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D.C. Chart - Immigration Consequences of Common Protest Offenses¹

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Introduction:

The following is intended as an introductory tool for attorneys advising their clients regarding the immigration consequences of D.C. protest related criminal case dispositions.² Immigration is a complicated area of law *that is constantly changing* and the immigration consequences that could apply in any individual case can vary widely. Thus, while this chart is intended to be a resource, attorneys should consult with an experienced immigration attorney to ensure the accuracy of their advice.

In General:

It is important to note that, depending on the specifics of an individual's case and status, even the most minor interaction with the criminal system can trigger immigration consequences up to and including removal (i.e. deportation). Thus, even when the charged offense would otherwise be deemed minor, an attorney for a noncitizen should seek to dispose of their client's case by having the charges dropped or by seeking deferred prosecution agreements or other diversion agreements where the defendant does not admit any facts sufficient to establish guilt or culpability.³ Under the Immigration and Nationality Act ("INA"), the definition of a "conviction" is much broader than under the D.C. Code. D.C. dispositions that might not be convictions pursuant to the D.C. Code but that are convictions under the INA include deferred sentencing agreements even when

¹ © October 2020, Just Futures Law. The analysis included in the chart below was generated in consultation with the D.C. Public Defender Service Immigration staff Katie D'Adamo and Veronica Guerrero. Court appointed or pro bono attorneys can seek assistance in determining immigration consequences for their clients by contacting them via email at kdadamo@pdsdc.org and vguerrero@pdsdc.org, initially sending name and case # only for conflict check. Just Futures Law also thanks Dan Kesselbrenner for his contributions.

² People who are not residents of Washington, D.C. may face different consequences in their own jurisdiction.

³ It is possible that even though these dispositions are not considered convictions, they may nonetheless carry immigration consequences, such as triggering conduct-based inadmissibility grounds or denial of discretionary relief.



they result in withdrawal of a plea and dismissal,⁴ and convictions that are set aside under the Youth Act.⁵ However, it is important to note that even dispositions that are not considered convictions under the D.C. Code or under the INA may nonetheless carry immigration consequences, for example by triggering conduct-based inadmissibility grounds or denial of discretionary relief.

Where a disposition that will count as “conviction” cannot be attained, certain offenses are more likely to result in immigration consequences up to and including placement in removal proceedings and deportation. In those circumstances, attorneys should attempt to negotiate for pleas that do not trigger specific deportability grounds.

Below is a chart of common offenses that could potentially be charged in connection with a protest-related arrest. The chart addresses the likelihood that convictions for the included offenses will give rise to grounds for removal. Identifying the potential grounds of removability triggered by a particular offense is often insufficient in and of itself to determine the immigration consequences of a particular conviction; additional immigration consequences may arise from the offenses described in the chart, such as the denial of naturalization, adjustment of status, inadmissibility, or the denial of discretionary relief from removal. Further, there are also specific types of immigration status, such as Deferred Action for Childhood Arrivals (“DACA”) and Temporary Protected Status (“TPS”), which have distinct criminal bars, and are ultimately discretionary in nature and can be revoked even absent specified convictions. For example, TPS can be revoked if an individual is convicted of two misdemeanors punishable by 5 days or more or of one felony. DACA also has very specific criminal bars.⁶ **Defense attorneys must have a complete understanding of their client’s immigration and criminal history in order to provide accurate advice concerning the immigration consequences of a conviction.**

Even though D.C. law treats attempt offenses for crimes other than crimes of violence as misdemeanors punishable only by a maximum of 180-days imprisonment and/or a fine – see <https://code.D.C.council.us/D.C./council/code/sections/22-1803.html> – if pursuant to the INA the completed offense would be considered a crime involving moral turpitude (“CIMT”) or an aggravated felony, then INA typically treats an attempt to commit such offense as a CIMT or aggravated felony as well.

D.C.’s sentencing guidelines, which only apply in felony cases, are voluntary. This means that attorneys can use the severity of possible immigration consequences to negotiate for a plea or sentence below the typical range. This can also be especially important when attempting to negotiate a sentence in order to avoid possible immigration consequences. That said, unless the attorney and prosecutor agree to a D.C. Crim Pro R. 11 (c)(1)(c) plea, judges almost always sentence within the guidelines.

