



Introduction



1A Auditors

IPMG Press & Media Management for Public Entities Conference
First Amendment Auditors: Introduction to Law and Risk Reduction Strategies
September 10, 2025
Collinsville, Illinois

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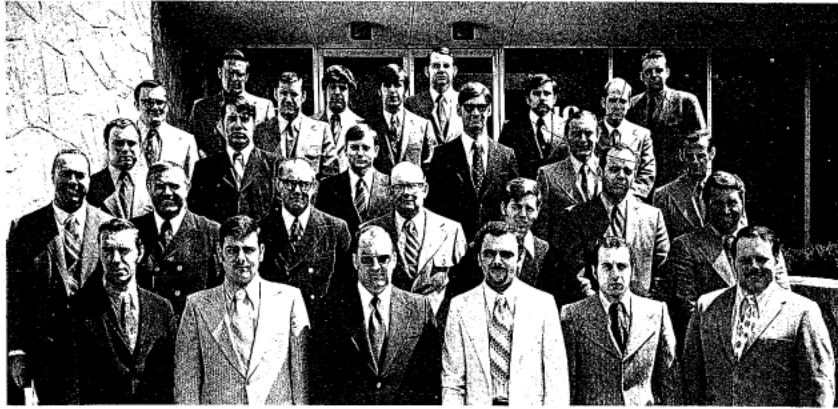


Welcome to the
Conference

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**POLICE TRAINING INSTITUTE -
UNIVERSITY OF ILLINOIS
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Row 1 (l to r): Ronald Roepke, Des Plaines PD; Michael Harrison, Itasca PD; John Mallaburn, West Chicago PD; Daniel Moses, Evanston PD; Charles Wernick, Evanston PD; Bruce Eggensen, Geneseo PD.
Row 2 (l to r): Richard E. Cuthery, PT; LaVerne Schmidt, Aurora PD; Robert Buchik, Des Plaines PD; Dennis Wind, Lombard PD; Russell Carter, U. of Ill. Security-Urbana; Thomas Clevenger, U. of Ill. Security-Urbana.

Row 3 (l to r): Keith Haggstad, Rochelle PD; Charles Kross, DeKalb PD; James Kniceley, Lombard PD; Ronald Robinson, Des Plaines PD; Robert Hamilton, Deerfield PD; Robert Hoch, U. of Ill. Security-Urbana.
Row 4 (l to r): John Lynch, Champaign PD; Michael Smith, Champaign PD; Thomas Fessler, West Chicago PD; Thomas Lindsay, Rantoul PD.
Row 5 (l to r): Wayne Meeker, Champaign PD; Jim Evans, PT; Larry Myroth, Rochelle PD; David Torres, Aurora PD; Allan Krueger, Aurora PD.

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ROW 1 (l to r): Burnis Glasco, Valley View; James Nayfeldt, Palatine; Clyde Ruble, Bolingbrook; Frank Cornell, Bolingbrook; William Charnisky, Bolingbrook; Christopher Jamison, Palatine; Harry Cramond, Round Lake Beach; and William Ruhl, Franklin Park.
ROW 2 (l to r): James Maher, River Forest; Harry Mingorelli, DuPage County Forest Preserve; Leland Sembler, Stratos; George Durdovich, Franklin Park; Coe Mayer, Rolling Meadows; Richard Raffin, Franklin Park; Ron Lilberg, Franklin Park; David Sullivan, Will County; Leonard Schultz, Evergreen Park; and Franklin Bullock, Waukegan.

ROW 3 (l to r): Greg Connor, PT; Anthony Zaccagnini, Cook County Forest Preserve; Ronald Pruss, Will County; Philip Ingram, Bolingbrook; Herman Vander Wayde, South Holland; Michael Victor, Rolling Meadows; John Yltsela, Bloomingdale; Claude Franke, River Forest; Robert Gordon, Riverside; Robert Folgate, Freeport; Walter Simkus, Franklin Park; Richard Kluk, Lyons; John Johnson, Palatine; Karl Berg, Franklin Park; Kenneth Bers, Cook County Forest Preserve; and John Booth, Waukegan.



- Outline, Purpose, and Goals

- 1) Recognize First Amendment Auditor phenomenon
- 2) Understand bedrock First and Fourth Amendment issues and principles; First Amendment forum analysis
- 3) Legal and practical strategies for reduction of risk

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First Amendment Auditors: A rising risk phenomenon



First Amendment Auditors: What are they?

- Nationwide movement, often expressed at the local government level, involving individuals who confront government officials and employees for a variety of motivations and often doing so with video/audio devices.
- Loosely connected through social media/online platforms
- Outcomes of "audits" often posted, resulting in commentary and criticism
- The term "auditors" reflects the terminology used by the individuals themselves; not based on investigative authority



Source: Press NH Now (YouTube); <https://www.youtube.com/watch?v=U7Jbx2FUY-o>

**WATCH MY BACK
I'M A SCARED PIGGY!!**



First Amendment Auditors: Motivations

- REMEMBER!
- Stay calm
- Stay focused
- Stay controlled
- Be aware of motivations (actual and potential)
- Prepare in advance
- Review, develop, and understand your policies and practices
- Rely on your preparation and training
- Remember that many auditors want you to overreact
- Remember that you are likely being recorded
- Understand the nature of the property you are on (forum analysis)

