

# ELECTION PROTECTION

## Preventing and Responding to Illegal Armed Voter Intimidation and Election Interference

No right is more fundamental in a free country than the right to vote. The combination of the pandemic's public-health challenges with the possibility that extremists may try to disrupt voting presents a unique test for public officials seeking to ensure a safe and orderly election for everybody. But the law is clear: intimidating voters or election personnel is illegal, and that includes armed intimidation. Local officials should act now, first, by understanding the law, and second, by taking steps immediately to prevent and prepare to respond to potential voter intimidation and election interference, including by spreading the word that such conduct will not be tolerated.

### STEP 1: UNDERSTAND THE LAW

#### What does the law say?

Voter intimidation is a crime under federal law and the law of all 50 states and the District of Columbia.<sup>1</sup> It is illegal to intimidate someone to try to influence who they vote for or to try to deter them from voting. Civil statutes also provide remedies to combat voter intimidation—meaning anyone who intimidates voters could be sued as well as arrested.<sup>2</sup>

#### How are guns relevant?

Firearms are a ready means of intimidation. In the U.S. Supreme Court's words, "the display of a gun instills fear in the average citizen."<sup>3</sup> And laws nationwide recognize the special intimidating effect of guns: again, every state and the District of Columbia prohibits the use of a gun to threaten or intimidate a member of the public.<sup>4</sup>

#### What actions will amount to illegal armed intimidation?

Determining what exact conduct with a firearm will constitute a crime is highly fact-specific, but the starting point is the simple fact that the individual or group has chosen to stand near a polling place with a firearm.<sup>5</sup> Officials should also take into account whether any voters report being intimidated or act in a manner indicating that they have been intimidated. Other factors to consider include, for example:

- whether those displaying firearms are making verbal threats or other intimidating statements to voters;
- whether an individual is pointing, brandishing,<sup>6</sup> or aggressively displaying the gun, or has a finger on the trigger (although intimidation can occur without such direct conduct);
- for handguns, whether the gun is holstered or in hand; for long guns, whether an individual is holding or touching the gun in a manner that suggests readiness to use; and
- whether an armed individual or group moves towards, tries to draw the attention of, or engages with voters, or positions themselves in an intimidating way.

## **Do the First or Second Amendments protect armed intimidation of voters?**

No. There is no constitutional right to intimidate voters—or anyone else. The First Amendment does not protect intimidation in any context,<sup>7</sup> and the special importance of the polling place means that even political speech, the core First Amendment activity, may be prohibited in and around entrances to polling places.<sup>8</sup> The Second Amendment likewise does not grant a license to intimidate, including in a state that permits open carry: as one Texas court put it, “there is no constitutionally protected right to display a firearm in a public place *in a manner that is calculated to alarm.*”<sup>9</sup>

## **Is it significant if there is a group of armed individuals outside a polling place, rather than just one or two?**

Yes, for several reasons. First, multiple armed individuals are naturally more likely to intimidate than one or two. Second, all fifty states prohibit private, unauthorized militias from engaging in law enforcement activities, and several also prohibit paramilitary activity that furthers civil disorder; public officials should look for statements, attire, or conduct suggesting that the group is acting as a private militia. (The Institute for Constitutional Advocacy and Protection at Georgetown Law has prepared state-by-state [fact sheets](#) explaining the laws barring unauthorized private militias and providing practical steps to take if militias show up at polling or voter-registration locations.) Third, there is dangerous historical precedent for groups using weapons as badges of potentially oppressive authority to intimidate voters. Over 30 years ago, the Republican National Committee had to answer in court after it deployed a “National Ballot Security Task Force” of off-duty police officers wearing revolvers, arm bands and two-way radios to patrol polling sites with threatening signs and to challenge voters.<sup>10</sup> Historical oppression makes armed individuals appearing to act as officials all the more likely to deter voters in communities of color.

## **Is it legal to take a gun inside a polling place?**

Only six states and the District of Columbia have laws forbidding people to carry guns in polling places specifically,<sup>11</sup> though depending on the location of the polling place, prohibitions on guns in other sensitive places—such as schools—may apply. But even if someone is allowed to carry a gun into a polling place, they are still forbidden to intimidate other voters with that gun, inside or outside the building.<sup>12</sup>

## **What about after Election Day—what does the law say about armed individuals intimidating election officials or disrupting the vote count?**

The general prohibitions on armed intimidation discussed above will apply equally after Election Day. Moreover, federal law and the laws of all fifty states and the District of Columbia prohibit interfering with the orderly conduct of the election, including interfering with or intimidating election officials or disrupting the counting of ballots.<sup>13</sup>

## **STEP 2: PREPARE NOW**

Elected officials (including Governors, Mayors, Attorneys General, and District Attorneys) should meet with local and state law enforcement and local and state election officials to educate them about the laws prohibiting armed intimidation or interference in connection with voting or vote counting and prepare a written plan of action for addressing voting-related armed intimidation.

