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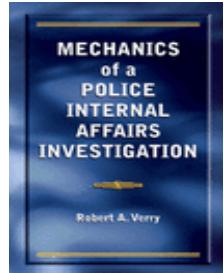


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## First Amendment Auditors

By Dr. Robert A. Verry (Chief-ret.)<sup>1</sup>

Given the widespread publicity from individuals traveling the country to educate the public and law enforcement about the constitutional right to record in public and on public property, it is surprising how frequently officers continue to unlawfully detain or arrest these auditors for exercising their First Amendment rights.

For about three years I have been involved in numerous investigations involving First Amendment Auditors, but three of the recent YouTube videos I was contacted on were out of New Jersey<sup>2</sup> and Kansas City.<sup>3</sup> In Wall Township New Jersey, the officer detained, n1, the auditor while standing on what appears to be a public easement recording a bank. The officer told the auditor he was not free to leave.<sup>4</sup>

**n1** - Detention is a temporary stop, typically brief, based on reasonable suspicion that an individual might be involved in criminal activity; it allows officers to investigate further without taking the person into full custody. During detention, a person is not free to leave, but it does not carry the same legal consequences as arrest.

In the second video the incident took place in Somerville, New Jersey where the Sergeant arrested,<sup>5</sup> n2, the auditor while standing on the public sidewalk recording a bank, and in the Kansas City incident, the officer told the auditor he was under arrest<sup>6</sup> while handcuffed after being first told he was being detained for not giving the officer his information.

**n2** – An arrest requires probable cause, which is a higher standard than reasonable suspicion and involves formally taking the person into custody to face criminal charges. Arrest signifies a significant restriction of liberty, usually accompanies physical restraint, and starts formal criminal proceedings, often resulting in booking and criminal charges.

While I hold personal views regarding the detention and arrest of the auditors, the purpose of this paper is not to second-guess the actions of the Wall Township, Somerville Borough, or Kansas

<sup>1</sup> This work was supported by OpenAI (comparable to Grammarly) for language, grammar, and punctuation editing and refinement.

<sup>2</sup> <https://www.youtube.com/watch?v=v2dqANgv0QY>; <https://www.youtube.com/watch?v=1I8ufoXlih8>

<sup>3</sup> <https://www.youtube.com/watch?v=64pj3QBTa1k&t=328s>

<sup>4</sup> Recording at 7:13; 8:36

<sup>5</sup> <https://www.youtube.com/watch?v=-ZKUzTr9kL8&list=WL&index=6&t=361s>

<sup>6</sup> Recording at 16:43

City police officers. I recognize that, in at least one of the three incidents, multiple internal affairs complaints have been filed. What I will offer is this that across these three distinct events, several core themes emerge that define the nature of these citizen-police encounters.

<b>Theme</b>	<b>Description</b>
<b>First Amendment Audits as Catalyst</b>	The foundational action in all incidents is the open and conspicuous recording of a public-facing business and the subsequent police response. The auditors frame their actions as journalism, education, or an exercise of rights, while police and employees perceive it as a potential threat.
<b>The ID Refusal Flashpoint</b>	The refusal to provide identification serves as the pivotal moment where interactions escalate. This act tests the officers' knowledge of "stop and identify" statutes, which vary significantly. The incidents show a spectrum of outcomes: legal acceptance of refusal, an incorrect legal claim leading to arrest, and supervisory correction of an unlawful demand for ID.
<b>The "Suspicious Activity" Gray Area</b>	The concept of "suspicious activity" is used to justify initial contact and detention. However, the activity itself—filming from a public space—is constitutionally protected. This creates a conflict where police detain individuals for legal actions that are deemed contextually unusual or alarming, blurring the line between investigation and infringement of rights.
<b>Impact of Supervisory Intervention</b>	The role of the supervising officer is shown to be decisive. A sergeant's arrival can either escalate a situation through an aggressive assertion of authority or de-escalate it through a more measured application of legal principles, overriding the initial actions of subordinate officers.
<b>Public vs. Private Property Disputes</b>	The physical boundary between public and private space is a recurring legal battleground. The ambiguity of property lines, particularly on sidewalks adjacent to businesses, is used by police as justification for detentions and trespass warnings, even when the legal standing of such claims is uncertain.

Moreover, this paper invites law enforcement professionals reviewing the referenced videos to consider how a reasonable and prudent officer would respond under identical circumstances. Specifically, it asks whether detaining or arresting the auditors was a reasonable and prudent course of action and whether the reviewing officer would have acted in the same manner.

What police officers and citizens who observe a First Amendment auditor standing on a sidewalk, recording in a post office, or recording in a public building need to understand is that they rely on a core constitutional principle. That basic principle is that they have the right to observe, record, and document government activity occurring in public spaces. Simply stated, if the individual is where they are allowed without a camera (or recording device) they are allowed with a camera (or recording device).

