

# SESSIONS V. DIMAYA: VAGUENESS DOCTRINE & DEPORTATION STATUTES

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## INTRODUCTION

Through a convoluted legal pathway a nonviolent crime can be classified as a violent crime, transported into civil law, and result in the deportation of someone who has been legally present in the United States for nearly twenty years. Such is the case in *Sessions v. Dimaya*.<sup>1</sup> *Dimaya* presents the Supreme Court with the chance to correct that injustice by (again) holding deportation to be a penalty akin to criminal punishment, and by recognizing the applicability of vagueness doctrine to statutes resulting in deportation. This commentary argues that would be the proper outcome in *Dimaya* for three reasons. First, the doctrine of *stare decisis* requires it. Second, this outcome conforms with the principles underlying the doctrine of unconstitutional vagueness. Third and finally, failure to extend that doctrine—in the form of the criminal vagueness standard—to this case would appear politically motivated and inconsistent. The appearance of extra-judicial political influence reduces the legitimacy, and thereby the effectiveness, of the judiciary.

## I. FACTS

Respondent James Dimaya was admitted to the United States and became a lawful permanent resident in 1992.<sup>2</sup> Mr. Dimaya pleaded no contest to,<sup>3</sup> and was convicted of, first-degree residential burglary<sup>4</sup> in

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1. *Sessions v. Dimaya*, No. 15-1498 (U.S. 2017)

2. Brief for Respondent at 5, *Sessions v. Dimaya*, NO. 15-1498 (U.S. 2016) [hereinafter Brief for Respondent].

3. *Id.*

4. *Dimaya v. Lynch*, 803 F.3d 1110, 1111 (9th Cir. 2015), *cert. granted*, 137 S. Ct. 31 (2016), *reh'g granted sub nom.* *Sessions v. Dimaya*, NO. 15-1498 (U.S. 2017).

California twice (once in 2007 and once in 2009).<sup>5</sup> He was sentenced to two years in prison for each offense.<sup>6</sup>

In 2010, the Department of Homeland Security initiated removal proceedings against Mr. Dimaya.<sup>7</sup> An immigration judge determined that California's first-degree burglary is a crime of violence,<sup>8</sup> found Mr. Dimaya removable from the United States and ordered him removed.<sup>9</sup> The Board of Immigration Appeals ("BIA") agreed and dismissed his appeal.<sup>10</sup> The Ninth Circuit granted Mr. Dimaya's petition for review and remanded his case to the BIA after finding a criminal statute, incorporated as a definition into the civil removal law, to be void for vagueness<sup>11</sup> in accordance with *Johnson v. United States*.<sup>12</sup> The Supreme Court granted certiorari, and after oral argument on January 17, 2017, the case was set for reargument on October 2, 2017.

## II. LEGAL BACKGROUND

At issue in *Dimaya* is the interaction between the constitutional vagueness doctrine (typically applicable to criminal law) and civil immigration laws which incorporate criminal laws by reference and result in deportation.

### A. Vagueness Doctrine

The vagueness doctrine stems from the Fifth Amendment, which guarantees that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law."<sup>13</sup> The United States Supreme Court "establish[ed] 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

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5. CAL. PENAL CODE §§ 459, 460(a) (West 2017).

6. Brief for Petitioner at 4, *Sessions v. Dimaya*, NO. 15-1498 (U.S. 2016) [hereinafter Brief for Petitioner].

7. *Id.*

8. *Dimaya*, 803 F.3d at 1112.

9. Brief for Petitioner, *supra* note 6, at 4.

10. *Id.* at 4-5.

11. *Dimaya*, 803 F.3d at 1120.

12. *Johnson v. United States*, 135 S. Ct. 2551 (2015); *accord* *Baptiste v. Attorney Gen.*, 841 F.3d 601, 604 (3d Cir. 2016); *Golicov v. Lynch*, 837 F.3d 1065, 1075 (10th Cir. 2016); *Shuti v. Lynch*, 828 F.3d 440, 446 (6th Cir. 2016); *United States v. Vivas-Ceja*, 808 F.3d 719, 723 (7th Cir. 2015) (applying *Johnson* to find § 16(b) unconstitutionally vague). *But see* *United States v. Gonzalez-Longoria*, 831 F.3d 670, 686 (5th Cir. 2016) (en banc) (holding that the law was not unconstitutionally vague).

