

How to Responsibly Record Mobile Video of Civil Rights Violations: FAQs from the Multicultural Media, Telecom & Internet Council

These FAQs were prepared by the Multicultural Media, Telecom & Internet Council (MMTC), the leading advocate for diversity and inclusion in telecommunications.* The FAQs are intended to prepare you to use wireless devices, such as video-equipped cell phones, to record police conduct in order to (1) hold accountable those law enforcement officers and others that engage in activities that may violate basic civil rights; and (2) applaud and highlight law enforcement activities that recognize and protect individuals' civil rights. These FAQs are for informational use only. They do not constitute legal advice and should not be used as such.

Introduction

Tamir Rice, Walter Scott, Freddie Gray, Alton Sterling, Philando Castile ... these are just a few of the names of African Americans who have been killed at the hands of police in 2015 and 2016 alone. While it is not a new phenomenon, the increase in videos of police misconduct has certainly changed the conversation. With the increase of dash cams, body cams, and citizen videos, police are now on high alert that their actions are not only being watched, but they may be held accountable.

Speaking December 21, 2015 on National Public Radio, President Obama declared that “[t]here’s no black family that hasn’t had a conversation around the kitchen table around driving while black and being profiled or being stopped. *I think really what’s changed over the past several years has been the pervasiveness of smartphones and the visuals that suddenly have sparked a conversation about how we can deal with it.* And although it’s uncomfortable sometimes, I actually think that over the long term, it’s how, in Dr. King’s words, you get a disinfectant in applying sunlight to it” (emphasis supplied).¹

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¹ Interview with President Barack Obama, National Public Radio (December 21, 2015), available at <https://www.youtube.com/watch?v=MNop1dom1m8> (last visited Jan. 4, 2019); see also Leah Donnell, “‘Sometimes Progress Is A Little Uncomfortable: President Obama on Identity Politics,’” NATIONAL PUBLIC RADIO (December 21, 2015) (emphasis added), available at <https://www.npr.org/sections/codeswitch/2015/12/21/460558449/sometimes-progress-is-a-little-uncomfortable-president-obama-on-identity-politic> (last visited Jan. 4, 2019).

MMTC's Santana Resolution was inspired by the heroic actions of Feidin Santana, the young man who recorded the shooting death of Walter Scott at the hands of law enforcement in N. Charleston, SC. The video shot by Mr. Santana led directly to the arrest and indictment of the officer. Without that video, it is highly likely that the officer would have gotten away with this unjustified killing of an unarmed and non-threatening black man. The purpose of the Santana Resolution is to train the members of 11 national organizations and others on how to record police misconduct and other potential civil rights violations in a responsible manner.²

Why Should You Record the Police?

1. According to The Washington Post, as of May 1, 2018, 36 percent of the unarmed people shot to death by police since 2015 are black, even though only approximately 13 percent of the U.S. population is comprised of black people.³ Although the total number of unarmed fatalities has declined since 2015, black people continue to be killed by police at more than twice the rate of white people.⁴ Recording allows people to capture an incident in order to have an independent review of the officer's actions without resorting to hearsay, faulty memories, or misconceptions regarding the actual scene. In light of the statistics cited above, it is time to call attention to the bias and other problems that impact interactions with the police. Shedding light on this American problem benefits every American—not only can recording of police conduct serve to hold individual officers accountable for wrongdoing and potentially deter others from acting in a similar manner, it also can highlight lawful police conduct as a model for law enforcement agencies around the nation.

² See Press Release, Multicultural Media, Telecom and Internet Council, MMTC Adopts 'Santana Resolution' to Encourage Mobile Video Use to Document Important Events (July 15, 2015), available at <http://broadbandandsocialjustice.org/2015/07/mmtc-adopts-santana-resolution-to-encourage-mobile-video-use-to-document-important-events/> (last visited Jan. 8, 2019) (containing full text of Santana Resolution).

³ John Sullivan, Julie Tate, and Jennifer Jenkins, *Fatal Police Shootings of Unarmed People Have Significantly Declined, Experts Say*, THE WASHINGTON POST, May 7, 2018, available at https://www.washingtonpost.com/investigations/fatal-police-shootings-of-unarmed-people-have-significantly-declined-experts-say/2018/05/03/d5eab374-4349-11e8-8569-26fda6b404c7_story.html?utm_term=.30c5007f0c13 (last visited Jan. 8, 2019) ("Since The Post began tracking fatal police shootings, blacks have been shot and killed at rates significantly higher than their percentage of the overall U.S. population.").

⁴ See 2018 Police Shootings Database, THE WASHINGTON POST, at https://www.washingtonpost.com/graphics/2018/national/police-shootings-2018/?utm_term=.02850f9f3e37 (last visited Jan. 8, 2019) (indicating that 209 of the 996 people shot and killed by the police in 2018 were black, as compared to 401 white people fatally shot by police in the same time period).

What Is the Law on Recording the Police?

