



***JOHNSON V. UNITED STATES AND THE
FUTURE OF THE VOID-FOR-
VAGUENESS DOCTRINE***

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Last Term, in *Johnson v. United States*, the U.S. Supreme Court struck down a portion of the Armed Career Criminal Act as unconstitutionally vague. The *Johnson* opinion is certain to have a large impact on federal criminal defendants charged with unlawfully possessing a firearm. But it is also likely to have other important consequences. The language deemed vague in *Johnson* is similar or identical to language in the Federal Sentencing Guidelines and other statutes. What is more, the *Johnson* opinion elaborates on the void-for-vagueness doctrine in important ways. Those elaborations ought to make vagueness challenges easier to win in the future.

This Commentary examines the implications of *Johnson*. It also briefly discusses Justice Thomas's concurrence. Justice Thomas refused to join the majority opinion, instead opting to decide the case in Johnson's favor on statutory construction grounds. In addition to his statutory construction analysis, Justice Thomas questioned the

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constitutional basis of the void-for-vagueness doctrine. Justice Thomas's approach to the vagueness doctrine, if adopted by other members of the Court, could eviscerate the notice function of the doctrine.

I. THE JOHNSON CASE

When the Supreme Court first granted certiorari in *Johnson v. United States*,¹ it seemed like a straightforward statutory interpretation case. Samuel Johnson had pled guilty to the federal offense of being a felon in possession of a handgun.² Prosecutors sought to invoke a mandatory minimum sentencing provision of the Armed Career Criminal Act ("ACCA") under which Johnson would serve at least 15 years in prison.

The ACCA imposes this mandatory minimum on certain firearm offenders who have three previous convictions for a violent felony or a serious drug felony. The term violent felony is defined to include state or federal court convictions for any felony that:

- (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
- (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another . . .³

Johnson's previous felony convictions included a conviction for robbery, attempted robbery, and possession of a short-barreled shotgun.⁴ His robbery and attempted robbery convictions clearly fell

¹ 135 S. Ct. 2551 (2015).

² 18 U.S.C. § 922(g).

³ 18 U.S.C. § 924(e)(2)(B).

⁴ 135 S. Ct. at 2556.

within subsection (i), and so they could serve as predicates for the mandatory minimum. But Johnson's conviction for possessing a short-barreled shotgun was more difficult. Unlike robbery and attempted robbery, the crime of possessing a short-barreled shotgun does not include the use of force, the attempt to use force, or threats to use force as an element, and so it cannot qualify as a crime of violence under subsection (i). Nor is it one of the enumerated crimes in subsection (ii). Therefore, Johnson's conviction for possessing a short-barreled shotgun could trigger the mandatory minimum only if it fell within the broader language of subsection (ii) — namely, if it was a crime that “otherwise involves conduct that presents a serious potential risk of physical injury to another.”

This language — which is commonly referred to as the “residual clause” of the ACCA — has generated a large number of splits among the federal circuits. Although the Supreme Court had decided several cases in recent years to resolve such splits, the opinions in those cases did not articulate any analysis that allowed circuit courts to decide easily whether various state court convictions fell within the residual clause. Whether possession of a short-barreled shotgun falls within the residual clause was one of these questions that had split the circuits. And when the Supreme Court granted certiorari in *Johnson*, it did so on this narrow statutory interpretation issue.⁵ Following the order, the parties briefed that issue, the Court held oral argument in November 2014, and most people assumed that the case would be decided on those grounds.

Then the Supreme Court issued a surprising order in *Johnson*: It ordered the parties to brief whether the residual clause of the

⁵ 134 S. Ct. 1871 (2014) (granting certiorari).

ACCA was unconstitutionally vague.⁶ Johnson had preserved this argument in the lower courts but had not sought certiorari on that issue. And so the vagueness issue had not been briefed, and no questions on the issue were asked at oral argument.⁷ Subsequently, the parties briefed the vagueness issue as ordered, and the Court held a second oral argument in April of 2015.

As a general matter, “the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.”⁸ Statutes that fail to meet this standard violate the Due Process Clause.

