



CONSTITUTIONAL  
Q&A

# THE RIGHT TO PROTEST

THE RUTHERFORD INSTITUTE

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**THE RUTHERFORD INSTITUTE**, a national nonprofit civil liberties organization, is deeply committed to protecting the constitutional freedoms of every American and the integral human rights of all people through its extensive legal and educational programs. The Institute provides its legal services at no charge to those whose constitutional and human rights have been threatened or violated. The Institute's mission is twofold: to provide legal services in the defense of civil liberties and to educate the public on important issues affecting their constitutional freedoms.

“Since when have we Americans been expected to bow submissively to authority and speak with awe and reverence to those who represent us? The constitutional theory is that we the people are the sovereigns, the state and federal officials only our agents. We who have the final word can speak softly or angrily. We can seek to challenge and annoy, as we need not stay docile and quiet.”—Justice William O. Douglas, dissenting, *Colten v. Kentucky*, 407 U.S. 104 (1972).

Among the greatest and most precious of our constitutional rights is the right to free speech, enshrined in the First Amendment and rendered applicable to all states by the Fourteenth Amendment. Along with the constitutional right to peacefully assemble, freedom of speech allows us to challenge the government through protests and demonstrations.

## CONSTITUTIONAL Q&A

Living in a representative democracy such as ours means that each person has the right to stand outside the halls of government and express his or her opinion on matters of state without fear of arrest. That’s what the First Amendment is all about. It gives every American the right to “petition the government for a redress of grievances.” It ensures, as Adam Newton and Ronald K.L. Collins report for the Five Freedoms Project, “that our leaders hear, even if they don’t listen to, the electorate. Though public officials may be indifferent, contrary, or silent participants in democratic discourse, at least the First Amendment commands their audience.”<sup>1</sup> As Newton and Collins elaborate:

“Petitioning” has come to signify any nonviolent, legal means of encouraging or disapproving government action, whether directed to the judicial, executive or legislative branch. Lobbying, letter-writing, e-mail campaigns, testifying before tribunals, filing lawsuits, supporting referenda, collecting signatures for ballot initiatives, peaceful protests and picketing: all public articulation of issues, complaints and interests designed to spur government action qualifies under the petition clause, even if the activities partake of other First Amendment freedoms.<sup>2</sup>



Unfortunately, through a series of carefully crafted legislative steps, our government officials—both elected and appointed—have managed to disembowel this fundamental freedom, rendering it little more than the right to file a lawsuit against government officials. In the process, government officials have succeeded in insulating themselves from their constituents, making it increasingly difficult for average Americans to be seen or heard by those who most need to hear what “we the people” have to say.

Indeed, while lobbyists mill in and out of the homes and offices of Congressmen, the American people are kept at a distance through “free speech zones,” electronic town hall meetings, and security barriers. And those who dare to breach the gap—even through silent forms of protest—are arrested for making their voices heard.

Clearly, the government has no interest in hearing what “we the people” have to say. If Americans are not able to peacefully assemble outside of the halls of government for expressive activity, the First Amendment has lost its meaning. If “we the people” cannot stand peacefully outside of the Supreme Court, the Capitol, the White House or anywhere else within

the public sphere, our ability to hold the government accountable for its actions is threatened, as are the rights and liberties we cherish as Americans.

## THE CASE OF HAROLD HODGE

The case of Harold Hodge is a particularly telling illustration of the way in which the political elite in America have sheltered themselves from all correspondence and criticism. On a snowy morning on January 24, 2011, Harold Hodge walked to the plaza in front of the U.S. Supreme Court building with a sign around his neck. The 3' x 2' placard read: "The U.S. Gov. allows police to illegally murder and brutalize African Americans and Hispanic people." Hodge, a 45-year-old African-American, stood silently at attention in front of the building displaying his message. There weren't many passersby, and he wasn't blocking anyone's way. However, after a few minutes, Hodge was approached by a police officer for the Supreme Court. The officer informed Hodge that he was violating a law prohibiting expressive activity in and around the Supreme Court building<sup>3</sup> and asked him to leave.



