RESOLVED, That the American Bar Association calls upon the United States Department of Justice and Department of Homeland Security to desist from the use of force by federal agents to suppress lawful First Amendment activity;

FURTHER RESOLVED, That the American Bar Association opposes the targeted use of force against journalists, legal observers, and others seeking to document law enforcement conduct;

FURTHER RESOLVED, That the American Bar Association opposes the use of federal agents to arrest or detain individuals where such agents are not requested by the States or are not necessary to preserve demonstrable federal interests; and

FURTHER RESOLVED, That the American Bar Association denounces the deployment of unidentified federal officers or officers using unmarked vehicles to suppress lawful First Amendment activity and to remove individuals from city streets, and calls upon the United States Department of Justice and Department of Homeland Security to cease and publicly renounce such tactics, and to investigate the unlawful use of such tactics.
REPORT

In recent months, since the deaths of several African-American individuals in encounters with the police, many American cities and towns have seen protests against police brutality and systemic racism in law enforcement.¹ These protests raise matters of the highest public interest. The proper conduct of the police within the boundaries of the law and the Constitution is a matter of grave concern to the American Bar Association, which is dedicated to the preservation of the rule of law, and to all citizens and residents of the United States.

Moreover, the public streets have been, since time immemorial, a public forum where Americans have been entitled to assemble peaceably to express their opinions about the conduct of governmental affairs in their name.² Under the First Amendment to the United States Constitution, it is a foundational principle in our democratic republic that the right of peaceful public protest may not be abridged except under the narrowest and most exceptional circumstances.³

Not only does the First Amendment protect the right to peaceful protest, but the Fourth Amendment does as well. Under the Fourth Amendment, an individual may not be arrested except upon probable cause of having committed a crime.⁴ Even a temporary “stop” of an individual not amounting to a full-scale arrest requires reasonable suspicion that the person has committed, or is about to commit, a crime.⁵ If an individual is not suspected of committing a crime, there can be no proper basis for her arrest or detention. The Fourth Amendment also prevents law enforcement officers from using excessive force in carrying out arrests and stops, even when they might have probable cause or reasonable suspicion.⁶ And under the Fourth Amendment, absent urgent or other exceptional circumstances, law enforcement officers detaining individuals should clearly identify themselves as such, to ensure accountability to the rule of law.⁷


² See U.S. Const. amend. I (“Congress shall make no law respecting … the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”); see also Shuttlesworth v. City of Birmingham, 394 U.S. 147 (1969); Cantwell v. Connecticut, 310 U.S. 296 (1940).


⁴ See U.S. Const. amend. IV (“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”); United States v. Watson, 423 U.S. 411, 421-22 (1976).


⁷ See Nehad v. Browder, 929 F.3d 1125, 1138 (9th Cir. 2019); Doornbos v. City of Chicago, 868 F.3d 572, 575 (7th Cir. 2017); Child v. City of Portland, 547 F. Supp. 2d 1161, 1165 (D. Or. 2008); Newell v. City of
Finally, fundamental principles of federalism have long assigned responsibility for maintaining peace and order on public streets to local officials and local law enforcement officers, not the federal government. The United States does not have, and has never had, a federal police force. This traditional allocation of authority reflects the wisdom, born of centuries of experience, that the law enforcement function should be accountable to the people in their communities. To be sure, the federal government has the authority to protect distinct federal interests, such as federal property, and the federal government has, in extraordinary circumstances, used federal agents to safeguard civil rights protected by the Constitution where States were unwilling and unable to do so, and where States have requested federal assistance in preserving public peace. But these are exceptional deviations from a virtually unbroken tradition recognizing that law enforcement is fundamentally a state and local responsibility.

Recent events have led the American Bar Association to conclude that these fundamental constitutional principles have been fundamentally imperiled by conduct of the federal government. In response to protests against police misconduct, in particular in Washington, D.C., and Portland, Oregon, the federal government has moved to use federal agents to curtail protest activity. This pattern began in June 2020, when federal agents used chemical agents to disperse peaceful protesters near the White House.

On June 26, 2020, the President of the United States issued an unprecedented Executive Order denouncing purported “[a]narchists and left-wing extremists [who] have sought to advance a fringe ideology that paints the United States of America as fundamentally unjust and have sought to impose that ideology on Americans through violence and mob intimidation.” That order contends, without evidence or justification, that states and local governments “apparently have lost the will or the desire to stand up to the radical fringe and defend the fundamental truth that America is good, her people are virtuous, and that justice prevails in this country to a far greater extent than anywhere else in the world.”

Recent reports indicate that federal agents within the United States Departments of Justice and Homeland Security are carrying out operations, most notably on the streets of Portland, with the objective of disrupting protests against racism and police brutality. Those reports give strong reason to believe that those federal agents are not carrying out

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8 See, e.g., Bond v. United States, 572 U.S. 844, 858 (2014) (“Perhaps the clearest example of traditional state authority is the punishment of local criminal activity.”).


10 See, e.g., Cooper v. Aaron, 358 U.S. 1, 12 (1958).

11 See 10 U.S.C. § 251; Exec. Order No. 12,804, Providing for the Restoration of Law and Order in the City and County of Los Angeles, and Other Districts of California (May 1, 1992).


14 Id.
the limited enforcement functions traditionally associated with the federal government, such as protecting federal property, but rather are unconstitutionally abridging peaceful protected conduct and are encroaching on local law enforcement authority.