Writing for a six-justice majority in *Johnson*, Justice Scalia declared the residual clause unconstitutionally vague. According to the majority, several features of the ACCA’s residual clause made it difficult to estimate the risk posed by a defendant’s previous crime, and

⁶ Although the Supreme Court’s decision to tackle the vagueness question was unexpected, a brief examination of the Court’s recent ACCA cases reveals increasing dissatisfaction among the Justices with the residual clause. In *James v. United States*, 550 U.S. 192 (2007), Justice Scalia wrote a dissent (which Justices Ginsburg and Stevens joined) in which he criticized the “imprecision and indeterminacy” of clause, saying Congress “abdicated its responsibilities.” In *Begay v. United States*, 553 U.S. 137 (2008), Justice Scalia wrote a concurring opinion in which he called for the application of the rule of lenity, and Justice Alito wrote a dissenting opinion (joined by Justices Souter and Thomas) stating that the residual clause “calls out for legislative clarification.” In *Chambers v. United States*, 555 U.S. 122 (2009), Justice Alito wrote a concurring opinion (joined by Justice Thomas) in which he again called for legislative clarification. Most recently, in *Sykes v. United States*, 131 S. Ct. 2267 (2011), Justice Scalia wrote a dissenting opinion in which he gave detailed analysis about why he believed that the residual clause was unconstitutionally vague.

⁷ Rory Little, *Argument Analysis: Justices Unhappily Consider Whether Sawed-off Shotguns Are Inherently Violent*, SCOTUSBLOG, (Nov. 6, 2014), <http://www.scotusblog.com/2014/11/argument-analysis-justices-unhappily-consider-whether-sawed-off-shotguns-are-inherently-violent/>.

⁸ *Kolender v. Lawson*, 461 U.S. 352, 357 (1983).

it was thus unclear whether a conviction fell within the clause.⁹ For one thing, because the mandatory minimum sentence is triggered by a *conviction* for a crime of violence, the Court has long held that whether a defendant's conviction falls within the residual clause must be determined by looking at the crime of conviction, not at the underlying criminal conduct that resulted in the conviction.¹⁰ This so-called categorical approach required judges to assess the risk posed by the "ordinary case" of a defendant committing the crime, rather than the elements of a crime or the facts surrounding a particular defendant's crime.¹¹ For example, in assessing whether possession of a short-barreled shotgun qualifies as a crime of violence, the district court judge in *Johnson* did not ask about the manner in which Samuel Johnson possessed his shotgun. Whether Johnson was brandishing the shotgun during drug deals or whether he kept it locked in his basement played no role in the judge's determination whether Johnson's possession of the short-barreled shotgun "present[ed] a serious potential risk of physical injury to another." Instead, the judge had to decide whether the "ordinary case" of possessing a short-barreled shotgun posed such a risk. Unsurprisingly, judges often disagreed about what that "ordinary case" looked like.

The majority also cited the list of enumerated crimes that preceded the residual clause as contributing to its vagueness. Those enumerated crimes—burglary, arson, extortion, and crimes involving the use of explosives—further obscure the meaning of the residual clause in at least two ways. First, the listed crimes do not seem to create the same risk of injury to others. While arson and crimes involving explosives obviously involve a risk to others, burglary and extortion do not involve similarly obvious risk. Thus, if we read the

⁹ 135 S. Ct. 2551, 2557 (2015).

¹⁰ See *Taylor v. United States*, 495 U.S. 575 (1990).

¹¹ 135 S. Ct. at 2558–59.

residual clause's reference to "serious risk of potential injury" as incorporating the levels of risk from the enumerated crimes – and the word "otherwise" suggests we should – then the disparity of risk for the enumerated crimes makes it difficult to assess what level of risk is sufficient to qualify as "serious risk of potential injury."

