

FALL 2018

# POLICE, PROTESTERS, AND THE PRESS



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**REPORTERS  
COMMITTEE**  

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**FOR FREEDOM OF THE PRESS**

## Introduction<sup>1</sup>

The United States has seen a wave of mass demonstrations and political protests in recent years. Press coverage of these events has been vital to communicating protesters' concerns to the government and public.<sup>2</sup> Yet in 2017, the most dangerous place in the U.S. for a journalist was at a protest. According to the U.S. Press Freedom Tracker, nearly half of all press freedom incidents—such as arrests of and attacks on journalists, as well as searches and seizures of newsgathering equipment—occurred at protests.<sup>3</sup>

This guide aims to help journalists understand their rights at protests and avoid arrest when reporting on these events. It summarizes the legal landscape and provides strategies and tools to help journalists avoid incidents with police and navigate them successfully should they arise. This guide does not replace the legal advice of an attorney. Journalists with additional questions or in need of assistance finding a lawyer should contact the Reporters Committee's hotline at 800-336-4243 or [rcfp@hotline.org](mailto:rcfp@hotline.org).

## Overview of the Law

Journalists covering protests have the same rights as other members of the public to observe, photograph, and record in public places. The First Amendment protects journalists' fundamental free speech, press, and assembly rights, which includes protection from arrest for negative news coverage or to prevent reporting on public demonstrations. Police may not prevent journalists from covering protests if the journalists are in a place where the public is allowed, and they are not disrupting or interfering with law enforcement. Simply being near a protest or other newsworthy event is not a crime.

However, journalists can be arrested if police have probable cause to believe a journalist broke the law while reporting—for example, by trespassing or disobeying a police order to disperse. An increasing number of courts have also recognized a First Amendment right to record police in the public performance of their jobs, though the interpretation of this right varies by state. Both the Fourth Amendment and the Privacy Protection Act of 1980 protect journalists from having their person and belongings searched or seized.

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<sup>1</sup> By Reporters Committee Legal Intern Kelsey Fraser and Staff Attorney Sarah Matthews. Attorneys at Reed Smith LLP contributed to the research and writing of this guide.

<sup>2</sup> Sarah Matthews, *Press Freedoms in the United States 2017: A Review of The U.S. Press Freedom Tracker*, RCFP (Mar. 27, 2018) at 9, <https://perma.cc/3D7P-DDML>.

<sup>3</sup> *Id.* at 4.

## First Amendment Protections

The First Amendment safeguards the right to freedom of speech and the press, which are fundamental liberties “at the foundation of free government.”<sup>4</sup> The government may not use police power or other means to arbitrarily or unnecessarily interfere with these freedoms.<sup>5</sup> In fact, the purpose of these rights was to foster public discussion free of government interference.<sup>6</sup>

### Right to gather news generally

Freedom of the press includes some protection for the right to collect and disseminate news, but this right is not absolute.<sup>7</sup> General laws that apply to all citizens apply equally to the press, so journalists must stay within the bounds of the law when exercising their First Amendment freedoms.<sup>8</sup> For example, journalists cannot trespass on private property or engage in other unlawful conduct that occurs during a protest under the guise of gathering news.<sup>9</sup> However, police cannot arrest journalists in retaliation for negative coverage or to prevent reporting on a public demonstration.

In addition, most courts have recognized that the First Amendment right of access does not permit government officials to deprive certain journalists of access to information made available to others, particularly in retaliation for past news coverage or based on viewpoint.<sup>10</sup> Some courts have held that the government must have “compelling” reasons to justify differential treatment, though others have found a reasonable basis sufficient.<sup>11</sup> The press has no right of special access to

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<sup>4</sup> *Marsh v. Ala.*, 326 U.S. 501, 509 (1946).

<sup>5</sup> *See, e.g., Bridges v. Cal.*, 314 U.S. 252, 262-63 (1941).

<sup>6</sup> *Cohen v. Cal.*, 403 U.S. 15, 24 (1971).