13. U.S. CONST. amend. V.

it punishes, or so standardless that it invites arbitrary enforcement.”<sup>14</sup> By invalidating statutes which are so vague they violate this “first essential of due process,” the Supreme Court enforces the Due Process Clause and secures the rights of the people against their government.<sup>15</sup>

### *B. Vagueness in an Immigration Context*

In 1951, the Supreme Court analyzed an immigration statute using the criminal standard of vagueness in *Jordan v. De George*.<sup>16</sup> In *Jordan*, like in *Dimaya*, the Court dealt with a vagueness challenge to an immigration statute resulting in deportation. There, the Court utilized the criminal vagueness standard to analyze an immigration statute, even though the challenged statute was not criminal.<sup>17</sup> The Court stated two reasons to do so: first, applying vagueness doctrine to non-criminal laws comports with the doctrine’s purpose of providing notice.<sup>18</sup> Second, the drastic effects of deportation function as a penalty, like criminal penalties do.<sup>19</sup>

In the *Jordan* opinion, the Court discussed the applicable vagueness standards in an immigration context. The Court initially articulated that the “essential purpose of the ‘void for vagueness’ doctrine is to warn individuals of the criminal consequences of their conduct.”<sup>20</sup> Then the Court emphasized that the statute at issue was an immigration statute which was not criminal in nature.<sup>21</sup> Nonetheless “in view of the grave nature of deportation,” the Court analyzed it under the criminal vagueness standard, “despite the fact that [it was] not a criminal statute.”<sup>22</sup>

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14. *Johnson*, 135 S. Ct. at 2556 (citing *Kolender v. Lawson*, 461 U.S. 352, 357–358 (1983)).

15. *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926) (citing *International Harvester Co. v. Kentucky*, 234 U.S. 216, 221 (1914)); see, e.g., *Johnson*, 135 S. Ct. at 2563 (invalidating a statute based on violation of Fifth Amendment due process).

16. *Jordan v. De George*, 341 U.S. 223, 231–32 (1951).

17. *Id.* at 231.

18. See *id.* at 230 (explaining that the immigration statute’s “function is to apprise aliens of the consequences which follow after conviction”).

19. See *id.* at 231 (“Despite the fact that this is not a criminal statute, we shall nevertheless examine the application of the vagueness doctrine in this case. We do this in view of the grave nature of deportation.”).

20. *Id.*

21. See *id.* (“It should be emphasized that this statute does not declare certain conduct to be criminal.”).

22. *Id.* at 231.

### C. Vagueness in Residual Clauses

In *Johnson v. United States*,<sup>23</sup> the Supreme Court held the Armed Career Criminal Act (“ACCA”) “residual clause”<sup>24</sup> to be unconstitutionally vague.<sup>25</sup> ACCA statutorily raises minimum and maximum prison sentences for certain violators.<sup>26</sup> The ACCA residual clause was one trigger for the harsher statutory sentences. The ACCA residual clause, 18 U.S.C. § 924(e)(2)(B)(ii), defined “violent felony” as a crime punishable by a sentence of more than one year which, “is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.”<sup>27</sup>

The Supreme Court announced “[t]wo features” of the ACCA residual clause “conspire[d] to make it unconstitutionally vague.”<sup>28</sup> The first feature was that it created “uncertainty about how to estimate the risk posed by a crime. It tie[d] the judicial assessment of risk to a judicially imagined ‘ordinary case’ of a crime, not to real world facts or statutory elements.”<sup>29</sup> The second feature was that it created “uncertainty about how much risk it [took] for a crime to qualify as a violent felony.”<sup>30</sup>