2. Is it illegal to record police conduct in public?

- a. In general, subject to the discussion set forth elsewhere in these FAQs (including the discussion of state wiretapping and eavesdropping laws), it is not illegal to record police officers engaged in the public discharge of their duties, so long as you do not interfere with the police and you abide by other reasonable restrictions as to the time, place, and manner of your recording.
- b. On May 14, 2012, the Special Litigation Section of the Civil Rights Division of the Department of Justice (“DOJ”) released a thorough advisory letter stating that non-intrusive, respectful videotaping of police officers in a public setting is protected by the First Amendment of the Constitution (“Letter to Baltimore Police Department”).⁵ The DOJ and the American Civil Liberties Union (“ACLU”) have stood by this interpretation of the law.
- c. There is no uniform federal law or Supreme Court decision affirming the positions taken by the DOJ in the Letter to Baltimore Police Department. As of January 8, 2019, federal appeals courts covering 25 states have found that the First Amendment provides the right to photograph and record public police conduct, subject to reasonable time, place, and manner restrictions.⁶ To date, no court has found a limitation on the First Amendment right for bystanders to record police activity beyond reasonable time, place, and manner restrictions applicable to all First Amendment activity and the potential application of state wiretapping laws. However, because there is no Supreme Court decision or uniform nationwide legal standard governing the recording of public police conduct, it is important to make yourself familiar with the laws of your state before you record police conduct. If you still have questions after familiarizing yourself with the laws of your state, contact your local ACLU office.⁷
- d. In addition, the DOJ Letter to Baltimore Police Department encouraged police departments to adopt and make publicly available policies regarding the recording

⁵ Letter from Jonathan M. Smith, Chief, Special Litigation Section, Civil Rights Division, U.S. Department of Justice, to Mark H. Grimes, Office of Legal Affairs, Baltimore Police Department (May 14, 2012), *available at* https://www.justice.gov/sites/default/files/crt/legacy/2012/05/17/Sharp_ltr_5-14-12.pdf (last visited Jan. 8, 2019).

⁶ See *Fields v. City of Phila.*, 862 F.3d 353 (3d Cir. 2017); *Phillip Turner v. Lt. Driver, et al.*, 848 F.3d 678 (5th Cir. 2017); *Gericke v. Begin*, 753 F.3d 1 (1st Cir. 2014); *American Civil Liberties Union of Ill. v. Alvarez*, 679 F.3d 583 (7th Cir. 2012); *Glik v. Cunniffe*, 655 F.3d 78, 82 (1st Cir. 2011); *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000); *Fordyce v. City of Seattle*, 55 F.3d 436, 439 (9th Cir. 1995).

⁷ See AMERICAN CIVIL LIBERTIES UNION, <https://www.aclu.org/about/affiliates?redirect=affiliates> (last visited Jan. 8, 2019).

of police misconduct by the public.⁸ In response to that letter and/or in connection with the settlement of specific cases, some police departments have issued official policies or guidelines regarding the recording of police officers.⁹ These policies provide valuable and specific information regarding how officers in these departments should handle video recording by members of the public. We recommend that, prior to recording police conduct, you contact your local police department to determine whether such guidelines or policies have been adopted and are available to the public.

3. Which laws protect my right to record police misconduct?

- a. The First Amendment of the Constitution. As described above, this right is limited only by reasonable time, place, and manner restrictions.¹⁰ However, whether you can lawfully record the audio portion of an interaction with the police depends upon each state's laws regarding recording, wiretapping, and eavesdropping. Due to the increase in video recordings of police activities, the courts have begun to flesh out the law in this area. As noted in Q&A #2(c) above, it is vital that you make yourself familiar with the laws in your state, particularly on recording and wiretapping, before you begin recording police activity.¹¹
- b. In the vast majority of states and the District of Columbia, citizens can record in-person conversations with the consent of one party to the conversation.¹² You can

⁸ See Letter to Baltimore Police Department at 11 (“Comprehensive policies and effective training are critical to ensuring that individuals’ First, Fourth and Fourteenth Amendment rights are protected when they record police officers in the public discharge of their duties.”).

⁹ E.g., *Video Recording, Photographing and Audio Recording of Metropolitan Police Department Members by the Public*, General Order, D.C. Metropolitan Police Department (issued July 19, 2012) available at https://go.mpdonline.com/GO/GO_304_19.pdf (last visited Jan. 8, 2019). This policy was adopted as part of a settlement of a civil suit against the D.C. police department in connection with a police officer preventing a bystander from recording a traffic stop. Tim Cushing, *DC Police Chief Lays Down New Cell/Camera Policy: ‘Don’t Seize. Don’t Delete. Don’t Interfere.’* TECHDIRT, July 25, 2012, available at <https://www.techdirt.com/articles/20120724/15385919815/dc-police-chief-lays-down-new-cellcamera-policy-dont-seize-dont-delete-dont-interfere.shtml> (last visited Jan. 8, 2019).

¹⁰ See, e.g., *Glik*, 655 F.3d at 84; *Smith*, 212 F.3d at 1333.

¹¹ Because the law in this area is continually evolving, if you have any questions after reviewing the laws in your state, you should contact your local chapter of the ACLU to discuss your questions or concerns.

¹² The consent of only one party is required in Alabama, Alaska, Arizona, Arkansas, Colorado, Connecticut (but consent of all parties is required to avoid civil liability), District of Columbia, Georgia, Hawaii, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Minnesota, Mississippi, Missouri, Nebraska, Nevada (but the consent of all parties is required to record a telephone conversation, see *Lane v. Allstate Ins. Co.*, 114 Nev. 1176, 969 P.2d 938 (1998)), New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, West Virginia,

give this consent if you are a participant in the conversation being recorded. If you are not participating in the conversation, consent can be given by any party to the conversation to be recorded. In these one-party consent states, the wiretapping laws allow you to record your own interactions, including those with police as they are discharging their duties under the law, whether or not you are in a public area or the police know you are recording.¹³ If you are recording an interaction between the police and someone else in a one-party consent state, it could be argued that you have violated the state wiretapping law if you record without obtaining the consent of either party. However, as described in Q&A #3(d) below, there are exceptions to the wiretapping laws where the parties being recorded have no “reasonable expectation of privacy,” such as in public places where the interaction is easily observed and overheard by passersby, and where the parties being recorded know that the interaction is being recorded and continue the interaction anyway. As a result, if you are conspicuously recording public police conduct that anybody in the area could see and overhear, you can legally record the interaction between the police and someone else.