<sup>7</sup> *Branzburg v. Hayes*, 408 U.S. 665, 707 (1972) (“News gathering is not without its First Amendment protections.”); *Curtis Pub. Co. v. Butts*, 388 U.S. 130, 150 (1967); *U.S. v. Brown*, 250 F.3d 907 (5th Cir. 2001); *Turner v. Lieutenant Driver*, 848 F.3d 678 (5th Cir. 2017).

<sup>8</sup> *See, e.g., Zemel v. Rusk*, 381 U.S. 1, 17 (1965) (“The right to speak and publish does not carry with it the unrestrained right to gather information.”); *see also Branzburg*, 408 U.S. at 682 (“It is clear that the First Amendment does not invalidate every incidental burdening of the press that may result from the enforcement of civil or criminal statutes of general applicability.”)

<sup>9</sup> *See, e.g., Eberhard v. Cal. Highway Patrol*, 2015 WL 6871750 (N.D. Cal. 2015) (finding probable cause to arrest journalist for trespassing to cover highway construction project protests).

<sup>10</sup> *See, e.g., Nicholas v. N.Y.C.*, 2017 WL 766905, at \*1 (S.D.N.Y. 2017) (denying government’s motion to dismiss lawsuit challenging revocation of press pass where photojournalist plaintiff was excluded from scene arbitrarily or based on viewpoint and others were permitted); *see generally Lee Levine, et al., Newsgathering and the Law* § 10.02[2] at n.46 (4th ed. 2013) (collecting cases).

<sup>11</sup> *See, e.g., Levine, supra* n.47-48; *Sherrill v. Knight*, 569 F.2d 124 (D.C. Cir. 1977) (holding that failure to articulate standards governing denial of White House press passes for security reasons violated First Amendment).

information<sup>12</sup> and can be excluded from crime and disaster scenes to the same extent as the general public.<sup>13</sup>

## Right to record

The First Amendment generally protects filming and audio recording of government officials engaged in their duties in a public place, including police officers performing their responsibilities (during a protest or otherwise). Although the Supreme Court has not addressed the issue, six federal appellate courts have recognized this constitutional right to record, reflecting a growing consensus on the matter.<sup>14</sup> Reflecting the dramatic increase in citizen journalism, these cases have also recognized that the right to gather news and access information, which form the basis for the right to record, applies to private citizens as well as journalists.<sup>15</sup>

Notwithstanding this growing consensus, journalists may encounter limitations to this right to record, depending on the state and the circumstances (e.g., whether the recording was made openly or secretly). Courts have held that the right to record may be subject to reasonable time, place, and manner restrictions, though these are less applicable in public places.<sup>16</sup> In addition, it is illegal in most states to surreptitiously record a private conversation without the consent of at least one party or, in some states, all parties.<sup>17</sup> Journalists recording protest activities can increase their chances of First Amendment protection and reduce their risk of arrest by identifying themselves as press, not interfering with law enforcement, and recording from a safe distance, if possible.<sup>18</sup>

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<sup>12</sup> See, e.g., *Branzburg*, 408 U.S. at 684. (“It has generally been held that the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally.”); *Pell v. Procunier*, 417 U.S. 817, 834 (1974) (“The Constitution does not, however, require government to accord the press special access to information not shared by members of the public generally.”).

<sup>13</sup> *Houchins v. KQED*, 438 U.S. 1, 11 (1978).

<sup>14</sup> See *Fields v. Philadelphia*, 862 F.3d 353 (3rd Cir. 2017); *Turner v. Lieutenant Driver*, 848 F.3d 678 (5th Cir. 2017); *Gericke v. Begin*, 753 F.3d 1 (1st Cir. 2014); *Am. Civil Liberties Union of Ill. v. Alvarez*, 679 F.3d 583 (7th Cir. 2012); *Glik v. Cunniffe*, 655 F.3d 78 (1st Cir. 2011); *Smith v. City of Cumming*, 212 F.3d 1332 (11th Cir. 2000); *Fordyce v. City of Seattle*, 55 F.3d 436 (9th Cir. 1995).

