AMERICAN CONSTITUTIONALISM

VOLUME II: RIGHTS AND LIBERTIES

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Supplementary Material

Chapter 11: The Contemporary Era – Criminal Justice/Due Process and Habeas Corpus

**Sessions v. Dimaya, \_\_\_ U.S. \_\_\_** (2018)

*James Dimaya was a native of the Philippines and a lawful permanent resident of the United States who was twice convicted of first degree burglary in California. After his second conviction, the United States moved that he be deported under the Immigration and Nationality Act (INA). That Act makes persons deportable who have been convicted of an “aggravated felony,” which includes any “crime of violence.* [*18 U.S.C. § 16*](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=18USCAS16&originatingDoc=I12092c10421411e8a2e69b122173a65f&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.History*oc.Search)) *defines a crime of violence as*

*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 [the elements clause], 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 [the residual clause*]*.*

*The Board of Immigration ordered Dimaya to be deported but that decisions was reversed by the Court of Appeals for the Ninth Circuit on the ground that the statutory definition of a “crime of violence” was unconstitutionally vague. Attorney General Jefferson Sessions, reporesenting the United States, appealed to the Supreme Court.*

*The Supreme Court by a 5-4 vote agreed with the Ninth Circuit that the statutory definition of “crime of violence” was unconstitutionally vague. Justice Elana Kagan’s plurality opinion maintained that the federal definition of “crime of violent” was for all practical purposes identical to the definition of “violent felony” in the Armed Career Criminal Act of 215* (ACCA) *that the justices had declared unconstitutional vague in* Johnson v. United States *(2015)*, *The definition was:*

“*any crime punishable by imprisonment for a term exceeding one year ... 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.*”

*Why does Justice Kagan think the relevant language in §16 is constitutionally identical to the language of the ACCA? Why do the dissents disagree? Who has the better of the argument? Justice Neil Gorsuch and Justice Clarence Thomas debate the original status of the vagueness doctrine. Do they disagree about the relevant history or what counts as originalism done properly? What best explains the difference between the two leading conservative originalists in this case?*

JUSTICE [KAGAN](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0301239401&originatingDoc=I12092c10421411e8a2e69b122173a65f&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) announced the judgment of the Court and an in which JUSTICE [GINSBURG](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0224420501&originatingDoc=I12092c10421411e8a2e69b122173a65f&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), JUSTICE [BREYER](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0254766801&originatingDoc=I12092c10421411e8a2e69b122173a65f&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), and JUSTICE [SOTOMAYOR](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0145172701&originatingDoc=I12092c10421411e8a2e69b122173a65f&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) join.

. . . .

“The prohibition of vagueness in criminal statutes,” our decision in *Johnson v. United States* (2015) explained, is an “essential” of due process, required by both “ordinary notions of fair play and the settled rules of law.” The void-for-vagueness doctrine, as we have called it, guarantees that ordinary people have “fair notice” of the conduct a statute proscribes and the doctrine guards against arbitrary or discriminatory law enforcement by insisting that a statute provide standards to govern the actions of police officers, prosecutors, juries, and judges. In that sense, the doctrine is a corollary of the separation of powers—requiring that Congress, rather than the executive or judicial branch, define what conduct is sanctionable and what is not.

The Government argues that a less searching form of the void-for-vagueness doctrine applies here than in *Johnson* because this is not a criminal case. . . . But this Court's precedent forecloses that argument, because we long ago held that the most exacting vagueness standard should apply in removal cases. . . . That approach was demanded, we explained, “in view of the grave nature of deportation”—a “drastic measure,” often amounting to lifelong “banishment or exile,” . . .

*Johnson* is a straightforward decision, with equally straightforward application here. . . .  [§ 16](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=18USCAS16&originatingDoc=I12092c10421411e8a2e69b122173a65f&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))'s residual clause has the same two features as ACCA's, combined in the same constitutionally problematic way. Consider those two, just as *Johnson* described them: “In the first place,” *Johnson* explained, ACCA's residual clause created “grave uncertainty about how to estimate the risk posed by a crime” because it “tie[d] the judicial assessment of risk” to a hypothesis about the crime's “ordinary case.” Under the clause, a court focused on neither the “real-world facts” nor the bare “statutory elements” of an offense. Instead, a court was supposed to “imagine” an “idealized ordinary case of the crime”—or otherwise put, the court had to identify the “kind of conduct the ‘ordinary case’ of a crime involves.” But how, *Johnson* asked, should a court figure that out? By using a “statistical analysis of the state reporter? A survey? Expert evidence? Google? Gut instinct? ACCA provided no guidance, rendering judicial accounts of the “ordinary case” wholly “speculative.” . . .

