



# High Court Strikes Down Provision of Crime of Violence Definition as Unconstitutionally Vague

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*UPDATE: In June 2019, following the publication of this Sidebar, the Supreme Court in [United States v. Davis](#) held that the residual clause of the “crime of violence” definition found in [18 U.S.C. § 924\(c\)](#) is unconstitutionally vague. [18 U.S.C. § 924\(c\)](#) imposes enhanced prison sentences on criminal defendants who use a firearm during the commission of a “crime of violence,” and employs a definition of a “crime of violence” that is virtually identical to the one found in [18 U.S.C. § 16](#). Citing [Johnson v. United States](#) and [Sessions v. Dimaya](#), the Court ruled that the second prong of [18 U.S.C. § 924\(c\)](#)’s definition, which covers a felony “that by its nature, involves a substantial risk that physical force against the person or property of another may be used,” provides no reliable way to determine whether a criminal offense ordinarily carries a substantial risk of force. The government, which acknowledged that [18 U.S.C. § 924\(c\)](#)’s second prong was unconstitutionally vague in light of [Johnson](#) and [Dimaya](#), had urged the Court to adopt a “case-specific” approach that considers a criminal defendant’s actual conduct when assessing whether an offense carries a “substantial risk” of physical force. While recognizing that a “case-specific” approach would make the “substantial risk” inquiry less vague, the Court nonetheless declined to adopt that approach, reasoning that [18 U.S.C. § 924\(c\)](#)’s plain language, context, and legislative history indicated that Congress had intended the courts to apply a “categorical approach” that looked only to the ordinary nature of a generic crime, rather than the underlying facts, when deciding whether an offense carried a substantial risk of physical force under [18 U.S.C. § 924\(c\)](#). The Court’s decision in [Davis](#), like earlier decisions in [Dimaya](#), [Johnson](#), and other cases reinforces that Congress may not impose criminal or civil penalties on an individual without specifying the conduct that triggers those penalties, a concept rooted in “the twin constitutional pillars of due process and separation of powers.”*

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A non-U.S. national (alien) may be subject to removal and face other serious immigration-related consequences if he has been convicted of an aggravated felony. The Immigration and Nationality Act (INA) defines an aggravated felony to include a “crime of violence” for which the term of imprisonment is at least one year, and incorporates the federal crime of violence (COV) definition found in 18 U.S.C. § 16. Recently, the Supreme Court in *Sessions v. Dimaya* affirmed a decision by the U.S. Court of Appeals for the Ninth Circuit (Ninth Circuit) holding that the language of the second prong of the COV definition, which covers any felony offense that involves a “substantial risk” of physical force, is unconstitutionally vague (the first prong of the COV definition, covering an offense that includes as an element the actual, attempted, or threatened use of force, remains in effect). The Supreme Court relied on its decision in *Johnson v. United States*, which held that a similarly worded component of the federal violent felony definition found in the Armed Career Criminal Act (ACCA), which was employed for sentencing enhancement purposes, was void for vagueness under the Due Process Clause. By striking down part of the COV definition, the Supreme Court’s ruling in *Dimaya* potentially narrows the scope of criminal offenses that may subject an alien to removal. Beyond the immigration context, the Supreme Court’s decision narrows the scope of numerous other statutes that incorporate the federal COV definition when imposing heightened criminal or civil penalties on those who have committed a “crime of violence.”

