

Safety Note: Guide to Legal Rights in the U.S.

The following advice and recommendations are intended to give the reader a high-level understanding of the rights of a journalist when confronted by law enforcement officers while covering a protest or other political event. Given that these incidents often quickly escalate and that some – both protestors and police – do not always conform to legal strictures, it is generally prudent to comply with an officer's commands, even if they are not lawful, and to protect one's safety.

Quick Tips and Recommendations

- Carry your press credentials at all times and ensure credentials are visible to law enforcement.
- When covering demonstrations, protests, and campaign or political events, make sure you know in advance what restrictions are in place regarding the public's right to access, and whether there are any curfew or other restrictions in place.
- Do not trespass on private property to gather news; do not cross police lines at crime scenes; comply with location restrictions and barriers, absent exigent circumstances.
- You may record video or audio of public events, including of law enforcement activities at such events, as long as you are not interfering with or obstructing law enforcement activity.
- Maintain neutrality when covering events. For example, do not join crowd chants or wear clothing with slogans related to the events you are covering.
- Comply with dispersal orders or other directives issued by law enforcement. If engaged in an encounter with law enforcement, explain that you are a journalist covering the event and show your credentials. You may continue to record interactions with law enforcement.
- If law enforcement requests your audio or video recordings, camera, recording devices, equipment or notes, you may refuse and request that the official contact your media outlet or its lawyers.
- During a stop-and-frisk or arrest make it clear to law enforcement that any equipment, memory cards, notebooks, etc. contain journalistic materials or notes.

First Amendment rights of journalists

Right to gather news

The First Amendment protects both the freedom of speech and the freedom of the press. Journalists have a right to access public places to gather and disseminate news. Public places include sidewalks and public parks, but not private property. In addition, for government owned property, even those that allow for limited access to the public, members of the public, protestors, and reporters may be barred if the location is not itself public (for instance, private areas of a courthouse or jail), and hours of access for journalists are generally limited to those when the general public is permitted access.

Private property, such as convention centers or stadiums, may be used by public entities and public property may be used for private political party conventions. In either case, journalists may be provided access similar to the general public. For example, a judge ruled that a state Democratic organization holding a convention in the city's civic center could not discriminate among journalists by admitting some and not others. The judge said that a

private body leasing a government facility had the same constitutional obligations as the government (*National Broadcasting Co. v. Association of State Democratic Chairs*, 14 Med. L. Rep. 1383, N.D. Ohio 1987). This will vary by jurisdiction. If you expect to be covering a convention or political party gathering, the journalist should attempt to get access/credentials in advance to allow for an opportunity for resolution of any disagreements in advance.

Time, place and manner restrictions on demonstrations

The government is permitted to impose time, place and manner restrictions on speech as long as those requirements:

- are content neutral (e.g., justified without reference to the content of the regulated speech),
- are narrowly tailored to serve a significant governmental interest, and
- leave open ample alternative channels for communication of the information.

These restrictions could include noise restriction ordinances, as well as a zone system in anticipation of a demonstration, such as demonstration zones, no demonstration zones, journalist-only zones, and areas for pedestrian traffic. In addition, restrictions may prohibit protestors from bringing camping material or staying overnight in public spaces. Localities typically have rules requiring protestors to obtain a permit for a protesting, or for specific kinds of protesting (for instance marching in the street or using a loudspeaker). As long as the standards for granting a permit and the scope of the permit satisfy the time, place and manner restrictions, such processes are constitutionally permitted. Where those permit-related restrictions are not followed by a member of the public or a journalist, public officials may lawfully deny access.

Dispersal orders and curfews

Even where protestors have a valid permit, or where no permit is required under local rules, police may order protestors and reporters to disperse from an area if the time, place and manner restrictions test is met. This may occur where protestors are on a sidewalk blocking access to a building, or on a street blocking traffic. Similarly, if a reporter is in an unsafe area, for instance, stopped on a highway to record an accident, or standing on a phone booth to record a protest, police could order the protestor to leave the highway or come down from the phone booth. Police are generally required to issue warnings ordering protestors and reporters to disperse before making arrests, and courts may consider whether protestors and reporters could in fact hear the warnings in determining whether the arrests were proper.

During the recent nationwide protests in response to the death of George Floyd, a number of municipalities issued curfew orders. Many of these curfew orders have exemptions for journalists, either explicitly or by permitting essential workers. Journalists should get as much information as possible about any applicable curfew order before reporting in an area, and should wear large, visible media credentials so that they are clearly identifiable as members of the press.

Right to record

Most courts have determined that the First Amendment protects the right to make video recordings of police officers when they are in public, although this right can be subject to the time, place and manner restrictions described above and recording or covering the demonstrations or law enforcement activity should be conducted in a manner that is not obstructing or threatening the safety of others or physically interfering with law enforcement. Many states have eavesdropping or wiretapping statutes that prohibit recording private conversations without the consent of one or both parties to the conversation, and some states have statutes that also apply to public

conversations. In certain circumstances, courts have held that the application of these statutes infringes on the recorder's First Amendment rights. Nonetheless, reporters should review applicable law and guidance in the states in which they are working.

Retaliation

Government officials cannot retaliate against reporters for their reporting or selectively grant access, for example, by denying a press credential. Reporters who have been unfairly denied press credentials should review the applicable law in the jurisdiction to learn how to challenge or appeal the decision.