Hodge, steadfast in his commitment to peaceably exercise his right to assemble and petition his government, politely refused. Over the course of some 35 minutes, several more police officers gathered and began to slowly circle Hodge. After ordering Hodge two more times to disperse,

the officers placed Hodge under arrest, handcuffing his hands behind his back and leading him to a holding cell within the Supreme Court building.<sup>4</sup>

Hodge is not the only person to be arrested for demonstrating in front of the Supreme Court building. Anti-death penalty demonstrators have been arrested for unfurling a banner on the Supreme Court steps.<sup>5</sup> In October 2011, Dr. Cornel West, the Princeton University philosopher and activist, was arrested on the steps of the Supreme Court while protesting the influence of corporate money on the political process.<sup>6</sup> In January 2008, 34 demonstrators protesting the indefinite detention of inmates at Guantanamo Bay were arrested for demonstrating outside the Supreme Court. D.C. Superior Court Judge Wendell P. Gardner Jr. stated that most of those demonstrators would be sentenced to probation, but that he would perhaps jail those who had prior convictions for civil disobedience so that they would stop doing “the same thing over and over.”<sup>7</sup>

This desire of government officials to insulate themselves from those exercising their First Amendment rights—whether it is a single protester or a crowd of thousands—stems from an elitist mindset that views themselves as different, set apart somehow, from the people they have been appointed to serve and represent. It is nothing new.

## FREE SPEECH ZONES

The law under which Harold Hodge was prosecuted was enacted by Congress in 1949. Since then, interactions with politicians have become increasingly staged and distant. Press conferences and televised speeches now largely take the place of face-to-face interaction with constituents. There also has been an increased use of so-called “free speech zones,” designated areas for expressive activity used to corral and block protesters at political events from interacting with public officials.

Perhaps the most egregious instance of imposing a free speech zone upon protesters occurred in 2004 at the Democratic National Convention, where Boston Police constructed a cage of Jersey walls and chain link

fences out of sight of the convention center into which protesters were huddled. After seeing the designated area, Judge Douglas Woodcock stated, “[o]ne cannot conceive of other elements put in place to make a space more of an affront to the idea of free expression than the designated demonstration zone.”<sup>8</sup> Such an area is obviously not designed to foster the peoples’ right to free speech, to assemble peaceably and to petition the government.

## THERE CAN BE NO FREE SPEECH WHEN THE GOVERNMENT SPEAKS IN A LANGUAGE OF FORCE

As constitutional attorney John W. Whitehead has warned:

There can be no free speech for the citizenry when the government speaks in a language of force. What is this language of force? Militarized police. Riot squads. Camouflage gear. Black uniforms. Armored vehicles. Mass arrests. Pepper spray. Tear gas. Batons. Strip searches. Surveillance cameras. Kevlar vests.<sup>9</sup> Drones. Lethal weapons. Less-than-lethal weapons unleashed with deadly force.<sup>10</sup> Rubber bullets. Water cannons. Stun grenades. Arrests of journalists. Crowd control tactics.<sup>11</sup> Intimidation tactics. Brutality.<sup>12</sup>

Unfortunately, this is how the government at all levels—federal, state and local—now responds to those who choose to exercise their First Amendment right to peacefully assemble in public and challenge the status quo.

This police overkill isn’t just happening in troubled hot spots such as Ferguson, Mo., and Baltimore, Md., where police brutality gave rise to civil unrest, which was in turn met with a militarized show of force that caused the whole stew of discontent to bubble over into violence.<sup>13</sup> For example:

- A decade earlier, the New York Police Department engaged in mass arrests of peaceful protesters, bystanders, legal observers and journalists who had gathered for the 2004 Republican National Convention.

Protesters were subjected to blanket fingerprinting and detained for more than 24 hours at a “filthy, toxic pier that had been a bus depot.” That particular exercise in police intimidation tactics cost New York City taxpayers nearly \$18 million in a lawsuit that resulted in the largest protest settlement in history.<sup>14</sup>

- Demonstrators, journalists and legal observers gathered in North Dakota to peacefully protest the Dakota Access Pipeline reported being pepper sprayed, beaten with batons, and strip searched by police.<sup>15</sup>
- In 2017, this militarized intimidation reared its ugly head in the university town of Charlottesville, Va.,<sup>16</sup> where protesters who took to the streets to peacefully express their opposition at a Ku Klux Klan rally were held at bay by implacable lines of gun-wielding riot police. Only after the Klansmen had been safely escorted to and from the rally by black-garbed police did the assembled army of city, county and state police declare the public gathering unlawful and proceed to unleash canisters of tear gas on the few remaining protesters to force them to disperse.<sup>17</sup>



