

First Amendment Audits

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Roadmap

- What are First Amendment audits?
- Framework for First Amendment analysis
- Practical takeaways and case studies



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What are First Amendment “audits”?

- Nationwide social media/internet-based movement
- Individuals asserting a First Amendment right to enter and remain on government-owned property and to film public officials and employees.



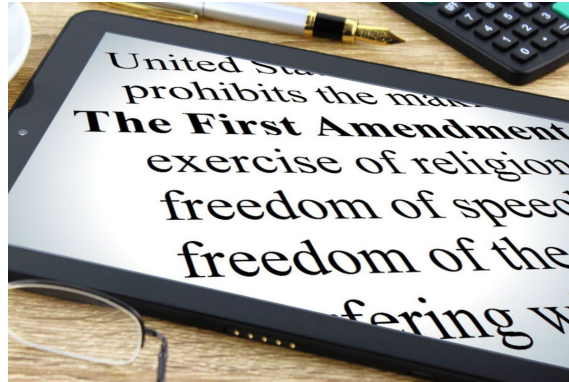
Common Features

- Roaming a building
- Refusal to self-identify
- Escalation of encounter
- Sensationalized captions
- Social media attention



Questions Raised

- Is the act of filming protected by the First Amendment?
- If so, can the government place limitations on filming?



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Framework for First Amendment Free Speech Analysis on Government Property

1. Does the First Amendment protect the expressive activity at issue?
2. What is the nature of the “forum” where expressive activity is being regulated?
3. Does the regulation satisfy the standard of judicial review associated with that forum?

Does the First Amendment protect the expressive activity at issue?

The First Amendment

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.

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Some speech receives less (or no) First Amendment protection...

- True threats
- Obscenity
- Fighting words
- Defamation
- Blackmail
- Solicitation to commit crimes

Is filming protected under the First Amendment?

“If the act of making a photograph or recording is to facilitate speech that will follow, the act is a step in the ‘speech process,’ and thus qualifies itself as speech protected by the First Amendment.”

- *Ness v. City of Bloomington*,
11 F.4th 914, 923 (8th Cir. 2021)



Is filming protected under the First Amendment?

- The Supreme Court has recognized a “paramount public interest in a free flow of information to the people concerning public officials.”
 - *Garrison v. State of La.*, 379 U.S. 64, 77 (1964)
- “[T]he First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally.”
 - *Branzburg v. Hayes*, 408 U.S. 665, 684 (1972)



Is there a right to film public officials?

The First, Third, Fifth, Seventh, Ninth, and Eleventh Circuit have all recognized a First Amendment right to film public officials carrying out their duties in public places, *at least in the context of police activity in traditional public forums.*

The Fourth Circuit Court of Appeals has not yet recognized this right.

Case to watch:
Sharpe v.
Winterville Police
Department

How broad is the right (where recognized)?

- “[T]he 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 (11th Cir. 2000)
- “[T]he videotaping of public officials is an exercise of First Amendment liberties.”
 - *Glik v. Cunniffe*, 655 F.3d 78 (1st Cir. 2011)



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Forum Analysis

- Only used in cases where courts are assessing the constitutionality of restrictions on speech on government property.
- Standard of judicial review depends on the category of “forum” at issue.
- Boundaries of the forum depend on the access sought—generally narrowly defined.

Traditional Public Forums

An area of public property traditionally open for public assembly, expression, protest, solicitation, and debate, or “which has immemorially been held in trust for the use of the public and, time out of mind, has been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.”

Perry Ed. Assn. v. Perry Local Educators’ Ass’n, 460 U.S. 37 (1983).

Examples:

- Streets.
- Sidewalks.
- Parks.
- Public squares.
- Highways.

Content-based restrictions are presumed unconstitutional.

Time, place, and manner restrictions are allowed if they are (i) narrowly tailored to further a substantial government interest, and (ii) leave ample channels of communication available.



Nonpublic Forums

Public property that has not been traditionally used or designated for use as a forum for expressive activity.

