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## The Removal of Aliens Who Drink and Drive: Felony DWI as a Crime of Violence Under 18 U.S.C. § 16(b)

### Cover Page Footnote

J.D. Candidate, 2003, Fordham University School of Law. I would like to thank Fordham Professor Abner S. Greene for his inspiration and support. A special thank you to my mom and dad, my brothers, and Johnny Kim for always loving and believing in me.

# THE REMOVAL OF ALIENS WHO DRINK AND DRIVE: FELONY DWI AS A CRIME OF VIOLENCE UNDER 18 U.S.C. § 16(b)

*Julie Anne Rah\**

*“[D]eportation is a drastic measure and at times the equivalent of banishment or exile. It is the forfeiture for misconduct of a residence in this country. Such a forfeiture is a penalty.”<sup>1</sup>*

*“No man is above the law and no man is below it; nor do we ask any man’s permission when we require him to obey it. Obedience to the law is demanded as a right; not asked as a favor.”<sup>2</sup>*

## INTRODUCTION

Removal from the United States is undoubtedly one of the harshest penalties facing a resident alien. Yet it is equally clear that aliens who commit particularly serious crimes must be deported.<sup>3</sup> While the United States will continue to welcome people from other nations, our government is clear in its message that it will not tolerate certain offenses committed by alien criminals at the cost of the rights and privileges of American citizens. The question of what crimes are sufficiently serious to warrant removal, however, has caused some controversy among the courts.

The difficulty of this question is created by the Legislature’s use of vague terms to describe removable offenses, without providing sufficiently clear definitions to facilitate their interpretation. For example, among other crimes, Congress authorizes the government to

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1. *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948).

2. Theodore Roosevelt, *Third Annual Message (December 7, 1903)*, in *Familiar Quotations* 687 (John Bartlett ed., 1980).

3. The Immigration and Nationality Act uses the term “removable” to mean that, where an alien has not yet been admitted to the United States, the alien is inadmissible and, where an alien has been admitted to the United States, the alien is deportable. 8 U.S.C. § 1229a(e)(2) (2000). This Note will use the terms “removable” and “deportable” interchangeably.

deport aliens for committing either a "crime of moral turpitude"<sup>4</sup> or a "crime of violence."<sup>5</sup> While Congress failed to define the term "crime of moral turpitude,"<sup>6</sup> Congress defined a "crime of violence" as a crime "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>7</sup> Unfortunately, this definition of crime of violence has caused interpretive difficulties within the courts.

For example, the circuit courts currently are split over the issue of whether felony driving while intoxicated ("felony DWI")<sup>8</sup> constitutes a crime of violence under 18 U.S.C. § 16. The Board of Immigration Appeals ("BIA") recently interpreted 18 U.S.C. § 16(b) to encompass felony DWI,<sup>9</sup> precipitating a string of circuit court cases addressing the same issue. The Second, Fifth, Seventh, and Ninth Circuits disagreed with the BIA, holding that felony DWI is not a crime of violence, while the Tenth Circuit held that felony DWI is a crime of violence.<sup>10</sup> The debate generally centers around whether the language

4. 8 U.S.C. § 1227(a)(2)(A)(i).

5. 8 U.S.C. § 1101(a)(43)(F). A crime of violence is one of many crimes that constitute a deportable "aggravated felony." See 8 U.S.C. § 1101(a)(43)(A)-(U). In 1988, Congress added the term "aggravated felony" to the Immigration and Nationality Act, thereby creating a new category of removable crimes. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7342, 102 Stat. 4181, 4469-70 (codified as amended at 8 U.S.C. § 1101(a)(43)); see also *infra* Part I.B.3.a. At first, the definition of "aggravated felony" was somewhat limited, including murder, drug trafficking, and arms trafficking. § 7342, 102 Stat. at 4469-70. Over the past decade, however, Congress has repeatedly amended the definition, broadening it to cover over twenty subcategories of removable offenses, including a crime of violence. 8 U.S.C. § 1101(a)(43)(A)-(U); see also *infra* Part I.B.3.a. The Immigration and Nationality Act defines a crime of violence by reference to another federal statute, 18 U.S.C. § 16 (2000). 8 U.S.C. § 1101(a)(43)(F); see also *infra* Part I.C.1.

6. See *infra* note 43.

7. 18 U.S.C. § 16(b).

8. For the purposes of this Note, the term "felony DWI" refers to statutory drunk driving offenses that rise to a felony based on the number of prior convictions. For example, Virginia makes DWI a felony upon the third and subsequent convictions. See Va. Code Ann. § 18.2-270(C) (Michie 1950 & Supp. IV 1996) ("Any person convicted of three or more [DWI] offenses . . . committed within a ten-year period shall be guilty of a Class 6 felony . . ."). Alabama felony DWI occurs upon the fourth and subsequent convictions. See Ala. Code § 32-5A-191(h) (1975) ("On a fourth or subsequent conviction, a person convicted of violating this section shall be guilty of a Class C felony . . ."). In North Dakota, the fifth and subsequent convictions constitute felony DWI. See N.D. Cent. Code § 39-08-01(2) (1997) ("A person violating this section or equivalent ordinance is guilty . . . of a class C felony for a fifth or subsequent offense in a seven-year period.").

9. *In re Arturo Puente-Salazar*, Interim Decision 3412 (BIA 1999). See *infra* Part I.C.3. for a discussion of the BIA's role in removal proceedings and the BIA's analysis of 18 U.S.C. § 16.

10. For a discussion of the courts holding that felony DWI is not a crime of violence, see *infra* Part II.A. For a discussion of the courts holding that felony DWI is a crime of violence, see *infra* Part II.B.

of 18 U.S.C. § 16(b) requires a crime of violence to involve a specific intent to use physical force.

The importance of resolving this issue is highlighted in Judge Rhesa Hawkins Barksdale's dissent to the denial of a petition for rehearing en banc of *United States v. Chapa-Garza*.<sup>11</sup> Judge Barksdale writes that the issue of whether felony DWI is a crime of violence is one "affecting hundreds if not thousands of aliens."<sup>12</sup> Judge Barksdale goes on to say that "[t]he attention this issue has recently received, the exacerbation of the circuit split since *Chapa-Garza* was rendered, and the action taken by the Board of Immigration Appeals (BIA) in response to *Chapa-Garza* highlight the importance of the issue."<sup>13</sup> The need to secure uniformity in the implementation of our country's immigration laws underscores the importance of resolving this issue.

This Note addresses the question of whether felony DWI constitutes a crime of violence by analyzing the definition of crime of violence under 18 U.S.C. § 16(b), evaluating congressional policies behind its immigration laws, and proposing an amendment to the immigration law's definition of crime of violence. Part I of this Note discusses Congress's broad power over immigration and the history of immigration law in the United States, focusing on provisions regarding removal. Part I also explains the categorical approach used by the BIA and the courts to determine whether an offense constitutes a crime of violence, and discusses the BIA's interpretation of 18 U.S.C. § 16(b). Part II examines the competing views of the circuit courts as to whether felony DWI is a crime of violence under 18 U.S.C. § 16. Specifically, Part II highlights the circuit courts' disagreement over whether the statutory language of 18 U.S.C. § 16(b) requires a crime of violence to involve specific intent to use physical force, thus excluding felony DWI because drunk driving does not involve such intent.

Finally, Part III argues, based on the language of the statute, that the BIA and Tenth Circuit correctly interpreted 18 U.S.C. § 16(b) to include felony DWI. Part III then suggests that congressional policies regarding removal further support a finding that felony DWI constitutes a removable offense. Part III concludes by urging the Legislature to amend § 1101(a)(43)(F) of the Immigration and

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11. 243 F.3d 921 (5th Cir. 2001). *Chapa-Garza* held that Texas felony DWI is not a crime of violence under 18 U.S.C. § 16(b). *Id.* at 928. See *United States v. Chapa-Garza*, 262 F.3d 479, 480 (5th Cir. 2001), for Judge Barksdale's dissent.

12. *Chapa-Garza*, 262 F.3d at 480 (Barksdale, J., dissenting).

13. *Id.* The BIA held in *In re Puente-Salazar* that felony DWI constitutes a crime of violence. Interim Decision 3412 at 14-15. In light of the *Chapa-Garza* decision, the BIA decided to no longer remove aliens convicted of felony DWI in the Fifth Circuit. See *In re Olivares-Martinez*, 23 I. & N. Dec. 148, 149-50 (BIA 2001) (stating that "[t]he Board historically follows a court's precedent in cases arising in that circuit"). Thus, the BIA will undoubtedly refrain from removing aliens convicted of felony DWI in the Second, Seventh, and Ninth Circuits as well.

Nationality Act. Rather than referring to the definition of crime of violence at 18 U.S.C. § 16, the Act should incorporate the language of section 4B1.2(a) of the U.S. Sentencing Guidelines, which defines the term “crime of violence” for career offenders.<sup>14</sup> Such an amendment would clarify the immigration law’s “crime of violence” definition to include reckless conduct that is particularly dangerous, such as repeated drinking and driving.

## I. BACKGROUND

### A. Congressional Power Over Immigration

The Constitution of the United States confers upon Congress broad power over immigration. Although the Constitution does not explicitly state Congress’s authority over immigration, the Supreme Court has held that such authority derives from Congress’s power to regulate commerce.<sup>15</sup> Other constitutional sources of federal power over immigration are the Naturalization Clause,<sup>16</sup> the Migration or Importation Clause,<sup>17</sup> and the War Powers Clause.<sup>18</sup> Congress’s power to control immigration is also implied from the inherent right of a sovereign to control its borders.<sup>19</sup>

The Supreme Court has consistently upheld Congress’s plenary powers over immigration, including power over the exclusion and deportation of aliens.<sup>20</sup> The Court has proclaimed that Congress’s

14. U.S. Sentencing Guidelines Manual § 4B1.2(a) (2001). See *infra* note 101 for the U.S. Sentencing Guideline’s definition of crime of violence.

15. The Commerce Clause authorizes Congress “[t]o regulate Commerce with foreign Nations, and among the several States.” U.S. Const. art. I, § 8, cl. 3; see, e.g., *Edye v. Robertson* (“Head Money Cases”), 112 U.S. 580, 591 (1884) (upholding federal tax on arriving aliens under the Commerce Clause); *Smith v. Turner* (“The Passenger Cases”), 48 U.S. (1 How.) 282 (1849) (holding that state statutes imposing a tax on immigrants arriving in the ports of the state are unconstitutional).

