

RE: ferguson effect one pager

From: "Toensing, Brady (OLP)" <(b) (6)>
To: "McNally, Joseph (OLP)" <(b) (6)>
Date: Thu, 11 Jun 2020 19:20:49 -0400
Attachments: Section on impact of reduced policing 06.11.2020.docx (17.83 kB)

Hey, Joe. Please see attached. I was unable to find the "forthcoming" academic paper referenced in the June 1 WSJ article written by Jason Riley, but I used quotes from the article that draw from the study with good points on this issue. I also included bullet points that may or may not fit into our final project – use or not as you please. Feel free to call if you want to discuss. (b) (6)

Best, b.

Brady C. Toensing
Senior Counsel
Office of Legal Policy
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(b) (6)

From: McNally, Joseph (OLP) <(b) (6)>
Sent: Thursday, June 11, 2020 5:58 PM
To: Toensing, Brady (OLP) <(b) (6)>
Subject: RE: ferguson effect one pager

Yes- all good. Thanks, Brady. Know you are busy.

From: Toensing, Brady (OLP) <(b) (6)>
Sent: Thursday, June 11, 2020 5:58 PM
To: McNally, Joseph (OLP) <(b) (6)>
Subject: RE: ferguson effect one pager

Hey, Joe. I am planning on getting you my piece by 7PM. Is that okay for you?

Brady C. Toensing
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From: McNally, Joseph (OLP) <(b) (6)>
Sent: Thursday, June 11, 2020 3:46 PM
To: Toensing, Brady (OLP) <(b) (6)>
Subject: ferguson effect one pager

This is just a shell of it – send it in whatever form you want and I will figure it out. Bullet points with a citation is fine and I can figure out the rest.

I. Reducing violent crime is key to reducing officer shootings of civilians.

- **Studies have shown no evidence of racial discrimination in police shootings.**
 - Research by Harvard economist Roland G. Fryer, Jr. found no evidence of racial discrimination in shootings: “On the most extreme use of force – officer-involved shootings with a Taser or lethal weapon – there are no racial differences in either the raw data or when accounting for controls.”¹
 - Researchers at the University of Maryland and Michigan State University (PNAS Study) also found no racial bias in police shootings: “We didn’t find evidence for anti-Black or anti-Hispanic disparity in police use of force across all shootings, and, if anything, found anti-White disparities when controlling for race-specific crime.”²
- **Reducing violent crime is key to reducing officer shootings of civilians:**
 - Violent crime rates in communities are strong predictor of the race of a person who is fatally shot by police.
 - The PNAS Study showed reducing violent crimes in communities is necessary to reducing fatal police shootings. One of that study’s clearest results was “that violent crime rates strongly predict the race of a person fatally shot. At a high level, reducing race-specific violent crime should be an effective way to reduce fatal shootings of Black and Hispanic adults. Of course, this is no simple task—crime rates are the result of a large and dynamic set of forces.”³

II. When policing activities go down, violent crime increases.

- In a new, but not-yet-released paper, Harvard economist Fryer found that reductions in policing following viral incidents of deadly force led to a spike in total crime, and violent crime, including homicides, in those communities where the incident occurred. Fryer’s research showed “[i]t happened in Ferguson, Mo., after Michael Brown was shot by an officer. It happened in Chicago after a cop

¹ Roland G. Fryer, Jr., *An empirical Analysis of Racial Differences in Police Use of Force*, Dept of Economics, Harvard University, July 2017, at 29-30,

https://scholar.harvard.edu/files/fryer/files/empirical_analysis_tables_figures.pdf?mod=article_inline

² David J. Johnson et al., *Officer characteristics and racial disparities in fatal officer-involved shootings*, Proc. Nat’l Acad. Sci. U.S.A., July 22, 2019; at 4, available at www.pnas.org/cgi/doi/10.1073/pnas.1903856116

³ *Id.*

gunned down Laquan McDonald. And it occurred in Baltimore after Freddie Gray died in police custody.”⁴

- In cities impacted by viral incidents of deadly force, those where police contacts with civilians fell the most saw the highest increases in homicides. “Fryer’s ‘estimates show that we lost a thousand more lives, most of them black as well, because of an increase in homicides.’ The protesters and their political allies insist that policing is the problem, but when police pull back, black communities are hit hardest.”

⁴ Jason L. Riley, *Good Policing Saves Black Lives*, A report by Harvard’s Roland Fryer shows that when the cops pull back homicides increase, WSJ, June 1, 2020, <https://www.wsj.com/articles/good-policing-saves-black-lives-11591052916?mod=searchresults&page=1&pos=2>

From: [Bugnacki, John \(OLP\)](#)
To: [Toensing, Brady \(OLP\)](#)
Subject: Files
Date: Thursday, August 1, 2019 11:20:57 AM
Attachments: [Copy of SCOTUS Statutory Construction 8_01.xlsx](#)
[Cover Memo.docx](#)

Hi Brady,

Please find the requested files attached.

From,

John

MEMORANDUM

ATTORNEY WORK PRODUCT – DEPARTMENT OF JUSTICE – OFFICE OF LEGAL POLICY

To: Brady Toensing

From: John Bugnacki

Date: August 01, 2019

Re: Statutory Construction Analysis Methodology

In the attached spreadsheet, there are multiple columns that sort data related to cases in which the Supreme Court ruled against the Government as a party or against a party with which the Government was aligned as an amicus curae.

The first column “Term” contains the Supreme Court term for the selected case. The second column “Case Name” contains the Bluebook citation for the selected case. The third column “Statute(s) Involved” contains the statutes that were interpreted in the selected case. The fourth column “Issue” contains the issues presented in the selected case. The fifth column “General Ruling” contains the central answer/holding to the issues presented. The sixth column “Statutory Construction Ruling w/analysis of how DOJ/Govt lost” contains an analysis of the statutory construction and reasoning of the case leading to the holding. The seventh column “DOJ Nexus” contains information on whether the Government was a party or amicus curae in the particular case; amicus curae is denoted by the term “Amicus” and party is denoted by the term “Party.”