⁴ See *Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003).

⁵ See *Dung Phan v. Holder*, 667 F.3d 448, 450 (4th Cir. 2012); D.C. Code § 24-901 et seq.

⁶ See this important summary of DACA related bars: https://www.ilrc.org/sites/default/files/documents/ilrc-2012-daca_chart.pdf

Offenses⁷

Curfews

Offense	Sentence	Notes	Is it an Aggravated Felony (AF), Crime Involving Moral Turpitude (CIMT), or Other Removability Ground? ⁸	Suggestions for Possible Alternate Plea
§ 2–1543. Curfew authority; defenses; enforcement and penalties.	Fine (up to \$500) Community service	Covers minors and adults	No (strict liability offense)	
§ 24–2203.4 Curfew ordered under emergency powers	three hundred dollars (\$300), or by imprisonment for not more than ten (10) days.	https://twitter.com/RachelSadon/status/1267281840731275265 https://D.C.ist.com/story/20/05/31/mayor-muriel-bower-institutes-a-sunday-night-curfew-starting-at-11-p-m/	No	**Note DACA and TPS may be implicated here.

⁷ Chart information and analysis current as of 10/28/2020.

⁸ As noted in the introduction, conviction of two misdemeanors punishable by 5 days or more of potential jail time or one felony will also result in revocation of TPS status. DACA status has separate criminal disqualifiers available here: https://www.ilrc.org/sites/default/files/documents/ilrc-2012-daca_chart.pdf.

Masks

Offense	Sentence	Notes	AF/CIMT/GMC	Suggestions for Possible Alternate Plea
§ 22–3312.03. Wearing hoods or masks.	a misdemeanor punishable by a fine not more than the amount set forth in <u>§ 22-3571.01</u> , or imprisonment not to exceed 180 days, or both		Not AF CIMT Unlikely	

Arson, Looting

Offense	Sentence	Notes	AF/CIMT/GMC	Suggestions for Possible Alternate Plea
§22–303. Malicious Burning, Destruction, or Injury of Another's Property.	180 days (for damage valuing less than \$1000); 10 years (damage valuing more than \$1000)	This includes any attempted damage to property.	Crime involving moral turpitude (CIMT). Misdemeanor version = petty offense if only CIMT conviction. Felony version possibly charged as an aggravated felony if sentence of one year or more imposed (includes suspended time).	Pursue Unlawful Entry §22–3302 or Trespass (§22–3301) as an alternative Possible alternative: If someone cannot get a safer plea and does not want to go to trial, then allocating to an attempted to injure property without malice would be the safest disposition.

Assault and Battery

Offense	Sentence	Notes	AF/CIMT/Etc	Suggestions for Possible Alternate Plea
§ 22–402. Assault with Intent to Commit Mayhem or with Dangerous Weapon	Up to 10 years	These are offenses against a person. Victims can bring this against you.	Likely CIMT. Possible aggravated felonies if sentence of 1 year or more imposed (with exception of misdemeanor version) (tho good defense ADW is not COV under 18 USC 16(a))	Seek alternative plea of simple misdemeanor assault under §22-404a1, unlawful entry, or disorderly conduct under preferred subsections (highlighted below)
§ 22–403. Assault with Intent to Commit Any Other Offense	Up to 5 years		The minimum conduct should not be a CIMT, but there could be a problem with showing a realistic probability. If forced to plead to this offense and a defendant didn't want to go to trial, then affirmatively allocuting to intending to commit an offense that did not involve moral turpitude would be safest disposition (e.g. trespass or plain simple assault (not on a PO))	Seek alternative plea of simple misdemeanor assault under §22-404a1, unlawful entry, or disorderly conduct under preferred subsections (highlighted below).