16. U.S. Const. art. I, § 8, cl. 4 (vesting in Congress the power “[t]o establish a uniform Rule of Naturalization”).

17. *Id.* § 9, cl. 1 (dealing with limiting migration and importation of “[s]uch Persons as any of the States now existing shall think proper to admit”).

18. *Id.* § 8, cl. 11 (granting Congress the power to declare war). This power gives Congress the authority to expel aliens from the U.S. and/or to prevent his or her entry. See *Ira J. Kurzban, Immigration Law Sourcebook* 19 (6th ed. 1998).

19. See *Harisiades v. Shaughnessy*, 342 U.S. 580, 587-88 (1952) (stating that the power to expel aliens is a power “inherent in every sovereign state”); *Fong Yue Ting v. United States*, 149 U.S. 698, 711 (1893) (holding that “[t]he right to exclude or to expel all aliens [is] . . . an inherent and inalienable right of every sovereign and independent nation”); *Chae Chan Ping v. United States* (“The Chinese Exclusion Case”), 130 U.S. 581, 609 (1889) (finding that the power to exclude foreigners is “an incident of sovereignty”).

20. See *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 210 (1953) (stating that congressional power to exclude or deport aliens is “largely immune from judicial control”); *Fong Yue Ting*, 149 U.S. at 713-14 (extending congressional power to both deportation and exclusion).

exclusive control over the formulation of immigration policies “has become about as firmly imbedded in the legislative and judicial tissues of our body politic as any aspect of our government.”<sup>21</sup> Thus, although issues concerning aliens within this country raise challenging policy questions, it is clear that Congress has broad and well-established authority to exclude or deport aliens for any reason that it deems necessary to protect this country’s best interest.<sup>22</sup>

### B. *The History of Removal Law in the United States*

Exercising its broad powers over immigration, Congress has, over the years, enacted numerous laws regarding the exclusion and deportation of aliens from the United States, resulting in a “complex scheme” of immigration law.<sup>23</sup> The following history of immigration law will focus on one of the most significant trends in immigration law and policy over the past decade: the growing emphasis on the swift removal of aliens with criminal convictions. Over the years, Congress has declared its hard-line position against criminal aliens by increasing the substantive grounds for removal while decreasing the available procedural remedies.

#### 1. Removal Law Before 1952

Apart from the short-lived Alien and Sedition Acts of 1798,<sup>24</sup> the first one hundred years of this nation’s existence was a period of unrestricted immigration.<sup>25</sup> The primary reasons for this open-door policy were the broad frontier and a developing nation’s need for labor.<sup>26</sup> The nation, however, soon became dissatisfied with the unimpeded flow of immigration. Thus, in 1875, Congress invoked its power over immigration and passed its first restrictive statute, barring

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

22. See Brent K. Newcomb, Comment, *Immigration Law and the Criminal Alien: A Comparison of Policies for Arbitrary Deportations of Legal Permanent Residents Convicted of Aggravated Felonies*, 51 Okla. L. Rev. 697, 702 (1998).

23. See *Plyler v. Doe*, 457 U.S. 202, 225 (1982) (“Drawing upon this power, upon its plenary authority with respect to foreign relations and international commerce, and upon the inherent power of a sovereign to close its borders, Congress has developed a complex scheme governing admission to our Nation and status within our borders.”). Courts have often noted that immigration law is one of the most complicated areas of United States law. See, e.g., *Lok v. INS*, 548 F.2d 37, 38 (2d Cir. 1977) (“We . . . note the striking resemblance between some of the laws we are called upon to interpret and King Minos’s labyrinth in ancient Crete. The Tax Laws and the Immigration and Nationality Acts are examples . . . of Congress’s ingenuity in passing statutes certain to accelerate the aging process of judges.”).

24. The 1798 Alien & Sedition Acts provided for the deportation of criminal aliens, but Congress either repealed them or allowed them to expire. Act of July 14, 1798, ch. 74, 1 Stat. 596 (expired Mar. 3, 1801); Act of June 25, 1798, ch. 58, 1 Stat. 570 (expired June 25, 1800); Act of June 18, 1798, ch. 54, 1 Stat. 566 (repealed 1802).

25. 1 Charles Gordon et al., *Immigration Law and Procedure* § 2.02[1] (1999).

26. *Id.*

the admission of convicts and prostitutes.<sup>27</sup> Over the years, the number of "quality control"<sup>28</sup> exclusions would grow to include, among others, lunatics, idiots, and those likely to become a "public charge."<sup>29</sup>

In 1882, Congress passed the nation's first racist immigration laws aimed at stemming the flood of immigrants from China.<sup>30</sup> The "Chinese Exclusion Acts" suspended all immigration of Chinese laborers for a period of ten years and forbade any United States court to admit Chinese residents to citizenship.<sup>31</sup>

As Congress began to impose restrictions on admission into the country, it also began to consider the need to remove those who had illegally entered the country.<sup>32</sup> Thus, at first, deportation statutes acted primarily as supplements to the exclusion laws.<sup>33</sup> For example, the March 3, 1891 Act made deportable "any alien who shall come into the United States in violation of law."<sup>34</sup> In 1907, however, Congress made deportable any alien who was a prostitute "at any time within three years after she shall have entered the United States."<sup>35</sup> Notably, this statute authorized for the first time the deportation of an alien based on her conduct after she had made a lawful entry.<sup>36</sup>

In 1917, Congress passed a comprehensive revision of the immigration laws, best known for its controversial literacy test.<sup>37</sup> The Quota Law of 1921, enacted as a temporary measure, was the first law that limited the number of immigrants permitted each year.<sup>38</sup>

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27. Act of March 3, 1875, ch. 141, § 5, 18 Stat. 477, 477-78; 1 Oscar M. Trelles II & James F. Bailey III, *Immigration and Nationality Acts: Legislative Histories and Related Documents* 335 (1979).

28. David Weissbrodt, *Immigration Law and Procedure in a Nutshell* 6 (3d ed. 1992).

29. Act of Aug. 3, 1882, ch. 376, § 2, 22 Stat. 214, 214.

30. Thomas Alexander Aleinikoff et al., *Immigration: Process and Policy* 2 (3d ed. 1995). In the "Chinese Exclusion Case," the Supreme Court upheld such legislation, stating: "That the government of the United States, through the action of the legislative department, can exclude aliens from its territory is a proposition which we do not think open to controversy." *Chae Chan Ping v. United States*, 130 U.S. 581, 603 (1889).

31. Chinese Exclusion Act of May 6, 1882, ch. 126, 22 Stat. 58 (repealed 1943). The Chinese exclusion laws were repealed in 1943, at which time the Chinese were made eligible for immigration and naturalization. Act of Dec. 17, 1943, ch. 344, 57 Stat. 600.

32. See Aleinikoff et al., *supra* note 30, at 511.

33. *Id.*

34. Act of Mar. 3, 1891, ch. 551, § 11, 26 Stat. 1084, 1086.

35. Act of Feb. 20, 1907, ch. 1134, § 3, 34 Stat. 898, 900.

36. Christina LaBrie, Note, *Lack of Uniformity in the Deportation of Criminal Aliens*, 25 N.Y.U. Rev. L. & Soc. Change 357, 359-60 (1999).

37. Act of Feb. 5, 1917, ch. 29, § 3, 39 Stat. 874, 877 (excluding all "aliens over sixteen years of age, physically capable of reading, who can not read the English language, or some other language or dialect"); Charles Gordon & Ellen Gittel Gordon, *Immigration and Nationality Law* § 1.1c (Student ed. 1979).

38. Act of May 19, 1921, ch. 8, § 2, 42 Stat. 5, 5-6 (expired June 30, 1922); Gordon & Gordon, *supra* note 37, § 1.1c.



Congress enacted a permanent policy of imposing numerical restrictions in 1924.<sup>39</sup> Until 1952, the immigration laws of 1917 and 1924 remained substantially unchanged.

## 2. The Immigration and Nationality Act of 1952

In 1952, Congress coordinated all of the existing immigration laws into one statute, the Immigration and Nationality Act of 1952 ("INA").<sup>40</sup> Originally, the INA established a preference system, favoring skilled workers and the relatives of United States citizens and permanent resident aliens, and a controversial national-origins quota system, imposing a 150,000-person ceiling on immigration from the Eastern Hemisphere.<sup>41</sup> Although Congress has amended the INA repeatedly since 1952, much of the 1952 Act remains as originally enacted and provides the foundation for immigration and nationality law in effect today.<sup>42</sup>

Along with its preference and quota systems, the INA also authorized the deportation of any alien convicted of a "crime involving moral turpitude."<sup>43</sup> Although the statute itself does not

39. Act of May 26, 1924, ch. 190, § 11, 43 Stat. 153, 159-60. The 1924 legislation adopted a formula that favored immigrants from countries that were already heavily represented in the United States. *See id.*; Gordon & Gordon, *supra* note 37, § 1.1c. Because few new immigrants were arriving from the preferred countries, the quota system significantly reduced the overall number of aliens entering the United States. *See* Austin T. Fragomen, Jr. & Steven C. Bell, *Immigration Fundamentals: A Guide to Law and Practice* 1-3 (3d ed. 1994).

40. Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 (codified as amended at 8 U.S.C. §§ 1101-1537 (2000)); Aleinikoff et al., *supra* note 30, at 56.

41. Aleinikoff et al., *supra* note 30, at 56-57.

42. Gordon & Gordon, *supra* note 37, § 1.2.

43. § 241, 66 Stat. at 204-08 (codified as amended at 8 U.S.C. § 1227(a)(2)(A)(i)). The term "moral turpitude" first appeared in the March 3, 1891 Act, which denied entry to aliens convicted of a "felony or other infamous crime or misdemeanor involving moral turpitude." Act of Mar. 3, 1891, ch. 551, § 1, 26 Stat. 1084, 1084; 1 Trelles & Bailey, *supra* note 27, at 350. Congress, however, did not define the term "moral turpitude" in the March 3, 1891 Act or the accompanying House or Senate reports. Aleinikoff et al., *supra* note 30, at 542.