Thus, the *Johnson* analysis of vagueness scrutinizes the indeterminacy of a crime’s risk, and then the indeterminacy of how much risk is required to invoke the applicable statute.<sup>31</sup> As applied to the ACCA residual clause in *Johnson*, these two factors resulted in “more unpredictability and arbitrariness than the Due Process Clause” allowed for.<sup>32</sup> The Court held the ACCA residual clause, § 924(e)(2)(B)(ii), to be unconstitutionally vague.<sup>33</sup>

Two years later, however, the Supreme Court distinguished *Beckles v. United States*<sup>34</sup> from *Johnson*. *Beckles* asked whether a residual clause in the Sentencing Guidelines, identical to the text of

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23. *Johnson v. United States*, 135 S. Ct. 2551 (2015).

24. *See id.* at 2555–56 (explaining the ACCA residual clause).

25. *Id.* at 2563.

26. 18 U.S.C. § 924 (2012).

27. *Id.*

28. *Johnson*, 135 S. Ct. at 2557.

29. *Id.*

30. *Id.* at 2558.

31. *Id.* at 2557–58.

32. *Id.* at 2558.

33. *Id.* at 2563.

34. *Beckles v. United States*, 137 S. Ct. 886 (2017).

the ACCA residual clause, was also unconstitutionally vague.<sup>35</sup> The Court held that it was not.<sup>36</sup> The *Johnson* ruling did not apply to the Sentencing Guidelines because the Sentencing Guidelines, unlike the ACCA, “merely guide the exercise of a court’s discretion in choosing an appropriate sentence.”<sup>37</sup>

*Beckles* demonstrates *Johnson*’s holding that the ACCA residual clause was unconstitutionally vague does not necessarily extend to other instances of even the same text. In *Beckles*, that was because the “[Sentencing] Guidelines are not subject to a vagueness challenge under the Due Process Clause.”<sup>38</sup> The Supreme Court has only “invalidated two kinds of criminal laws as ‘void for vagueness’: laws that *define* criminal offenses and laws that *fix the permissible sentences* for criminal offenses.”<sup>39</sup> The Sentencing Guidelines were neither.

#### *D. The Convoluted Legal Pathway Intermingling Civil and Criminal Law*

Under 8 U.S.C. § 1227(a)(2)(A)(iii), “[a]ny alien who is convicted of an aggravated felony at any time after admission is deportable.”<sup>40</sup> An “aggravated felony” is defined by 8 U.S.C. § 1101(a)(43)(F) as “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.”<sup>41</sup> Both of these laws are civil laws. But the definition incorporates by reference a criminal law. Under the 18 U.S.C. § 16(b) “residual clause” (a criminal statute), a crime of violence is “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.”<sup>42</sup>

Therefore, there are two issues in the upcoming *Dimaya* case. First, a civil law makes noncitizens removable if they are convicted of an aggravated felony<sup>43</sup> as defined by a criminal statute.<sup>44</sup> Second, that

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35. *Id.* at 890.

36. *Id.* at 897.

37. *Id.* at 892.

38. *Id.*

39. *Id.*

40. 8 U.S.C. § 1227 (2012).

41. 8 U.S.C. § 1101.

42. 18 U.S.C. § 16 (2012).

43. 8 U.S.C. § 1227.

44. 8 U.S.C. § 1101.

criminal statute includes a residual clause as indeterminate as the ACCA residual clause struck down in *Johnson* for vagueness.<sup>45</sup>

### III. HOLDING

The Ninth Circuit found § 16(b) to be unconstitutionally vague and held that the constitutional vagueness doctrine applies to civil statutes resulting in deportation.<sup>46</sup>

### IV. ARGUMENTS

The parties in *Sessions v. Dimaya* essentially disagree on two points. The threshold question is whether the *Johnson* analysis for vagueness, a doctrine traditionally used in criminal law, applies to a civil immigration statute which results in deportation and incorporates a criminal law definition. The next question is whether the incorporated criminal definition is unconstitutionally vague under a *Johnson* analysis.