§ 22-404.(a)(2). Assault causing significant injury	Up to 3 years		CIMT AF if sentence is 1 year or more	Seek alternative plea of simple misdemeanor assault under §22-404a1, unlawful entry, or disorderly conduct under preferred subsections (highlighted below)
§ 22-404.1. Aggravated Assault	Up to 10 or up to 5 years (attempt)		CIMT AF is sentence is 1 year or more	Seek alternative plea of simple misdemeanor assault under §22-404a1, unlawful entry, or disorderly conduct under preferred subsections (highlighted below)

Assault and Battery on a Police Officer/Security Guard:

Assault and Battery on police officers or other offenses related to law enforcement those who might be police officers e.g. security guards

Offense	Sentence	Notes	AF/CIMT/Etc	Suggestions for Possible Alternate Plea
§ 22-405. Assault on Member of Police Force, Campus or University Special Police, or Fire Department	§ 22-405 (b) Misdemeanor, up to 6 months.	Includes “any licensed special police officer” such as a private security guard. This means that any alleged injuries to a security	Conviction for misdemeanor APO under section b is unlikely to be a CIMT because it does not require specific intent	Seek alternative plea of simple misdemeanor assault under §22-404a1 as first choice. Second choice misdemeanor version

		guard will carry a higher sentence.	to injure and does not require that the assault causes injury; and even if it is, subject to petty offense exception; Felony APO under subsection (c) likely CIMT + possible AF if sentence is 1 year or more	under §22–405(b)
§ 22–405 (c) Felony, up to 10 years				
§ 22–405.01. Resisting Arrest by Individual Reasonably Believed to be Law Enforcement Officer.	Up to 10 years		Resisting arrest possible CIMT AF unlikely but seek sentence less than one year to be safe	Seek alternative plea of misdemeanor assault under §22-404a1.
§ 22–1404. Falsely Impersonating Public Officer or Minister	not less than 1 year nor more than 3 years		False impersonation likely CIMT AF unlikely	Possible alternative plea of 22–1409. Use of official insignia; penalty for unauthorized use. Likely not a CIMT
§ 22–1931. Obstructing,	180 days	If a person interferes or does not allow	Possible CIMT, petty offense if only CIMT	§ 22–1321. Disorderly Conduct

Preventing, or Interfering with Reports to or Requests for Assistance from Law Enforcement Agencies, Medical Providers, or Child Welfare Agencies		someone to enter a space to provide help, this is one offense that could be applied.	Not AF because term of imprisonment is not a year	
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Offenses against law and order

Offense	Sentence	Notes	AF/CIMT/GMC	Suggestions for Possible Alternate Plea
§ 22–1301. Affrays.	Not more than 180 days	The offense is not defined by the statute but it “appears to occur whenever two persons fight in public.” <i>See Hedgpeth v. Rahim</i> , 213 F. Supp. 3d 211, 223 (D.D.C. 2016), <i>aff’d</i> , 893 F.3d 802 (D.C. Cir. 2018).	Likely not a CIMT See <i>In the Matter of O-----</i> , 4 I. & N. Dec. 301 (BIA 1951). Not AF	N/A
§ 22–1307. Crowding, Obstructing, or Incommoding.	Misdemeanor, and not more than 90 days		Unlikely to be CIMT Not AF	N/A
§ 22–1321. Disorderly	Misdemeanor, and not		1321-a1; 1321a2; 1321a3 are possible CIMT if	Preferable subsections for a plea are 1321b; 1321c;

Conduct	more than 90 days		statute found to be divisible; Not AF	1321-c1; 1321-d; 1321-e
<p>§ 22–1309. Throwing stones or other missiles.</p> <p>It shall not be lawful for any person or persons within the District of Columbia to throw any stone or other missile in any street, avenue, alley, road, or highway, or open space, or public square, or enclosure, or to throw any stone or other missile from any place into any street, avenue, road, or highway, alley, open space, public square, or inclosure, under a penalty of not more than \$500 for every such offense.</p>	penalty of not more than \$500 for every such offense	strict liability offense involving only property damage. In general, strict liability crimes generally are not CIMTs.	<p>Unlikely CIMT, but if divisible then subsections 1 & 2 more problematic</p> <p>Petty offense only if CIMT conviction</p> <p>Not AF</p>	N/A
§ 22–1323. Obstructing bridges connecting	(1) Shall be fined not less than \$1,000 and	D.C. Code § 22-1323 does not require an intent to	CIMT unlikely	N/A