The term "moral turpitude" also appeared in the Act of 1917. Act of Feb. 5, 1917, ch. 29, § 19, 39 Stat. 874, 889. Again, Congress generally remained silent as to what types of crimes constituted crimes of moral turpitude. Aleinikoff et al., *supra* note 30, at 543. Apparently, Congress believed that the term had "acquired a commonly known meaning over time and were content to let continuing interpretation by immigration officials and judges control." *Id.*

Although it remained largely undefined, the 1952 Act adopted the term "moral turpitude" as a grounds for removal. *Id.* at 543-44. As in the past, Congress failed to discuss the meaning of the term. *Id.* at 544. In sum, the legislative history reveals that Congress never attempted to define the meaning of "moral turpitude." *Id.* The lack of a clear definition suggests that "[t]he phrase had ancient lineage and application outside the immigration laws when it was included in the statute. No doubt, Congress assumed that its meaning in other areas would be imported into the 1891 immigration law." *Id.* (citations omitted).

define moral turpitude,<sup>44</sup> moral turpitude generally refers to conduct that “shocks the public conscience as being inherently base, vile, or depraved, and contrary to the accepted rules of morality and the duties owed between persons or to society in general.”<sup>45</sup> Courts have interpreted “crime of moral turpitude” to include fraud, murder, kidnapping, rape, prostitution, burglary, theft, and arson.<sup>46</sup> This provision applies if the alien commits a crime of moral turpitude within five years of entry and is either sentenced to confinement or actually confined for a year or more.<sup>47</sup> An alien is also deportable if he or she commits two unrelated crimes of moral turpitude at any time after admission.<sup>48</sup>

### 3. Significant Amendments to the INA Since 1952

Since 1952, Congress has enacted several significant amendments to the INA. Characterized by a get-tough attitude toward criminal aliens, these amendments have both expanded the substantive grounds for removal and decreased the procedural remedies available to criminal aliens.

#### a. *The Expansion of Removable Crimes*

The problem of criminal aliens recaptured Congress’s attention in the 1980s when immigration levels began to rise,<sup>49</sup> along with an increase in reported criminal-alien activity.<sup>50</sup> Not coincidentally, the percentage of aliens in the prison population rose as well.<sup>51</sup> Congress recognized the seriousness of the criminal-alien problem and the need to impose stiffer penalties.<sup>52</sup> Thereafter, Congress dramatically increased the types of removable crimes through a number of significant amendments to the INA. Although crimes of moral turpitude continued to constitute grounds for removal, the types of

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44. 8 U.S.C. § 1227(a)(2)(A)(i).

45. *Hamdan v. INS*, 98 F.3d 183, 186 (5th Cir. 1996) (citing *In re Franklin*, 20 I. & N. Dec. 867, 868 (BIA 1994)).

46. Franco Capriotti et al., *Small-Time Crime Big-Time Trouble: The New Immigration Laws*, 13 *Crim. Just.* 4, 5 (1998).

47. § 1227(a)(2)(A)(i).

48. *Id.* (a)(2)(A)(ii).

49. From 1981 to 1990, immigration rose sixty-one percent above the period from 1971 to 1980, with a total of 7,338,062 people entering the United States. Craig H. Feldman, Note, *The Immigration Act of 1990: Congress Continues to Aggravate the Criminal Alien*, 17 *Seton Hall Legis. J.* 201, 209 n.47 (1993). During the 1980s, the number of immigrants entering the United States nearly matched the number that had entered over the previous twenty years. *Id.* In 1990, 1,536,483 immigrants entered the United States, which, at the time, was the highest in any one year. *Id.*

50. *Id.* at 209.

51. *Id.* at 210.

52. *Id.*

removable offenses would come to include an even broader range of conduct.

Congress began its campaign to combat the criminal-alien problem in 1988 by passing the Anti-Drug Abuse Act ("ADAA").<sup>53</sup> The ADAA broadened the types of removable offenses by introducing the aggravated felony,<sup>54</sup> which would constitute a completely separate basis for deportability.<sup>55</sup>

The ADAA defined aggravated felony as "murder, any drug trafficking crime . . . or any illicit trafficking in any firearms or destructive devices . . . or any attempt or conspiracy to commit any such act, committed within the United States."<sup>56</sup> Unlike crimes involving moral turpitude, aggravated felonies need not be committed within five years after entry into the United States.<sup>57</sup> With the creation of this new category of removable crimes, Congress evinced a clear determination to expel from the United States a broader class of criminal aliens.<sup>58</sup>

In the years following the ADAA, Congress rapidly expanded the list of crimes that constitute an aggravated felony. In the Immigration Act of 1990<sup>59</sup> ("1990 Act"), Congress expanded the "aggravated felony" definition to include any illicit trafficking in any controlled substance and money laundering, as long as the sentence was five years or more.<sup>60</sup> The 1990 Act also added "any crime of violence (as defined in [18 U.S.C. § 16] . . . ) for which the term of imprisonment imposed (regardless of any suspension of such imprisonment) is at least 5 years."<sup>61</sup> A crime of violence is any "offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or . . . involves a substantial

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53. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181 (codified as amended in scattered sections of 8 U.S.C.).

54. Anti-Drug Abuse Act § 7342, 102 Stat. at 4469-70 (codified at 8 U.S.C. § 1101(a)(43) (2000)).

55. Feldman, *supra* note 49, at 206.

56. § 7342, 102 Stat. at 4469-70 (codified at 8 U.S.C. § 1101(a)(43)).

57. See 8 U.S.C. § 1227(a)(2)(A)(iii).

58. See, e.g., 136 Cong. Rec. S17741 (Oct. 27, 1990) (statement of Sen. Graham) ("The aggravated felony aliens' provisions in the 1988 act were important steps toward solving a major problem faced by Federal and State criminal justice systems—the problem of how to expeditiously remove from our streets those aliens who are convicted of murder, or trafficking in drugs or weapons.").

59. Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (codified as amended in scattered sections of 8 U.S.C.).

60. *Immigration Act of 1990* § 501(a)(2)-(3), 104 Stat. at 5048 (codified at 8 U.S.C. § 1101(a)(43)).

61. § 501(a)(3), 104 Stat. at 5048 (codified as amended at 8 U.S.C. § 1101(a)(43)(F)). Congress later made the 1990 Act retroactive so that convictions need not occur after the enactment of the 1990 Act for it to apply to deportation hearings. See *Miscellaneous and Technical Immigration and Naturalization Amendments of 1991*, Pub. L. No. 102-232, § 306(a)(13), 105 Stat. 1733, 1752 (codified at 8 U.S.C. § 1101(a)(43)).

risk that physical force . . . may be used in the course of committing the offense."<sup>62</sup>

The Immigration and Nationality Technical Corrections Act of 1994 added a broad range of federal and state crimes to the growing list of removable crimes.<sup>63</sup> Then, in the most recent and, arguably, the most substantial expansion of the aggravated felony definition, Congress passed the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA")<sup>64</sup> and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA").<sup>65</sup> Both the AEDPA and the IIRIRA greatly increased the number of aliens whose criminal convictions make them removable.<sup>66</sup> Significantly, the IIRIRA reduced the sentence requirement from a five-year minimum to a one-year minimum for crimes added by the AEDPA as well as for crimes of violence, theft, receipt of stolen property, burglary, RICO violations, alien smuggling, and document fraud.<sup>67</sup> The IIRIRA also made its provisions retroactive.<sup>68</sup>

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62. 18 U.S.C. § 16 (2000).

63. Immigration and Nationality Technical Corrections Act of 1994, Pub. L. No. 103-416, § 222, 108 Stat. 4305, 4320-22 (codified at 8 U.S.C. § 1101(a)(43)). The 1994 Act made the following crimes aggravated felonies: the illicit trafficking in firearms or explosives, theft and burglary offenses for which the sentence is at least five years, receipt of stolen property, kidnapping for ransom, child pornography, Racketeer Influenced and Corrupt Organizations Act ("RICO") violations with a five-year sentence, running a prostitution business, espionage, treason, fraud or tax evasion in amounts over \$200,000, alien smuggling, certain document fraud, and failure to surrender for a prison sentence of fifteen years or more. *Id.*

64. Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214 (relevant portions codified as amended in scattered sections of 8 U.S.C.). The AEDPA was enacted in response to the 1995 Oklahoma City bombing as an effort to deter and punish terrorism. Terry Coonan, *Dolphins Caught in Congressional Fishnets—Immigration Law's New Aggravated Felons*, 12 Geo. Immigr. L.J. 589, 600 (1998). Although President Clinton opined that the bill "made a number of major, ill-advised changes in our immigration laws having nothing to do with fighting terrorism," he signed the bill into law on April 24, 1996. *Id.*

65. Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, div. C, 110 Stat. 3009-546 (relevant portions codified as amended in scattered sections of 8 and 18 U.S.C.). Congress passed the IIRIRA six months after the AEDPA, devoting an entire bill to immigration and implementing significant amendments to the INA. Coonan, *supra* note 64, at 601-05.

66. With the AEDPA, Congress added the following offenses to the definition of aggravated felony: commercial bribery, counterfeiting, forgery, certain kinds of stolen vehicle trafficking, obstruction of justice, perjury, bribery of a witness, a second conviction involving gambling offenses, transportation for prostitution, failure to appear before a court to answer to a felony charge, and illegal re-entry if an alien already has a conviction for an aggravated felony. AEDPA § 440(e), 110 Stat. at 1277-78 (codified at 8 U.S.C. § 1101(a)(43)). The IIRIRA added rape and sexual abuse of a minor to the definition of aggravated felony. IIRIRA § 321(a)(1), 110 Stat. at 3009-3627 (codified at 8 U.S.C. § 1101(a)(43)(A)).

67. § 321(a)(4), 110 Stat. at 3009-627 (codified at 8 U.S.C. § 1101(a)(43)).

