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Posted Tue, April 17th, 2018 2:32 pm

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## Opinion analysis: Crime-based removal provision is unconstitutionally vague (Corrected)

In the last few years, the Supreme Court has decided a steady number of criminal-removal cases. In light of the Trump administration's emphasis on the removal of "criminal aliens," we will likely see even more criminal-removal cases in the future.

Most of the removal cases that have recently come before the court, including *Esquivel-Quintana v. Sessions*, which was decided last term, have involved ordinary issues of statutory interpretation and deference to administrative agencies. *Sessions v. Dimaya*, which the court decided today in a 5-4 ruling, is different. The case began as a constitutional challenge to a criminal-removal provision in the immigration laws, which historically have been almost wholly immune from judicial review. It was originally argued last term, when the court was short-handed after the death of Justice Antonin Scalia, and the justices ordered reargument, suggesting that they were divided on the merits.

An immigrant convicted of an "aggravated felony" under 8 U.S.C. §1101(a)(43) is subject to mandatory removal and is ineligible for most forms of relief from removal. The definition of "aggravated felony" incorporates by reference 18 U.S.C. §16(b). Section 16(b) defines a "crime of violence" to encompass "any ... 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 the offense."

A lawful immigrant from the Philippines, James Garcia Dimaya has lived in the United States since 1992. He has two residential burglary convictions, neither of which involved violence. Based on the convictions, the immigration court and the Board of Immigration Appeals ordered Dimaya removed from the United States. The U.S. Court of Appeals for the 9th Circuit overturned the BIA's order, finding that Section 16(b) was unconstitutionally vague. To reach that conclusion, the court relied on *Johnson v. United States*, in which the Supreme Court, in a 2015 opinion by Scalia, found that the Armed Career Criminal Act's similarly worded definition of "violent felony" was so vague as to violate the due process clause.

At oral argument last October, the justices [appeared to be divided](#) as to whether this case was distinguishable from *Johnson*. In the end, that question was at the heart of the disagreement between the majority and dissenting justices.

Relying on *Johnson*, the court, in an opinion by Justice Elena Kagan, joined by Justices Ruth Bader Ginsburg, Stephen Breyer, Sonia Sotomayor and, in large part, Neil Gorsuch, affirmed the 9th Circuit's ruling that Section 16(b) is unconstitutionally vague. The court began by noting that to determine whether a person's conduct falls within the ambit of Section 16(b), "courts use a distinctive form of what we have called the categorical approach." Rather than assessing whether the particular facts of someone's conduct pose the substantial risk required under the statute, courts consider the overall nature of the offense, and ask "whether 'the ordinary case' of an offense poses the requisite risk." The court went on to conclude that defining the "ordinary case" under the "crime of violence" provision poses the same vagueness and due process problems, including unpredictability and arbitrariness, as those identified in *Johnson*. As the court summed it up, "*Johnson* tells us how to resolve this case. ... [N]one of the minor linguistic disparities in the statutes makes any real difference."

In a section of the opinion not joined by Gorsuch, a plurality of the court rejected the government's argument that "a less searching form of the void-for-vagueness doctrine applies here than in *Johnson* because this is not a criminal case." Citing the 1951 case *Jordan v. DeGeorge*, the court noted that "we long ago held that the most exacting vagueness standard should apply to removal cases," because the penalty of deportation is so severe.

Gorsuch concurred in part and concurred in the judgment. He emphasized at the outset that "[v]ague laws invite arbitrary power." He defended the originalist foundations for vagueness challenges that Justice Clarence Thomas questioned at length in his dissent, tracing the history of those

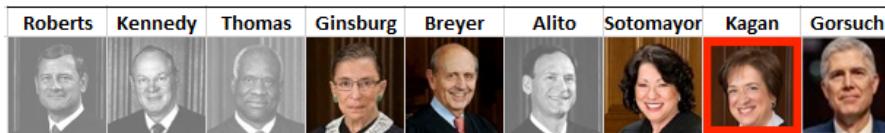
more clearly when it seeks to deport a lawfully resident alien than when it wishes to subject a citizen to indefinite civil commitment, strip him of a business license essential to his family's living, or confiscate his home?"

Chief Justice John Roberts, joined by Justices Anthony Kennedy, Clarence Thomas and Samuel Alito, dissented. Roberts distinguished *Johnson*, arguing that "the Court too readily dismisses the significant textual distinctions between §16(b) and the ACCA residual clause." Even under the exacting "standard applicable to criminal laws," Roberts maintained, "§16(b) is not unconstitutionally vague." Unlike the ACCA residual clause struck down in *Johnson*, "[t]he more constrained inquiry required under §16(b)— which asks only whether the offense elements naturally carry with them a risk that the offender will use force in committing the offense—does not itself engender 'grave uncertainty about how to estimate the risk posed by a crime.' And the provision's use of a commonplace substantial risk standard—one not tied to a list of crimes that lack a unifying feature—does not give rise to intolerable 'uncertainty about how much risk it takes for a crime to qualify.'"

Although he agreed with Roberts' dissent, Thomas wrote a separate dissent to express "doubt that our practice of striking down statutes as unconstitutionally vague is consistent with the original meaning of the Due Process Clause." He further questioned the "categorical approach" to review of the crime-based statutes, and he would have found that the statute was not unconstitutionally vague as applied to Dimaya.

In the end, the majority dutifully applied its holding in *Johnson* to the immigration laws. The court's holding is consistent with its recent decisions applying routine approaches, including traditional methods of interpretation and doctrines of deference to administrative agencies, to judicial review of the immigration laws. What is different about *Sessions v. Dimaya* is that it applies the Constitution to the removal grounds of the immigration laws. In that sense, it continues what could be seen as a recent movement by the court toward applying ordinary constitutional norms in the immigration context. At the end of last term, for example, the court in *Sessions v. Morales-Santana* held that gender distinctions favoring women over men in the derivative citizenship provisions violated the Constitution's equal protection guarantee. It remains to be seen whether and how far the court will proceed along this path.

*An earlier version of this post suggested that Kennedy and Alito joined the part of Thomas' dissent in which he expresses "doubt that our practice of striking down statutes as unconstitutionally vague is consistent with the original meaning of the Due Process Clause." Kennedy and Alito joined Thomas' dissent as to Parts I-C-2, II-A-1 and II-B, but not as to that statement from Thomas' second paragraph.*



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**Recommended Citation:** Kevin Johnson, *Opinion analysis: Crime-based removal provision is unconstitutionally vague (Corrected)*, SCOTUSBLOG (Apr. 17, 2018, 2:32 PM), <https://www.scotusblog.com/2018/04/opinion-analysis-crime-based-removal-provision-is-unconstitutionally-vague/>

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