Photo by Hawes Spencer

To be clear, this is the treatment being meted out to protesters across the political spectrum. As a *USA Today* article notes, “Federally arming police with weapons of war silences protesters across all justice movements... People demanding justice, demanding accountability or demanding basic human rights without resorting to violence, should not be greeted with machine guns and tanks. Peaceful protest is democracy in action. It is a forum for those who feel disempowered or disenfranchised. Protesters should not have to face intimidation by weapons of war.”<sup>18</sup>

## THE DANGERS OF A MILITARIZED RESPONSE TO FIRST AMENDMENT ACTIVITY

A militarized police response to protesters poses a danger to all those involved, protesters and police alike. In fact, militarization makes police more likely to turn to violence to solve problems.<sup>19</sup> As a recent study by researchers at Stanford University makes clear, “[w]hen law enforcement receives more military materials — weapons, vehicles and tools — it becomes ... more likely to jump into high-risk situations. Militarization makes every problem — even a car of teenagers driving away from a party — look like a nail that should be hit with an AR-15 hammer.”<sup>20</sup> Even the color of a police officer’s uniform adds to the tension. As the Department of Justice reports, “[s]ome research has suggested that the uniform color can influence the wearer—with black producing aggressive tendencies, tendencies that may produce unnecessary conflict between police and the very people they serve.”<sup>21</sup>

In an age when police have become overly militarized and trained to use aggressive tactics, doing whatever they deem necessary to maintain order with no regard for the rights of citizens to freedom of speech, assembly and protest, people now exercise their constitutional rights at their peril. Moreover, as First Amendment activities—particularly protests—have become larger and more sophisticated in recent years, so have the responses by law enforcement in handling protesters. Modern police forces are now armed with a wide range of instruments and weapons known as riot gear, designed to control, disperse and deter large crowds even when

no violence has occurred. The gear includes batons, shields and helmets, which give the police an overwhelming presence and deter the exercise of freedom of speech by protesters. Police possess even more aggressive weaponry, such as pepper spray, tear gas, rubber bullets, stun grenades and acoustic riot control devices (LRAD).<sup>22</sup>



The increasing militarization of American police forces has spurred the development of an array of new weapons used to menace demonstrators: armored tactical vehicles, flare and smoke launchers, Kevlar vests, KA-BAR style fighting knives, shotguns, automatic rifles and deltoid armor, just to name a few.<sup>23 24</sup> Police also have been trained in crowd control tactics such as kettling, which involves officers deploying in large lines or circles to contain protesters within a limited area, leaving them a single exit that is controlled by the police.<sup>25</sup>

## A FIRST AMENDMENT CHALLENGE AND DUTY

Protests have attended the most important moments in the nation's history and have become a large part of American society. Engaging protesters safely and effectively is both a challenge and a duty for the police.

However, attempts to exercise First Amendment rights is futile if one is facing an army of police equipped with deadly weapons, surveillance devices, and a slew of laws that empower police to arrest and charge citizens with spurious charges of “contempt of cop” or “unlawful assembly” based solely upon an assertion of constitutional rights.

There are other, far better models to follow. For instance, in 2011 the St. Louis, Mo., police opted to employ a passive response to Occupy St. Louis activists. First, police gave protesters nearly 36 hours’ notice to clear an area occupied by protesters. This is in stark contrast to the 20 to 60 minutes of notice given Occupy activists in other cities. Then, as journalist Brad Hicks reports, when the police finally showed up:

They didn’t show up in riot gear and helmets, they showed up in shirt sleeves with their faces showing. They not only didn’t show up with SWAT gear, they showed up with no unusual weapons at all, and what weapons they had all securely holstered. They politely woke everybody up. They politely helped everybody who was willing to remove their property from the park to do so. They then asked, out of the 75 to 100 people down there, how many people were volunteering for being-arrested duty? Given 33 hours to think about it, and 10 hours to sweat it over, only 27 volunteered. As the police already knew, those people’s legal advisers had advised them not to even passively resist, so those 27 people lined up to be peacefully arrested, and were escorted away by a handful of cops. The rest were advised to please continue to protest, over there on the sidewalk ... and what happened next was the most absolutely brilliant piece of crowd control policing I have heard of in my entire lifetime. All of the cops who weren’t busy transporting and processing the voluntary arrestees lined up, blocking the stairs down into the plaza. They stood shoulder to shoulder. They kept calm and silent. They positioned the weapons on their belts out of sight. They crossed their hands low in front of them, in exactly the least

provocative posture known to man. And they peacefully, silently, respectfully occupied the plaza, using exactly the same non-violent resistance techniques that the protesters themselves had been trained in.<sup>26</sup>