Compounding that first uncertainty, *Johnson* continued, was a second: ACCA's residual clause left unclear what threshold level of risk made any given crime a “violent felony.” . . . The problem came from layering such a standard on top of the requisite “ordinary case” inquiry. As the Court explained: “[W]e do not doubt the constitutionality of laws that call for the application of a qualitative standard such as ‘substantial risk’ to real-world conduct; the law is full of instances where a man's fate depends on his estimating rightly ... some matter of degree[.] The residual clause, however, requires application of the ‘serious potential risk’ standard to an idealized ordinary case of the crime. Because the elements necessary to determine the imaginary ideal are uncertain[,] this abstract inquiry offers significantly less predictability than one that deals with the actual ... facts.”

. . . . As the Court again put the point, in the punch line of its decision: “By combining indeterminacy about how to measure the risk posed by a crime with indeterminacy about how much risk it takes for the crime to qualify as a violent felony, the residual clause” violates the guarantee of due process.

[Section 16](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=18USCAS16&originatingDoc=I12092c10421411e8a2e69b122173a65f&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))'s residual clause violates that promise in just the same way. To begin where *Johnson* did, [§ 16(b)](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=18USCAS16&originatingDoc=I12092c10421411e8a2e69b122173a65f&refType=RB&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_a83b000018c76) also calls for a court to identify a crime's “ordinary case” in order to measure the crime's risk. . . .And [§ 16(b)](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=18USCAS16&originatingDoc=I12092c10421411e8a2e69b122173a65f&refType=RB&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_a83b000018c76) also possesses the second fatal feature of ACCA's residual clause: uncertainty about the level of risk that makes a crime “violent.” In ACCA, that threshold was “serious potential risk”; in [§ 16(b)](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=18USCAS16&originatingDoc=I12092c10421411e8a2e69b122173a65f&refType=RB&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_a83b000018c76), it is “substantial risk.” But the Government does not argue that the latter formulation is any more determinate than the former, and for good reason. As the Chief Justice's valiant attempt to do so shows, that would be slicing the baloney mighty thin. . . .

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The dissent [in *Johnson*] issued the same invitation [as Justice Thomas], based on much the same reasoning, to jettison the categorical approach in residual-clause cases. . . . To begin where *Johnson* did, the Government once again “has not asked us to abandon the categorical approach in residual-clause cases.” . . . Of course, we are not foreclosed from going down Justice Thomas path just because the Government has not done so. But we find it significant that the Government cannot bring itself to say that the fact-based approach Justice Thomas proposes is a tenable interpretation of [§ 16](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=18USCAS16&originatingDoc=I12092c10421411e8a2e69b122173a65f&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))'s residual clause.

Perhaps one reason for the Government's reluctance is that such an approach would generate its own constitutional questions. As Justice Thomas relates, this Court adopted the categorical approach in part to “avoid[ ] the Sixth Amendment concerns that would arise from sentencing courts' making findings of fact that properly belong to juries.”  Justice Thomas thinks that issue need not detain us here because “the right of trial by jury ha[s] no application in a removal proceeding.” But although this particular case involves removal, [§ 16(b)](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=18USCAS16&originatingDoc=I12092c10421411e8a2e69b122173a65f&refType=RB&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_a83b000018c76) is a criminal statute, with criminal sentencing consequences. And this Court has held (it could hardly have done otherwise) that “we must interpret the statute consistently, whether we encounter its application in a criminal or noncriminal context.”

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. . . . [A} court applying [§ 16(b)](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=18USCAS16&originatingDoc=I12092c10421411e8a2e69b122173a65f&refType=RB&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_a83b000018c76) gets to consider everything that is likely to take place for as long as a crime is being committed. Because that is so, [§ 16(b)](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=18USCAS16&originatingDoc=I12092c10421411e8a2e69b122173a65f&refType=RB&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_a83b000018c76)'s “in the course of” language does little to narrow or focus the statutory inquiry. All that the phrase excludes is a court's ability to consider the risk that force will be used after the crime has entirely concluded—so, for example, after the conspiracy has dissolved or the burglar has left the building. . . .

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[T]he Government observes that [§ 16(b)](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=18USCAS16&originatingDoc=I12092c10421411e8a2e69b122173a65f&refType=RB&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_a83b000018c76) focuses on the risk of “physical force” whereas ACCA's residual clause asked about the risk of “physical injury.” . . . So, for example, if a crime is likely enough to lead to a shooting, it will also be likely enough to lead to an injury. . . . In interpreting statutes like [§ 16(b)](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=18USCAS16&originatingDoc=I12092c10421411e8a2e69b122173a65f&refType=RB&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_a83b000018c76), this Court has made clear that “physical force” means “force capable of causing physical pain or injury.” . . .

To say that ACCA's listed crimes failed to resolve the residual clause's vagueness is hardly to say they caused the problem. Had they done so, *Johnson* would not have needed to strike down the clause. It could simply have instructed courts to give up on trying to interpret the clause by reference to the enumerated offenses. . . .

