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Peas in a Pod, or Birds of a Different Feather?

A Discussion of *Johnson v. United States* and What It Might Mean for the Immigration and Nationality Act's Crime of Violence Aggravated Felony Provision

By Raechel Horowitz

Section 16(b) of the United States Code, title 18, defines a "crime of violence" as 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" (emphasis added).[1] Under the Immigration and Nationality Act, a conviction for a crime of violence, as defined by 18 U.S.C. § 16, for which the term of imprisonment is at least one year, is considered an aggravated felony. Section 101(a)(43)(F) of the Act, 8 U.S.C. § 1101(a)(43)(F). Convictions for aggravated felonies may bear significant immigration consequences.[2]

In 2015, the Supreme Court decided *Johnson v. United States*, which held that a similar definition included in the residual clause of the Armed Career Criminal Act ("ACCA") is unconstitutionally vague. 135 S. Ct. 2551 (2015). Is section 16(b) similar enough to the ACCA's residual clause to meet the same constitutional fate? This question has been brewing in the circuit courts since *Johnson*. So far, four circuits, the Third, Sixth, Ninth, and Tenth, have concluded that section 16(b), as incorporated by the Act, is unconstitutionally vague in light of *Johnson*. The Seventh Circuit has found section 16(b) unconstitutional in the context of illegal reentry. The Fifth Circuit, in addressing the same reentry statute, has held that section 16(b)'s distinctions allow it to survive a vagueness challenge.

The Supreme Court recently granted *certiorari* in *Lynch v. Dimaya* to address the issue. 137 S. Ct. 31 (2016).[3] Oral arguments are scheduled for January 17, 2017. This article will set the stage in anticipation of the Supreme Court's decision by discussing *Johnson*, the relationship between the ACCA's residual clause and

section 16(b), and how the circuit courts view section 16(b) in light of *Johnson*. Additionally, this article will briefly address another residual clause that existed in former section 4B1.2(a)(2) of the United States Sentencing Guidelines. This section shared similarities with both section 16(b) and the ACCA's residual clause, but has since been amended in light of *Johnson,* as discussed *infra* pp. 10–11.

Johnson v. United States

Federal law prohibits certain individuals from shipping, possessing, or receiving firearms, and a conviction under that law ordinarily carries a maximum sentence of 10 years of imprisonment. 18 U.S.C. § 922(g). However, if the defendant has at least three prior convictions for "violent felon[ies]," sentencing dramatically increases to a *minimum* sentence of 15 years and a maximum sentence of life imprisonment. 18 U.S.C. § 924(e) (emphasis added).

Johnson found the ACCA's definition of "violent felony" problematic, specifically its inclusion of the phrase "conduct that presents a serious potential risk of physical injury to another." This language is commonly known as the ACCA's "residual clause." The Court ruled that the residual clause of the ACCA is unconstitutionally vague and thus violates the Fifth Amendment's Due Process Clause. The Fifth Amendment guarantees that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law." The vagueness doctrine "establishe[s] that the Government violates this guarantee by taking away someone's life, liberty, or property under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement." *Johnson,* 135 S. Ct. at 2556. The Supreme Court found that the ACCA's residual clause was both unpredictable and allowed for arbitrary enforcement. *Id.*

Specifically, *Johnson* examined whether the ACCA's residual clause applied to the Minnesota offense of unlawful possession of a short-barreled shotgun. The case marked the fifth time since 2007 that the Court addressed the same issue as it applied to various state statutes.[4] Evidently, the fifth time broke the camel's back. Six justices, led by Justice Scalia, threw up their hands in collective exasperation with the ACCA's residual clause, declaring its standard "hopeless[ly] indetermin[ate]" and unable to meet the Constitutional guarantee of due process.[5] *Johnson,* 135 S. Ct. at 2558. The Court pointed to two abstract features that "conspire[d]" to shroud the ACCA's residual clause in more uncertainty than the Fifth Amendment can bear: the difficulties in ascertaining what conduct "ordinarily" occurs during the commission of a given crime and determining whether that conduct amounts to a "serious potential risk."

The ACCA's residual clause has long demanded a categorical approach. *See Taylor v. United States,* 495 U.S. 575, 600 (1990). Under the categorical approach, the actual conduct resulting in a conviction is irrelevant. Instead, a secondary court focuses on theoretical conduct that could have resulted in a conviction under the statute. In the context of the ACCA's residual clause, the theoretical conduct to be considered is the conduct occurring in the "ordinary case" of a crime or the typical conduct that results in a conviction under the statute. *See James,* 550 U.S. at 208.

The Supreme Court expressed concern with the "grave uncertainty" about how to determine what conduct is ordinarily associated with any one crime. *Johnson,* 135 S. Ct. at 2557. It noted that there was no uniform standard for making such a determination. For example, the majority opinion in *James*, one of the prior Supreme Court decisions assessing the residual clause, described the "ordinary case" of attempted burglary that could include the risk of an armed, would-be burglar being spotted by police or confronted by a homeowner, raising the possibility of a violent encounter. 550 U.S. at 211. By contrast, the dissent asserted that "any confrontation that occurs during an attempted burglary is likely to consist of nothing more than the occupant's yelling 'Who's there?' from his window and the burglar's running away." *Id.* at 226 (Scalia, J., dissenting). Thus, the "ordinary case" may itself be a point of contention.

The second layer of indeterminacy is rooted in the language of the ACCA's residual clause, which requires a court to determine whether the agreed upon conduct poses a "serious potential risk of physical injury." The Court noted the intrinsic difficulty of drawing precise boundaries for a speculative standard. This imprecision is not inherently problematic when applied to "real-world facts." *Johnson,* 135 U.S. at 2557. However, the residual clause focuses on the *potential risk* for injury. As discussed above, the ACCA's residual clause first requires a "judge-imagined abstraction" of "ordinary" conduct and then a determination of whether *that* conduct meets the

(imprecise) standard of a "serious potential risk." *See id.* Thus, the ACCA's residual clause is dually separated from the underlying facts leading up to a conviction in that a secondary court must evaluate the *potential* for harm posed by *theoretical* conduct.

"[M]oreover, the residual clause forces courts to interpret 'serious potential risk' in light of . . . four enumerated crimes—burglary, arson, extortion, and crimes involving the use of explosives." *Id.* at 2558. However, rather than serving as guideposts, the Supreme Court found that these enumerated crimes only further muddied the analysis, as alternative manners of committing the same enumerated crime carry drastically varying levels of risk. For example, a crime that carries the same level of risk for physical injury as the enumerated crime of extortion meets the standard of a "serious potential risk." Yet deciding whether "the typical extortionist threaten[s] his victim in person with the use of force, or . . . threaten[s] his victim by mail with the revelation of embarrassing personal information" will yield highly differing standards of what constitutes a "serious potential risk." *Id.* The Court stated, "each of the uncertainties in the residual clause may be tolerable in isolation, but their sum makes a task for us which at best could be only guesswork." *Id.* (internal quotation marks omitted).