As Forbes concluded: "This is a more humane, less costly, and ultimately more productive way to handle a protest. This is great proof that police can do it the old fashioned way - using their brains and common sense instead of tanks, SWAT teams, and pepper spray - and have better results."<sup>27</sup>

The following **Constitutional Q&A** addresses a series of common questions and concerns regarding protest activities, free speech demonstrations, and the parameters of exercising the right to protest while interacting with government officials and law enforcement.

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## WHAT LAWS GIVE ME THE RIGHT TO PROTEST?

The First Amendment to the U.S. Constitution reads: “Congress shall make no law . . . 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.”<sup>28</sup> Protesting is an exercise of these constitutional rights because it involves speaking out, by individual people or those assembled in groups, about matters of public interest and concern. Even though the First Amendment only refers to a limit on “Congress,” courts long ago decided that states and local governments may not infringe on the rights to speak, assemble and petition.<sup>29</sup>



## WHERE CAN I ENGAGE IN PROTEST ACTIVITY?

Protests and demonstrations are not allowed in all places. A person cannot claim a First Amendment right to protest and demonstrate on property that is privately owned by someone else. A homeowner may allow you to use their front yard, but the owner can impose restrictions on what you can say because it is their property. They may make you leave if they disagree with what you are saying, and if you refuse to leave they can bring trespassing charges against you. This also applies to private property that is generally open to the public, such as a shopping mall or shopping

center,<sup>30</sup> although these areas sometimes allow demonstrations and other free speech activity with permission from the owner.

On the other hand, you are allowed to engage in protest activities on land you own. The Supreme Court has ruled that the government may not forbid homeowners from posting signs on their property speaking out on a political or social issue.<sup>31</sup>

Otherwise, the right to protest generally extends to places that are owned and controlled by the government, although not all government-owned property is available for exercising speech and assembly rights. The courts have developed a so-called “forum test” to determine whether government property is available for use by the public to exercise their right to freedom of speech. This test divides government property into three kinds of forums:

- **Traditional Public Forum** – These are places that have been traditionally considered available for public assembly and debate. The authority of the government to limit expressive activity in these places is sharply limited. Streets, sidewalks and parks are included in this category.<sup>32</sup>
- **Designated Public Forum** – Public property that is not traditionally open for First Amendment activity may be made available by the government for that purpose. If the government adopts rules and policies allowing First Amendment activity on public property, the public has a right to exercise their right to free speech and assembly in that place.<sup>33</sup> An example of this might be a meeting room in a public library made available for presentations, discussions and debates.
- **Nonpublic Forum** – All other public property that is not a traditional or designated forum is considered a non-public forum. Courts have ruled that the “First Amendment does not guarantee access to property simply because it is owned or controlled by the government.”<sup>34</sup> Thus, schools and jails are nonpublic forums and citizens do not have a right to assemble and protest at these places.



## WHAT ARE MY RIGHTS TO PROTEST IN A TRADITIONAL PUBLIC FORUM?

Places historically associated with the free exercise of expressive activities, such as streets, sidewalks and parks, are traditional public forums and the government's power to limit speech and assembly in those places is very limited. The government may not impose an absolute ban on expression and assembly in traditional public forums except in circumstances where it is essential to serve a compelling government interest. However, expression and assembly in traditional public forums may be limited by reasonable time, place and manner regulations.<sup>35</sup> Examples of reasonable regulations include restrictions on the volume of sound produced by the activity<sup>36</sup> or a prohibition on impeding vehicle and pedestrian traffic.<sup>37</sup> To be a valid time, place and manner regulation, the restriction must not have the effect of restricting speech based on its content and it must not be broader than needed to serve the interest of the government.<sup>38</sup>

## CAN I PICKET AND/OR DISTRIBUTE LEAFLETS AND OTHER TYPES OF LITERATURE ON PUBLIC SIDEWALKS?

Yes, a sidewalk is considered a traditional public forum where you can engage in expressive activities, such as passing out literature or speaking out on a matter of public concern.<sup>39</sup> In exercising that right, you must not

block pedestrians or the entrances to buildings. You may not physically or maliciously detain someone in order to give them a leaflet, but you may approach them and offer it to them.