- c. In California, Florida, Illinois, Maryland, Massachusetts,¹⁴ Michigan,¹⁵ Montana,¹⁶ New Hampshire, Pennsylvania and Washington¹⁷—you must obtain the consent of all parties to record an in-person conversation.¹⁸

Wisconsin, and Wyoming. In addition, note that Delaware is a one-party consent state under its wiretapping statute but it is a violation of Delaware privacy law to record private conversations without the consent of all parties.

¹³ This is because you are a party to the recorded activity. See Steve Silverman, *7 Rules for Recording Police*, FLEX YOUR RIGHTS, May 21, 2012, available at <https://www.flexyourrights.org/7-rules-for-recording-police> (last visited Jan. 8, 2019) (“Silverman Article”); *Know Your Rights: Photographers: What to Do If You Are Stopped or Detained From Taking Photographs*, AMERICAN CIVIL LIBERTIES UNION, available at <https://www.aclu.org/know-your-rights/photographers-what-do-if-you-are-stopped-or-detained-taking-photographs?redirect=know-your-rights-photographers> (last visited Jan. 8, 2019) (“ACLU Photographers’ Rights”).

¹⁴ Note that, December 2018, a federal district court in Massachusetts ruled that the Massachusetts wiretapping statute may not be used to “prohibit the secret audio recording of government officials, including law enforcement officials, performing their duties in public spaces, subject to reasonable time, manner, and place restrictions.” *Martin v. Gross*, Civil Action No. 16-11362-PBS (D. Mass. Dec. 10, 2018).

¹⁵ Michigan’s statute, on its face, requires the consent of all-parties to record a private conversation. In 1982, an appellate court held that the statute does not prohibit a person from recording without the consent of all parties so long as the person making the recording is also a participant in the conversation. See *Sullivan v. Gray*, 324 N.W.2d 58 (Mich. Ct. App. 192). Under Michigan law, a recording of a private conversation made by a person that is not a party to the activity, e.g., a bystander, would require the consent of all parties.

¹⁶ In Montana, a recording can be made without the consent of all parties if one person provides a warning that the recording is being made. See MONT. CODE ANN. § 45-8-213(1)(c)(iii). In addition, the Montana all-party consent requirement does not apply to recordings of public

- d. In both one-party and all-party consent states, there is generally an exception to the consent requirement in state wiretapping laws where the person being recorded does not have a “reasonable expectation of privacy” in the circumstances under which he or she is being recorded. This means that if you are recording police activity taking place in a public place that is easily observed and overheard by others in the area, there is no “reasonable expectation of privacy” and you may openly record the police (or anyone in public).¹⁹ In contrast, you have a reasonable expectation of privacy when you are having a personal conversation with someone in your own home, or in your car with the windows rolled up. It is possible to have a reasonable expectation of privacy for a conversation had in a public place, such as one in which the parties are huddled in a corner and whispering. Because the reasonableness of someone’s expectation of privacy is evaluated based on the unique facts of each interaction, it is best to record those instances in which it is most clear that there is no reasonable expectation of privacy—police conduct in the public discharge of their duties, in public places where the conduct is easily observed and overheard. In addition, where the parties to a conversation are aware that it is being recorded and continue the conversation anyway, it may be presumed that they have consented to the recording. As a result, it is best to be clear that you are recording the activity by conspicuously holding your camera or mobile device and, if necessary, stating that you are recording, rather than hiding it or otherwise attempting to record surreptitiously. This is particularly important when you are recording interactions to which you are not a party (that is, between the police and somebody else).

4. When and where is it ok to record police conduct?

- a. You may legally record on-duty police officers while they are conducting their duties in a public space or a private space where you have a right to be, such as your own property or the private property of someone whose permission you have to be there.²⁰

5. What is a public space?

employees in the performance of their official duties. *See* MONT. CODE ANN. § 45-8-213(1)(c)(i).

¹⁷ In Washington, consent is considered to have been obtained if a person announces, in a reasonable manner, to the other individuals engaged in the conversation that the conversation will be recorded, provided the announcement is also recorded. *See* REV. CODE WASH. (ARCW) § 9.73.030(3).

¹⁸ *See also supra* at n. 12 (stating that certain one-party consent state laws have been interpreted to require consent of all parties in certain circumstances, and noting those states with conflicts in their laws). The state of Vermont has not enacted a wiretapping statute.

¹⁹ *See* ACLU Photographers’ Rights, *supra* n. 13.

²⁰ *See* Letter to Baltimore Police Department, 3-4.