The methodology for deciding whether a case was relevant was to review each Oyez.com case summary for all of the cases between the Supreme Court terms of 2009-2010 and 2018-2019. The first step was determining whether there was a Government party in the case or an amicus curae brief filed by the Government. If there was neither of these factors, then the analysis did not proceed further. Then, after identifying that the Government was a party, the

next step was determining whether the ruling was adverse to the Government. If the ruling was not adverse, the analysis did not proceed forward. Then, the next step was determining whether the ruling involved a federal statute. If there was no federal statute involved, the analysis did not proceed forward. Determining whether a federal statute was involved entailed examining the case summary for a statute being named whose interpretation was central to the holding. If a statute was obliquely mentioned, then further research via Westlaw was necessary to determine the statute involved in the actual text of the case. If there was not statute, the analysis did not proceed further.

Once all of the above factors were present, then data was imported from the Oyez, Inc case summary into the columns “Vote (including Justices dissenting),” “Statute(s) Involved,” “Issue,” “General Ruling,” and “Statutory Construction,” and “Term.” The citations for the “Case Name” column came from Westlaw.

From: [Toensing, Brady \(OLP\)](#)
To: [Freeman, Lindsey \(OLP\)](#); [Champoux, Mark \(OLP\)](#)
Cc: [Bugnacki, John \(OLP\)](#)
Subject: SCOTUS Statutory Construction Research
Date: Thursday, August 1, 2019 12:06:46 PM
Attachments: [Copy of Copy of SCOTUS Statutory Construction 8_01.xlsx](#)
[Cover Memo to Supreme Court RC 08012019.docx](#)

Dear Lindsey and Mark – Attached is the SCOTUS statutory construction research going back to the 2009-2010 term on a spreadsheet with an accompanying memorandum from John Bugnacki explaining his research methodology for this project. John did a really nice job on this. Please let us know when you would like to meet to discuss next steps. For example, would you like John to now try to identify cases where we might want to propose a fix and from that identify if a legislative fix has already been proposed or passed? Best, bt

* * * * *

Brady C. Toensing
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(m) (b) (6)

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(b) (6)

From: [Bugnacki, John \(OLP\)](#)
To: [Toensing, Brady \(OLP\)](#)
Subject: Omnibus Bill Project Update
Date: Saturday, September 7, 2019 2:37:46 AM
Attachments: [DOJ Statutory Suggested Edits.docx](#)

Hi Brady,

I'm almost finished with the statutory omnibus project. I'm going to do a final proofing on Monday, but please see the attached file as a preview of the work.

I imported the cells into Microsoft Word so they are easier to read.

From,

John

From: [Bugnacki, John \(OLP\)](#)
To: [Toensing, Brady \(OLP\)](#)
Subject: RE: Omnibus Bill Project Update
Date: Monday, September 9, 2019 3:58:51 PM
Attachments: [DOJ Statutory Suggested Edits 9_9_2019.docx](#)

Hi Brady,

Here is the updated file that has been finalized. I will send the excel spreadsheet in this same thread.

From,

John

From: Toensing, Brady (OLP) (b) (6)
Sent: Saturday, September 7, 2019 7:49 AM
To: Bugnacki, John (OLP) (b) (6)
Subject: Re: Omnibus Bill Project Update

Thank you, John. I will look at this. What are you doing working so late on the weekend? Or at anytime? You should be out drinking beers!

On Sep 7, 2019, at 2:37 AM, Bugnacki, John (OLP) (b) (6) > wrote:

Duplicative Material



From: [Bugnacki, John \(OLP\)](#)
To: [Toensing, Brady \(OLP\)](#)
Subject: RE: Omnibus Bill Project Update
Date: Monday, September 9, 2019 8:19:09 PM
Attachments: [Copy of SCOTUS Statutory Construction 9_09.xlsx](#)

Hi Brady,

Please find the updated spreadsheet attached. I won't be in tomorrow – perhaps tomorrow morning (b) (6), so we can maybe discuss in further detail on Wednesday afternoon once I get back.

From,

John

From: Toensing, Brady (OLP) (b) (6)
Sent: Saturday, September 7, 2019 7:49 AM
To: Bugnacki, John (OLP) (b) (6)
Subject: Re: Omnibus Bill Project Update

Duplicative Material



From: [Bugnacki, John \(OLP\)](#)
To: [Toensing, Brady \(OLP\)](#)
Subject: New file version
Date: Friday, September 20, 2019 3:11:49 PM
Attachments: [Copy of SCOTUS Statutory Construction 9_20.xlsx](#)

Hi Brady,

Here is the new version of the file.

From,

John

From: [Toensing, Brady \(OLP\)](#)
To: [Von Bokern, Jordan L. \(OLP\)](#)
Subject: RE: Quick Call re Supreme Court Review
Date: Friday, November 22, 2019 6:03:39 PM
Attachments: [SCOTUS Statutory Construction Analysis BT Review GREEN CASES 11142019.xlsx](#)
[Cover Memo.docx](#)
[DOJ Statutory Suggested Edits 9_9_2019.docx](#)

Jordan – Please see attached. Let’s discuss the memo titled “DOJ Statutory Suggested Edits,” before you dig too deeply into that one (it may be repetitive of information from the spreadsheet). Let me know when you have done a macro-review and we can talk. Meantime, I will think about how we divvy up this project. We, obviously, need to identify the GREEN cases (those most ripe, eligible, and desirable for fixing) and the Yellows and the Reds. Mark had suggested just identifying the GREENS and then turning to the rewrite, but I think it would be most efficient to just rewrite the statute while the case is fresh in our minds (rather than having to re-read it later). I also want to add a column to our working spreadsheet that explains our decision-making on the category assigned to each case, at least for the yellows and the reds. We should also discuss the product we produce to BAW via Mark (for onward usage of the DAG).