## **CAN MY FREE SPEECH BE RESTRICTED BECAUSE OF WHAT I SAY, EVEN IF IT IS CONTROVERSIAL?**

No, the First Amendment protects speech even if most people would find it offensive, hurtful or hateful.<sup>40</sup> Speech generally cannot be banned based upon its content or viewpoint because it is not up to the government to determine what can and cannot be said. A bedrock principle of the First Amendment is that the government may not prohibit expression of an idea because society finds it offensive or disagreeable.<sup>41</sup>

Furthermore, protest speech cannot be banned because of a fear that others may react violently to the speech. Demonstrators cannot be punished or forbidden from speaking because they might offend a hostile mob. The idea of a “heckler’s veto” has no place in First Amendment law.<sup>42</sup>

## **HOW DO THESE RIGHTS APPLY TO PUBLIC PLACES I TYPICALLY VISIT?**

Your rights to speak out and protest in particular public places will depend on the use and purpose of the place involved. For example, the lobbies and offices of public buildings that are used by the government are generally not open for expressive activities because the purpose of these buildings is to carry out public business. Protesting would interfere with that purpose.<sup>43</sup> Ironically, the meetings of a governmental body, such as a city council or town board, are not considered public forums open for protest activities because the purpose of the meeting is generally to address public business that is on the agenda. However, some government councils and boards set aside a time at the meeting when the public can voice their complaints.<sup>44</sup>

The grounds of public colleges and universities are generally considered available for assembly and protest by students and other members of the institution's community. However, those who are not students, faculty or staff of the institution may be denied access to the campus for speech and protest activities under rules issued by the school.<sup>45</sup>

Public elementary and secondary school grounds also are not considered places where persons can engage in assembly and protest. However, students at these schools do not lose their right to free speech when they enter the school. The First Amendment protects the right of students to engage in expressive acts of protest, such as wearing armbands to demonstrate opposition to a war, that are not disruptive to the school environment.<sup>46</sup>



## DO I NEED A PERMIT IN ORDER TO CONDUCT A PROTEST?

As a general rule, no. The government cannot require that individuals or small groups obtain a permit in order to speak or protest in a public forum.<sup>47</sup>

However, if persons or organizations want to hold larger rallies and demonstrations, they may be required by local laws to obtain a permit. The

Supreme Court has recognized that the government, in order to regulate competing uses of public forums, may impose a permit requirement on those wishing to hold a parade or rally.<sup>48</sup> Government officials cannot simply prohibit a public assembly according to their discretion,<sup>49</sup> but the government can impose restrictions on the time, place, and manner of peaceful assembly, provided that constitutional safeguards are met.<sup>50</sup> Such time, place and manner restrictions can take the form of requirements to obtain a permit for an assembly.<sup>51</sup>

Whether an assembly or demonstration requires a permit depends on the laws of the locality. A permit certainly is required for any parade because it would involve the use of the streets and interfere with vehicle traffic. A permit to hold an event in other public places typically is required if the gathering involves more than 50 persons or the use of amplification.<sup>52</sup>

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### **WHERE AND HOW DO I OBTAIN A PERMIT?**

This will depend on the laws of the place where you want to hold a rally or demonstration. The organizer of a public assembly usually must apply for and obtain a permit in advance from the local police department or governmental body.<sup>53</sup>

### **WHAT DO I NEED TO PROVIDE TO OBTAIN A PERMIT?**

Applications for permits usually require specific information about the date, time, and location of the proposed demonstration, as well as information about the organizer of the event and specific details about how the assembly is to be conducted, especially if the event takes place near other major public events.<sup>54</sup>

There may also be fees involved in obtaining a permit. An application fee may be charged, but only if it is “nominal” and is related to the actual expenses involved in processing the application.<sup>55</sup> The event applicant also may be required to obtain insurance to cover any damages to public property caused by the event. The amount of insurance required must

have a reasonable relationship to the risks posed by the event. If there is not a reasonable likelihood of damage from the event, then no insurance may be required.<sup>56</sup> An applicant may not be charged for the actual or projected costs of police protection required by the event.<sup>57</sup> Some courts also hold that the fees and costs must be waived for an applicant who is too poor to pay them.<sup>58</sup>