<sup>15</sup> See, e.g., *Glik*, 655 F.3d at 83.

<sup>16</sup> See *Fields*, 862 F.3d 353; *Smith*, 212 F.3d 1332.

<sup>17</sup> See generally *Tape-recording laws at a glance*, Reporter’s Recording Guide (Aug. 1, 2012), <https://www.rcfp.org/reporters-recording-guide/tape-recording-laws-glance>.

<sup>18</sup> In *Higginbotham v. Sylvester*, -- F. App’x --, 2018 WL 3559116 (2d Cir. July 25, 2018), a video journalist challenged his arrest, claiming it was in retaliation for recording an Occupy Wall Street protest. The Second Circuit affirmed the trial court’s grant of summary judgment, finding that police had arrested the plaintiff after they had repeatedly told him to come down from a phone booth surrounded by a crowd of people, and he had refused to comply, endangering the safety of those around him. The court concluded that no reasonable jury could find that the police had arrested him due to his recording activity as opposed to his reckless endangerment of others.

If police prevent journalists from recording or arrest them for doing so, journalists may be able to bring a civil rights action pursuant to 42 U.S.C. § 1983 under a theory that the officer violated the plaintiff's constitutional rights under the First<sup>19</sup> or Fourth<sup>20</sup> Amendment. Even if a court has recognized a First Amendment right to record police, however, an officer may have qualified immunity from liability if the officer's conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."<sup>21</sup> Whether a right to record will be found to be "clearly established" can depend on the particular circumstances and jurisdiction.<sup>22</sup>

## Fourth Amendment Protections

The Fourth Amendment protects the right of the people to be secure against unreasonable searches and seizures. Journalists are entitled to this qualified right of personal security on city streets during protests.<sup>23</sup> In fact, the Supreme Court has held that Fourth Amendment limitations must be "scrupulously observed" in cases involving information protected by the First Amendment.<sup>24</sup> Journalists often include Fourth Amendment claims in civil actions against law enforcement for lack of probable cause to arrest and unlawful seizure of recording equipment.<sup>25</sup>

### Seizure

The Supreme Court has described the seizure of property as a "meaningful interference with an individual's possessory interest."<sup>26</sup> Seizure can also be of an individual's person, as when law enforcement restrains one's ability to walk away.

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<sup>19</sup> See, e.g., *Smith v. City of Cumming*, 212 F.3d 1332 (11th Cir. 2000) (recognizing First Amendment right to record).

<sup>20</sup> See *Johnson v. Hawe*, 388 F.3d 676 (9th Cir. 2004).

<sup>21</sup> Courts can dismiss a case on qualified immunity grounds if: (1) a constitutional right was not violated, or (2) the right was not clearly established. See *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

<sup>22</sup> See, e.g., *Glik*, 655 F.3d at 84–85 (finding right to record in public park was clearly established and distinguishing case law from other circuits that found a right to record was not clearly established).

<sup>23</sup> See *Terry v. Ohio*, 392 U.S. 1, 8–9 (1968) ("This inestimable right of personal security belongs as much to the citizen on the streets of our cities as to the homeowner closeted in his study to dispose of his secret affairs.").

<sup>24</sup> *Walter v. U.S.*, 447 U.S. 649, 655 (1980); see also Department of Justice, STATEMENT OF INTEREST OF THE UNITED STATES SHARP, NO. 1:11-cv02888-BEL, 11 (D. Md. Jan. 10, 2012), [http://www.justice.gov/crt/about/spl/documents/Sharp\\_SOI\\_1-10-12.pdf](http://www.justice.gov/crt/about/spl/documents/Sharp_SOI_1-10-12.pdf) ("The interests animating the Fourth Amendment's prohibition against unreasonable searches and seizures are heightened when the property at issue is also protected by the First Amendment.").