68. § 321(b), 110 Stat. at 3009-3628 (codified at 8 U.S.C. § 1101(a)(43)).

b. *The Decreased Availability of Procedural Remedies*

Beginning with the Anti-Drug Abuse Act of 1988, in addition to expanding the grounds for removal, the amendments to the INA also decreased the procedural remedies available to criminal aliens, particularly aggravated felons. The ADAA established expedited deportation procedures for aliens with aggravated felony convictions, requiring that the proceedings be completed before the alien is released from incarceration for the underlying crime.<sup>69</sup> This provision authorized the government to deport aggravated felons immediately after their release from prison.<sup>70</sup> The ADAA also required that the Attorney General detain aggravated felons during the period following release from incarceration until the conclusion of the deportation hearing.<sup>71</sup> Other provisions included the elimination of voluntary departure for aggravated felons,<sup>72</sup> the creation of a presumption of deportability,<sup>73</sup> and the reduction of the time period in which an aggravated felon may appeal a removal order from six months to sixty days.<sup>74</sup> Finally, the ADAA prohibited a deported aggravated felon from reapplying for admission to the United States for a period of ten years.<sup>75</sup>

The 1990 Act further decreased the procedural remedies available to aliens convicted of aggravated felonies. Before the 1990 Act, a waiver of exclusion or deportation was available to legal permanent residents if they had a "lawful unrelinquished domicile of seven consecutive years" in the United States.<sup>76</sup> The 1990 Act, however, limited the discretionary waiver, making it unavailable to legal permanent residents who were convicted of an aggravated felony and had served a sentence of at least five years.<sup>77</sup> The 1990 Act also reduced the time period for filing a petition of review of a final deportation order from sixty days to thirty days<sup>78</sup> and further increased the period of inadmissibility for deported aggravated felons from ten years to twenty years.<sup>79</sup> And, for the first time, Congress

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69. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7347, 102 Stat. 4181, 4471-72 (codified as amended at 8 U.S.C. § 1228(a)(3)).

70. Feldman, *supra* note 49, at 207.

71. Anti-Drug Abuse Act § 7343(a), 102 Stat. at 4470 (codified as amended at 8 U.S.C. § 1226(c)(1)).

72. § 7343(b), 102 Stat. at 4470 (codified as amended at 8 U.S.C. § 1229c(a)(1)).

73. § 7347(c), 102 Stat. at 4472 (codified as amended at 8 U.S.C. § 1228(c)).

74. § 7347(b), 102 Stat. at 4472 (codified as amended at 8 U.S.C. § 1252(b)(1)); *see also infra* text accompanying note 78.

75. § 7349, 102 Stat. at 4473 (codified as amended at 8 U.S.C. § 1182(a)(9)(A)(ii)); *see also infra* text accompanying notes 79, 86.

76. Immigration and Nationality Act of 1952, Pub. L. No. 82-414, § 212(c), 66 Stat. 163, 187.

77. Immigration Act of 1990, Pub. L. No. 101-649, § 511(a), 104 Stat. 4978, 5052.

78. § 502(a), 104 Stat. at 5048 (codified at 8 U.S.C. § 1252(b)(1)).

79. § 514, 104 Stat. at 5053 (codified as amended at 8 U.S.C. § 1182(a)(9)).

explicitly barred an alien convicted of an aggravated felony from applying for either asylum or withholding of deportation.<sup>80</sup>

Congress continued to limit the procedural remedies available to criminal aliens with the AEDPA and the IIRIRA.

Before 1996, a lawful permanent resident could apply for discretionary relief from removal, even if his removal was based on criminal grounds, including aggravated felonies, if the sentence served was less than five years.<sup>81</sup> The AEDPA, however, specifically disallowed discretionary relief for aggravated felons,<sup>82</sup> and then, the IIRIRA completely repealed such relief and replaced it with "cancellation of removal."<sup>83</sup> This new procedure bars cancellation of removal for all aggravated felons, regardless of the length of their residence in the United States, the hardship to remaining family members, and whether the aliens will face persecution in their country of origin.<sup>84</sup> The IIRIRA also removed from all courts the jurisdiction to review any final order of removal against an alien deportable as an aggravated felon.<sup>85</sup> Finally, aliens who have been removed on the basis of an aggravated felony are now permanently barred from the United States.<sup>86</sup>

### C. Felony DWI As a Crime of Violence

As discussed previously, through a number of significant amendments to the Immigration and Nationality Act of 1952, Congress greatly expanded the substantive grounds for removal. For the purposes of this Note, the most significant addition to the

80. § 515, 104 Stat. at 5053 (codified at 8 U.S.C. § 1158(b)) (rendering aggravated felons ineligible for asylum and withholding of deportation because they had committed a "particularly serious crime" and were a danger to the community).

81. Bruce Robert Marley, Comment, *Exiling the New Felons: The Consequences of the Retroactive Application of Aggravated Felony Convictions to Lawful Permanent Residents*, 35 San Diego L. Rev. 855, 874 & n.97 (1998).

82. AEDPA, Pub. L. No. 104-132, § 440(d), 110 Stat. 1214, 1277.

83. IIRIRA, Pub. L. No. 104-208, div. C, § 304, 110 Stat. 3009, 3009-594 (codified at 8 U.S.C. § 1229b). A legal permanent resident qualifies for cancellation if he or she has been present in the United States for seven years, was a legal permanent resident for at least five of those years, and has not been convicted of an aggravated felony. 8 U.S.C. § 1229b(a). Other aliens qualify for cancellation if they have been physically and continuously present in the United States for a period of at least ten years, have been persons of good moral character during that time, have not been convicted of certain criminal offenses, and can establish that removal would result in "exceptional and extremely unusual hardship" to an immediate relative. 8 U.S.C. § 1220b(b).

84. 8 U.S.C. § 1229b(a)(3).

85. IIRIRA, § 306, 110 Stat. at 3009-607 (codified at 8 U.S.C. § 1252(a)(2)(C)).

86. 8 U.S.C. § 1182(a)(9)(A)(ii). If an aggravated felon re-enters after deportation, the government can prosecute him or her under 8 U.S.C. § 1326(b)(2) for the crime of re-entry. See generally James P. Fleissner & James A. Shapiro, *Federal Sentences for Aliens Convicted of Illegal Reentry Following Deportation: Who Needs the Aggravation?*, 9 Geo. Immigr. L.J. 451 (1995) (examining the law governing the re-entry of deported aliens, and arguing that Congress's approach to changing the law has been "unprincipled").

subcategories of crimes that constitute a deportable aggravated felony is a “crime of violence,” as defined at 18 U.S.C. § 16.<sup>87</sup>

Before addressing the circuit split over whether felony DWI constitutes a crime of violence under 18 U.S.C. § 16(b),<sup>88</sup> the following sections discuss: the statutory background of the “crime of violence” definition; the categorical approach used by the courts and the Board of Immigration Appeals to determine whether an offense constitutes a crime of violence; and the BIA’s interpretation of 18 U.S.C. § 16(b).

### 1. Statutory Background

Under current immigration laws, an alien who is convicted of a crime of violence, with at least a one-year sentence imposed, is considered an aggravated felon subject to removal.<sup>89</sup> A crime of violence is defined in 8 U.S.C. § 1101(a)(43)(F) by reference to another federal statute, 18 U.S.C. § 16.<sup>90</sup> 18 U.S.C. § 16 defines a crime of violence as:

(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(b) 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>91</sup>

Offenses that the courts have held to be crimes of violence under 18 U.S.C. § 16, and thereby, removable offenses, include burglary of a habitation,<sup>92</sup> unauthorized use of a motor vehicle,<sup>93</sup> involuntary manslaughter,<sup>94</sup> assisting or instigating escape or attempted escape of a prisoner,<sup>95</sup> and indecency with a child involving sexual contact.<sup>96</sup>

Although relatively new to the INA, the term “crime of violence” is used throughout the United States Code. For Title 18, 18 U.S.C. § 16 serves as the general definition of crime of violence.<sup>97</sup> In addition, 18

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87. 8 U.S.C. § 1101(a)(43)(F).

88. *See infra* Part II.

89. 8 U.S.C. § 1101(a)(43)(F).

90. *Id.*

91. 18 U.S.C. § 16 (2000).

92. *E.g.*, *United States v. Guadardo*, 40 F.3d 102 (5th Cir. 1994).

93. *E.g.*, *United States v. Galvan-Rodriguez*, 169 F.3d 217 (5th Cir. 1999).

94. *E.g.*, *Park v. INS*, 252 F.3d 1018 (9th Cir. 2001).

95. *E.g.*, *United States v. Aragon*, 983 F.2d 1306 (4th Cir. 1993).

96. *E.g.*, *United States v. Velazquez-Overa*, 100 F.3d 418 (5th Cir. 1996).

97. *See, e.g.*, 18 U.S.C. § 929(a)(1)(2000) (punishing the use of restricted ammunition during the commission of a crime of violence); 18 U.S.C. § 1952(a)(2) (forbidding the use of interstate travel, commerce, or mail with intent to commit a crime of violence); 18 U.S.C. § 1959(a)(4) (punishing attempts or conspiracies to commit a crime of violence in aid of any racketeering activity).

U.S.C. §§ 924(c)(3) and 3156(a)(4) contain separate definitions of crime of violence, which are virtually identical to that at 18 U.S.C. § 16.<sup>98</sup> Prior to 1989, the United States Sentencing Guidelines defined the term “crime of violence” for career offenders at section 4B1.2 by incorporating the definition at 18 U.S.C. § 16,<sup>99</sup> just as is currently done in § 1101(a)(43)(F) of the INA.<sup>100</sup> However, effective November 1, 1989, the sentencing guidelines amended section 4B1.2 by dropping reference to 18 U.S.C. § 16 and defining a crime of violence, in part, as an offense that “involves conduct that presents a serious potential risk of physical injury to another.”<sup>101</sup> As discussed later in Part III.C, the courts have consistently interpreted the “crime of violence” definition under the sentencing guidelines to include certain reckless conduct, including drunk-driving offenses.<sup>102</sup>

## 2. The Categorical Approach to Analyzing Crimes of Violence Under 18 U.S.C. § 16(b)

Although the circuits disagree on the question of whether felony DWI is a crime of violence, the courts agree that the phrase “by its nature” in 18 U.S.C. § 16(b) compels the courts to use a categorical approach, rather than an examination of the underlying facts of the conviction, to determine whether an offense constitutes a crime of violence.<sup>103</sup>

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98. 18 U.S.C. §§ 924(c)(3), 3156(a)(4). The differences between these statutes and 18 U.S.C. § 16 are minimal, involving minor discrepancies in punctuation, and have no real effect on the meaning of the statutes.

99. See U.S. Sentencing Guidelines Manual app. C, at 106-07 (1997). A defendant is a career offender if:

- (1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction, (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense, and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.