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Q&A****WHAT IF THE REQUEST FOR A PERMIT IS DENIED?**

A law requiring a permit for a demonstration, event or rally must allow a permit applicant to appeal a denial of the permit. Persons who are denied a permit must be given the chance to have a court decide whether the denial was legal.<sup>59</sup> The court can determine if the reason given for the denial is valid and also whether the rules of the permitting process are constitutional.<sup>60</sup>

**WHAT IS A HECKLER'S VETO? CAN GOVERNMENT OFFICIALS PROHIBIT EXPRESSIVE ACTIVITIES BASED ON THE PRESENCE OF COUNTERPROTESTERS OR FEAR OF VIOLENCE ARISING BASED ON A RESPONSE TO WHAT IS BEING SAID?**

Denying a permit for a protest or speech activity based on the presence of counterdemonstrators or fear of violence arising based on a response to what is being said constitutes an unconstitutional "hecklers' veto."

As First Amendment scholar David Hudson notes:

“Heckler’s veto” refers to a situation involving a government official who allows a hostile audience’s reaction to shut down or silence an unpopular speaker. In other words, the speaker’s right to free speech is suppressed by the fear of disruption. The U.S. Supreme Court sanctioned the heckler’s veto in the unfortunate case of *Feiner v. New York* (1951). Irving Feiner, a former World War II veteran and student at the University of Syracuse, fulminated against racism on a public street corner. He said that black people did not have equal rights and “should rise up in arms and fight for their rights.” A growing crowd surrounded Feiner and expressed hostility to the young speaker. Evidence in the record indicated that some in the crowd were “pushing, shoving and milling around.” Instead of protecting Feiner from the hostile crowd, the police arrested Feiner and charged him with incitement of a breach of the peace. The U.S. Supreme Court upheld Feiner’s conviction by a 5-4 vote. The majority wrote that the police officers acted reasonably in trying to diffuse a potentially volatile situation. They wrote that Feiner engaged in “deliberate defiance” of police officers, who were worried about “the imminence of greater disorder.” Justice Hugo Black filed a fiery dissent, contending that the police should have protected Feiner instead of placing him under arrest. He explained that “today’s holding means that as a practical matter, minority speakers can be silenced in any city.” The late, great First Amendment scholar Harry Kalven, Jr. described the principle of heckler’s veto: “If the police can silence the speaker, the law in effect acknowledges a veto power in hecklers who can, by being hostile enough, get the law to silence any speaker of whom they do not approve.”<sup>61</sup>

Justice Black’s dissent represents the controlling First Amendment law today. Courts are clear that there is no place for a “hecklers’ veto” under the First Amendment.<sup>62</sup> The rights of speech and assembly may not be re-

stricted because demonstrators may be met by opposition. Any decision that the demonstration poses a threat to public safety should be based solely on the plans and actions of those engaging in expressive activities, not on those who plan to be present in opposition. Otherwise, hecklers and counterdemonstrators could always shut down speech they disagree with by manufacturing threats to public safety.

## **DO COUNTER-DEMONSTRATORS HAVE FREE SPEECH RIGHTS?**

Yes, they do. Just because counter-demonstrators oppose you and the viewpoint of your demonstration does not mean they have any less right to speak out and demonstrate. However, the same rules apply to counter-demonstrators as apply to the original assembly. The group cannot be violent and must assemble and protest in an appropriate place and manner.

## **WHAT CAN'T I DO IN EXERCISING MY RIGHT TO PROTEST?**

The Supreme Court of the United States has held that the First Amendment protects the right to conduct a peaceful public assembly.<sup>63</sup> The First Amendment does not provide the right to conduct an assembly at which there is a clear and present danger of riot, disorder, interference with traffic on public streets or other immediate threat to public safety.<sup>64</sup> Statutes that prohibit people from assembling and using force or violence to accomplish unlawful purposes are permissible under the First Amendment.<sup>65</sup>

## **AM I ALLOWED TO CARRY A WEAPON OR FIREARM AT A DEMONSTRATION OR PROTEST?**

Your right to have a weapon with you when you protest largely depends on what is allowed by state law and is unlikely to be protected by the First Amendment's guarantee to freedom of speech. Not all conduct can be considered "speech" protected by the First Amendment even if the

person engaging in the conduct intends to express an idea.<sup>66</sup> Most courts have held that the act of openly carrying a weapon or firearm is not expression protected by the First Amendment.<sup>67</sup>