<sup>25</sup> See e.g., *Garcia v. Montgomery Cnty.*, 145 F.Supp.3d 492, 523 (D. Md. 2015) (involving assertion by photojournalist that law enforcement unlawfully seized his video card and had no probable cause to arrest him for disorderly conduct).

<sup>26</sup> See *U.S. v. Jacobsen*, 466 U.S. 109, 113 (1984).

Officers must have probable cause to believe an individual is committing a crime before making an arrest. However, in *Terry v. Ohio*, the Supreme Court held that law enforcement could briefly detain and “frisk” an individual for weapons, consistent with the Fourth Amendment, so long as the officer has a “reasonable suspicion” that the individual is armed and dangerous.<sup>27</sup> This “reasonable suspicion” standard requires less than the “fair probability that contraband or evidence of a crime will be found”<sup>28</sup> (the standard of probable cause required to arrest) but more than an “inchoate and unparticularized suspicion or ‘hunch.’”<sup>29</sup> The stop must be justified at the time it occurs, reasonably related in scope to the circumstances that justified the stop, and conducted using the least intrusive means reasonably available.<sup>30</sup> Officers can consider contextual characteristics like presence in a “high crime area” in assessing reasonable suspicion,<sup>31</sup> though by itself an individual’s mere presence in an area of suspected criminal activity is insufficient.<sup>32</sup> During *Terry* stops, law enforcement can ask people to identify themselves, though whether they are obligated to respond depends on the state they are in.<sup>33</sup>

At protests, law enforcement cannot stop and frisk protesters or journalists without an objective, reasonable belief that they are armed and dangerous. If journalists are dispersed in a crowd of protesters, and the protest turns violent, however, the risk of a *Terry* stop (or arrest, for that matter) is heightened. During a *Terry* stop, law enforcement may temporarily seize journalists’ equipment, though such a seizure typically requires an arrest supported by probable cause. Journalists should always clearly identify their purpose at a protest to law enforcement and should wear press credentials, if possible, in order to tip the reasonable suspicion or probable cause calculation in their favor.

## Search

The Supreme Court uses a two-prong test established in *Katz v. United States* to determine the reasonableness of a search under the Fourth Amendment.<sup>34</sup> The test

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<sup>27</sup> See *Terry*, 392 U.S. at 21 ([T]o justify such a seizure an officer must have a reasonable suspicion of criminal activity based on “specific and articulable facts ... [and] rational inferences from those facts.”); *Ill. v. Wardlow*, 528 U.S. 119 (2000); *INS v. Delgado*, 466 U.S. 210, 217 (1984).

<sup>28</sup> *Ill. v. Gates*, 462 U.S. 213, 238 (1983).

<sup>29</sup> *U.S. v. Sokolow*, 490 U.S. 1 (1989); *U.S. v. Montoya de Hernandez*, 473 U.S. 531, 541, 544 (1985).

<sup>30</sup> See *Hiibel v. Sixth Judicial Dist. Ct. Nev.*, 542 U.S. 177 (2004); see also *Florida v. Royer*, 460 U.S. 491, 500 (1983) (“[A]n investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop. Similarly, the investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer’s suspicion in a short period of time.”).

<sup>31</sup> See *Wardlow*, 528 U.S. at 124.

<sup>32</sup> See *Brown v. Tex.*, 443 U.S. 47, 52 (1979).

<sup>33</sup> See *Hiibel*, 542 U.S. at 186; *U.S. v. Hensley*, 469 U.S. 221, 229 (1985); *Hayes v. Fla.*, 470 U.S. 811, 816 (1985); *Royer*, 460 U.S. at 497; *Adams v. Williams*, 407 U.S. 143, 146 (1972).

