



RULES of **ENGAGEMENT**
for **INTERACTING**
with **POLICE**

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THE RUTHERFORD INSTITUTE, a national nonprofit civil liberties organization, is deeply committed to protecting the constitutional freedoms of every American and the integral human rights of all people through its extensive legal and educational programs. The Institute provides its legal services at no charge to those whose constitutional and human rights have been threatened or violated. The Institute's mission is twofold: to provide legal services in the defense of civil liberties and to educate the public on important issues affecting their constitutional freedoms.

Front cover photo by Ryan Johnson

In an age of militarized police often trained to view the citizenry as enemy combatants and equipped with weaponry and gear better suited for the battlefield, the perils of exercising one's constitutional rights grow more costly with each passing day. For example:

- Zachary Noel was tasered by police and charged with resisting arrest after he questioned why he was being ordered out of his truck during a traffic stop. "Because I'm telling you to," the officer replied before repeating his order for Noel to get out of the vehicle and then, without warning, shooting him with a taser through the open window.¹
- Levar Edward Jones was shot by a South Carolina police officer during a routine traffic stop over a seatbelt violation as he was in the process of reaching for his license and registration. The trooper justified his shooting of the unarmed man by insisting that Jones reached for his license "aggressively."²
- Fred Marlow was charged with interfering and resisting arrest, and fined \$5,000 for daring to film a SWAT team raid that took place across the street from his apartment.³ Marlow was asleep when he heard what sounded like "multiple bombs blasting and glass breaking." Rushing outside to investigate, Marlow filmed police officers dressed in army green camouflage standing beside an armored vehicle, in the process of carrying out a SWAT team raid to serve a search warrant. Ordered to return inside or face arrest for interference, Marlow explained that he was on his own property and could be outside. He was subsequently arrested.⁴

What these incidents make clear is that anything short of compliance will often get an individual charged with any of the growing number of contempt charges (ranging from resisting arrest and interference to disorderly conduct, obstruction, and failure to obey a police order) that get trotted out anytime a citizen voices discontent with the government or challenges or even questions the authority of a government official, particularly a law enforcement officer.

So what can you really do when you find yourself stopped by law enforcement officers who have almost absolute discretion to decide who is a threat, what constitutes resistance, and how harshly they can deal with the citizens they were appointed to “serve and protect”? In other words, what are the rules of engagement when it comes to interacting with the police?

Unfortunately, there is no longer any fail-safe plan for such encounters.



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Certainly, at a minimum, an individual can attempt to comply and do whatever a police officer tells you to do. Don’t talk back. Don’t threaten. And don’t walk away. In other words, don’t do anything that even hints at resistance. However, the news is riddled with reports of individuals who didn’t resist when confronted by police and still got tasered, tackled or shot simply because they looked at police in what appeared to be a threatening manner or moved in a way that made an officer fear for his safety.

To begin with, and most importantly, Americans need to know their rights when it comes to interactions with the police, bearing in mind that many law enforcement officials are largely ignorant of the law themselves.⁵ In a

nutshell, the following are your basic rights when it comes to interactions with the police as outlined in the Bill of Rights:

- You have the right under the First Amendment to ask questions and express yourself.
- You have the right under the Fourth Amendment to not have your person or your property searched by police or any government agent unless they have a search warrant authorizing them to do so.
- You have the right under the Fifth Amendment to remain silent, to not incriminate yourself and to request an attorney.
- Depending on which state you live in and whether your encounter with police is consensual as opposed to your being temporarily detained or arrested, you may have the right to refuse to identify yourself. Presently, 26 states do not require citizens to show their ID to an officer (drivers in all states must do so, however).

Knowing your rights is only part of the battle, unfortunately. The hard part comes in when you have to exercise those rights in order to hold government officials accountable to respecting those rights.

