

## **Actions Law Enforcement Can Take to Address and Prevent Voter Intimidation**

This guidance provides steps an officer can take to preserve the peace and enforce the law at or near polling places. Officers should exercise sound judgment based upon the facts of a particular situation. If possible, consult with legal counsel and coordinate with prosecuting officials.

### **Familiarize Yourself With Your State’s Election Laws**

- Voter intimidation is a crime under federal law and under every state’s laws.<sup>i</sup> Voter intimidation is conduct that is intended to compel prospective voters to vote against their preferences, or to not vote at all, through activity that is reasonably calculated to instill fear. Examples may include<sup>ii</sup>:
  - Verbal threats of violence
  - Confronting voters wearing military-style or official-looking uniforms
  - Brandishing or intimidating display of firearms
  - Disrupting lines or blocking entrances
  - Spreading false information about voter fraud, requirements to vote, or penalties
  - Aggressively approaching voters’ cars or writing down license plate numbers
  - Following voters to, from, or within polling places
  - Directly and aggressively challenging voters’ qualifications
  - Appearing to patrol or police the voting line while armed
- Most states prohibit electioneering within the immediate vicinity of the polling place.<sup>iii</sup> Officers and election officials are empowered to maintain order and enforce electioneering laws even if First and Second Amendment rights are restricted.<sup>iv</sup>
- State and local law may restrict the carrying of firearms within or in the immediate vicinity of the polling place.<sup>v</sup>
- State law defines who may act as a “poll watcher” or “election observer” and who may challenge a voter’s qualifications to vote at the polls.<sup>vi</sup>

### **What Can Law Enforcement Do if Armed Individuals or Groups are Near Polling Places?**

1. Consensual Engagement<sup>vii</sup>: Law enforcement may approach an armed individual or group near a line of voters at a polling place and ask “Why are you here?”
  - If the answer is to patrol the line of voters, protect against voter fraud, enforce the law, or a similar response, you may ask the individual or group to stop the activity because armed private militias are not authorized under state law, are not protected by the Second Amendment, and have no authority to engage in the functions of law enforcement.<sup>viii</sup>
  - If the answer is to challenge voters’ qualifications or a similar response, you may ask the individual or group to stop the activity. Although state laws vary as to who is allowed to challenge a voter’s qualifications and how, openly armed individuals or groups do not have authority to intimidate voters by making direct challenges to voters’ qualifications outside a polling place.
  - If the answer is to exercise their First or Second Amendment rights, you may ask the individual or group to put away their firearms or move away from the line of voters because their openly armed presence likely would be intimidating to voters. Regardless, if you have reasonable articulable suspicion that the individual or group is violating state laws or local ordinances, you may inquire further, as noted below.

## 2. Investigating Possible Criminal Activity and Making Arrests

- Individuals must comply with weapons permit restrictions and other general laws, such as any state laws that prohibit brandishing firearms or using firearms to intimidate.<sup>ix</sup>
- If the armed individual or group appears to be patrolling the line of voters, engaging in conduct that appears to be done for the purpose of intimidating voters, or is violating any state criminal law or local ordinance (including ordinances prohibiting public disturbances and loitering), you may conduct a *Terry* stop to inquire further, even where First and Second Amendment rights are implicated.<sup>x</sup>
  - In open-carry states, the mere carrying of a holstered handgun by an individual in public, without more, would not warrant a *Terry* stop, but it could be the basis for asking the person what he or she is doing, as discussed above.<sup>xi</sup>
- If there is probable cause to believe that individuals or groups are acting in violation of any state criminal law or local ordinance, you may direct them to cease the offensive activity, and if they refuse, you may arrest them.