The Court also referred to its "repeated attempts and repeated failures to craft a principled and objective standard out of the residual clause" as evidence of its indeterminacy. In doing so, the Court cited to the vastly varying metrics that it used to guide its "substantial risk" analysis. These include assessing the similitude between the crime of conviction and one of the enumerated crimes,[6] data from a report,[7] and yes, even common sense.[8] The residual clause proved "impossible" among lower Federal courts as well. The Court stated, "[i]t has been said that the life of the law is experience. Nine years' experience trying to derive meaning from the residual clause convinces us that we have embarked upon a failed enterprise." *Johnson,* 135 S. Ct. at 2560.

The Case of the "Typically" Tampered Witness

To illustrate the potential arbitrariness of the residual clause, consider that you are a court tasked with assessing whether an individual's previous conviction for witness tampering is a "violent felony" (defined as a felony that involves a "serious potential risk of physical injury to another"). Remember that, under the categorical analysis, it does not matter what the actual conduct was. Instead, you must determine how a witness is *ordinarily* tampered with. But how? Does witness tampering typically "involve offering the witness a bribe?" *Johnson,* 135 S. Ct. at 2557. Not much risk of injury there. "Or threatening the witness with violence?" *Id.* An obvious risk of physical injury.[9] If you shrugged your shoulders, you are in company with a majority of the Supreme Court, which expressed similar confusion. "How does one go about deciding what kind of conduct the 'ordinary case' of a crime involves? 'A statistical analysis of the state reporter? A survey? Expert evidence? Google? Gut instinct?'" *Id.* (quoting *United States v. Mayer,* 560 F.3d 948, 952 (9th Cir. 2009) (Kozinski, C.J., dissenting from denial of rehearing en banc)). Once you establish what kind of conduct makes up the ordinary case, you must evaluate whether this poses a serious potential risk of physical harm. Of course, there is a possibility that you might build this analysis upon conduct that is not truly the "ordinary case." However, even putting that aside, how does one determine when such conduct crosses the line to create a "serious potential risk" of harm? Once again, the residual clause provides as many questions as answers.

The Residual Clause and its Relations

While *Johnson* specifically addresses the ACCA's residual clause, its holding naturally stamped a question mark over the continued viability of the Act's definition of a "crime of violence." The ACCA's definition of "violent felony" (specifically the residual clause) and the Act's definition of "crime of violence" (specifically 18 U.S.C. § 16(b)) are historically linked,[10] and have notable similarities in both statutory construction and analysis. These two provisions also share beginnings with the Guidelines' former definition of "crime of violence."[11]

With nuanced variations, the ACCA's residual clause, the 2015 Guidelines' residual clause, and the Act define "violent felony" or "crime of violence," with similar language. The ACCA's residual clause (italicized below) defines a "violent felony," in relevant part, as an offense that is:

> burglary, arson, or extortion, involves the use of explosives, *or otherwise involves conduct that presents a serious potential risk of physical injury to another*.

18 U.S.C. § 924(e)(2)(B)(ii).[12]

The Guidelines' residual clause (italicized below) formerly defined a "crime of violence" as an offense that is:

> burglary of a dwelling, arson, or extortion, involves use of explosives, *or otherwise involves conduct that presents a serious potential risk of physical injury to another.*

U.S.S.G. § 4B1.2(a)(2) (2015) (amended 2016).[13]

The Act, through reference to section 16(b), defines "crime of violence," as an offense that is:

> *a felony . . . 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.*

18 U.S.C. § 16(b) (emphasis added).[14]

As mentioned above, the ACCA applies in criminal proceedings and increases the sentence of a Federal defendant convicted of illegal possession of a weapon if the defendant has at least three prior convictions for violent felonies. Similarly, section 4B1.1 of the Sentencing Guidelines calls for enhanced sentencing in criminal proceedings for those defendants who are "career offenders." A defendant meets the definition of a "career offender" if he is convicted of a "crime of violence" or "controlled substance offense" and has at least two prior convictions for either a crime of violence or a controlled substance offense. "Crime of violence" in this context is defined under section 4B1.2(a)(2) of the Guidelines.[15] Until recently, the career offender provision defined "crime of violence" in terms identical to the ACCA's residual clause. Pursuant to the Act, an alien who has previously been convicted in a criminal court of a crime of violence as defined by 18 U.S.C. § 16(a) or (b) has been convicted of an aggravated felony for purposes of removal.[16]

Subtle differences in statutory construction between the ACCA's residual clause and section 16(b) have become points of tension among the circuit courts. One key difference is that the "substantial risk" standard of the residual clause is evaluated in comparison with the risk created by four preceding enumerated crimes—burglary, arson, extortion, and crimes involving the use of explosives. 18 U.S.C. § 924(e). Prior to its amendment, the Guidelines' residual clause also included a list of enumerated offenses, nearly identical to those listed in the ACCA.[17] By contrast, the Act's "substantial risk" standard is not measured against any benchmark.[18]

Additionally, both the ACCA's residual clause and the Guidelines' former residual clause required assessment of the potential for "physical injury," while section 16(b) evaluates the potential for "physical force." Furthermore, *Johnson* specifically acknowledged that the residual clause burdened courts with assessing the likelihood of physical injury for acts occurring both during and after commission of the crime, citing to extortion and burglary in particular. *Johnson,* 135 S. Ct. at 2557 ("Risk of injury arises because the extortionist might engage in violence *after* making his demand or because the burglar might confront a resident in the home *after* breaking and entering." (emphasis in original)). By comparison, a section 16(b) inquiry is statutorily limited to evaluating actions that occur "*in the course of committing the offense.*"[19]

Finally, it is worth noting that the ACCA's residual clause, the Guideline's former residual clause, and the Act's section 16(b) all rest on the same foundational pillar of analysis: the "categorical approach."

The Act's "Crime of Violence" Provision After *Johnson*

The tensions brewing in the circuit courts can be boiled down to one word: "enough." Both those in favor of extending *Johnson* to the aggravated felony definition of a crime of violence and those opposed acknowledge the similarities and differences between the two provisions. The issue then is whether section 16(b) is different *enough* to survive constitutional scrutiny or similar *enough* to meet the same fate as the residual clause. Note that despite the ACCA's and 2015 Guidelines' identical residual clauses (including comparison to a nearly identical enumerated list of offenses), the circuit courts after *Johnson* have split over whether the career offender provision is similarly unconstitutional. *See United States v. Calabretta*, 831 F.3d 128, 134 n.6 (3d Cir. 2016) (collecting cases).

A Brief Stop at Square One:
Does the Vagueness Doctrine Apply?

An early question that may be presented before the Supreme Court is whether the vagueness doctrine applies in civil removal proceedings. The Fifth Amendment's Due Process Clause requires that criminal statutes be

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CIRCUIT COURT DECISIONS FOR NOVEMBER 2016

by John Guendelsberger

The United States courts of appeals issued 121 decisions in November 2016 in cases appealed from the Board. The courts affirmed the Board in 111 cases and reversed or remanded in 10, for an overall reversal rate of 8.3%, compared to last month's 13.5%. There were no reversals from the First, Fourth, Fifth, Sixth, Seventh, Eighth, Tenth, and Eleventh Circuits.

The chart below shows the results from each circuit for November 2016 based on electronic database reports of published and unpublished decisions.