The second complication raised by the enumerated crimes is that they suggest a court's evaluation of risk ought not be limited to the *actus reus* of the defendant's crime.¹² Actions taken by others and actions taken subsequent to the commission of the crime appear to be relevant as well. Consider, for example, the enumerated crime of burglary. Burglary is traditionally defined as breaking and entering into the dwelling of another with the intent to commit a further felony therein. The *actus reus* of the crime is breaking and entering – actions which, standing alone, do not appear to create a risk of injury to others. It is only if the burglar is confronted by a resident or another individual and if that confrontation causes some sort of escalation that a risk of injury arises.

These features, the Court said, made it so difficult to estimate the risk posed by a defendant's previous crime that the residual clause was void for vagueness. The language of the residual clause did not give sufficient notice of what criminal conduct was likely to fall within that language, and it was so malleable that "it invites arbitrary enforcement."¹³ Thus, the Court held it was unconstitutionally vague.

II. IMPLICATIONS OF *JOHNSON*

The most obvious implication of the *Johnson* decision is that it strikes down the residual clause of the ACCA. There are also other

¹² 135 S. Ct. at 2259.

¹³ *Id.* at 2556.

direct implications of the decision. For example, as the U.S. Sentencing Commission recently acknowledged, *Johnson* has important consequences for the Federal Sentencing Guidelines. Guideline § 4B1.2(a) defines the term “crime of violence,”¹⁴ which is cross referenced in several other Guidelines. That definition includes language that is identical to the ACCA residual clause, and thus both the Sentencing Commission¹⁵ and the Department of Justice¹⁶ have conceded that this portion of 4B1.2(a) is unconstitutionally vague.

Johnson may also have important implications for immigration law. Federal immigration decisions regularly turn on whether a non-citizen has committed an “aggravated felony.”¹⁷ The federal definition of an aggravated felony includes a lengthy list of particular offenses,¹⁸ and the definition also incorporates a catch all provision

¹⁴ In particular, it states:

The term ‘crime of violence’ means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that --

(1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or

(2) 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.

USSG § 4B1.2(a) (emphasis added).

¹⁵ See Sentencing Guidelines for United States Courts, 80 Fed. Reg. 49314-01 (Aug. 17, 2015).

¹⁶ See Brief of Appellee, *United States v. Pagan-Soto* (1st Cir. Aug. 11, 2015) (No 13-2243).

¹⁷ See, e.g., 8 U.S.C. § 1326(b)(2) (setting fines and criminal penalties for reentry if an individual’s “removal was subsequent to a conviction for commission of an aggravated felony”); 8 U.S.C. § 1228 (providing for expedited removal of individuals convicted of committing aggravated felonies).

¹⁸ 8 U.S.C. § 1101 (a)(43).

for “a crime of violence.”¹⁹ The phrase “crime of violence” is defined in a manner that is quite similar to the ACCA:

The term “crime of violence” means--

- (a) an 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 the offense.²⁰

The language “any other offense that . . . by its nature, involves a substantial risk that physical force against the person or property of another may be used” is similar, though not identical to, the residual clause of the ACCA. What is more, federal courts often use the same categorical approach to assessing “substantial risk” language from this statute that the *Johnson* Court heavily criticized in the context of the ACCA.²¹ As a result, it is possible that lower courts will interpret *Johnson* to invalidate this provision of federal immigration law.

In addition to these more immediate consequences, *Johnson* may have more long-term effects on the void-for-vagueness doctrine. In particular, the case may make it easier for criminal defendants to prevail on vagueness challenges in future cases because it held that a law

¹⁹ 8 U.S.C. § 1101 (a)(43)(F) (“[A] crime of violence (as defined in section 16 of Title 18, but not including a purely political offense) for which the term of imprisonment [is] at least one year.”).

²⁰ 18 U.S.C. § 16.

²¹ E.g., *United States v. Willis*, --F.3d--, No. 13-30376, 2015 WL 4547542, at *3 (9th Cir. July 29, 2015); *Santapaola v. Ashcroft*, 249 F. Supp. 2d 181, 189 (D. Conn. 2003).

may be unconstitutionally vague even if there are some cases that could be easily resolved under the statutory language.