Restrictions must be:

- **Viewpoint neutral.** Cannot suppress expression merely because the government opposes the speaker's view.
- **Reasonable** in light of the purpose served by the forum.

Examples:

- Government employees' offices (usually)
- Lobbies of government buildings (depending on policy/practice)
- The interior of polling places
- Courthouses
- Military bases



Designated Public Forums

Areas the government has *intentionally* opened (“designated”) for expressive activity, even if the area was not traditionally used for such purposes.

- Opened to same (or similar) broad spectrum of expressive activity as a traditional public forum
- Examples:
 - University meeting facilities open for use by student groups
 - City-leased theatre designed for expressive activities
 - School auditorium used by community groups

Same standard of judicial review as a traditional public forum



Limited Public Forums

Subcategory of designated public forums that are either:

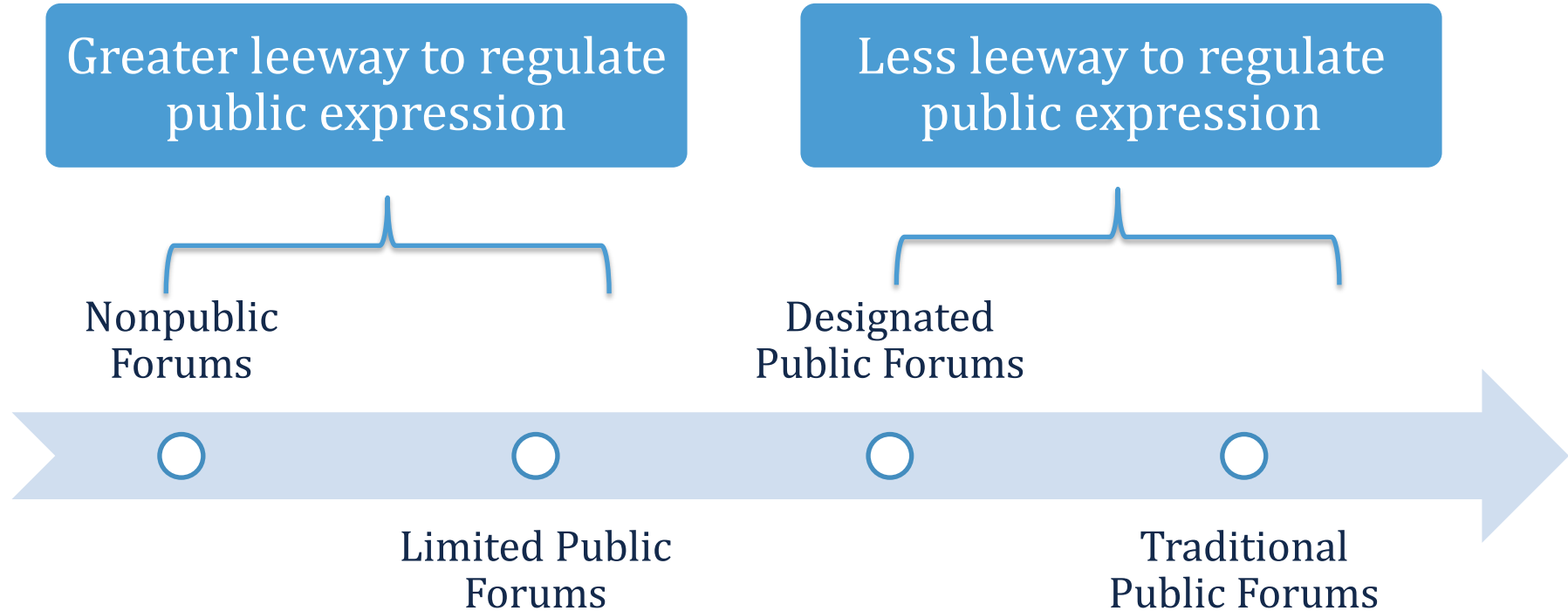
- Only open for use **only by certain groups** or
- Dedicated solely to the discussion of **certain subjects**.