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[A] host of issues respecting [§ 16(b)](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=18USCAS16&originatingDoc=I12092c10421411e8a2e69b122173a65f&refType=RB&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_a83b000018c76)'s application to specific crimes divide the federal appellate courts. Does car burglary qualify as a violent felony under [§ 16(b)](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=18USCAS16&originatingDoc=I12092c10421411e8a2e69b122173a65f&refType=RB&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_a83b000018c76)? Some courts say yes, another says no.[8](https://1.next.westlaw.com/Document/I12092c10421411e8a2e69b122173a65f/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad74016000001636a7489ab62a6aeda%3FNav%3DCASE%26fragmentIdentifier%3DI12092c10421411e8a2e69b122173a65f%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=c9335fbca7a39c6e1b7d85ae4fa43c10&list=CASE&rank=3&sessionScopeId=2addf38c5b95005a92bc883f27b07abcb57884f4eb9c67e80726c063fc592341&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_footnote_B00982044336067) What of statutory rape? Once again, the Circuits part ways. How about evading arrest? The decisions point in different directions. Residential trespass? The same is true. . . .

*Johnson* tells us how to resolve this case. That decision held that “[t]wo features of [ACCA's] residual clause conspire[d] to make it unconstitutionally vague.”  Because the clause had both an ordinary-case requirement and an ill-defined risk threshold, it necessarily “devolv[ed] into guesswork and intuition,” invited arbitrary enforcement, and failed to provide fair notice [Section 16(b)](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=18USCAS16&originatingDoc=I12092c10421411e8a2e69b122173a65f&refType=RB&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_a83b000018c76) possesses the exact same two features. And none of the minor linguistic disparities in the statutes makes any real difference. So just like ACCA's residual clause, [§ 16(b)](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=18USCAS16&originatingDoc=I12092c10421411e8a2e69b122173a65f&refType=RB&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_a83b000018c76) “produces more unpredictability and arbitrariness than the Due Process Clause tolerates.” . . .

JUSTICE [GORSUCH](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0183411701&originatingDoc=I12092c10421411e8a2e69b122173a65f&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), concurring in part and concurring in the judgment.

Vague laws invite arbitrary power. Before the Revolution, the crime of treason in English law was so capaciously construed that the mere expression of disfavored opinions could invite transportation or death. The founders cited the crown's abuse of “pretended” crimes like this as one of their reasons for revolution. Today's vague laws may not be as invidious, but they can invite the exercise of arbitrary power all the same—by leaving the people in the dark about what the law demands and allowing prosecutors and courts to make it up.

The law before us today is such a law. Before holding a lawful permanent resident alien like James Dimaya subject to removal for having committed a crime, the Immigration and Nationality Act requires a judge to determine that the ordinary case of the alien's crime of conviction involves a substantial risk that physical force may be used. But what does that mean? Just take the crime at issue in this case, California burglary, which applies to everyone from armed home intruders to door-to-door salesmen peddling shady products. How, on that vast spectrum, is anyone supposed to locate the ordinary case and say whether it includes a substantial risk of physical force? The truth is, no one knows. The law's silence leaves judges to their intuitions and the people to their fate. In my judgment, the Constitution demands more.

I begin with a foundational question. Writing for the Court in *Johnson v. United States* (2015), Justice Scalia held the residual clause of the Armed Career Criminal Act void for vagueness because it invited “more unpredictability and arbitrariness” than the Constitution allows.  Because the residual clause in the statute now before us uses almost exactly the same language as the residual clause in *Johnson*, respect for precedent alone would seem to suggest that both clauses should suffer the same judgment.

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Consider first the doctrine's due process underpinnings. The Fifth and Fourteenth Amendments guarantee that “life, liberty, or property” may not be taken “without due process of law.” That means the government generally may not deprive a person of those rights without affording him the benefit of (at least) those “customary procedures to which freemen were entitled by the old law of England.” . . . Perhaps the most basic of due process's customary protections is the demand of fair notice. Criminal indictments at common law had to provide “precise and sufficient certainty” about the charges involved. . . . The same held true in civil cases affecting a person's life, liberty, or property. A civil suit began by obtaining a writ—a detailed and specific form of action asking for particular relief. Because the various civil writs were clearly defined, English subjects served with one would know with particularity what legal requirement they were alleged to have violated and, accordingly, what would be at issue in court.

The requirement of fair notice applied to statutes too. Blackstone illustrated the point with a case involving a statute that made “stealing sheep, or other cattle” a felony. Because the term “cattle” embraced a good deal more then than it does now (including wild animals, no less), the court held the statute failed to provide adequate notice about what it did and did not cover—and so the court treated the term “cattle” as a nullity. . . .

