

BLOG POST

Three Strikes is Out

July 13, 2015

The finale of the latest Supreme Court Term featured a [landmark ruling on same-sex marriage](#), narrow defenses of President Barack Obama's [signature healthcare law](#) and [independent redistricting commissions](#), and [a little case about a man caught in possession of a short-barreled shotgun](#). While the first three cases raise issues that have been hotly debated in cities across the country, few legal questions have appeared before the Justices so frequently in recent years as the one raised in the last case: whether certain criminal acts pose a "a serious potential risk of physical injury to another" and thereby count towards [a federal three-strikes law](#). Resolving this question once-and-for-all, the Justices in [Johnson v. United States](#) threw up their hands and struck down the statute as void for vagueness.

Introduction

Over the past decade, the Supreme Court has heard case after case testing whether various crimes fall under the 18 U.S.C. § 924(e) three-strikes provision, which is part of the larger Armed Career Criminals Act. The three-strikes law calls for steep sentencing enhancements for federal defendants charged with their third violent felony. The Act provides certain crimes that qualify – such as arson, burglary, and extortion – and until recently, the Act had a residual clause to cover all conduct presenting "[a serious potential risk of physical injury to another](#)." But courts have had a heck of a time deciding what crimes are covered by the residual clause. As the Justices wrestled with the challenge of deciding which crimes fell under the residual clause, they began to question whether fault lay with the Court, for misunderstanding the law, or with Congress, for drafting a flawed statute. For example, in [Begay v. United States](#), Justice Scalia questioned whether the enumerated offenses of arson, burglary, and extortion really had a common theme from which the Court could base the residual clause:

The phrase "shades of red," standing alone, does not generate confusion or unpredictability; but the phrase "fire-engine red, light pink, maroon, navy blue, or colors that otherwise involve shades of red" assuredly does so.

Johnson was the fifth case in recent years in which the Supreme Court considered whether a prior conviction satisfied the residual clause, and [six Justices ultimately voted to strike down](#) the provision as unconstitutional rather than decipher again the discord between draftsmanship and congressional intent. *Johnson* again exposes concerns over prosecutors' discretion to seek harsh sentences for what the Justices consider to be relatively mild crimes, may have opened the door for challenging current three-strikes sentences and convictions under similarly worded criminal statutes.

Analysis

Johnson begins with the story of a strikingly unsympathetic plaintiff. In 2010, the FBI began to monitor Samuel Johnson, suspecting that he intended to commit acts of terrorism in support of a white supremacist organization. Johnson disclosed to undercover agents that he planned to attack the Mexican consulate in Minnesota, progressive bookstores, and liberals. After his arrest, Johnson pleaded guilty to being a felon in possession of a firearm and federal prosecutors sought an enhanced sentence under the Armed Career Criminal Act, relying in part on a past conviction in Minnesota for possessing a short-barreled shotgun. The district court agreed that possession of a short-barreled shotgun fell under the residual clause and sentenced Johnson to fifteen years in federal prison. The Supreme Court granted certiorari to determine whether a Minnesota conviction for possession of a short-barreled shotgun qualified as a violent felony under the Armed Career Criminal Act. Two months after the case was argued, the Supreme Court took the unusual step of placing the case back on the docket for oral argument and requested supplemental briefing on whether the statute was unconstitutionally vague.

In the majority opinion, Justice Scalia wrote that two features of the residual clause made it unconstitutionally vague. First, the clause provided no way to estimate the level of risk of physical harm posed by a crime. Second, even if judges could assign risk-levels to crimes, the clause left judges without a way to determine what level of risk was necessary for a crime to be a violent felony.

As evidence of the indeterminacy of the residual clause, Justice Scalia pointed to the Court's inability to come up with a principled standard for applying the clause. Even with a categorical approach, the Court resorted to ad hoc tests in three of its last four residual clause cases. And to determine whether possession of a short-barreled shotgun is a violent crime, judges must ascertain the effect of how remote the potential physical harm is from the criminal act. Should judges look at the risk that the shotgun will go off accidentally while possessed by the defendant? Or is the risk that the defendant will later use the gun to commit an undoubtedly violent crime? According to Justice Scalia, there was simply no way to know.

Johnson again highlights concern with the discretion afforded to prosecutors to seek harsh sentences. For example, in *Yates v. United States*, in which the Supreme Court balked at prosecutors' attempts to convict a fisherman under an anti-shredding provision of the Sarbanes-Oxley Act, ***Justice Scalia noted that*** the Justice Department's practice of seeking such high sentences could lead him to read criminal statutes more carefully in the future. Similarly, in *Johnson*, when prosecutors sought a significant sentence enhancement that caused the defendant's sentence to jump from no more than ten years to a fifteen-year minimum, ***Justice Ginsberg asked*** whether the Department of Justice provides written guidance to prosecutors regarding when to pursue enhanced sentences under the Armed Career Criminal Act. Chief Justice Roberts expressed concern that prosecutors can leverage harsh sentencing enhancements in plea-bargain negotiations, and that steep sentencing enhancements may cause criminal defendants to take plea deals rather than go to trial to litigate issues like the definition of the residual clause of the Armed Career Criminal Act.

The *Johnson* decision may ultimately stand as a textbook example of the interplay between Congress and the courts on important questions of criminal law. Congress passed the Armed Career Criminal Act as part of the Comprehensive Crime Control Act of 1984, with the goal of increasing sentences for repeat offenders. However, lengthy prison sentences are now under significantly more scrutiny as prison reform becomes a focus of this administration. While Congress may draft a new three-strikes provision that better captures violent offenses with

specificity, it appears that the courts will not lose a moment's rest over seeing this residual clause laid to bed.