## Before Election Day:

Elected officials and trusted community voices should engage in pre-election public education and communications emphasizing some or all of the following:

- Voting is a constitutional right and an important act of civic engagement. Intimidation—including armed intimidation—will not be tolerated at or around polling places, at ballot drop-off locations, or at election offices.
- Using firearms to intimidate voters is illegal under state and federal law.
- Using firearms to intimidate election officials or disrupt the electoral process is illegal under state and federal law.
- Laws against voter intimidation, interference with the electoral process, and armed intimidation generally will be strictly enforced, including potentially criminal prosecution and/or civil lawsuits where warranted.

Recent and effective examples of these communications include Virginia Attorney General Herring's [advisory opinion](#) outlining protections for voters at polling places and Nevada Attorney General Ford's [television appearance](#) emphasizing the illegality of voter intimidation.

In addition, officials should have a plan in place to minimize the risks of disruption to voting or ballot-counting. Here are some suggestions.

## For early voting and Election Day:

- A welcoming atmosphere and clear instructions will go a long way to making voters feel comfortable. Where possible, plan to have personnel outside to greet voters, give directions, and answer questions.
- Anticipate the possibility of long lines and plan and mark the path a line should follow. If the polling site is in a location where guns are not permitted, try to keep the line within that location (for example, within school grounds).
- Have a plan in place for what to do if poll workers witness, or voters report, intimidation, militia activity, or election interference—which should include information about calling the police and/or calling senior election officials, depending on the circumstances.
- If intimidation happens, act immediately.

## For ballot counting:

- Once voting is complete, the security of those engaged in counting ballots should be paramount. Plan now to ensure they can work free from interruption or interference.
- Ensure that locations for ballot counting are secure and that only those specifically permitted under election laws can access those locations.
- Make sure that law enforcement officers are aware of and ready to enforce these rules.

**If you have questions, please contact [everytownlaw@everytown.org](mailto:everytownlaw@everytown.org)**

*NOTE: The legal analysis set forth here reflects the opinions of Everytown Law, is presented for informational purposes only, and is not legal advice from Everytown Law. Public officials should consult with their own counsel about these issues and how they might apply depending on specific facts and circumstances. Emailing the address above does not create an attorney-client relationship; do not send confidential information.*

1. 18 U.S.C. § 245(b)(1)(A) (illegal to use “force or threat of force ... to intimidate ... any other person or any class of persons from ... voting or qualifying to vote”); 18 U.S.C. § 241 (illegal to “conspire to injure, oppress, threaten, or intimidate” any person in the free exercise of any constitutional or federal statutory right, including the right to vote); 18 U.S.C. § 594 (illegal to “intimidate[], threaten[], coerce[], or attempt[] to intimidate, threaten, or coerce, any other person for the purpose of interfering with the right of such other person to vote” in a general election); 52 U.S.C. § 20511(1) (illegal to “knowingly and willfully intimidate[], threaten[], or coerce[]” any person for “registering to vote, or voting, or attempting to register or vote” in a federal election); Ala. Code § 17-17-33; Alaska Stat. § 15.56.030; Ariz. Rev. Stat. § 16-1013; Ark. Code Ann. § 7-1-104; Cal. Elec. Code § 18540; Colo. Rev. Stat. § 1-13-713; Conn. Gen. Stat. § 9-364; Del. Const., Art. 5, § 7; D.C. Code § 1-1001.14; Fla. Stat. Ann. § 104.0615; Ga. Code Ann. § 21-2-567; Haw. Rev. Stat. Ann. § 19-3; Idaho Code § 18-2305; 10 Ill. Comp. Stat. Ann. 5/29-4; Ind. Code Ann. § 3-14-3-21.5; Iowa Code § 39A.2; Kan. Stat. Ann. § 25-2415; Ky. Rev. Stat. Ann. § 119.155; La. Stat. Ann. § 18:1461.4; Me. Rev. Stat. tit. 21-A, § 674 (interference); Md. Code Ann., Elec. Law § 16-201; Mass. Gen. Laws ch. 56, §§ 29-31, 46-49; Mich. Comp. Laws § 168.932(a); Minn. Stat. § 211B.07; Miss. Code Ann. § 97-13-39; Mo. Rev. Stat. § 115.635; Mont. Code Ann. § 13-35-218; Neb. Rev. Stat. § 32-1536; Nev. Rev. Stat. § 293.710; N.H. Rev. Stat. Ann. § 659:40; N.J. Stat. Ann. § 19:34-28; N.M. Stat. Ann. § 1-20-14; N.Y. Elec. Law § 17-150; N.C. Gen. Stat. §§ 163-273, 163-274(a)(7); N.D. Cent. Code § 12.1-14-02; Ohio Rev. Code Ann. § 3599.01; Okla. Stat. tit. 26, § 16-113; Or. Rev. Stat. § 260.665; 25 Pa. Cons. Stat. § 3527; 17 R.I. Gen. Laws Ann. § 17-23-5; S.C. Code Ann. § 7-25-80; S.D. Codified Laws § 12-26-12; Tenn. Code Ann. § 2-19-115; Tex. Penal Code Ann. §§ 36.03(a)(2), 1.07(a)(9)(B); Tex. Elec. Code Ann. § 276.013; Utah Code Ann. § 20A-3a-502; Vt. Stat. Ann. tit. 17, § 2017; Va. Code Ann. § 24.2-607; Wash. Rev. Code § 29A.84.620; W. Va. Code § 3-9-10; Wis. Stat. § 12.09; Wyo. Stat. Ann. § 22-26-111. For federal offenses, see generally U.S. Dept of Justice, *Federal Prosecution of Election Offenses* 49-55 (8th ed. 2017).

