

EMPOWERING DEMOCRACY: WHAT POLICE NEED TO KNOW ABOUT PROTECTING THE COUNT

During the vote-counting period, law enforcement plays an important role in protecting election staff and ballots, while also protecting First Amendment rights during public demonstrations. Law enforcement should consult closely with election officials to assess and address security needs during both initial vote counts and any recounts. And, when there are public demonstrations directed at election officials, officers should exercise sound judgment in tailoring their responses based upon the facts of a particular situation. Whenever possible, law enforcement should consult with legal counsel and coordinate with local officials, community groups, and cooperating agencies.

WHAT SHOULD LAW ENFORCEMENT DO BEFORE ANY VOTE COUNTING PROCESS?

Reach out to local election officials and community groups to assess anticipated security needs and collaboratively determine how to meet them. Even if such outreach did not occur before an election, it is not too late to initiate it in anticipation of a recount.

Set personnel up for success. Ensure that officers have easy access to the legal authorities they will most likely need to invoke in the wake of vote counting disruption or demonstrations. See below for additional information on what these authorities and principles may include.

(Re)-establish information sharing channels. Open or continue to engage with inter- and intra-agency information sharing partners such as local fusion centers or other crime coordination centers to collect tips/leads from the community and law enforcement and improve data sharing on threats to election officials and election processes.

WHAT ARE THE RULES?

The First Amendment does not protect activity that endangers those who are completing a vote count, just as it does not protect violence, unlawful conduct, threats of violence, or destruction of property.

- Law enforcement may take measures to secure locations where the vote count is ongoing.
- Law enforcement may impose reasonable, viewpoint-neutral time, place, and manner restrictions on protestors in order to protect public safety (e.g., creating buffer zones, banning items that can be used as weapons, etc.).¹

¹ For further analysis of permissible viewpoint-neutral time, place, and manner restrictions, along with other guidance for policing protests, with citations to applicable legal authority, see Institute for Constitutional Advocacy and Protection, *Protests and Public Safety: A Guide for Cities and Citizens*, <https://constitutionalprotestguide.org/>.

- Law enforcement may declare an unlawful assembly and order demonstrators to disperse when a group has become violent or poses a clear danger of imminent violence.²
- Crowd dispersal should **not** be used as a response to individual acts of violence or as a preventative measure.

State laws prohibit disturbing, harassing, or otherwise interfering with public officials or public employees' discharge of their duties. In addition, generally applicable state laws, such as those prohibiting harassment, continue to apply even to those who may be engaging in expressive conduct. Law enforcement officials should consult local laws and prepare to enforce them as necessary.³

Media and legal observers should not be subject to orders to disperse. Law enforcement agencies should identify appropriate areas for media and legal observers to gather if a dispersal order is issued to protesters.⁴

The Second Amendment does not protect private paramilitary organizations or militias. Every state prohibits unauthorized paramilitary activities by vigilante groups.⁵ Law enforcement agencies should not coordinate with, encourage, or facilitate the participation or presence of armed unauthorized paramilitary or militia groups at public demonstrations and protests.

Demonstrators have the right to record police action. Individuals who hinder or obstruct officers from performing their duties should be asked to move. They should not be asked to stop recording.⁶

WHAT SHOULD POLICE DO DURING DEMONSTRATIONS?

Ensure that law enforcement's response to mass demonstrations reflects a commitment to facilitating peaceful speech and assembly.

- Officers should continually monitor and assess crowd behavior.
- Officers should maintain contact with event organizers and leaders throughout the demonstration to seek voluntary cooperation, warn organizers in advance of executing arrests, if feasible, and communicate where any arrested demonstrators will be detained.

² See *id.*

³ See, e.g., [18 Pa. Code Ann. § 5101 \(2022\)](#); [Mich. Comp. Laws § 750.478a \(2022\)](#); [Mich. Comp. Laws § 750.478a \(2022\)](#); [Nev. Rev. Stat. § 197.090 \(2021\)](#).

⁴ See *Index Newspapers LLC v. United States Marshals Service*, 977 F.3d 817, 829-834 (9th Cir. 2020) (upholding district court's preliminary injunction excluding journalists and legal observers from government's lawful dispersal orders because government was not likely to be able to show that it had a "overriding interest based on findings that [dispersal] is essential to preserve higher values and is narrowly tailored to serve that interest"; citing *Press-Ent. Co. v. Superior Ct. of Cal.* 478 U.S. 1, 9 (1986)); see also *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 573 (1980) ("While media representatives enjoy the same right of access as the public, they often are provided special seating and priority of entry so that they may report what people in attendance have seen and heard. This contributes to public understanding of the rule of law and to comprehension of the functioning" of government (quotation marks, alteration, and citation omitted)).

⁵ Fact sheets containing each state's laws banning unauthorized paramilitary activity are available at <https://www.law.georgetown.edu/icap/our-work/addressing-the-rise-of-unlawful-private-militias/state-fact-sheets/>. See also Institute for Constitutional Advocacy and Protection, *Prohibiting Private Armies at Public Rallies: A Catalog of Relevant State Constitutional and Statutory Provisions* (3d ed. Sept. 2020). <https://www.law.georgetown.edu/icap/wp-content/uploads/sites/32/2018/04/Prohibiting-Private-Armies-at-Public-Rallies.pdf>.

⁶ See *Fields v. City of Philadelphia*, 862 F.3d 353, 359 (3d Cir. 2017) ("recording police activity in public falls squarely within the First Amendment right of access to information"); *Glik v. Cunniffe*, 655 F.3d 78, 83 (1st Cir. 2011) ("the First Amendment protects the filming of government officials in public spaces"); *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000) ("The 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.").

- Before making any arrests, officers should clearly communicate the thresholds for arrest and give audible warnings to demonstrators and fair notice for them to conform their behavior.
- Officers should intervene to deescalate verbal conflicts between demonstrators and individual officers before the situation escalates.
- Officers should avoid even inadvertently escalating tensions, which may turn the focus of the crowd towards law enforcement.
- When individual officers appear overly stressed or are escalating tension through their words or actions, officers should be given a break or removed from the assignment.

Ensure that all officers are clearly identified by displaying the insignia of their departments and their names.

When individuals in an otherwise peaceful crowd are engaged in serious unlawful conduct, isolate, arrest, and remove law violators as quickly and discreetly as possible.

- Officers should balance the seriousness of the unlawful conduct with the feasibility of arrest and the potential for escalating tensions.
- Mass arrests are rarely feasible, are likely to inflame the crowd, and should be avoided.

When there is no reasonably effective alternative to force in order to effect a law enforcement purpose, officers must ensure they use only force proportional to the circumstances.

- Officers should continually assess and modulate their response according to the behavior of the crowd, de-escalating wherever feasible.
- Always consider and evaluate the risk of incidental exposure, and avoid directing chemical agents, blast balls/flash bangs, and kinetic impact projectiles towards individuals who are not posing an immediate threat of serious harm.

When dispersal orders are necessary, provide notice and an opportunity to comply by using amplified sound to communicate the order and to identify and communicate dispersal routes.

For further information, go to [constitutionalprotestguide.org](https://www.constitutionalprotestguide.org).

This guidance was prepared jointly by the Institute for Constitutional Advocacy and Protection (ICAP) at Georgetown University Law Center, the States United Democracy Center (SUDC), and 21CP Solutions.

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