## Background

An aggravated felony conviction imposes serious immigration consequences. An alien admitted into the United States who has been convicted of an aggravated felony is subject to removal from the country. An aggravated felony conviction also may result in an alien being barred from many forms of discretionary relief, subject to mandatory detention by immigration authorities pending removal proceedings, barred from readmission into the United States, and precluded from acquiring U.S. citizenship. The INA defines an “aggravated felony” to encompass many enumerated offenses, including a “crime of violence” for which the term of imprisonment is at least one year. The statute incorporates the two-pronged COV definition found in 18 U.S.C. § 16:

- (a) [A]n offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
- (b) any other offense that is a felony and that, *by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing any offense.*

In *Dimaya*, a lawful permanent resident (Dimaya) challenged his order of removal that was predicated on a finding that his burglary conviction constituted a crime of violence under the second prong of the COV definition, 18 U.S.C. § 16(b). In his petition for review to the Ninth Circuit, Dimaya argued that § 16(b) is unconstitutionally vague because it has no standard to determine whether a criminal offense carries a “substantial risk” of physical force. This ambiguity, Dimaya contended, deprived him of due process.

In 2015, while Dimaya’s case was pending, the Supreme Court in *Johnson v. United States* held that a similarly worded provision of the ACCA, which was employed for the purpose of imposing increased prison sentences on certain firearm offenders convicted of a “violent felony,” was unconstitutionally vague. Specifically, the ACCA’s multi-pronged violent felony definition included a provision covering a felony offense that:

- [I]s burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

The Supreme Court in *Johnson* determined that the italicized language of this “residual clause” of the violent felony definition “leaves grave uncertainty” about how to estimate the risk ordinarily posed by a crime, and that it also has no practicable way to measure the level of risk required to meet the “serious

potential risk” threshold. The Court thus **held** that the residual clause “produces more unpredictability and arbitrariness than the Due Process Clause tolerates.”

The Ninth Circuit **granted** Dimaya’s petition for review, and held that the second prong of the COV definition, which rendered Dimaya’s burglary conviction an aggravated felony that made him removable, was unconstitutionally vague. The circuit court concluded that the Supreme Court’s holding in *Johnson* concerning the ACCA’s residual clause “applies with equal force to the similar statutory language and identical mode of analysis used” by the second prong of the COV definition. Apart from the Ninth Circuit, the **Third, Sixth, Seventh, and Tenth** Circuits had also held that 18 U.S.C. § 16(b)’s COV definition is unconstitutionally vague; the **Fifth Circuit**, on the other hand, rejected a vagueness challenge to 18 U.S.C. § 16(b). Faced with this circuit split, the Supreme Court **granted** certiorari to the government’s **appeal** of *Dimaya*.

## The Supreme Court’s Decision in *Sessions v. Dimaya*

After **holding** the case over from the October 2016 term, the Supreme Court issued its decision in April 2018. In a 5-4 ruling, the Supreme Court **affirmed** the Ninth Circuit’s decision. In an **opinion** written by Justice Kagan (joined in part by Justices Ginsburg, Breyer, Sotomayor, and Gorsuch), the Court **rejected** the government’s **contention** that civil immigration laws governing removal should be subject to a “less exacting” vagueness standard under the **Due Process Clause** than criminal statutes like the ACCA’s residual clause. Citing *Jordan v. De George*, a 1951 case where the Supreme Court applied the vagueness standard to an immigration statute given the “grave nature of deportation,” Justice Kagan **opined** that “the Government cannot take refuge in a more permissive form of the void-for-vagueness doctrine than the one *Johnson* employed.”

Citing *Johnson* as “a straightforward decision, with equally straightforward application here,” Justice Kagan **wrote** that 18 U.S.C. § 16(b) suffers from the same “constitutionally problematic” features that infected the ACCA’s residual clause. Justice Kagan’s opinion **characterized** 18 U.S.C. § 16(b) as involving an “excessively speculative” analysis to determine a crime’s inherent risk. In particular, the COV definition’s residual clause covers an offense that “by its nature” involves a substantial risk of physical force, inviting judges to consider a range of factors such as statistics, surveys, experts, Google, and even “[g]ut instinct.” The Court **determined** that § 16(b) possesses similar uncertainty over how to assess what constitutes a “substantial risk” of physical force necessary to meet the COV definition. Given these concerns, the Court **concluded** that 18 U.S.C. § 16(b) is unconstitutionally vague.