First Amendment Auditors: Motivations

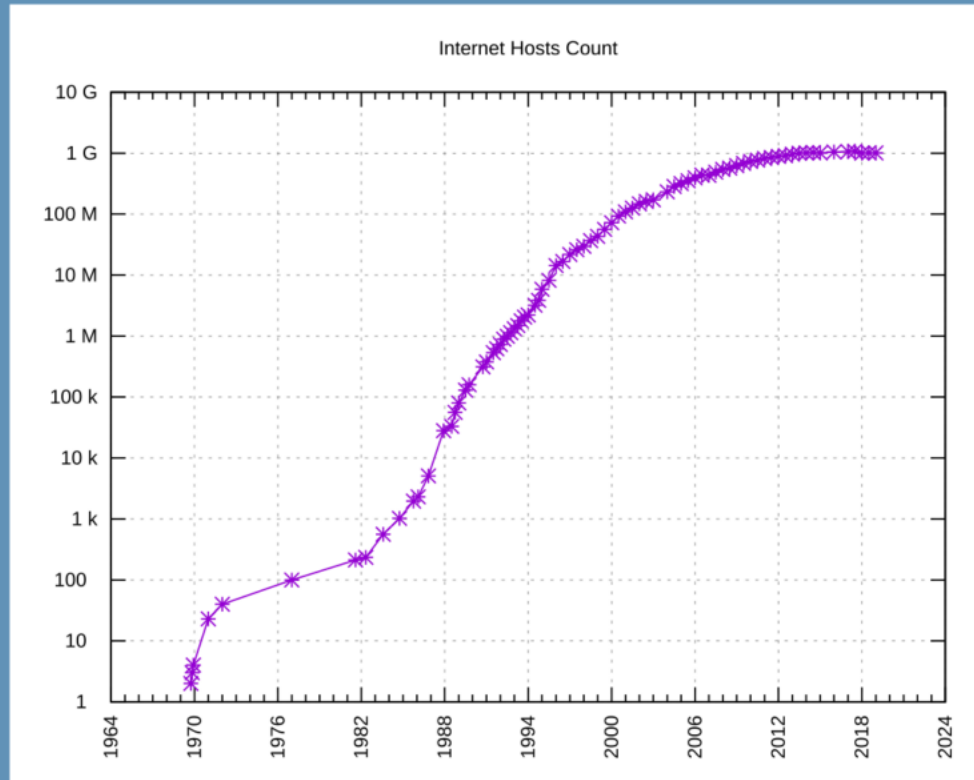
- Motivations are wide-ranging
- Sometimes the individual is legitimately seeking to exercise rights
- Legitimate intention to conduct government business or seek government assistance
- Seeking government accountability
- Other motivations though
 - Fame and attention; self-importance
 - In some situations, misguided belief that they are acting legally
 - Monetary gain online (e.g. YouTube, TikTok channels)
 - Monetary gain through lawsuits/settlements
 - Animosity towards the government
 - Personal entertainment

First Amendment Auditors: Common Tactics and Conduct

- Encounters can involve any type of public property or premises
- Not just police
- Video/audio/other equipment
- Sometimes no devices
- Face masks and other concealing clothing
- Request for employee's name/title/authority/compensation
- Questions about the nature of property
- Requests for documents
- Demands to provide legal opinions/explanations
- Statements by the auditor's of the auditor's own opinion of the law
- "Audit fail": if ask to turn devices off (and other evaluation of responses from employee)

First Amendment Auditors: A brief history

- 1990s: Scrutiny of American policing and of government substantially enters the video age (e.g. O.J. Simpson trial; Rodney King; President Bill Clinton)
- Late 1990s: Exponential adoption of the internet