2. See 42 U.S.C. § 1985(3); 52 U.S.C. § 10101(b); 52 U.S.C. § 10307(b).

3. *McLaughlin v. United States*, 476 U.S. 16, 17-18 (1986). The issue in *McLaughlin* was whether an unloaded gun is a “dangerous weapon” for purposes of the federal bank robbery statute; the Court unanimously held that it is.

4. Ala. Code §§ 13A-6-23 (Menacing), 13A-11-7 (Disorderly Conduct); Alaska Stat. § 11.41.220 (Assault in the Third Degree); Ariz. Rev. Stat. Ann. §§ 13-1202 (Threatening or Intimidating), 13-2904 (Disorderly Conduct); Ark. Code Ann. § 5-71-207 (Disorderly Conduct); Cal. Penal Code § 417 (Brandishing a Weapon); Colo. Rev. Stat. §§ 18-3-206 (Menacing), 18-9-106 (Disorderly Conduct); Conn. Gen. Stat. § 53a-61aa (Threatening in the First Degree); Del. Code Ann. tit. 11, § 602 (Menacing); D.C. Code § 22-404 (Assault or Threatened Assault in a Menacing Manner); Fla. Stat. § 790.10 (Improper Exhibition of Dangerous Weapons or Firearms); Ga. Code Ann. §§ 16-11-102 (Pointing Gun or Pistol at Another), 16-11-39 (Disorderly Conduct); Haw. Rev. Stat. §§ 711-1101 (Disorderly Conduct), 707-716 (Terroristic Threatening in the First Degree); Idaho Code §§ 18-3303 (Exhibition or Use of Deadly Weapon), 18-6409 (Disturbing the Peace); 720 Ill. Comp. Stat. 5/24-1 (Unlawful Use of Weapons), 5/26-1 (Disorderly Conduct); Ind. Code §§ 35-47-4-3 (Pointing a Firearm), 35-45-2-1 (Intimidation); Iowa Code §§ 708.1 (Assault), 708.6 (Intimidation with a Dangerous Weapon); Kan. Stat. Ann. §§ 21-6203 (Disorderly Conduct), 21-5412 (Assault and Aggravated Assault); Ky. Rev. Stat. Ann. § 508.050 (Menacing); La. Stat. Ann. § 14:37 (Aggravated Assault), 40:1382 (Negligent Carrying of a Concealed Handgun); Me. Stat. tit. 17-A, § 209 (Criminal Threatening), tit. 25, § 2001-A (Threatening Display of or Carrying Concealed Weapon); Md. Code Ann., Crim. Law § 3-202(a)(2) (Assault); Mass. Gen. Laws ch. 265, § 15B (Assault by Means of a Dangerous Weapon); Mich. Comp. Laws §§ 750.234e (Brandishing Firearm in Public), 750.233 (Pointing or Aiming Firearm at Another Person), 750.82 (Felonious Assault); Minn. Stat. §§ 609.66(a)(2) (Dangerous Weapons -- Intentional Pointing), 609.713 (Threats of Violence); Miss. Code Ann. §§ 97-37-19 (Deadly Weapons; Exhibiting in Threatening Manner), 97-35-13 (Disturbance in Public Place); Mo. Rev. Stat. § 571.030(4) (Unlawful Use of Weapons); Mont. Code Ann. § 45-5-213(1)(b) (Assault with Weapon); Neb. Rev. Stat. §§ 28-310(1)(b) (Assault in the Third Degree), 28-311.01 (Terroristic Threats); Nev. Rev. Stat. § 202.320 (Drawing Deadly Weapon in Threatening Manner); N.H. Rev. Stat. Ann. § 631:4 (Criminal Threatening); N.J. Stat. Ann. § 2C:12-1(a)(3) (Assault); N.M. Stat. Ann. § 30-3-2 (Aggravated Assault); N.Y. Penal Law § 120.14(1) (Menacing in the Second Degree); N.C. Gen. Stat. § 14-34 (Assaulting by Pointing Gun); N.D. Cent. Code § 12.1-17-03 (Reckless Endangerment); Ohio Rev. Code Ann. § 2903.22 (Menacing); Okla. Stat. tit. 21, § 1289.16 (Felony Pointing Firearms); Or. Rev. Stat. §§ 166.190 (Pointing Firearm at Another), 163.190 (Menacing); 18 Pa. Cons. Stat. § 2701 (Assault); R.I. Gen. Laws § 11-5-2 (Felony Assault); S.C. Code Ann. § 16-23-410 (Pointing Firearm at Another Person); S.D. Codified Laws § 22-18-1.1(5) (Menacing); Tenn. Code Ann. § 39-13-102 (Aggravated Assault); Tex. Penal Code Ann. §§ 42.01(a)(8) (Disorderly Conduct), 22.01 (Assault); Utah Code Ann. §§ 76-10-506 (Threatening With or Using Dangerous Weapon), 76-5-107 (Threat of Violence); Vt. Stat. Ann. tit. 13, § 4011 (Aiming Gun at Another); Va. Code Ann. § 18.2-282 (Pointing, Holding, or Brandishing Firearm); Wash. Rev. Code § 9A.1.270(1) (Weapons Apparently Capable of Producing Bodily Harm); W. Va. Code § 61-7-11 (Brandishing Deadly Weapons); Wis. Stat. § 941.20(1)(c) (Endangering Safety by Use of Dangerous Weapon); Wyo. Stat. Ann. § 6-2-504(b) (Reckless Endangering).