D.C. and Virginia. “knowingly and willfully obstructs any bridge connecting the District of Columbia and the Commonwealth of Virginia”	not more than \$5,000, and in addition may be imprisoned not more than 30 days; or	achieve an immoral result or willful disregard of an inherent and substantial risk that an immoral act will occur, nor is the conduct morally reprehensible	Argument against CIMT w/r/t intent requirement and conduct. Not AF	
§ 22–3321. Obstructing public highway.	A fine for each offense of not less than \$100 nor more than \$250 and be imprisoned till the fine and the costs of suit and collection of the same are paid.		Not CIMT. Not AF.	
§ 22–1322. Rioting or Inciting to Riot	Max is 180 days unless damages exceed \$5K, then it is 10 years	Broad statute	CIMT and AF	Disorderly conduct § 22–1321. Generally disorderly conduct and breach of the peace offenses are regulatory offenses and thus not CIMTs. Violations of § 22–1321 are punishable by a fine and/or no more than 90 days imprisonment
§ 22–1810. <u>Threatening to Kidnap or Injure a Person or Damage His Property</u>	Up to 20 years:	Very broad statute and can cover a lot of conduct. Has a harsh sentencing range.	Likely a CIMT Possible aggravated felony if sentence imposed is 1 year or	Seek alternative plea of simple misdemeanor assault under §22-404a1 or Attempted Threats under § 22–404

Whoever threatens within the District of Columbia to kidnap any person or to injure the person of another or physically damage the property of any person or of another person, in whole or in part			more (some defenses) Possible AF if sentence more than 1 year	
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Trespassing, defacing buildings and unlawful imprisonment type offenses

Offense	Sentence	Notes	AF/CIMT/Etc	Suggestions for Possible Alternate Plea
§ 22–3302. Unlawful entry on property	Misdemeanor, not more than 180 days	This is standard trespassing	Unlikely CIMT Not AF	N/A
§ 22–3312.01. Defacing Public or Private Property	Not more than 180 days	This includes graffiti on someone’s property where the owner does not consent Also includes chalking protest messages on public and private property.	Unlikely CIMT. There are defenses with respect to the requisite intent and the statute is overbroad with respect to culpable conduct (see chalking example) Not AF	N/A
§ 22–2501. Possession	Not more than 180	For using an object for	Not AF	N/A

of implements of crime; penalty.	days	purposes of committing a crime. Anything can count as a tool of crime.	Not CIMT	
Burglary § 22–801. Definition and Penalty	First degree: 5-30 Second degree: 2-15	Building, but increases if person/object inside damaged or injured More of a nighttime offense	Likely CIMT unless the intent to commit a crime which is not a CIMT Possible aggravated felony especially if the underlying crime is a crime of violence or if the sentence imposed is a year or more.	§ 22–3302. Unlawful entry on property If you can't avoid burglary charge, the most secure way to plead to burglary while avoiding an aggravated felony conviction of any type is to avoid a sentence imposed of one year or more, on any single count

Do D.C. Criminal Justice Agencies Work with ICE?

Yes they do. While Mayor Bowser has stated that D.C. is a “sanctuary city,” many agencies in the D.C. criminal legal system still cooperate with ICE. The D.C. criminal legal system is comprised of both D.C. and federal agencies, the latter of which are generally not subject to laws or policies passed by the D.C. Council or the Mayor. The D.C. agencies include the Office of Attorney General, the D.C. Jail, and the Metropolitan Police Department (MPD). The federal agencies consist of the U.S. Marshal Service, the Pretrial Services Agency, the Court Services and Offender Supervision Agency (CSOSA), the U.S. Attorney’s Office, and the Bureau of Prisons, all of which cooperate with ICE in different ways.

As of October 2020, the D.C. Council was in the process of promulgating a final version of the Sanctuary Values Act, which addresses information-sharing with and transfers of custody between ICE and the D.C. Jail, in St. Elizabeths hospital, or by MPD. The temporary version of

the Act⁹ prohibits the D.C. Jail, St. Elizabeths, and MPD from sharing release date, name, and address information with ICE. Despite this law, sometimes ICE has been present at the Jail when a noncitizen is released from D.C. Jail custody, where ICE then arrests and detains them.