Some of the Court's previous cases has said that a statute was void for vagueness only if it was vague in all applications.²² But the *Johnson* majority rejected this language, stating that it was inconsistent with the Court's holdings in prior cases. In particular, the Court pointed to *United States v. L. Cohen Grocery Co.*,²³ which held that a law prohibiting "unjust or unreasonable rates" for grocers was unconstitutionally vague, and *Coates v. Cincinnati*,²⁴ which similarly invalidated a law prohibiting people on sidewalks from conducting themselves "in a manner annoying to persons passing by." The Court noted that these holdings were incompatible with a rule that "a vague provision is constitutional merely because there is some conduct that clearly falls within the provision's grasp."²⁵ As the Court noted, charging a thousand dollars for a pound of sugar is clearly "unjust or unreasonable," and spitting in someone's face on a sidewalk is obviously annoying.²⁶

In rejecting the idea that clarity in some cases will save a statute from unconstitutionality, the Court has made vagueness challenges easier for defendants to win. If a statute truly needed to be vague in all applications in order to violate due process, then the government need only identify a single instance in which reasonable people would agree about the application of a statute in order to survive a vagueness challenge. Even if this was not the standard that courts were actually using to resolve vagueness claims, the clarification in

²² See *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494-95 (1982).

²³ 255 U.S. 81 (1921).

²⁴ 402 U.S. 611 (1971).

²⁵ *Johnson*, 135 S. Ct. at 2561.

²⁶ *Id.*

Johnson that this is not the correct standard to apply is likely to benefit some criminal defendants in future cases.

Another aspect of the *Johnson* opinion that could have long-lasting effects involves criminal sentencing. The residual clause of the ACCA did not define whether conduct was legal or illegal, rather it identified circumstances that triggered a higher penalty. In its brief, the government argued that the vagueness doctrine need not be applied with the same force in cases involving sentencing statutes, as opposed to statutes that define criminal conduct.²⁷ Justice Alito echoed this reasoning in his dissent.²⁸ But it did not persuade the majority. After reciting the basic underpinnings of the vagueness doctrine, the majority opinion simply stated: "These principles apply not only to statutes defining elements of crimes, but also to statutes fixing sentences."²⁹

Of course, it remains to be seen how big of an effect these aspects of the *Johnson* opinion will have on the void-for-vagueness doctrine. The decision does not tell us how many easy cases can arise under a statute before it is no longer unconstitutionally vague. And while the opinion tells us that vagueness principles apply to sentencing statutes, it did not explicitly reject the notion that those principles might apply with different force. Thus, the magnitude of these doctrinal developments in *Johnson* is still unknown. But there is no doubt that *Johnson* modifies the vagueness doctrine in a manner that allows for more defense rulings.

²⁷ Brief of Respondent at 17-18, *Johnson v. United States*, 135 S. Ct. 2551 (Mar. 20, 2015) (No. 13-7120) (This argument found some support in *Chapman v. United States*, 500 U.S. 453, 467-68 (1991).

²⁸ *Johnson*, 135 S. Ct. at 2577 (Alito, J. concurring)

²⁹ *Id.*

III. JUSTICE THOMAS'S CONCURRENCE

Any assessment of the impact that *Johnson* will have on the void-for-vagueness doctrine would be incomplete without a discussion of Justice Thomas's concurrence. Justice Thomas concurred in the judgment because he believed that the case could be decided on the narrow statutory interpretation grounds that possession of a short-barreled shot gun did not fall within the residual clause. But Justice Thomas's concurrence also voiced doubts about the legitimacy of the void-for-vagueness doctrine.

Justice Thomas's concerns about the vagueness doctrine are part of a more general concern about constitutional doctrines rooted in the Due Process Clause. The courts are likely to use such doctrines, according to Justice Thomas, to achieve their own policy goals.³⁰ In making this argument, Justice Thomas drew a series of parallels between the vagueness doctrine and substantive due process.³¹ Given the controversial status of substantive due process,³² drawing parallels between the two doctrines is obviously meant to question the legitimacy of the vagueness doctrine.