U.S. Sentencing Guidelines Manual § 4B1.1 (2001).

100. 8 U.S.C. § 1101(a)(43)(F) (2000).

101. U.S. Sentencing Guidelines Manual app. C, 106-07 (1997). U.S. Sentencing Guidelines section 4B1.2 provides in full:

- (a) The term “crime of violence” means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that—
  - (1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or
  - (2) is burglary of a dwelling, arson, or extortion, involves the use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

U.S. Sentencing Guidelines Manual § 4B1.2 (2001).

102. See *infra* Part III.C.

103. See *Dalton v. Ashcroft*, 257 F.3d 200, 204 (2d Cir. 2001) (stating that the language of the statute requires a categorical approach focused on the “intrinsic nature of the offense rather than on the factual circumstances surrounding any particular violation”); *Bazan-Reyes v. INS*, 256 F.3d 600, 606 (7th Cir. 2001) (stating that the court would employ a categorical approach to determine whether certain



Under this approach, the court need only determine whether the generic elements of the offense underlying the conviction constitute a crime of violence.<sup>104</sup> “If a crime by its nature presents a substantial risk that force will be used against the property [or person] of another, then it falls within the ambit of § 16(b) whether [or not] such force was actually used in the crime.”<sup>105</sup> In an all-or-nothing categorical analysis, if the definition of an offense found in a particular statute covers both conduct that constitutes a crime of violence and conduct that does not, a court will not deem a conviction under the statute a crime of violence.<sup>106</sup> In such situations, the court will use a “modified categorical approach” and examine the charging paper and judgment of conviction to assess whether or not the *actual* offense underlying the defendant’s conviction constitutes a crime of violence.<sup>107</sup> The court, however, will not consider the particular facts surrounding the conviction.<sup>108</sup> The BIA also applies a categorical approach in analyzing whether a conviction constitutes a crime of violence under 18 U.S.C. § 16(b), requiring an examination of the generic elements of the crime, rather than the specific facts of the case, to determine whether a crime involves a substantial risk that physical force may be used.<sup>109</sup>

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conduct constitutes a crime of violence); *United States v. Velazquez-Overa*, 100 F.3d 418, 421 (5th Cir. 1996) (“A sentencing court need only consider the fact that [the defendant] was convicted and the inherent nature of the offense.”); *United States v. Reyes-Castro*, 13 F.3d 377, 379 (10th Cir. 1993) (noting that “a court must only look to the statutory definition, not the underlying circumstances of the crime,” in deciding whether an offense is “by its nature” a crime of violence under 18 U.S.C. § 16(b)); *United States v. Rodriguez*, 979 F.2d 138, 140-41 (8th Cir. 1992) (explaining that “a sentencing court is not required to consider the underlying circumstances” of the crime).

104. *Bazan-Reyes*, 256 F.3d at 606.

105. *United States v. Rodriguez-Guzman*, 56 F.3d 18, 21 n.14 (5th Cir. 1995).

106. *See Xiong v. INS*, 173 F.3d 601, 605 (7th Cir. 1999). For example, the Ninth Circuit held that the crime of vehicle burglary under section 459 of the California Penal Code is not a crime of violence, because section 459 “does not require an unprivileged or unlawful entry into the vehicle, [and] a person can commit vehicle burglary by borrowing the keys of another person’s car and then stealing the car radio once inside.” *Sareang Ye v. INS*, 214 F.3d 1128, 1134 (9th Cir. 2000) (citation omitted).

107. *See Sareang Ye*, 214 F.3d at 1133 (citing *United States v. Parker*, 5 F.3d 1322, 1327 (9th Cir. 1993)).

108. *Id.*

109. *In re Alcantar*, 20 I. & N. Dec. 801, 809-13 (BIA 1994).

### 3. The Board of Immigration Appeals' Interpretation of 18 U.S.C. § 16(b)

#### a. *Administrative Structure*

While Congress uses its constitutional power to create and establish immigration law, the Department of Justice ("DOJ") and Department of State have the power and burden of administering and enforcing these laws.<sup>110</sup> Specifically, Congress vests nearly all of the authority to administer and enforce the immigration laws in the Attorney General, who delegates most of these responsibilities to other officials within the DOJ, particularly the Immigration and Naturalization Service ("INS") and the Executive Office for Immigration Review ("EOIR").<sup>111</sup>

The INS handles much of the day-to-day duties of immigration, such as processing visa petitions and adjustments of status and patrolling the border.<sup>112</sup> The EOIR consists of the immigration judges and the Board of Immigration Appeals.<sup>113</sup> The immigration judges conduct removal hearings,<sup>114</sup> and the immigration judges' decisions are automatically appealable to the BIA.<sup>115</sup> The BIA is an administrative body that is distinct and independent from the INS and directly accountable to the Attorney General.<sup>116</sup> Upon exhaustion of all administrative remedies,<sup>117</sup> judicial review of removal determinations is available in some cases,<sup>118</sup> either before a United States district court or a United States court of appeals.<sup>119</sup>

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110. 1 Gordon et al., *supra* note 25, § 3.01[1].

111. 8 U.S.C. § 1103(a) (2000). ("The Attorney General shall be charged with the administration and enforcement of this chapter and all other laws relating to the immigration and naturalization of aliens . . ."); *see also* 1 Gordon et al., *supra* note 25, § 3.01[1] ("The major enforcement responsibilities under the immigration laws are assigned to the Attorney General.").

112. Aleinikoff et al., *supra* note 30, at 103-04.

113. *See id.* at 112.

114. Before 1996, the INS removed aliens to their home countries through exclusion or deportation hearings, depending on whether the alien had made an entry into the United States. *See* Richard D. Steel, *Steel on Immigration Law* § 14.01 (2d ed. 2000). The IIRIRA replaced these hearings with one removal hearing. Pub. L. No. 104-208, div. C, § 304, 110 Stat. 3009, 3009-587 (1996). Although there is one consolidated hearing, an alien who has not been admitted to the United States has the burden to prove admissibility "beyond doubt," *see* 5 Gordon et al., *supra* note 25, § 64.03[2][b], while the government must prove deportability by "clear and convincing evidence," *id.* § 64.03[2][e].

115. 8 C.F.R. § 3.1(b)(2) (2001).

116. Aleinikoff et al., *supra* note 30, at 112.

117. Steel, *supra* note 114, § 14.23.

118. Several categories of aliens, including aggravated felons, no longer have a statutory right to seek judicial review of their removal orders. 8 U.S.C. § 1252(a)(2)(C) (2000). However, the courts have noted that, although the statute may bar them from reviewing final orders of removal against any alien based on an aggravated felony, the courts retain jurisdiction to review the threshold question of

b. *In re Puente-Salazar: Felony DWI Is a Crime of Violence*

In September 1999, the Board of Immigration Appeals rendered the decision that led to the recent string of circuit court cases addressing the issue of whether felony DWI constitutes a crime of violence. In *In re Puente-Salazar*,<sup>120</sup> Puente-Salazar, a native and citizen of Mexico, sought review of an immigration judge's decision finding him removable as a result of his conviction for Texas felony DWI.<sup>121</sup> Upon appeal, the BIA agreed with the immigration judge, holding that Puente-Salazar's conviction constituted a crime of violence under 18 U.S.C. § 16(b),<sup>122</sup> and therefore, a removable aggravated felony.<sup>123</sup>

The BIA began its analysis by noting that it would apply the categorical approach to determine whether felony DWI constitutes a crime of violence under § 16(b).<sup>124</sup> Thus, the offense must be a felony that, by its inherent nature, would involve a risk that physical force would be used against the person or property of another, regardless of whether the risk develops or the harm actually occurs.<sup>125</sup>

Then, relying on its own precedent, the BIA rejected the respondent's main argument that the physical force described in the statute must be accompanied by a specific intent to use such force.<sup>126</sup> In *In re Alcantar*, the BIA had held that § 16(b) is not limited to crimes of specific intent, but is broad enough to include reckless conduct.<sup>127</sup> Also, in *In re Magallanes-Garcia*, the BIA interpreted 18 U.S.C. § 16(b) to include drunk-driving offenses, based on evidence that drunk driving is inherently reckless.<sup>128</sup> The BIA also noted that

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whether the alien's underlying conviction constitutes an aggravated felony. *Dalton v. Ashcroft*, 257 F.3d 200, 203 (2d Cir. 2001); *Bazan-Reyes v. INS*, 256 F.3d 600, 604 (7th Cir. 2001). For further information on the judicial review of removal orders, see Peter R. Hill, *Did Congress Eliminate All Judicial Review of Orders of Deportation, Exclusion, and Removal for Criminal Aliens?*, 2 *Bender's Immigr. Bull.* 345 (May 15, 1997).

119. *Fragomen & Bell*, *supra* note 39, at 8-2.

120. Interim Decision 3412 (BIA 1999).

121. *Id.* at 2-3. The Texas DWI statute renders a misdemeanor DWI offense a felony in the third degree upon two prior convictions. *Tex. Penal Code Ann.* § 49.09(b) (Vernon 1974 & Supp. III 2000).

122. Both parties agreed that 18 U.S.C. § 16(a) was inapplicable because the Texas DWI statute did not include "as an element the use, attempted use, or threatened use of physical force against the person or property of another." *Puente-Salazar*, Interim Decision 3412, at 8 (quoting 18 U.S.C. § 16(a) (2000)).

123. *Id.* at 14-15.

124. *Id.* at 9.

125. *Id.*

126. *Id.* at 12.

127. *In re Alcantar*, 20 I.&N. Dec. 801, 813 (BIA 1994) (finding involuntary manslaughter to be a crime of violence under 18 U.S.C. § 16(b), because "18 U.S.C. § 16(b) does not require specific intent to do violence. It includes at a minimum reckless behavior . . .").