- a. Traditionally, public spaces include sidewalks, streets, and public parks.²¹ However, First Amendment protections also apply to recordings of police conduct on private property.²² Thus, you may record police activity from your home or other private property where you have a right to be present.²³ For example, the 1991 assault of Rodney King was recorded by an individual who was awakened by sirens and recorded the scene from the balcony of his apartment.²⁴

Interacting with Police

6. What should I do if the police ask me to stop recording?

- a. If approached by police, remember to stay calm and respectful, yet firm in your position.²⁵ At your discretion, you may tell the officer, in a polite and non-threatening manner, your knowledge of the laws of your state.²⁶ If at any point you feel uncomfortable or physically threatened, you should stop recording and consider filing a formal, written complaint concerning the incident.
- b. If an officer asks you to stop recording because you are infringing on his rights, and assuming you are in a one-party consent state, you may respond “Respectfully Officer, the state law only requires the consent of one party in a conversation. As long as I am not interfering with your work I’m allowed to continue recording.”²⁷
- c. If you live in one of the handful of all-party consent states, you may respond with “I’m aware of the law, however, courts have ruled that it doesn’t apply to on-duty police officers in public places.”²⁸
- d. Never argue with the officer. If the officer insists you stop recording after politely telling them your knowledge of the law, just let it go and stop recording. But consider filing a formal, written complaint regarding the incident.

7. Do I need to obtain consent to record police?

²¹ *See id.* at 4.

²² *Id.* at 4 (citing federal court precedent).

²³ *See id.* at 3-4.

²⁴ *Id.*

²⁵ *See Silverman Article, supra* n. 13.

²⁶ *See id.*

²⁷ *See id.*

²⁸ *See id.*

- a. If you live in one of the all-party consent states listed above, then consent may be required to record police activity. However, the “reasonable expectation of privacy” exception to privacy and wiretapping laws works in your favor. Under this exception, there is no reasonable expectation of privacy for activities and conversations easily observed or overheard in public places, meaning an on-duty police officer (or anyone in a public space) cannot expect that their actions will be considered private and those actions can thus be legally recorded.²⁹ Likewise, if it is obvious that you are recording and the police continue the interaction, courts will likely presume that their continuation of the interaction constitutes consent to the recording, though there is no case law specifically addressing this issue. Accordingly, to err on the side of caution in an all-party consent state, you should clearly state that you are recording at a volume loud enough to be heard.

8. Can I be legally charged with a crime for recording public police conduct?

- a. In some states, arguably. As stated above, the DOJ, ACLU, and a number of federal appeals courts have found that the right to record public police conduct in the discharge of their official duties is protected by the First Amendment, subject to reasonable time, place, and manner restrictions. In the states where the First Amendment right to record public police conduct has been clearly established by federal courts,³⁰ you should not be charged with a crime for making a video recording public police conduct so long as you do not interfere with the police and abide by reasonable time, place, and manner restrictions. However, in the states where the First Amendment right has not been clearly established, recording the police arguably remains subject to the restrictions of the state’s wiretapping laws, and there is the possibility that you could be arrested and charged with violating these laws.³¹ And, regardless of whether you live in a state where the First Amendment right to record public police conduct is clearly established, this does not mean that the police are aware of the right to record, or that they cannot find another reason to arrest you. Some police officers have charged people with catchall misdemeanors like obstruction of justice or even disorderly conduct for recording them. If an officer instructs you to stand back or states that you are

²⁹ See *supra* Q&A #5 for a discussion of public spaces.

³⁰ This includes the states and territories under the jurisdiction of the First, Third, Fifth, Seventh, Ninth, and Eleventh Circuit Courts of Appeals: Maine, New Hampshire, Massachusetts, Rhode Island, Puerto Rico, Louisiana, Mississippi, Texas, Indiana, Illinois, Wisconsin, Montana, Idaho, Washington, Oregon, California, Nevada, Arizona, Alaska, Hawaii, Guam, the Northern Mariana Islands, Alabama, Georgia, Florida, Delaware, New Jersey, Pennsylvania, and the U.S. Virgin Islands.

³¹ This includes the states and territories under the jurisdiction of the Second, Fourth, Sixth, Eighth, Tenth, and District of Columbia Circuit Courts of Appeals: Vermont, New York, Connecticut, West Virginia, Maryland, Virginia, North Carolina, South Carolina, District of Columbia, Michigan, Ohio, Kentucky, Tennessee, Minnesota, Iowa, Missouri, Arkansas, Nebraska, North Dakota, South Dakota, Oklahoma, Kansas, Wyoming, Colorado, New Mexico, Utah.

interfering with their work, obey them and get out of their way. Police officers may legitimately order citizens to stop activity that interferes with their work, and courts are more likely to take their word than yours.³²

9. What if the police ask me for ID?

There is no federal law that requires you to carry a government-issued ID.³³ However, the laws of several states permit police to ask you to identify yourself if the police have “reasonable suspicion” that you are involved in a crime.³⁴ To determine whether an officer has reasonable suspicion, you may politely ask the officer whether you are being detained or if you are free to go.³⁵ If the officer says that you are free to go, or indicates that you are not being detained, you have no legal obligation to identify yourself and are thus may choose to stay or leave.³⁶ If, however, you are being detained, you may say “Officer, I’m not required to show you my ID by law, however, my name is [full name].”³⁷ You may also give them your date of birth and address if you choose, but it is not required.³⁸

10. Are mainstream media journalists the only ones allowed to record police conduct?

No. The First Amendment protection applies to all citizens.

