



House Passes Bill to Amend the Federal “Crime of Violence” Definition

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Recently the House passed the [Community Safety and Security Act of 2018](#) (CSSA), which would amend the federal “crime of violence” (COV) definition found at [18 U.S.C. § 16](#). Many federal statutes incorporate that definition for various purposes, including describing elements of certain criminal offenses, imposing enhanced prison sentences, or subjecting offenders to other penalties. The two-pronged COV definition at [18 U.S.C. § 16](#) covers (1) an offense that has as an element the actual, attempted, or threatened “use of physical force” or (2) any felony offense that involves a “substantial risk” of physical force. In [Sessions v. Dimaya](#), the Supreme Court struck down the definition’s second prong on vagueness grounds, narrowing the scope of criminal offenses qualifying as COVs. In [response to the Court’s decision](#), the House passed the [CSSA](#), which would retain the COV definition’s first prong, but also amend that definition to include many enumerated criminal offenses. Because the CSSA adds to the range of conduct covered by the COV definition, the bill’s enactment may broaden the scope of various laws incorporating that definition.

Background

In 1984, Congress passed the [Comprehensive Crime Control Act](#) (CCCA), which used the term “crime of violence” in connection with elements of certain criminal offenses, conditions for issuing bail, and circumstances where heightened criminal penalties were required. The CCCA also created a two-pronged COV definition. That definition, codified at [18 U.S.C. § 16](#), covers:

- (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.

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Congress later incorporated the COV definition into [various statutes](#) to describe proscribed conduct or impose enhanced penalties. For example, under the Immigration and Nationality Act (INA), a non-U.S. national (alien) convicted of a [COV for which the term of imprisonment is at least one year](#) may face significant immigration consequences, including being [rendered removable](#) from the United States, as well as being subject to [mandatory detention](#) pending removal proceedings and [ineligible for naturalization and many forms of relief from removal](#).

Judicial rulings have informed the interpretation of [the scope of the COV definition](#). The majority of the [federal courts of appeals](#) interpret the definition's reference to "physical force" to cover acts that are violent in nature; the term does not cover all physical contact or even necessarily an intentional act that results in physical injury. In addition, with respect to the mental state required for a COV, the Supreme Court [has held](#) that the use of force requires more than negligent or accidental conduct. The High Court has not considered whether reckless acts may fall under the COV definition, but [lower courts have generally ruled](#) that the definition does not cover reckless acts.

Recently, the Supreme Court held in *Sessions v. Dimaya* that the second prong of the COV definition, which covers any felony offense that involves a "substantial risk" of physical force, is unconstitutionally vague. Citing its earlier decision in *Johnson v. United States* striking down a similarly worded component of the [federal "violent felony" definition](#), the Court [determined](#) that the COV definition's second prong required speculation by judges over whether a particular offense involved a "substantial risk" of physical force, and this indeterminacy rendered the prong [void for vagueness](#) under the Due Process Clause. In striking down the second prong of the COV definition, the *Dimaya* Court not only narrowed the scope of the definition, but also various federal statutes that incorporated it.

The Community Safety and Security Act of 2018

In September 2018, the House passed the [CSSA](#). The bill, introduced [in response](#) to the *Dimaya* decision, would amend 18 U.S.C. § 16 by creating a new COV definition. The key provisions are as follows:

1. Clarifying the COV definition's reference to "force": The bill [retains](#) language in the current COV definition that covers an offense "that has as an element the use, attempted use, or threatened use of physical force against the person or property of another." The bill adds a definition of ["force,"](#) which means "the level of force capable of causing physical pain or injury or needed or intended to overcome resistance."

2. Enumerating offenses: While retaining the first prong of the current COV definition, generally covering offenses involving physical force, the bill would replace the second prong, which was ruled impermissibly vague in *Dimaya*, with a list of [enumerated criminal offenses](#) including:

[M]urder, voluntary manslaughter, assault, sexual abuse or aggravated sexual abuse, abusive sexual contact, child abuse, kidnapping, robbery, carjacking, firearms use, burglary, arson, extortion, communication of threats, coercion, fleeing, interference with flight crew members and attendants, domestic violence, hostage taking, stalking, human trafficking, piracy, or a terrorism offense as described in chapter 113B [of the federal criminal code] (other than in section 2332d).