³⁰ See *id.* at 2567 (Thomas, J., concurring) ("This Court has a history of wielding doctrines purportedly rooted in due process of law to achieve its own policy goals")

³¹ E.g., *id.* at 2564 ("[O]ur vagueness doctrine shares an uncomfortably similar history with substantive due process, a judicially created doctrine lacking any basis in the Constitution."); *id.* at 2567 ("Although our vagueness doctrine is distinct from substantive due process, their histories have disquieting parallels.").

³² See, e.g., GERALD GUNTHER & KATHLEEN M. SULLIVAN, CONSTITUTIONAL LAW 453 (13th ed. 1997) ("In no part of constitutional law has the search for legitimate ingredients of constitutional interpretation been more difficult and controversial than in the turbulent history of substantive due process."); 1 LAWRENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1333 (3d ed. 2000) ("Modern critics of substantive due process . . . have taken to task the very concept of using the Due Process Clause as a basis for reviewing the *substance* of legislation.") (emphasis in original).

Justice's Thomas's critique of the vagueness doctrine is largely an historical one. According to Justice Thomas, although vague statutes have long posed a problem for judges, only in more recent years have the courts fashioned a constitutional rule declaring such statutes void. In earlier days, "courts addressed vagueness through a rule of strict construction of penal statutes."³³ Rather than striking down laws as unconstitutionally vague, early American courts "simply refused to apply them in individual cases under the rule that penal statutes should be construed strictly."³⁴ Notably, Justice Thomas's description of this early practice is not simply a description of what we now call the rule of lenity – the rule that ambiguous criminal statutes should be interpreted in a defendant's favor. The rule of lenity, like other rules of statutory construction, allows courts to develop an interpretation of a statute that will apply in future cases.³⁵ In contrast, the approach to vague statutes that Justice Thomas describes was only a refusal to apply such laws on a case-by-case basis.³⁶

In support of this characterization, Justice Thomas relies on two opinions by Justice Bushrod Washington. In the first case, *United States v. Sharp*, Justice Washington, while riding circuit, refused to "recommend to the jury, to find the prisoners guilty of making, or endeavouring to make a revolt, however strong the evidence may be," because the relevant statute did not define the phrase "to make a revolt." Although Justice Washington believed that he knew how

³³ 135 S. Ct. at 2567.

³⁴ *Id.* at 2568.

³⁵ See, e.g., *United States v. Kozminski*, 487 U.S. 931, 951 (1988) (using the rule of lenity to construe a statute, in part, to avoid "the arbitrariness and unfairness of a legal system in which the judges would develop the standards for imposing criminal punishment on a case-by-case basis").

³⁶ "The process of refusing to apply such laws appeared to occur on a case-by-case basis." *Johnson*, 135 S. Ct. at 2568 (2015) (Thomas, J., concurring in the judgment).

to define the phrase, he could not locate such a definition “by any authority to be met with, either in the common, admiralty, or civil law.”³⁷ Eleven years later, the same statute came before the U.S. Supreme Court on a certified question from a lower court in *United States v. Kelly*. Writing for the Supreme Court, Justice Washington supplied a “judicial definition” of the phrase “endeavoring to make a revolt.”³⁸

Justice Thomas relied on these two cases to conclude that vagueness determinations were made only on a case-by-case basis in early America. It is far from clear that this is the correct inference to draw from these two cases. While the decision in *Sharp* was based on a vagueness concern, the decision in *Kelly* was not a decision about whether the statute was vague. It was instead about whether the courts were “competent” to “give a judicial definition” of the crime in light of the fact that Congress had not defined it. The *Kelly* Court answered that question in the affirmative. At the time, the legislature was not seen as the only source of substantive criminal law; courts regularly defined crimes as a matter of common law during the colonial era and the early nineteenth century.³⁹ Nor was *Kelly* a case about whether the defendants in that case ought to be held criminally liable for actions that they took before a judicial definition had been rendered. The decision resolved a legal question that had been certified to the Court.⁴⁰ What is more, to the extent vagueness determinations were made on a case-by-case basis in early America, this may be attributable to the fact that precedent as we currently conceive of

³⁷ *United States v. Sharp*, 27 F. Cas. 1041, 1043 (C.C.D. Pa. 1815).