128. *In re Magallanes-Garcia*, Interim Decision 3341, at 6 (BIA 1998). *Magallanes-*

the respondent's argument failed to recognize the significant difference between the term "use" in § 16(a) and the phrase "may be used" in § 16(b).<sup>129</sup> The BIA pointed out that § 16(a) focuses on the statutory elements of the offense, while § 16(b) focuses on the nature of the crime,<sup>130</sup> and that deriving a specific-intent requirement from the language of § 16(b) is an unreasonable inference.<sup>131</sup> The BIA concluded that the nature of the crime of operating a motor vehicle in a public place while intoxicated involves a substantial risk that physical force may be applied.<sup>132</sup>

Since *Puente-Salazar*, the BIA consistently has affirmed alien removal orders based on felony DWI convictions, and aliens have appealed these orders to the federal circuit courts.<sup>133</sup>

## II. THE CIRCUIT COURTS' DISAGREEMENT OVER WHETHER FELONY DWI IS A CRIME OF VIOLENCE UNDER 18 U.S.C. § 16(b)

This section presents the circuit courts' disagreement over whether a felony DWI conviction is a crime of violence under 18 U.S.C. § 16(b), and therefore, a deportable aggravated felony under 8 U.S.C. § 1101(a)(43)(F). The controversy centers around whether the language of 18 U.S.C. § 16(b) requires specific intent to use physical force. The Second, Fifth, and Seventh Circuits held that felony DWI is not a crime of violence because the statutory language requires an intentional use of physical force, and drunk driving does not involve such intent.<sup>134</sup> The Ninth Circuit also held that felony DWI is not a crime of violence, basing its decision on other reasons.<sup>135</sup> The circuit split was created by the Tenth Circuit's contrary holding that felony DWI is a crime of violence because the "generic elements of the offense present 'a substantial risk that physical force . . . may be used.'"<sup>136</sup>

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Garcia was convicted of driving under the influence in violation of Arizona's drunk-driving statute. *Id.* at 2-3. After discussing the magnitude of the drunk-driving problem and the potential harm inherent in drunk driving, the BIA concluded that driving under the influence has an "enormous potential to result in harm" and held the offense to be a crime of violence. *Id.* at 6. Thus, the BIA again interpreted 18 U.S.C. § 16(b) to include particularly dangerous reckless conduct. *Id.*

129. *Puente-Salazar*, Interim Decision 3412, at 12.

130. *Id.*

131. *Id.*

132. *Id.*

133. See e.g., *Montiel-Barraza v. INS*, 275 F.3d 1178 (9th Cir. 2002); *Dalton v. Ashcroft*, 257 F.3d 200, 203 (2d Cir. 2001); *Bazan-Reyes v. INS*, 256 F.3d 600, 602 (7th Cir. 2001); *Tapia Garcia v. INS*, 237 F.3d 1216, 1217 (10th Cir. 2001).

134. *Dalton*, 257 F.3d at 207-08; *Bazan-Reyes*, 256 F.3d at 612; *United States v. Chapa-Garza*, 243 F.3d 921, 928 (5th Cir. 2001).

135. *Montiel-Barraza*, 275 F.3d at 1180; see *infra* Part II.A.4.

136. *Tapia Garcia*, 237 F.3d at 1223.

## A. Circuits Holding That Felony DWI Is Not a Crime of Violence

1. The Fifth Circuit: *United States v. Chapa-Garza*

The Fifth Circuit addressed the issue of whether felony DWI constitutes a crime of violence in *United States v. Chapa-Garza*.<sup>137</sup> In *Chapa-Garza*, five defendants were convicted in the Western District of Texas for unlawfully returning to the United States after being removed.<sup>138</sup> The defendants had been subject to removal based on their felony DWI convictions.<sup>139</sup> Upon the defendants' appeals, the Fifth Circuit held that Texas felony DWI is not a crime of violence, and therefore, not an aggravated felony.<sup>140</sup> Central to its holding was that the language of § 16(b) requires an intentional use of force to effectuate the crime.<sup>141</sup>

*Chapa-Garza* began by distinguishing the definition of crime of violence in § 16(b), which applies to the sentencing of aliens, from the definition found in section 4B1.2 of the U.S. Sentencing Guidelines,<sup>142</sup> which applies to career offenders.<sup>143</sup> The government had urged the court to find that any offense that creates a substantial risk of harm, whether intentional or accidental, is a crime of violence.<sup>144</sup> The *Chapa-Garza* court rejected the government's argument, because such an interpretation would mean that § 16(b) and section 4B1.2(a)(2) are construed the same way—a construction the court flatly rejected.<sup>145</sup>

In comparing § 16(b) and section 4B1.2(a)(2), the court found that section 4B1.2(a)(2)'s "otherwise" clause contains broader language

137. 243 F.3d 921 (5th Cir. 2001). *Chapa-Garza* was not the first time the Fifth Circuit addressed the issue. In *Camacho-Marroquin v. INS*, the Fifth Circuit held that Texas felony DWI is a crime of violence. 188 F.3d 649, 652 (5th Cir. 1999), *withdrawn*, 222 F.3d 1040, 1040 (5th Cir. 2000). The Fifth Circuit based its decision on the substantial risk that drunk driving will result in the use of force. *Id.* To support this holding, the court cited statistics on the number of deaths and injuries and the cost in property damage caused by drunk drivers annually. *Id.* However, the defendant in *Camacho-Marroquin* moved to withdraw his petition for rehearing en banc, so the INS could deport him in lieu of incarceration. As a result, the Fifth Circuit withdrew its opinion. *Camacho-Marroquin*, 222 F.3d at 1040.

138. *Chapa-Garza*, 243 F.3d at 923.

139. *Id.* The Texas DWI statute provides in relevant part: "If it is shown . . . that the person has previously been convicted two times of an offense relating to the operating of a motor vehicle while intoxicated . . . the offense is a felony of the third degree." Tex. Penal Code Ann. § 49.09(b) (Vernon 1974 & Supp. III 2000).

140. *Chapa-Garza*, 243 F.3d at 928. Although the *Camacho-Marroquin* decision had been withdrawn, the Fifth Circuit did not address why the court was, in essence, "reversing" its holding in *Camacho-Marroquin*. *See id.* at 924.

141. *Id.* at 926-27.

142. *See supra* note 101 for the sentencing guideline's definition of crime of violence.

143. *Chapa-Garza*, 243 F.3d at 924-27.

144. *Id.* at 924.

145. *Id.*

than the language of § 16(b).<sup>146</sup> The court determined that section 4B1.2(a)(2) only requires that the offense involve conduct presenting a serious risk of physical injury to another, whereas § 16(b) requires “a substantial risk that the defendant will *use* physical force against another’s person or property *in the course of committing the offense.*”<sup>147</sup> In other words, the court differentiated between section 4B1.2(a)(2)’s concern with the risk of a particular effect of a defendant’s conduct, i.e. physical injury, and § 16(b)’s concern with the defendant’s conduct itself.<sup>148</sup> The court based its reasoning on the absence of language in § 16(b) requiring that there be a substantial risk that another’s person or property will sustain injury, but only that there be a “substantial risk that the defendant will *use* physical force.”<sup>149</sup>

In addition to urging that § 16(b) should be interpreted differently from section 4B1.2(a)(2), the court emphasized that the language in § 16(b) refers only to those offenses involving a substantial likelihood that the defendant will use physical force intentionally.<sup>150</sup> The court went on to explain that the use of physical force against persons or property is “most reasonably read to refer to intentional conduct, not an accidental, unintended event,” such as drunk driving.<sup>151</sup> The court supported its construction with a dictionary definition of the verb “use,” pointing out that the relevant definitions of the verb indicate that “use” refers to a volitional, purposeful employment of the object being “used.”<sup>152</sup> The court reasoned:

While the victim of a drunk driver may sustain physical injury from physical force being applied to his body as a result of collision with the drunk driver’s errant automobile, it is clear that such force has not been intentionally “used” against the other person by the drunk driver at all, much less in order to perpetrate any crime, including the crime of felony DWI.<sup>153</sup>

The court noted that the crime of felony DWI in Texas is committed when the defendant, while intoxicated and after two prior DWI convictions, “*begins operating* a vehicle.”<sup>154</sup> Finding that intentional force against the person or property of another is hardly

146. *Id.* at 925.

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.* at 926.

151. *Id.*

152. *Id.* The Court quoted the definition of “use” as:

1. To put into service or apply for a purpose; employ. 2. To avail oneself of; practice: *use caution*. 3. To conduct oneself toward; treat or handle: *used his colleagues well*. 4. To seek or achieve an end by means of; exploit: *felt he was being used*. 5. To take or consume; partake of: *She rarely used alcohol*.

*Id.* (quoting the American Heritage College Dictionary (3d ed. 1997)).

153. *Id.* at 927.

154. *Id.* (emphasis added).

ever used to start a car, the Fifth Circuit held that felony DWI is not a crime of violence as defined by 18 U.S.C. § 16(b).<sup>155</sup>

## 2. The Seventh Circuit: *Bazan-Reyes v. INS*

Four months after *Chapa-Garza*, the Seventh Circuit in *Bazan-Reyes v. INS*<sup>156</sup> also held that felony DWI is not a crime of violence under § 16(b), because the offense does not involve an intentional use of force.<sup>157</sup> In *Bazan-Reyes*, petitioners Jose A. Bazan-Reyes,<sup>158</sup> Wincenty Z. Maciasowicz,<sup>159</sup> and Arnoldo Gomez-Vela<sup>160</sup> sought review of INS and BIA decisions finding them removable based on their state drunk-driving offenses.<sup>161</sup> Before addressing the issue, the Seventh Circuit stated that it would review *de novo* the BIA's determination that petitioners had committed a removable aggravated felony.<sup>162</sup>

The court began by noting that the BIA had interpreted the definition of crime of violence found in § 16(b) to include reckless conduct, such as drunk driving.<sup>163</sup> The petitioners, however, challenged the BIA's interpretation of the statute, arguing that § 16(b) requires a substantial risk of *intentional* force.<sup>164</sup> The petitioners claimed that drunk-driving offenses generally do not involve intentional force or a substantial risk of intentional force, and thus, such offenses cannot be crimes of violence.<sup>165</sup>

The Seventh Circuit agreed with the petitioners' construction of § 16(b). Much like the Fifth Circuit, the Seventh Circuit distinguished

155. *Id.*

156. 256 F.3d 600 (7th Cir. 2001).

157. *Id.* at 612.

158. Bazan-Reyes, a citizen of Mexico, had entered the United States without inspection. *Id.* at 602. Bazan-Reyes, whose criminal record included four previous convictions for DWI, had pleaded guilty to a Class D felony, Operating a Vehicle While Intoxicated, in violation of section 9-30-5-3 of the Indiana Code. *Id.* The relevant provisions of section 9-30-5-3 provide: "A person . . . commits a Class D felony if: (1) the person has a previous conviction of operating while intoxicated; and (2) the previous conviction of operating while intoxicated occurred within the five (5) years immediately preceding the occurrence of the violation of section 1 or 2 of this chapter." Ind. Code § 9-30-5-3 (1998).

