

Know Your Rights: The First Amendment in the Immigration Context

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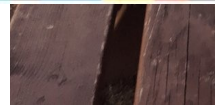
The ACLU of Hawai'i

I. What is it?

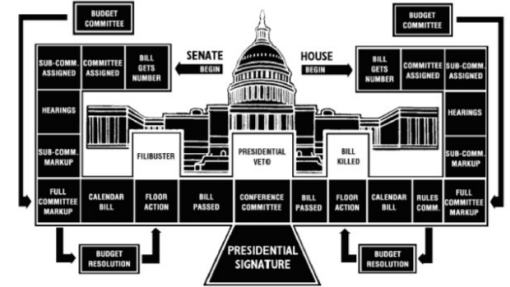
- Non-profit
- Non-partisan
- Civil rights / civil liberties watchdog

II. What does it do?

- Litigation
- Policy advocacy & lobbying
- Organizing
- Public education & press



How does a Bill become Law?



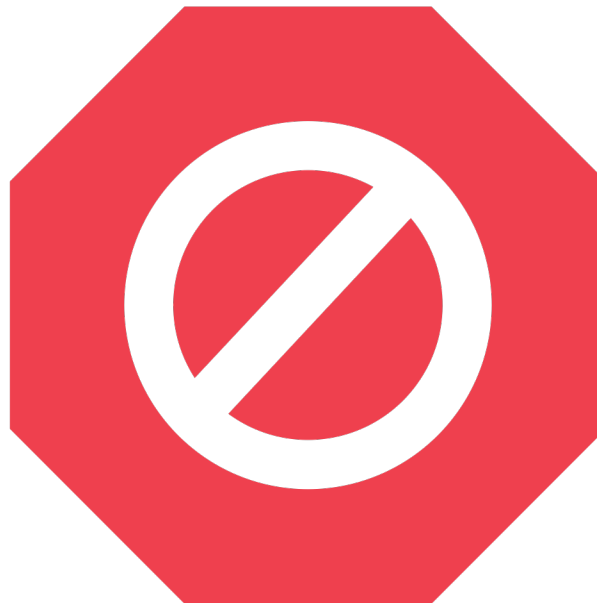
Today's Agenda

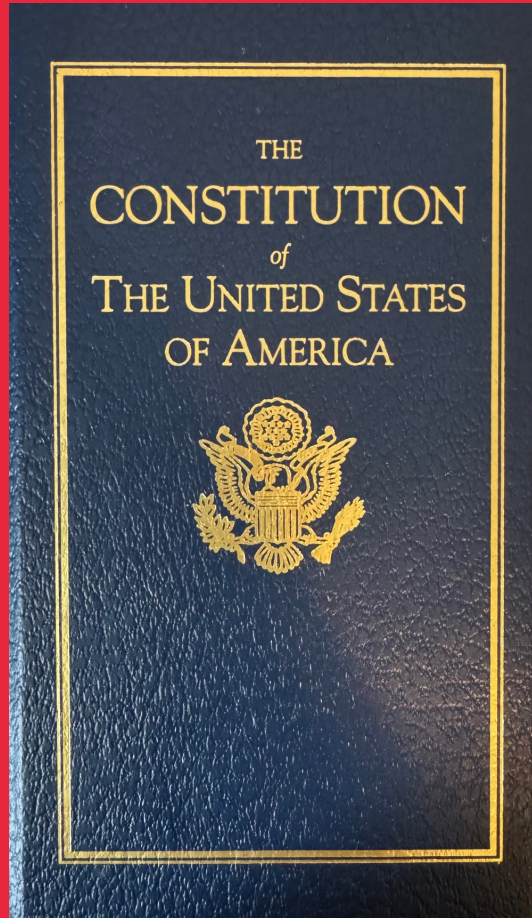
The First Amendment in the Immigration Context

1. What is the First Amendment?
2. In-Person Activities: free speech, protests, and assembly (Emily)
3. Written Activities: free speech and the right to petition (Aaron)
4. First Amendment Rights in Enforcement Operations (Wookie)
5. Q&A

