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# The Void-for-Vagueness Doctrine in Criminal Law

## Vagueness as Constitutional Violation

Defendants in federal criminal cases often challenge their prosecutions by arguing that the laws they allegedly violated are unconstitutionally vague. The Fifth Amendment to the U.S. Constitution requires that no person "be deprived of life, liberty, or property, without due process of law." (The Fourteenth Amendment applies the same standard to state and local laws.) Under the void-for-vagueness doctrine, due process requires that criminal laws define prohibitions with "sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." The Court has emphasized that while this vagueness doctrine "focuses both on actual notice to citizens and arbitrary enforcement," the "more important aspect of vagueness doctrine 'is not actual notice, but the other principal element of the doctrine—the requirement that a legislature establish minimal guidelines to govern law enforcement.'" Absent such guidelines, a law risks permitting a "standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections." While the doctrine applies to both civil and criminal statutes, the Court has stated that the standards of precision are higher for criminal laws given the comparatively severe consequences of a violation.

## The Void-for-Vagueness Doctrine in Practice

Courts have distinguished between challenges alleging that a statute is unconstitutionally vague on its face, meaning "no standard of conduct is specified at all," and challenges alleging that statutes are unconstitutionally vague as applied to the facts of a particular case. In either situation (and defendants can argue both), the bar for a finding of unconstitutional vagueness is high: The Supreme Court has recognized the "strong presumptive validity that attaches to an Act of Congress" as a reason to avoid deeming statutes to be unconstitutionally vague "simply because difficulty is found in determining whether certain marginal offenses fall within their language." Further, to the extent courts can avoid vagueness problems by construing statutes narrowly, the Supreme Court has instructed them to do so.

Courts have typically defaulted to an as-applied analysis in evaluating vagueness claims. Where the laws at issue implicate First Amendment concerns, however, courts have been more amenable to facial challenges.

### As-Applied Challenges

In an as-applied analysis, the question is whether a statutory provision is vague "in light of the facts of the case at hand." With respect to notice, the court asks whether the statute "sufficiently warned" a defendant that his particular conduct was prohibited. For example, the U.S. Court of Appeals for the Eighth Circuit commented that under a federal law prohibiting anyone "who is an unlawful user of or addicted to any controlled substance from possessing guns," a "frail and elderly grandmother" who "uses marijuana for a chronic medical condition a day before possessing a gun" would be subject to a different analysis than a defendant in another circuit who engaged in "prolonged use of heroin, occurring before, during and after the period of the gun purchases."

With respect to the issue of arbitrary enforcement, a court evaluating an as-applied challenge can allow a prosecution to proceed by determining either "that a statute as a general matter provides sufficiently clear standards to eliminate the risk of arbitrary enforcement" or that "the conduct at issue falls within the core of the statute's prohibition, so that the enforcement before the court was not the result of the unfettered latitude that law enforcement officers and factfinders might have in other, hypothetical applications of the statute."

**Examples of Unconstitutional Vagueness "As Applied"**

- Where a law prohibiting possession of machine guns allowed for such possession "by or under the authority of" a police department, the statute was unconstitutionally vague as applied to the lead rifle instructor for state police because no reasonable police officer in his situation would be able to determine whether his position and supervisor approval would constitute adequate "authority."
- Where a law prohibited distribution of substances "substantially similar" to controlled substances, the statute was unconstitutionally vague as applied to defendants in a case where there was no scientific consensus on whether the substance at issue was chemically analogous to a controlled substance.
- Where a law prohibited sexual conduct with individuals under the age of 13, the provision was unconstitutionally vague as applied to a case where both parties were under 13 because it invited arbitrary enforcement (evinced by the fact that both participants were under 13 but only one was charged).
- Where a regulation prohibited conduct that "interferes with, impedes or disrupts the use of" a campground, the prohibition was unconstitutionally vague as applied to a person who passively sat nude outside his tent because people of ordinary intelligence would disagree as to whether the regulation applied in those circumstances.

