

## Effectively Dealing with Individuals Conducting 1<sup>st</sup> & 2<sup>nd</sup> Amendment Audits

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## First Amendment of 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."
- ▶ The First Amendment didn't apply to state and local governments/authorities until after the Fourteenth Amendment was ratified
- ▶ The Due Process Clause of the Fourteenth Amendment is the vessel through which the First Amendment applies to state and local governments
  - ▶ Some of the Amendments in the Bill of Rights have been held by the Supreme Court of the United States (SCOTUS) to apply to state and local governments through the doctrine of Selective Incorporation
    - ▶ First announced in the *Slaughter House Cases*, 83 U.S. 36 (1872)
    - ▶ Presently the first eight amendments of the Bill of Rights have been held to apply to state and local governments through the doctrine of Selective Incorporation

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## First Amendment and Law Enforcement

- ▶ Common areas of interaction for the First Amendment and Law Enforcement Officials
  - ▶ Free Speech
  - ▶ Press
  - ▶ Assembly
- ▶ Each one of these topics contain a spectrum of activity
  - ▶ Some are easy to pick out while others are more difficult
  - ▶ Training for officers, supervisors and executives is essential to provide everyone in the law enforcement agency with a solid foundation and understanding of First Amendment implications
- ▶ First Amendment auditors may be present during any first amendment activity.

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## What is a 1<sup>st</sup> Amendment Audit

- ▶ Generally speaking, a 1<sup>st</sup> Amendment Audit is when an individual (or group of individuals) engages in a behavior that is protected by the 1<sup>st</sup> Amendment and records the law enforcement/government response to the protected activity.
  - ▶ Often the activity the auditors engage in is designed to make government officials uncomfortable.
    - ▶ Filming operations inside a government complex.
    - ▶ Filming operations that are occurring in public places.
- ▶ In some instances, the auditors may challenge law enforcement or seek to be detained by law enforcement for engaging in constitutionally protected activity.

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Which of These are protected by the First Amendment?

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## Context

- ▶ In order to understand the scope and breadth of 1<sup>st</sup> Amendment Audits we need to have a basic understanding of the 1<sup>st</sup> Amendment protections and what government actors can and cannot do as it relates to free speech.

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## QUIZ

- ▶ Officers on a car stop are being recorded by individuals standing on a nearby sidewalk. One of the officers directs the people to "move on" but they refuse. The officer gives another warning and after it is ignored arrest the individuals filming and confiscates the cell phone that was being used to film them.
- ▶ Can the officers force them to move?
- ▶ Is the arrest valid?
- ▶ First Amendment issue?

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## Quiz Answers

- ▶ The citizen filming the police was engaged in activity that is protected by the First Amendment
  - ▶ *Gilk v. Cunniffe*, 655 F.3d 78, 82 (5<sup>th</sup> Cir. 2011)
  - ▶ "The filming of government officials engaged in their duties in a public place, including police officers performing their responsibilities, fits comfortably within these principles. Gathering information about government officials in a form that can readily be disseminated to others serves a cardinal First Amendment interest in protecting and promoting 'the free discussion of governmental affairs.'"

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## Garcia v. Montgomery County, Maryland

- ▶ Mannie Garcia was a reporter who sees two Hispanic men being arrested as he is leaving a restaurant with his family and is concerned that the officers are using excessive force
- ▶ Garcia films the incident from 30 to 100 feet away. Garcia did not interfere with the police and identified himself as a member of the press and showed officers he had nothing in his possession except the camera
  - ▶ Initially filming at 30 feet and then moves across the street (100 ft) after being spotlighted
  - ▶ Other than that he did not communicate with the officers
- ▶ Both Garcia and the officers were on public property
- ▶ Garcia is arrested and the battery and video card are removed from his cell phone and not returned
  - ▶ Claims he was placed in a chokehold and forcibly dragged along the ground. Also hit in head on the cruiser
- ▶ Charged with disorderly conduct
  - ▶ Acquitted six months later but Internal Affairs clears officers of any wrongdoing

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## Garcia v. Montgomery County