11. What should I do if the police threaten to arrest me?

³² *Know Your Rights When Taking Photos and Making Video and Audio Recordings*, AMERICAN CIVIL LIBERTIES UNION OF PENNSYLVANIA, available at <http://www.aclupa.org/issues/policepractices/your-right-record-and-observe-police/taking-photos-video-and-audio> (last visited Jan. 8, 2019) (“ACLU-PA Recording Rights”).

³³ Silverman Article, *supra* n. 13.

³⁴ *Id.* These laws – which are commonly referred to as “stop and identify” laws – have been enacted in Alabama, Arizona, Arkansas, Colorado, Delaware, Florida, Georgia, Illinois, Indiana, Kansas, Louisiana, Missouri (Kansas City only), Montana, Nebraska, Nevada, New Hampshire, New Mexico, New York, North Dakota, Ohio, Rhode Island, Utah, Vermont, and Wisconsin. In those states that have not enacted express “stop and identify” laws, there may be local ordinances that might require you to identify yourself to a law enforcement officer.

³⁵ See Silverman Article, *supra* n. 13; ACLU-PA Recording Rights, *supra* n. 32.

³⁶ *Id.*

³⁷ Silverman Article, *supra* n. 13. If you are being detained, you may also politely ask the officer to tell you why you are being detained (e.g., the crime you are suspected of committing) and respectfully remind the officer that recording police activity is a protected right and does not equate to reasonable suspicion. ACLU-PA Recording Rights, *supra* n. 32.

³⁸ Silverman Article, *supra* n. 13.

- a. If the police threaten to arrest you, you should take this seriously.³⁹ Remain, calm, polite and compliant. You may choose to obey them and turn off your recording device saying something like, “I will turn it off, but I am doing so under protest.”⁴⁰ You can later file a formal, written complaint regarding the incident.
- b. If you choose to continue recording, be prepared to face an arrest.⁴¹ Do not resist, but try your best not to drop your camera.⁴² Remember that you have the right to remain silent and the right to an attorney, and you should explicitly assert both of these rights.⁴³ Also, remember that if you are still recording, the recording may be used for or against you in court, so do your best to remain calm and respectful. If you are arrested for recording police activity, after asserting your right to remain silent and your right to an attorney, contact your local chapter of the ACLU.

12. What if the police confiscate or destroy my phone?

The Supreme Court has ruled that the police may NOT search your cell phone without a warrant.⁴⁴ They may, however, seize your phone without a warrant if they have a reasonable belief that doing so is necessary to prevent the destruction of evidence of a crime while they seek a warrant.⁴⁵ Under no circumstances should the police delete pictures on your phone or destroy your phone.⁴⁶ This is illegal.⁴⁷ If you believe the police are illegally deleting your photos or video, peacefully but clearly voice your objection and state that it is illegal for them to do so. Do not, under any circumstances, try to retrieve your phone or make physical contact with the officer in any way. If you find that the police have, in

³⁹ Silverman Article, *supra* n. 13.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.* See also, *When Can Police Search Your Car*, FLEX YOUR RIGHTS, available at <https://www.flexyourrights.org/faqs/when-can-police-search-your-car/> (last visited Jan. 8, 2019) (reminding that you should affirmatively assert your rights to remain silent and be represented by legal counsel regardless of whether the police have informed you of such rights).

⁴⁴ See *Riley v. California*, 573 U.S. ___, 134 S.Ct. 2473 (2014); ACLU Photographers’ Rights, *supra* n. 13.

⁴⁵ *Id.*

⁴⁶ See ACLU Photographers’ Rights, *supra* n. 13 (stating that police officers “have faced felony charges of evidence tampering, obstruction, and theft for taking a photographer’s memory card.”).

⁴⁷ See Letter to Baltimore Police, at 2 (“Private individuals have a First Amendment right to record police officers in the public discharge of their duties, and that officers violate individuals’ Fourth and Fourteenth Amendment rights when they seize and destroy such recordings without a warrant or due process.”).

fact, deleted images or video or destroyed your phone, contact a lawyer or your local chapter of the ACLU to discuss your legal options. Using the apps discussed in Q&As #23 and 24 will help to further protect your recording from illegal tampering.

13. What if the police ask me to delete my recording?

The police do not have the right to ask you to delete anything on your phone.⁴⁸ If they ask you to do so, calmly and politely inform them that you are under no legal obligation to delete anything on your phone.

14. Should I inform police of my constitutional rights to record if threatened?

Remember to remain calm and polite. Gauge the situation. If the officer is calm and you feel comfortable doing so, you may state your knowledge of your rights under the Constitution and have a dialogue. However, if the officer is angry and combative, it is best to stop recording and put your phone away. You can always file a formal, written complaint regarding the incident at a later time.

⁴⁸ *See id.*

Recording on Election Day

15. Why should I record voter intimidation or other Polling Place irregularities?

- a. “Ballot security” initiatives are practices carried out by political parties and private groups to prevent voter fraud.⁴⁹ However, far too often these practices prevent eligible voters from casting their ballots inadvertently or by intentionally interfering with voting rights.⁵⁰ By recording and documenting these instances of voter intimidation in compliance with applicable laws and policies, we bring awareness to this issue and deter it from happening.⁵¹
- b. At the same time, special care should be taken in any recording of voter intimidation not to interfere with other voters or the voting process, or to inadvertently violate laws aimed at preventing voter intimidation. Voting is a very private matter, and attempts to record in polling stations or within designated “buffer” zones⁵² are subject to various state and local laws, regulations, and policies designed to safeguard voter privacy, protect against voter intimidation, and to ensure the proper functioning of the voting process. Accordingly, prior to taking any photographs or videos of voter challenges on Election Day, check your local election board website for any policies or statements regarding the use of recording devices at or near polling stations. If no information is available or you have further questions regarding prohibited activities in or around polling stations, contact your local election officials.

