



## U.S. v. DAVIS: THE SUPREME COURT PROVIDES FURTHER CLARITY ON HOW IT WILL REMEDY VAGUE LAWS

by David Debold

Sometimes it takes the actions of some pretty unsympathetic characters to test judicial resolve to strike down vaguely written statutes as opposed to trying to “save” them. The Supreme Court’s recent decision in *United States v. Davis*, 588 U.S. \_\_\_\_ (June 24, 2019), shows that a majority is willing to stick to that constitutionally required approach. The outcome is a good sign that the current Court will resist the temptation to write a “better” law when the statute Congress drafted fails to give fair warning of the line between criminal and innocent conduct.

The defendants in *Davis* committed a string of gas station robberies. Federal prosecutors charged them with several counts of robbery under the Hobbs Act, plus a Hobbs Act conspiracy count. At issue were additional charges under 18 U.S.C. § 924(c), which imposes a mandatory minimum sentence of at least five years for using or carrying a firearm during and in relation to a federal crime of violence or drug trafficking crime. A crime of violence is a felony offense that either (i) 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 (ii) “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”).

Nobody disputed that carrying a firearm during and in relation to each Hobbs Act robbery was a crime of violence under the elements clause. An element of robbery is the threatened use of force against another person. But because the conspiracy charge did not have such an element—the statute applies to conduct that does not ripen into an actual robbery—the government had to invoke the definition’s residual clause. The government contended that the “nature” of this conspiracy involved a substantial risk of physical force against others because these conspirators carried through on their agreement to commit robberies. Nobody seriously disputed that the requisite risk was shown if that is the test.

The problem was that the Court had previously struck down as impermissibly vague nearly identical residual clauses in two other statutes. In those earlier cases the Supreme Court applied its longstanding practice of interpreting the residual clauses at issue using what is called a “categorical approach.” This means that instead of looking at how the defendant actually committed the offense in question, the court should consider whether the hypothesized “ordinary case” for committing the offense presented a substantial risk of physical force or injury to another.

In one of these two statutes, a prior conviction for a violent felony could increase a defendant’s sentence for possession of a firearm by a convicted felon. The Court struggled for years trying to give clear meaning to that statute’s residual clause. After four tries the Court finally threw up its hands over the clause’s

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“unpredictability and arbitrariness.” The Court found no good way for judges to decide what the “ordinary case” for various offenses entailed, much less whether the risk of physical force or injury was substantial in a hypothesized case. The residual clause in each statute was stricken as void for vagueness.

In *Davis*, the government seized on a difference between those residual clauses and the one in § 924(c). Under § 924(c) a jury decides if the *charged* offense is a crime of violence, whereas the other two statutes required looking back to whether a *prior* offense of conviction qualified. And when the Court adopted the categorical approach in its earlier cases, it noted how hard it is to reconstruct, often years later, how a prior offense was actually committed. Invoking the canon of construction to avoid unconstitutional interpretations of statutes where possible, the government argued that the categorical approach should be abandoned in applying § 924(c)’s residual clause. The jury should instead focus on the offense *as the defendant committed it* to decide if the risk of physical force was substantial.

The Court rejected that invitation in a 5-4 opinion written by Justice Gorsuch. All agreed that if Congress had written the residual clause in § 924(c) to focus on how the defendant actually committed the offense, there would be no vagueness. But the Court had already interpreted nearly identical language in the other statutes to mean the “ordinary case” of an offense.

The Court’s discussion of the “constitutional avoidance” canon of construction provides helpful clues for the fate of future void-for-vagueness claims. It stated that while the Court has sometimes adopted a narrower construction of a statute to cure vagueness, the government here was asking the Court to expand the reach of the statute (turning more offenses into crime of violence) to save it. The Court found no precedent for doing so, explaining that this would risk offending the very same due process and separation-of-powers principles on which the vagueness doctrine rests. The Court further noted that using the avoidance canon to adopt a more expansive reading of the statute would place the doctrine at war with the rule of lenity.

There are two important take-aways from the Court’s willingness in *Davis* to strike down a criminal prohibition as unconstitutionally vague, rather than try to save it under the guise of interpretation. First, no matter how clearly some conduct seems to fit what Congress had in mind when it drafted a law, and no matter how objectionable that conduct might be, the Court will not go out of its way to “clarify” a poorly written statute so that such conduct is covered. Here, all agreed that the defendants engaged in a conspiracy that fit the common understanding of a violent offense, but because Congress failed to give fair warning of which *other* conduct crossed the line, the whole provision needed to go.

Second, when a statute’s problem is not so much “overbreadth” as fuzzy lines, the government cannot save the statute by proposing a line that gives clarity while sweeping in more conduct. Imagine, for example, a federal law with enhanced penalties for committing an offense affecting commerce that is punishable under the law of the state where it occurred and by its nature threatens senior citizens with a disproportionate amount of loss. As written it would present the same problem as the statute in *Davis*: there is too much ambiguity in a law that requires examining myriad state laws to determine whether they pose the specified risk “by their nature.” One option might be interpreting that law to require proof that a defendant’s actual conduct targeted the elderly. Even though Congress undoubtedly would have wanted the statute to reach at least that group of offenders, under the approach in *Davis* the Court would tell Congress: this law is no good, and we’re not fixing it for you. By doing so, the Court would be honoring the separation of powers and sparing everyone the need to guess at what fix a court might choose for the ambiguous line Congress drew.