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These early cases, admittedly, often spoke in terms of construing vague laws strictly rather than declaring them void. But in substance void the law is often exactly what these courts did: rather than try to construe or interpret the statute before them, judges frequently held the law simply too vague to apply. Blackstone, for example, did not suggest the court in his illustration should have given a narrowing construction to the term “cattle,” but argued against giving it any effect *at all*.

What history suggests, the structure of the Constitution confirms. Many of the Constitution's other provisions presuppose and depend on the existence of reasonably clear laws. Take the Fourth Amendment's requirement that arrest warrants must be supported by probable cause, and consider what would be left of that requirement if the alleged crime had no meaningful boundaries. Or take the Sixth Amendment's mandate that a defendant must be informed of the accusations against him and allowed to bring witnesses in his defense, and consider what use those rights would be if the charged crime was so vague the defendant couldn't tell what he's alleged to have done and what sort of witnesses he might need to rebut that charge.

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Persuaded that vagueness doctrine enjoys a secure footing in the original understanding of the Constitution, the next question I confront concerns the standard of review. What degree of imprecision should this Court tolerate in a statute before declaring it unconstitutionally vague? For its part, the government argues that where (as here) a person faces only civil, not criminal, consequences from a statute's operation, we should declare the law unconstitutional only if it is “unintelligible.” But in the criminal context this Court has generally insisted that the law must afford “ordinary people ... fair notice of the conduct it punishes.”  And I cannot see how the Due Process Clause might often require any less than that in the civil context either. Fair notice of the law's demands, as we've seen, is “the first essential of due process.” . . .

To be sure, this Court has also said that what qualifies as fair notice depends “in part on the nature of the enactment.”  But to acknowledge th[is] truism[] does nothing to prove that civil laws must always be subject to the government's emaciated form of review. In fact, if the severity of the consequences counts when deciding the standard of review, shouldn't we also take account of the fact that today's civil laws regularly impose penalties far more severe than those found in many criminal statutes? Ours is a world filled with more and more civil laws bearing more and more extravagant punishments. Today's “civil” penalties include confiscatory rather than compensatory fines, forfeiture provisions that allow homes to be taken, remedies that strip persons of their professional licenses and livelihoods, and the power to commit persons against their will indefinitely. Some of these penalties are routinely imposed and are routinely graver than those associated with misdemeanor crimes—and often harsher than the punishment for felonies. And not only are “punitive civil sanctions ... rapidly expanding,” they are “sometimes more severely punitive than the parallel criminal sanctions *for the same conduct*.”

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Alternatively still, Justice Thomas suggests that, at least at the time of the founding, aliens present in this country may not have been understood as possessing any rights under the Due Process Clause. For support, he points to the Alien Friends Act of 1798. But the Alien Friends Act—better known as the “Alien” part of the Alien and Sedition Acts—is one of the most notorious laws in our country's history. It was understood as a temporary war measure, not one that the legislature would endorse in a time of tranquility. Yet even then it was widely condemned as unconstitutional by Madison and many others. It also went unenforced, may have cost the Federalist Party its existence, and lapsed a mere two years after its enactment. With this fuller view, it seems doubtful the Act tells us a great deal about aliens' due process rights at the founding.[2](https://1.next.westlaw.com/Document/I12092c10421411e8a2e69b122173a65f/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad74016000001636a7489ab62a6aeda%3FNav%3DCASE%26fragmentIdentifier%3DI12092c10421411e8a2e69b122173a65f%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=c9335fbca7a39c6e1b7d85ae4fa43c10&list=CASE&rank=3&sessionScopeId=2addf38c5b95005a92bc883f27b07abcb57884f4eb9c67e80726c063fc592341&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_footnote_B01622044336067)

. . . .

Today, a plurality of the Court agrees that we should reject the government's plea for a feeble standard of review, but for a different reason. My colleagues suggest the law before us should be assessed under the fair notice standard because of the special gravity of its civil deportation penalty. But, grave as that penalty may be, I cannot see why we would single it out for special treatment when (again) so many civil laws today impose so many similarly severe sanctions. Why, for example, would due process require Congress to speak more clearly when it seeks to deport a lawfully resident alien than when it wishes to subject a citizen to indefinite civil commitment, strip him of a business license essential to his family's living, or confiscate his home? I can think of no good answer.

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The implacable fact is that this isn't your everyday ambiguous statute. It leaves the people to guess about what the law demands—and leaves judges to make it up. You cannot discern answers to any of the questions this law begets by resorting to the traditional canons of statutory interpretation. No amount of staring at the statute's text, structure, or history will yield a clue. Nor does the statute call for the application of some preexisting body of law familiar to the judicial power. The statute doesn't even ask for application of common experience. Choice, pure and raw, is required. Will, not judgment, dictates the result.