⁴⁹ Wendy Weiser and Max Feldman, “The State of Voting 2018”, BRENNAN CENTER FOR JUSTICE, June 2018, at 13 *available at* https://www.brennancenter.org/sites/default/files/publications/2018_06_StateOfVoting_v5%20%281%29.pdf (last visited Jan. 8, 2019) (stating that “practices include efforts to identify improperly registered voters, often using unreliable methods; efforts to formally challenge the eligibility of individual or groups of voters; and efforts to discourage voters from committing fraud”).

⁵⁰ *See id.* (“In the heated environment of political campaigns, there is a high risk that these kinds of operations will lead to voter intimidation or deception.”).

⁵¹ The Voting Rights Project of the Lawyer’s Committee for Civil Rights, the Advancement Project’s Voter Protection initiative, and the NAACP Legal Defense Fund all provide extensive information regarding “ballot security” measures, common forms of voter intimidation, and how to identify, report, and protect against these practices. For more information visit <https://lawyerscommittee.org/project/voting-rights-project/> (last visited Jan. 4, 2019), <https://advancementproject.org/issues/voting-rights/> (last visited Jan. 4, 2019), and <https://www.naacpldf.org/our-impact/political-participation/> (last visited Jan. 4, 2019).

⁵² State and local laws and regulations prescribe a “buffer zone” around polling places in which certain activity is prohibited. Buffer zones typically range from 30-150 feet from the polling place, but vary among jurisdictions. You should review your local election board website and/or consult with local election officials to determine the buffer zone at any particular polling place.

16. Can I record voter intimidation at the polls?

- a. It depends on the statutes, regulations, and policies applicable to your polling location. The DOJ has found that in certain circumstances photographing or recording of individuals at the polls, or entering or exiting a polling place, is a form of voter intimidation prohibited by the Voting Rights Act.⁵³ Further, some states hold that voters have a right to cast their ballots in private,⁵⁴ and many states, such as Arizona,⁵⁵ Florida,⁵⁶ Georgia,⁵⁷ Kentucky,⁵⁸ Nevada,⁵⁹ and

⁵³ *E.g.*, Letter from Deval L. Patrick, Assistant Attorney General, Civil Rights Division, U.S. Department of Justice, to Constance Slaughter-Harvey, Mississippi Assistant Secretary of State for Elections (June 14, 1994), *available at* http://big.assets.huffingtonpost.com/cameras_ms_letter.pdf (last visited Jan. 8, 2019). *See also*, U.S. Attorney Liu Announces Appointment of Election Day Officer, Press Release, Department of Justice (Nov. 1, 2018), *available at* <https://www.justice.gov/usao-dc/pr/us-attorney-liu-announces-appointment-election-day-officer> (last visited Jan. 8, 2019) (stating that “actions of persons designed to interrupt or intimidate voters at polling places by questioning or challenging them, or by photographing or videotaping them, under the pretext that these are actions to uncover illegal voting may violate federal voting rights law”).

⁵⁴ *E.g.*, CAL. CONST. ART. II, § 7 (“voting shall be secret”); The State of Alabama’s Official Election Center, Alabama Votes.gov, Frequently Asked Questions, <https://www.sos.alabama.gov/alabama-votes/faqs> (last visited Jan. 8, 2019) (advising voters that photographs and videos are not allowed because “each voter has a right to cast a ballot in secrecy and in privacy” and stating that, although cell phones are permitted in the polling place, you cannot use your cell phone to “take photographs or film video inside the polling place.”).

⁵⁵ AZ. REV. STAT. § 16-515 (prohibiting photography and videos within seventy-five feet of the polling place).

⁵⁶ FLA. STAT. § 101.031(5) (expressly prohibiting all photography in the polling place).

⁵⁷ GA. CODE § 21-2-413(e) (prohibiting photographic or other recording devices in the polling area).

⁵⁸ KY. REV. STAT. § 117.236 (prohibiting the use of personal telecommunications devices to record the identity of voters). The Kentucky Secretary of State has interpreted this law to prohibit the use of a camera or other recording equipment at a polling place in Kentucky. *See* YouTube, Trey Grayson, Kentucky Election Information (posted Oct. 20, 2008), *available at* <https://www.youtube.com/watch?v=h0VGE0ycx0Y> (last visited Jan. 8, 2019) (stating that many people find photography at the polls intimidating); AJ Willinham, Andrea Diaz, Doug Criss, and Christina Maxouris, “Here’s What Each US State Says About Taking Ballot Selfies,” CNN, Nov. 2, 2018, *available at* <https://www.cnn.com/2018/11/02/us/taking-selfies-when-voting-laws-in-states-trnd/index.html> (last visited Jan. 8, 2019) (stating that Kentucky law prohibits “recording other people voting”).

⁵⁹ NEV. REV. STAT. § 293.274 (prohibiting photography, videotaping, and sound recording of conduct at a polling place).