The right to possess a firearm is protected by the Second Amendment,<sup>68</sup> and all states allow carrying a concealed weapon in public, although most require a permit to do so.<sup>69</sup> Some states allow persons to openly carry firearms in public.<sup>70</sup> However, it is not yet settled whether the Second Amendment guarantees the right to possess a firearm in public,<sup>71</sup> so your right to carry a firearm at a demonstration or protest is a matter that depends on what is allowed under state law. Carrying other weapons, such as stun guns, which are not firearms also is subject to restrictions imposed by state law.<sup>72</sup> Possession of weapons also may be prohibited in certain places where demonstrations might take place, such as a national park.<sup>73</sup>

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Even if possession of weapons is allowed, their presence at demonstrations and rallies can be intimidating and provocative and does not help in achieving a civil and peaceful discourse on issues of public interest and concern. Demonstrations often relate to issues raising strong feelings among competing groups—the presence of counter-demonstrators makes conflict likely. In these situations, where the purpose of the gathering is to engage in speech activities, firearms and other weapons are threatening, result in the suppression of speech and are contrary to the purpose of the First Amendment to allow all voices to be heard on matters of public importance.

## WHAT CAN'T THE POLICE DO IN RESPONDING TO PROTESTERS?

In recent history, challenges to the right to protest have come in many forms. In some cases, police have cracked down on demonstrations by declaring them “unlawful assemblies” or through mass arrests, illegal use of force or curfews. Elsewhere, expression is limited by corralling protesters into so-called “free-speech zones.”<sup>74</sup> New surveillance technologies are increasingly turned on innocent people, collecting information on their activities by virtue of their association with or proximity to a given protest. Even without active obstruction of the right to protest, police-inspired intimidation and fear can chill expressive activity and result in self-censorship.<sup>75</sup> All of these things violate the First Amendment and are things the police cannot do to censor free speech. Unless the assembly is violent violence is clearly imminent, the police have limited authority under the law to shut down protesters.



## WHAT SHOULD I DO IF MY RIGHTS ARE BEING VIOLATED BY A POLICE OFFICER?

As discussed above, citizens have a fundamental constitutional right to assemble and protest. If this right is being exercised peacefully and in compliance with any valid time, place and manner regulations of speech, police have no legal authority to interfere. If police do attempt to stop

you from lawfully exercising your First Amendment rights, you should assert your legal authority to assemble and speak and demand to know the basis for the officer's interference. You might also try to speak to a higher ranking officer to see if he or she will intervene on your behalf. It may be necessary for you to take a stand in defense of your rights, in which case you might be arrested and taken from the scene. This may result in charges being brought against you, but you should not be convicted if your only offense was to exercise your First Amendment rights.<sup>76</sup>

As Justice John Paul Stevens noted in his dissent in *Minnesota Board for Community Colleges v. Knight*:

It is inherent in the republican form of government that high officials may choose—in their own wisdom and at their own peril—to listen to some of their constituents and not to others. But the First Amendment does guarantee an open marketplace for ideas—where divergent points of view can freely compete for the attention of those in power and of those to whom the powerful must account...

There can be no question but that the First Amendment secures the right of individuals to communicate with their government. And the First Amendment was intended to secure something more than an exercise in futility—it guarantees a meaningful opportunity to express one's views. For example, [the Supreme] Court has recognized that the right to forward views might become a practical nullity if government prohibited persons from banding together to make their voices heard. Thus, the First Amendment protects freedom of association because it makes the right to express one's views meaningful.

## ENDNOTES

1. Adam Newton, "Freedom of Petition Overview," *Newseum* (Oct. 10, 2002), <http://www.newseuminstitute.org/first-amendment-center/topics/freedom-of-petition/freedom-of-petition-overview/>.
2. Adam Newton, "Freedom of Petition Overview," *Newseum* (Oct. 10, 2002), <http://www.newseuminstitute.org/first-amendment-center/topics/freedom-of-petition/freedom-of-petition-overview/>.
3. Under 40 U.S.C. § 6135, "[i]t is unlawful to parade, stand, or move in processions or assemblages in the Supreme Court Building or grounds, or to display in the Building and grounds a flag, banner, or device designed or adapted to bring into public notice a party, organization, or movement." The penalty for violating this law is a fine of up to \$5,000 and/or up to 60 days in jail.
4. *Hodge v. Talkin*, 799 F.3d 1145 (D.C. Cir. 2015).
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