159. Maciasowicz was a citizen of Poland and a lawful permanent resident. *Bazan-Reyes*, 256 F.3d at 603. Maciasowicz had pleaded guilty under the Wisconsin statute to two counts of homicide by intoxicated use of a vehicle. *Id.*

160. Gomez-Vela was a citizen of Mexico and a lawful permanent resident of the United States. *Id.* Gomez-Vela, who had two previous drunk-driving convictions, was found guilty of aggravated driving under the influence under the Illinois statute. *Id.*

161. *Id.* at 602.

162. *Id.* at 605.

163. *Id.* at 606 (citing *In re Puente-Salazar*, Interim Decision 3412 (BIA 1999), *In re Magallanes-Garcia*, Interim Decision 3341 (BIA 1998), and *Matter of Alcantar*, 20 I. & N. Dec. 801, 814 (BIA 1994)).

164. *Id.*

165. *Id.*

section 4B1.2(a)(2) of the U.S. Sentencing Guidelines from 18 U.S.C. § 16(b), finding that section 4B1.2(a)(2) does not contain any requirement of specific intent, whereas § 16(b) does require intentional conduct.<sup>166</sup> The court stated that “the physical force that ‘may be used in the course of committing the offense’ must be accompanied by intent to use that force.”<sup>167</sup> According to the court, the petitioners’ use of intentional force to open the car door or press the accelerator did not satisfy the statute’s requirement of the intentional use of physical force.<sup>168</sup> Rather, the force must be actual violent force.<sup>169</sup> The court then concluded, as did the Fifth Circuit, that because intentional force is “‘virtually never employed to commit’” drunk-driving offenses, the offenses are not crimes of violence under § 16(b).<sup>170</sup>

### 3. The Second Circuit: *Dalton v. Ashcroft*

Joining the Fifth and Seventh Circuits, the Second Circuit in *Dalton v. Ashcroft*<sup>171</sup> held that an alien’s New York felony DWI offense was not a crime of violence.<sup>172</sup> In *Dalton*, the petitioner, a citizen of Canada and a lawful permanent resident of the United States, was convicted of felony DWI in New York under the New York Vehicle and Traffic Law, as a third-time offender.<sup>173</sup> While Dalton was serving his prison sentence, the INS commenced removal proceedings against him, charging that he was removable as an aggravated felon because of his felony DWI conviction.<sup>174</sup> Dalton argued that felony DWI was not a crime of violence, but the immigration judge rejected his argument and ordered his removal.<sup>175</sup> The Board of Immigration Appeals affirmed the immigration judge’s removal order, finding that felony DWI constitutes a crime of violence.<sup>176</sup> Dalton then appealed the BIA’s decision to the Second Circuit.<sup>177</sup>

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166. *Id.* at 608-11.

167. *Id.* at 611.

168. *Id.*

169. *Id.* (citing *Solorzano-Patlan v. INS*, 207 F.3d 869, 875 n.10 (7th Cir. 2000) (finding that “the force necessary to constitute a crime of violence, must actually be violent”).

170. *Id.* at 612 (quoting *United States v. Chapa-Garza*, 243 F.3d 921, 927 (5th Cir. 2001)).

171. 257 F.3d 200 (2d Cir. 2001).

172. *Id.* at 208.

173. *Id.* at 202. New York Vehicle and Traffic Law section 1192.3 provides that “[n]o person shall operate a motor vehicle while in an intoxicated condition.” N.Y. Veh. & Traf. Law § 1192.3 (McKinney 1996). Section 1193 elevates the crime to a class D felony when one “operates a vehicle [while intoxicated] after having been convicted of [DWI] twice within the preceding ten years.” *Id.* § 1193(1)(c)(ii).

174. *Dalton*, 257 F.3d at 203.

175. *Id.*

176. *Id.*

177. *See id.*



The Second Circuit began by stating that it would give *Chevron* deference<sup>178</sup> to the BIA's interpretation of the INA, but would apply *de novo* review to the BIA's interpretation of federal or state criminal statutes, including 18 U.S.C. § 16.<sup>179</sup> The Second Circuit then applied the categorical approach to determine whether felony DWI constitutes a crime of violence, focusing its analysis on the offense's inherent nature rather than on the factual circumstances underlying Dalton's violation.<sup>180</sup>

Upon review of the relevant state court decisions, the Second Circuit found that the scope of the New York DWI offense is sufficiently broad to include attempted DWI.<sup>181</sup> The state courts had held that a defendant is guilty of driving while intoxicated even if he or she falls asleep at the wheel of a car and the vehicle never moves,<sup>182</sup> or if the vehicle itself is not even operative.<sup>183</sup> The court concluded that New York case law makes clear that a person can be convicted under the New York DWI statute even when the person's conduct involves no risk that force may be used or that injury may result.<sup>184</sup> The court, therefore, could not find that this "minimum threshold, even if met on three separate occasions" satisfied the definition of a crime of violence.<sup>185</sup>

The court rejected the government's contention that the minimum conduct required for a DWI conviction does, in fact, present a "substantial risk that physical force . . . may be used" because the defendant's intent is the focus of the conduct, and an intent to drink and drive always presents the risks involved in drunk driving.<sup>186</sup> The court countered the government's argument by stating that "[a]n intention to drive is not the same as driving."<sup>187</sup> The court proposed that § 16(b) contemplates a crime of violence to involve "real, substantial" risks, and therefore, cannot support removal based on

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178. See *infra* text accompanying notes 231-36.

179. *Dalton*, 257 F.3d at 203-04 (citing *Sutherland v. Reno*, 228 F.3d 171, 173-74 (2d Cir. 2000)).

180. *Id.* at 204-05.

181. *Id.* at 205 (citing *People v. Prescott*, 745 N.E.2d 1000, 1004 (N.Y. 2001)). The *Prescott* court stated:

Our courts have long recognized that the definition of operation is broader than that of driving and that [a] person operates a motor vehicle within the meaning of [the statute] when, in the vehicle, he intentionally does any act or makes use of any mechanical or electrical agency which alone or in sequence will set in motion the motive power of the vehicle.

*Prescott*, 745 N.E.2d at 1004 (internal quotations and citations omitted) (alterations in original).

182. *Dalton*, 257 F.3d at 205 (citing *People v. Marriott*, 325 N.Y.S.2d 177, 178 (3d Dep't 1971)).

183. *Id.* (citing *People v. David "W,"* 442 N.Y.S.2d 278, 279 (3d Dep't 1981)).

184. *Id.*

185. *Id.* at 205-06.

186. *Id.* at 206.

187. *Id.*

“hypothetical harms.”<sup>188</sup> Therefore, the court concluded that felony DWI could not be a crime of violence, because not all violations of New York’s felony DWI statute are by their nature crimes of violence in that risk of physical force is not a requisite element of the New York DWI offense.<sup>189</sup>

The court went on to say that even if New York’s DWI statute was comparable in scope to § 16(b), the language of § 16(b) “fails to capture the nature of the risk inherent in drunk driving.”<sup>190</sup> The court reasoned that the risk of drunk driving is the risk associated with the resulting accident, not the risk that the driver will “use physical force” while driving the vehicle.<sup>191</sup> The court stated that pressing the accelerator or moving the steering wheel cannot reasonably be interpreted as the use of physical force.<sup>192</sup> Disagreeing with the government’s argument that the “the crashing of the drunk driver’s automobile . . . constitutes the force that is likely to be used,” the court noted that “[a]lthough an accident may properly be said to involve force, one cannot be said to *use* force in an accident as one might use force to pry open a heavy, jammed door.”<sup>193</sup>

To emphasize the difference between an accident and the intentional “use of physical force,” the court then discussed the difference between the risk of the “use of physical force” and the “risk of injury.”<sup>194</sup> The government had argued that the difference, if any, is insignificant.<sup>195</sup> The court disagreed, claiming that many crimes involve a substantial risk of injury without involving the use of force.<sup>196</sup> The court rejected the contention that all conduct involving a risk of injury necessarily involves the use of physical force and agreed with the Fifth Circuit’s conclusion that the word “use” along with the phrase “in the course of committing the offense” supports interpreting § 16(b) to include only intentional conduct.<sup>197</sup> Thus, the Second Circuit concluded that a felony DWI conviction under the New York Vehicle and Traffic Law does not constitute a crime of violence under 18 U.S.C. § 16(b).<sup>198</sup>

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188. *Id.* (noting that “[j]ust as many good intentions are crushed by reality, so too can reality felicitously crush bad intentions”).

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.* at 207.

195. *Id.*

196. *Id.* The court cited as examples crimes of gross negligence or reckless endangerment—such as leaving an infant alone near a pool and statutes criminalizing the use, possession and/or distribution of dangerous drugs—to illustrate that some criminal conduct may involve a substantial risk of injury or harm without involving the use of physical force. *Id.*

197. *Id.* at 207-08.

198. *Id.* at 208.

#### 4. The Ninth Circuit: *Montiel-Barraza v. INS*

In the most recent decision addressing the issue, the Ninth Circuit agreed with the Second, Fifth, and Seventh Circuits and held that felony DWI is not a crime of violence.<sup>199</sup> In *Montiel-Barraza v. INS*, Ramon Montiel-Barraza petitioned the Ninth Circuit to review a removal order issued by the Board of Immigration Appeals.<sup>200</sup> The BIA had deemed Montiel-Barraza an aggravated felon based on his felony conviction under the California Vehicle Code for driving under the influence of alcohol (“DUI”) with four prior convictions within the past seven years.<sup>201</sup>

Relying on its own precedent, the Ninth Circuit held that Montiel-Barraza’s conviction did not constitute a crime of violence under 18 U.S.C. § 16(b).<sup>202</sup> In *United States v. Trinidad-Aquino*, the Ninth Circuit had held that a conviction for driving under the influence with injury to another is not a crime of violence.<sup>203</sup> The present case, however, involved a DUI offense without proof of injury to another.<sup>204</sup> Because the court had previously held that driving under the influence with injury to another did not constitute a crime of violence, it could not logically hold that a violation of the “lesser” offense qualified as a crime of violence.<sup>205</sup> The court refused to take into account the fact that Montiel-Barraza’s conviction was elevated to a felony, stating that enhancement statutes do not “alter the elements of the underlying offense.”<sup>206</sup>

#### B. *The Tenth Circuit’s Holding that Felony DWI Is a Crime of Violence: Tapia Garcia v. INS*

In a decision that preceded the four other circuits’ decisions addressing the issue, the Tenth Circuit held in *Tapia Garcia v. INS* that an alien’s Idaho DUI offense constituted a crime of violence.<sup>207</sup>

In *Tapia Garcia*, the petitioner, a legal permanent resident of the United States and citizen of Mexico, was convicted in Idaho for felony DUI in violation of the Idaho Code.<sup>208</sup> As a result, the INS

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199. *Montiel-Barraza v. INS*, 275 F.3d 1178, 1180 (9th Cir. 2002).