#### A. Applying Johnson vagueness analysis

Petitioner, the United States, argues that immigration removal statutes are not subject to the *Johnson* vagueness analysis for three reasons.<sup>47</sup> First, Petitioner points to the fact that immigration removal statutes are civil, but the vagueness doctrine has only historically applied in full force to criminal laws.<sup>48</sup> Petitioner supports this argument in part by drawing on the statement in *Jordan* that vagueness doctrine aims “to warn individuals of the criminal consequences of their conduct,” highlighting that *Jordan* itself emphasized the statute at issue was not criminal.<sup>49</sup> Petitioner concludes this argument by explaining that *Jordan* “did not [] hold—in a case where the issue was not briefed or argued—that the same [criminal] standard of definiteness applies to civil removal statutes.”<sup>50</sup>

Second, Petitioner claims that the constitutional values which form the basis for the vagueness doctrine, fair notice and prevention

45. See, e.g., *United States v. Vivas-Ceja*, 808 F.3d 719, 720 (7th Cir. 2015) (“Section 16(b) is materially indistinguishable from the ACCA’s [unconstitutionally vague] residual clause.”).

46. *Dimaya v. Lynch*, 803 F.3d 1110, 1120 (9th Cir. 2015), cert. granted, 137 S. Ct. 31 (2016), reh’g granted sub nom. *Sessions v. Dimaya*, NO. 15-1498 (U.S. 2017).

47. Brief for Petitioner, *supra* note 6, at 13.

48. *Id.* at 14–19.

49. *Id.* at 19 (quoting *Jordan v. De George*, 341 U.S. 223, 230 (1951)).

50. *Id.* at 20.

of arbitrary enforcement, are not “implicated to remotely the same extent” in an immigration context because removal proceedings are not punishments in the way criminal penalties are.<sup>51</sup> Fair notice is not a concern because removal statutes, as civil statutes, are not subject to the Ex Post Facto Clause.<sup>52</sup> Arbitrary enforcement concerns are also negated in the immigration context because, due to its close connection to foreign relations and national security, the executive branch has historically had broad authority in immigration enforcement.<sup>53</sup>

Third, Petitioner argues the incorporation of a criminal provision into a civil removal provision maintains the civil nature of the law. The civil vagueness standard of “unintelligibility” therefore applies here, and under that standard “[R]espondent was not denied due process.”<sup>54</sup> For those three reasons, Petitioner urges that the *Johnson* analysis for vagueness not be applied to § 16(b) as it is incorporated by immigration statutes.

Respondent, in contrast, argues that § 16(b) is subject to the *Johnson* vagueness analysis when it is incorporated by reference into deportation statutes.<sup>55</sup> Respondent relies heavily on *Jordan* to support this position. First, Respondent asserts that not only did “*Jordan* [hold] that the standard vagueness analysis applies to deportation statutes,”<sup>56</sup> but also that since *Jordan*, the circuits have likewise held deportation statutes to be susceptible to vagueness challenges under that standard.<sup>57</sup> Second, Respondent contends that overruling the *Jordan* holding would be illogical because here, unlike the exclusively civil consequences in *Jordan*,<sup>58</sup> the provision at issue is in fact a criminal statute.<sup>59</sup>

Third, Respondent argues that *Jordan* was correctly decided.<sup>60</sup> In support of this argument, Respondent points to the “severe consequences and punitive characteristics that put [deportation statutes] on par with criminal statutes.”<sup>61</sup> Respondent also relates a

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51. *Id.* at 21.

52. *Id.* at 21–22.

53. *Id.* at 23.

54. *Id.* at 25–27.

55. Brief for Respondent, *supra* note 2, at 38.

56. *Id.* at 39.

57. *Id.* at 40.

58. *Id.* at 44.

59. *Id.* at 41.

60. *Id.* at 44.