Same standard of judicial review as a nonpublic forum

- Examples:
 - Public meetings, in many instances
 - Public hearings
 - Public libraries



Forum Analysis



How do we know what type of forum is at issue?

- Look to history and tradition
- Analyze the government's **intent** for the forum (policy, practice, nature of the property)



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Government Intent

Courts look to:

- Policies
- Practices (extent of use granted)
- Nature of the property/area



Examples of Analyzing Government Intent: Lobbies

- ***Claudio v. U.S.***, 836 F. Supp. 1219 (E.D.N.C. 1993), *aff'd*, 28 F.3d 1208 (4th Cir. 1994)
 - Main entrance lobby of a federal building was a nonpublic forum.
- ***United States v. Gilbert***, 920 F.2d 878 (11th Cir. 1991)
 - Interior of a federal government building was a nonpublic forum.
- ***Freedom Found. v. Washington Dep't of Ecology***, 426 F. Supp. 3d 793 (W.D. Wash. 2019), *aff'd*, 840 F. App'x 903 (9th Cir. 2020)
 - Department of Ecology lobby was a nonpublic forum.
- ***Fams. Achieving Indep. & Respect v. Nebraska Dep't of Soc. Servs.***, 111 F.3d 1408 (8th Cir. 1997)
 - Lobby of state-operated DSS was a nonpublic forum.

Publicly Accessible ≠ Public Forum for First Amendment Purposes

United States v. Grace, 461 U.S. 171 (1983)

- “Publicly owned or operated property does not become a ‘public forum’ simply because members of the public are permitted to come and go at will.”
- “There is little doubt that in some circumstances the Government may ban the entry on to public property that is not a ‘public forum’ of all persons except those who have legitimate business on the premises.”

State v. Barber, 281 N.C. App. 99 (2021)

- Interior of the North Carolina General Assembly is not “an unlimited public forum” for purposes of First Amendment activity.
- “The government may prohibit...conduct on a content-neutral basis that would affect the ability of members and staff to carry on legislative functions.”

Publicly Accessible ≠ Public Forum for First Amendment Purposes

United States v. Kokinda, 497 U.S. 720 (1990)

The postal sidewalk was constructed solely to assist postal patrons to negotiate the space between the parking lot and the front door of the post office, not to facilitate the daily commerce and life of the neighborhood or city.

Postal entryways...may be open to the public, but that fact alone does not establish that such areas must be treated as traditional public fora under the First Amendment.



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Traditional and Designated Public Forums

Time, place, and manner restrictions are permissible if they:

1. Are content-neutral
2. Are narrowly tailored to serve a significant government interest, and
3. Leave open ample alternative channels of communications

Content-based restrictions must survive *strict scrutiny*

- Necessary to serve a compelling government interest, and
- Narrowly tailored such that the regulation is the least restrictive means of achieving that interest

Limited Public Forums and Nonpublic Forums

Regulations must be:

1. **viewpoint-neutral** and
2. **reasonable** in light of the purpose served by the forum.

TYPE OF FORUM

TEST FOR EVALUATING RESTRICTIONS

Traditional Public Forum Designated Public Forum	<ul style="list-style-type: none">•Restrictions on the time, place, and manner of speech are permissible, so long as those regulations are:<ul style="list-style-type: none">•Content-neutral,•Narrowly tailored to serve a significant government interest, and•Leave open ample alternative channels of communication.•Content-based restrictions on First Amendment activities are subject to strict scrutiny. The government must show that the regulation is necessary to serve a compelling government interest, and narrowly tailored such that it is the least restrictive means of achieving that interest.•Viewpoint-based restrictions are prohibited.
Limited Public Forum Nonpublic Forum	<ul style="list-style-type: none">•Restrictions on First Amendment activity are permitted so long as they are:<ul style="list-style-type: none">•Viewpoint-neutral, and•Reasonable in light of the purpose served by the forum.•Viewpoint-based restrictions are prohibited.