- ▶ Garcia sues and includes claims for violation of his First and Fourth Amendment rights
- ▶ Defendant police officers file a motion to dismiss
- ▶ Court overrules motion to dismiss
- ▶ Court relies on *Gilk* and *Mills v. Alabama*, 384 U.S. 214 (1966) in denying the motion to dismiss on First Amendment claims
  - ▶ "a citizen's right to film government officials, including law enforcement officers, in the discharge of their duties in a public space is a basic, vital, and well-established liberty safeguarded by the First Amendment."
- ▶ While it is legal for a citizen to videotape/record law enforcement activity in the open; citizens may not interfere with nor hinder law enforcement activity
  - ▶ Likewise they may not incite, encourage, provoke or assist in the illegal behavior of others

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## Press vs. Citizen

- ▶ So was Garcia's conduct protected under the First Amendment because he was a member of the press or because he was a citizen?
- ▶ In this context is there a difference?
- ▶ What constitutes a member of the press today?
  - ▶ Network affiliated reporters are the easiest to discuss
  - ▶ Blogger?
  - ▶ Independent Photo Journalists?
  - ▶ Social Media contributors?
- ▶ Another note on the press: protection of confidential sources is protected by the First Amendment
  - ▶ If forced to reveal a source to a grand jury (or you) the other sources will be deferred from furnishing information – *Branzburg v. Hayes*, 408 U.S. 665 (1972).

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## Prior Restraint and Content Based Restrictions

- ▶ Prior restraint is the suppression of material that would be published or broadcast in some fashion
  - ▶ Prior restraint of First Amendment activity by government officials is generally disfavored.
    - ▶ Not per se unconstitutional but get a heavy burden when reviewed by courts. Very limited exceptions. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 68-73 (1963).
    - ▶ Will be treated as presumptively invalid
- ▶ Content based restrictions are restrictions and prohibitions that are based on the content of the speech
  - ▶ This is generally considered unconstitutional but there are exceptions
  - ▶ This type of restriction will receive strict scrutiny – in order to be constitutional, the restriction must be narrowly tailored to achieve/promote a compelling governmental interest
  - ▶ Not all speech receives First Amendment protection

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## Categories of Speech

- ▶ There are three overarching categories of speech which are defined based on the level of protection afforded by the Constitution
  - ▶ Unprotected
    - ▶ Fighting words, threats of bodily harm, obscenity
  - ▶ Limited Protection
    - ▶ Workplace speech
  - ▶ Highly Protected
    - ▶ Political speech

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## Unprotected Speech

- ▶ Fighting words may be lawfully restricted by the government so long as a person "of common intelligence" would understand that the words are likely to cause "an average listener to fight"
  - ▶ Government may not regulate use based on "hostility or favoritism towards the underlying message"
    - ▶ Remember expressing views on subjects that may be disfavored is not fighting words
      - ▶ *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377 (1992).
- ▶ Fear inspiring – Yelling "Fire!" in a crowded theater (unless there actually is a real fire)
  - ▶ *Lynch v. Ackley*, 811 F.3d 569 fn 8 (2<sup>nd</sup> Cir. 2016); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942).
- ▶ Advocacy of illegal conduct – *Whitney v. California*, 274 U.S. 357 (1927)
  - ▶ Speech must present a clear and present danger (incites imminent lawless action)
    - ▶ "fear of serious injury alone cannot justify suppression of speech and assembly"
    - ▶ "reasonable ground to fear that serious evil will result if free speech is practiced."

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## Unprotected Speech

- ▶ Defamatory language – language that is false and intended to harm the reputation of another person
- ▶ Obscenity
- ▶ Threats of physical harm – *Police Department of City of Chicago v. Mosely*, 408 U.S. 92 (1972)
  - ▶ "the ability to criticize government and public officials are undeniably privileges that are afforded to all citizens"
  - ▶ "but the right to free speech is not absolute at all times and under all circumstances. There are certain well-defined and narrowly limited classes of speech, the prevention of which have never been thought to raise any Constitutional problem"