Welcome aboard. I am grateful for your assistance and looking forward to working with you too. Best, bt

* * * * *

Brady C. Toensing
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(o) (b) (6)
(b) (6)

From: Von Bokern, Jordan L. (OLP) (b) (6)
Sent: Friday, November 22, 2019 2:39 PM
To: Toensing, Brady (OLP) (b) (6)
Subject: RE: Quick Call re Supreme Court Review

Hi Brady,

After 4:30 would probably work best for me. I’ll be around. Looking forward to working with you on this!

Jordan

Jordan L. Von Bokern
Counsel
Office of Legal Policy
U.S. Department of Justice
950 Pennsylvania Ave., NW

Washington, DC 20530

Office: (b) (6)

Cell: (b) (6)

Email: (b) (6)

From: Toensing, Brady (OLP) <(b) (6)>

Sent: Friday, November 22, 2019 1:27 PM

To: Von Bokern, Jordan L. (OLP) (b) (6)

Subject: Quick Call re Supreme Court Review

Hi, Jordan. I just tried to reach you. Is there a good time for a call for you? I have a meeting from 3 to 4:30 this afternoon. Otherwise, I am generally free.

* * * * *

Brady C. Toensing
Senior Counsel
Office of Legal Policy
U.S. Department of Justice

(m) (b) (6)
(o) (b) (6)
(b) (6)

From: [Toensing, Brady \(OLP\)](#)
To: [Toensing, Brady \(OLP\)](#)
Subject: SCOTUS Statutory Construction Analysis DRAFT
Date: Friday, March 27, 2020 6:34:35 PM
Attachments: [SCOTUS Statutory Construction Analysis Green Cases BT RW 03262020.xlsx](#)

* * * * *

Brady C. Toensing
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U.S. Department of Justice

(m) (b) (6)

(o) (b) (6)

(b) (6)

From: [Toensing, Brady \(OLP\)](#)
To: [Toensing, Brady \(OLP\)](#)
Subject: SCOTUS Stat Construction 3/30 draft
Date: Monday, March 30, 2020 6:59:23 PM
Attachments: [SCOTUS Statutory Construction Analysis Green Cases BT RW 03292020.xlsx](#)

* * * * *

Brady C. Toensing
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(o) (b) (6)

(b) (6)

From: [Toensing, Brady \(OLP\)](#)
To: [Toensing, Brady \(OLP\)](#)
Subject: DRAFT SCOTUS RW 04022020
Date: Thursday, April 2, 2020 6:39:23 PM
Attachments: [Memo Transmittal re Supreme Court Statutory Review DRAFT 04022020.docx](#)
[SCOTUS Statutory Construction Analysis 04022020.xlsx](#)

* * * * *

Brady C. Toensing
Senior Counsel
Office of Legal Policy
U.S. Department of Justice

(m) (b) (6)

(o) (b) (6)

(b) (6)

From: [Toensing, Brady \(OLP\)](#)
To: [Champoux, Mark \(OLP\)](#)
Subject: DRAFT SCOTUS Statutory Construction Analysis and transmittal memo
Date: Friday, April 3, 2020 7:49:30 AM
Attachments: [SCOTUS Statutory Construction Analysis 04032020.xlsx](#)
[Memo Transmittal re Supreme Court Statutory Review DRAFT 04032020.docx](#)

Dear Mark – Attached is the draft SCOTUS statutory construction analysis spreadsheet and transmittal memo. I would be happy to walk you through the data and analysis at your convenience. I look forward to your feedback. Best, bt

* * * * *

Brady C. Toensing
Senior Counsel
Office of Legal Policy
U.S. Department of Justice
(m) (b) (6)
(o) (b) (6)
(b) (6)

From: [Toensing, Brady \(OLP\)](#)
To: [Crytzer, Katherine \(OLP\)](#)
Subject: Supreme Court Statutory RC
Date: Monday, June 15, 2020 2:29:59 PM
Attachments: [Memo Transmittal re Supreme Court Statutory Review DRAFT 04032020.docx](#)
[SCOTUS Statutory Construction Analysis 04032020.xlsx](#)

Hi, Kate. Enjoy.

* * * * *

Brady C. Toensing
Senior Counsel
Office of Legal Policy
U.S. Department of Justice

(m) (b) (6)

(o) (b) (6)

(b) (6)

RE: DRAFT SCOTUS Statutory Construction Analysis and transmittal memo

From: "Champoux, Mark (OLP)" (b) (6)
To: "Toensing, Brady (OLP)" (b) (6)
Cc: "Crytzer, Katherine (OLP)" (b) (6)
Date: Tue, 16 Jun 2020 11:56:53 -0400
Attachments: Memo Transmittal re Supreme Court Statutory Review DRAFT 04032020-MC.docx (27.62 kB); DOJ Proposed Sentencing Fixes from Aug 2019.pdf (275.78 kB)

Brady,

I'm sorry I was a bottleneck on this for so many weeks – my apologies. Getting some comments back to you is my last substantive policy work for OLP...I think.

Attached are some redline suggestions to the memo, which I thought was very well done.

Some additional thoughts:

- I reviewed the green-highlighted cases and skimmed the yellow-highlighted cases and think it's all in pretty good shape. Obviously our analysis and recommendation is subject to whatever input we get from other components who may have particular equities/expertise (e.g., CRM, OSG, etc.). One question is whether to seek their input before we transmit to ODAG or after. I think ODAG wants just our input for now, and so it's appropriately stated in the memo that we will need to get further input from other components.
- The spreadsheet should be formatted so that it can print nicely on paper. Currently, at least the green highlighted opinions sheet isn't formatted to print within the margins of one page (i.e., the columns go on to a second page).
- For criminal sentencing cases (Johnson, Dimaya, Davis, and Rehaif), the Department already coordinated on preferred legislative fixes. These are reflected in the attached PDFs. In the case of Johnson, Dimaya, and Davis, I think OLA's recommendation was (b) (5) For Rehaif, we (b) (5) if you can please make sure the spreadsheet is consistent with these aspects of the attached PDF, that would be great.
- As a next step, I suggest review by Beth to see if she's comfortable with this approach and if she has any edits to the memo.
- All of this is subject to whatever Katie thinks is best – she's the boss now!