61. *Id.*

number of sources which illustrate that the civil/criminal distinction is not necessarily the distinction upon which the relevant vagueness test depends.<sup>62</sup> Respondent's final point is that, contrary to Petitioner's claims,<sup>63</sup> deportation laws "raise the same concerns that underlie the void-for-vagueness doctrine in the criminal context"; namely fair notice and prevention of arbitrary enforcement.<sup>64</sup>

*B. Does § 16(b) fail the Johnson vagueness analysis?*

Petitioner argues that even if the *Johnson* criminal vagueness standard is applied, § 16(b) is nonetheless sufficiently determinate.<sup>65</sup> Petitioner contends that § 16(b) passes the *Johnson* analysis for three reasons. First, § 16(b) is textually different than the ACCA residual clause in a manner making it more determinate.<sup>66</sup> Second, the fact that § 16(b) requires a court to apply a general standard of risk to an ordinary case of an offense does not make it vague.<sup>67</sup> Third, the complicated judicial history of confusing precedents that was present for the ACCA residual clause is absent for § 16(b).<sup>68</sup> Petitioner also adds that, if the Supreme Court were to find § 16(b) unconstitutionally vague, there would be "deleterious consequences for both criminal justice and immigration enforcement."<sup>69</sup>

On the other hand, Respondent argues the § 16(b) residual clause is unconstitutionally vague under *Johnson*.<sup>70</sup> In the first place, § 16(b) shares the two features of indeterminacy<sup>71</sup> which "conspire[d] to make [the ACCA residual clause] unconstitutionally vague."<sup>72</sup> As to the first feature, "courts [are left] with nothing more than gut instinct," because § 16(b) provides "no meaningful guidance."<sup>73</sup> As to the

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62. See *id.* at 47 ("[T]he civil/criminal line 'is not an adequate distinction.'") (citation omitted).

63. See Brief for Petitioner, *supra* note 6, at 20–25 (explaining why the respondent was not denied due process under the vagueness standard appropriate for provisions applied in immigration removal proceedings).

64. See Brief for Respondent, *supra* note 2, at 51–56 (explaining how deportation statutes implicate concerns about fair notice and arbitrary enforcement).

65. Brief for Petitioner, *supra* note 6, at 28.

66. See *id.* at 29–39 (addressing how § 16(b) is drafted more precisely than the ACCA's residual clause).

67. *Id.* at 42.

68. *Id.* at 45–52.

69. *Id.* at 53.

70. Brief for Respondent, *supra* note 2, at 12.

71. *Id.* at 13–14.

72. *Johnson v. United States*, 135 S. Ct. 2551, 2557 (2015).

73. Brief for Respondent, *supra* note 2, at 19.



second feature, Respondent draws attention to the similar inability of either the ACCA or § 16(b) residual clauses to identify the risk of the “ordinary case” of any given crime.<sup>74</sup>

Respondent confronts Petitioner’s arguments regarding textual differences between the residual clauses by noting and addressing three textual differences. First, unlike the ACCA residual clause, § 16(b) contains a textual limitation: “in the course of committing the offense.”<sup>75</sup> But Respondent explains that, as it has been interpreted by the courts, this phrase does not clarify meaning nor impose a limitation.<sup>76</sup> A second textual difference is that the ACCA residual clause refers to “risk of physical injury,” but § 16(b) refers to risk of “physical force.”<sup>77</sup> Respondent notes that the two indicate the same thing,<sup>78</sup> but because injuries result in wounds while force may or may not, if there is any difference in this respect, § 16(b) is more vague, not less.<sup>79</sup> Third, Respondent explains that § 16(b)’s lack of a list of crimes compounds the provision’s indeterminacy by failing to provide any examples of what the provision intends to prohibit.<sup>80</sup> Finally, Respondent rebuts Petitioner’s assertion § 16(b) lacks a confusing history of case law by citing examples of the confusion generated by § 16(b).<sup>81</sup>

Respondent also explains that Petitioner’s arguments regarding possible harmful consequences of finding the residual clause unconstitutionally vague were also made in *Johnson*, where they failed to persuade the Court.<sup>82</sup> Respondent goes on to note that a variety of convictions would satisfy the statutory definition of aggravated felony even if § 16(b) were invalidated.<sup>83</sup>

## V. ANALYSIS

The Supreme Court should follow *Jordan*, apply the *Johnson* vagueness analysis to deportation statutes, and strike § 16(b) as void for vagueness. There is an inherent difficulty in defining the vagueness

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74. *Id.* at 15–17.