Circuit	Total	Affirmed	Reversed	% Reversed
First	0	0	0	0.0
Second	19	18	1	5.3
Third	4	2	2	50.0
Fourth	10	10	0	0.0
Fifth	12	12	0	0.0
Sixth	1	1	0	0.0
Seventh	4	4	0	0.0
Eighth	2	2	0	0.0
Ninth	63	56	7	11.1
Tenth	1	1	0	0.0
Eleventh	5	5	0	0.0
All	121	111	10	8.3

The 121 decisions included 68 direct appeals from denials of asylum, withholding, or protection under the Convention Against Torture; 25 direct appeals from denials of other forms of relief from removal or from findings of removal; and 28 appeals from denials of motions to reopen or reconsider. Reversals within each group were as follows

	Total	Affirmed	Reversed	% Reversed
Asylum	68	63	5	7.4
Other Relief	25	23	2	8.0
Motions	28	25	3	10.7

The five reversals or remands in asylum cases involved the Convention Against Torture (two cases), nexus, level of harm for past persecution, and designation of country of removal for withholding of removal. The two reversals or remands in the "other relief" category addressed a U-visa petition and the constitutionality of the 18 U.S.C. § 16(b) prong of the crime of violence aggravated felony ground of removal. The three motions cases involved the provisional unlawful presence waiver (two cases) and changed country conditions.

The chart below shows the combined numbers for January through November 2016 arranged by circuit from highest to lowest rate of reversal.

Circuit	Total	Affirmed	Reversed	% Reversed
Seventh	39	30	9	23.1
Tenth	30	24	6	20.0
Sixth	43	36	7	16.3
Third	78	67	11	14.1
Ninth	914	787	127	13.9
Eleventh	48	44	4	8.3
First	37	34	3	8.1
Eighth	58	54	4	6.9
Fifth	135	126	9	6.7
Second	311	294	17	5.5
Fourth	87	84	3	3.4
All	1,780	1,580	200	11.2

Last year's reversal rate at this point (January through November 2015) was 13.2%, with 1,710 total decisions and 225 reversals or remands.

The numbers by type of case on appeal for the first 11 months of 2016 combined are indicated below

	Total	Affirmed	Reversed	% Reversed
Asylum	961	866	95	9.9
Other Relief	429	354	75	17.5
Motions	390	360	30	7.7

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RECENT COURT OPINIONS

Third Circuit:

United States v. Henderson, 841 F.3d 623 (3d Cir. 2016): In a sentencing case, the Third Circuit concluded that a controlled substance manufacture, delivery, or distribution offense described in 35 Pa. Stat. Ann. § 780-113(f)(1) may be analyzed under the "modified categorical" approach. The court concluded that the particular substance at issue (in this case heroin) is an element of the offense and not merely a "means" of violating the statute. Thus, while the Pennsylvania statute criminalizes substances not described on the federal schedules, the sentencing court properly consulted the record of conviction to establish the substance involved.

Fourth Circuit:

Larios-Reyes v. Lynch, 843 F.3d 146 (4th Cir. 2016): The petitioner sought review of the Board's conclusion that his conviction for "Third Degree Sex Offense" under Maryland Criminal Law Article § 3-307 qualifies as the aggravated felony offense of "sexual abuse of a minor." The court stated that the federal generic definition of "sexual abuse of a minor" is a perpetrator's physical or nonphysical misuse or maltreatment of a minor for a purpose associated with sexual gratification. The Fourth Circuit concluded that § 3-307 is not a categorical match to the Federal generic definition because it is not necessary to show that a defendant acted for the purpose of sexual gratification.

Fifth Circuit:

Gonzalez-Soto v. Lynch, 841 F.3d 682 (5th Cir. 2016): The Fifth Circuit found that the petitioner did not demonstrate eligibility for withholding of removal from Mexico based on membership in either of two proposed particular social groups. The petitioner first asserted that he will likely face persecution in Mexico because the family of a man murdered by his father more than two decades ago will target him for revenge. The court agreed with the Board that this claim is speculative. The respondent also claimed that he will likely face persecution in Mexico because he will be perceived to have wealth for having lived in the United States. The Fifth Circuit reiterated that returning citizens who are perceived as wealthy are not part of a protected group and that economic extortion is not a form of persecution.

United States v. Penaloza-Carlon, 842 F.3d 863 (5th Cir. 2016): In this sentencing case, the Fifth Circuit concluded that the district court did not commit plain error in concluding that a conviction for third degree rape under Or. Rev. Stat. § 163.355(1) constitutes a crime of violence warranting a 12-level sentencing enhancement. Applying its case law to conclude that harm to a minor is not a necessary element of "sexual abuse of a minor," the Fifth Circuit notably disagreed with the Ninth Circuit, in whose jurisdiction these cases typically arise**.**

Seventh Circuit:

Perez-Fuentes v. Lynch, 842 F.3d 506 (7th Cir. 2016): The Seventh Circuit did not find support for the petitioner's argument that the Immigration Judge breached his duty to develop the record by not asking more questions during testimony. *See* 8 U.S.C. § 1229a(b)(1); 8 C.F.R. § 1240.32(b). In agreeing with the agency that the Immigration Judge had not deprived the pro se alien of due process, the Seventh Circuit noted that while petitioner provided a list of questions that the Immigration Judge could have asked, the petitioner did not provide the court with "answers to those questions or any other concrete information that might have affected the outcome of the proceeding." Since the petitioner could not demonstrate that he suffered prejudice, the Seventh Circuit denied the petition for review.

Ninth Circuit:

Reyes v. Lynch, 842 F.3d 1125 (9th Cir. 2016): In this case, the applicant filed a petition for review of the Board's decision in *Matter of W-G-R-*, 26 I&N Dec. 208 (BIA 2014). The Ninth Circuit panel unanimously concluded that the Board's articulation of its "particularity" and "social distinction" requirements for demonstrating membership in a particular social group are entitled to deference. The panel also concluded that the Board reasonably determined that the respondent's proposed particular social groups consisting of "former members of Mara 18" and "deportees from the United States to El Salvador" are not cognizable. However, the court found error in the agency's assessment of the petitioner's claim under the Convention Against Torture and remanded the record for further proceedings.

Tenth Circuit:

Xue v. Lynch, 841 F.3d 1162 (10th Cir. 2016): The Tenth Circuit affirmed the determination that the Chinese petitioner, a Christian who practiced his religion in "house churches," did not establish eligibility for asylum. The court affirmed the agency's determination that the mistreatment that the petitioner had experienced—which included a four-day detention, a single incident of

physical abuse, and the imposition of a substantial fine—did not rise to the level of past persecution. In addressing the possibility of future persecution, the Tenth Circuit approved of the Board's reliance on country information suggesting that the suppression of house churches is regionalized and irregular. The court found the Board's denial of asylum to be supported by substantial evidence.

Eleventh Circuit:

United States v. Esprit, 841 F.3d 1235 (11th Cir. 2016): In a sentencing case, the Eleventh Circuit found that, unlike the generic definition of burglary, the Florida burglary statute does not require unlawful entry into a building as an element because the statute defines a building to include the curtilage of the building, and Florida jurors are never required to decide whether a defendant committed burglary by unlawfully entering a building rather than just its curtilage. The Eleventh Circuit observed that the Florida burglary statute "creates a single indivisible crime that includes non-generic burglary," and thus the modified categorical approach is not applicable. Accordingly, no conviction under the Florida burglary statute qualifies as generic burglary.