As a rule of thumb, you should always be sure to clarify in any police encounter whether or not you are being detained, i.e., whether you have the right to walk away. That holds true whether it's a casual "show your ID" request on a boardwalk, a stop-and-frisk search on a city street, or a traffic stop for speeding or just to check your insurance. If you feel like you can't walk away from a police encounter of your own volition—and more often than not you can't, especially when you're being confronted by someone armed to the hilt with all manner of militarized weaponry and gear—then for all intents and purposes, you're essentially under arrest from the moment a cop stops you. Still, it doesn't hurt to clarify that distinction.

While technology is always going to be a double-edged sword, with the gadgets that are the most useful to us in our daily lives—GPS devices,

cell phones, the internet—being the very tools used by the government to track us, monitor our activities, and generally spy on us, cell phones are particularly useful for recording encounters with the police⁶ and have proven to be increasingly powerful reminders to police that they are not all powerful.

No matter what individual police officers might say to the contrary, members of the public have a First Amendment right to record police interactions. As the Justice Department recognized in a 2012 memorandum, “recording governmental officers engaged in public duties is a form of speech through which private individuals may gather and disseminate information of public concern, including the conduct of law enforcement officers.”⁷

The following guidelines are intended to help you know what your rights are when stopped by the police, understand how to behave during a police encounter, provide you with options for what to do if you believe your rights have been violated during a police stop, and ultimately emerge from the encounter with your life and property intact.

WHAT SHOULD I DO IF I AM STOPPED BY A POLICE OFFICER?

There are a few guidelines that should be followed in order to prevent an encounter with the police from escalating while still protecting your rights:

- It is important to remain calm during all encounters with law enforcement officials. It is easier to do this when you have a general idea of your rights and the rights of officers during a stop;
- Keep both hands in plain view and do not make any sudden movements which might be mistaken by the officers as aggressive behavior;
- Politely ask the officer the reason for the stop, because the reason limits the kinds of questions the officer may ask as well as the scope of the investigation;
- Avoid doing anything that could give the officer a reason to suspect criminal activity. Also, if you're so disposed, answer basic questions concerning who you are and the reason for your presence;
- If you are stopped while driving, pull the car to a safe place as quickly as possible. Upon request, show the police your driver's license, registration and proof of insurance;
- If an officer asks to search your belongings or your vehicle, you have the right to refuse. If you consent, you will likely forfeit any constitutional protections against unreasonable searches;
- With the exception of identifying yourself, you have the right to refuse to answer questions, especially if the questions have nothing to do with the reason for the stop;
- Finally, if you are arrested, it is best not to argue with or resist the police even if you believe the action is unjust. Resistance allows the po-

lice to bring additional criminal charges against you and could result in violence against you. If such charges are brought against you, it may also make it harder for you to be released from jail on bail. Instead, say you wish to remain silent and ask for a lawyer immediately.

WHEN ARE POLICE ALLOWED TO STOP ME WHILE ON THE STREET?

Police may approach and speak to people in public without suspecting any wrongdoing. In such instances, however, a citizen is not obligated to speak with the officer and is free to walk away.⁸ In order for police to stop and hold a person for questioning and investigation – a so-called Terry stop – the Fourth Amendment requires that there be reasonable suspicion that the person is engaged in illegal activity.⁹ Police may also effect an arrest. This involves taking a person into custody if there is a warrant for the arrest of the person or if the police have probable cause to believe the person committed a crime. A stop that is initially a Terry stop may result in police discovery of evidence and, potentially, probable cause for an arrest.

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WHAT LAWS PROTECT ME IN THE CASE OF AN ENCOUNTER WITH A POLICE OFFICER?

The most fundamental protection is provided by the Fourth Amendment to the U.S. Constitution,¹⁰ which guarantees “the right of the people to be secure in their persons, . . . against unreasonable searches and seizures[.]” Whenever a law enforcement officer intentionally interferes with a person’s freedom of movement, the officer has “seized” that person for purposes of the Fourth Amendment. A “seizure” can be an arrest, or it can be something less intrusive, like a traffic stop or a Terry stop. To comply with the Fourth Amendment, a police officer must have a reasonable basis for seizing a person; an arrest requires that the officer have probable cause to believe the person violated a law, while a Terry stop requires the officer have reasonable suspicion of criminal activity. Various state laws may also provide protections which forbid warrantless arrests for minor offenses that an officer himself does not see.¹¹

WHAT IS THE DIFFERENCE BETWEEN “REASONABLE SUSPICION” AND “PROBABLE CAUSE”?