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CHIEF JUSTICE [ROBERTS](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0258116001&originatingDoc=I12092c10421411e8a2e69b122173a65f&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), with whom JUSTICE [KENNEDY](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0243105201&originatingDoc=I12092c10421411e8a2e69b122173a65f&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), JUSTICE [THOMAS](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0216654601&originatingDoc=I12092c10421411e8a2e69b122173a65f&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), and JUSTICE [ALITO](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0153052401&originatingDoc=I12092c10421411e8a2e69b122173a65f&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) join, dissenting.

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[Section 16(b)](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=18USCAS16&originatingDoc=I12092c10421411e8a2e69b122173a65f&refType=RB&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_a83b000018c76) does not present the same ambiguities [as the ACCA provisions at issue in *Johnson*]. The two provisions do correspond to some extent. Under our decisions, both ask the sentencing court to consider whether a particular offense, defined without regard to the facts of the conviction, poses a specified risk. And, relevant to both statutes, we have explained that in deciding whether statutory elements inherently produce a risk, a court must take into account how those elements will ordinarily be fulfilled. But the Court too readily dismisses the significant textual distinctions between [§ 16(b)](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=18USCAS16&originatingDoc=I12092c10421411e8a2e69b122173a65f&refType=RB&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_a83b000018c76) and the ACCA residual clause. . . . .

. . . . There are three material differences between [§ 16(b)](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=18USCAS16&originatingDoc=I12092c10421411e8a2e69b122173a65f&refType=RB&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_a83b000018c76) and the ACCA residual clause in this respect. First, the ACCA clause directed the reader to consider whether the offender's conduct presented a “*potential* risk” of injury. Forced to give meaning to that befuddling choice of phrase—which layered one indeterminate term on top of another—we understood the word “potential” to signify that “Congress intended to encompass possibilities even more contingent or remote than a simple ‘risk.’ ” [Section 16(b)](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=18USCAS16&originatingDoc=I12092c10421411e8a2e69b122173a65f&refType=RB&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_a83b000018c76), on the other hand, asks about “risk” alone, a familiar concept of everyday life. It therefore calls for a commonsense inquiry that does not compel a court to venture beyond the offense elements to consider contingent and remote possibilities.

Second, [§ 16(b)](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=18USCAS16&originatingDoc=I12092c10421411e8a2e69b122173a65f&refType=RB&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_a83b000018c76) focuses exclusively on the risk that the offender will “use [ ]” “physical force” “against” another person or another person's property. Thus, unlike the ACCA residual clause, “[§ 16(b)](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=18USCAS16&originatingDoc=I12092c10421411e8a2e69b122173a65f&refType=RB&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_a83b000018c76) plainly does not encompass all offenses which create a ‘substantial risk’ that *injury will result from* a person's conduct.” The difference is that [§ 16(b)](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=18USCAS16&originatingDoc=I12092c10421411e8a2e69b122173a65f&refType=RB&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_a83b000018c76) asks about the risk that the offender himself will *actively employ*force against person or property. That language does not sweep in all instances in which the offender's acts, or another person's reaction, might result in unintended or negligent harm.

Third, [§ 16(b)](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=18USCAS16&originatingDoc=I12092c10421411e8a2e69b122173a65f&refType=RB&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_a83b000018c76) has a temporal limit that the ACCA residual clause lacked: The “substantial risk” of force must arise “in the course of committing the offense.” Properly interpreted, this means the statute requires a substantial risk that the perpetrator will use force while carrying out the crime. The provision thereby excludes more attenuated harms that might arise following the completion of the crime. The ACCA residual clause, by contrast, contained no similar language restricting its scope. And the absence of such a limit, coupled with the reference to “potential” risks, gave courts free rein to classify an offense as a violent felony based on injuries that might occur after the offense was over and done. . . .

Those three distinctions—the unadorned reference to “risk,” the focus on the offender's own active employment of force, and the “in the course of committing” limitation—also mean that many hard cases under ACCA are easier under [§ 16(b)](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=18USCAS16&originatingDoc=I12092c10421411e8a2e69b122173a65f&refType=RB&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_a83b000018c76). Take the firearm possession crime from *Johnson* itself, which had as its constituent elements (1) unlawfully (2) possessing (3) a short-barreled shotgun. None of those elements, “by its nature,” carries “a substantial risk” that the possessor will use force against another “in the course of committing the offense.” Nothing inherent in the act of firearm possession, even when it is unlawful, gives rise to a substantial risk that the owner will then shoot someone. . . .

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. . . . The “substantial risk” standard in [§ 16(b)](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=18USCAS16&originatingDoc=I12092c10421411e8a2e69b122173a65f&refType=RB&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_a83b000018c76) is significantly less confusing because it is not tied to a disjointed list of paradigm offenses. Recall that the ACCA provision defined a “violent felony” to include a crime that “is burglary, arson, or extortion, involves use of explosives, or *otherwise* involves conduct that presents a serious potential risk of physical injury to another.”  As our Court recognized early on, that “otherwise” told the reader to understand the “serious potential risk of physical injury” standard by way of the four enumerated crimes.  But how, exactly? That question dogged our residual clause cases for years, until we said *no más* in *Johnson*.

