

What to do When First Amendment Auditors Come to Town

Eric Shytle, General Counsel, Municipal Association of South Carolina
Deborah Fox, Meyers Nave, Principal & Chair, First Amendment Practice Group

meyers | nave
A Professional Corporation

MASC Municipal Association of South Carolina℠

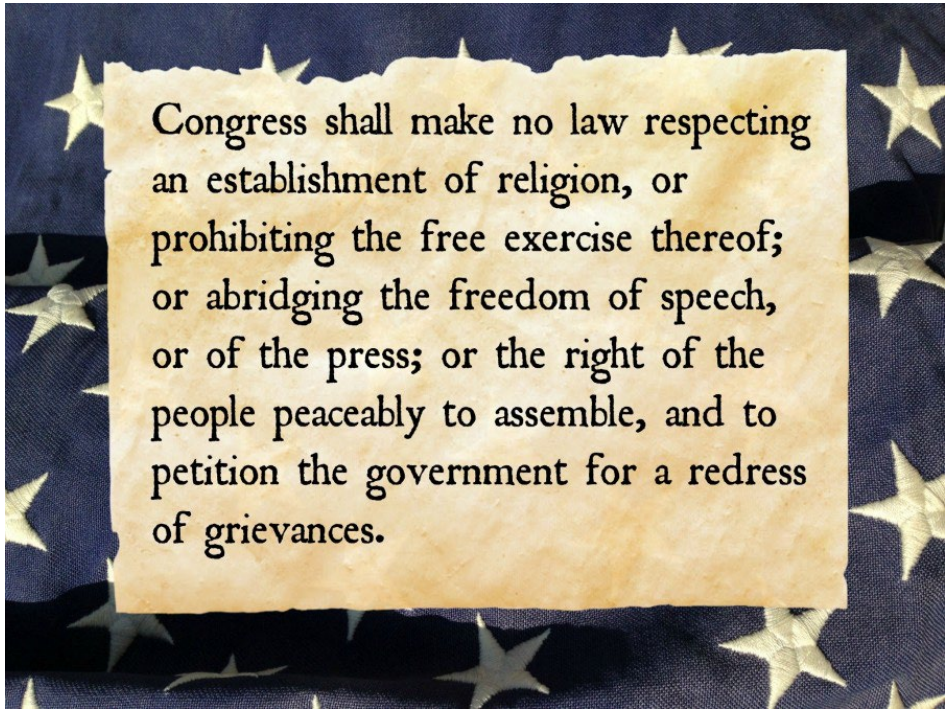
October 20, 2022

What We'll be Covering

1. What is the First Amendment, Exactly?
2. What is a First Amendment Auditor?
3. How does the First Amendment Apply in Different Government Locales?
4. Practical Pointers in An Audit Situation

1. What is the First Amendment, Exactly?

What is the First Amendment?



First Amendment

- Key Protections:
  - Speech
  - Press
  - Assembly
  - Petition
  - Religion



Editorial credit: Matt Gush / Shutterstock.com

Protected Speech: SCOTUS

SCOTUS has recognized that the First Amendment's protections extend to individual and collective speech "in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends."

Roberts v. U.S. Jaycees, 468 U.S. 609, 622 (1984).

Forms of Protected Speech

- Books
- Newspapers
- Leaflets
- Rallies
- Nonverbal Expression
- Symbols



What is the First Amendment, Exactly?

- Unprotected Speech
  - Obscenity
  - Defamation
  - Fraud
  - Incitement
  - True Threats
  - Fighting Words
  - Child Pornography
- Hate Speech?



Is Video Recording Speech?

Majority View & Modern Trend— 1st, 3rd, 7th, 9th, 11th Circuits:

- Little to no distinction between the act of creation and dissemination for First Amendment purposes.
- "[W]e have never seriously questioned that the processes of writing words down on paper, painting a picture, and playing an instrument are purely expressive activities entitled to full First Amendment protection."

Animal Legal Defense Fund – 1st Circuit

Is Video Recording Speech?

Animal Legal Defense Fund v. Wasden **(9th Cir. 2018) 878 F.3d 1184, 1203:**

- "The act of recording is itself an inherently expressive activity; decisions about content, composition, lighting, volume, and angles, among others, are expressive in the same way as the written word or a musical score."



Or, is Video Recording Conduct?

Minority/Dated View --- 3rd Cir. dicta, some district courts

- Recording of planning commission meeting was not an "expressive" activity fall under First Amendment protection; rather, "the alleged constitutional violation consisted of a restriction on [Plaintiff's] right to receive and record information."

Whiteland Woods, L.P. v. Twp. of W. Whiteland, 193 F.3d 177, 182 (3d Cir. 1999).

Is Video Recording Conduct?

Minority View

- An argument can be made that the act of photographing, in the abstract, is not sufficiently expressive or communicative and therefore not within the scope of First Amendment protection-even when the subject of the photography is a public servant.
  Pomykacz v. Borough of W. Wildwood, 438 F. Supp. 2d 504, 513 (D.N.J. 2006).