<sup>34</sup> *Katz v. U.S.*, 389 U.S. 347 (1967).

considers, first, whether a person had an actual, subjective expectation of privacy and, second, whether the expectation of privacy was one that society is prepared to recognize as reasonable.<sup>35</sup> Reasonableness is the “ultimate touchstone”<sup>36</sup> of the Fourth Amendment and is context-specific.<sup>37</sup> Although the Fourth Amendment generally requires a court-issued warrant before the government can search a person or his or her property, the Supreme Court has recognized certain exceptions where the intrusion of the search on a person’s privacy is outweighed by the government interest.<sup>38</sup> Common exceptions to the warrant requirement include voluntary consent,<sup>39</sup> “exigent” or urgent circumstances,<sup>40</sup> and searches conducted during (or “incident to”) an arrest.<sup>41</sup>

Due to the frequency of arrests at protests, the search-incident-to-arrest exception is particularly important for journalists to be aware of.<sup>42</sup> During these searches, police can search for and/or seize “evidence” in the area within the arrestee’s “immediate control” from which he or she could reach a weapon or destructible evidence.<sup>43</sup> The Supreme Court later broadened the scope of a permissible search-incident-to-arrest to personal property “immediately associated with the person of the arrestee,”<sup>44</sup> finding the search of a package of cigarettes found on an arrestee reasonable, despite the lack of concern regarding weapons or destructible evidence.<sup>45</sup>

As of the Supreme Court’s 2014 decision in *Riley v. California*, law enforcement generally cannot use the search-incident-to-arrest exception to search the contents of cellphones.<sup>46</sup> The *Riley* decision has profound implications for journalists. In addition to text messages, call logs, emails, web history, and GPS location data, a journalist’s cellphone may contain contact information for sources, reporting notes and drafts, audio and video recordings, and photographs related to

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<sup>35</sup> Katz, 389 U.S. at 361 (Harlan, J., concurring).

<sup>36</sup> *Riley v. Cal.*, 134 S. Ct. 2473, 2482 (2014).

<sup>37</sup> *Maryland v. King*, 133 S. Ct. 1958, 1969 (2013) (“[T]he Fourth Amendment’s proper function is to constrain, not against all intrusions as such, but against intrusions which are not justified in the circumstances, or which are made in an improper manner.”)

<sup>38</sup> *Riley*, 134 S. Ct. at 2484.

<sup>39</sup> See, e.g., *U.S. v. Drayton*, 536 U.S. 194 (2002).

<sup>40</sup> *Ky. v. King*, 563 U.S. 452 (2011); *Brigham City v. Stuart*, 547 U.S. 398 (2006); *Warden v. Hayden*, 387 U.S. 294 (1967).

<sup>41</sup> See *U.S. v. Chadwick*, 433 U.S. 1 (1977); *U.S. v. Robinson*, 414 U.S. 218 (1973); *Chimel v. Cal.*, 395 U.S. 752 (1969).

<sup>42</sup> Searches incident to illegal arrests are unlawful. See *Rios v. U.S.*, 364 U.S. 253 (1960).

<sup>43</sup> See, e.g., *Cupp v. Murphy*, 412 U.S. 291 (1973); see also *Chimel*, 395 U.S. at 762–63.

<sup>44</sup> *Chadwick*, 433 U.S. at 15 (finding that a 200-pound locked footlocker could not be searched incident to arrest).

<sup>45</sup> See *Robinson*, 414 U.S. at 236.

<sup>46</sup> For examples of how lower federal courts have applied *Riley*, see *U.S. v. Lara*, 815 F.3d 605 (9th Cir. 2017); *U.S. v. Eisenhour*, 44 F. Supp. 3d 1028 (D. Nev. 2014); *U.S. v. Spears*, 31 F. Supp. 3d 869 (N.D. Tex. 2014).

their First Amendment right to gather news.<sup>47</sup> Absent voluntary consent or a case-specific exigent circumstance, law enforcement cannot search a journalist's cellphone. Law enforcement can, however, seize it, examine it for physical threats, and secure it while a warrant is pending to search its contents.<sup>48</sup> During an arrest, law enforcement can also search the immediate surrounding area and personal property immediately associated with the journalist's person such as an equipment bag, even without a safety or evidence preservation justification.