First Amendment auditors who test government compliance rely on a complex web of constitutional provisions, federal appellate court precedents, and legal doctrines established over the past several decades. While every provision will not be explored herein, this analysis examines many of the constitutional amendments and court decisions that form the legal foundation for recording police officers, public officials, and activities in public places.

### The First Amendment

The First Amendment to the United States Constitution provides the primary constitutional foundation for recording activities. The amendment states,

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.

First Amendment auditors invoke two distinct but interconnected protections within this amendment. First, the freedom of speech, which protects the act of recording as a form of expression and information gathering that enables future speech. The second, is the freedom of the press, which extends to private citizens like the First Amendment auditors and not just traditional media organizations or journalist.

### The Fourteenth Amendment

While slightly more complex to understand than the First Amendment, the 14<sup>th</sup> Amendment addresses due process and incorporation, whereby, it states,

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law.

Hence, it is the 14<sup>th</sup> Amendment that the Supreme Court used to connect “We the People’s” fundamental rights in the Bill of Rights (e.g., Free Speech) applies to all states ensuring that police departments, municipalities, and government officials must respect an individual’s First Amendment rights. It is under the claim 42 U.S.C. § 1983 that First Amendment auditors file their cause of action against public officials who violate their Constitutional rights.

### The Fourth Amendment

First Amendment auditors could also invoke the Fourth Amendment when police officers seize their recording devices, delete recordings, or arrest them without probable cause, which states,

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.

Moreso, the 4<sup>th</sup> Amendment becomes relevant when law enforcement confiscates a First Amendment auditor’s recording device or arrests the individual without probable cause.

Beyond the Constitutional Rights, the table below breakdowns the right of a private citizen to record the police by the Federal Circuit.

Case	Holding & Scope of Protected Activity
Lovell v. City of Griffin, 303 U.S. 444 (1938)	The First Amendment protects recording and sharing information without government permission.
Fordyce v. City of Seattle, 55 F.3d 436 (9th Cir. 1995)	Recognized a First Amendment right to film matters of public interest. Video recording police and protests in public.
Glik v. Cunniffe, 655 F.3d 78 (1 <sup>st</sup> Cir. 2011)	The First Amendment unambiguously protects the right to record police performing duties in public. Open video recording of police in public spaces by private citizens.
ACLU of Illinois v. Alvarez, 679 F.3d 583 (7th Cir. 2012)	Audio recording police in public is protected speech; broad eavesdropping statute unconstitutional as applied. Audio recording of police officers in public.
Fields v. City of Philadelphia, 862 F.3d 353 (3d Cir. 2017)	Recording police in public is protected regardless of recorder's intent. Photography and video recording of police in public.
Turner v. Driver, 848 F.3d 678 (5th Cir. 2017)	First Amendment right to record police exists, subject to reasonable restrictions. Recording police stations and officers from public property.
Askins v. U.S. Department of Homeland Security, 899 F.3d 1035 (9th Cir. 2018)	Right to record law enforcement extends to federal officers on public land. Photography of law enforcement activities at ports of entry from public areas.
Smith v. Cumming, 212 F.3d 1332 (11th Cir. 2000)	Recognized a First Amendment right to photograph or videotape police conduct. Photography and video recording of police in public.
Irizarry v. Yehia, 38 F.4th 1282 (10th Cir. 2022)	Right to record police was clearly established; physical interference violates First Amendment. Recording police during traffic stops; protection from obstruction.

Lovell v. City of Griffin, 303 U.S. 444 (1938) is an 88-year-old decision that held government officials cannot decide who is allowed to speak, publish, or share information. In other words, the First Amendment not only protects free speech, but also the gathering and disseminating information. First Amendment Auditors frequently upload their recordings to a social media platform doing so without prior permission or a license before dissemination.

In Glik v. Cunniffe, 655 F.3d 78 (1<sup>st</sup> Cir. 2011) the First Circuit Court of Appeals issued a landmark decision affirming that the First Amendment protects the right of private citizens to record police officers performing their official duties in public. The case arose after Simon Glik was arrested for openly recording a police arrest on Boston Common and charged under Massachusetts' wiretap statute and related offenses. The court unanimously held that recording police activity in public constitutes constitutionally protected information gathering that serves the fundamental First Amendment interest in fostering free discussion of governmental affairs. The court further ruled that Glik's conduct did not violate the wiretap statute because it criminalized only secret recordings, not open and visible recording. The decision firmly established that the right to record police in public extends to ordinary citizens and is not limited to members of the press.