Thank you Brady!

MC

(b) (6)

From: Toensing, Brady (OLP) (b) (6)
Sent: Friday, April 3, 2020 7:49 AM
To: Champoux, Mark (OLP) (b) (6)
Subject: DRAFT SCOTUS Statutory Construction Analysis and transmittal memo

Duplicative Material

Crime of Violence Legislative Fixes

Recommendation

- (b) (5)

Discussion

- **Section 924(c) Amendment: “Davis Fix”**
 - 18 U.S.C. § 924(c) is one of the most valuable tools for federal prosecution of violent crimes. Section 924(c) makes it a crime for a defendant to use, carry, or possess a firearm during or in furtherance of a “crime of violence.”
 - The Supreme Court recently invalidated the residual clause of Section 924(c)(3)(B) as unconstitutionally vague in *United States v. Davis* (2019).
 - Rep. Martha Roby and Rep. Doug Collins have introduced H.R. 3533, the “Combat Violent Crime Act of 2019,” which would (b) (5) if the actual conduct constitutes a “crime of violence.”
 - As the Supreme Court explicitly recognized in *Davis*, this straightforward legislative fix would (b) (5)
- **Section 16 Definitional Amendment: “Dimaya Fix”**
 - 18 U.S.C. § 16 defines “crime of violence” as a felony offense “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.” This definition was used throughout the criminal code and in civil immigration proceedings.
 - In *Sessions v. Dimaya* (2018), the Supreme Court struck down the “crime of violence” definition as unconstitutionally vague.
 - Last Congress, the House passed H.R. 6691, the “Community Safety and Security Act of 2018,” which amended Section 16 to constitutionally define “crime of violence” with an enumerated list of offenses. On September 7, 2018, President Trump tweeted his support for the legislation and urged Congress that it “Need[ed] to get this bill to my desk fast!”
 - This legislative fix to the *Dimaya* decision will (b) (5)
- **Section 924(e) Armed Career Criminal Act (ACCA): “Johnson Fix”**
 - The Armed Career Criminal Act (ACCA), first passed in 1984, created a 15-year mandatory minimum penalty for repeat offenders who illegally possess a firearm after three or more felony robbery, burglary, violent felony, or serious drug trafficking convictions.
 - The residual clause in ACCA defined “violent felony” to include “conduct that presents a serious potential risk of physical injury to another.”
 - In 2015, the Supreme Court invalidated the Armed Career Criminal Act’s (ACCA) residual clause in *Johnson v. United States*. Since that date, at least 1461 ACCA defendants have

been released based on post-conviction challenges; 42% have either been re-arrested or returned to BOP custody.

- Senators Graham, Cotton, Hawley, Perdue, Blackburn, and Kennedy have introduced S. 1547, the “Restoring the Armed Career Criminal Act,” to address the flaws in ACCA by [REDACTED] (b) (5) Rep. Kustoff introduced companion legislation (H.R. 2837).
- Without a legislative fix, federal prosecutors will [REDACTED] (b) (5) [REDACTED]

Attachments

- *Davis* Fix (18 U.S.C. §924(c)): H.R. 3533
- *Dimaya* Fix (18 U.S.C. §16): H.R. 6691
- *Johnson* Fix (18 U.S.C. §924(e)): S. 1547

***Davis* Fix: Amendment to
18 U.S.C. § 924(c)**

H.R. 3533: “Combat Violent Crime Act of
2019” (Reps. Roby & Collins)

116TH CONGRESS
1ST SESSION

H. R. 3533

To amend title 18, United States Code, to clarify the definition of crime of violence, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

JUNE 27, 2019

Mrs. ROBY (for herself and Mr. COLLINS of Georgia) introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To amend title 18, United States Code, to clarify the definition of crime of violence, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Combat Violent Crime
5 Act of 2019”.

6 **SEC. 2. AMENDMENT TO THE DEFINITION OF CRIME OF VI-**
7 **OLENCE.**

8 Section 924(c)(3)(B) of title 18, United States Code,
9 is amended—

1 (a) by striking “by its nature, involves” and inserting
2 “, based on the facts underlying the offense, involved”;
3 and

4 (b) by striking “may be used” and inserting “may
5 have been used”.

6 **SEC. 3. APPLICATION.**

7 (a) IN GENERAL.—The amendments made by this
8 Act shall apply to any offense committed on or after the
9 date of the enactment of this Act.

10 (b) RULE OF CONSTRUCTION.—The amendments
11 made by this Act shall not be construed to create any right
12 to challenge a sentence imposed before the date of the en-
13 actment of this Act under section 924 of title 18, United
14 States Code.

○

***Dimaya* Fix: Amendment to
18 U.S.C. § 16**

H.R. 6691: “Community Safety and Security
Act of 2018” (Rep. Handel – 115th Congress)

115TH CONGRESS
2D SESSION

H. R. 6691

IN THE SENATE OF THE UNITED STATES

SEPTEMBER 12, 2018

Received; read twice and referred to the Committee on the Judiciary

AN ACT

To amend title 18, United States Code, to clarify the definition of “crime of violence”, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