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With [§ 16(b)](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=18USCAS16&originatingDoc=I12092c10421411e8a2e69b122173a65f&refType=RB&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_a83b000018c76), by contrast, a court need simply consider the meaning of the word “substantial”—a word our Court has interpreted and applied innumerable times across a wide variety of contexts. The court does not need to give that familiar word content by reference to four different offenses with varying amounts and kinds of risk.

. . . .

The more constrained inquiry required under [§ 16(b)](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=18USCAS16&originatingDoc=I12092c10421411e8a2e69b122173a65f&refType=RB&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_a83b000018c76)—which asks only whether the offense elements naturally carry with them a risk that the offender will use force in committing the offense—does not itself engender “grave uncertainty about how to estimate the risk posed by a crime.” And the provision's use of a commonplace substantial risk standard—one not tied to a list of crimes that lack a unifying feature—does not give rise to intolerable “uncertainty about how much risk it takes for a crime to qualify.” That should be enough to reject Dimaya's facial vagueness challenge.

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 JUSTICE [THOMAS](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0216654601&originatingDoc=I12092c10421411e8a2e69b122173a65f&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), with whom JUSTICE [KENNEDY](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0243105201&originatingDoc=I12092c10421411e8a2e69b122173a65f&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) and JUSTICE [ALITO](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0153052401&originatingDoc=I12092c10421411e8a2e69b122173a65f&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) join in part.

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I continue to harbor doubts about whether the vagueness doctrine can be squared with the original meaning of the Due Process Clause—and those doubts are only amplified in the removal context. I am also skeptical that the vagueness doctrine can be justified as a way to prevent delegations of core legislative power in this context. But I need not resolve these questions because, if the vagueness doctrine has any basis in the Due Process Clause, it must be limited to cases in which the statute is unconstitutionally vague as applied to the person challenging it. That is not the case for respondent, whose prior convictions for first-degree residential burglary in California fall comfortably within the scope of [§ 16(b)](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=18USCAS16&originatingDoc=I12092c10421411e8a2e69b122173a65f&refType=RB&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_a83b000018c76).

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. . . . [T]he vagueness doctrine is not legitimate unless the “law of the land” view of due process is incorrect. Under that view, due process “require[s] only that our Government ... proceed ... according to written constitutional and statutory provision[s] before depriving someone of life, liberty, or property.”  More than a half century after the founding, the Court rejected this view of due process in *Murray's Lessee v. Hoboken Land & Improvement Co.* (1856). But the textual and historical support for the law-of-the-land view is not insubstantial.

Even under *Murray's Lessee,* the vagueness doctrine is legitimate only if it is a “settled usag[e] and mod[e] of proceeding existing in the common and statute law of England, before the emigration of our ancestors.” That proposition is dubious. Until the end of the 19th century, “there is little indication that anyone ... believed that courts had the power under the Due Process Claus[e] to nullify statutes on [vagueness] ground[s].”  That is not because Americans were unfamiliar with vague laws. Rather, early American courts, like their English predecessors, addressed vague laws through statutory construction instead of constitutional law. . . .

The difference between the traditional rule of lenity and the modern vagueness doctrine is not merely semantic. Most obviously, lenity is a tool of statutory construction, which means States can abrogate it—and many have. The vagueness doctrine, by contrast, is a rule of constitutional law that States cannot alter or abolish. Lenity, moreover, applies only to “penal” statutes, but the vagueness doctrine extends to all regulations of individual conduct, both penal and nonpenal. . . . . . . .

Even assuming the Due Process Clause prohibits vague laws, this prohibition might not apply to laws governing the removal of aliens. The Founders were familiar with English law, where “‘the only question that ha[d] ever been made in regard to the power to expel aliens [was] whether it could be exercised by the King without the consent of Parliament.’” Less than a decade after the ratification of the Bill of Rights, the founding generation had an extensive debate about the relationship between the Constitution and federal removal statutes. In 1798, the Fifth Congress enacted the Alien Acts. One of those Acts, the Alien Friends Act, gave the President unfettered discretion to expel any aliens “he shall judge dangerous to the peace and safety of the United States, or shall have reasonable grounds to suspect are concerned in any treasonable or secret machinations against the government thereof.” . . .

. . . .