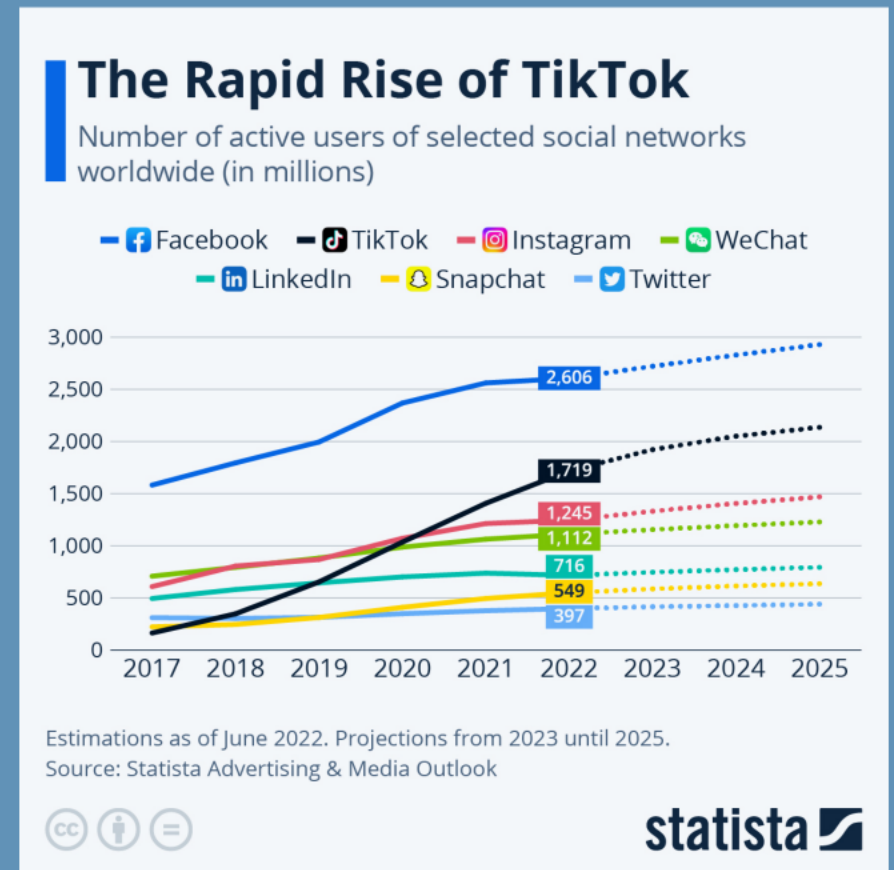


Source: Internet Systems Consortium; <https://web.archive.org/web/20120518101749/http://www.isc.org/solutions/survey/history>

First Amendment Auditors: A brief history

- 2004: Facebook founded
- 2006: YouTube acquired by Google
- 2007: Iphone introduced; rise of smartphone digital camera
- 2010 to present: Continued rise of multiple social media platforms

Source: Statista: <https://www.statista.com/chart/28412/social-media-users-by-network-am/>





Source: Washington Post; <https://www.youtube.com/watch?v=lhP6L9QFD9k>

WAP



What problems can Auditors create?

- creates **conflict** with private citizens and public officials/employees.
- **disrupts** public and private businesses.
- causes public **resources to be wasted**.
- puts public officials (sometimes other citizens) **in harm's way**.
- poses a **risk of actual and threatened litigation**

Trends and risk to Illinois public entities

- Many suits are brought for violations of the Constitution
- 42 U.S.C. § 1988: Plaintiffs can recover attorneys' fees if they prevail
- 42 U.S.C. § 1983: Entitles Plaintiffs to seek **punitive damages** against public employees or officials; not covered by insurance
- Observation of **more frequent First Amendment litigation** in terms of suits and claims
- Substantial **rise in settlement values and verdicts** in Illinois (and not just in the Chicago area)
- <https://news.wttw.com/2024/12/27/ald-jim-gardiner-agrees-pay-157k-settle-lawsuit-claiming-he-violated-first-amendment>

Documented Examples of Outcomes

2018: Colorado town pays \$41,000 to man who confronted police with camera outside of a police substation; <https://www.kktv.com/content/news/Colorado-Springs-to-pay-cameraman-41000-after-First-Amendment-audit-of-police-484291511.html>

2022: Pennsylvania school board pays \$300,000 for conduct towards citizens at public school board meeting; <https://levittownnow.com/2022/07/15/pennsbury-settles-first-amendment-lawsuit-for-300000/>

2022: Radio producer receives \$125,000 after arrested while filming officers in police parking lot; <https://www.desmoinesregister.com/story/news/crime-and-courts/2022/11/17/man-detained-while-making-video-illegal-police-parking-gets-125000-des-moines-city-lawsuit/69651774007/>

2024: Vermont man paid \$175,000 after arrested for using the middle finger and swearing at police; <https://www.thefire.org/news/victory-vermont-man-jailed-flipping-cop-receives-175k-settlement>

First Amendment Retaliatory Arrest

In *Nieves v. Bartlett*, 139 S.Ct. 1715 (2019)

Probable cause typically is an absolute bar to a First Amendment claim for retaliatory arrest.

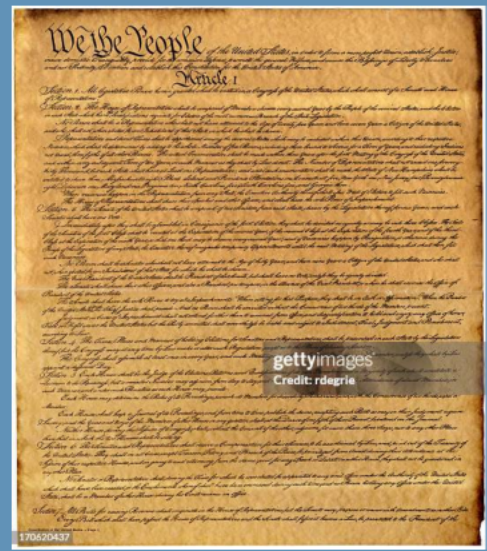
EXCEPTION TO ABSOLUTE BAR OF PROBABLE CAUSE

- But the Nieves rule has at least one important exception, which recognizes that police often **“have probable cause to make arrests” for a wide range of minor offenses “but typically exercise their discretion not to do so.”**
- Supreme Court gives jaywalking as an example

First Amendment Retaliatory Arrest

- Gonzalez v. Trevino, 2025 Supreme Court case: "We recognized the Nieves exception to account for “circumstances where officers have probable cause to make arrests, but typically exercise their discretion not to do so.”
- Exception was broadened

Legal Fundamentals



The First Amendment to the United States Constitution 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."
- The rights are not absolute: the Supreme Court (and other case law) has defined the boundaries and scope of these rights
- Applies to state and local government