The difference involves the amount and reliability of police evidence. “Reasonable suspicion” supports the seizure of a person for investigation when specific and articulable facts, taken together with rational inferences from those facts, reasonably warrant the intrusion.¹² “Probable cause” supports arrest of a person when the officer’s knowledge of trustworthy facts and circumstances is sufficient to lead a prudent man to the belief that the person had committed or was committing an offense.¹³

Courts are willing to accept a wide variety of justifications for reasonable suspicion and probable cause. For example, a federal appeals court upheld the constitutionality of a traffic stop performed because the driver had acne scars and was driving with a stiff upright posture.¹⁴ Another federal appeals court upheld the constitutionality of a traffic stop that occurred because a motorist was driving a vehicle with hanging air fresheners, rosaries and pro-police bumper stickers while driving several miles

over the speed limit.¹⁵ In both situations, the courts concluded the police had reasonable suspicion that the drivers should be seized for investigation of criminal activity.

WHAT CAN POLICE DO DURING A TERRY STOP?

A Terry stop is supposed to be a limited seizure. During such a stop, police may ask for identification and questions related to the basis for the stop. Additionally, if police have a basis for believing the person stopped is armed, they may conduct a “frisk” of the person’s clothing. If any weapon is found, the police may disarm the person. This “frisk” must be limited and may not include a search for drugs or other contraband.¹⁶ A Terry stop also must be limited in duration, lasting no longer than is needed to complete its purpose.¹⁷

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WHAT MAY POLICE DO DURING THE COURSE OF AN ARREST?

In the course of an arrest, police may handcuff you¹⁸ and conduct a full search of your person. The purpose of this full search is to find any evidence of the offense which is the basis of the arrest as well as to find items which may pose a danger to the arresting officers.¹⁹ A full search may include a “strip search,” during which police may force you to remove your clothing and inspect your body to make sure you are not carrying any weapons or contraband.²⁰ The police do not need to have reasonable suspicion that you are carrying such items, and may conduct a strip search even if you were arrested for a minor, nonviolent offense. While an arrest limits your right to privacy, it does not eliminate it and the Fourth Amendment continues to protect you during criminal proceedings. If you believe your rights were violated during an arrest, you can ask a court to dismiss charges, suppress evidence, or award damages that result from police misconduct.

WHAT ABOUT POLICE STOPPING ME WHEN I AM DRIVING MY CAR?

A police officer’s traffic stop of a vehicle is also regarded as a seizure under the Fourth Amendment. For this type of seizure, police must have reasonable suspicion that the person driving has broken the law – usually a traffic offense.²¹ Traffic stops are considered more like Terry stops than arrests, so to be reasonable the stop must be limited in time and scope and address only the offense which was the basis for the stop.²² Police may ask to see your license, vehicle registration, and proof of insurance as well as for you and any passengers to exit the vehicle.²³ However, police do not have an automatic right to conduct a “frisk” of the vehicle occupants nor are they entitled to search the car. If asked, you do not have to consent to a search of the car. In the event police want to have a drug-detection dog examine the car, they may not unreasonably extend the stop in order to do so.²⁴



MAY POLICE STOP MY CAR BECAUSE THEY RECEIVED AN ANONYMOUS TIP THAT I AM BREAKING A LAW?

Yes, in certain circumstances. The Supreme Court has held that police may perform a traffic stop on the basis of an anonymous tip. The tip must have sufficient level of reliability and convey information that clearly

identifies the vehicle, as well as the driver's allegedly criminal behavior.²⁵ If the tip describes the driver's conduct in a way that creates a reasonable suspicion that the driver is committing a crime, the police do not have to witness the driver committing a traffic violation before performing a traffic stop.