75. *Id.* at 21.

76. *Id.* at 22–24.

77. *Id.* at 25.

78. *Id.*

79. *Id.* at 26.

80. *Id.* at 28–29.

81. *See id.* at 30–38 (“The § 16 residual clause has generated substantial confusion.”).

82. *Id.* at 56.

83. *Id.* at 59.

required for a statute to violate Due Process: “there is no yardstick of impermissible indeterminacy.”<sup>84</sup> But in *Dimaya*, the Supreme Court has a yardstick. The yardstick is the doctrine of *stare decisis*. That doctrine, as well as the underpinnings of vagueness doctrine and the judiciary’s need to avoid the appearance of improper influence, all counsel the Court to affirm and hold § 16(b) unconstitutionally vague.

The consistent application of precedent provides the Court a much-needed vagueness yardstick in this case for two reasons. First, there is little difference between the unconstitutionally vague residual clause in *Johnson* and the residual clause in § 16(b). Second, *Jordan* illustrates a historical instance of the criminal standard of vagueness doctrine extending to immigration statutes. Consistency and *stare decisis* therefore dictate that vagueness doctrine should be applied to statutes resulting in deportation, and that § 16(b) should be struck down for vagueness.

Since deportation is a more significant sanction than many criminal sanctions, applying vagueness doctrine here would give effect to the doctrine’s purpose of “warn[ing] individuals of the criminal consequences of their conduct.”<sup>85</sup> Nearly a century ago the Supreme Court recognized that “the Fifth Amendment affords protection in its guarantee of due process” to aliens facing deportation because deportation can result in those people being deprived “of all that makes life worth living.”<sup>86</sup> Many criminal sanctions deprive a convicted violator of much less than that.

A law is impermissibly vague in violation of due process when it “tak[es] away someone’s life, liberty, or property,” and is “so vague that it fails to give ordinary people fair notice of the conduct it punishes.”<sup>87</sup> The Supreme Court’s recognition of deportation as a punishment in *Jordan* therefore invites the application of vagueness doctrine to deportation statutes regardless of their classification as civil or criminal law.<sup>88</sup> Applying the vagueness doctrine to deportation

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84. John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189, 196 (1985).

85. *Jordan v. De George*, 341 U.S. 223, 230 (1951).

86. *Ng Fung Ho et al. v. White*, 259 U.S. 276, 284–85 (1922).

87. *Johnson v. United States*, 135 S. Ct. 2551, 2556 (2015).

88. *See, e.g., Padilla v. Kentucky*, 559 U.S. 356, 364 (2010) (“[A]s a matter of federal law, deportation is an integral part . . . of the penalty that may be imposed.”); *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948) (“[Deportation] is the forfeiture for misconduct of a residence in this country. Such a forfeiture is a penalty.”).

statutes will further its underlying principles because punishment and notice are what matter, not a law's classification.

Nonetheless, the Supreme Court may be reluctant to apply *Jordan* and *Johnson* here, because *Beckles* may have been a signal of the Court's intention to limit *Johnson* to its facts. If that is the case, the Court can amplify the signal by upholding § 16(b). However, since *Dimaya* shares crucial aspects of *Johnson* and *Jordan*, limiting *Johnson* like the Court did in *Beckles* and disregarding *Jordan* would invite criticism of inconsistency.

In *Jordan*, the Supreme Court analyzed an immigration statute resulting in deportation under the vagueness doctrine.<sup>89</sup> Consistency thus necessitates a similar application of the established vagueness doctrine even if the vagueness doctrine itself has changed in recent years because of *Johnson*. And the *Johnson* vagueness analysis is not somehow limited to provisions with a list of examples; rather, the analysis is applicable to provisions which are exceedingly indeterminate.<sup>90</sup> The text of § 16(b), "any other offense that . . . by its nature, involves a substantial risk that physical force . . . may be used in the course of committing the offense," is indeterminate.<sup>91</sup> Thus a *Johnson* vagueness analysis is necessary to determine the meaning of the text.