United States v. Green, 842 F.3d 1299 (11th Cir. 2016): In this sentencing case, the Eleventh Circuit concluded that Fla. Stat. Ann. § 784.03 is overbroad as to whether the assault offense is a "violent felony," but divisible relative to the element of whether the defendant intentionally touched the victim, intentionally struck the victim, or intentionally caused bodily injury. The panel approved of the district court's application of the modified categorical approach, which included reliance on a sentencing recommendation that incorporated the arrest report as the factual basis for the defendant's nolo contendere plea. The court noted that Florida requires a factual basis for a nolo contendere plea. Since this document revealed that the petitioner's conviction was under the "striking element" of the statute, the Eleventh Circuit affirmed the district court's sentencing enhancement based on a prior "violent felony" conviction.

United States v. Gundy, 842 F.3d 1156 (11th Cir. 2016): In this sentencing case, the Eleventh Circuit held that a Georgia burglary statute is divisible as to the location burgled. The court noted that the state prosecutor must select and identify the locational element of the place burgled. Thus, for sentence enhancement purposes, the sentencing court could properly consult the record of conviction to determine that the defendant had burgled dwelling houses or buildings housing a business, rather than a vehicle or watercraft.

Update: The Eleventh Circuit ordered that *United States v. Vail-Bailon*, 838 F.3d 1091 (11th Cir. 2016), be reheard en banc, vacating the three-judge panel opinion issued on September 28, 2016.

BIA PRECEDENT DECISIONS

In *Matter of L-T-P-*, 26 I&N Dec. 862 (BIA 2016), the Board held that a Cuban applicant must be either a refugee or an asylee to be eligible for adjustment of status pursuant to section 209 of the Immigration and Nationality Act. While Cubans who were paroled into the United States under section 212(d)(5) of the Act, 8 U.S.C. § 1182(d)(5), between April 1, 1980, and May 18, 1980, are considered to have been admitted as refugees pursuant to the Refugee Act of 1980, the Board concluded that those who were paroled in after that period are not considered refugees.

To determine whether the respondent was a refugee or asylee, the Board reviewed the evolution of classifying Cubans arriving in the United States. Beginning in 1959, Cubans fleeing the Fidel Castro government were paroled into this country, but until 1966 they were prohibited from adjusting their status from inside the United States pursuant to former section 245(c) of the Act, 8 U.S.C. § 1255(c). In 1966, the Cuban Adjustment Act exempted Cubans from the 245(c) requirement but did not confer refugee status.

When large numbers of Cubans arrived in the United States during the Mariel Boat Lift in 1980, Congress enacted section 212(d)(5)(B) of the Act, which effectively prevented the Attorney General from classifying a "refugee" as a "parolee" unless compelling reasons existed related to that alien. But subsequently, the status of "Cuban/Haitian Entrant (Status Pending)" was created whereby Cubans were paroled into the United States but not admitted as refugees. Ultimately the regulations implementing section 209 of the Act provided that Cubans who were paroled into this country between April 1, 1980, and May 18, 1980, were admitted as refugees. As of June 20, 1980, Cubans were again treated as parolees rather than refugees.

The respondent, a Cuban native and citizen, was paroled into the United States in August 1980. Based on this date, he was not admitted to the United States as a refugee. Additionally, the respondent had never been granted asylee status. Thus, since he was neither a refugee nor an asylee, the Board concluded that he was ineligible to adjust his status under section 209 of the Act. The appeal was dismissed.

In *Matter of M-S-B-*, 26 I&N Dec. 872 (BIA 2016), the Board held that a time-barred asylum application may be deemed frivolous pursuant to section 208(d)(6) of the Act, 8 U.S.C. § 1158(d)(6), where the applicant deliberately misrepresents his or her date of entry when it is material to the threshold question of the timeliness of the application. The issue in the instant case was whether the respondent was barred from adjustment of status as the result of having filed a frivolous asylum application.

An asylum application may be deemed frivolous under the framework set forth at 8 C.F.R. § 1208.20 and in *Matter of Y-L-*, 24 I&N Dec. 151 (BIA 2007), if the applicant deliberately fabricates a material element of his or her application. The Immigration Judge determined that the respondent had falsified his date of entry into the United States and that the misrepresentation was directly material to whether he had satisfied the 1-year filing deadline contained in section 208(a)(2)(B) of the Act, the threshold requirement for seeking asylum. Thus the Immigration Judge found the application to be frivolous.

The respondent, whose case arises in the Third Circuit, relied on *Luciana v. Attorney General of the United States*, 502 F.3d 273 (3d Cir. 2007). In *Luciana*, the Third Circuit held that, if the application is otherwise time-barred, a fabrication within the applicant's claim is not material because the merits of the application are not reached. The respondent argued that any misrepresentation is immaterial if the application is time-barred. However, the Board concluded that *Luciana* is distinguishable because the respondent's fabrication in this case concerned the threshold issue of the timeliness of the application itself.

The Board acknowledged that *Luciana* conflicts with *Matter of X-M-C-*, 25 I&N Dec. 322 (BIA 2010), to the extent that *Luciana* held that any deliberate fabrication relating to the merits in a time-barred asylum application is immaterial for the section 208(d)(6) frivolousness bar. In *Matter of X-M-C-*, the Board held that the materiality of a false statement in an asylum application is determined at the time the application is filed, so a decision that the application is frivolous can be issued even if there is no final decision on the merits. Consequently, an asylum applicant who deliberately fabricated a potentially dispositive element of the application may be subject to the frivolousness bar even where he or she is otherwise ineligible or statutorily barred from asylum on another basis. The Board stated that it would continue to follow *Matter of X-M-C-* outside of the Third Circuit. The appeal was dismissed.

In *Matter of W-A-F-C-*, 26 I&N Dec. 880 (BIA 2016), the Board held that the Department of Homeland Security ("DHS") should be granted a continuance to re-serve a notice to appear to a minor under 14 years of age where the notice had been improperly served.

In this case, the Immigration Judge granted the respondent's motion to terminate proceedings after determining that the DHS's service of the notice to appear directly on the then-12-year-old respondent did not comply with the regulatory requirements. The DHS opposed termination, arguing that following the respondent's objection to the improper service it had mailed the notice to appear to both the respondent's attorney and his mother and offered to serve it in court.

Noting that *Matter of E-S-I-*, 26 I&N Dec. 136 (BIA 2013), provides that service on a minor under 14 shall be made to the person with whom the minor resides, the Board observed that the DHS should have originally served the notice to appear on the person with whom the respondent lived at the time of service, rather than on the respondent. However, since *Matter of E-S-I-* provides that an Immigration Judge should grant a continuance for DHS to properly serve a respondent where indicia of incompetency are present or arose shortly after a hearing, the Board concluded that, under the circumstances of this case, the Immigration Judge should have granted a continuance so that the DHS could effectuate proper service. The record was remanded.

defined with sufficient specificity. Additionally, the criminal standard must not be so uncertain as to allow for "arbitrary and discriminatory enforcement" by judges. *See Hill v. Colorado,* 530 U.S. 703, 732 (2000).