Eyewitness accounts state, for example, that federal agents have used chemical agents and have assaulted and detained individuals at considerable distance from federal property, such as federal courthouses, and have carried out those arrests and detentions without any basis to suspect the individuals of criminal activity.15

Reports also indicate that federal agents are targeting members of the media and legal observers to prevent them from reporting on their activities.16 And reports indicate that federal agents carried out these actions in some cases without identifying themselves as commissioned law enforcement officers, without displaying any badge or marking identifying their authority, and—perhaps most alarmingly—placing the detainees in unmarked vehicles, rendering it impossible for the detainees or for media and legal observers to ascertain where the detainees were taken or how they were being treated.17

These actions are fundamentally antithetical to American constitutional traditions. They are also detrimental to the effort, in which many Americans are now engaged, of reforming our institutions and reckoning with our flawed past. Americans are conducting a great debate over the role of the police, the pernicious yet persistent legacy of racism in our society, and the need for accountability for government misconduct. That vigorous, impassioned, and sometimes even overheated debate is in our best tradition as a people. It is not the role of the government, and certainly not the federal government, to suppress it. To the contrary, we should be working to restore trust in our institutions, but also to ensure that such trust is deserved. The rule of law demands no less, and that being so, it compels the American Bar Association to recognize that governmental efforts to stymie that debate, suppress those reform efforts, and stigmatize those engaging in them should come to an end immediately.

Respectfully submitted,

Wendy K. Mariner
Chair, ABA Section of Civil Rights and Social Justice
August 2020


GENERAL INFORMATION FORM

Submitting Entity: ABA Section of Section of Civil Rights and Social Justice

Submitted By; Wendy K. Mariner, Chair

1. **Summary of Resolution(s).** The resolution urges the federal government to desist from the use of force by federal agents to suppress lawful First Amendment activity, opposes the targeted use of force against journalists, legal observers, and others, denounces the deployment of unidentified federal officers or officers using unmarked vehicles to suppress lawful First Amendment activity and to remove individuals from city streets, and calls upon the United States Department of Justice and Department of Homeland Security to cease and publicly renounce such tactics, and to investigate their use.

2. **Approval by Submitting Entity**
   The Section of Civil Rights and Social Justice approved the resolution on July 28, 2020.

3. **Has this or a similar resolution been submitted to the House or Board previously?**
   No.

4. **What existing Association policies are relevant to this Resolution and how would they be affected by its adoption**
   The ABA has long supported fundamental principles of free expression especially in a public forum and also opposed unreasonable use of force by law enforcement officers. This resolution would continue in the tradition of the ABA’s strong support of constitutional protections. See, e.g., 18A106B (recognizes the important role that nonlawyer human rights defenders, journalists and others play in protecting justice and the rule of law, and deplores attacks on those professions, as well as on individuals, aimed at silencing or intimidating human rights voices); 2005A104b (federal shield law for journalists); 19A10c (upholds free principles of free expression on university and college campuses); the Criminal Justice Standards including 1-5.3 (suggesting legislatures clarify the authority of police agencies to develop substantive and procedural rules controlling police authority – particularly regarding investigatory methods, the use of force, and enforcement policies – and creating methods for discovering and dealing with abuses of that authority); 08A104C (banning racial profiling).

5. **If this is a late report, what urgency exists which requires action at this meeting of the House?**
   The report responds to actions by federal agents in July 2020 requiring an immediate response from the ABA.

6. **Status of Legislation.**
   The Preventing Authoritarian Policing Tactics on America’s Streets Act was introduced on July 20, 2020 in the Senate as an amendment to National Defense Authorization Act, which the Senate is currently debating. See SB4420. Companion legislation was
also introduced in the House of Representatives. The No Tear Gas or Projectiles Act was introduced in the Senate on June 30, 2020. See SB4114. Both acts are currently pending.

7. **Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.** The Section will work with relevant stakeholders within and outside of the American Bar Association and the Governmental Affairs Office to implement the policy.

8. **Cost to the Association.** The adoption of this proposed resolution would result in only minor indirect costs associated with Section staff time devoted to the policy subject matter as part of the staff members’ overall substantive responsibilities.

9. **Disclosure of Interest.** N/A

10. **Referrals.**

- Center for Human Rights
- Commission on Homelessness and Poverty
- Commission on Racial & Ethnic Diversity in the Profession
- Commission on Youth at Risk
- Government and Public Sector Lawyers Division
- Law Practice Division
- National Conference of Federal Trial Judges
- Section of Litigation
- Standing Committee on Legal Aid & Indigent Defense
- Criminal Justice Section
- Diversity and Inclusion Center
- National Association of Criminal Defense Lawyers
- Coalition on Racial and Ethnic Justice
- Young Lawyers Division
- State and Local Government Law

11. **Contact Name and Address Information (Prior to the Meeting).**

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   Paula Shapiro, CRSJ Section Director
12. Contact Name and Address Information (Person who will present the Resolution with Report to the House)

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EXECUTIVE SUMMARY

1. **Summary of the Resolution**
The resolution urges the federal government to desist from the use of force by federal agents to suppress lawful First Amendment activity, opposes the targeted use of force against journalists, legal observers, and others, denounces the deployment of unidentified federal officers or officers using unmarked vehicles to suppress lawful First Amendment activity and to remove individuals from city streets, and calls upon the United States Department of Justice and Department of Homeland Security to cease and publicly renounce such tactics, and to investigate their use.

2. **Summary of the Issue that the Resolution Addresses**
The resolution and report respond to reported actions by federal and unidentified agents to curtail protest activity in response to protests against police misconduct beginning in June 2020 requiring an immediate response from the ABA.

3. **Please Explain How the Proposed Policy Position Will Address the Issue**
The proposed resolution will address the issue by urging the federal government to desist from the use of force by federal agents to suppress lawful First Amendment activity.

4. **Summary of Minority Views or Opposition Internal and/or External to the ABA Which Have Been Identified**
None have been identified.