5. In a similar context, a Michigan trial court considering a policy banning guns in libraries suggested that, while mere open carrying was not itself illegal brandishing, “doing so in a library has ‘an aspect of an intent to make someone feel threatened or intimidated.’” See *Capital Area Dist. Library v. Mich. Open Carry, Inc.*, 826 N.W.2d 736, 739 (Mich. Ct. App. 2012) (quoting trial court, which had upheld library policy as a matter of law; the appellate court ultimately reversed that decision on preemption grounds).

6. To “brandish” a firearm, as one State Attorney General has explained, includes to “display ostentatiously.” Mich. Atty Gen. Op. No. 7101 (Feb. 6, 2002), available at <https://bit.ly/34wclUNo>; see also, e.g., *Morris v. Commonwealth*, 607 S.E.2d 110, 114 (Va. 2005) (“Brandish” means “to exhibit or expose in an ostentatious, shameless, or aggressive manner.” (citation omitted)).

7. See *Virginia v. Black*, 538 U.S. 343, 360 (2003).

8. See *Burson v. Freeman*, 504 U.S. 191, 196-210 (1992) (plurality opinion); *id.* at 214-16 (Scalia, J., concurring in the judgment).

9. *Ex parte Poe*, 491 S.W.3d 348, 355 (Tex. App. 2016); see also *McBride v. State*, 128 N.E.3d 531, 539 n.4 (Ind. Ct. App. 2019) (noting that, “although a person has the right to own guns, he has no right to misuse them or to threaten other people with them”); *cf. State v. Spencer*, 876 P.2d 939, 941-42 (Wash. Ct. App. 1994) (rejecting constitutional challenge to brandishing statute under Washington state equivalent to Second Amendment).

10. *Democratic Nat’l Comm. v. Republican Nat’l Comm.*, 671 F. Supp. 2d 575, 579 (D.N.J. 2009). In light of the lawsuit, for more than three decades a federal decree strictly limited the RNC’s ability to engage in similar behavior. But the decree expired in 2017. *Democratic Nat’l Comm. v. Republican Nat’l Comm.*, No. 18-1215, 2019 U.S. App. LEXIS 415, at \*2 (3d Cir. Jan. 7, 2019).