1 **SECTION 1. SHORT TITLE.**

2 This Act may be cited as the “Community Safety and
3 Security Act of 2018”.

4 **SEC. 2. CRIME OF VIOLENCE.**

5 Section 16 of title 18, United States Code, is amend-
6 ed to read as follows:

7 **“SEC. 16. CRIME OF VIOLENCE DEFINED.**

8 “(a) The term ‘crime of violence’ means an offense—

9 “(1)(A) that—

10 “(i) is murder, voluntary manslaughter, as-
11 sault, sexual abuse or aggravated sexual abuse,
12 abusive sexual contact, child abuse, kidnapping,
13 robbery, carjacking, firearms use, burglary,
14 arson, extortion, communication of threats, co-
15 ercion, fleeing, interference with flight crew
16 members and attendants, domestic violence,
17 hostage taking, stalking, human trafficking, pi-
18 racy, or a terrorism offense as described in
19 chapter 113B (other than in section 2332d); or

20 “(ii) involves the unlawful possession or
21 use of a weapon of mass destruction; or

22 “(B) that involves use or unlawful posses-
23 sion of explosives or destructive devices de-
24 scribed in 5845(f) of the Internal Revenue Code
25 of 1986;

1 “(2) that has as an element the use, attempted
2 use, or threatened use of physical force against the
3 person or property of another; or

4 “(3) that is an attempt to commit, conspiracy
5 to commit, solicitation to commit, or aiding and
6 abetting any of the offenses set forth in paragraphs
7 (1) and (2).

8 “(b) In this section:

9 “(1) The term ‘abusive sexual contact’ means
10 conduct described in section 2244(a)(1) and (a)(2).

11 “(2) The terms ‘aggravated sexual abuse’ and
12 ‘sexual abuse’ mean conduct described in sections
13 2241 and 2242. For purposes of such conduct, the
14 term ‘sexual act’ means conduct described in section
15 2246(2), or the knowing and lewd exposure of geni-
16 talia or masturbation, to any person, with an intent
17 to abuse, humiliate, harass, degrade, or arouse or
18 gratify the sexual desire of any person.

19 “(3) The term ‘assault’ means conduct de-
20 scribed in section 113(a), and includes conduct com-
21 mitted recklessly, knowingly, or intentionally.

22 “(4) The term ‘arson’ means conduct described
23 in section 844(i) or unlawfully or willfully damaging
24 or destroying any building, inhabited structure, vehi-

1 cle, vessel, or real property by means of fire or ex-
2 plosive.

3 “(5) The term ‘burglary’ means an unlawful or
4 unprivileged entry into, or remaining in, a building
5 or structure, including any nonpermanent or mobile
6 structure that is adapted or used for overnight ac-
7 commodation or for the ordinary carrying on of busi-
8 ness, and, either before or after entering, the per-
9 son—

10 “(A) forms the intent to commit a crime;

11 or

12 “(B) commits or attempts to commit a
13 crime.

14 “(6) The term ‘carjacking’ means conduct de-
15 scribed in section 2119, or the unlawful taking of a
16 motor vehicle from the immediate actual possession
17 of a person against his will, by means of actual or
18 threatened force, or violence or intimidation, or by
19 sudden or stealthy seizure or snatching, or fear of
20 injury.

21 “(7) The term ‘child abuse’ means the unlawful
22 infliction of physical injury or the commission of any
23 sexual act against a child under fourteen by any per-
24 son eighteen years of age or older.

1 “(8) The term ‘communication of threats’
2 means conduct described in section 844(e), or the
3 transmission of any communications containing any
4 threat of use of violence to—

5 “(A) demand or request for a ransom or
6 reward for the release of any kidnapped person;
7 or

8 “(B) threaten to kidnap or injure the per-
9 son of another.

10 “(9) The term ‘coercion’ means causing the
11 performance or non-performance of any act by an-
12 other person under which such other person has a
13 legal right to do or to abstain from doing, through
14 fraud or by the use of actual or threatened force, vi-
15 olence, or fear thereof, including the use, or an ex-
16 press or implicit threat of use, of violence to cause
17 harm, or threats to cause injury to the person, rep-
18 utation or property of any person.

19 “(10) The term ‘domestic violence’ means any
20 assault committed by a current or former spouse,
21 parent, or guardian of the victim, by a person with
22 whom the victim shares a child in common, by a per-
23 son who is cohabiting with or has cohabited with the
24 victim as a spouse, parent, or guardian, or by a per-

1 son similarly situated to a spouse, parent, or guard-
2 ian of the victim.

3 “(11) The term ‘extortion’ means conduct de-
4 scribed in section 1951(b)(2)), but not extortion
5 under color of official right or fear of economic loss.

6 “(12) The term ‘firearms use’ means conduct
7 described in section 924(c) or 929(a), if the firearm
8 was brandished, discharged, or otherwise possessed,
9 carried, or used as a weapon and the crime of vio-
10 lence or drug trafficking crime during and in rela-
11 tion to which the firearm was possessed, carried, or
12 used was subject to prosecution in any court of the
13 United States, State court, military court or tri-
14 bunal, or tribal court. Such term also includes un-
15 lawfully possessing a firearm described in section
16 5845(a) of the Internal Revenue Code of 1986 (such
17 as a sawed-off shotgun or sawed-off rifle, silencer,
18 bomb, or machine gun), possession of a firearm in
19 violation of sections 922(g)(1), 922(g)(2) and
20 922(g)(4), possession of a firearm with the intent to
21 use such firearm unlawfully, or reckless discharge of
22 a firearm at a dwelling.

23 “(13) The term ‘fleeing’ means knowingly oper-
24 ating a motor vehicle and, following a law enforce-

1 ment officer’s signal to bring the motor vehicle to a
2 stop—

3 “(A) failing or refusing to comply; or

4 “(B) fleeing or attempting to elude a law
5 enforcement officer.

6 “(14) The term ‘force’ means the level of force
7 capable of causing physical pain or injury or needed
8 or intended to overcome resistance.

9 “(15) The term ‘hostage taking’ means conduct
10 described in section 1203.

11 “(16) The term ‘human trafficking’ means con-
12 duct described in sections 1589, 1590, and 1591.

13 “(17) The term ‘interference with flight crew
14 members and attendants’ means conduct described
15 in section 46504 of title 49, United States Code.

