

Can government officials prohibit all demonstrations in public forums during controversial events?

No. Officials may employ extra law enforcement protection to deter violence during events expected to excite the interests of the public, and they may institute reasonable time, place and manner restrictions on all groups wishing to protest. But officials cannot deny outright the constitutional right to protest on public streets and sidewalks, public parks, and other public forums.

Can protestors hold a rally or demonstration outside a federal courthouse?

Demonstrations in front of federal court buildings can be restricted. If you wish to hold an event outside a federal building, you first should contact the U. S. Marshall to discuss your plans.

What if protestors want to participate in “civil disobedience?”

Civil disobedience is generally understood as violating the law through a non-violent manner of protest. While engaging in civil disobedience may prove a point or gain support for a movement, no one is legally entitled to break the law no matter how minor the infraction. While ACLU-TN supports the free exercise of the constitutional right to protest, it does not encourage anyone to break the law. If individuals decide to participate in civil disobedience, you should anticipate being arrested and prosecuted.

What should protestors do if they are confronted by law enforcement?

It is very important to be courteous to law enforcement and obey their orders even if you believe their actions to be constitutionally improper. Failure to obey a police officer may result in a criminal offense arrest under the Tennessee Code Annotated (TCA) such as resisting arrest, a Class B misdemeanor (TCA 39-16-602), or disorderly conduct, a Class C misdemeanor (TCA 39-17-305). After the situation is over, you can object to law enforcement’s actions in court. The court may dismiss charges against you if the police are found to have violated First Amendment rights.

For large demonstrations, it is a good idea to arrange for impartial legal observers to be present. Legal observers should not participate in the demonstration, but should document any actions taken both by demonstrators and by law enforcement. The testimony of legal observers is typically more trusted in court proceedings than that of demonstration participants. ACLU-TN can conduct training for legal observers. If your organization is interested in such a training, please contact us.

Your Right to Protest in Tennessee



“If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”

—Justice William J. Brennan
Texas v. Johnson (1989)

Prepared by the
American Civil Liberties Union
of Tennessee
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The American Civil Liberties Union (ACLU) has a long history of protecting First Amendment rights around the nation and in Tennessee. In 1925, ACLU Cooperating Attorney Clarence Darrow defended biology teacher John T. Scopes against charges he had violated the state anti-evolution statute in the now-infamous “Monkey Trial.” Today, ACLU of Tennessee (ACLU-TN) continues its work to translate the guarantees of the First Amendment and the entire Bill of Rights into realities for all Tennesseans.

This publication is specifically designed to answer questions you may have about *Your Right to Protest*. However, this pamphlet is only an outline of current federal law. Not every issue surrounding protest rights is discussed, and this brochure should not be taken as specific legal advice. If you have legal questions or believe you need legal help, you should consult a private attorney.

THE RIGHT TO FREE EXPRESSION

How does the First Amendment protect my right to free expression?

The First Amendment guarantees free expression by protecting the right to freedom of speech, freedom of the press, and freedom of assembly and petition. The courts also have ruled that the First Amendment protects the freedom of association, which is implied by the other freedoms listed above.

Free expression encompasses all forms of speech, from the spoken and written word, to T-shirt slogans and black armbands, to rallies and protest signs, to organizational memberships. The First Amendment protects free expression from infringement by federal, state and local governments.

Can the government place any restrictions on my right to free expression?

Yes. The courts have consistently ruled that while the government may not restrict the actual content of speech, it may restrict the time, place, and manner of speech. For example, a municipality cannot permit members of only one political party to hold rallies on the public streets. This would be restricting speech based on its content. But the government may prohibit political rallies from taking place at unusual hours or from blocking pedestrian or vehicle traffic. This would be restricting only the time, place and manner of the speech.

The courts have generally found time, place and manner restrictions to be permissible because such regulations serve to ensure the safety and order of the community at large. However, it is important to note that in order to be constitutional, time, place and manner restrictions must be content-neutral, meaning they must apply to everyone regardless of the opinion being expressed.

