

Guidance for Law Enforcement About First Amendment Rights

In the United States, the First Amendment guarantees the freedom to express one's views, to peacefully assemble with others who share those views, and to petition the government for redress of grievances. But these rights are not boundless—attempts to intimidate and coerce through threats of violence, stalking, and armed paramilitary activity are *not* constitutionally protected.

First Amendment Principles

- The First Amendment protects the right to engage in hateful, racist, offensive speech and to associate with others who share those views. *Nat'l Socialist Party of Am. v. Vill. of Skokie*, 432 U.S. 43 (1977).
- The First Amendment does *not* protect violent or unlawful conduct, even if the person engaging in it intends to express an idea. *United States v. O'Brien*, 391 U.S. 367, 376 (1968).
- The First Amendment does *not* protect speech that incites imminent violence or lawlessness. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

What does this mean for policing protest activity?

- The First Amendment generally protects protest activity that occurs in public spaces, including public spaces in close proximity to private residences, even if the message is hateful.
- However, protest activity that includes unlawful conduct, including threats of imminent violence against particular persons or property, is not protected.
- Individuals engaging in threats of imminent death or injury to particular persons, threats of violence to particular property, or other unlawful conduct may be ordered to disperse or may be arrested.
- Unlawful activity by a few protesters is not generally enough to transform a peaceful assembly into an unlawful assembly, but where the protesters have shown a common intent to resort to force or violence that creates a clear danger to public safety, law enforcement may declare an unlawful assembly and order the protesters to disburse.
- Law enforcement officers may maintain order by enforcing content-neutral laws – including noise ordinances, trespassing laws, and other criminal laws of general applicability; however, content-neutral laws must be enforced in an even-handed manner and not based on the viewpoint or message of the protesters.

What kinds of criminal laws prohibit threats and similar conduct?

- It is a felony under federal law to communicate a threat to injure or kidnap another person online, by phone or mail, or using other interstate channels. 18 U.S.C. § 875(c).

- It is a felony under federal law to engage in stalking, defined as a course of conduct conducted online, through the mail, or traveling across state lines, which would put a person in reasonable fear of death or serious bodily injury or cause substantial emotional distress, when done with the intent to kill, injure, harass, intimidate, or surveil that person. 18 U.S.C. § 2261A.
- State criminal laws penalize threats to injure or kill another person as well as stalking, which generally refers to a course of conduct that involves repeated harassment or threats that would cause a reasonable person to feel terrorized, frightened, or intimidated. *See, e.g.*, Ariz. Rev. Stat. § 13-2923; Ga. Code § 16-5-90; Mich. Comp. Laws § 750.411i.; 18 Pa. C.S.A. § 2709.1; Wis. Stat. §§ 947.0125, 947.013.
- Crimes of violence intended to intimidate and coerce are considered terrorism under federal law, *see* 18 U.S.C. § 2331, and the laws of many states, and threats to commit such crimes are not protected by the First Amendment.
 - “Terroristic threats,” generally defined as a threat to commit a crime of violence with the purpose of terrorizing another person or causing public panic, fear, or serious public inconvenience, or in reckless disregard of the risk of causing terror or public panic, fear, or inconvenience, are prohibited in many states and often have penalties greater than the penalties for other threats. *See, e.g.*, Ga. Code §§ 16-11-37, 16-11-37.1; 18 Pa. C.S.A. § 2706; Wis. Stat. § 947.019.
 - Many states make it a felony to commit an act of terrorism or threaten to commit an act of terrorism, which generally is defined as a crime of violence with the intent to intimidate or coerce a civilian population or induce the policy of the government through intimidation or coercion. *See, e.g.*, Ariz. Rev. Stat. §§ 13-2301, 13-2308.01, 13-2308.02; Ga. Code § 16-11-221; Mich. Comp. Laws §§ 750.543b, 750.543f & 750.543m; 18 Pa. C.S.A. § 2717.
- It is a felony under federal law to intentionally “solicit, command, induce, or otherwise endeavor to persuade” another person to engage in a crime of violence against a person or property. 18 U.S.C. § 373. Many states have similar laws.
- Collective armed action by private paramilitary organizations is unauthorized in every state and violates criminal laws in many states. *See, e.g.*, Ga. Code §§ 38-2-277, 16-11-151; Mich. Comp. Laws §§ 70.528a; 750.215; 18 Pa. C.S.A. § 5515; Wis. Stat. § 946.69; *see also Prohibiting Private Armies at Public Rallies* (Sept. 2020), available at <https://www.law.georgetown.edu/icap/wp-content/uploads/sites/32/2018/04/ProhibitingPrivate-Armies-at-Public-Rallies.pdf>.

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