

Guidance for Election Officials to Prevent and Address Voter Intimidation

Election officials are on the front lines of protecting voters' rights to cast their ballots. This guidance provides steps election officials can take to prevent and address voter intimidation at the polls. Officials should exercise sound judgment based upon the facts of a particular situation and respond immediately to disruptive conduct. If possible, consult and coordinate with law enforcement, prosecuting officials, and legal counsel in advance to develop a response plan.

Applicable Federal and State Election Laws

- Voter intimidation is a crime under federal law and under every state's laws.ⁱ Voter intimidation is conduct that is intended to compel prospective voters to vote against their preferences, or to not vote at all, through activity that is reasonably calculated to instill fear. **Voter intimidation is unlawful both inside and outside of any no-electioneering zone.** Examples may includeⁱⁱ:
 - Verbal threats of violence
 - Confronting voters wearing military-style or official-looking uniforms
 - Brandishing or intimidating display of firearms
 - Disrupting lines or blocking entrances
 - Spreading false information about voter fraud, requirements to vote, or penalties
 - Aggressively approaching voters' cars or writing down license plate numbers
 - Following voters to, from, or within polling places
 - Directly and aggressively challenging voters' qualifications
 - Appearing to patrol or police the voting line while armed
- Most states prohibit electioneering within the immediate vicinity of the polling place.ⁱⁱⁱ Election officials may enforce electioneering laws even if First and Second Amendment rights are restricted.^{iv}
- State and local law may restrict the carrying of firearms within or in the immediate vicinity of the polling place. State law may also prohibit brandishing firearms or using firearms to intimidate.^v
- State law defines who may act as a "poll watcher" or "election observer" and who may challenge a voter's qualifications to vote at the polls.^{vi}
- State law may criminalize attempts to intimidate, bribe, or impede the functions of poll workers.^{vii}

What Can Election Officials Do if Armed Individuals or Groups are Near Polling Places?

State law often charges election officials with the primary authority to maintain order at the polls. Election officials may approach armed individuals or groups near a polling place and ask, "Why are you here?"

- If the answer is to patrol the line of voters, protect against voter fraud, enforce the law, or a similar response, you may ask the individual or group to stop the activity because they are not authorized to engage in law enforcement functions. Moreover, armed militia activity is not protected by the Second Amendment.^{viii}
- If the answer is to challenge voters' qualifications or a similar response, you may ask the individual or group to stop the activity unless they are authorized under state law. Openly armed individuals or groups do not have authority to intimidate voters by making direct challenges to voters' qualifications outside a polling place.
- If the answer is to exercise their First or Second Amendment rights, you may nonetheless ask the individual or group to put away their firearms or move away from the line of voters if their presence is intimidating to voters.

Election officials may contact law enforcement to assist in protecting public safety or to investigate possible criminal activity and make arrests.

- Election officials should consider that the presence of uniformed law enforcement officers at the polls may intimidate some voters, but should not delay in contacting law enforcement when there is a clear threat to public safety or if assistance is needed to address voter intimidation or criminal activity.
- If an individual or group is engaging in conduct that appears to be done for the purpose of intimidating voters, or is violating any state criminal law or local ordinance (including ordinances prohibiting public disturbances and loitering and generally applicable weapons restrictions), law enforcement may intervene even where First and Second Amendment rights are implicated.^{ix}
- Individuals who are arrested may still be permitted to vote under state law.^x

What Else Can Election Officials Do to Prevent Voter Intimidation Near Polling Places?

Election officials may impose reasonable time, place, and manner restrictions that are narrowly tailored to serve the government's compelling interest in protecting against voter intimidation. **Any restrictions must not be applied in a manner that discriminates based on viewpoint.** Such restrictions could include:

- Moving individuals or groups who are shouting, chanting, or waving large banners to a location further from voters, but still within earshot. Where possible, election officials should consider in advance what locations near the polling site would be most appropriate for such demonstrations.
- Directing openly armed individuals or groups to put away their weapons or move further away from voters.
- Ensuring all pathways to enter and exit the polling location, including to and from the parking lot, are clear and unimpeded, except for those waiting in line to vote.
- Separating opposing groups and setting up buffer zones.^{xi}

This resource has been prepared by the Institute for Constitutional Advocacy and Protection (ICAP) at Georgetown University Law Center with the assistance of O'Melveny & Myers LLP. ICAP's mission is to use the power of the courts to defend American constitutional rights and values. Visit us at <https://www.law.georgetown.edu/icap/>. Contact us at reachICAP@georgetown.edu.

ⁱ 18 U.S.C. §§ 245(b)(1)(A), 594, 20511(1).

ⁱⁱ Institute for Constitutional Advocacy and Protection, Georgetown Law, Fact Sheet: Protecting Against Voter Intimidation, available at <http://bit.ly/voterintimidationsheet>.

ⁱⁱⁱ See Nat'l Ass'n of Secretaries of State, *State Laws Prohibiting Electioneering Activities Within a Certain Distance of the Polling Place* (Jan. 2020), <https://www.nass.org/sites/default/files/surveys/2020-01/state-laws-polling-place-electioneering-Jan2020.pdf>.

^{iv} See *Burson v. Freeman*, 504 U.S. 191 (1992).

^v See Giffords Law Center to Prevent Gun Violence, *Preventing Armed Voter Intimidation: A State-by-State Analysis* (Sept. 25, 2020), <https://giffords.org/lawcenter/report/preventing-armed-voter-intimidation-a-state-by-state-analysis/>; Mich. Sec'y of State, Memorandum, Open Carry of Firearms at Polling Stations on Election Day Is Prohibited, (Oct. 16, 2020), available at https://www.michigan.gov/documents/sos/BOE_Open_Carry_Polling_Place_Instructions_10_16_2020_705274_7.pdf.

^{vi} See Nat'l Ass'n of Secretaries of State, *State Laws on Authorized Poll Watchers & Voter Challenges* (Jan. 2020), <https://www.nass.org/resources/2018-election-information/Poll-Watchers-Voter-Challenges>.

^{vii} See, e.g., Md. Code Ann. Elec. Law § 16-204-06; N.C. Gen. Stat. § 163-275(11); Kan. Stat. Ann. § 25-2418; Tenn. Code Ann. § 2-19-125.

^{viii} *District of Columbia v. Heller*, 554 U.S. 570 (2008); *Presser v. Illinois*, 116 U.S. 252 (1886). Find more information about your state's anti-paramilitary laws at <http://bit.ly/50factsheets>.

^{ix} *Embodry v. Ward*, 695 F.3d 577 (6th Cir. 2012); *Deffert v. Moe*, 111 F. Supp. 3d 797 (W.D. Mich. 2015); *Baker v. Schwarb*, 40 F. Supp. 3d 881 (E.D. Mich. 2014); *Baker v. Smiscik*, 49 F. Supp. 3d 489 (E.D. Mich. 2014); *Chesney v. City of Jackson*, 171 F. Supp. 3d 605 (E.D. Mich. 2016); see also *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490 (1949); *United States v. Matusiewicz*, 84 F. Supp. 3d 363 (D. Del. 2015).

^x See, e.g., Va. Code Ann. § 24.2-607.

^{xi} *Olivieri v. Ward*, 801 F.2d 602, 607 (2d Cir. 1986).