The Court also **rejected** the government’s **claim** that 18 U.S.C. § 16(b) involves a “significantly more focused inquiry” than the ACCA’s residual clause that had been struck down in *Johnson*. The government argued that, unlike the ACCA’s residual clause, 18 U.S.C. § 16(b) only requires consideration of the risk of physical force during a crime’s commission, rather than the risk of potential injury arising after the crime, and it is not linked to a “confusing list” of enumerated crimes. The Court **determined** that, although 18 U.S.C. § 16(b) temporally limits its analysis to the risk of force arising “in the course of committing any offense,” this language made no meaningful difference because analyzing a crime’s inherent risk is already limited to what usually happens during its commission. The Court also **considered** the fact that the COV definition’s second prong focuses on the risk of “physical force” rather than “physical injury,” but found no significant distinction because both standards require a court to hypothetically envision a crime’s potential consequences. Finally, the Court **noted**, although 18 U.S.C. § 16(b) is not preceded by a list of enumerated crimes like the ACCA’s residual clause, the absence of such a list is immaterial because the indeterminate features of 18 U.S.C. § 16(b) remain present.

In an **opinion concurring in part and concurring in the judgment**, Justice Gorsuch agreed that, because 18 U.S.C. § 16(b) “uses almost exactly the same language as the [ACCA’s] residual clause in *Johnson*, respect for precedent alone would seem to suggest that both clauses should suffer the same judgment.”

Justice Gorsuch [opined](#), however, that the vagueness doctrine should extend to all civil statutes—not just the civil immigration law at issue in the case—because many civil laws impose “similarly severe sanctions” as those imposed by the INA. Notably, Justice Gorsuch [identified](#) the vagueness doctrine to be rooted not only in the Due Process Clause, but also in [separation of powers](#) concerns. (Justice Kagan’s opinion, while describing the vagueness doctrine as a “[corollary of the separation of powers](#),” focused its vagueness analysis primarily upon the due process implications for an affected individual.)

In a [dissenting opinion](#), Chief Justice Roberts (joined by Justices Kennedy, Thomas, and Alito) [argued](#) that 18 U.S.C. § 16(b) “does not present the same ambiguities” as the ACCA’s residual clause given the “significant textual distinctions” between those provisions. Chief Justice Roberts [argued](#) that, unlike the ACCA’s residual clause, 18 U.S.C. § 16(b)’s “more constrained” focus on a crime’s inherent risk of physical force involves “a commonsense inquiry that does not compel a court to venture beyond the offense elements to consider contingent and remote possibilities.” He further [distinguished](#) 18 U.S.C. § 16(b) on the basis that “it is not tied to a disjointed list of paradigm offenses” that each have their own “varying amounts and kinds of risk.”

In a [separate dissenting opinion](#), Justice Thomas (joined in part by Justices Kennedy and Alito) [questioned](#) whether the [vagueness doctrine](#) was rooted in the original meaning of the Due Process Clause, and whether laws governing the removal of aliens [should even be subject](#) to a vagueness prohibition. Justice Thomas [argued](#), in the alternative, that the vagueness doctrine should be “limited to case-by-case challenges to particular applications of a statute” rather than facial challenges to the statute. He continued that even if 18 U.S.C. § 16(b) were subject to a facial vagueness challenge, courts should be [permitted to consider](#) the “actual, underlying conduct” at issue in the case before it when assessing whether the applicable law sufficiently captures “an unmistakable core” of criminal conduct.

