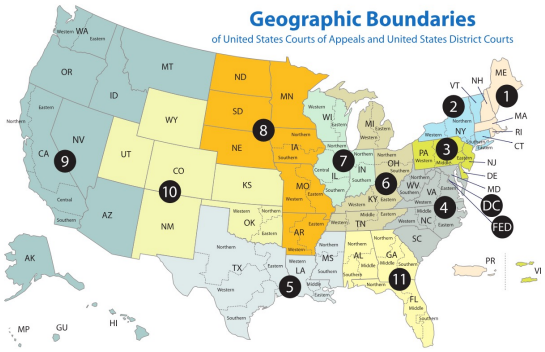
Do auditors really have the right to film public officials?

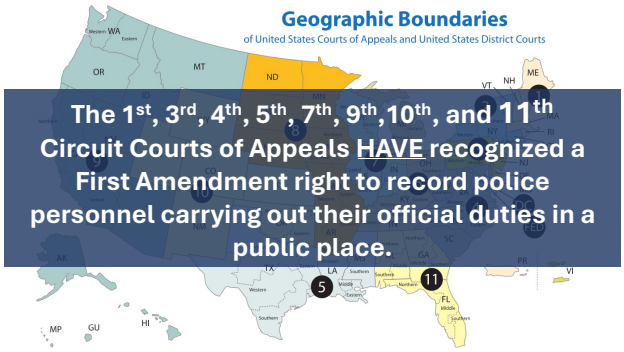
Do auditors really have the right to film public officials?

Yes.

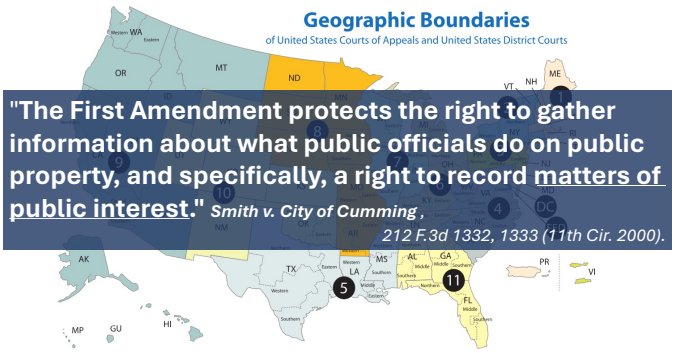


To date, no U.S. Supreme Court case has established a right to film public officials engaged in carrying out their official duties.

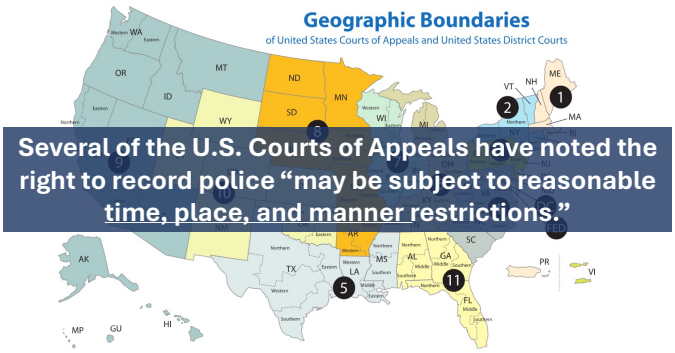




The 1st, 3rd, 4th, 5th, 7th, 9th, 10th, and 11th Circuit Courts of Appeals HAVE recognized a First Amendment right to record police personnel carrying out their official duties in a public place.



"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).



Several of the U.S. Courts of Appeals have noted the right to record police "may be subject to reasonable time, place, and manner restrictions."

In 2012, the U.S. Department of Justice recognized:

"... individuals have a First Amendment right to observe and record police officers engaging in the public discharge of their duties."

Can I film and take photos at a security checkpoint?

Can I film and take photos at a security checkpoint?

Yes.

Can I film and take photos at a security checkpoint?