After the Alien Friends Act lapsed in 1800, Congress did not enact another removal statute for nearly a century. The States enacted their own removal statutes during this period, and I am aware of no decision questioning the legality of these statutes under State due-process or law-of-the-land provisions. Beginning in the late 19th century, the Federal Government reinserted itself into the regulation of immigration. When this Court was presented with constitutional challenges to Congress' removal laws, it initially rejected them for many of the same reasons that Marshall and the Federalists had cited in defense of the Alien Friends Act. . . . Thus, for more than a century after the founding, it was, at best, unclear whether federal removal statutes could violate the Due Process Clause. And until today, this Court had never deemed a federal removal statute void for vagueness. Given this history, it is difficult to conclude that a ban on vague removal statutes is a “settled usag[e] and mod[e] of proceeding existing in the common and statute law of England, before the emigration of our ancestors” protected by the Fifth Amendment's Due Process Clause.

Instead of a longstanding procedure under *Murray's Lessee,* perhaps the vagueness doctrine is really a way to enforce the separation of powers—specifically, the doctrine of nondelegation. . . . I agree that the Constitution prohibits Congress from delegating core legislative power to another branch. But I locate that principle in the Vesting Clauses of Articles I, II, and III—not in the Due Process Clause. . . . [And] at first blush, it is not at all obvious that the nondelegation doctrine would justify wholesale invalidation of [§ 16(b)](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=18USCAS16&originatingDoc=I12092c10421411e8a2e69b122173a65f&refType=RB&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_a83b000018c76).

If [§ 16(b)](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=18USCAS16&originatingDoc=I12092c10421411e8a2e69b122173a65f&refType=RB&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_a83b000018c76) delegates power in this context, it delegates power primarily to the Executive Branch entities that administer the INA—namely, the Attorney General, immigration judges, and the Board of Immigration Appeals (BIA). But Congress does not “delegate” when it merely authorizes the Executive Branch to exercise a power that it already has. And there is some founding-era evidence that “the executive Power,” Art. II, § 1, includes the power to deport aliens.

Blackstone—one of the political philosophers whose writings on executive power were “most familiar to the Framers,” described the power to deport aliens as executive and located it with the King. . . . Some of the Federalists defending the Alien Friends Act similarly argued that the President had the power to remove aliens. Taken together, this evidence makes it difficult to confidently conclude that the INA, through [§ 16(b)](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=18USCAS16&originatingDoc=I12092c10421411e8a2e69b122173a65f&refType=RB&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_a83b000018c76), delegates core legislative power to the Executive.

. . . .

I need not resolve these historical questions today, as this case can be decided on narrower grounds. If the vagueness doctrine has any basis in the original meaning of the Due Process Clause, it must be limited to case-by-case challenges to particular applications of a statute. . . . This Court's precedents likewise recognize that, outside the First Amendment context, a challenger must prove that the statute is vague as applied to him. . . .

In my view, [§ 16(b)](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=18USCAS16&originatingDoc=I12092c10421411e8a2e69b122173a65f&refType=RB&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_a83b000018c76) is not vague as applied to respondent. When respondent committed his burglaries in 2007 and 2009, he was “sufficiently forewarned ... that the statutory consequence ... is deportation.”  At the time, courts had “unanimous[ly]” concluded that residential burglary is a crime of violence, and not “a single opinion ... ha [d] held that [it] is *not*.”  Residential burglary “ha[d] been considered a violent offense for hundreds of years ... because of the potential for mayhem if burglar encounters resident.”

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. . . . [§ 16(b)](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=18USCAS16&originatingDoc=I12092c10421411e8a2e69b122173a65f&refType=RB&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_a83b000018c76) requires only a risk of physical force, not actual physical force, and that risk would seem to be present whenever someone is home during the burglary. Further, *Johnson* is not conclusive because, unlike ACCA's residual clause, [§ 16(b)](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=18USCAS16&originatingDoc=I12092c10421411e8a2e69b122173a65f&refType=RB&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_a83b000018c76) covers offenses that involve a substantial risk of physical force “against the person *or property* of another.” (Emphasis added.) Surely the ordinary case of residential burglary involves at least one of these risks. According to the statistics referenced by the Court, most burglaries involve either a forcible entry (*e.g.,*breaking a window or slashing a door screen), an attempted forcible entry, or an unlawful entry when someone is home. Thus, under any metric, respondent's convictions for first-degree residential burglary are crimes of violence under [§ 16(b)](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=18USCAS16&originatingDoc=I12092c10421411e8a2e69b122173a65f&refType=RB&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_a83b000018c76).

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. . . . [I]f the categorical approach renders [§ 16(b)](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=18USCAS16&originatingDoc=I12092c10421411e8a2e69b122173a65f&refType=RB&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_a83b000018c76) unconstitutionally vague, then constitutional avoidance requires us to make a reasonable effort to avoid that interpretation. And a reasonable alternative interpretation is available: Instead of asking whether the ordinary case of an alien's offense presents a substantial risk of physical force, courts should ask whether the alien's actual underlying conduct presents a substantial risk of physical force. . . .