For those reasons, failure to extend the vagueness doctrine to deportation statutes would at least *appear* to be an inconsistent application of the rule of law, and apparent inconsistencies result in Frankfurter constraint violations.<sup>92</sup> The "Frankfurter constraint"<sup>93</sup> is the idea that "courts will be effective and respected only if they are able to construct doctrine that is persuasively determinate and principled."<sup>94</sup> When the

results of a particular rule appear consistent, it is easier . . . to view this rule [and its results] as properly judicial . . . [When] the results

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89. *Jordan*, 341 U.S. at 231.

90. *Johnson*, 135 S. Ct. at 2561.

91. 18 U.S.C. § 16 (2012).

92. See, e.g., *Jordan*, 341 U.S. at 231 ("We shall . . . test this [deportation statute] under the established criteria for the 'void for vagueness' doctrine."); *Johnson*, 135 S. Ct. at 2551.

93. Lawrence Lessig, *Translating Federalism: United States v. Lopez*, 1995 SUP. CT. REV. 125, 174; see generally FELIX FRANKFURTER, THE COMMERCE CLAUSE UNDER MARSHALL, TANEY, AND WAITE (1937) (discussing Justice Frankfurter's views on Commerce Clause jurisprudence).

94. Ernest A. Young, *The Rehnquist Court's Two Federalisms*, 83 TEX. L. REV. 1, 95 (2004).

appear inconsistent . . . it becomes easier for observers to view these results as determined, or influenced, by factors external to the rule.<sup>95</sup>

Actual extra-judicial influence is not necessary: Frankfurter constraint violations require only the appearance that the judiciary be influenced by extra-judicial factors. Because the judiciary is a countermajoritarian and supposedly apolitical institution, inconsistency leads to a perception of improper influence, which decreases institutional legitimacy.

Because of modern hyper-politicization of immigration, the risk of appearing influenced by extra-judicial factors in *Dimaya* is extremely high, especially in the face of a history of Supreme Court statements to the effect that, “the ex post facto Clause . . . should be applied to deportation.”<sup>96</sup> Failing to follow *Jordan* and *Johnson* would violate the Frankfurter constraint. The Court should therefore find that the vagueness doctrine extends to statutes resulting in deportation, and that § 16(b) is unconstitutionally vague.

Despite all this, the Court may rule in favor of Petitioner, and could explain that ruling based on two factors. First, the Court may draw a bright line between civil deportation and criminal punishment and distinguish removal proceedings from criminal proceedings because “[r]emoval is a civil, not criminal, matter.”<sup>97</sup> Second, the Court could invoke the time-honored plenary powers doctrine: “over no conceivable subject is the legislative power of Congress more complete”<sup>98</sup> than over immigration law, which is historically “committed to the political branches of the Federal Government.”<sup>99</sup> Although an outcome based on those two reasons in favor of Petitioner is possible, those reasons are nonetheless insufficient to outweigh Respondent’s argument. To conform with precedent, advance the interests which underlie vagueness doctrine, and appear unmotivated by extrajudicial forces, the court should rule that § 16(b) is unconstitutionally vague.

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95. Lessig, *supra* note 93, at 174.

96. *Galvan v. Press*, 347 U.S. 522, 531 (1954).

97. *Arizona v. United States*, 567 U.S. 387 (2012).

98. *Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 320, 339 (1909).

99. *Mathews v. Diaz*, 426 U.S. 67, 81 (1976).

### CONCLUSION

To avoid the appearance of improper influence on judicial decision making, courts must ensure the results of a particular rule appear consistent. Despite an order for reargument, the Supreme Court can avoid the risk of a political appearance in *Dimaya*. The Supreme Court should formally recognize that the vagueness doctrine extends to immigration statutes that result in deportation. Consequently, the Supreme Court should affirm the Ninth Circuit and find the residual clause of § 16(b) as incorporated by § 1101(a)(43)(F) to be unconstitutionally vague.