### **What Else Can Law Enforcement Do to Prevent Voter Intimidation Near Polling Places?**

You may impose reasonable time, place, and manner restrictions that are narrowly tailored to serve the government's compelling interest in protecting against voter intimidation. **Any restrictions must not be applied in a manner that discriminates based on viewpoint.** Appropriate restrictions could include:

- Moving individuals or groups who are shouting, chanting, or waving large banners to a location further from voters, but still within earshot.
- Directing openly armed groups of individuals to put away their weapons or move further away from voters.
- Separating opposing groups and setting up buffer zones.<sup>xiii</sup>

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*This resource has been prepared by the Institute for Constitutional Advocacy and Protection (ICAP) at Georgetown University Law Center with the assistance of O'Meheny & Myers LLP. ICAP's mission is to use the power of the courts to defend American constitutional rights and values. Visit us at <https://www.law.georgetown.edu/icap/>. Contact us at [reachICAP@georgetown.edu](mailto:reachICAP@georgetown.edu).*

<sup>i</sup> 18 U.S.C. §§ 245(b)(1)(A), 594, 20511(1).

<sup>ii</sup> Institute for Constitutional Advocacy and Protection, Georgetown Law, Fact Sheet: Protecting Against Voter Intimidation, available at <http://bit.ly/voterintimidationsheet>.

<sup>iii</sup> See Nat'l Ass'n of Secretaries of State, *State Laws Prohibiting Electioneering Activities Within a Certain Distance of the Polling Place* (Jan. 2020), <https://www.nass.org/sites/default/files/surveys/2020-01/state-laws-polling-place-electioneering-jan2020.pdf>.

<sup>iv</sup> See *Burson v. Freeman*, 504 U.S. 191 (1992).

<sup>v</sup> See Giffords Law Center to Prevent Gun Violence, *Preventing Armed Voter Intimidation: A State-by-State Analysis* (Sept. 25, 2020), <https://giffords.org/lawcenter/report/preventing-armed-voter-intimidation-a-state-by-state-analysis/>; Mich. Sec'y of State, Memorandum, Open Carry of Firearms at Polling Stations on Election Day Is Prohibited, (Oct. 16, 2020), available at [https://www.michigan.gov/documents/sos/BOE\\_Open\\_Carry\\_Polling\\_Place\\_Instructions\\_10\\_16\\_2020\\_705274\\_7.pdf](https://www.michigan.gov/documents/sos/BOE_Open_Carry_Polling_Place_Instructions_10_16_2020_705274_7.pdf).

<sup>vi</sup> See Nat'l Ass'n of Secretaries of State, *State Laws on Authorized Poll Watchers & Voter Challenges* (Jan. 2020), <https://www.nass.org/resources/2018-election-information/Poll-Watchers-Voter-Challenges>.

<sup>vii</sup> *United States v. Drayton*, 536 U.S. 194 (2002); *Florida v. Bostick*, 501 U.S. 429 (1991).

<sup>viii</sup> *District of Columbia v. Heller*, 554 U.S. 570 (2008); *Presser v. Illinois*, 116 U.S. 252 (1886). Find more information about your state's anti-paramilitary laws at <http://bit.ly/50factsheets>.

<sup>ix</sup> See Giffords Law Center to Prevent Gun Violence, *supra* note v.

<sup>x</sup> *Emboday v. Ward*, 695 F.3d 577 (6th Cir. 2012); *Deffert v. Moe*, 111 F. Supp. 3d 797 (W.D. Mich. 2015); *Baker v. Schwarb*, 40 F. Supp. 3d 881 (E.D. Mich. 2014); *Baker v. Smiscik*, 49 F. Supp. 3d 489 (E.D. Mich. 2014); *Cbesney v. City of Jackson*, 171 F. Supp. 3d 605 (E.D. Mich. 2016); see also *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490 (1949); *United States v. Matusienicz*, 84 F. Supp. 3d 363 (D. Del. 2015).

<sup>xi</sup> *Northrup v City of Toledo Police Dept.*, 785 F. 3d 1128 (6th Cir. 2015).

<sup>xiii</sup> *Olivieri v. Ward*, 801 F.2d 602, 607 (2d Cir. 1986).