Fourth Amendment

“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”

Important: If police are called to intervene, it is vital that any arrest/detention is supported by the existence of probable cause for a crime

Important: It is also vital that any force used is objectively reasonable

Barnes v. City of Centralia, Illinois, 943 F.3d 826, 828 (7th Cir. 2022)

(IFMK defeats First Amendment Auditors with probable cause defense)

Acts of filming/recording: Seventh Circuit (Illinois)

KEY CASE: Am. C.L. Union of Illinois v. Alvarez, 679 F.3d 583 (7th Cir. 2012)

Overview: ACLU sought preliminary injunction; Court granted an injunction to bar enforcement of eavesdropping statute as applied to organization's "police accountability program," which included a plan to openly make audiovisual recordings of police officers performing their duties in public places and speaking at a volume audible to bystanders.

COURT HOLDING: Audio and visual recordings can be protected by the First Amendment: "The act of making an audio or audiovisual recording is necessarily included within the First Amendment's guarantee of speech and press rights as a corollary of the right to disseminate the resulting recording."

OUTCOME: "As applied here, [the law] interferes with the gathering and dissemination of information about government officials performing their duties in public."

Alvarez: There is a First Amendment right to record the police in public spaces during the performance of their duties

Recording is protected: The law is clear that “[t]he act of making [a] recording is necessarily included within the First Amendment's guarantee of speech and press rights[.]” *ACLU v. Alvarez*, 679 F.3d 583, 595 (7th Cir. 2012)

"The right to record"

So is criticism of police: “the First Amendment protects a significant amount of verbal criticism and challenge directed at police officers” including “[t]he freedom of individuals verbally to oppose or challenge police action without thereby risking arrest.” *Houston v. Hill*, 482 U.S. 451, 461–63 (1987).

Indiana's "Buffer Law": 2025 cases

- Recent cases demonstrate uncertainty in First Amendment law
- *Nicodemus v. City of S. Bend, Indiana*, 137 F.4th 654, 659 (7th Cir. 2025) (May)
- Indiana Buffer Law: "A person who knowingly or intentionally **approaches** within twenty-five (25) feet of a law enforcement officer lawfully engaged in the execution of the law enforcement officer's duties after the **law enforcement officer has ordered the person to stop approaching** commits unlawful encroachment on an investigation, a Class C misdemeanor." Indiana Code (I.C.) § 35-44.1-2-14.
- Donald Nicodemus, a citizen-journalist, challenged the law as facially unconstitutional; it violates his First Amendment right to record the police in public spaces.

Indiana's Buffer Law: Nicodemus

- Nicodemus is a citizen journalist from South Bend whose YouTube channel, “Freedom 2 Film,” has over 23,000 subscribers. Nicodemus records police activity in and around South Bend and posts his recordings to his channel. He also “livestreams” police activity, meaning he broadcasts police activity live for his YouTube subscribers to view in real time. He does this to bring awareness to the public of police conduct, assist in ending inappropriate or problematic law enforcement behavior, and educate the public of “newsworthy activities.” (YouTube channel still active)
- Nicodemus goes to crime scene (shots fired) and starts filming; officer invoked the Buffer law and told him to move back; officer counted off 25 feet but Nicodemus remained filming nearby

Indiana's Buffer Law: Nicodemus

- Court recognized that Alvarez acknowledged that the police are not allowed to interfere with a citizen's observation of police activity in performance of their duties, referring to this as a "right to record"
- **HOLDING:** "We held in *ACLU of Illinois v. Alvarez* that there is a First Amendment right to record the police in the execution of their duties in public spaces."
- **OUTCOME (Law upheld):** "To the extent the buffer law restricts the right to record, it is a reasonable 'time, place, or manner' restriction within the bounds of the First Amendment on its face."
- Facial challenge to the statute; not applied challenge

Indiana's Buffer Law **STRUCK DOWN: Rokita**

- Reps. Comm. for Freedom of the Press v. Rokita, No. 24-2927, 2025 WL 2218472, at *1 (7th Cir. Aug. 5, 2025)
- Pre-enforcement void for vagueness challenge under the Fourteenth Amendment and facial challenge under the First Amendment brought by several media groups
- While appeal pending, Indiana passed a second buffer law effective July 1, 2025 (different than Nicodemus case)

Narrower law: Officer who "reasonably believes that a person's presence within twenty-five (25) feet of the law enforcement officer will interfere with the performance of the law enforcement officer's duties;" Ind. Code Ann. § 35-44.1-2-15 (West)

Indiana's Buffer Law **STRUCK DOWN: Rokita**

- Reps. Comm. for Freedom of the Press v. Rokita, No. 24-2927, 2025 WL 2218472, at *1 (7th Cir. Aug. 5, 2025)
- **The Seventh Circuit holds that the law is unconstitutional: "The buffer law is similarly susceptible to arbitrary enforcement and is therefore unconstitutionally vague." (compares to a Supreme Court striking down law allowing police discretion to arrest for loitering)**
- "The buffer law offers no 'guidance to the officer deciding whether [a do-not-approach] order should issue' in the first place. See id. Without such guidance, any on-duty officer can use the buffer law to subject any pedestrian to potential criminal liability by simply ordering them not to approach, even if the pedestrian is doing nothing more than taking a morning stroll or merely walking up to an officer to ask for directions."