16 “(18) The term ‘kidnapping’ means conduct de-
17 scribed in section 1201(a)(1) or seizing, confining,
18 inveigling, decoying, abducting, or carrying away
19 and holding for ransom or reward or otherwise any
20 person.

21 “(19) The term ‘murder’ means conduct de-
22 scribed as murder in the first degree or murder in
23 the second degree described in section 1111.

24 “(20) The term ‘robbery’ means conduct de-
25 scribed in section 1951(b)(1), or the unlawful taking

1 or obtaining of personal property from the person or
2 in the presence of another, against his will, by
3 means of actual or threatened force, or violence or
4 intimidation, or by sudden or stealthy seizure or
5 snatching, or fear of injury, immediate or future, to
6 his person or property, or property in his custody or
7 possession, or the person or property of a relative or
8 member of his family or of anyone in his company
9 at the time of the taking or obtaining.

10 “(21) The term ‘stalking’ means conduct de-
11 scribed in section 2261A.

12 “(22) The term ‘weapon of mass destruction’
13 has the meaning given such term in section
14 2332a(c).

15 “(23) The term ‘voluntary manslaughter’
16 means conduct described in section 1112(a).

17 “(c) For purposes of this section, in the case of any
18 reference in subsection (b) to an offense under this title,
19 such reference shall include conduct that constitutes an
20 offense under State or tribal law or under the Uniform
21 Code of Military Justice, if such conduct would be an of-
22 fense under this title if a circumstance giving rise to Fed-
23 eral jurisdiction had existed.

24 “(d) For purposes of this section, the term ‘con-
25 spiracy’ includes any offense that is a conspiracy to com-

1 mit another offense under State or Federal law, irrespec-
2 tive of whether proof of an overt act is required to estab-
3 lish commission of the conspiracy offense.”.

Passed the House of Representatives September 7,
2018.

Attest:

KAREN L. HAAS,
Clerk.

Johnson Fix: Amendment to
18 U.S.C. § 924(e)

S. 1547: “Restoring the Armed Career Criminal Act” (Sens. Graham, Cotton, Hawley, Perdue, Blackburn, & Kennedy)

116TH CONGRESS
1ST SESSION

S. 1547

To amend title 18, United States Code, relating to sentencing of armed career criminals.

IN THE SENATE OF THE UNITED STATES

MAY 20, 2019

Mr. COTTON (for himself, Mrs. BLACKBURN, Mr. GRAHAM, Mr. HAWLEY, and Mr. PERDUE) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To amend title 18, United States Code, relating to sentencing of armed career criminals.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Restoring the Armed
5 Career Criminal Act”.

6 **SEC. 2. AMENDMENTS TO THE ARMED CAREER CRIMINAL**
7 **ACT.**

8 Section 924 of title 18, United States Code, is
9 amended—

1 (1) in subsection (a)(2), by striking “(a)(6),
 2 (d), (g), (h), (i), (j), or (o) of section 922” and in-
 3 serting “(a)(6), (d), (h), (i), (j), or (o) of section
 4 922, or, except as provided in subsection (e) of this
 5 section, subsection (g) of section 922”; and

6 (2) by striking subsection (e) and inserting the
 7 following:

8 “(e)(1) Whoever knowingly violates section 922(g)
 9 and has three or more previous serious felony convictions
 10 for offenses committed on occasions different from one an-
 11 other shall be fined under this title and imprisoned not
 12 less than 15 years and not more than 30 years, and, not-
 13 withstanding any other provision of law, the court shall
 14 not suspend the sentence of, or grant a probationary sen-
 15 tence to, such person with respect to the conviction under
 16 section 922(g).

17 “(2) In this subsection—

18 “(A) the term ‘offense punishable by imprison-
 19 ment for a statutory maximum term of not less than
 20 10 years’ includes an offense (without regard to the
 21 application of any sentencing guideline, statutory
 22 criterion, or judgment that may provide for a short-
 23 er period of imprisonment within the statutory sen-
 24 tencing range) for which the statute provides for a
 25 range in the period of imprisonment that may be im-

1 posed at sentencing the maximum term of which is
2 not less than 10 years; and

3 “(B) the term ‘serious felony conviction’
4 means—

5 “(i) any conviction by a court referred to
6 in section 922(g)(1) for an offense that, at the
7 time of sentencing, was an offense punishable
8 by imprisonment for a statutory maximum term
9 of not less than 10 years; or

10 “(ii) any group of convictions for which a
11 court referred to in section 922(g)(1) imposed
12 in the same proceeding or in consolidated pro-
13 ceedings a total term of imprisonment not less
14 than 10 years, regardless of how many years of
15 that total term the defendant served in cus-
16 tody.”.

17 **SEC. 3. APPLICABILITY.**

18 (a) IN GENERAL.—The amendments made by this
19 Act shall apply to any offense committed after the date
20 of enactment of this Act by an individual who, on the date
21 on which the offense is committed, has three or more pre-
22 vious serious felony convictions (as defined in subsection
23 (e) of section 924 of title 18, United States Code, as
24 amended by this Act).

1 (b) RULE OF CONSTRUCTION.—This Act and the
2 amendments made by this Act shall not be construed to
3 create any right to challenge a sentence imposed under
4 subsection (e) of section 924 of title 18, United States
5 Code.



Ensuring Adequate Gun Law Enforcement (EAGLE) Act

Recommendations

- (b) (5)

- (b) (5)

Discussion

Rehaif Fix

- A June 2019 Supreme Court decision (*Rehaif v. United States*) increased the burden on federal prosecutors to secure convictions for unlawful possession of firearms by a prohibited person (e.g., by a felon, unlawful alien, drug user, or other prohibited class of persons). After that decision, prosecutors must prove both that the defendant knew he possessed a firearm and that he knew he belonged to the relevant category of restricted persons.
- The proposed legislation (b) (5)

Prosecution of “Lie-and-Try” Offenders

- Although it is already a felony for a prohibited person to lie on his background check form in an effort to evade the background check in acquiring a firearm, it is not easy for prosecutors to obtain convictions for such offenses due to the difficulty in proving that a person knew he made a false statement and also had an intent to deceive the firearm dealer. As a result, many such cases are not currently prosecuted.
- The proposed legislation addresses this problem by (b) (5)

The proposal rests on two mechanisms:

- First, (b) (5)
- Second, (b) (5)
- (b) (5)

Attachments: Proposed Legislation and Analysis Statement

SEC. ____ ENSURING ADEQUATE GUN LAW ENFORCEMENT ACT.