In ACLU of Illinois v. Alvarez, 679 F.3d 583 (7<sup>th</sup> Cir. 2012) the Seventh Circuit held that the First Amendment protects the open audio recording of police officers performing their official duties in public. The court invalidated the application of Illinois's eavesdropping statute, which broadly criminalized recording any oral communication without the consent of all parties, even when the communication occurred in public. Writing for the court, Judge Posner concluded that the statute burdened substantially more speech than necessary to serve legitimate privacy interests, noting that police officers speaking in public have no reasonable expectation of privacy. The decision was significant in clarifying that First Amendment protections extend not only to video recording but also to audio recording, reinforcing constitutional safeguards for documenting public law enforcement activity.

Fields v. City of Philadelphia, 862 F.3d 353 (3d Cir. 2017) addresses the recording of police officers and officials in public. In this case, the Third Circuit held that private citizens have a First Amendment right to record police officers performing their duties in public, regardless of whether the person recording is a journalist or has a specific expressive purpose. Stated differently, the person recording does not need to be a journalist and possess press credentials, and they are under no obligation to tell anyone, including law enforcement, why they are recording because recording in and by itself is a protected speech.

In Turner v. Lieutenant Driver, 848 F.3d 678 (5<sup>th</sup> Cir. 2017) the Fifth Circuit considered whether the First Amendment protects the right to record police facilities and officers from public sidewalks. The case arose after Philip Turner was detained while filming a police station from public property and declined to identify himself. The court held that the First Amendment encompasses a right to record police activity, subject to reasonable time, place, and manner restrictions, and expressly extended that protection to the recording of police stations and law enforcement buildings from public spaces. The decision clarified that recording police from publicly accessible locations constitutes protected expressive activity.<sup>7</sup>

In the Ninth Circuit, the First Amendment right to record law enforcement activity developed through a line of cases beginning with Fordyce v. City of Seattle, 55 F.3d 436 (9<sup>th</sup> Cir. 1995) in which the court recognized an early constitutional right to film matters of public interest and reversed summary judgment where officers interfered with a citizen recording a public protest. Although brief, Fordyce laid the foundational principle that recording public events involving law enforcement implicates First Amendment protections. More than two decades later, the Ninth Circuit reaffirmed and expanded this principle in Askins v. U.S. Department of Homeland Security, 899 F.3d 1035 (9<sup>th</sup> Cir. 2018) holding that the First Amendment protects the right to record law enforcement officers—including federal officers—performing official duties in public places. The court emphasized that interference with or destruction of recordings violates constitutional protections, even in sensitive locations such as ports of entry, so long as the recording occurs from public land. Together, these decisions firmly establish within the Ninth Circuit that recording law enforcement activity in public spaces is a core component of the First Amendment right to gather information.

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<sup>7</sup> The court granted qualified immunity because the right was not clearly established in the Fifth Circuit at the time of the incident. The decision prospectively established the right going forward.

In Irizarry v. Yehia, 38 F.4th 1282 (10th Cir. 2022) the Tenth Circuit held that the First Amendment right to record police officers performing their duties in public was clearly established by 2019 and denied qualified immunity to an officer who intentionally interfered with that right during a traffic stop. The officer physically obstructed the camera, shined a flashlight into the lens to prevent recording, and maneuvered his vehicle toward the journalists. The court emphasized that active interference with recording—even in the absence of arrest or seizure—constitutes a First Amendment violation. It further concluded that precedent from other circuits was sufficient to clearly establish the right, rejecting the argument that the absence of earlier Tenth Circuit authority shielded the officer. The decision underscores that law enforcement officers may not retaliate against or obstruct lawful recording of their public duties.

In Smith v. Cumming, 212 F.3d 1332 (11<sup>th</sup> Cir. 2000) the Eleventh Circuit explicitly recognized a First Amendment right to photograph or videotape police conduct. Although the opinion provided limited analysis, it established early precedent confirming that recording police activity is constitutionally protected within the circuit. The case is frequently cited as foundational authority supporting later, more detailed decisions recognizing the right to record law enforcement.

A First Amendment auditor's constitutional right to record police officers, public officials, or in public facilities or places is not absolute. There are, for example, places and/or reasons why the police may restrict or prohibit their cameras, however, the officer may consider seeking legal advice from their legal representative before detaining a First Amendment auditor, making an arrest or confiscating their camera to avoid exposing themselves to civil liability or risk losing their immunity. Three examples include, but may not be limited to,

1. Protecting an officer's safety when, for example, a motorist on a traffic stop is threatening the use of a firearm at a distance requires a restriction if said auditor, even if standing on a public sidewalk, could pose an immediate safety threat to the officers or others,
2. Interference with a police officer's duties by, for example, blocking or obstructing a police officer from performing a law enforcement function. Caution should be taken to confirm the First Amendment auditor is physically interfering or is about to interfere, and
3. Breaching locations where police parameters are set up typically with crime scene tape. These areas could include, for example, crowd control during a riot.