³⁸ *United States v. Kelly*, 24 U.S. 417, 418 (1826).

³⁹ See Thomas W. Merrill, *The Disposing Power of the Legislature*, 110 COLUM. L. REV. 452, 456-58 (2010).

⁴⁰ Cf. U.S. Sup. Ct. R. 19 (“A United States court of appeals may certify to this Court a question or proposition of law on which it seeks instruction for the proper decision of a case Only questions or propositions of law may be certified”).

it—the idea that prior decisions not only provide the authority for later decisions, but also that prior decisions may bind subsequent courts—is “of relatively recent origin.”⁴¹

Even assuming that Justice Thomas’s historical account of vagueness is correct—that is to say, even if vagueness determinations were made only on a case-by-case basis—there are sound reasons not to adopt this approach today. Such an approach would eviscerate the notice protection provided by the current doctrine. When explaining why a vague criminal statute violates the right to due process, the Supreme Court usually offers two explanations—that vague laws give insufficient notice to citizens about what conduct is permitted and what conduct is prohibited, and that vague laws may lead to arbitrary and discriminatory enforcement.⁴² Although the Court has sometimes suggested that enforcement concerns are the primary justification for the doctrine,⁴³ it has continued to stress the importance of notice. If a law is written imprecisely, an individual may accidentally engage in illegal conduct. As a consequence, in order to avoid conviction under vague statutes, citizens may choose to avoid large swaths of conduct that might be prohibited by the vague statute.⁴⁴ That is to say, not only are vague statutes a trap for the unwary, but they also may chill legal conduct.

⁴¹ Thomas R. Lee, *Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court*, 52 VAND. L. REV. 647, 659–81 (1999).

⁴² *Skilling v. United States*, 561 U.S. 358, 130 S. Ct. 2896, 2927–28 (2010) (“To satisfy due process, ‘a penal statute [must] define the criminal offense [1] with sufficient definiteness that ordinary people can understand what conduct is prohibited and [2] in a manner that does not encourage arbitrary and discriminatory enforcement.’”) (quoting *Kolender v. Lawson*, 461 U.S. 352, 357 (1983)) (alterations in original). See also *Grayned v. City of Rockford*, 408 U.S. 104, 108–109 (1972) (identifying these two reasons).

⁴³ See *Kolender*, 357–58 (1983) (quoting *Smith v. Goguen*, 415 U.S. 566, 574 (1974)).

⁴⁴ *Grayned*, 408 U.S. at 108–109 (“[B]ecause we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary

A case-by-case approach to vagueness has dramatic notice consequences. If a criminal law is written so unclearly that an ordinary person cannot determine what conduct is prohibited, a court ruling under the current vagueness doctrine will help that individual. The court will either interpret the statute in a manner that provides further clarification regarding what is prohibited,⁴⁵ or it will deem the law unconstitutionally vague and, as a consequence, the statute will not be enforced in future cases. Under a case-by-case approach, a court ruling does not provide such clarification. The fact that a court deemed a statute impermissibly vague in a case against one defendant provides no help to the ordinary person who cannot determine what conduct is prohibited. That individual must still avoid large swaths of conduct that might or might not be prohibited by the vague statute because a court in a subsequent case would not be bound by the prior vagueness ruling. Put simply, a case-by-case approach would fail to achieve the notice function that is served by the current vagueness doctrine.

* * *

Johnson v. United States initially appeared to be a straightforward statutory interpretation case. But the Supreme Court's decision to address whether the residual clause of the Armed Career Criminal Act was unconstitutionally vague transformed the case into some-

intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning.”).

⁴⁵ See, e.g., *Skilling v. United States*, 561 U.S. 358 (2010) (providing a judicial interpretation of the federal statute prohibiting honest services fraud).

thing more. In deciding that the residual clause was void-for-vagueness, the Court elaborated on its vagueness doctrine in a way that is likely to make vagueness challenges easier to win in future cases.