California,⁶⁰ have statutes that make it generally illegal to record video or take photographs of voters inside and/or immediately outside polling stations. Many such laws, as well as other laws mandating the secrecy of ballots and voting have been interpreted or applied to prohibit all uses of recording devices in polling stations except in very limited circumstances, such as by *bona fide* news organizations.⁶¹

- b. In addition, many state election boards have adopted policies restricting, discouraging, or prohibiting use of cellphone cameras and other recording devices in polling stations and in the surrounding buffer zones.⁶² Check your local election board website or contact an election official to determine the policy at your polling station. Many polling places have signs prohibiting any photography or videography. These signs are usually placed inside the polling stations. If there are signs like this at your particular polling station, you should obey them. If a poll worker instructs you to put away a phone or camera, you should follow those instructions. Many polling places also have a 30-100 foot buffer zone in which certain activity, such as electioneering and photography, is prohibited. These zones are typically (but not always) marked by signs, flags, or chalk lines. Laws and policies regarding video or photography generally apply to these areas designated as buffer zones, such that recording instances of voting intimidation within a buffer zone could be deemed illegal.⁶³
- c. Even in states or counties where cameras and video recorders are not expressly prohibited at or near polling locations, you should avoid recording any individuals

⁶⁰ CAL. ELEC. CODE § 18541(a)(3) (prohibiting “[p]hotograph[ing], video record[ing], or otherwise record[ing] a voter entering or exiting a polling place” within 100 feet of a polling place). The Elections Division of the California Secretary of State has interpreted this law, in combination with others, to prohibit the use of cameras and video equipment at polling places, with limited exceptions for credentialed media and “ballot selfies” (i.e., photographs a voter takes of his/her own ballot to share on social media). Memorandum from Jana M. Lean, Chief, California Elections Division to All County Clerks/Registrars of Voters (May 4, 2018), *available at* <https://elections.cdn.sos.ca.gov/ccrov/pdf/2018/may/18104jl.pdf> (last visited Jan. 8, 2019). Note that the limited exceptions are subject to prohibitions, *inter alia*, “on interference with the conduct of elections and with the duties of election workers”, “regarding the intimidation of other voters”, and “on compromising the privacy of other voters casting a ballot.” *Id.*

⁶¹ *See, e.g., supra* at notes 56 and 58.

⁶² *E.g.,* RULES AND INFORMATION FOR VOTERS, *available at* https://elections.maryland.gov/voting/election_day_questions.html (last visited Jan. 4, 2019) (stating that cell phones, pagers, cameras, and computer equipment in an early voting center or at a polling place is prohibited); SOUTH CAROLINA ELECTION COMMISSION, POLL MANAGERS HANDBOOK, 44 (2018), *available at* <https://scvotes.org/sites/default/files/SEC%20MNL%201100-201804%20Poll%20Managers%20Handbook.pdf> (last visited Jan. 4, 2019) (instructing poll managers to ask voters not to use cell phones, tablets, or cameras in the voting area).

⁶³ *E.g.,* CAL. ELEC. CODE § 18541.

not directly engaged in voter challenges (e.g., persons voting or waiting in line to vote). As mentioned above, the U.S. Department of Justice has recognized that recording of individuals at polling stations can be a form of voter intimidation under certain circumstances, and many states have statutes protecting the privacy of voters, several of which have been interpreted to prohibit photography and videotaping in and around polling places.

- d. Typically, individuals engaging in voter intimidation at or near a polling station, such as third parties who are handing out flyers or shouting or demanding information from citizens at the polling place, are not actively voting or waiting in line to vote. In most circumstances, so long as a recording is made outside of a polling station and any applicable buffer zone, recording individuals engaging in voter intimidation who are not in the process of voting would not run afoul of laws designed to protect the privacy of voters and integrity of the voting process. Recording these individuals and their activities is the goal of documenting these situations. For example, to the extent consistent with applicable laws and policies, you might try to capture photos of flyers created to intimidate voters or actions or activities designed to frighten voters away.⁶⁴

17. Can I discreetly record voter intimidation at or near polls?

Videotaping in a discreet manner may be less likely to intimidate other voters, but as discussed above, some state wiretap laws prohibit the recording of “private” conversations without the consent of one or more of the recorded parties.⁶⁵

Surreptitious recording of private citizens, even in public places, could be considered a violation of state wiretap laws where the recorded party has a “reasonable expectation of privacy.” Moreover, the court cases discussed above finding that the First Amendment protects the right to videotape police executing their official duties do not necessarily apply to the recording of private citizens engaging in “ballot security” measures. Accordingly, it is best to keep your recording overt and directed towards the voter challenger rather than other individuals casting or waiting to cast their ballots.⁶⁶ In addition, surreptitious recording must not be used to circumvent local or state-specific prohibitions on the use of cellphones and cameras in or near polling stations.

18. What if a voter challenger approaches me?

⁶⁴ We recommend that you check your states laws, as well as your local election board website, for any restrictions regarding photography before taking such photographs.

⁶⁵ See *supra* Q&A #5.

⁶⁶ See *supra* Q&A #16 (explaining that recording instances of voter intimidation in a polling station, or within the buffer zone, could be deemed to violate laws aimed at protecting voter privacy (including those that restrict the use of cameras, videorecorders, etc.), particularly if the recording captures bystanders not involved in the misconduct).

Voter challengers have used various tactics to intimidate voters from asking if voters owe back taxes and child support to having police officers posted outside the polling place, which are all illegal. If a voter challenger approaches you, firmly state your knowledge of the law but do not engage in arguing with them. If you are in a location where cellphones and cameras are allowed, record the interaction or have someone with you record it, but capture only the voter challenger (and not other voters) in the recording. Voter challengers often use videotaping to intimidate voters, but it is also effective in deterring them from continued harassment.