(b) (5)



(b) (5)



ANALYSIS STATEMENT FOR ENSURING ADEQUATE GUN LAW ENFORCEMENT (EAGLE) ACT


This proposal will (b) (5)



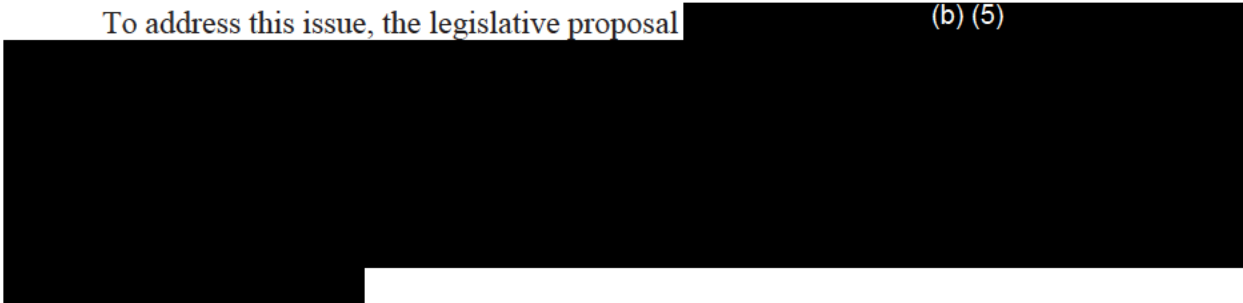
Rehaif Fix

In June 2019, the Supreme Court held in *Rehaif v. United States*, 588 U.S. __ ; 139 S. Ct. 2191 (2019), that, in a prosecution for possession of a firearm by a restricted person in violation of 18 U.S.C. §§ 922(g) and 924(a), the government must prove both that the defendant knew he possessed the firearm and that he knew he belonged to a relevant category of restricted persons. A dissenting opinion by Justice Alito cited a collection of opinions by federal circuit courts demonstrating that the Court's opinion was at odds with long-established precedent holding that liability under those sections did not previously depend on a defendant's knowledge of his prohibited status.

The Court's opinion increases prosecutors' burden of proof in enforcing the prohibitions against firearms purchasing and possession for certain categories of prohibited persons, including felons, drug users, unlawful aliens, and fugitives from justice, among others. (b) (5)



To address this issue, the legislative proposal (b) (5)



Enforcement of "Lie and Try" Violations

"Lie and try" violations occur where a potential firearm buyer provides false or fraudulent information on the ATF Form 4473 (required in all firearm purchases from federal firearms licensees), in an effort to evade the firearms background check system. Section 922(a)(6) of Title 18 provides for a felony punishable by up to ten years in prison if a person *knowingly* provides false or fraudulent information related to a material fact to obtain a firearm.¹ While this statute is

¹ 18 U.S.C. §922(a)(6) states it is unlawful "for any person in connection with the acquisition or attempted acquisition of any firearm or ammunition from a licensed importer, licensed manufacturer, licensed dealer, or licensed collector, knowingly to make any false or fictitious oral or written statement or to furnish or exhibit any false, fictitious, or misrepresented identification, intended or likely to deceive such importer, manufacturer, dealer,

available for prosecution, many potential cases are not charged by federal prosecutors, in part due to the difficulty in proving an intent to deceive and also due to lack of jury appeal in cases where defendants may claim they simply misunderstood the form.²

The proposed amendment to (b) (5)

. The proposal rests on two mechanisms:

First, (b) (5)

Second, (b) (5)

(b) (5)

or collector with respect to any fact material to the lawfulness of the sale or other disposition of such firearm or ammunition under the provisions of this chapter.” The maximum penalty for a violation of this provision is ten years. 18 U.S.C. §924(a)(2). This is the provision that is used to prosecute persons who knowingly provide false information on the Form 4473.

² See, e.g., GAO Report to the Ranking Member, Subcommittee on Commerce, Justice, Science, and Related Agencies, Committee on Appropriations, House of Representatives (September 2018), <https://www.gao.gov/assets/700/694290.pdf>.

³ (b) (5)

From: [Toensing, Brady \(OLP\)](#)
To: [Crytzer, Katherine \(OLP\)](#)
Subject: RE: DRAFT SCOTUS Statutory Construction Analysis and transmittal memo
Date: Wednesday, June 24, 2020 10:21:48 PM
Attachments: [Memo Transmittal re Supreme Court Statutory Review DRAFT 06.24.2020.docx](#)
[SCOTUS Statutory Construction Analysis 06.24.2020.xlsx](#)

Hi, Katie. Here is an updated transmittal memo and spreadsheet incorporating Mark's edits and suggestions (see below). Please let me know if you have any questions or need anything else. Best, bt

Brady C. Toensing
Senior Counsel
Office of Legal Policy
U.S. Department of Justice
(m) (b) (6)
(o) (b) (6)
(b) (6)

From: Crytzer, Katherine (OLP) (b) (6)
Sent: Wednesday, June 24, 2020 6:22 PM
To: Toensing, Brady (OLP) (b) (6)
Subject: RE: DRAFT SCOTUS Statutory Construction Analysis and transmittal memo

Sure. I am still at the office and should be here for another 45 mins or so.