There is a preliminary injunction¹⁰ prohibiting the U.S. Marshals from seizing individuals for ICE who have otherwise been ordered released. See N.S. v Hughes No. 1:2020cv00101 (D.D.C. 2020). The U.S. Marshals are federal law enforcement agents who serve as the bailiffs in D.C. local courts and also transport detainees to and from the D.C. Jail. Prior to the injunction, the U.S. Marshals cooperated with ICE by notifying ICE of individuals suspected of being deportable and by holding individuals ordered released by the court for transfer to ICE when requested. Despite a federal court order prohibiting them from seizing individuals pursuant to ICE detainers, the Marshals currently have a policy under which they transfer individuals into ICE custody if ICE is in the courthouse at the time the individual is ordered released.

How will ICE Know that the Individual is a Noncitizen?

ICE uses the criminal legal system to locate and detain deportable noncitizens. Agencies within the D.C. criminal legal system alert ICE, either directly or indirectly, when noncitizens are in their custody by:

Fingerprinting:

- When individuals are arrested and fingerprinted, ICE may receive an automated notification particularly if that individual has a prior fingerprint record in DHS databases.
- Once ICE is notified, they are able to coordinate with U.S. Marshals to pick up the noncitizen if that individual is ordered released at presentment (also known as “first appearance”) or if their case is no papered, and transfer them into ICE custody.

Pretrial Services:

- The Pretrial Services Agency is a federal entity within CSOSA that makes recommendations to the court about a person’s eligibility for release pending trial and that supervises defendants whom the court releases pending trial.¹¹ In order to make those recommendations, it collects information about newly arrested defendants, including country of origin and whether the individual is a U.S. citizen. It then provides this information to the Court.
- When Pretrial Services learns that a defendant is a noncitizen, they run an automated immigration status check which serves to notify ICE that the noncitizen is in their custody. Pretrial Services has also called ICE when they suspect someone they interview is a noncitizen, and

⁹ Sanctuary Values Amendment Act of 2019, Bill 23-0501.

¹⁰ Status of injunction current as of 10/28/2020.

¹¹ D.C. does not have a bail or money bond system. Persons with pending charges in D.C. Superior Court are either detained at the Jail or released, usually with conditions they must comply with in order to remain on release status.

has cooperated with ICE in the past if ICE reaches out for information. There have also been numerous incidents of ICE arresting noncitizens when they report to their Pretrial Services appointments.

- If you are advising a noncitizen defendant prior to presentment, you should consider whether to advise the defendant to decline to answer Pretrial Services' questions related to immigration status or to refuse entirely to answer any of Pretrial Services' questions. The consequence of declining to answer some or all questions, however, could be that the judge decides to hold the individual at presentment, meaning they will spend additional time in custody at the D.C. Jail before a subsequent hearing at which they can request release.

Who is Most Likely to be Transferred into ICE Custody at Presentment?

ICE can issue a detainer for anyone who is undocumented or deportable, including individuals with no previous criminal background. When a noncitizen is in police custody, ICE often works with the police or the U.S. Marshals to coordinate a transfer from police custody to ICE custody. This often happens after presentment in C-10. Certain noncitizens are at a higher risk for being picked up by ICE:

- Individuals who are undocumented
- Individuals with other pending criminal charges
- Individuals who have been convicted of a crime
- Individuals who have received a final order of removal (including those who failed to appear at their deportation hearing) but have not yet left the country
- Individuals already in deportation proceedings
- Individuals who have reentered illegally after deportation
- Individuals charged with serious felonies

While ICE technically can also issue detainer requests for individuals who are DACA recipients, TPS recipients, or individuals in the United States on a valid student visa (all of which involve an element of discretion), ICE is unlikely to do so on the basis of simple protest related charges unless the individual has some other criminal history as described above.

ICE at the Courthouse

Although it is not common, as of October 2020, there have been at least two reported instances of ICE seeking to arrest a noncitizen inside or near D.C. Superior Court when appearing later for their court dates after having been released from C-10.