Is any type of expression not protected by the First Amendment?

Yes. The courts have recognized several types of speech that do not fall within First Amendment guarantees:

- In 1919, the Supreme Court ruled in Schenck v. U.S. (249 U. S. 47) that the First Amendment does not protect speech that creates a “clear and present danger” (such as “shouting fire in a theatre”).

- In its 1942 decision in Chaplinsky v. New Hampshire (315 U.S. 568), the Supreme Court ruled that speech that incites violence or directly encourages others to commit a crime (“fighting words”) is a threat to the public safety and is therefore not protected by the First Amendment.
- In 1973, the Supreme Court found in Miller v. California (413 U.S.15) that the First Amendment does not protect “obscene” material. The Court established the “SLAPS” test for determining obscenity: speech is obscene if “the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.” However, obscenity remains difficult to define – as Supreme Court Justice Potter Stewart once said: “I know it when I see it.”
- The courts have ruled that defamation – a known false statement about a person or an organization intended to harm the reputation of that person or organization – is not protected by the First Amendment. Defamation in writing is libel, and defamation through the spoken word is slander.

PROTESTING ON PUBLIC PROPERTY

Where can I exercise my First Amendment right to pass out leaflets or to hold a rally, march or demonstration?

Because the First Amendment protects free speech from infringement by the government, leafleting and assembly is generally permissible in most public areas, such as public parks, public streets and sidewalks, and outside public buildings. These locations are commonly known as public forums, which are generally defined as areas that can be used for the communication of any and all views on political and social issues.

There are three basic types of public forums:

- A traditional public forum is any area historically dedicated to public assembly and protest, such as public streets, public parks and public sidewalks.
- A limited public forum is public property that, while not typically dedicated to public assembly, has been opened to expressive activity by particular categories of people or on particular subjects. Examples of limited public forums would be university meeting rooms open for use by student groups or a city auditorium open for theatrical performances.
- A non-public forum is public property that is not a traditional public forum and that has not been opened for public expression. Examples of non-public forums include prisons and military bases (more information below). The government can severely restrict public expression in a non-public forum.

The First Amendment does not regulate the activities of private individuals, businesses or organizations. You therefore do not have a constitutional right to free speech, assembly or protest while on private property.

Can the government place any restrictions on the use of a public forum?

Yes. Depending on the specific public location and the government’s interest in ensuring safety and order, restrictions governing the use of public property for assembly and protest may apply. The following are some location-specific regulations to consider when planning

protest activities:

Public sidewalks: Demonstrating groups should leave room for passers-by and should not block the flow of pedestrian traffic. If leafleting, demonstrators should not force passers-by to accept leaflets or harass individuals who refuse leaflets.

Public parks: The parks department in charge of the facility may require a permit if demonstrators wish to use a sound system for a large gathering. In addition, the parks department may restrict the hours of the day in which events can be held in order to comply with local noise ordinances or park regulations.

Public streets: Any march on the public street is typically considered a parade; therefore the location, time and duration of the march are subject to regulation by city officials to prevent traffic problems.

Marchers may be expected to obey traffic laws (such as red lights) during the march.

Public schools: School administrators have the ability to restrict access to school property in order to provide a safe and orderly environment for students. However, if administrators open school facilities to any non-student group, they are obligated to extend this privilege to all non-student groups who wish to have access.

Lobbies of public buildings: It is more difficult to obtain access to the inside of a public building than it is to obtain access to the street or sidewalk outside. However, if some non-government-sponsored expressive activities are permitted in the lobby, then similar activities by others may not be prohibited based on the content of the expression. But if no such activities are permitted, then it is unlikely that a rally or demonstration would be allowed inside.