Lessons and takeaways

- The law in the Seventh Circuit may be in flux
- **There are several unanswered questions in the Seventh Circuit**
- For example, how does Alvarez apply when person is not actually filming public officials, but is filming on public property? (a recent 8th Circuit case says there might still be protection)
- What is the degree to which an auditor can film an official who is not a law enforcement? Some boundaries are unclear
- What about "right to record" in areas not recognized as traditional public forum?

Lessons and takeaways

- **RECOMMENDATION:** If you are a governmental official in a traditional public space/forum, understand that filming may be constitutionally protected in the same way as it is for the filming of law enforcement officials
- (More recommendations to follow.....)

Forum Analysis: Restriction of Speech

- Practical assumption and best practice: Filming of public officials who are carrying out their duties is a clearly established First Amendment right
- But is this right absolute?
- **NO**
- The government can impose limitations in certain scenarios
- **FORUM ANALYSIS: WHAT MATTERS GOVERNMENT INTENT, THE NATURE OF THE PROPERTY, AND LOCATION**

Forum Analysis: Restriction of Speech

The government can restrict: “Nothing in the Constitution requires the Government freely to grant access to all who wish to exercise their right to free speech on every type of Government property without regard to the nature of the property or to the disruption that might be caused by the speaker’s activities.”

Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 799–800 (1985).

“no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated.”

Perry Educ. Ass’n v. Perry Loc. Educators’ Ass’n, 460 U.S. 37, 46 (1983)

Restriction of speech: three-step test

GOVERNMENT HAS THE POWER TO RESTRICT

BUT THE GOVERNMENT MUST RESTRICT PROPERLY

(1) Is that activity/speech protected by the First Amendment? (assume the filming while performing duties is protected)

(2) SECOND, A COURT MUST IDENTIFY THE NATURE OF THE "FORUM" WHERE THE SPEECH IS BEING RESTRICTED

(3) Do the government's restrictions satisfy the standard applicable to that forum? (courts use different standards depending on the forum at issue)

Four Categories of Public Forums

(1) Traditional Public Forums

(2) Designated Public Forums

(3) Limited Public Forums

(4) Nonpublic Forums

NOTE: Traditional Public Forums and Nonpublic Forums are most common

NOTE: Even the courts have questioned soundness of their own "forum" approach

Traditional Public Forums: Characteristics

These are “places which by long tradition or by government fiat have been devoted to assembly and debate,” including public streets and parks.

Traditional public forums have “immemorially been held in trust for the use of the public, and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.”

Perry Educ. Ass’n v. Perry Loc. Educators’ Ass’n, 460 U.S. 37, 46 (1983)

The hallmarks of a traditional public forum are that it “has been traditionally open to the public for expressive activity” and used for “communicating thoughts between citizens, and discussing public questions.”

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

Traditional Public Forums: Examples

- Parks
 - Sidewalks
 - Public Streets
 - Main public square of City
 - Steps in front of City hall
 - Front lawn of County office building
 - City-maintained alleyway
-
- Open air, exterior = more likely to be traditional public forum



Traditional Public Forums: Standards

- Receive the **greatest level** of protection from government intrusion
- May make "time, place, manner restrictions" so long as they are:
 - (1) **content-neutral**
 - (2) **narrowly-tailored to service a significant state interest**
 - (3) **leave open ample alternative channels of communication**
- **Content-based restrictions are subject to an even higher standard: strict scrutiny ("strict in theory, fatal in fact")**
- **Strict Scrutiny:** The government must show that the regulation is necessary to serve a **compelling** state interest and **narrowly tailored such that it is the least restrictive means** of achieve that interest
- **Viewpoint-based restrictions are PROHIBITED**

Content-Based vs. Viewpoint-Based Restrictions

- Goes beyond the scope of this presentation
- Frequent source of litigation and is incredibly detailed and complex
- **RECOMMENDATION:** Be careful about imposing any restrictions on filming/recording in traditional public forums; the courts are highly skeptical

Designated Public Forums: Characteristics

- **INTENTIONAL OPENING IS KEY:** A designated public forum is “created by purposeful governmental action” when the government has intentionally opened property “for expressive activity by part or all of the public,” even if the property was not traditionally used for such purposes. Arkansas Educ. Television Comm'n v. Forbes, 523 U.S. 666, 666 (1998)
- The hallmark of a designated public forum is that the government has made it “**generally accessible to all speakers**,” in a similar manner to the broad expressive activity permitted in traditional public forums.
- **SUMMARY:** Don't have to keep it open, but when it is open, subject to the same limitations as traditional public forum

Designated Public Forums: Examples

- Subject to the same rules as traditional public forum when open
- University meeting facilities open for after school groups
- Municipal/County auditoriums
- City-owned/leased theater dedicated to expressive activities



Designated Public Forums: Standard

- Same as traditional public forums
- RECOMMENDATION: If you intentionally open public property to speakers, make sure you use the same caution as you would for traditional public forums (sidewalks, plazas, streets)

Limited Public Forums: Characteristics

- A limited public forum exists where a government has intentionally reserved a forum only for certain groups or for the discussion of certain topics
- In other words, the government has opened a forum for expressive activity, but it has established initial restrictions on access to that forum based on subject matter, the speaker, or both.
- Not obligated to create in the first place or keep it open forever