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## Forum

- ▶ The forum (location) of the speech affects the level of protection from restriction the speech receives
  - ▶ Traditional Public Forums (TPF)
    - ▶ Public streets, sidewalks, parks, etc.
    - ▶ These are areas that by long tradition have been devoted to or viewed as areas to assemble and/or debate
    - ▶ Governmental regulation of speech in these areas is limited
  - ▶ Specifically Designated Forums
    - ▶ Areas not traditionally open for speech but the government has specifically designated them for some public discourse
      - ▶ Public meetings, public universities, public schools
      - ▶ Generally these areas get an intermediate level of protection but sometimes get the same protection as TPFs
  - ▶ Private governmental property
    - ▶ All other public property that is not historically been a place of public expression
      - ▶ Government property leased to private groups, secure locations
      - ▶ Government may restrict speech so long as the restrictions are reasonable and viewpoint/content neutral

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## Private Property

- ▶ Generally speaking, a private property owner may prohibit others from conducting First Amendment activities on their property
  - ▶ Camping, marching, protesting, leafleting, picketing, etc.
- ▶ There is no requirement that a private property owner post "No Trespassing" signs to prevent others from using their property
  - ▶ While not required there may be times where this is advantageous
  - ▶ As a side note: a person cannot trespass on public property
    - ▶ This includes when they are annoying other nearby property owners
- ▶ There have been some limited instances where SCOTUS has held that the owner of private property must allow citizens to use their property for First Amendment activities
  - ▶ *Marsh v. State of Alabama*, 326 U.S. 501 (1946) – The "Company Town" scenario

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## Time, Place and Manner Restrictions

- ▶ Governments may impose reasonable time, place and manner restrictions on First Amendment activities in public forum locations
  - ▶ Examples:
    - ▶ Time – use of a park ends at a particular time
    - ▶ Place – may not obstruct traffic on interstates
    - ▶ Manner – Must obtain a permit in advance
- ▶ These restrictions must be narrowly tailored to serve a significant and legitimate governmental interest
- ▶ The restrictions must also be content neutral
  - ▶ "The principal inquiry in determining content neutrality, in speech cases generally and in time, place or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." – *Hill v. Colorado*, 530 U.S. 703 (2000)

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## Responses to Audit Activity

- ▶ **Don't overreact** – Individuals that engage in these audits will generally post the reaction of government officials on social media. Sometimes this is motivated by their beliefs, sometimes it's motivated by money. As such, auditors are often looking for the negative reaction or the overreaction to their conduct.
- ▶ **Be polite (and possibly helpful)** – Remember this behavior is protected by the Constitution. Making you uncomfortable or annoying you is not a crime.
  - ▶ Example: Auditors came to the Platte County Government Complex with visibly displayed cameras on one individual and hidden cameras on others. When they encountered a deputy, the deputy asked, "Can I help you find something?" The auditors said no and then asked if there was a problem with them filming. The deputy said that there was not a problem, and he was just trying to be helpful. The deputy then said if they need help with anything they could come to our lobby, and we'd be glad to help them and then walked away. (That video was not placed online, but videos from other departments visited on the same day were).

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## Before the Audit

- ▶ **Educate employees about audits** – If there is not a negative reaction, the video will likely not be posted. All public employees should have some level of familiarity with this type of behavior and what responses are appropriate.
- ▶ **Identify non-public areas** – Remember the time, place and manner restrictions. The government can hold certain areas as off limits to the public. If an area can be seen from public view, it can be lawfully recorded. Auditors do not have the lawful right to enter areas that have restricted access.
  - ▶ If a door to an office area is propped open where anyone could enter then an auditor could enter and film.
  - ▶ Think about areas where visitors would normally have to be invited in order to gain access to the area.

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## Closing Thoughts on 1<sup>st</sup> Amendment Issues

- ▶ It will not be uncommon to see an overlapping of First Amendment and Fourth Amendment Claims if police action is taken against a speaker
- ▶ Agencies tend to focus on Fourth Amendment training but not on First Amendment training
  - ▶ Look at policies, training (classroom and scenario), after action
- ▶ These principles apply as much in the virtual world as in the physical world
  - ▶ Have you created public forums?
    - ▶ Online Community Policing Efforts – Social media pages
    - ▶ Does your management of them implicate the First Amendment?
- ▶ Emerging area of law to watch
  - ▶ High-tech monitoring of First Amendment activities
    - ▶ New technology... old themes
    - ▶ Right to privacy of association