Katie Crytzer
Acting Deputy Assistant Attorney General
Office of Legal Policy
U.S. Department of Justice
950 Pennsylvania Ave., NW
Washington, DC 20530
Office: (b) (6)
Cell: (b) (6)
(b) (6)

From: Toensing, Brady (OLP) (b) (6)
Sent: Wednesday, June 24, 2020 6:04 PM
To: Crytzer, Katherine (OLP) (b) (6) >
Subject: RE: DRAFT SCOTUS Statutory Construction Analysis and transmittal memo

Hi, Katie. May I call you to get your guidance on this note from Mark from the email below?

For criminal sentencing cases (Johnson, Dimaya, Davis, and Rehaif), the Department already

coordinated on preferred legislative fixes. These are reflected in the attached PDFs. In the case of Johnson, Dimaya, and Davis, I think OLA's recommendation was to (b) (5)
(b) (5) For Rehaif, (b) (5)
(b) (5)
(b) (5) If you can please make sure the spreadsheet is consistent with these aspects of the attached PDF, that would be great.

Brady C. Toensing
Senior Counsel
Office of Legal Policy
U.S. Department of Justice
(m) (b) (6)
(o) (b) (6)
(b) (6)

From: Crytzer, Katherine (OLP) (b) (6)
Sent: Tuesday, June 16, 2020 12:28 PM
To: Champoux, Mark (OLP) (b) (6) >; Toensing, Brady (OLP) (b) (6)
Subject: RE: DRAFT SCOTUS Statutory Construction Analysis and transmittal memo

MC – Thanks for closing this down. I had a good call with Brady yesterday about the project, and we'll take it from here.

Brady – We should take full advantage of Mark's thinking on this. Please incorporate Mark's thoughts and edits and then send me an updated packet (I think that's just memo and spreadsheet, but let me know if I need anything else). I will hold on review of the current packet that you sent yesterday.

Katie Crytzer
Acting Deputy Assistant Attorney General
Office of Legal Policy
U.S. Department of Justice
950 Pennsylvania Ave., NW
Washington, DC 20530
Office: (b) (6)
Cell: (b) (6)
(b) (6)

From: Champoux, Mark (OLP) (b) (6)
Sent: Tuesday, June 16, 2020 11:57 AM
To: Toensing, Brady (OLP) (b) (6)
Cc: Crytzer, Katherine (OLP) (b) (6) >
Subject: RE: DRAFT SCOTUS Statutory Construction Analysis and transmittal memo

From: [Crytzer, Katherine \(OLP\)](#)
To: [Helmets, Jessica \(OLP\)](#)
Cc: [Toensing, Brady \(OLP\)](#)
Subject: Statutory Construction Project
Date: Thursday, July 2, 2020 1:21:26 PM
Attachments: [20200702 SCOTUS Statutory Construction Analysis.xlsx](#)
[20200702 SCOTUS Statutory Construction.docx](#)

Jessica,

Attached for BAW's review is a memo and attachment related to ODAG's SCOTUS statutory construction request. This is a legacy project that I inherited from Mark. Brady is the real brains behind the operation. Please let us know if you have any questions. Thanks.

Katie Crytzer
Acting Deputy Assistant Attorney General
Office of Legal Policy
U.S. Department of Justice
950 Pennsylvania Ave., NW
Washington, DC 20530
Office: (b) (6)
Cell: (b) (6)
(b) (6)

From: [Helmets, Jessica \(OLP\)](#)
To: [Toensing, Brady \(OLP\)](#)
Subject: FW: Wednesday
Date: Wednesday, July 8, 2020 9:50:22 AM
Attachments: [20200707 SCOTUS Statutory Construction EXCEL FINAL.pdf](#)
Importance: High

Hi Brady –

Per Beth's comment below (which I should have thought of) – is there a way you can just add a header via PDF without opening the Excel sheet again?

She is looking to print that ASAP.

Thanks,

Jessica

From: Williams, Beth A (OLP) (b) (6)
Sent: Wednesday, July 8, 2020 9:46 AM
To: Helmets, Jessica (OLP) (b) (6)
Subject: RE: Wednesday

Thanks. Can we put a DRAFT / Decisional and Predeliberative header on each page?

Beth A. Williams
Assistant Attorney General
Office of Legal Policy
U.S. Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530
Office: (b) (6)

From: [Toensing, Brady \(OLP\)](#)
To: [Helmerts, Jessica \(OLP\)](#)
Subject: RE: Master spreadsheet for stat construction
Date: Tuesday, July 21, 2020 9:02:36 AM
Attachments: [20200708 SCOTUS Statutory Construction EXCEL FINAL 45 pager.xlsx](#)

* * * * *

Brady C. Toensing
Senior Counsel
Office of Legal Policy
U.S. Department of Justice

(m) (b) (6)
(o) (b) (6)
(b) (6)

From: Helmerts, Jessica (OLP) (b) (6)
Sent: Tuesday, July 21, 2020 8:54 AM
To: Toensing, Brady (OLP) (b) (6)
Subject: RE: Master spreadsheet for stat construction

Yes.

From: Toensing, Brady (OLP) (b) (6)
Sent: Tuesday, July 21, 2020 8:53 AM
To: Helmerts, Jessica (OLP) (b) (6)
Subject: RE: Master spreadsheet for stat construction

The excel format?

* * * * *

Brady C. Toensing
Senior Counsel
Office of Legal Policy
U.S. Department of Justice

(m) (b) (6)
(o) (b) (6)
(b) (6)

From: Helmerts, Jessica (OLP) (b) (6)
Sent: Tuesday, July 21, 2020 8:53 AM
To: Toensing, Brady (OLP) (b) (6)
Subject: Master spreadsheet for stat construction

Hi Brady,

Do you have the master spreadsheet from which you created the PDF for the statutory construction

project? ODAG is asking for it (they just have it in PDF).

Thanks!

Jessica

Jessica Helmers

Acting Chief of Staff

Office of Legal Policy

U.S. Department of Justice

(b) (6)

(b) (6)