Other types of public property: Some types of public property are non-traditional public forums and therefore have special restrictions on free speech. For example, protests are prohibited on military bases, even if those protesting are in the armed services. Similarly, protests on jail or prison property can be restricted for safety and security reasons. Post offices do not allow flyers to be posted inside the building and do not allow partisan political activity inside the building. However, leafleting and other protest activities are permitted on the public street or sidewalk outside. Demonstrations may be prohibited in the immediate vicinity of courthouses.

PROTESTING ON PRIVATE PROPERTY

Do any First Amendment protections apply to private property?

No. The First Amendment only applies to the government. Owners of private businesses, private organizations and private homes have the right to decide who they will allow to say what on their property. For example, while the First Amendment protects a protestor's right to picket on the public street, a protestor does not have a First Amendment right to picket in the yard of a private residence.

Many people argue that some private properties have become the modern-day equivalent of the "public square," and that individuals on these properties should enjoy similar First Amendment protections as on public property. For example, a few states have passed laws or enjoyed court rulings protecting free speech in shopping malls. However, malls in Tennessee have not yet been designated "public spaces" by the courts or by the state legislature.

Does the First Amendment protect my right to leaflet door-to-door to private residences?

Yes. Several important Supreme Court cases involving Jehovah's Witnesses – whose faith mandates the door-to-door distribution of religious materials – have established that the First Amendment protects leafleting at private residences and prohibits restrictions against this right.

In 1938 in Lovell v. Griffin (303 U.S. 444), the Supreme Court overturned a Georgia ordinance (challenged by Jehovah's Witnesses) that prohibited the distribution of any kind of literature without a permit from the city manager. More recently, in Watchtower Bible and Tract Society v. Village of Stratton (240 F.3d 553, 2002), the Court overturned a local Ohio ordinance requiring door-to-door canvassers to register with the mayor before engaging in such activities. The Court found that door-to-door leafleting was an essential element of free speech, not only for religious speech, but also for anonymous political speech and the distribution of other types of handbills.

There are some special points to keep in mind when preparing to leaflet to private residences:

- The courts have ruled that a "no trespassing" or "no soliciting" sign at a private residence is a reasonable time, place and manner restriction on the right to canvas door-to-door. It is probably best not to leaflet at a residence where canvassers are clearly unwelcome.
- If a person refuses to leave private property after being asked to do so, he or she could be prosecuted for trespassing, which is a Class C misdemeanor under Tennessee Code Annotated (TCA) 39-14-405.
- While the ability to leaflet door-to-door is protected by the First Amendment, Title 18 U.S.C. 1725 makes it a federal offense to put material on which no postage has been paid in residential mailboxes. The Supreme Court ruled this statute constitutional in United States Postal Service v. Greenburgh Civic Associations (453 U.S. 114, 1981).

PROTEST REGULATIONS AND REQUIREMENTS

Can I be required to obtain a permit for my protest activities?

Yes. Government officials have an interest in knowing the time, place and manner in which protest activities will take place to ensure the safety and order of the community at large. However, for a permit to be required, a statute or ordinance must exist mandating all individuals wishing to engage in protest activities at a particular location to obtain a permit. A permit requirement may not be selectively enforced.

How do I know when I need to obtain a permit?

If you are in any doubt, it is always helpful to call a lawyer or a public official for advice, especially if your demonstration consists of a large number of participants. Your Mayor's Office, County Clerk's Office, or local police department also should have information on permit requirements and procedures.

Can I be charged a fee for obtaining a permit?

Yes, as long as the fee is reasonable and is not overly burdensome so as to chill free expression. Generally, a reasonable permit fee should cover the administrative costs of processing a permit application.

How do I obtain a permit?

Permit application procedures vary depending on your location, as different cities have different local ordinances. As mentioned earlier, you should call your Mayor's Office, County Clerk's Office, or local police department for information and application materials. For activities taking place in a public park, call the appropriate parks department. Remember, permit requirements must be specific and cannot distinguish between groups. A permit cannot be denied based on the content of a group's message.

What can I do if my permit application is denied?