### Facial Challenges

While facial challenges to statutes are generally disfavored, courts have been more amenable to facial challenges in cases implicating First Amendment concerns or where

particularly vague enactments may infringe on "constitutionally protected rights." Caselaw is not entirely clear regarding when a facial challenge may be appropriate even absent such concerns. In some cases, the Supreme Court has said that where a statute does not involve "constitutionally protected conduct," a facial challenge should be sustained only "if the enactment is impermissibly vague in all of its applications" and that someone whose conduct clearly violates a law "cannot complain of the vagueness of the law as applied to the conduct of others." The Court has also said that where a statute "proscribe[s] no comprehensible course of conduct at all," it could potentially be addressed in a facial challenge because "such a statute may not constitutionally be applied to any set of facts." In *Johnson v. United States*, the Supreme Court considered a challenge to the "residual clause" of the Armed Career Criminal Act, which applied enhanced penalties in some cases where defendants had prior offenses involving "conduct that presents a serious potential risk" of harming others. The Court struck the residual clause down as unconstitutionally vague on its face as a consequence of its "hopeless indeterminacy," notwithstanding that there could be "straightforward cases" under that law. The majority opinion in *Johnson* appeared to reject the "impermissibly vague in all of its applications" standard, noting that "although statements in some of our opinions could be read to suggest otherwise, our *holdings* squarely contradict the theory that a vague provision is constitutional merely because there is some conduct that clearly falls within the provision's grasp." The dissent markedly disagreed with this interpretation of precedent. Three years later, in *Sessions v. Damaya*, the Court invalidated a similar residual clause due to its risk of "unpredictability and arbitrariness," again over a vigorous dissent to the effect that a facial analysis was inappropriate. The Court struck down another "residual clause" on vagueness grounds in *United States v. Davis* without addressing the issue of facial versus as-applied analysis.

One federal district court, while acknowledging that the caselaw on the availability of facial void-for-vagueness challenges is "limited and unclear," has surmised that facial vagueness challenges may be viable outside the First Amendment context when a law presents a "high risk" of being unconstitutionally vague due to concerns about arbitrary enforcement.

### Examples of Facial Unconstitutional Vagueness

- A requirement that a person stopped by police provide "credible and reliable" identification
- A law declaring any person "known to be a member of any gang" to be a "gangster" and thereby subject to criminal penalties under certain circumstances
- A prohibition on loitering, defined as "to remain in any one place with no apparent purpose"
- Sentencing enhancement where the predicate offense "otherwise involves conduct that presents a serious potential risk of physical injury to another"
- A law imposing criminal penalties on any person who "treats contemptuously" a U.S. flag
- A law making it illegal to "make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries"
- A law prohibiting people from gathering on sidewalks and "there [conducting] themselves in a manner annoying to persons passing by"

## Considerations for Congress

Whether a statute is vague depends on its language, meaning that careful drafting can be critical to a statute's surviving constitutional scrutiny. As the Supreme Court has said, however, "Condemned to the use of words, we can never expect mathematical certainty from our language." Given the difficulty of anticipating "untold and unforeseen variations in factual situations," the Court has acknowledged that Congress may achieve only a certain degree of specificity in drafting prohibitions and that it is "not unfair to require" that anyone who deliberately goes close to the line assumes the risk that he may cross it.

Congress may nonetheless wish to employ certain drafting strategies to bolster statutes against allegations of unconstitutional vagueness. Statutes using terms susceptible to "wholly subjective interpretation" are more likely to be found unconstitutionally vague. While the Supreme Court struck down a requirement to provide police with "credible and reliable" identification, for example, it may have taken a different view had the law contained an enumerated list of acceptable identification documents. Incorporating scienter requirements—that is, requiring proof of the defendant's state of mind—may also cure statutes of vagueness concerns. As one court observed, "[W]hen a statute imposes a scienter requirement to the effect that the defendant should have known of the unlawfulness of his conduct, it is impossible, as a matter of logic, that he would lack adequate notice of the unlawfulness of his conduct." Because statutes incorporating an intent requirement force the government to prove that the defendant violated the law with a certain state of mind, such requirements can mitigate concerns about arbitrary enforcement of laws prohibiting conduct that could be legal in some contexts and illegal in others.

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