- Recording "does not partake of the attributes of expression; it is conduct, pure and simple."
  D'Amario v. Providence Civic Ctr. Auth., 639 F. Supp. 1538, 1544 (D.R.I. 1986), *aff'd*, 815 F.2d 692 (1st Cir. 1987).

2. First Amendment as Applied to Auditors

What is a First Amendment Auditor?

- An American social movement categorized by its practitioners as activism and citizen journalism that tests constitutional rights – in particular, the right to photograph and video record in a public space.
- Two main classes: (1) auditor-initiated contact with police or public employee; and (2) auditor-initiated intrusion into public space/buildings.
- Both are **by design** intended to provoke a response.

What is a First Amendment Auditor?

- Auditors tend to film or photograph government buildings, equipment, access control points, and sensitive areas, as well as recording law enforcement or military personnel present.
- Audits are often confrontational in nature.
- Many times hoping to get cited or arrested.

Is this Legally Permissible?

Step One: Must Determine the Forum Limits

Step Two: Determine What Restrictions Can Be Imposed in the Forum

Step Three: Determine What Enforcement Action, If Any to Adopt

Public Property: How is it Characterized?

- The nature of the forum determines the extent to which the government can constrain free speech.
  Cornelius v. NAACP Legal Def. and Educ. Fund, Inc., 473 U.S. 788, 797 (1985).

- The property is categorized as either a **traditional public forum**, a **designated public forum**, or a **limited public forum.**
  Hopper v. City of Pasco, 241 F.3d 1067, 1074 (2001).

Family Feud: Constitutional Edition



Forum Classification

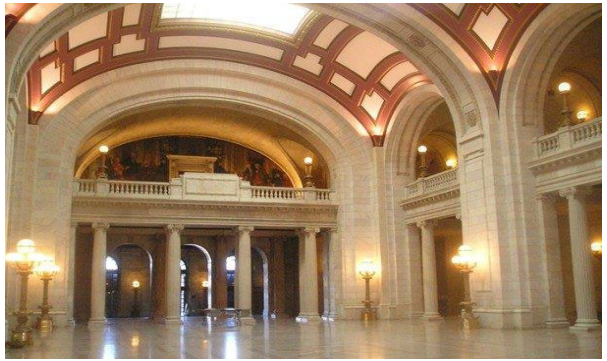
Traditional Public Forum

– Where people have traditionally been able to express their ideas: *town square, park, public street*

Non-Public Forum

– Government property traditionally not open to the free exchange of ideas: *courthouse lobby, prison, post office, military base*





Traditional Public Forum

Content Neutral:

1. Reasonable time, place and manner;
2. Narrowly-tailored to serve a **significant** government interest; *and*
3. Leaves open ample alternative channels of communication.

Content Based:

1. Subject to strict scrutiny;
2. Must be least restrictive means to achieve **compelling** government interest; *and*
3. Presumptively invalid

Reasonable Time, Place and Manner Limits

Possibilities to consider:

- General disruption
- Invasion of personal privacy rights
- Interference with ability to do the public's work (especially including police)
- Sensitive areas such as minors, health care

Reasonable Time, Place and Manner Limits

Possibilities to consider:

- Public Safety—critical public infrastructure like water storage, electric plants, airports



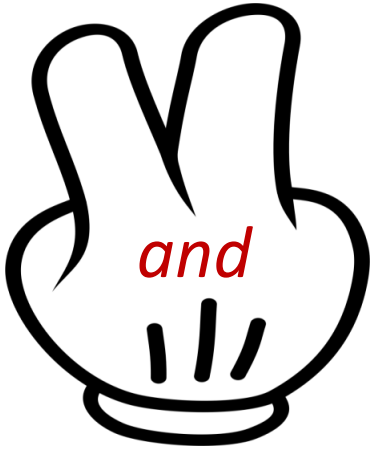


Non-Public Forum Test

Most Lenient Test

Restrictions need only be:

Reasonable



Viewpoint Neutral

Non-Public Forums

Governmental regulations of speech in nonpublic forums:

- Must be **reasonable** in light of the purpose of the forum.
- Must be **viewpoint neutral**.
- Should convey a **clear intent** that the government opens the property only as a nonpublic forum.
- May allow for the **closure** of the forum at any time.

Non-Public Forums



- The local government can therefore make sure that essentially “private” work areas – personal offices, workstations, courtrooms, waiting rooms, secure locations, and so on – are marked and treated as **nonpublic forums**.

Non-Public Forums

Useful rule of thumb:

- Would you be required to allow traditional speech in the location?
- For example, could protestors gather in an employee's office to demonstrate?

INSIDER



Richard Barnett, a supporter of US President Donald Trump sits inside the office of US Speaker of the House Nancy Pelosi as he protest inside the US Capitol in Washington, DC, January 6, 2021. Photo by SAUL LOEB/AFP via Getty Images

https://www.businessinsider.com/accused-capitol-rioter-interviewed-on-russian-state-tv-2021-6

Designated Public Forum

Designated Public Forum

- Government intentionally opens non-traditional areas for First Amendment activity

Same strict review as public forum

- Interior of city hall opened to display art
- Municipal auditorium dedicated to expressive activity
- Employees work stations – behind the planning counter

Limited Public Fora

Limited Public Forum

- Non-public forum opened to First Amendment activity but limited to certain groups, topics

Same review as non-public forum

- Public library meeting rooms
- Public school property

Staying Too Long

- What is loitering?
- Staying in one location without an intended purpose.
- Can you preclude auditors from sitting all day in various public settings?