Tips to help assess risk to your client of transfer into ICE custody.

1. Understand your client’s immigration status and whether their prior criminal history or current charges in light of their status puts them at risk of transfer into ICE custody for placement into removal proceedings. Encourage clients to visit an immigration attorney prior to participating in a given action to understand potential defenses to deportation available to them if placed in removal proceedings.
2. Understand the person’s goals and help them assess their personal risk. Keep in mind that some people want to test the system and are willing to risk arrest and transfer to ICE.
 - a. Example: In one action, a group wanted to pressure the local government to enact a tighter and stronger sanctuary city policy. They refused to disclose their names, address, DOB, POB or other information in a booking sheet. These tactics increased the risk of longer pre-trial detention and ICE transfer. Attorneys elected to do research around transfers and developed a political and advocacy strategy that could support their goals.
3. Find out if this a high risk action or a low risk action. Green actions include large marches, like the Women’s March. Red actions might involve night-time protests or direct actions on government buildings.
4. Remember to ask about client’s social media use and advise clients that police and ICE are often scanning social media sites. It might be a good idea to have those sites go dormant or private.
5. Phone security practices: Assume that your phone will be taken by police if arrested and understand that the police could then seek a warrant to search your phone. At the same time, they are a powerful tool to document abuses and surveillance by police.
6. If they are arrested, it’s a good rule of thumb to assert Miranda (5th Amendment) rights, to ask for an attorney, and to decline to provide any immigration status information or answer “Place of Birth” questions.
7. Encourage them to be in contact with local organizers and people involved in jail support. They will have information about jail support and release.

Common questions:

1. Should I carry ID?

If you use a non-D.C. ID, you might not be eligible for a D.C. disposition called ”post and forfeit.” “Post and forfeit” is an option for a limited number of low-level misdemeanor charges; it allows D.C. resident to post a small amount of money, usually \$50, after an arrest

(which does not constitute a conviction for immigration purposes but could have consequences for discretionary types of relief). However, post and forfeit are usually offered for large “corporate” marches.

A passport, special ID/license for noncitizens, consular matricula card, or any immigration card is evidence that can be used to prove you are a noncitizen in immigration court. If you are arrested in D.C., however, such identification would provide law enforcement information about your noncitizen status that you might otherwise choose not to provide. Consider whether you want to carry such ID and risk D.C. law enforcement having proof that you are a noncitizen.

2. If I am arrested, for how long will I be locked up?

It depends.

It could be relatively quick if DC MPD offers you “post and forfeit” or “citation release.” If you are given the post and forfeit option, you will be released, after you “post” the fee, from the police station. Some offenses are eligible for “citation release.” This is when a person is booked at the police station but then released with a date to appear in court on a specific date in the future. (D.C. does not have a money bond system; you cannot “post bail” from the police station or from court.) Both post and forfeit and citation release are entirely discretionary and only available for a relatively small number of low-level, non-violent, misdemeanors.

If you are not able to “post and forfeit” or you do not receive a “citation release,” you will be taken from the police station to the Central Cell Block and held in police custody until you are presented in court. (This is called a “presentment” or an “first appearance.”) Court is closed on Sundays, so if you are arrested on a Saturday, you will stay in police custody until you appear in court on Monday. When you go to court, if the prosecutor decides to “paper your case” (bring charges against you), then the court will either order you released, usually with conditions or will order that you be detained. If you were held in police custody, an attorney will meet with you in court and explain more about your chances for release and the hearings you are entitled to if the prosecutor requests detention pending trial.

3. What happens if I don’t answer questions about my immigration status or place or birth when I’m being booked by D.C. authorities?

- a. They could detain you longer. But it may help you avoid being targeted by ICE.
- b. Note that if you are advising a noncitizen defendant you should consider whether to advise the defendant to decline to answer Pretrial Services’ questions related to immigration status or to refuse to answer all of Pretrial Services’ questions altogether. The

consequence of this could be that the judge decides to hold the individual at presentment, meaning they will spend additional time in custody at the D.C. Jail. However, this option reduces the likelihood of an ICE transfer.