You may NOT:

- Interfere with the screening process
- Film "sensitive information"
- Refuse to assume the proper stance during screening
- Block the movement of others through the checkpoint
- Refuse to submit a recording device for screening
- Photograph or film equipment monitors that are shielded from public view

What about a person's Right to Privacy?

What about a person's Right to Privacy?

There is NO expectation of privacy in PUBLIC.
(Generally)

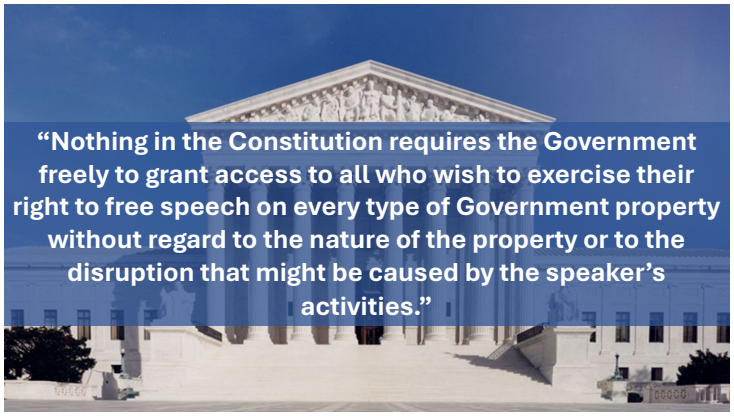
Where
do First Amendment Audits generally take place?

Where
do First Amendment Audits generally take place?

Public Property



Publicly Accessible =/= No Rules





Not all public spaces are the same.



Traditional Public Forums

"... places which by long tradition or by government fiat have been devoted to assembly and debate."

Traditional Public Forums

"... has been traditionally open to the public for expressive activity."

Traditional Public Forums

Used for, "communicating thoughts between citizens, and discussing public questions."





Traditional
Public Forums

Public Parks



Traditional
Public Forums

Sidewalks



Traditional
Public Forums

Public Streets



If the person can stand there legally, the person can photograph or video anything within view.

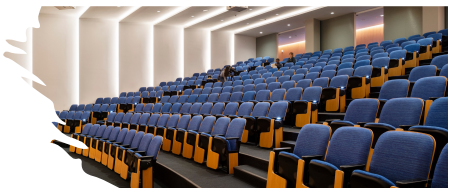
Designated
Public Forums

University meeting facilities open for student groups

Municipal auditorium

City-leased theater designed for and dedicated to expressive activities





Limited
Public Forums

Interior of City Hall

Public Libraries

Public School Facilities- After school hours





FSS 286.011
Sunshine Law

Meetings of any Board or Commission

State-County-City-Political Subdivision

"open to the public at all times"

Limited
Public Forums

Public Meetings

Florida Attorney General Advisory Legal Opinion AGO 91-28

"Nondisruptive" video and audio recording may not be prohibited.

Limited
Public Forums

Public Meetings



Canvassing Board

Community Development District

Library Board





Is the site a Public Forum when not in use by the Farmers Market?



Open to the Public
or
Limited Access



Fences or Physical Barriers
Paid Admission
Security Screening

Nonpublic Forums











Nonpublic Forums

Places where, "...the government is acting as a proprietor, managing its internal operations."

Nonpublic Forums

"... is not by tradition or designation a forum for public communication."

Nonpublic Forums

"Courts have consistently found public property to be a nonpublic forum where the evidence shows... that the property's purpose is to conduct or facilitate government business, and not to provide a forum for public expression."



It is well established that public school facilities are nonpublic forums unless "school authorities have by policy or by practice opened those facilities for indiscriminate use by the general public... or by some segment of the public, such as student organizations."

Outside of the classroom setting, certain areas of school property may become limited public forums if the school has opened them up for expressive activity by student groups or the outside public.