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## 2<sup>nd</sup> Amendment Audits

- ▶ 2<sup>nd</sup> Amendment audits are very similar to 1<sup>st</sup> Amendment audits except that they will involve the carrying of a firearm.
  - ▶ It is not uncommon for the audits to be combined where an individual is engaging in 2<sup>nd</sup> Amendment activity and also 1<sup>st</sup> Amendment activity or another person is filming the interaction with police (1<sup>st</sup> Amendment).
- ▶ It is extremely important that law enforcement officers are versed in the firearms laws for their jurisdiction.
  - ▶ Remember Missouri is an open carry state.
- ▶ The rules you learned in the academy about contact, detention and arrest are just as applicable in these scenarios as they are in any other law enforcement interaction.

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## Constitutional Provisions

- ▶ 2<sup>nd</sup> Amendment to the Constitution of the United States
  - ▶ A well-regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed.
- ▶ Article 1, Section 23. Constitution of the State of Missouri
  - ▶ "That the right of every citizen to keep and bear arms, ammunition, and accessories typical to the normal function of such arms, in defense of his home, person, family and property, or when lawfully summoned in aid of the civil power, shall not be questioned. The rights guaranteed by this section shall be unalienable. Any restriction on these rights shall be subject to strict scrutiny and the state of Missouri shall be obligated to uphold these rights and shall under no circumstances decline to protect against their infringement. Nothing in this section shall be construed to prevent the general assembly from enacting general laws which limit the rights of convicted violent felons or those adjudicated by a court to be a danger to self or others as result of a mental disorder or mental infirmity."

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## Back to the Academy

- ▶ It's not uncommon to hear the phrase "Am I being detained or am I free to go" or something similar.
  - ▶ This is not a way to annoy you. This should cause your constitutional standard alarm to start going off.
- ▶ In the academy you learned about three levels of interaction:
  - ▶ Contact
  - ▶ Detention
  - ▶ Arrest
- ▶ The distinction between these three is important to remember in these scenarios.
- ▶ You may become involved in this through a call for service. Just because the behavior alarmed someone doesn't mean it's illegal.

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## Back to the Academy

- ▶ Contact – The individual has complete freedom of movement and may choose to end the encounter and leave. The contact is voluntary.
- ▶ Detention – A limited seizure, **based on reasonable suspicion**, to investigate an ambiguous situation in which freedom of movement is temporarily limited.
  - ▶ Remember we must have reasonable suspicion that the person is engaged in criminal activity before we can lawfully detain them.
- ▶ Arrest – A physical seizure of a person where the subject is not free to leave.
  - ▶ Remember we must have probable cause that a crime has been committed and that the person we have seized committed the crime.

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## Hiibel v. Sixth Judicial Dist. Court of Nevada

- ▶ It is not unheard for individuals engaged in audit activity to not provide their names.
  - ▶ Call me Good Samaritan, Concerned Citizen, etc.
- ▶ There is often a misconception about what the US Supreme Court has said about a person being required to do so.
- ▶ The Hiibel case provides a good outline on what is required in order to compel a person to provide identity.
  - ▶ More properly put – what is required before law enforcement can take enforcement action against a person for not providing identity information.

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## Hiibel v. Sixth Judicial Dist. Court of Nevada

- ▶ The Humboldt County, Nevada Sheriff's Office received a call reporting an assault. The caller reported seeing a man assault a woman in a red and silver GMC truck.
- ▶ When a deputy arrived on scene, he found a truck matching the description parked on the side of the road with a man standing by the truck and a young woman sitting inside the vehicle.
- ▶ The deputy told the man that he was investigating a report of a fight. The deputy asked the man if he had identification and the man refused to produce it and asked why the deputy wanted to see his identification.
- ▶ The deputy responded that he was conducting an investigation and needed to see some identification.