Content vs. Viewpoint

Content-based:
Applies based on
topic or subject
matter

Viewpoint-based:
Discriminates against
particular *views* held
about a subject matter

Content-Based vs. Viewpoint-Based

- How does this apply to restrictions on filming?



Sheets v. City of Punta Gorda, Florida,

415 F.Supp.3d 1115 (M.D. Fla. 2019).

- City ordinance prohibited filming in City Hall without the consent of the individuals being filmed.
- Ordinance did not target any specific opinion, belief, view, or ideology in its plain language.
- Parties agreed this was a limited public forum.

Viewpoint-neutral? Upheld by the court?

“Reasonable in light of the purpose of the forum”

“The Government’s decision to restrict access to a nonpublic forum need only be reasonable; it need not be *the most* reasonable or *the only* reasonable limitation.”

- **Fourth Circuit on reasonableness:**
 - The government's *means* and *ends* must both be reasonable
 - There is no requirement that the restriction be narrowly tailored or that the Government's interest be compelling



“Reasonable in light of the purpose of the forum”

Restrictions must be:

- Capable of clear interpretation and application
- Support a *legitimate* government objective

Objectives may differ based on location/agency:

- Safety and efficacy of employees
- Duty to protect confidential information
- “Captive audience” issues

Putting it into practice:

Filming on county jail property?

- First Amendment auditors are arrested after filming on county jail property (entryway, sidewalks, and garage adjacent to county jail)
- Lawsuit alleged retaliation in violation of First Amendment rights
- How did the court rule?



Putting it into practice: Filming in courthouse hallway?

- Courthouse sign prohibited filming court proceedings or individuals involved with court proceedings without prior judicial approval.
- Plaintiff filmed two deputies interacting with an individual who refused to leave the pretrial room.
- How did the court rule?



Putting it into practice:

Filming in county probation office lobby?

- Mecklenburg County probation office prohibits the use of cell phones in the office.
- Defendant recording in the lobby of the probation office with his cell phone and was asked to stop recording, refused, started screaming that he had a right to record in the office.
- How did the court rule?



Practical Takeaways

- Consider policies addressing permissible uses of a certain area
 - What is the governmental interest being served?
 - Is the policy actually designed to promote that interest?
 - Does it target specific beliefs, opinions, or perspectives?
- Consistent implementation/training is key
- Communicate limitations to the public (signage, etc.)



Other Issues



**NO
TRESPASSING**

When Auditors Refuse to Leave

Second-Degree Trespass - G.S. 14-159.13

Individual enters or remains on the premises of another without authorization and after being asked to leave by a person in charge of the premises, a lawful occupant, or another authorized person.

Trespass in a Building Open to the Public?

Myth:

Government buildings cannot be the premises “of another”

Reality:

Government buildings belong to the *government*, but if held open to the public, the law implies the government’s consent for the public to enter.

Implied Consent Can Be Revoked

Explicit Revocation:

- *State v. Nickens*, 262 N.C. App. 353 (2018) – order to leave revokes any implied consent to remain



Implicit Revocation:

1. Individual's **conduct** is sufficient to render the implied consent void
2. Individual **exceeds the scope** of the implied consent

Public Records Requests and First Amendment Audits

1. The request does not need to be fulfilled immediately.
2. Requestors do not need to fill out a form or identify themselves in any way.
3. Requestors can legally film the documents provided by a local government in response to a public records request.
 - Be careful to redact/withhold confidential information



Final Takeaways

Filming public officials engaging in public duties is likely protected activity under the First Amendment

- BUT no Fourth Circuit Court of Appeals case recognizing the right (yet!)
- AND law in other circuits largely focuses on police in traditional public forums

Government can likely impose reasonable, viewpoint-neutral restrictions on filming in limited public forums and nonpublic forums

- BUT no Fourth Circuit Court of Appeals case on filming restrictions (yet!)
- Policy, practice, and signage are all important