IF POLICE BELIEVE I AM DRIVING UNDER THE INFLUENCE OF ALCOHOL, CAN THEY FORCE ME TO TAKE A BREATH TEST OR A BLOOD TEST WITHOUT A WARRANT?

The Supreme Court has held that it is constitutional to require, under threat of criminal penalty, motorists arrested for drunk driving to submit to a breath test.²⁶ However, it is not constitutional for police to require an individual to submit to a warrantless blood test.²⁷ If the police do obtain a warrant for a blood test, it can be forcibly performed. Whether or not you will be subject to a criminal penalty for refusing a breath test depends upon the law of the state in which the stop takes place. Furthermore, states may impose civil penalties on those who refuse to take a breath or blood test.²⁸

IF POLICE MUST HAVE REASONABLE SUSPICION TO STOP A CAR, WHY ARE THEY ALLOWED TO CONDUCT ROADSIDE CHECKPOINTS FOR DRUNK DRIVERS?

The Supreme Court has ruled that it is constitutional for police to set up roadside checkpoints in order to check drivers for compliance with licensing requirements and sobriety. The conduct of these stops must be strictly tied to their safety purpose. As such, police are limited to making observations of the driver and may only require motorists to produce documents. Police cannot, for instance, demand drivers exit the vehicle unless they have additional evidence raising a suspicion of legal activity.²⁹

IF POLICE ASK TO SEARCH ME, MY CAR, MY HOUSE, OR ANY OF MY BELONGINGS, DO I HAVE TO SAY YES? IF I REFUSE, CAN MY REFUSAL BE USED AGAINST ME?

No, you never have to consent to a police officer's request to search your belongings and your refusal will not be used against you in a criminal case. However, with few exceptions, consenting to a search removes all of your Fourth Amendment protections from unreasonable searches.³⁰

WHEN MAY POLICE SEARCH MY CAR WITHOUT A WARRANT?

If a police officer arrests a suspect during a traffic stop, he or she may search the part of the car under the arrestee's "immediate control" to make sure the arrestee cannot gain access to a weapon or destroy evidence.³¹ Police may search a car without a prior arrest if there is probable cause to believe it contains evidence of a crime and the car is on a public road with the capacity to drive away. The scope of the search is limited based on what the officer is looking for – for example, if searching for a stolen television, the officer cannot open a small bag that obviously cannot hold a television.³² If an officer has probable cause to search a car, he or she may also search belongings of passengers in the car.³³ Furthermore, if there is an object of incriminating nature in plain view of an officer standing in a legally allowed position, the police may seize the object.³⁴ The officer must immediately know the object is subject to seizure in order to seize it under this so-called plain view doctrine.

MAY POLICE SEARCH MY CELL PHONE WITHOUT A WARRANT?

No, police may not usually search your cell phone without a warrant, even if they perform an arrest.³⁵ However, police may search a cell phone in certain emergency situations circumstances. This so-called "exigent circumstances exception" to the general requirement that police must have a warrant to perform a search requires a court to examine each case

to determine whether an emergency really existed.³⁶ If police search your phone without a warrant and claim that exigent circumstances permitted the search, contact The Rutherford Institute for assistance in challenging the search.

WHAT ARE MY RIGHTS REGARDING POLICE USE OF TRAINED CONTRABAND-DETECTION DOGS?

The Supreme Court has held that a sniff by a police dog trained to detect the presence of narcotics is not a “search” under the Fourth Amendment and police do not need a warrant to perform some police dog sniff tests in public or semi-public places.³⁷ However, the Supreme Court recently held that allowing a drug dog to sniff a home’s “curtilage” is a search and requires consent from the home’s owner, or a warrant.³⁸ Curtilage includes your home itself and the area around it, including your front porch and immediately surrounding yard space. The Supreme Court also recently held that officers cannot prolong a traffic stop to perform a dog-sniffing drug test without reasonable suspicion that the driver or passenger has committed an offense other than a traffic offense.³⁹

WHAT IS CIVIL ASSET FORFEITURE?