The circuit courts that have found the Act's incorporation of section 16(b) to be unconstitutional cite the Supreme Court case of *Jordan v. De George,* which examined the application of the vagueness doctrine in the context of a civil removal proceeding. 341 U.S. 233 (1951) ("Despite the fact that this is not a criminal statute, we shall nevertheless examine the application of the vagueness doctrine to this case. We do this in view of the grave nature of deportation."). These circuits have found that the Supreme Court "explicitly rejected" the argument that the vagueness doctrine does not apply in civil removal proceedings. *See Dimaya,* 803 F.3d at 1113.

By contrast, the Government has argued that while the vagueness doctrine appropriately applies to criminal statutes, this protection does not extend to civil removal proceedings. The Government has stressed that the Supreme Court has historically had "greater tolerance" for statutes carrying civil penalties than criminal penalties when addressing vagueness challenges. Petition for a Writ of Certiorari, *Lynch v. Dimaya,* 2016 WL 3254180, at *12 (No. 15-1498). For example, there is no constitutional prohibition on *ex post facto* laws for removal proceedings, as there is for criminal proceedings. Additionally, the Government noted, Immigration Judges have been delegated significant authority to exercise discretion on a "case-by-case" basis, which suggests that "immigration law necessarily tolerates more potential for disuniformity." *Id.* "Thus," contends the Government, "provisions of [the Act] governing removal should be subject to a less exacting form of vagueness doctrine than the sentencing statute at issue in *Johnson.*" *Id.* The Government argues that *Jordan v. De George*, while it examined the application of the vagueness doctrine in a civil removal case, did not specifically examine "whether the *same* vagueness standard that governs criminal statutes also governs statutes applied in civil removal proceedings." *Id.* at *14 (emphasis added).

Ninth Circuit

On the heels of *Johnson*, a divided panel of the Ninth Circuit struck down section 16(b) in the immigration context, holding that the "crime of violence" incorporated by the Act suffered from the same constitutional defects as the residual clause. *See Dimaya v. Lynch*, 803 F.3d 1110, 1120 (9th Cir. 2015), *cert. granted*, 137 S. Ct. 31 (2016). The Government filed a writ of certiorari with the United States Supreme Court, which was granted on September 29, 2016. *Lynch v. Dimaya,* 137 S. Ct. 31. Oral arguments are scheduled for January 17, 2017.

In *Dimaya*, the petitioner, a lawful permanent resident since 1992, was convicted twice of first-degree residential burglary in violation of section 459 of the California Penal Code. On both occasions, he was sentenced to 2 years in prison. The Department of Homeland Security charged him with removability as an alien who was convicted of a "crime of violence" aggravated felony under the Act. The Immigration Judge found that first-degree burglary was a crime of violence under section 16(b), sustained the charge of removability, and found that he was statutorily ineligible for cancellation of removal. The Board affirmed the Immigration Judge's determination. While the petitioner's case was before the Ninth Circuit, the Supreme Court decided *Johnson.* The Ninth Circuit requested supplemental briefing to address "whether section 16(b), as incorporated into the [Act], is also unconstitutionally vague." *Dimaya,* 803 F.3d at 1112.

Upon review of this question, the court found the same two features that created too much uncertainty in the residual clause also existed within section 16(b). The court recognized that the language of section 16(b) was "similar" to the residual clause and its mode of analysis "identical." *Dimaya,* 803 F.3d at 1115. For example, nothing within the Act provided any more guidance on how to "choose between competing accounts of what a crime looks like in the ordinary case." *Id.* at 1116 (internal quotations and citations omitted). Like in *Johnson,* the Ninth Circuit acknowledged that, in general, calling upon a court to assess varying degrees of risk did not pose any vagueness problems because the judge would assess the degree of risk associated with "real-world conduct." *Id.* (quoting *Johnson,* 135 S. Ct. at 2561). However, the court noted, both the residual clause and section 16(b) have

required courts to assess the degree of risk associated with a categorical "ordinary case" of a crime. The court stated, "Section 16(b) gives judges no more guidance than does the ACCA provision as to what constitutes a substantial enough risk of force to satisfy the statute." *Id.* at 1117. This "same combination of indeterminate inquiries . . . is subject to identical unpredictability and arbitrariness as ACCA's residual clause." *Id.* at 1115. Thus, the Ninth Circuit struck down the Act's incorporation of section 16(b) as unconstitutionally vague.

Sixth Circuit

The Sixth Circuit provides an interesting comparison for when the combined elements of the categorical approach and an imprecise standard may void a statute for vagueness. The Sixth Circuit has addressed the constitutionality of section 16(b)'s "crime of violence," *Shuti v. Lynch,* 828 F.3d 440 (6th Cir. 2016), as well as that of an identical definition contained in 18 U.S.C. § 924(c). *United States v. Taylor*, 814 F.3d 340 (6th Cir. 2016). Notably, the cases yielded opposite results.

In *Shuti*, the Sixth Circuit determined that section 16(b) is "parallel" to the residual clause and falls prey to the same "wide-ranging inquiry" which rendered the residual clause unconstitutional. 828 F.3d at 440. The statutory language is "not a perfect match," but "these provisions undeniably bear a textual resemblance." *Id.* at 446. Additionally, both the residual clause and section 16(b) are subject to "[a]n identical mode of analysis," the categorical approach. *Id.* at 445. Finally, both the residual clause and section 16(b) require an "imprecise analysis of the possible risk of harm posed by this [ordinary case] abstraction." *Id.* at 447. The court concluded that, based on these similarities, it "cannot avoid the conclusion that [section 16(b)] falls squarely within *Johnson's* core holding." *Id.*

The court noted that "consistent comingling" of precedent developed in interpreting section 16(b), the ACCA's residual clause, and the Guidelines suggests that these provisions were intended to be analyzed in the same way. *Id.* "In other words, [aggravated felony] cases can be applied to the ACCA, ACCA cases can be applied to the Guidelines, and Guidelines cases can be applied to [aggravated felonies]."[20] *Id.* "The interoperability of the categorical approach in these cases may have been its virtue, but the taint of its indeterminacy is also its downfall." *Id.* at 449.

The Sixth Circuit characterized the differences between the residual clause and section 16(b) as "distinctions without a difference," noting that the residual clause's "list of examples" was not a key factor in deciding *Johnson. Id.* at 448. "Rather, the court's wide-ranging inquiry holding was the more important aspect." *Id.* at 449 (internal quotations and citations omitted). The Sixth Circuit also dismissed the Government's argument that section 16(b)'s use of the word "force" (as opposed to "physical injury") was a material difference. "The reason is simple," the court stated, "a marginally narrower abstraction is an abstraction all the same." *Id.* The problem, the court noted, rests in the sometimes drastically competing accounts of the way a crime may be committed—some of which may pose a risk of force or physical injury, some of which pose very little risk indeed—and the lack of a "reliable way to choose between these competing accounts, regardless of its focus on the risk that force may be used." *Id.* (internal quotations omitted).