Disclaimer

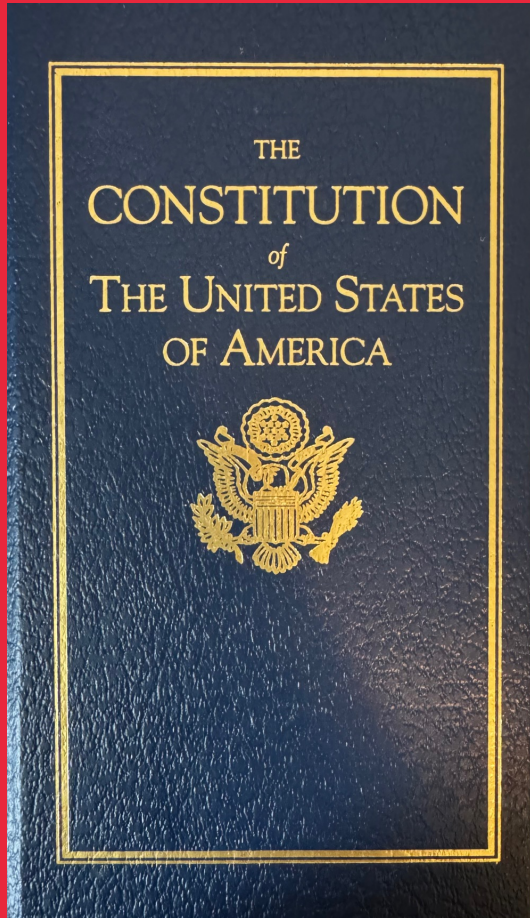
- I. This presentation is for information purposes, it is not legal advice
- II. Always consult with a lawyer if you are arrested or in removal proceedings
- III. In this administration, policies and practices are changing quickly





First Amendment.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.



First Amendment.

- Free Speech
- Free Press
- Protest
- Assembly
- Petition

The First Amendment in Person:

Speech, Assembly, & Protest



We all have the right to . . .

Freedom of Speech.

- Government cannot tell you what to say or *what not* to say
- Government cannot punish you for *what* you say* (retaliation)
 - Includes political ideas
 - *Especially* includes criticism
- Government can regulate *when* and *where* you can say things (e.g., protest permits) – called “time/place/manner” restrictions

* Some exceptions on next slide

Exceptions?

- Incitement
 - Statements intended to lead to the commission of a crime
- Defamation/libel
 - False statements that harm someone's reputation
- Obscenity
 - “Appeal to prurient interest”
- True threats of violence
 - Serious statement that speaker intends to commit violence



Free Speech Rights of Non-Citizens

“Freedom of speech and of press is accorded [non-citizens] residing in this country.”

Bridges v. Wixon, 326 U.S. 135, 148 (1945).

- **However**, *Bridges* did not specifically address all types of immigrants, including undocumented immigrants
- While we believe the same rights should be extended to **all**, we cannot be certain until SCOTUS says so

We all have the right to . . .

Freedom of assembly (association).

- Right to gather peacefully to express, promote, pursue and defend shared ideas
- Government cannot tell you *who* you can or cannot associate with, and cannot punish you for *who** you associate with (retaliation)
- Government can regulate *when* and *where* you can say things (e.g., protest permits) – called “time/place/manner” restrictions

* Some exceptions on next slide

Exceptions?

- Illegal acts
 - Rioting, blocking traffic
- Conspiracy to commit a crime
 - Need specific intent
 - Beware “guilt by association”

Not an exception:

- Unpopular ideas



Assembly Rights of Non-Citizens

“[I]t does not require war to bring the power of deportation into existence or to authorize its exercise. Congressional apprehension of foreign or internal dangers [i.e., communism] short of war may lead to its use.”

Harisiades v. Shaughnessy, 342 U.S. 580, 587 (1952)

- Is this still valid caselaw? We will have to see.
- There are good reasons why it shouldn't be valid anymore, or should have a very narrow application



More safety tips available from the National Immigration Law Center: <https://www.nilc.org/resources/immigrant-participation-in-protests-rights/>

Protesting is protected speech & assembly.

- BUT that doesn't mean the government won't punish people anyways

Tips for Protesters

- Create a safety plan
 - Contact info for attorney, plan for childcare
- Know your constitutional rights (4th and 5th Am.)
- Be familiar with emergency exit routes
- Leave mobile devices at home or turn off biometrics
- Avoid posting information on social media

Who is most at risk? (our best guess)

Undocumented Residents

Visa Holders (esp. F-1 visas)

Conditional Green Card (LPR)

Green Card (LPR) / COFA

Recently Naturalized Citizen

Naturalized Citizen

Birthright Citizen

The First Amendment in Writing: Social Media, Written Criticisms, Lawsuits

- I. First Amendment Protects thoughts and opinions expressed in writing
- II. First Amendment includes “freedom of press”
- III. Also includes the right to file a complaint with the government requesting relief (e.g. lawsuit, police report).



Retaliation

- The government cannot retaliate against you because of protected 1A conduct
- Arresting and attempting to deport may be one such form of retaliation . . .

Trump Administration Actions on Immigrants' Rights to Written Speech

Ongoing case: *Ozturk v. Trump* (D. Vt.)

- In March, ICE arrested Rümeysa Öztürk, a graduate student at Tufts University in Massachusetts, with the intent to deport her
- Based on Govt.'s public statements, appears she was only arrested for co-authoring an Op-ed criticizing Tufts Administration's positions on human rights violations in Gaza
- So far in court, government has declined to provide any other (non-speech) reason for her arrest

Revocation of Visas

- Rümeyşa entered the U.S. on a valid F-1 student visa
- Revocation of a visa can lead to deportation:
 - I. “Any alien who is present in the United States . . . whose nonimmigrant visa (or other documentation authorizing admission into the United States as a nonimmigrant) has been revoked under section 1201(i) of this title, is deportable.” 8 U.S.C. § 1227(a)(1)(B) (Immigration Nationality Act (“INA”)).