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## Hiibel v. Sixth Judicial Dist. Court of Nevada

- ▶ The man appeared to be intoxicated and became agitated and insisted that he had not done anything wrong. The man taunted the deputy by placing his hands behind his back and telling the deputy to take him to jail.
- ▶ The deputy asked for identification 11 times and warned the man that he would be arrested if he continued to refuse to comply. The man was eventually arrested and charged with obstruction based on a Nevada statute which requires a detained person to identify themselves.
- ▶ At the time of this case the Supreme Court had previously invalidated two stop and identify statutes from Texas and California. (*Brown v. Texas* and *Kolender v. Lawson*)

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## Hiibel v. Sixth Judicial Dist. Court of Nevada

- ▶ These statutes did not require reasonable suspicion. The *Hiibel* Court noted that in the previous cases "the stop was not based on specific, objective facts establishing reasonable suspicion to believe the suspect was involved in criminal activity. Absent that factual basis for detaining the defendant...the risk of arbitrary and abusive police practices was too great...."
- ▶ The Court noted that reasonable suspicion existed for the initial stop in the *Hiibel* case.
- ▶ The Court noted that asking questions is an essential part of police investigations and that in the ordinary course of business a police officer is free to ask a person for identification without implicating the Fourth Amendment.

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## Hiibel v. Sixth Judicial Dist. Court of Nevada

- ▶ The Court pointed out that beginning with *Terry v. Ohio*, the Court had recognized that a law enforcement officer's reasonable suspicion that a person may be involved in criminal activity permits the officer to stop the person for a brief time and take additional steps to investigate further.
- ▶ The Court also noted that the officer's actions must be justified at their inception and reasonably related in scope to the circumstances which justified the interference in the first place.
- ▶ The Court also pointed out that a concurring opinion in the *Terry* case stated that a person detained in an investigative stop can be questioned but is not obliged to answer, answers may not be compelled and the refusal to answer furnishes no basis for an arrest.

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## Hiibel v. Sixth Judicial Dist. Court of Nevada

- ▶ The *Hiibel* Court noted that the Fourth Amendment does not impose obligations on the citizen but instead provides rights against the government. As such, the Fourth Amendment itself cannot require a suspect to answer questions.
- ▶ The issue in *Hiibel* was the Nevada law, not the Fourth Amendment, required the detained person to provide their name when asked.
- ▶ The Supreme Court held that the principles of *Terry* allowed a state to require a suspect to disclose their name during a *Terry* stop.
- ▶ The reasonableness of the seizure is determined by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests.

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## Hibel v. Sixth Judicial Dist. Court of Nevada

- ▶ The Court held that a law which required an individual to disclose their name during a valid Terry stop was consistent with the Fourth Amendment.
- ▶ The Court did engage in a discussion on other types of compelled identification such as fingerprinting and discussed the Fifth Amendment, but those points are not germane to the topics of this course.

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## So What About in Missouri?

- ▶ We saw in Hibel that we at least need reasonable suspicion.
  - ▶ Remember the question "Am I being detained or am I free to go?" if we don't have reasonable suspicion and we're in a consensual/voluntary contact we can't detain them.
- ▶ Is there a Missouri law that requires a person to provide identification?
  - ▶ Be mindful of the distinctions between contacting the driver of a vehicle and contacting a person walking down the street.
  - ▶ Does RSMo 84.710 apply to every peace officer?

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## Closing Thoughts About 2<sup>nd</sup> Amendment Issues

- ▶ Be careful about what you do with the person's firearm.
  - ▶ Taking the person's firearm may constitute a seizure under the 4<sup>th</sup> Amendment.
  - ▶ You will have to have a **legal** reason to affect the seizure.
  - ▶ As with any other situation, you must have **articulable facts and circumstances** to justify the actions you take.
- ▶ Know the law in your jurisdictions about where firearms are prohibited.
  - ▶ State statute vs. city ordinance and county ordinances.
    - ▶ Be sure it's a law you are empowered to enforce.
- ▶ Be cautious of broad sweeping justifications that aren't based on articulable facts.
  - ▶ Examples – officer safety or calls from a concerned citizen

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## Examples of Audits

- ▶ We're going to review some videos of encounters with auditors and discuss the encounters.
- ▶ Pay special attention to the officers' conduct and justifications
  - ▶ Are these good or not so good?
- ▶ <https://www.youtube.com/watch?v=lfWWn1hwfzY>
- ▶ <https://www.youtube.com/watch?v=ys4Wi9AqQ1U>

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## Questions?

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