The bill [defines](#) many of these enumerated offenses, including by cross-referencing definitions found elsewhere in existing law (e.g., defining "carjacking" in reference to conduct covered by [Section 2119](#) of the U.S. Criminal Code). For some offenses, the bill provides new or alternative definitions that are untethered to any federal statute—for instance, the bill specifies that an offense is considered "carjacking" under the new COV definition if the conduct either is covered by Section 2119 or otherwise involves "the unlawful taking of a motor vehicle from the immediate actual possession of a person against his will, by means of actual or threatened force, or violence or intimidation, or by sudden or stealthy seizure or snatching, or fear of injury."

In addition to the twenty-four offenses listed above, the bill [separately defines](#) a COV as an offense that “involves the unlawful possession or use of a weapon of mass destruction,” and defines “weapon of mass destruction” by reference to [18 U.S.C. § 2332a\(c\)](#). The revised definition [also covers](#) an offense “that involves use or unlawful possession of explosives or destructive devices described in [\[Section\] 5845\(f\) of the Internal Revenue Code of 1986](#).”

3. Attempts, Solicitations, Conspiracies, and Aiding and Abetting: The bill also revises the COV definition to [specify](#) that it includes “an attempt to commit, conspiracy to commit, solicitation to commit, or aiding and abetting any of the offenses” covered by the definition.

Potential Impact of the Legislation

In amending the COV definition, including to enumerate specific offenses coming under its scope, the CSSA would alter the application of the COV definition to a number of offenses, including to reach certain conduct not covered under the current definition. Over the last few decades, [judicial interpretation](#) of the COV definition has generally construed the term to cover crimes involving the intentional use of violent force (or the threatened use of such force). For that reason, courts have interpreted the COV definition to exclude crimes lacking these characteristics, such as [second-degree manslaughter](#), [driving under the influence](#), [criminal recklessness](#), [misdemeanor domestic violence](#), [vehicular homicide](#), [automobile theft](#), and [simple assault](#).

While the CSSA would [retain](#) the first prong of the COV definition covering any offense involving the actual, attempted, or threatened “use of physical force,” the bill includes an [enumerated list](#) of crimes that do not necessarily require intentional violent force, or even any use of force, threatened or otherwise. Here are some examples of how the CSSA may expand the COV definition’s breadth:

- The bill lists “[assault](#),” as that term is defined in [18 U.S.C. § 113\(a\)](#), as a COV. This offense covers not only physically violent, injurious conduct, but also [offensive touching](#). The bill also covers assaults whether committed recklessly, knowingly, *or* intentionally.
- The bill includes [burglary](#) and defines that offense as “an unlawful or unprivileged entry into or remaining in, a building or structure” for the purpose of committing a crime. The use of violent or threatened force is not a component of that definition.
- The bill encapsulates an offense involving [coercion](#) as a COV, and defines “coercion” as causing someone to do something (or refrain from doing something) either through fraud *or* the use of violent force.
- The bill includes an offense involving [fleeing](#) as a COV, and defines that offense as flouting a police officer’s instructions to stop a motor vehicle, or fleeing or attempting to elude a police officer following such instructions.
- The bill covers “[interference with flight crew members and attendants](#)” as a COV and incorporates the definition of that offense under [49 U.S.C. § 46504](#). That provision includes assaulting *or* intimidating a flight crew member or flight attendant, or interfering with their performance of duties aboard the aircraft. The definition does not require the use of violent force, and [some courts have construed](#) the definition to encompass drunkenness or disruptive behavior on a plane without intent to intimidate or interfere with the flight crew.
- The CSSA includes “[firearms use](#)” offenses, and defines “firearms use” to cover both the use of a firearm while committing a crime, as well as the unlawful possession of a firearm itself, regardless of whether used to commit a separate offense.
- The bill [includes](#) any offense that involves the unlawful possession or use of weapons of mass destruction, or that involves the use or unlawful possession of explosives or destructive devices.