11. Ariz. Rev. Stat. Ann. § 13-3102(A)(11); Cal. Elec. Code § 18544(a); Fla. Stat. Ann. § 790.06(12); Ga. Code Ann. § 21-2-413(i); La. Stat. Ann. § 18:1461.7(C)(3); Tex. Penal Code Ann. § 46.03 (a)(2); D.C. Code Ann. § 7-2509.07(a)(5).

12. In locations where guns in polling places are illegal, furthermore, officials should take that into account in assessing whether someone who brings a gun to stand outside the polling place is trying to intimidate voters.

13. Federal law forbids using “force or threat of force [to] willfully injure[], intimidate[], or interfere[] with . . . any legally authorized election official.” 18 U.S.C. § 245(b)(1)(A). Thirty-eight states specifically prohibit interfering with an election official or the election process. See Alaska Stat. § 15.56.060; Ariz. Rev. Stat. § 16-1004; Ark. Code Ann. § 7-1-103(19)(G); Cal. Elec. Code § 18502; Colo. Rev. Stat. § 1-13-701; Del. Code Ann. tit. 15, §§ 5118, 5139; Ga. Code Ann. §§ 21-2-566, 21-2-569, 21-2-597; Idaho Code §§ 18-2306, 18-2313; Ind. Code Ann. § 3-14-3-4; Ky. Rev. Stat. Ann. § 119.155; La. Stat. Ann. § 18:1461.5; Md. Code Ann., Elec. Law § 16-205; Mass. Gen. Laws ch. 56, § 48; Mich. Comp. Laws §§ 168.727, 168.733; Miss. Code Ann. § 97-13-21; Mo. Rev. Stat. § 115.637; Mont. Code Ann. § 13-35-203; Neb. Rev. Stat. Ann. § 32-1501; Nev. Rev. Stat. Ann. § 293.710; N.J. Stat. Ann. § 19:34-11; N.M. Stat. Ann. § 1-20-14; N.Y. Elec. Law § 17-152 (conspiracy); N.C. Gen. Stat. §§ 163-275, 163-274; N.D. Cent. Code Ann. §§ 12.1-14-02, 12.1-14-03; Ohio Rev. Code Ann. § 3599.24; Okla. Stat. Ann. tit. 26, § 16-113; 25 Pa. Cons. Stat. §§ 3508, 3527, 3549; 17 R.I. Gen. Laws Ann. § 17-23-17; S.C. Code Ann. §§ 7-13-860, 7-25-190; S.D. Codified Laws § 12-26-22; Tenn. Code Ann. §§ 2-19-103, 2-19-101; Utah Code Ann. § 20A-3a-501; Vt. Stat. Ann. tit. 17, § 2581; Va. Code Ann. § 24-2-607; Wash. Rev. Code § 29A.84.510; W. Va. Code § 3-9-10; Wis. Stat. § 12.13(3)(x); Wyo. Stat. Ann. § 22-26-111. General prohibitions on intimidating public officials or interfering with government administration would apply to election interference in a further ten states and the District of Columbia. See Ala. Code § 13A-10-2; D.C. Code § 22-851; Fla. Stat. § 838.021; Haw. Rev. Stat. § 710-1010; 720 Ill. Comp. Stat. 5/12-9; Iowa Code § 718.4; Kan. Stat. Ann. § 21-5922; Me. Stat. tit. 17-A, § 751; N.H. Rev. Stat. Ann. § 642:1; Or. Rev. Stat. Ann. § 162.235; Tex. Penal Code Ann. §§ 36.06, 38.13; see also Mich. Comp. Laws §§ 750.478a, 750.479; N.Y. Penal Law § 195.05; S.C. Code Ann. § 16-3-1040. The remaining two states also prohibit certain kinds of election interference, as well as generally prohibiting disorderly conduct or breach of the peace. See Conn. Gen. Stat. §§ 9-308 (procedures for the canvassing process), 9-364a (prohibiting willfully and fraudulently suppressing any properly-cast vote), 53a-181 (breach of the peace), 53a-182 (disorderly conduct); Minn. Stat. §§ 204C.19 (prohibiting touching or interfering with ballots during the counting process), 609.72 (disorderly conduct); Minn. R. 8235.0700 (upon a recount, “[t]he recount official shall ensure that public observation does not interfere with the counting of the ballots.”).