Revocation of Visas Contd.

- The government is also targeting students based on another provision:

An alien whose presence or activities in the United States the Secretary of State has reasonable ground to believe would have potentially serious adverse foreign policy consequences for the United States is deportable.

8 U.S.C. § 1227(a)(4)(C)(i).

- The government is not relying on this provision in Rümeyisa's case, but has in others, including Mahmoud Khalil.

Ozturk v. Trump Contd.

- Arrested in Massachusetts, then quickly transported to Vermont, then Louisiana
- Rümeysa (represented by ACLU) filed a petition for writ of habeas corpus alleging **retaliation** for protected speech
- Last week, a Vermont federal judge ordered Rümeysa transferred back to Vermont (by May 1) and indicated he is inclined to rule in her favor

What does this all mean for immigrants who hope to criticize the government in writing?

- While we believe that immigrants have rights to speak on public and political issues, the administration appears to be deporting and attempting to deport immigrants for just that
- Immigrants planning to speak about hot-button issues and express opinions on hot-button issues in writing (1) be mindful of social media (consider privacy settings) and (2) **proceed cautiously**; (3) consider preemptively consulting an immigration attorney.

The First Amendment during police/ICE enforcement operations: **The right to record**

- I. Why recording matters
- II. The law on the right to record law enforcement officers
- III. Practical guidance on recording law enforcement
- IV. Interacting with law enforcement (*e.g.*, police, ICE)



Officials said the public will be asked to step back if they are encroaching on the perimeter and a second warning may be necessary, but arrests could follow.

Why does recording law enforcement matter?



- I. It promotes accountability and oversight
- II. It can deter misconduct
- III. It serves as evidence that can be used in legal proceedings
- IV. It supports broader movements for justice

The law protects the public's right to record

In Hawai'i, you have the right to record government officials engaged in official duties in public places:

- A. First Amendment to U.S. Constitution
 1. Ninth Circuit: "**The First Amendment protects** the right to photograph and record matters of public interest. . . . This includes **the right to record law enforcement officers engaged in the exercise of their official duties in public places.**"
 - *Askins v. Dep't of Homeland Sec.*, 899 F.3d 1035 (9th Cir. 2018)
- B. Article I, section 4 of the Hawai'i Constitution
 1. Hawai'i Supreme Court: "[T]he **filming of government officials engaged in their duties in a public place**, including police officers performing their responsibilities **is protected** by the First Amendment to the United States Constitution and **by the independent protections afforded by article I, section 4 of the Hawai'i Constitution.**"
 - *State v. Russo*, 141 Haw. 181 (2017)



But the right to record is not absolute

- I. You must be in a “public space”, or somewhere you are authorized to be
 - E.g., you can’t trespass on private property
 - E.g., you can’t enter a restricted area of a government building
 - II. You can’t materially interfere with law enforcement operations
 - The meaning of “interfere” is, of course, very vague!
- I. The right is “subject to reasonable restrictions as to time, place, and manner” of the recording
 - Restrictions are justified if they (1) help ensure that law enforcement can carry out duties and (2) maintain safety
 - Any restrictions must (1) be narrowly tailored and (2) leave open ample alternative channels to engage in protected activity

Practical tips for recording law enforcement

- I. Observe and record from a safe distance
- II. Do not hide that you are recording—be open about what you're doing
- III. Do not physically interfere with police
 - ICE can order you to move if you are interfering with the operation
 - If you refuse to move, ICE can claim you're obstructing the operation
- IV. Talk/act calmly, avoid escalating, and clarify your purpose:
 - "I'm not interfering. I'm just exercising my First Amendment right to record from a safe distance."
- V. Comply with law enforcement orders
 - Even if you think they are wrong, don't risk getting arrested for obstruction

- I. During recording
 - Don't narrate (let video speak for itself) – and do not share info about targeted individuals (e.g., name, immigration status, criminal history)
 - Focus on law enforcement conduct
 - Capture relevant context
 - Use a passcode lock on phone
- II. After recording
 - Preserve the original of the video (edit on a copy)
 - Be strategic about whether and when to post on social media

Interacting with law enforcement (police, ICE)

I. You have the right to remain silent (Fifth Amendment)

- It's often best to exercise this right
 1. e.g., "I choose to remain silent."
 2. Provide red card
- You do NOT have to share: (1) name or place of birth; (2) immigration status; (3) criminal history
- Exception: traffic stops (must provide name and address under HRS § 291C-172)

I. You have the right not to be searched (Fourth Amendment)

- Even if police ask, you do not have to consent to a search of yourself or your belongings
 1. e.g., "I do not consent to this search."
 2. Provide red card
- Be careful about any actions that officers could interpret as consent

Questions?

ACLU

Hawai'i

WE THE PEOPLE