Other prohibited areas include,

1. Non-Public Areas, e.g., court rooms unless approved by the Judge, and employee's workspaces behind closed doors where an escort is generally required.
2. Public restrooms

Note: Any place where the First Amendment auditor is constitutionally recording is protected even when recording a restricted area if (when) access is visible to the recorder.

### Analysis

The incidents examined in this paper—arising in Wall Township, Somerville Borough, and Kansas City—reflect a persistent disconnect between well-established constitutional law and its application in everyday policing encounters involving First Amendment auditors. Despite decades of appellate precedent recognizing the right of private citizens to record police officers, public officials, and government activity in public spaces, these encounters continue to escalate into detentions and arrests that are constitutionally questionable.

Across the three incidents, the auditors' conduct shared a common and constitutionally protected core: open recording from locations where the public is lawfully permitted to stand. None of the described encounters began with allegations of criminal activity independent of the recording itself. Rather, the catalyst for police involvement was the act of recording, coupled with perceptions of "suspicious" behavior or concerns raised by third parties. This recurring pattern highlights a fundamental legal tension. While recording in public is protected, it is often treated by officers as inherently suspicious when divorced from traditional journalistic norms. If the First Amendment auditor was wearing a hat that stated CNN or Fox News would the outcome be different?

A central escalation point in these encounters was the refusal to provide identification. As the analysis demonstrates, identification demands occupy a legally sensitive space that depends on jurisdiction-specific "stop and identify" statutes and the presence of reasonable suspicion. In at least one incident, an arrest followed a refusal to identify despite what appeared to be the absence of clear legal authority compelling disclosure. This reflects a broader operational challenge: the conflation of voluntary police encounters with detentions, and detentions with arrests, without the requisite legal thresholds of reasonable suspicion or probable cause.

The invocation of "suspicious activity" further illustrates this challenge. While law enforcement officers are permitted to investigate genuinely suspicious conduct, the courts have repeatedly held that constitutionally protected behavior cannot, standing alone, supply the basis for detention. Filming from a public sidewalk or other publicly accessible area, even when unusual or unsettling to observers, does not become unlawful simply because it draws attention or discomfort. Detaining individuals for engaging in protected conduct risks transforming investigative discretion into constitutional infringement.

Supervisory intervention emerged as a decisive factor in shaping outcomes. Where supervisors intervened with a measured application of constitutional principles, encounters were more likely to de-escalate. Conversely, where supervisory authority reinforced or expanded questionable legal assumptions, the situation intensified. This underscores the critical role of supervisory training and legal literacy in preventing civil rights violations.

Finally, disputes over public versus private property boundaries repeatedly served as justification for police action. Ambiguity regarding easements, sidewalks, and areas adjacent to businesses often resulted in detentions or trespass warnings, despite the lack of clear legal exclusion. Courts have consistently held that recording from areas open to the public remains protected, even when the subject of the recording lies beyond restricted boundaries, so long as the recorder does not physically intrude into non-public spaces.

Taken together, the constitutional framework and federal appellate precedent reviewed in this paper leave little doubt that the right to record law enforcement activity in public spaces is firmly established. The First Amendment protects both the gathering and dissemination of information; the Fourteenth Amendment ensures that these protections bind state and local officials; and the Fourth Amendment limits the circumstances under which officers may detain, arrest, or seize recording devices. While reasonable time, place, and manner restrictions exist, they are narrow exceptions and not broad licenses to suppress protected activity.

### Conclusion

The encounters analyzed in this paper illustrate not a lack of constitutional guidance, but a recurring failure to apply it consistently in the field. Federal appellate courts across nearly every circuit have recognized that private citizens, including First Amendment auditors, have the right to record police officers, public officials, and government activity from public places. That right does not depend on journalistic credentials, expressive intent, or prior permission, and it does not evaporate simply because the recording makes others uncomfortable like it appeared to do in the three incidents highlighted for this paper.

At the same time, this right is not absolute. Law enforcement officers retain authority to impose narrowly tailored restrictions when necessary to protect officer safety, prevent actual physical interference, or secure genuinely restricted areas. However, the mere act of recording, refusal to provide identification absent legal compulsion, or presence in a public space does not satisfy those conditions.

Ultimately, this paper does not seek to assign fault to individual officers or departments, particularly where internal accountability processes are already underway. Instead, it poses a practical and professional question to law enforcement: when confronted with a person lawfully recording from a public location, would a reasonable and prudent officer conclude that detention or arrest is necessary—or would restraint better serve both constitutional obligations and public trust?

As public recording becomes increasingly commonplace, the answer to that question will continue to shape not only civil liability outcomes, but also the legitimacy of policing in a constitutional democracy.

With more than 30 years of experience investigating allegations of police misconduct, including matters involving First Amendment auditors, I welcome you to contact me should you have any questions or require the services of an internal affairs subject-matter expert for consultation.

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