19. Can I be arrested for recording voter intimidation at the polls?

In some states, yes. As discussed above, some states have laws that prohibit recording within the polling station or the buffer zone immediately outside of the polling station. Even in those states that do not have specific laws, as with any interaction with the police, there is always a chance you could be arrested. While there is no specific federal voting law against photographing at the polls, there are federal laws against voter intimidation and voting bribery.⁶⁷ Photography and video recording may both be used in these practices; therefore if you are asked by a poll worker or police officer to put away your cellphone, do so. Clearly state that you are recording voter challengers rather than anyone who is voting or poll workers.

20. Where can I record misconduct on Election Day?

In states where cameras and cellphones are not prohibited in or near polling stations, or if you are outside of the polling station or buffer zone surrounding your polling station, you can record voter intimidation to the same extent that you can record any other conversation as discussed above. Check with your local election office for the laws and policies applicable in your state. Be aware, however, that if you are recording misconduct by a private citizen, wiretap laws may restrict your ability to record conversations taking place in a location where there is a reasonable expectation of privacy without consent from one or both parties.

21. Can I be thrown out of the polls for recording voter intimidation?

Yes. Poll workers have the right to ask a person to leave the premises prior to casting his or her vote if the person is interfering with the voting process, causing a disturbance, or engaging in prohibited conduct, such as, in some states, recording video and taking photos inside the polling station. In addition, most states prohibit non-poll workers from being in the polling station if the individual is not engaged in casting his or her ballot. It is suggested that you vote before

⁶⁷ See, e.g., Voting Rights Act, 42 U.S.C. § 1973, et seq.

taking any pictures or other recording of voter intimidation. Similarly, you may be thrown out if you have already completed casting your ballot.

22. What should I do if I encounter voter intimidation at the polls?

If it is occurring in an area where cameras are allowed and the recording would not raise issues under wiretap laws (*e.g.*, the conversation is taking place in a public place that is easily observed and overheard by others in the area), use your phone's camera to record the incident and upload it using one of the apps mentioned in Q&A #24. Report voter intimidation, whether you have obtained a recording or not, to local election officials, the Voting Section of the U.S. Department of Justice, and/or one of the many voter protection hotlines operated by organizations like the Lawyers' Committee for Civil Rights.⁶⁸

How Do I Present Recordings to the Community?

23. What should I do with the video after I record it?

- a. If you have recorded police conduct or voter intimidation in accordance with the First Amendment, voting laws and regulations, and wiretapping laws, and without interfering with the police, it should be safe for you to publish the recording. However, because federal law and state privacy and wiretapping laws prohibit the publication of an illegal recording and provide for criminal and/or civil penalties, there is a risk that the police could try to argue that the recording was obtained illegally and that the publication of the recording should subject you to these additional penalties.⁶⁹ If after reviewing your state's wiretapping and publication laws, you think that the police could argue that your recording was obtained in violation of your state's privacy or wiretapping law, call your local chapter of the ACLU to discuss the circumstances under which you made the recording before publishing it or providing it to anyone else.
- b. Most Americans these days have a smartphone with locking capabilities. Make sure that your phone is always passcode protected! If a police officer or poll worker takes your phone, this will make it difficult for him or her to illegally search your phone and delete videos. Additionally, you are not required to give an officer the passcode for your phone in the absence of proper police procedures (*e.g.*, a court order, warrant, etc.). There are several apps that allow you to save

⁶⁸ The hotline number for the Lawyers' Committee Election Protection Project is 866-OUR-VOTE (866-687-8683). The hotline is staffed during national elections and the hotline schedule is posted on the group's website in the months before an election (<http://www.866ourvote.org/>).

⁶⁹ See REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, REPORTER'S RECORDING GUIDE (2012), available at <https://www.rcfp.org/wp-content/uploads/imported/RECORDING.pdf> (last visited Jan. 8, 2019) (indicating that, as of the summer of 2012, only Montana, South Dakota, Vermont, and the state of Washington do not impose additional penalties for the publication of an illegally intercepted communication).

your photos and videos in a hidden or passcode protected album like “Private Photo Vault” and “Photo Vault.”⁷⁰

24. What platforms enable you to preserve and release the video?

- a. Apps like “Periscope” and “Bambuser” allow you to record and live stream videos on platforms like Facebook.⁷¹ Both are free and offer features that make it easy to share videos instantaneously. Both apps have features that allow you to save the video even if your phone is put to sleep in the middle of the recording. This feature is especially useful if your phone is detained or illegally searched. Additionally, you can set your profile to private on both apps so that videos you record will not be published to the public immediately after recording.
- b. “YouTube”⁷² is a popular video platform you can use if you recorded your video using your phone’s standard video app. You may also set your videos to private if you don’t want to release them to the public as yet.

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⁷⁰ Information about these apps and where to download them is available at <https://privatephotovault.com> and <http://pacificsoftwaresolutions.net/photovault.asp> (last visited Jan. 8, 2019).

⁷¹ Information about these apps and where to download them is available at <https://www.periscope.tv/> and <http://bambuser.com/> (last visited Jan. 8, 2019).

⁷² <https://www.youtube.com/> (last visited Jan. 8, 2019).