

DC City Council Testimony on the Revised Criminal Code Act of 2021

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PRESENTED TO **WASHINGTON DC CITY COUNCIL COMMITTEE ON
THE JUDICIARY AND PUBLIC SAFETY**
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Introduction

Thank you for providing me the opportunity to speak today. My name is Nick Robinson. I am a senior legal advisor at the U.S. Program of the International Center for Not-for-Profit Law (ICNL) based here in Washington DC. We have advised policymakers in the U.S. and around the world on how to create a legal environment that better protects the freedoms of association, assembly, and expression.

We welcome the proposed changes to the offense of rioting in the Revised Criminal Code Act of 2021 which would much better address First Amendment concerns with the current law while still dealing with legitimate public safety needs. Last year, the US saw overbroad and outdated anti-riot acts being used to target and harass peaceful protesters during the nationwide demonstrations for racial justice. The DC rioting act also has a history of abuse, including against J20 protesters on the Inauguration Day of President Trump in 2017.

At ICNL we have surveyed rioting laws in all 50 states and Washington DC. These laws, including in DC, are generally modeled on an English Common Law tradition where the offense of rioting was designed to be a heavy-handed tool used by the Crown to target political and religious dissent.

Rioting laws in the U.S. frequently include at least one of three major defects that undermine core First Amendment rights and current DC law suffers from all of these defects. First, the current DC rioting law can be interpreted to create liability for simply being part of a crowd where others engage in riotous conduct, like kicking over a trashcan. In other words, the offense of rioting can create guilt by association, which is unconstitutional under the First Amendment.

Second, current DC law can create liability for rioting that does not result in actual violence or property destruction, but simply its threat, which creates a subjective and vague standard for enforcement.

Third, about half of states, including Washington DC, have an incitement to riot offense. Such offenses have a history of being used to target protected First Amendment speech, such as merely provocative speech. DC's incitement to riot provision includes prohibiting "urging" someone to riot. The Fourth Circuit and Ninth Circuits recently found that similar incitement language in the federal anti-riot act was unconstitutionally overbroad.

The changes to the Code being considered today are a clear improvement. The new code would eliminate the crime of incitement to riot altogether, putting Washington DC into the company of about half of U.S. states. It would require that an individual charged with rioting knowingly commit or attempt to commit a criminal offense that causes bodily injury, taking of property, or damage to property. Importantly, it also requires that the person convicted of rioting be reckless as to the fact 7 or more other people are also engaging in similar conduct nearby. In other words, it would substantially limit the possibility for the offense to create guilt by association and create a much clearer standard for enforcement. The bill also reduces the maximum penalty for the crime of rioting from a felony to a misdemeanor, which reduces the likelihood of charge stacking against protesters to pressure them to take a plea to a lesser offense of which they might be innocent.

The proposed changes to the rioting offense are a positive step forward. The government has clear interests in deterring and stopping riots, but rioting offenses have historically not been effective at this purpose. Instead, they have frequently been abused to undermine the freedom of peaceful assembly. Arguably there is no need for a rioting offense at all. If someone commits violence or vandalism they can be punished, frequently severely, for assault, destruction of property, or another related crime. Three states – Wisconsin, Nebraska, and Wyoming – do not have any rioting offense. Neither did the federal government until 1968. The District's current anti-rioting act dates from 1967 and was enacted as a heavy handed response to the 1960s race riots.

In response to the U.S. Capitol attack in January of this year, federal prosecutors have now prosecuted over 700 individuals, including for a range of serious crimes, but none for rioting or incitement to riot under either federal or District law. At least until now, federal prosecutors have adopted a more targeted approach towards those who breached the Capitol and shied away from outdated and constitutionally suspect rioting offenses.

Data I received from the DC Sentencing Commission and that I will [submit for the record](#) covering the period of 2012 to 2020 shows that the DC rioting act has been rarely used and that when it is used it is for mass arrests that rarely result in successful prosecutions. As many have long recognized, including a majority of the City Council that co-sponsored the [Rioting Modernization Amendment Act of 2020](#) last year, DC's current anti-rioting law is deeply flawed and needs substantial reform. The proposed changes to DC's rioting offenses in the Revised Criminal Code would be a major step forward and could serve as a potential model for the country.

Thank you for your time.