The court also distinguished its holding from its recent decision in *Taylor*. In *Taylor,* the Sixth Circuit found that 18 U.S.C. § 924(c)(3)(B), with statutory language that is identical to section 16(b), survived constitutional scrutiny under the vagueness doctrine. The *Taylor* panel expressly noted that "the statutory language of § 924(c)(3)(B) is distinctly narrower [than the ACCA's residual clause], especially in that it deals with physical force rather than physical injury." *Taylor,* 814 F.3d at 376. The court in *Taylor* also cited the residual clause's "confusing list of examples" and section 16(b)'s language limiting the risk of harm to conduct "used in the course of committing the offense" as a notable distinction in its analysis. *See id.* at 378. Ironically, the court stated that "[t]hese are distinctions that made a difference in *Johnson*."[21]

Nonetheless, the *Shuti* panel distinguished its holding on the basis that *Taylor* addressed a criminal statute which, "requires an ultimate determination of guilt beyond a reasonable doubt—by a jury, in the same proceeding," unlike statutes that require the categorical approach, such as the ACCA and the Act. *Shuti,* 828 F.3d at 449. *Shuti* also recognized the Supreme Court's reasoning in *Welch v. United States*[22] as clarifying the significant role that the categorical approach played in *Johnson's* holding. *Id.* at 444. Thus, the linguistic distinctions between the residual clause and section 16(b) noted in *Taylor* were less

significant than the combined categorical analysis and indefinite risk standard. *Shuti* asserted that the panel in *Taylor* "did not have the benefit of [*Welch*'s] guidance in this regard. Any dictum in that decision, purporting to address the constitutionality of the INA's residual clause, is simply that." *Id.* at 450.

Other Circuits That Have Found Section 16(b) Unconstitutional

The Third, Seventh, and Tenth Circuits have agreed with the Sixth and Ninth Circuits, holding that section 16(b) is overly vague. *See Golicov v. Lynch,* 837 F.3d 1065, 1072 (10th Cir. 2016) (finding that section 16(b) is "not meaningfully distinguishable" from the residual clause); *United States v. Vivas-Ceja*, 808 F.3d 719, 720 (7th Cir. 2015) (finding that section 16(b) is "materially indistinguishable" from the residual clause); *Baptiste v. Att'y. Gen. of U.S.,* 841 F.3d 601, 621 (3d Cir. 2016) ("because the two inquiries under the residual clause that the Supreme Court found to be indeterminate—the ordinary case inquiry and the serious potential risk inquiry—are materially the same as the inquiries under § 16(b), § 16(b) is unconstitutionally vague.").

Additionally, the Eighth Circuit bumped up against the issue when it addressed whether Minnesota's burglary statute was a crime of violence. *Xiong v. Lynch*, 836 F.3d 948 (8th Cir. 2016). The Board's decision below found that the statute was a crime of violence pursuant to section 16(b) and, alternatively, an aggravated felony burglary pursuant to section 101(a)(43)(G) of the Act. "Rather than allowing the Board's treatment of the case to force a decision on a constitutional question that might be unnecessary," the Eighth Circuit avoided the issue and remanded the case to the Board to flesh out its alternative finding that the appellant's burglary conviction was an aggravated felony under section 101(a)(43)(G). *Xiong,* 836 F.3d at 950.

Fifth Circuit

In *United States v. Gonzalez-Longoria*, 831 F.3d 670, 677 (5th Cir. 2016) (en banc), the Fifth Circuit held that section 16(b) is not "unconstitutionally vague on its face." The decision played out in a somewhat dramatic fashion. Originally, in February 2016, a panel of judges on the Fifth Circuit decided *United States v. Gonzalez-Longoria*, 813 F.3d 225 (5th Cir. 2016), *rev'd en banc,* 831 F.3d 670 (5th Cir. 2016), which agreed with "[t]he Seventh and Ninth Circuits [which] have both held that this language [of 18 U.S.C. §16(b)] is sufficiently similar to the ACCA's language to suffer the same unconstitutional fate." *Id.* at 226–27. However, in August 2016, the Fifth Circuit reversed this holding after en banc review. *Gonzalez-Longoria,* 831 F.3d 670.

Gonzalez-Longoria addresses the constitutionality of section 16(b) as incorporated by section 2L1.2(b)(1)(C) of the Guidelines. If an alien has been arrested for illegal reentry, the Guidelines suggest a sentencing enhancement if that individual has previously been deported after being convicted of an aggravated felony. In turn, section 2L1.2(b)(1)(C) incorporates the term "aggravated felony" as defined by the Act, including its definition of "crime of violence."[23]

The court acknowledged that like the residual clause, section 16(b) also calls for a categorical analysis of the "ordinary case" in conjunction with an imprecise risk standard. However, the court decided that these features must be considered contextually and reasoned that similar does not mean identical. The court found that key distinctions between the residual clause and section 16(b) keep section 16(b)'s combined categorical and potential risk analysis from "caus[ing] the *same level* of indeterminacy" as that of the residual clause. *Gonzalez-Longoria,* 831 F.3d at 675. The Fifth Circuit noted that *Johnson's* holding could be "read broadly, as a rejection of the categorical approach whenever it is combined with any degree of risk assessment, or narrowly, as a long-considered ill-ease and eventual repudiation of the categorical approach in the specific context of the . . . residual clause." *Id*. at 675–76 (footnote omitted). The court deemed the narrower interpretation "more sound." *Id.* at 676.

In so deciding, the Fifth Circuit found it significant that the ACCA called for assessing the risk of physical injury, while section 16(b) requires an assessment of the risk of physical force. The court observed that assessing the risk of physical force implicit in a crime is more concrete than assessing the risk of physical injury. The "use of force" standard focuses on the potential actions of the defendant, whereas the "physical injury" standard focuses on the potential *consequences* of those actions. Additionally, physical injury can result from negligent or unintentional behavior, while the use of physical force must be intentional. *See Leocal*, 543 U.S. 1, 10 (2004); *Matter of Chairez,* 26 I&N Dec. 819, 821 (BIA 2016)

("for purposes of [the] 'crime of violence' definition, the word 'use' denotes volition.").[24]

The court noted that section 16(b)'s risk assessment is temporally bound to the risk of force used "in the course of committing the offense." Thus, section 16(b) "does not allow courts to consider conduct or events occurring after the crime is complete" while the residual clause "requires courts to guess at the potential risk of possibly future injury." *Gonzalez-Longoria,* 831 F.3d at 675. For example, the Supreme Court in *Johnson* asked, "[H]ow remote is too remote?" in wondering whether the risk posed by possession of an illegal weapon should also include the possibility that the offender will use it later to commit a crime. *Johnson,* 135 U.S. at 2559. The Fifth Circuit found the difference significant and concluded, "18 U.S.C. § 16(b), which looks to whether a commission of a crime involves a substantial risk of physical force, is predictively more sound—both as to notice (to felons) and in application (by judges)—than imputing clairvoyance as to a potential risk of injury." *Gonzalez-Longoria,* 831 F.3d at 677.

The court also differentiated section 16(b)'s substantial risk analysis from that of the residual clause. Specifically, the court found the residual clause's list of enumerated crimes uniquely disorienting. Because section 16(b) is not similarly measured against such a list of examples, the uncertainty imbued in its level of risk assessment is "less pressing" than that of the residual clause. The court likened section 16(b) to "the dozens of federal and state criminal laws that employ terms such as substantial risk, grave risk, or unreasonable risk, that state and federal judges interpret as a matter of routine." *Id.* (citations omitted).