Journalist privilege

Most courts have recognized that journalists have a qualified privilege under the First Amendment against compelled disclosure of materials gathered in the course of their work. Journalists can be required to hand over their work materials, but only in limited circumstances, for instance, if the government demonstrates a compelling need and shows that the information is not obtainable from another source. Many states also have so-called "shield laws" which generally provide journalists with protection against disclosing their materials. These protections are not absolute: for example, in one very [recent case](#), a court upheld a [subpoena](#) requiring a number of news organizations to turn over unpublished photos and videos of a protest because "the photos and video were critical for an investigation into the alleged arson of [police] vehicles and theft of police guns." If a journalist's audio or video recordings or notes are requested or compelled by a government official, including a police officer, the journalist may refuse.

Fourth Amendment protections of journalists

Search

The Fourth Amendment protects journalists from unreasonable search and seizure. As a general matter, this means that police cannot search one's body or belongings without a warrant. But there are exceptions, including to prevent or avoid serious injury, to prevent the imminent destruction of evidence, and with the consent of the person to be searched.

In addition, police may briefly detain and search a person – a "stop and frisk" – *for investigative purposes* based on a *reasonable suspicion* that an individual is armed or about to commit a crime. There must be at least some objective justification for a stop and frisk, but the officer need not even believe that it is more likely than not that a crime is or is about to be underway. Therefore, this type of stop is generally limited to a pat down, bag search, or vehicle search to search for weapons. Law enforcement officers generally are not permitted to search the digital contents of a journalist's cell phone or camera based on *reasonable suspicion* alone.

Seizure

In addition to protection against an unreasonable search, the Fourth Amendment also protects against an unreasonable seizure. A seizure of property occurs when there is some meaningful interference with an individual's possession of that property. A seizure can also be of a person, such as when an individual is stopped and then frisked (as discussed above).

Prior to an arrest, and during a temporary seizure of a person (i.e., during a stop and frisk), police may also temporarily seize property, such as journalistic equipment. Therefore, it is particularly important for a journalist to prominently display press credentials and to identify himself or herself as press when confronted by police, so

as to hopefully assuage any concerns police may have regarding suspected criminal activity and to tip the *reasonable suspicion* analysis required for a warrantless search/seizure in the journalist's favor.

To preserve the added protections this law affords to such journalistic materials, a journalist—in addition to prominently displaying his or her press credentials—should let the officers know as soon as possible that certain materials that are or may be searched (whether notes, memory cards, etc.) are press materials related to media intended to be disseminated to the public. The Privacy Protection Act of 1980 (the PPA) provides for heightened standards to protect against unreasonable searches and seizures of certain materials reasonably believed to be related to media intended for dissemination to the public—including “work product materials” (e.g., notes or voice memos containing mental impressions, conclusions, opinions, etc. of the person who prepared such materials) and “documentary materials” (e.g., video tapes, audio tapes, photographs, and anything else physically documenting an event).

These materials generally cannot be searched or seized unless they are reasonably believed to relate to a crime committed by the person possessing the materials. They may, however, be held for custodial storage incident to an arrest of the journalist possessing the materials, so long as the material is not searched and is returned to the arrestee intact.

Arrest

An arrest is essentially a seizure of the person and so also implicates the Fourth Amendment. An officer must have *probable cause* to make an arrest. *Probable cause* requires more than a mere suspicion but less than absolute certainty that a crime has been or is being committed. The standard is intended to be practical and nontechnical and as a result, is “a fluid concept—turning on the assessment of probabilities in particular factual contexts—not readily, or even usefully reduced to a neat set of legal rules.” It is well-established that mere proximity to criminal activity does not establish probable cause to arrest, so a law-abiding journalist should not be arrested for covering a protest or demonstration even if that demonstration becomes unruly or violent.

When an officer makes a lawful arrest, the arrest impacts what qualifies as a reasonable search and seizure under the Fourth Amendment. It is considered reasonable for an officer to search an individual for weapons and evidence when making an arrest, even if the officer has no any actual objective concern for safety or evidence preservation. This means that an officer with probable cause to arrest a journalist (for, e.g., disobeying a lawful order of dispersal, violating a curfew, trespassing, or participating in other unlawful conduct) may have legal justification to search through the belongings of the journalist. However, a search or seizure incident to arrest is limited to the area within the immediate control or vicinity of the arrestee—i.e., anything which would be easily reachable as a potential weapon (such as, arguably, a large piece of camera equipment) or easily destroyed evidence (such as camera film or memory cards).

Often during protests, officers choose to issue citations as opposed to making arrests. The law is unsettled as to whether officers may conduct searches incident to the issuance of these citations. Some courts, including the federal courts in New York, have held that a law enforcement officer need not intend to make an arrest in order to conduct a search incident to arrest, so long as the officer has *probable cause* to make an arrest and conducts the search prior to giving a citation. Federal courts in the western states, including California, Oregon, and Washington, have taken a different approach. There, search incident to arrest is only permissible when an arrest is actually made. Thus, if an officer seeks to conduct a search of a journalist, the journalist may want to ask whether they are being arrested, as this may affect what rights the journalist has to refuse the search. On the other hand, this may escalate the encounter and cause the officer to place the journalist under arrest when perhaps this was not the officer's intention.

Importantly, a search incident to arrest likely does not extend to a search of the contents of mobile phones or cameras. The Supreme Court has held that a search of digital data on a cell phone does not implicate the risk of harm to an officer or evidence preservation, and is therefore outside the scope of a lawful search incident to arrest. This holding would likely apply to digital cameras as well, as cameras contain data similar to that stored on cell phones. Seizure of these items likely is permissible, though.

This guide was prepared for the Committee to Protect Journalists by TrustLaw, the Thomson Reuters Foundation's global pro bono legal program.



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