UNC School of Government
Local Government Law Bulletin
NO. 141 – November 2022
Kristi A. Nickoderm and Kristina Wilson



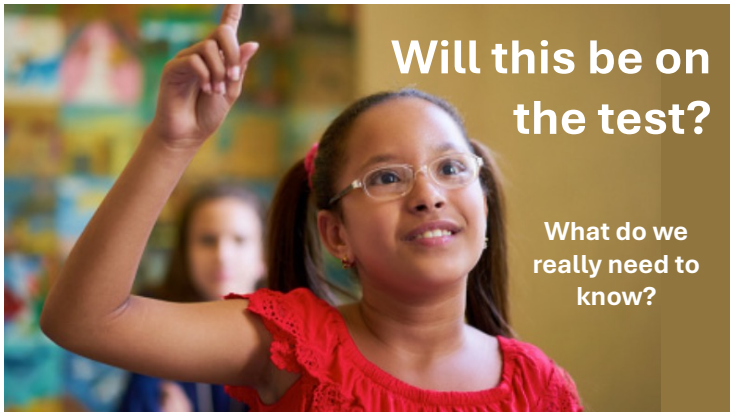
Nonpublic Forums

Lobby Areas of Government Buildings



Nonpublic Forums

Offices of Government Employees

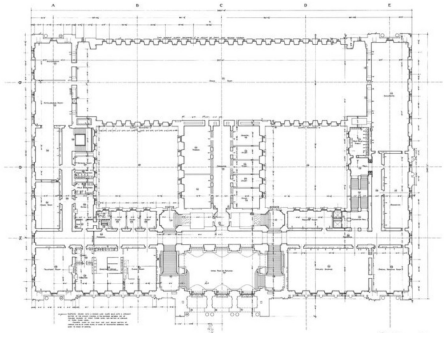


Will this be on the test?

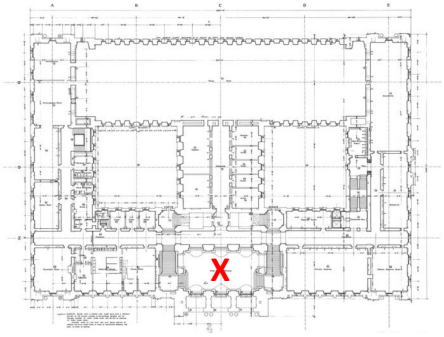
What do we really need to know?

Break It Down:

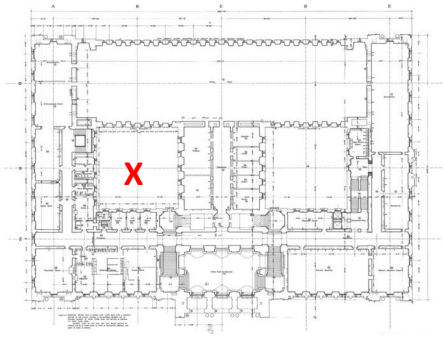
Which Type of Public Forum?

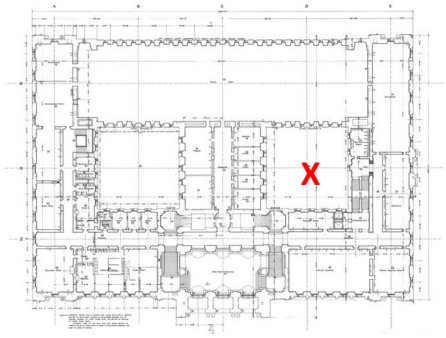


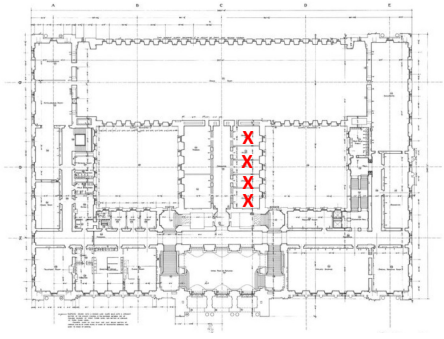
X



X







When the auditor is on *Public* Property.

Has the auditor attempted to conduct "legitimate business"?



When the auditor is on *Public* Property.

Is the *auditor* creating a disturbance or a breach of the peace?



"I may be annoying, but annoying isn't a crime."