Although *Riley* did not decide whether the Fourth Amendment permits searches of data on other devices, such as digital cameras, incident to arrest, the Supreme Court has suggested that treatment of other devices should be the same, since cellphones can "just as easily be called cameras, video players, rolodexes, calendars, tape recorders, libraries, diaries, albums, televisions, maps, or newspapers."<sup>49</sup> Nonetheless, at least one state court has been hesitant to extend the *Riley* holding to digital cameras and instead decided the issue under its state constitution.<sup>50</sup> Thus, absent further guidance from the Supreme Court, protections against law enforcement searches of data on devices other than cellphones will likely vary by jurisdiction.

The Supreme Court also recently expanded privacy protections for newsgathering activities with its decision in *Carpenter v. United States*.<sup>51</sup> The Court held that the Fourth Amendment requires the government to obtain a warrant to access historical cellphone location records held by wireless carriers, extending protections to third-party records for the first time. This decision strengthens journalists' ability to gather information and inform the public by preventing the government from unreasonably securing location data that can expose a journalist's movements, unmask sources, and reveal the stories that the journalist is reporting.

## Privacy Protection Act of 1980

The Privacy Protection Act of 1980 provides additional protections against searches and seizures of materials intended for publication.<sup>52</sup> This law restricts the government from searching or seizing "any work product materials" or "documentary materials" from someone "reasonably believed to have a purpose to

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<sup>47</sup> See Robert Corn-Revere, *Protecting the Tools of Modern Journalism*, AMERICAN BAR ASSOCIATION: COMMUNICATIONS LAWYER (Sept. 2014), [https://www.americanbar.org/publications/communications\\_lawyer/2014/september14/protecting.html](https://www.americanbar.org/publications/communications_lawyer/2014/september14/protecting.html) ("Smartphones have become an integral part of modern newsgathering technology.")

<sup>48</sup> *Riley*, 134 S. Ct. at 2485.

<sup>49</sup> *Riley*, 134 S. Ct. at 2489.

<sup>50</sup> See *Commonwealth v. Mauricio*, 80 N.E.3d 318 (Mass. 2017).

<sup>51</sup> No. 16-402, 585 U.S. \_\_\_\_\_ (2018)

<sup>52</sup> 42 U.S.C. § 2000aa.



disseminate to the public a newspaper, book, broadcast, or other similar form of public communication.”<sup>53</sup>

If law enforcement attempts to search or seize journalists’ work product or documentary materials, journalists should make clear that they are members of the press, intend to disseminate materials to the public, and are therefore protected by the Privacy Protection Act (in addition to the Fourth Amendment). Whether the police were (or should have been) on notice that an individual intends to disseminate materials to the public can play a significant factor in any later lawsuits to challenge the seizure of materials.<sup>54</sup> Wearing press credentials and carrying a camera and videotapes may be sufficient to put law enforcement on notice of an intent to disseminate.<sup>55</sup>

The Act includes an exception where there is probable cause to believe the person possessing the materials has committed or is committing a criminal offense to which the materials relate.<sup>56</sup> In one case, a court found that police did not violate the Act when they searched the home and seized the equipment of a photojournalist whose actions (not displaying press credentials, behaving similarly to protestors, and fleeing with protestors when vandalism occurred) supported the conclusion that she “conspired with the group of vandals or aided and abetted the offenses committed by the group.”<sup>57</sup>

Police may also seize materials, if they act in good faith, to ensure safekeeping during arrest, but only if journalists receive their equipment back within a

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<sup>53</sup> *Id.* “Work product materials” are those that are (1) “prepared, produced, authored, or created by the person in possession of the materials or by any other person; (2) are possessed for the purposes of communicating such materials to the public; and (3) include mental impressions, conclusions, opinions, or theories of the person who prepared, produced, authored, or created such material.” 42 U.S.C. § 2000aa-7(b). “Documentary materials” are “materials upon which information is recorded” such as written or printed materials, photographs, motion picture films, negatives, video tapes, audio tapes, and other mechanically, magnetically or electronically recorded cards, tapes, or discs. *Id.* at (b). To qualify as protected work product or documentary materials, they may not be contraband, fruits of a crime, or otherwise possessed for a criminal purpose. *Id.* at (a-b).