Limited Public Forums: Examples

- Public school activities during after-hours
- Interior of City Hall (depending on how used)
- Public libraries
- Public meetings

Limited Public Forums: Standard

- Restrictions must be:

(1) Reasonable in light of the purpose set by the forum (time, place, manner) (less demanding standard than in traditional public forums and designated public forums)

(2) Viewpoint-neutral

VIEWPOINT-BASED RESTRICTIONS ARE PROHIBITED

- E.g.: Public meetings, expression may be limited to time and manner, but need to be careful not to restrict content

Nonpublic Public Forums: Characteristics

- A nonpublic forum is a government space that “is not by tradition or designation a forum for public communication.”
- Spaces in which “the government is acting as a proprietor, managing its internal operations” fall into this category.

Walker v. Texas Div., Sons of Confederate Veterans, Inc., 576 U.S. 200, 200 (2015)

- “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.”

Freedom Found. v. Washington Dep't of Ecology, 426 F. Supp. 3d 793, 795 (W.D. Wash. 2019), aff'd, 840 F. App'x 903 (9th Cir. 2020)

Nonpublic Public Forums: Standard

- The Supreme Court has recognized that the government has much more flexibility to craft rules limiting speech

(1) reasonable in light of the purpose served by the forum

(2) viewpoint-neutral (same standard as for limited public forums)

- “The First Amendment does not forbid a viewpoint-neutral exclusion of speakers who would disrupt a nonpublic forum and hinder its effectiveness for its intended purpose.”
- The Supreme Court has “long recognized that the government may impose some content-based restrictions on speech in nonpublic forums, including restrictions that exclude political advocates and forms of political advocacy.”

Nonpublic Public Forums: Examples

- offices of government employees
- the interior of polling places
- the mailboxes of public school teachers
- lobby areas of government buildings



Larsen v. Fort Wayne Police Dep't, 825 F. Supp. 2d 965, 980 (N.D. Ind. 2010)
(upholding "no filming policy" as reasonable restriction during school show choir and noting that school was a nonpublic forum; father was arrested for disorderly conduct and resisting after he tried to film at school; First Amendment claims fail, but Fourth Amendment claims allowed to proceed)

Nonpublic Public Forums: Lobbies

- The trend in the Seventh Circuit is to treat lobbies as nonpublic forums
- Sefick v. Gardner, 164 F.3d 370, 371 (7th Cir. 1998)
- After denial of artist's application under Public Buildings Cooperative Use Act to display satirical sculpture of federal district judge Chicago federal courthouse, artist brought action for injunctive relief against General Services Administration (GSA) administrators, alleging violation of his First Amendment rights.



Nonpublic Public Forums: Lobbies

- Sefick v. Gardner, 164 F.3d 370, 371 (7th Cir. 1998)
- "The lobby of the courthouse is not a traditional public forum or a designated public forum, not a place open to the public for the presentation of views. No one can hold a political rally in the lobby of a federal courthouse. It is a 'nonpublic forum,' which government "may reserve ... for its intended purposes".
- "When deciding what may be displayed in a nonpublic forum, the government may exercise considerable selectivity, provided it does not transgress basic anti-discrimination rules. Thus it may forbid all political rallies, but it may not forbid one party's rallies while allowing another's."

Nonpublic Public Forums: Easterbrook

- "Nothing in the first amendment prevents the government from allowing sedate and decorous exhibits—the lobby of the Dirksen Courthouse contains the Great Seal of the United States, copies of the Constitution and Declaration of Independence, a memorial to a deputy marshal killed in the line of duty, and a bust of Senator Dirksen—while excluding the comic, the caustic, and the acerbic.
- The judiciary does not show reruns of the Three Stooges in courthouse lobbies, and from the perspective of promoting the judicial mission a sculpture satirizing judges would be worse than old physical comedies. No one doubts that displays in courtrooms and adjacent corridors may be limited to the icons of government, such as seals and flags, and that judges may insist that all those present behave in a dignified manner. Why should this be less true of the lobby? Newspapers and the streets outside are open to scathing criticism of what happens within the courthouse. See *United States v. Grace*, 461 U.S. 171, 103 S.Ct. 1702, 75 L.Ed.2d 736 (1983)
- But the halls of justice may be kept hushed.

Nonpublic Public Forums: Lobbies

- Sefick v. Gardner, 164 F.3d 370 (7th Cir. 1998)
- "Portraits of judges line the corridors and main courtrooms of the Dirksen Courthouse, but an artist's claim to have his own satirical portrait of a judge placed among these would be met with guffaws. Just so with a demand for display space in the courthouse lobby. **The First Amendment does not forbid a viewpoint-neutral exclusion of speakers who would disrupt a nonpublic forum and hinder its effectiveness for its intended purpose.**"

Nonpublic Public Forums: Lobbies

- Grossbaum v. Indianapolis–Marion Cnty. Bldg. Auth., 100 F.3d 1287, 1290 (7th Cir. 1996)
- The Indianapolis–Marion County Building Authority amended its rules and regulations to prohibit **all private groups and individuals from exhibiting displays in the lobby of its City–County Building.**
- This rule prevented the plaintiffs (Rabbi and Synagogue) from displaying a menorah in the lobby, they had done for eight years between 1985 and 1992.
- The plaintiffs sought a preliminary injunction
- The plaintiffs contended that even though the rule is viewpoint-neutral, its adoption was motivated by an unconstitutional desire to retaliate against the plaintiffs for previous litigation and to discriminate against their religious viewpoint.