## Impact of *Dimaya*

In striking down the second prong of the federal COV definition, as incorporated in the INA, the Supreme Court has potentially narrowed the scope of criminal offenses that would render an alien subject to removal. In fact, courts have previously interpreted 18 U.S.C. § 16(b) to cover a wide range of offenses such as [first-degree manslaughter](#), [attempted kidnapping](#), [lewd and lascivious acts upon a child](#), [sexual assault](#), [burglary](#), and [assault on a police officer](#). While many of these offenses may, as Justice Kagan [suggested](#), still constitute removable offenses under the INA, there may be some types of criminal conduct that would only fall within the second prong of the COV definition. Additionally, the Court’s decision may limit the government’s ability to remove aliens convicted of domestic violence offenses, a [separate ground of removal](#) that incorporates both prongs of the COV definition. In the wake of *Dimaya*, the Department of Homeland Security [asserted](#) that the Supreme Court’s decision “significantly undermines” the agency’s efforts to remove certain categories of aliens with violent crime convictions.

Nevertheless, an alien’s criminal conviction may still fall within 18 U.S.C. § 16(a)’s [elements-based prong](#) of the COV definition, which remains intact after *Dimaya*. An alien’s criminal conviction may also fall within the aggravated felony definition’s [many other enumerated categories](#) (e.g., murder, rape, sexual abuse of a minor, felony theft and burglary offenses)—which likewise [remain untouched by](#) *Dimaya*. And given the INA’s “[intertwining coverage for serious crimes](#),” immigration authorities may pursue [alternative grounds of deportability](#) for aliens who were formerly removable under the second prong of the COV definition. Thus, while *Dimaya* may narrow—at least to some degree—the range of offenses that render removability, the INA’s overall structure, in the words of Justice Kagan’s [majority opinion](#), still ensures that there are “many other ways to achieve that result.”

Ultimately, the Supreme Court’s conclusion that the second prong of the COV definition, as incorporated into the INA, is unconstitutionally vague may open the door to legal challenges to other INA provisions that sweep broadly in defining the scope of conduct that triggers removal and other adverse immigration

consequences. In addition, the *Dimaya* Court’s willingness to [apply the constitutional prohibition of vagueness, typically used in the review of criminal statutes](#), to a *civil* immigration law might suggest a greater willingness to review due process claims in the immigration context—typically reviewed under a [more forgiving standard](#) than in criminal cases—more stringently than in the past.

Further, the implications of the Supreme Court’s decision extend beyond the immigration context. As Chief Justice Roberts [noted](#) in his dissent, 18 U.S.C. § 16’s COV definition is [incorporated into many provisions](#) of the federal criminal code. The Court’s decision also calls into question the viability of a [related federal statute](#) that prohibits the use of a firearm during the commission of a “crime of violence,” and employs an identical COV definition as 18 U.S.C. § 16(b). Indeed, prior to the *Dimaya* ruling, the Department of Justice had [argued](#) that an invalidation of 18 U.S.C. § 16(b) “create[s] a cloud of uncertainty over the lawfulness of criminal prosecutions and sentencing enhancements” under federal law. The Court’s decision may also impact non-criminal federal statutes that incorporate the COV definition, such as a [civil rights law](#) that imposes civil liability on a person who commits a “crime of violence” based on gender. Mindful of these implications, Justice Thomas [warned](#) in his dissent that the Court’s decision could result in “the invalidation of scores of similarly worded state and federal statutes.”

Congress may address the vagueness concerns raised by *Dimaya* if it deems such recourse appropriate. As Justice Gorsuch observed in his [concurring opinion](#), the Court’s decision “sweeps narrowly” and “does not forbid the legislature from acting toward any end it wishes, but only requires it to act with enough clarity that reasonable people can know what is required of them and judges can apply the law consistent with their limited office.” Thus, Congress may consider amending 18 U.S.C. § 16(b) to specify circumstances when a criminal offense carries a substantial risk of physical force. Congress may also limit the COV definition to cover enumerated violent crimes, or perhaps modify the definition to cover certain criminal offenses that carry specified prison sentences. Or alternatively, as Justice Gorsuch [suggested](#), Congress may consider adding to the enumerated crimes that fit within the INA’s aggravated felony framework rather than amending the COV definition the framework incorporates.

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