<sup>54</sup> See, e.g., *Binion v. St. Paul*, 788 F. Supp. 2d 935 (D. Minn. 2011) (denying summary judgment on Privacy Protection Act claim where fact issue existed regarding whether journalist put police officers on notice that she intended to disseminate videotapes to the public); *Garcia*, 145 F. Supp. 3d at 524-25 (same); see also *Teichberg v. Smith*, 734 F. Supp. 2d 744, 751-52 (D. Minn. 2010) (granting summary judgment on Privacy Protection Act claim where plaintiff did not identify himself as a journalist, and seizure was temporary).

<sup>55</sup> *Binion*, 788 F. Supp. 2d at 949-48.

<sup>56</sup> See 42 U.S.C. § 2000aa(a)(1), (b)(1); *Sennett v. U.S.*, 667 F.3d 531 (4th Cir. 2012); *Berglund v. Maplewood*, 173 F. Supp. 2d 935 (D. Minn. 2001).

<sup>57</sup> *Sennett*, 667 F.3d at 534-37; see also *Garcia*, 145 F. Supp. 3d at 524-25 (denying government’s motion for summary judgment where fact issues existed regarding whether there was probable cause to believe the plaintiff engaged in disorderly conduct and whether the video recording related to that offense); *Binion*, 788 F.Supp.2d at 948 (finding the probable cause exception inapplicable where law enforcement did not have probable cause to arrest the journalist).

reasonable period of time. For example, a California court dismissed a journalist's claim under the Act when law enforcement seized his camera and notebook during his arrest for short-term safekeeping.<sup>58</sup> In contrast, claims made under the Act tend to be resolved in favor of a journalist where law enforcement substantially interferes with the journalist's newsgathering and reporting abilities or never returns the journalist's property.<sup>59</sup> For example, an Oregon court found a citizen journalist adequately stated a claim under the Act when an officer interfered with her attempt to livestream an arrest using her cellphone, because the officer grabbed her phone, terminating the broadcast, and ordered her to show him the video.<sup>60</sup>

## Common Charges

**Location-Based Offenses:** Trespassing is one of the most common charges journalists face when arrested while covering protests<sup>1</sup>. Journalists should be cognizant of where they are at all times and try to avoid trespassing on private property.

**Conduct-Based Offenses:** Journalists are also frequently arrested, along with protesters, for disorderly conduct<sup>2</sup>, obstruction<sup>3</sup>, and failure to disperse<sup>4</sup>. Other possible charges include failing to obey an officer's orders, disturbing the peace, and resisting arrest. These charges involve a degree of subjectivity from the arresting officer, which can make it difficult to know what conduct is criminal. To help avoid arrest, journalists should prominently display their press credentials and follow police orders to the extent possible.

**Wiretapping Violations:** Although an increasing number of courts have recognized a right to record police officers performing their duties in public, it is still illegal in most states to surreptitiously record a private conversation without the consent of at least one party, or, in some states, all parties<sup>5</sup>. Whether a conversation is private is a fact-specific analysis that typically considers whether the person recorded had a reasonable expectation of privacy. Wiretapping laws vary considerably across the country.

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1. See Arrests of journalists involving trespass charges or threatened charges, U.S. Press Freedom Tracker, <https://pressfreedomtracker.us/all-incidents/?categories=4&charges=5>.

2. See Arrests of journalists involving disorderly conduct charges, U.S. Press Freedom Tracker, <https://pressfreedomtracker.us/all-incidents/?categories=4&search=disorderly%20conduct>.