Civil asset forfeiture is a government practice wherein government agents (usually the police) seize private property they “suspect” may be connected to criminal activity. The authority of police to seize your property for civil forfeiture depends on your local state laws. In many cases, the government keeps the property regardless of whether any crime was actually proven, often sharing the proceeds with the local police who did the initial seizure. These seizures can happen during any encounter with police. Be aware that police are often able to justify seizing large amounts of cash on the grounds that they suspect the money is connected to sales of drugs or other contraband. If your property is seized under a civil asset forfeiture clause, contact the Rutherford Institute for assistance.

DO I HAVE THE RIGHT TO RECORD WHAT HAPPENS DURING A POLICE STOP?

The Supreme Court has not issued a ruling on this question, but a number of courts have ruled that there is a constitutional right under the First Amendment to make an audio or video recording of police officers' actions during the course of their public duties.⁴⁰ The courts found that the First Amendment right to gather, disseminate, and receive information of public importance applies to members of the public recording police in public places. However, the right to record police is not unlimited. For example, if the recording interferes with the ability of the officers to carry out their duties, the officers may lawfully order a person recording to stop. If you have an encounter with a police officer but were not able to record it, you still may be able to obtain a recording. In fact, the prevalence of police body cameras makes it likely that the encounter was recorded by the police.

DO I HAVE THE RIGHT TO REMAIN SILENT DURING A POLICE STOP?

Yes, but the right is qualified. The Fifth Amendment to the U.S. Constitution gives citizens a privilege against self-incrimination. Once a person is arrested, the Fifth Amendment clearly applies and a person is entitled to receive Miranda warnings. These include the rights to remain silent, and to request and have an attorney present during any police questioning.⁴¹ However, if there is a state law requiring persons who are stopped by police to identify themselves, a person may be required to provide his or her name to the police officer during a valid Terry stop.⁴² Beyond identifying oneself, however, there is no obligation to answer questions posed by police. The refusal to answer such questions should not be used against the person in a court of law.⁴³ However, be aware that not only may any answers you give potentially be used against you in a court of law, but with the rise of programs such as "Mental Health First Aid," which provides nonmedical personnel with training to identify and address mental illness, there is a risk your answers may also be used to detain you for mental health reasons.⁴⁴



WHAT NEW TECHNOLOGIES ARE BEING IMPLEMENTED WHICH COULD THREATEN MY PRIVACY?

In recent years, flashlights⁴⁵ and lasers for monitoring the alcohol content within the air of a vehicle have been developed.⁴⁶ Recently, there has also been a push to mandate “black boxes” in all new vehicles to constantly monitor information such as direction, speed, and seatbelt use, and already newer technologies such as GPS and internet connections in vehicles open up the potential for such monitoring.⁴⁷ Police have also gained access to software which allows them to extract cell phone data either via USB ports or Bluetooth, the latter potentially allowing a warrantless unconstitutional search without the owner’s knowledge.⁴⁸ Police departments are also beginning to equip officers with tablets outfitted with a number of biometric tools such as facial recognition software and fingerprint scanning.⁴⁹ Also, in addition to speed cameras, some departments are implementing tools which not only monitor your speed, but generate tickets automatically.⁵⁰

WHAT ARE MY OPTIONS IF I BELIEVE MY RIGHTS WERE VIOLATED BY POLICE DURING AN ENCOUNTER?

If you believe your rights are being violated during an encounter with police, the best course of action is to document the events in a safe manner and seek legal assistance after the encounter ends. Tense situations

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often provide police officers with the legal justifications they need to use force, even deadly force, against you. To avoid the risk of injury or death, it is important that you remain calm and courteous to officers during the encounter, and then challenge their actions later in court.

If you believe your rights have been violated, contact The Rutherford Institute for assistance or an attorney referral.

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THE RUTHERFORD INSTITUTE stands ready to defend your rights if they are violated by police. For over a quarter century, we have assisted, without charge, persons deprived of their liberty by government officials. If you believe your rights described above were violated and want to seek justice, contact us and we will listen and provide you with the guidance and help that you need.

Should you have further questions or need legal assistance in exercising your constitutional rights, please contact the Legal Department at legal@rutherford.org.

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