STRONG RECOMMENDATION!!

KNOW your Policy.

ACT within your Policy.

STRONG RECOMMENDATION!!

Notify your Chain/Legal Advisor

STRONG RECOMMENDATION!!

Notify your Chain/Legal Advisor

Location
Location
Location

Religion
Assembly
Press
Petition
Speech

Four Layer Preparedness

1) Policy

Four Layer Preparedness

1) Policy
2) Training

Four Layer Preparedness

1) Policy
2) Training
3) Signs & Physical Barriers

Four Layer Preparedness

1) Policy
2) Training
3) Signs & Physical Barriers
4) Consistent Enforcement



Auditors often use the phrase

"matters of public interest."



Auditors often use the phrase

"traditional public forum."



Auditors often use the phrase

"publicly accessible area."

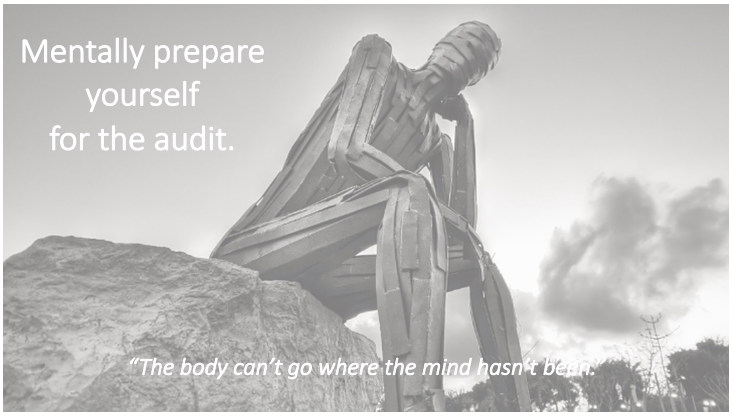


Auditors often ask

"Is that a Law or a Policy?"

Strategies and Tactics





Project Good Faith



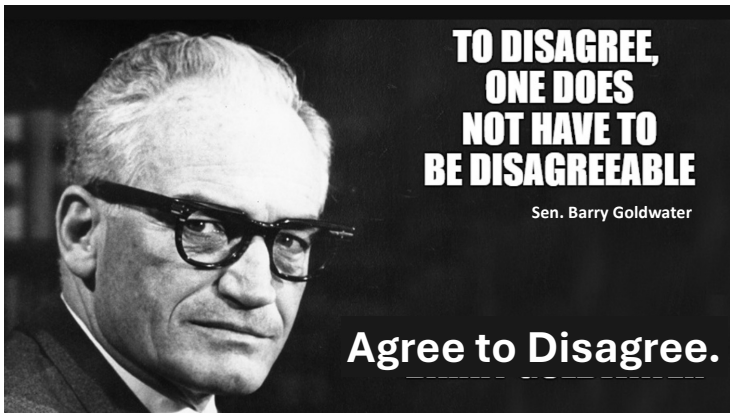
The Auditor picks the time and place.

<u>You</u> control your performance.









Be better at what you do, than they are at what they do.

People and things don't make us angry.

We allow ourselves to become angry.

People and things don't

Feeling anxious, angry, or afraid does not always = Disorderly Conduct

become angry or anxious.



There is nothing either good or bad but thinking makes it so.

~ William Shakespeare



Emotions are DATA, not directions.
Susan A. David, PhD.

Don't ask for Press Credentials.



What's the fastest way to be rid of an Auditor?

What's the fastest way to be rid of an Auditor?

Don't make the video they want.

Beat Them to the Punch:

Introduce yourself with your name and title.





You *WILL* take my Public Records Request!

(Is this the hill you're willing to die on?)







NEVER:

Touch - Herd

Block - Interfere

Don't let the Auditor dictate terms.

Use professional language that reflects your policy and training.

End of Course Handout

Hold up your quote cards!!

For questions or additional information, please contact Leith at:

Leith@Prokopton.net
407-467-0375

PROKOPTON TRAINING AND DEVELOPMENT