3. See Arrests of journalists involving obstruction charges, U.S. Press Freedom Tracker, <https://pressfreedomtracker.us/arrest-criminal-charge/?search=obstruction>.

4. See Arrests of journalists involving failure to disperse charges, U.S. Press Freedom Tracker, <https://pressfreedomtracker.us/all-incidents/?categories=4&charges=15>.

5. See *generally Tape-recording laws at a glance*, Reporter's Recording Guide (Aug. 1, 2012), <https://www.rcfp.org/reporters-recording-guide/tape-recording-laws-glance>.

<sup>58</sup> See Eberhard, 2015 WL 6871750 at \*8.

<sup>59</sup> See *Medina v. City of Portland*, 2015 WL 4425876 at \*1-2 (D. Or. 2015) (substantial interference with smart phone broadcast); *Garcia*, 145 F.Supp.3d at 498 (permanent seizure of video card).

<sup>60</sup> See *Medina*, 2015 WL 4425876 at \*1-2

# PRESS RIGHTS AT A PROTEST

## 1. DO I HAVE A FIRST AMENDMENT RIGHT TO COVER A PROTEST?

Yes, with limitations. Freedom of the press protects the right to collect and disseminate news, but the right is not absolute. Members of the media are subject to the same general laws as other citizens and do not have a special right of access to sources of information. However, police may not arrest a reporter or deny access simply to retaliate for negative news coverage or to prevent reporting on a public demonstration.

## 2. DO I HAVE A FIRST AMENDMENT RIGHT TO RECORD THE POLICE?

Most courts recognize a First Amendment right to record the public activities of law enforcement, but the issue is not settled in all jurisdictions. In addition, it is illegal in most states to surreptitiously record a private conversation without the consent of at least one party or, in some states, all parties. Journalists should familiarize themselves with the applicable wiretapping law. To reduce legal risks, journalists should clearly identify themselves as members of the press, record from safe distances, and remain open and transparent about recording.

## 3. CAN POLICE SEARCH AND SEIZE ME AND MY EQUIPMENT?

Police can briefly detain you if they have reasonable suspicion to believe you are engaged in criminal activity, and they can “frisk” or pat you down if they have an objective, reasonable belief that you are armed and dangerous. If police have probable cause to believe you are committing a crime, they can arrest you. Although a search of someone’s property generally requires a warrant issued by a court, during an arrest, police can search and seize personal property on your person and in your immediate vicinity. Although police cannot search the contents of a cellphone without a warrant, they can still seize it during an arrest, examine it for physical threats, and secure it while a warrant is pending. Other recording devices, such as cameras, may have similar protections, depending on the jurisdiction.

Under the Privacy Protection Act, the government cannot search or seize work product or documentary materials if the journalist intends to disseminate the materials to the public and is not engaged in any criminal activity to which the materials relate. Journalists should clearly identify themselves as members of the media to put police on notice that this law applies to them.

To mitigate the possible harm of a search or seizure, journalists can use live streaming platforms, minimize the amount of data kept on devices, and demand a court order for password requests. Journalists can also avoid consenting to searches, while remaining respectful.

## 4. CAN I RESIST POLICE ORDERS BASED ON MY RIGHTS?

Possibly, but it is not recommended. Depending on the context and the applicable state laws, doing so could put you at risk of arrest for various crimes such as failure to obey, failure to disperse, obstruction of justice, and disorderly conduct. Journalists should comply with requests from law enforcement but can calmly discuss their rights if they feel a request violates those rights. Journalists should remain respectful when interacting with police and avoid acting in a manner that incites violence, creates danger, or interferes with law enforcement.

## 5. WHAT STEPS CAN I TAKE TO AVOID ARREST?

You should identify yourself as a member of the press, be aware of what is happening around you during the event you are covering, and avoid breaking the law. See the [Reporters Committee’s tip sheet](#) for more.