In the event a permit application is denied, there are three basic options to consider: accept the denial and cancel the protest activity; pursue an administrative review of the denial if the procedure for such a review exists; or challenge the denial in court. If you have any questions or concerns about a denial of a permit application, you should speak to a private attorney about your options and report the incident to ACLU-TN.

Can protestors be required to pay for insurance coverage or police support for a rally or demonstration?

The courts generally have found that requiring protestors to pay burdensome fees discriminates against indigent persons and discourages First Amendment activities. As the Supreme Court has said, "freedom of speech, freedom of press, freedom of religion are available to all, not merely to those who can pay their own way" (Murdock v. Pennsylvania 319 U.S. 105, 1942).

For example, an organization should not be required to buy insurance in order to hold a rally. Such a requirement would be overly burdensome and would restrict the right to free expression. If you are told you must have insurance in order to hold a protest event, you should report the incident to ACLU-TN.

Additionally, the courts have ruled that it is chilling to free speech to hold a speaker responsible for police costs incurred if a large crowd and/or angry onlookers gather in response to what the speaker is saying.

PROTESTING IN THE POST-9/11 ERA

Have the events of 9/11 affected the First Amendment right to protest?

Yes. Following the tragic events of 9/11, Congress passed the USA PATRIOT Act, a 342-page document that greatly expanded law enforcement powers and eroded civil liberties. ACLU believes the PATRIOT Act was a misguided attempt to protect the country from future attacks, and contends our nation can be both SAFE AND FREE. ACLU vigorously opposed the PATRIOT Act for its infringements on our constitutional freedoms.

Protestors should know that the PATRIOT Act expanded anti-terrorism laws to include "domestic terrorism," which allows the

government to subject organizations to surveillance and criminal charges for political advocacy. For example, suppose a protestor gets excessively angry and throws a rock at a building. Before the PATRIOT Act, the protestor would likely face a misdemeanor charge, such as disturbing the peace. However, under the PATRIOT Act, the protestor could be charged as a domestic terrorist and face severe consequences.

The PATRIOT Act also gives law enforcement wide latitude in surveilling phone calls, email communication, and library and bookstore patronage. These regulations apply to all individuals, not just suspected "terrorists." In addition, the Attorney General's post-9/11 guidelines allow the FBI to spy on religious and political organizations without having any evidence of wrongdoing.

Moreover, safety and security concerns have led to an increased presence of law enforcement at rallies, protests, and other large gatherings. In Tennessee alone, there have been many reported incidents of law enforcement officials attending demonstrations to take names and/or photographs of protestors and speakers.

In short, protestors should be aware that law enforcement now has much greater authority to monitor activists and their protest activities.

Does the First Amendment protect my right to criticize government officials or government policies?

Yes. Public officials should expect to receive both positive and negative comments about their actions. In 1964 in New York Times v. Sullivan (376 U.S. 254), the Supreme Court set a high standard that public officials must meet before they may sue an individual for making critical comments against them. Under Sullivan, a public official must prove an individual acted with "actual malice" or "reckless disregard" in making a known false statement before the public official may sue for libel. In its ruling the Court said, "no court...has ever held, or even suggested, that prosecutions for libel on government have any place in the American system of jurisprudence."

Can I stage a counter protest at an event supporting someone whose policies I oppose?

Yes. The First Amendment guarantees the right to "petition the government for a redress of grievances." It is constitutionally protected to attend public rallies and speeches and to carry protest signs to demonstrate opposition to the speaker and/or the policies being advocated by the speaker.

Can government officials establish "protest zones" at events expected to draw large numbers of demonstrators, such as Presidential speeches or political conventions?

Probably. Protest zones are an increasingly common occurrence and raise many unanswered constitutional questions. Protest zones that embody reasonable time, place and manner restrictions – such as confining protestors to an area across the street from the event they are protesting – are probably permissible. But zones that are unreasonable – for example, confining protestors to an area several blocks away and out of sight from the event they are protesting – are highly questionable. Protestors that encounter such excessively restrictive zones should report them to ACLU-TN.