Nonpublic Public Forums: Lobbies

- Grossbaum v. Indianapolis-Marion Cnty. Bldg. Auth., 100 F.3d 1287, 1290 (7th Cir. 1996)
- In previous challenge, the plaintiff successfully challenged the County's prohibition on "all religious displays" as violated the First Amendment
- Rabbi previously displayed menorah, but ACLU requested policy change
- **Court determines that a courthouse lobby is a nonpublic forum**
- Court affirms denial of the preliminary injunction
- **Number of reasonable justification (pedestrian traffic, security, hostility by displays)**

Nonpublic Public Forums: Offices

- In Lavite v. Dunstan, the Seventh Circuit found that a county administration office building housing over twenty county departments was a nonpublic forum, where no evidence showed that the building had been used for political activity, assembly of the public, or other expressive activity. 932 F.3d 1020, 1029 (7th Cir. 2019) (veteran was banned from building)
- **"The lobby of the building, as Lavite points out, is open to the public, but visitors sign in at a security post and the space is open for public events only with advance approval. The district court correctly concluded that Lavite failed to offer evidence that, in policy or practice, the building was used for political activity or assembly of the public."**

Nonpublic Public Forums: Offices

In *Day v. Chicago Board of Education*, the Seventh Circuit found that a teacher's certification and substitute teacher's center run by the Chicago Board of Education was a nonpublic forum. 234 F.3d 1272 (7th Cir. 2000). Citizen not allowed to distribute pro-union literature.

- "A public agency's administrative headquarters is presumptively not a public forum."
- "Day does not contend that the School Board has made this space a designated public forum. So far as the record reveals, no one is allowed to use the space for speech."
- **"A public body may not discriminate among speakers-may not, for example, allow anti-union but ban pro-union speech even in a nonpublic forum"**
- "but nothing in this record suggests that Chicago's Board of Education has done this at the Center.:
- **"All it has done is try to keep the space quiet, so its employees can do their work, and that does not violate the Constitution."**

General Breakdown

- Exterior areas: Streets, parks, sidewalks, plaza are likely to be traditional public forum and the government should be very careful about imposing any restrictions
- Interior Areas:
 - If government INTENTIONALLY opened the area for indiscriminate use by the public for expression, likely a designated public forum (allowing protests, pamphlets, posting signs); need to treat like a traditional public forum and be careful
 - If the public entity did not take intentionally action through policy or past practice, then, property likely limited a public forum or nonpublic forum

How do courts classify forums?

GOVERNMENT INTENT IS KEY

Court use a factor test to determine "intent"

- (1) policies regarding the use and purpose of the area
- (2) practices regarding the use of the area (what the gov't actually does)
- (3) the nature of the property and its compatibility with expressive activity (disruption risk?)
- (4) the extent and use or access granted to the public (be consistent)
- (5) the history of use

Nonpublic Public Forums: Reasonableness

- Articulate government objectives clearly and in a way that does not suppress speech
- **CAUTION:** Avoid vague, blanket "no filming" policy (*i.e.* policy banning a filming in a local government lobby) if inconsistently applied to suppress First Amendment Auditors specifically



Nonpublic Public Forums: Reasonableness

You can plan ahead!: *Cornelius* (Supreme Court) “the Government need not wait until havoc is wreaked to restrict access to a nonpublic forum.”

CAUTION: A policy, ordinance, or resolution that gives significant discretion to officials and employees to interpret where, when, and how to stop someone from filming may lead to misinterpretation and inconsistent application

Begin thinking about "reasonableness"

- Think about security, safety, and privacy concerns
- Think about out how "no filming" policy actually supports the interests
- Think about how alternatives to the policy are not feasible

Nonpublic Public Forums: Reasonableness

GOVERNMENT OBJECTIVES AND JUSTIFICATIONS UPHOLD (IN VARIETY OTHER CONTEXTS AND COURTS; MAY NOT BE RELEVANT TO A PARTICULAR FORUM)

- limiting congestion and disruption
- preventing disruption to intended function
- keeping walkways free of obstruction
- protecting safety and convenience of those using the public forum
- protecting safety of those working in a government building
- preventing expressive activity that would hinder a government's effectiveness to protect vulnerable population
- providing patrons with a safe and comfortable environment for attending arts event
- avoiding political favoritism
- maintain established legal procedures and calmness in courtroom
- prevent disruptions and safety threats to employees in conducting city business

Illinois Auditor Case: Bergquist

Bergquist v. Milazzo, No. 18-CV-3619, 2021 WL 4439422, at *1 (N.D. Ill. Sept. 28, 2021)

FACTS:

- Plaintiff Amanda Bergquist, a self-described “First Amendment auditor,” went to the Bridgeview Courthouse in March 2018 to address three traffic tickets.
- At the security checkpoint, court security officers told her she could not bring the video camera she carried into the courthouse.
- Plaintiff subsequently began filming the exterior of the courthouse, scanning up and down with her camera.
- When officers noticed, they confronted her, asked for her identification, and attempted to ascertain her intentions for filming.
- Plaintiff refused to identify herself, remained uncooperative, and continued to record both the exterior and interior of the courthouse.
- The officers then detained her inside the courthouse, searched through her purse, wallet, and camera, and brought her before the presiding judge

Illinois Auditor Case: Bergquist

OUTCOME:

- Here, the relevant constitutional right is not whether a person can film the exterior of a government building, but rather whether Plaintiff had the right to be free from an investigatory detention when a **courthouse officer believed she was filming inside the courthouse (and when she, in fact, did film inside the courthouse)**, and also whether Plaintiff had the **right to be free from arrest when she continued to film** and remained evasive and uncooperative when officers asked her for her identity and the purpose of her recording.
- In the absence of any clearly established precedent forbidding the officers from taking action under these circumstances, **Defendants remain entitled to qualified immunity on Plaintiff's Fourth Amendment claims.**

Practical Considerations

- Review and develop policies
- Ensure policies would be clearly understood to the public and a court
- Conduct internal training across departments
- Evaluate the nature and use of all property; determine "intent" based on forum factors
- Evaluate signage and external communication of policy (consider posting on website)
- Officials/employees should prepare for their anticipated individual response
- Understand applicable enforceable laws
- Consult with your legal adviser and risk management professionals
- Consider adopting a "point person"

Practical Considerations: Policies

- IPMG law enforcement policies through LLRMI
- Crafting thoughtful policy – and providing training on the policy – prevents ad hoc/spontaneous decisions in handling situations
- Policies are strong evidence of intent

DONT'S

- Should not target specific opinions, beliefs, or perspectives
- Should not prohibit negative interactions
- Should not prohibit recording for purposes of criticism or harassment
- Should not reference "First Amendment Auditors" (This language could be considered prohibited viewpoint-based restrictions)

Practical Considerations: Policy Creation

CONSIDERATIONS

- Carefully consider the governmental interests and clearly articulate these interests in policies; this creates a strong connection to establish the intended forum
- Be specific and descriptive (e.g. apply to entire facility vs. certain areas)
- Carefully consider consequences (e.g. continuing to film in violation of policy could be disruptive and grounds for removal)
- If public entity prohibits filming, consider crafting exception for filming of law enforcement in performance of their official duties
- Determine application to devices (e.g. "just filming" vs. "all photography")
- Consistently apply policy
- Consult with your legal advisor

Practical Considerations: Policy Implementation

- Policy MUST be applied in a consistent and neutral manner, regardless of who is recording
- Train department heads and public-facing employees
- If filming is completely prohibited in a certain area, then an "auditor" should be treated the same as a member of the media
- Law enforcement officers need to be trained and aware of overall public entity's policy (i.e. need to avoid a disconnect between departments)
- Train in de-escalation
- Clearly communicate policy (signage and other external communication)

Practical Considerations: Individual Preparation

CONDUCT CONSIDERATIONS

- Stay calm
- Stay focused
- Project good-faith
- Be civil
- Don't need to give an interview
- Call a supervisor and/or police
- No need to over-elaborate
- Note that your reaction might be displayed and posted

Lyberger v. Snider, 42 F.4th 807 (7th Cir. 2022)

- First Amendment Auditor case
- Power of probable cause arguments
- Establish multiple bases

Lyberger v. Snider

FACTS

- Two brothers and friend driving around to record Youtube content:
"Southern Illinois Observer"
- Plaintiffs observe woman driving with an infant in her lap (according to them)
- Tailed woman to her woman mother-in-law's home; Plaintiffs began filming
- She sat car; her husband came out and began demanding that they leave
- She called 911; "told him to get off my property and he's still here recording"
- Plaintiffs stayed; Wamac officer arrives and asks for ID three times
- Wamac calls for back up; Two Centralia officers arrive
- Woman told officers she was concerned they filmed her breastfeeding
- Plaintiffs continue to refuse to produce IDs; arrested for obstruction and disorderly conduct

Lyberger: Strategy

- Disorderly conduct
- Criminal trespass
- Accountability statute: A person is legally accountable for the conduct of another when either before or during the commission of an offense, and with the intent to promote or facilitate that commission, he solicits, aids, abets, agrees, or attempts to aid that other person in the planning or commission of the offense. 720 ILCS 5/5-2(c).
- Driving without a license
- Mob action: A person commits mob action when there is a knowing assembly of two or more persons with the intent to commit or facilitate the commission of a felony or misdemeanor. 720 ILCS 5/25-1(a)(2)
- Stalking
- Obstruction

Lyberger: Outcome and Takeaways

- As to First Amendment retaliatory arrest, no evidence that the offenses were ones that Centralia typically did not enforce
- Because **PC existed for trespass, Fourth Amendment claims failed**; Court did not need to reach QI
- TAKEAWAYS
 - (1) Build a strong factual record for any and all offenses even if no charges
 - (2) If the offense cited is not typically used or enforced, use caution; you could be exposed First Amendment retaliation

Thank you for your time and service

Questions?

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Introduction



1A Auditors

IPMG Press & Media Management for Public Entities Conference
First Amendment Auditors: Introduction to Law and Risk Reduction Strategies
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