The opinion went on to note that "[w]hile there might be specific situations in which 18 U.S.C. § 16(b) would be vague . . . it is certainly not a statute that simply has no core."[25] *Id.* at (internal quotation marks omitted). The court concluded that section 16(b) could be "straightforwardly applied" to the appellant's particular offense and was "not vague as applied to [the petitioner]." *Id.*

Lastly, the Fifth Circuit noted the considerable period of time that the Supreme Court wrangled with the ACCA's residual clause before striking it down as unconstitutionally vague. The court felt that a similar "record of unworkability [is] not present" with respect to section 16(b). *Id.* at 678. "Thus, we decline to get ahead of the Supreme Court [by] invalidating duly enacted and longstanding legislation by implication." *Id.* The decision contains a dissenting opinion.[26]

Other Developments

In the wake of *Johnson*, both the career offender[27] and the alien smuggling[28] provisions of the Guidelines have seen revisions to their definitions of "crime of violence."

> The amendment is informed by . . . public comment and case law, as well as the Supreme Court's recent decision in *Johnson v. United States,* 135 S. Ct. 2551 (2015), regarding the statutory definition of "violent felony" in [the residual clause]. While not addressing the guidelines, that decision has given rise to significant litigation regarding the guideline definition of "crime of violence."

U.S. Sent'g Comm'n, *Notice of proposed amendments to the sentencing guidelines and commentary effective August 1, 2016*, 81 Fed. Reg. 4741 (Jan. 27, 2016). The amendment discarded the language matching the ACCA's residual clause and amends the list of enumerated offenses "in a number of ways to focus on the most dangerous repeat offenders." *Id.* The enumerated offenses now include "murder, voluntary manslaughter, kidnapping, aggravated assault, forcible sex offenses, robbery, arson, extortion, or the use or unlawful possession of a firearm described in 26 U.S.C. § 5845(a) or explosive material as defined in 18 U.S.C. § 841(c)." *Id.*

Interestingly, the Sentencing Commission removed the "classic example" of a crime of violence, "burglary of a dwelling," from the enumerated list of offenses, based on, among other factors, a finding that "most burglaries do not involve physical violence." *Id.* However, the amendment includes a provision that allows for enhanced sentencing in "the unusual case" of a burglary offense that involves violence. *Id.* The amended definition has been effective for the career offender provision since August 1, 2016. Similarly, the alien smuggling provision "conform[ed] the definition of 'crime of violence' to that adopted for use in the career offender guideline," effective November 1, 2016. U.S. Sent'g Comm'n, *Notice of proposed amendments to the sentencing guidelines and commentary effective August 1, 2016*, 81 Fed. Reg. 4741 (Jan. 27, 2016).

Conclusion

The residual clause and section 16(b) are indisputably similar and have undeniable differences. The circuit courts are split on the significance of these subtle distinctions. There is, of course, the combined categorical approach and substantial risk standard. However, are the rest of the pieces of the *Johnson* analysis—the exact language of the residual clause, the confusing list of examples, and the consistent failure to find a workable standard—key ingredients in the recipe for vagueness? Or merely garnish? Stay tuned, as the Supreme Court is poised to hear arguments in January.

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1. 18 U.S.C. § 16 was intended to define "crime of violence" generally throughout the criminal code and appears in many different statutes. *See Matter of Alcantar,* 20 I&N Dec. 801, 803–04 (BIA 1994). However, unless specified otherwise, any reference in this article to 18 U.S.C. § 16 discusses this provision as it is incorporated by the Act.

2. This includes, but is not limited to: expedited removal proceedings, *see* section 238(a)(1) of the Act, 8 U.S.C. § 1228(a)(1); bars to many discretionary forms of relief, including asylum, *see* section 208(b)(2)(B)(i) of the Act, 8 U.S.C. § 1208(b)(2)(B)(i); and mandatory detention, *see* section 236(c)(1) of the Act, 8 U.S.C. § 1226(c)(1). Additionally, an alien convicted of an aggravated felony is currently a top enforcement priority for removal by the Department of Homeland Security. Secretary Jeh Johnson, *Policies for the Apprehension, Detention and Removal of Undocumented Immigrants*, Dep't of Homeland Security, 3 (November 20, 2014), https://perma.cc/59CY-NTKX.

3. For updates on *Lynch v. Dimaya, see Lynch v. Dimaya,* SCOTUSblog, (last visited Dec. 20, 2016), http://www.scotusblog.com/case-files/cases/lynch-v-dimaya.

4. *See James v. United States,* 550 U.S. 192 (2007) (finding that Florida's attempted burglary is a "crime of violence"), *overruled by Johnson,*135 S. Ct. 2551; *Begay v. United States,* 553 U.S. 137 (2008) (finding that driving under the influence in violation of New Mexico law is not a "crime of violence"), *overruled by Johnson*, 135 S. Ct. 2551; *Chambers v. United States*, 555 U.S. 122 (2009) (finding that Illinois's failure to report to a penal institution is not a "crime of violence"), *overruled by Johnson,*135 S. Ct. 2551; *Sykes v. United States,* 564 U.S. 1 (2011) (finding that Indiana's vehicular flight from a law enforcement officer is a crime of violence), *overruled by Johnson,*135 S. Ct. 2551.

5. Justice Scalia wrote for the majority and was joined by Chief Justice Roberts and Justices Ginsburg, Sotomayor, Breyer, and Kagan. Justice Kennedy and Justice Thomas separately concurred in judgment. Justice Alito dissented.

6. *See James,* 550 U.S. at 203.

7. *See Chambers,* 555 U.S. at 128–30.

8. *See Sykes,* 564 U.S. at 20 (finding that statistics supporting the risks inherent in Indiana's intentional flight statute "merely reinforce common sense and real world experience" in determining that the statute is a "violent felony"); *Johnson,* 135 S. Ct. at 2559 ("Common sense has not even produced a consistent conception of the degree of risk posed by each of the four enumerated crimes; there is no reason to expect it to fare any better with respect to thousands of unenumerated crimes.").

9. While this is the "obvious" example, it is actually not quite as obvious as it seems. One must also presuppose that an individual who threatens violence typically intends to use violence in actuality. For example:

> Some judges have concluded that deciding whether conspiracy is a violent felony requires evaluating only the dangers posed by the 'simple act of agreeing [to commit a crime],' *United States v. Whitson,* 597 F.3d 1218, 1222 (11th Cir. 2010) (*per curiam*); others have also considered the probability that the agreement will be carried out, *United States v. White,* 571 F.3d 365, 370–371 (4th Cir. 2009).

Johnson, 135 S. Ct. at 2560 (alteration in original).

The standard under the residual clause is "serious potential risk of physical injury." Thus, threatened violence is not per se a violent felony under the residual clause, the way that it would be if threatened violence was an explicit element of the crime. While these presuppositions are provided for the purposes of the example, it is also an illustration of the complexity of the analysis.

> . . . we think many of the cases the Government and the dissent deem easy turn out not to be so easy after all. Consider just one of the Government's examples, Connecticut's offense of 'rioting at a correctional institution.' *See United States v. Johnson,* 616 F.3d 85 (2d Cir. 2010). That certainly sounds like a violent felony—until one realizes that Connecticut defines this offense to include taking part in 'any disorder, disturbance, strike, riot or other organized disobedience to the rules and regulations' of the prison. Conn. Gen. Stat. § 53a–179b(a) (2012). Who is to say which the ordinary 'disorder' most closely resembles—a full-fledged prison riot, a food-fight in the prison cafeteria, or a 'passive and nonviolent [act] such as disregarding an order to move.' *Johnson,* 616 F.3d, at 95 (Parker, J., dissenting).

