

## **Empowering Democracy:** **What Police Need to Know About Protecting the Count**

This resource addresses law enforcement’s role in protecting the *vote counting* process, which is distinct from its role in protecting public safety during the *voting* period of elections. During the voting period, law enforcement must ensure that its presence does not contribute to voter intimidation. Generally, this means that law enforcement officials should only appear at voting locations if their presence is requested by election officials in order to maintain a safe voting environment and to protect against voter intimidation. For locations and times where voting may be occurring alongside vote-counting, this same principle applies.

Many jurisdictions however, process ballots in centralized facilities, where voting does not occur, and jurisdictions will be counting or recounting the vote for some time after polls have closed. During the vote-counting period of any election, especially where voters are not also present, law enforcement may have an important role in protecting election workers, the counting process, 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.<sup>1</sup> And, when demonstrations are directed at election officials or workers, officers should exercise sound judgment in tailoring their responses based upon the facts of a particular situation to protect both free speech and the democratic process. Whenever possible, law enforcement should also consult with legal counsel to ensure all relevant authorities are correctly understood by law enforcement personnel, and coordinate with local officials, partner law enforcement agencies, and community groups to share information and expectations and align crisis response and communication strategies.

### **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.

**Conduct a security assessment at any vote counting facility and identify potential opportunities for security enhancement.** In addition to working with election officials, law enforcement should conduct its own review of facilities and consider any disruptive activity at vote counting centers in past cycles. Depending on the location history and threat environment, advanced protective actions such as cordoning off parking areas near the facility and allowing only authorized vehicles on the premises may be warranted.

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<sup>1</sup> See Nat’l Policing Inst., 21st Century Sols. & States United Democracy Ctr., *Public Safety & Elections: A Guide for Law Enforcement* (July 2024), [https://www.policinginstitute.org/wp-content/uploads/2024/07/SUDC\\_NPIReport-FULL.pdf](https://www.policinginstitute.org/wp-content/uploads/2024/07/SUDC_NPIReport-FULL.pdf).

**Consider and clarify the role that law enforcement will play in protecting the ballots themselves and vote tabulation locations.** Law enforcement should discuss the full ballot transfer process with election officials to understand where their assistance might help protect the ballots and help reduce any threats to them being destroyed or intercepted. All officers should understand what their role is in protecting the ballots themselves, the vote counting locations, and the election workers.

**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.).<sup>2</sup>
- 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.<sup>3</sup>
- 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.<sup>4</sup> Note that these laws barring interference with public officials' discharge of their duties apply even to those who are legally sanctioned ballot count observers.<sup>5</sup>

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<sup>2</sup> For further analysis of permissible viewpoint-neutral restrictions, along with other guidance for policing protests, with citations to applicable legal authority, see Inst. for Const. Advocacy & Prot., *Protests and Public Safety: A Guide for Cities and Citizens*, <https://constitutionalprotestguide.org/>.

<sup>3</sup> See *id.*

<sup>4</sup> See, e.g., 18 Pa. Stat. and Cons. Ann. § 5101 (2024); Mich. Comp. Laws § 750.478a (2024); Nev. Rev. Stat. § 197.090 (2023); Nev. Rev. Stat. § 293.705 (2023).

<sup>5</sup> For more information on the various election observer roles sanctioned in each state, including which states permit observation of the ballot count process, see *Policies for Election Observers*, Nat'l Conf. of State Legislatures (May 29, 2024), <https://www.ncsl.org/elections-and-campaigns/policies-for-election-observers>.

**Media and legal observers should not be subject to orders to disperse.** Law enforcement agencies should identify appropriate areas for media and legal observers of the protests to gather if a dispersal order is issued to protesters.<sup>6</sup>

**The Second Amendment does not protect private paramilitary organizations or militias.** Every state prohibits unauthorized paramilitary activities by vigilante groups.<sup>7</sup> 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.<sup>8</sup>

### What should police do during demonstrations?

**Ensure that law enforcement’s response to mass demonstrations reflects a commitment to facilitating peaceful speech and assembly.<sup>9</sup>**

- 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.
- 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.

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<sup>6</sup> See *Index Newspapers LLC v. United States Marshals Service*, 977 F.3d 817, 829-34 (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. (citation omitted)).

<sup>7</sup> 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 Inst. for Const. Advocacy & Prot., *Prohibiting Private Armies at Public Rallies: A Catalog of Relevant State Constitutional and Statutory Provisions* (4th ed. Jan. 2024), <https://www.law.georgetown.edu/icap/wp-content/uploads/sites/32/2024/02/50-state-survey-v4-FIN.pdf>.

<sup>8</sup> 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.”). See also *Irizarry v. Yehia*, 38 F.4th 1282, 1296 (10th Cir. 2022) (“As of May 2019, six circuits had determined that the First Amendment guarantees a right to film the police performing their duties in public. No other circuit has concluded otherwise. The substantial weight of this authority ... would have put a reasonable officer in Officer Yehia’s position on notice that Mr. Irizarry had a right to film the police conducting the traffic stop.”).

<sup>9</sup> For more details about the following recommendations and other ways law enforcement can prepare for election season, see Nat’l Policing Inst., 21<sup>st</sup> Century Sol., & States United Democracy Ctr., *supra* note 1.

- 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 persons 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 the use of force to affect 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 about how law enforcement can protect public safety during election season, see “Public Safety and Elections: A Guide for Law Enforcement,” by the National Policing Institute, States United Democracy Center, and 21st Century Policing Solutions, available at [policinginstitute.org/elections](https://policinginstitute.org/elections). A compendium of all States United resources addressing public safety during election season is available at [statesunited.org/safety](https://statesunited.org/safety).

For additional legal guidance on protecting the First Amendment during election season, visit the Institute for Constitutional Advocacy and Protection’s Election Hub, available at [law.georgetown.edu/icap/election-hub](https://law.georgetown.edu/icap/election-hub).

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

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