These provisions may not necessarily describe criminal offenses that involve the intentional use of violent force.

Given the incorporation of the COV definition into [many federal statutes](#), the enactment of the CSSA could expand the application of those laws, including the penalties attached to offenses covered by those statutes. For instance, the CSSA's broadening of the COV definition could expand the number of offenses subject to the mandatory minimum penalties of [18 U.S.C. § 924\(c\)](#) (enhancing the criminal sentence if a firearm is used during a COV); increase the possibility that a criminal defendant will be denied bail before trial under [18 U.S.C. § 3142\(f\)\(1\)\(A\)](#) (requiring, upon motion by government, a bail hearing before releasing a defendant who has committed a COV); and potentially increase the likelihood that a minor would be [tried as an adult](#) in federal court rather than turned over to state authorities for treatment as a delinquent. Likewise, the legislation could render more aliens [removable](#) for committing a covered offense falling under the revised COV definition.

Further, although the CSSA is intended to address ambiguity in the current COV definition highlighted in *Dimaya*, there may be some dispute regarding the precise conduct falling under the revised COV definition's purview. While the CSSA defines many of its listed crimes by reference to other federal statutes, the bill also introduces a series of [new definitions](#) for these crimes that may themselves be subject to vagueness challenges in the future. For example, the bill defines "[coercion](#)" to include, among other things, causing the "non-performance of any act by another person . . . through fraud" or through the use of threats to injure "the reputation" of any person. The bill also defines "[burglary](#)" to include an "unlawful or unprivileged . . . remaining in . . . any nonpermanent or mobile structure" used for "overnight accommodation or for the ordinary carrying on of business," and, "before or after entering, the person . . . forms the intent to commit a crime." Application of these definitions could potentially be subject to judicial challenge, including possibly on vagueness grounds.

Opponents of the bill [have argued that](#) the bill is [overbroad](#) and claimed that the revised COV definition would include numerous criminal offenses that do not involve violence, such as [remaining in a building](#) without authorization, committing a "[traffic violation](#)," or having "[an argument with a flight attendant over a Diet Coke](#)." They also [contend](#) that it would result in increased imprisonment and deportation of nonviolent offenders. They also argue the bill is [unnecessary](#) because the Supreme Court left undisturbed the COV definition's first prong, which may "suffice as a placeholder until Congress can undertake a more deliberate approach."

On the other hand, supporters of the bill [argue](#) that it is a "[responsible, carefully crafted piece of legislation](#)" that provides "[the necessary clarity in the law](#)" to protect victims of violent crimes and ensure public safety. They argue that failure to amend the COV definition [could](#) "foster vagueness and uncertainty in our courts, and potentially disrupt the prosecution of certain crimes of violence, like human trafficking, child abuse, domestic violence, and other acts that any reasonable individual would consider a crime of violence." Proponents of the bill also point to its [support](#) by the Department of Justice and some law enforcement organizations. The President [has also endorsed](#) the legislation, arguing that, under current immigration laws, "the Government is frequently blocked from deporting criminal aliens with violent felony convictions." Moreover, to the extent the CSSA's revised COV definition covers crimes that are not typically considered violent (e.g., coercion, fleeing), it is not unprecedented for Congress to define terms expansively to cover some conduct that is not necessarily illustrative of the term. For example, the INA [defines an "aggravated felony"](#) to cover a broad range of criminal conduct, including some misdemeanor offenses. And while some of the CSSA's covered offenses may not be violent per se, proponents may argue that they can be construed as having an inherent *risk* of violence.

In short, in determining whether and how to respond to the Supreme Court's ruling in *Dimaya* that aspects of the COV definition are unconstitutionally vague, Congress may find it useful to assess the breadth of offenses that it wants the definition to cover. The CSSA proposes to revise the COV definition in a manner that would include certain conduct that is not covered by the earlier definition. Congress may

choose to fully embrace or refine the scope of the bill's COV definition further, or perhaps, consider other legislative options.