City of Chicago v. Morales, 527 U.S. 41 (1999)



Staying Too Long

City of Chicago v. Morales, 527 U.S. 41, 42 (1999)

- It is difficult to imagine how any citizen of the city of Chicago standing in a public place with a group of people would know if he or she had an apparent purpose.



Filming by Auditors

Filming Restrictions in Sensitive Areas?



Recording Third Parties

- Generally speaking, it is legal to video record a private citizen as long as they do not have a reasonable expectation of privacy.
- Note that audio recording is more limited than video recording – wiretapping laws, reasonable expectations of privacy, and so on.

Examples of Filming Restrictions

- Policies established ahead of time limiting filming in limited public forums (e.g., City Hall, Administrative Offices) recommended approach.
  - Finding restriction on unconsented recording is reasonable considering City Hall's purpose and these circumstances.

Sheets v. City of Punta Gorda, Fla., 415 F. Supp. 3d 1115, 1123 (M.D. Fla. 2019)

Examples of Filming Restrictions

***Sheets v. City of Punta Gorda, Fla.*, 415 F. Supp. 3d 1115, 1123 (M.D. Fla. 2019)**



- Classic First Amendment Auditor situation.
- According to the City's affidavits, prior unconsented recording created disruptions for employees conducting City business.
- Videos of City employees circulated on the internet, leading to death threats, suspicious packages in the mail, and so many threatening calls that the City had to shut down its phone lines.

Examples of Filming Restrictions

- Plaintiff's attempt to videotape the interior of the Recorder of Deed's office was not, in and of itself, expressive activity.
- Plaintiff was gathering information to be used in a later form of speech — apparently an internet video.

See *King v. McKenna,* No. CV K15C-03-028 RBY, 2015 WL 5168481, at *7 (Del. Super. Ct. Aug. 24, 2015).

Examples of Filming Restrictions

- There was no signage or other indication of a policy prohibiting the public from taking photographs, and in fact there is no policy regarding photographing in public areas of government buildings in Fort Valley, Georgia.

Dunn v. City of Fort Valley, 464 F. Supp. 3d 1347, 1366 (M.D. Ga. 2020).

Filming Restrictions

Dunn v. City of Fort Valley

- Self-described citizen-journalist broadcasting on YouTube.
- Dunn was arrested after recording in public areas of City Hall.
- Indefinitely barred from the City Hall and Police Department without escort.



3. Practice Pointers When Confronted by an Auditor

Difficult Applications of the Rule

- What about **intentional** provocation of police officers while recording?
- What about interactions with government employees **other** than public safety officers?
- What about the rights of **third parties**, who merely happen to be interacting with government employees?
- What about filming **security-sensitive government property**?

How Portland Addressed the Issue

- Portland enacted rules of conduct on City property in 2017, due to the upward trend of public frustration against government and elected officials.
- Portland had been experiencing an increasing number of angry outbursts in city office buildings and business spaces.
- Portland's Rules of Conduct under PCC 3.18.020 of City Property applies to nonpublic forum generally and regulates behavior and conduct rather than speech or expressive activities.

Portland City Code 3.18.020 Rules of Conduct at City Property.

How Portland Addressed the Issue

1. Secured Access – No person shall enter, attempt to enter or remain in any areas of City Property designated as secured or restricted, or closed to public access.

2. Non-Disruption – No person shall engage in activity that disrupts or interferes with: the normal operation or administration of City business at City Property; lawful use by City employees and authorized users at City Property; or City permitted activities.

How Portland Addressed the Issue

Managing Poor Behavior

- No person shall refuse or fail to obey any reasonable direction of a Person-in-Charge of a City Property.
- Defines Reasonable Directive.
- Also includes direction to prevent damages to property, preclude disrupting City operations, keep the peace.

Practice Pointers: Public Entity

- Employee education
- Obtain solid legal review
- Create guidelines for the government's property to establish the nature of the *public forum* involved
- Creates guidelines for *conduct* that regulate only "time, place, and manner" – *not content*

Practice Pointers: Public Entity

- Make sure that the guidelines – both *forum* guidelines and *conduct* guidelines – are transparent to the public and known by employees
- Even handed application
- Provide contact information to employees so they know who to contact when situations develop

Practice Pointers: Employees

- Know the general legal authority
- Strive to remain calm and rational
- Deflect or defuse inflammatory statements
- If regulations apply (either to the forum or to the conduct), clearly articulate them
- Always assume that the audit may end up on YouTube
- Have on-hand the contact information to reach your local counsel

Thank you!!



Eric Shytle
EShytle@masc.sc



Deborah J. Fox
DFox@meyersnave.com