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The text of [§ 16(b)](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=18USCAS16&originatingDoc=I12092c10421411e8a2e69b122173a65f&refType=RB&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_a83b000018c76) does not require a categorical approach. The INA declares an alien deportable if he is “convicted of an aggravated felony” after he is admitted to the United States.  Aggravated felonies include “crime[s] of violence.” . . . At first glance, [§ 16(b)](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=18USCAS16&originatingDoc=I12092c10421411e8a2e69b122173a65f&refType=RB&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_a83b000018c76) is not clear about the precise question it poses. On the one hand, the statute might refer to the metaphysical “nature” of the offense and ask whether it ordinarily involves a substantial risk of physical force. On the other hand, the statute might refer to the underlying facts of the offense that the offender committed; the words “by its nature,” “substantial risk,” and “may” would mean only that an offender who engages in risky conduct cannot benefit from the fortuitous fact that physical force was not actually used during his offense. The text can bear either interpretation.

Although both interpretations are linguistically possible, several factors indicate that the underlying-conduct approach is the better one. To begin, [§ 16(b)](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=18USCAS16&originatingDoc=I12092c10421411e8a2e69b122173a65f&refType=RB&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_a83b000018c76) asks whether an offense “involves” a substantial risk of force. The word “involves” suggests that the offense must *necessarily* include a substantial risk of force. That condition is always satisfied if the Government must prove that the alien's underlying conduct involves a substantial risk of force, but it is not always satisfied if the Government need only prove that the “ordinary case” involves such a risk. . . .

A comparison of [§ 16(b)](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=18USCAS16&originatingDoc=I12092c10421411e8a2e69b122173a65f&refType=RB&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_a83b000018c76) and [§ 16(a)](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=18USCAS16&originatingDoc=I12092c10421411e8a2e69b122173a65f&refType=RB&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_8b3b0000958a4) further highlights why the former likely adopts an underlying-conduct approach. [Section 16(a)](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=18USCAS16&originatingDoc=I12092c10421411e8a2e69b122173a65f&refType=RB&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_8b3b0000958a4) covers offenses that have the use, attempted use, or threatened use of physical force “as an element.” Because [§ 16(b)](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=18USCAS16&originatingDoc=I12092c10421411e8a2e69b122173a65f&refType=RB&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_a83b000018c76) covers “other” offenses and is separated from [§ 16(a)](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=18USCAS16&originatingDoc=I12092c10421411e8a2e69b122173a65f&refType=RB&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_8b3b0000958a4) by the disjunctive word “or,” the natural inference is that [§ 16(b)](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=18USCAS16&originatingDoc=I12092c10421411e8a2e69b122173a65f&refType=RB&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_a83b000018c76) asks a different question. In other words, [§ 16(b)](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=18USCAS16&originatingDoc=I12092c10421411e8a2e69b122173a65f&refType=RB&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_a83b000018c76) must require immigration judges to look beyond the elements of an offense to determine whether it involves a substantial risk of physical force. But if the elements are insufficient, where else should immigration judges look to determine the riskiness of an offense? Two options are possible, only one of which is workable.

The first option is to consult the underlying facts of the alien's crime and then assess its riskiness. This approach would provide a definitive answer in every case. . . . The second option is to imagine the “ordinary case” of the alien's crime and then assess the riskiness of that hypothetical offense. But the phrase “ordinary case” does not appear in the statute. And imagining the ordinary case, the Court reminds us, is “hopeless[ly] indetermina[te],” “wholly ‘speculative,’ ” and mere “guesswork.”  Because courts disfavor interpretations that make a statute impossible to apply this Court should reject the ordinary-case approach for [§ 16(b)](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=18USCAS16&originatingDoc=I12092c10421411e8a2e69b122173a65f&refType=RB&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_a83b000018c76) and adopt the underlying-facts approach instead.

That the categorical approach is not the better reading of [§ 16(b)](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=18USCAS16&originatingDoc=I12092c10421411e8a2e69b122173a65f&refType=RB&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_a83b000018c76) should not be surprising, since the categorical approach was never really about the best reading of the text. As explained, this Court adopted that approach to avoid a potential Sixth Amendment problem with sentencing judges conducting minitrials to determine a defendant's past conduct. But even assuming the categorical approach solved this Sixth Amendment problem in criminal cases, no such problem arises in immigration cases. “[T]he provisions of the Constitution securing the right of trial by jury have no application” in a removal proceeding. . . . .

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The Court's decision today is triply flawed. It unnecessarily extends our incorrect decision in *Johnson*. It uses a constitutional doctrine with dubious origins to invalidate yet another statute (while calling into question countless more). And it does all this in the name of a statutory interpretation that we should have discarded long ago. Because I cannot follow the Court down any of these rabbit holes, I respectfully dissent.