Johnson, 135 S. Ct. at 2560 (alteration in original).

10. Section 16(b) and the ACCA were both enacted as constituents of the Comprehensive Crime Control Act of 1984 ("CCCA"). *See* Pub. L. No. 98-473, 98 Stat. 2136, 2185.

11. The Sentencing Reform Act (which created the agency charged with promulgating the Sentencing Guidelines) was also

enacted under the CCCA. *See* Pub. L. No. 98-473, 98 Stat. 2021. A general history of section 16(b), the ACCA, and the Guidelines can be found in *Matter of Alcantar,* 20 I&N Dec. at 804–07.

12. Initially, the ACCA did not call for increased sentencing for prior "violent felony" convictions. *See* Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, § 1802, 98 Stat. 2185 (1984). In 1986, the ACCA was amended to enhance sentencing for those convicted of a "violent felony," including under its residual clause. Career Criminals Amendment Act of 1986, Pub. L. No. 99-570, § 1401, 100 Stat. 3207-39.

13. While the Guidelines originally entailed enhanced sentencing for "crimes of violence," the term was not independently defined, and courts initially adopted the "crime of violence" definition in 18 U.S.C. § 16, the same definition later incorporated in the Act. *See Matter of Alcantar*, 20 I&N Dec. at 803–04. In 1989, the Sentencing Commission adopted a residual clause definition identical to the ACCA's residual clause. *Id.* at 804.

14. The Act incorporated section 16(b)'s "crime of violence" definition into the context of civil removal proceedings in 1990. IMMACT90, Pub. L. No. 101-649 § 501 (1990).

15. The definition at section 4B1.2 is used to trigger increased sentences under several other provisions in the Guidelines, including for illegal reentry.

16. The Act lists 23 types of crimes as aggravated felonies for immigration purposes. Conviction for a "crime of violence" is one kind of aggravated felony, pursuant to section 101(a)(43)(F) of the Act. The Act defines "crime of violence" by cross-referencing the definition for "crime of violence" listed under section 18 U.S.C. § 16.

17. *See* U.S.S.G. § 4B1.2(a)(2) (2015) (amended 2016) (listing burglary of a dwelling as an enumerated offense, as opposed to burglary).

18.

> Almost none of the cited laws links a phrase such as 'substantial risk' to a confusing list of examples. The phrase 'shades of red,' standing alone, does not generate confusion or unpredictability; but the phrase 'fire-engine red, light pink, maroon, *navy blue,* or colors that otherwise involve shades of red' assuredly does so.

Johnson, 135 S. Ct. at 2561 (emphasis in original) (internal quotation marks and citations omitted).

19. However, consider *Johnson,* 135 S. Ct. at 2557, which cited the residual clause's enumerated offense of burglary as "confirm[ation]" that the clause intends for courts to evaluate the risk of physical injury for events that occur after the crime has been committed. "Risk of injury arises because the burglar might confront a resident in the home *after* breaking and entering." Nonetheless, burglary has also been deemed the "classic example" of a section 16(b) "crime of violence." *Leocal v. Ashcroft*, 543 U.S. 1, 2 (2004).

20. The recent Supreme Court holding in *Mathis v. United States* —which addressed an elements versus means approach in the categorical analysis of the ACCA—acknowledged the relationship between developments in the categorical approach under the ACCA and the Act, mentioning it in two significant footnotes. *See* 136 S. Ct. 2243, 2251 n.2, 2253 n.3 (2016) (noting that the categorical approach requires looking to the elements of conviction rather than the underlying facts in the immigration context and then giving an example in the immigration context to illustrate the potential unfairness of using alternative means rather than elements in a categorical analysis). Furthermore, *Matter of Chairez,* 26 I&N Dec. 819, 819–20 (BIA 2016), explicitly adopted that reasoning, stating, "[T]he understanding of statutory 'divisibility' embodied in *Descamps* and *Mathis* applies in immigration proceedings nationwide to the same extent that it applies in criminal sentencing proceedings."

21. *Compare Taylor,* 814 F.3d at 377 (stating that differences in statutory language "are distinctions that made a difference in *Johnson*"), *with Shuti,* 828 F.3d at 448 (stating that differences in statutory language are "distinctions without a difference").

22. *Welch v. United States,* 136 S. Ct. 1257, 1268 (2016) (holding that *Johnson* announced a substantive rule that applied retroactively on collateral review).

23. *See* U.S.S.G. § 2L1.2, cmt.3(A) ("For purposes of subsection (b)(1)(C), 'aggravated felony' has the meaning given that term in 8 U.S.C. § 1101(a)(43), without regard to the date of conviction for the aggravated felony.").

24. As an example, the Fifth Circuit cited to *Johnson's* illustration of whether unlawful possession of a short-barreled shotgun posed a risk of physical injury, which could potentially include the risk "that the shotgun will go off by accident while in someone's possession . . . ." *Gonzalez-Longoria*, 831 F.3d at 676 (quoting *Johnson*, 135 S. Ct. at 2559). Such a consideration would not be relevant for section 16(b)'s "crime of violence" assessment. The Supreme Court in *Leocal* highlighted that "16(b) plainly does not encompass all offenses which create a 'substantial risk' that injury will result from a person's conduct. The 'substantial risk' in § 16(b) relates to the use of force, not to the possible effect of a person's conduct." 543 U.S. at 8 n.7. For example, the crime of causing injury to another while operating a vehicle under the influence is not a crime of violence pursuant to section 16(b). Although there is a 100% risk of physical injury, as it is a necessary element of the crime, there is little risk that physical force would be intentionally used in committing the crime.

25. However, compare this with *Johnson*, which specifically rejected the reasoning that some "straightforward cases under the residual clause" do not save the residual clause from the clutches of vagueness. 135 S. Ct. at 2560. "A vague provision is [not] constitutional merely because there is some conduct that clearly falls within the provision's grasp." *Id.* at 2561.

26. The dissenting opinion agreed with the majority's framework of evaluating section 16(b) in light of the two conspiring features that rendered the residual clause unconstitutional. The dissent also conceded that these features did not imbue the same level of indeterminacy in the context of section 16(b). However, "even though § 16(b) might be slightly less indeterminate, it is nonetheless similar enough to the residual clause to be trapped by the same constitutional character." *Id.* at 685 (Jolly, J., dissenting).

With respect to the four enumerated crimes in the residual clause, and lack thereof in section 16(b), the dissent "agree[d] that this provides a shadow of a difference, but hardly a constitutional

sockdolager." *Id.* Although there is no statutory list of examples in section 16(b), the dissent noted that judicial interpretation has created a similar comparative standard for section 16(b). Specifically, *Leocal* has named burglary, one of the residual clause's enumerated offenses, as "the classic example" of a section 16(b) crime. *Id.* Furthermore, the dissent noted, burglary is the example that troubled the Court in *Johnson* and if it "is a confusing example in one statute, then it is just as confusing in the other." *Id.*

27. U.S.S.G. § 4B1.2(a).

28. U.S.S.G. § 2L1.1.