200. *Id.* at 1179.

201. *Id.*; see also Cal. Veh. Code Ann. §§ 23152(a), 23550 (West 2000 & Supp. 2002).

202. *Montiel-Barraza*, 275 F.3d at 1180.

203. *United States v. Trinidad-Aquino*, 259 F.3d 1140, 1145-46 (9th Cir. 2001).

204. *Montiel-Barraza*, 275 F.3d at 1180.

205. *Id.*

206. *Id.*

207. *Tapia Garcia v. INS*, 237 F.3d 1216, 1223 (10th Cir. 2001).

208. *Id.* at 1217. Under the Idaho Code, a DUI offense qualifies as a felony if the defendant pleaded guilty to or was found guilty of two or more previous violations for driving under the influence within five years. Idaho Code § 18-8005(5) (Michie 1997 & Supp. 2001).

commenced removal proceedings against him for committing a crime of violence.<sup>209</sup> The immigration judge held that Tapia-Garcia's felony DUI offense constituted a crime of violence and ordered him removed to Mexico, a decision that was affirmed by the Board of Immigration Appeals.<sup>210</sup> Tapia-Garcia appealed his removal order to the Tenth Circuit.<sup>211</sup>

As an initial matter, the Tenth Circuit outlined the test laid out in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,<sup>212</sup> which governed the court's review of the BIA's interpretation of immigration statutes.<sup>213</sup> According to the *Chevron* test, the court must first determine whether the plain language of the statute clearly demonstrates Congress's intent.<sup>214</sup> If the statute is "silent or ambiguous with respect to the specific issue," the court must then determine whether the BIA's interpretation is "based on a permissible construction of the statute."<sup>215</sup> If the statute is unclear and the BIA's interpretation is reasonable, the court must defer to that interpretation.<sup>216</sup>

The Tenth Circuit then reviewed the BIA's reasoning and found that the BIA had previously held that offenses for operating a vehicle while intoxicated constituted a crime of violence, provided the offense rose to a felony under state law.<sup>217</sup> The BIA emphasized that a crime of violence under 18 U.S.C. § 16(b) does not require intentional conduct, but concluded that the operation of a vehicle while under the influence, by its nature, involves a substantial risk of physical force against the person or property of another.<sup>218</sup>

Upon review of the BIA's construction of 18 U.S.C. § 16(b), the Tenth Circuit held that the BIA reasonably construed the statute to include felony drunk-driving offenses.<sup>219</sup> The court reasoned that the well-documented dangers associated with drunk driving supports the BIA's conclusion that a felony DWI offense constitutes a crime of violence under § 16(b).<sup>220</sup> The court stated that "the risk of injury from drunk driving is neither conjectural or speculative. . . . Drunk driving is a reckless act that often results in injury, and the risks of driving while intoxicated are well known."<sup>221</sup> The Tenth Circuit thus

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209. *Tapia Garcia*, 237 F.3d at 1217.

210. *Id.*

211. *Id.*

212. 467 U.S. 837, 842-44 (1984).

213. *Tapia Garcia*, 237 F.3d at 1220.

214. *Id.*

215. *Id.* (quoting *Chevron*, 467 U.S. at 843).

216. *Tapia Garcia*, 237 F.3d at 1220-21.

217. *Id.* at 1222.

218. *Id.* (citing *In re Puente-Salazar*, Interim Decision 3412 (BIA 1999)).

219. *Id.*

220. *Id.* at 1223.

221. *Id.* at 1222 (quoting *United States v. Farnsworth*, 92 F.3d 1001, 1008-09 (10th Cir. 1996)).

indicated that a crime of violence does not require an intentional act.<sup>222</sup> The court also noted that the language of U.S. Sentencing Guideline section 4B1.2(a)(2) is similar to that of 18 U.S.C. § 16(b) and that both definitions of crime of violence support the conclusion that felony DUI may constitute a crime of violence because the “generic elements of the offense” present a “substantial risk that physical force . . . may be used.”<sup>223</sup> For the above reasons, the Tenth Circuit held that *Tapia-Garcia* was an alien subject to deportation for the commission of an aggravated felony.<sup>224</sup>

### III. INTERPRETING 18 U.S.C. § 16(b)

The disagreement among the circuits demonstrates the difficulties of interpreting 18 U.S.C. § 16(b). Although four circuits have held otherwise, Part III.A will argue that the BIA and the Tenth Circuit correctly determined that 18 U.S.C. § 16(b) does not require conduct involving specific intent and that felony DWI constitutes a crime of violence under the plain language of the statute. Part III.B suggests that congressional policies regarding removal further support a finding that felony DWI constitutes a removable offense. Finally, given the difficulty of statutory construction and the resulting circuit split, Part III.C proposes an amendment to 18 U.S.C. § 1101(a)(43)(F).

#### A. *Felony DWI Constitutes a Crime of Violence Under 18 U.S.C. § 16(b)*

This part begins with a discussion of the proper standard of review for circuit courts when interpreting § 16(b) for the purposes of removal, and then presents arguments supporting the conclusion that felony DWI constitutes a crime of violence under 18 U.S.C. § 16(b).

##### 1. The Proper Standard of Review

The circuit courts that disagree on whether felony DWI constitutes a crime of violence for deportation purposes also seem to disagree on the applicable standard of review. The dispute centers around whether to apply a *de novo* standard of review or a more deferential *Chevron*<sup>225</sup> standard of review to the BIA’s interpretation of 18 U.S.C. § 16(b).<sup>226</sup> The Tenth Circuit applied *Chevron* deference to the BIA’s interpretation of 18 U.S.C. § 16(b), holding that as long as the BIA’s

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222. *Id.*

223. *Id.* at 1222-23; *cf. supra* notes 143-49, 166-70 and accompanying text (discussing the Fifth and Seventh Circuits’ findings that U.S. Sentencing Guidelines section 4B1.2(a)(2) and 18 U.S.C. § 16(b) differ significantly).

224. *Tapia Garcia*, 237 F.3d at 1223.

225. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

226. *See supra* Part I.C.3.b for the BIA’s interpretation of 18 U.S.C. § 16(b).

interpretation was reasonable, the court would defer to that interpretation.<sup>227</sup> On the other hand, the Second and Seventh Circuits stated that they would apply *Chevron* deference to the BIA's interpretation of the INA, but would review *de novo* the BIA's interpretation of federal or state criminal statutes, including 18 U.S.C. § 16.<sup>228</sup> The Fifth Circuit case involved an appeal from the district court, not from the BIA.<sup>229</sup> Therefore, the Fifth Circuit did not mention *Chevron*, but applied a *de novo* standard of review, claiming that a district court's interpretation of the Sentencing Guidelines is reviewed *de novo*.<sup>230</sup>

It is well-established that *Chevron* requires federal courts to accord substantial deference to an agency's interpretation of the statutes it administers if the intent of Congress is unclear and the agency's interpretation is reasonable.<sup>231</sup> If the relevant statutory provision is silent or ambiguous, "a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency."<sup>232</sup> Rather, the court must only decide whether the agency's determination is based on a "permissible construction of the statute."<sup>233</sup> The *Chevron* deference, however, only applies when an agency is interpreting a statute it administers.<sup>234</sup> Some courts have held that *Chevron* deference will only apply to an inquiry "that implicates agency expertise in a meaningful way."<sup>235</sup> When the agency is interpreting state or federal criminal laws, the courts do not owe *Chevron* deference to the agency's interpretation because "the agency is not charged with the administration of such laws."<sup>236</sup> For example, the Fifth Circuit claimed that it "must uphold the BIA's determination of what conduct constitutes moral turpitude [under the INA] if it is reasonable. However, a determination of the

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227. *Tapia Garcia*, 237 F.3d at 1220-21.

228. *Dalton v. Ashcroft*, 257 F.3d 200, 203 (2d Cir. 2001) (citing *Sutherland v. Reno*, 228 F.3d 171, 173-74 (2d Cir. 2000)); *Bazan-Reyes v. INS*, 256 F.3d 600, 605 (7th Cir. 2001). The Ninth Circuit did not mention *Chevron* deference, but stated that it would review the "threshold issue of whether Montiel's conviction constituted an aggravated felony." *Montiel-Barraza v. INS*, 275 F.3d 1179, 1180 (9th Cir. 2002).

229. *United States v. Chapa-Garza*, 243 F.3d 921, 924 (5th Cir. 2001).

230. *Id.* (citing *United States v. Cho*, 136 F.3d 982, 983 (5th Cir. 1998)).

231. *See INS v. Aguirre-Aguirre*, 526 U.S. 415, 425 (1999); *Michel v. INS*, 206 F.3d 253, 262 (2d Cir. 2000).

232. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984).

233. *Id.* at 843.

234. *Id.* at 842.

235. *Sandoval v. Reno*, 166 F.3d 225, 239 (3d Cir. 1999); *Goncalves v. Reno*, 144 F.3d 110, 127 (1st Cir. 1998).

236. *Michel*, 206 F.3d at 262 ("[W]here the BIA is interpreting [a provision] of the [INA], *Chevron* deference is warranted, but where the BIA is interpreting state or federal criminal laws, we must review its decision *de novo* . . .").

elements of a [state] crime . . . for purposes of deportation pursuant to [the INA] is a question of law, which we review de novo.”<sup>237</sup>

A review of *Chevron* and the applicable case law suggests that a court, in fact, is not required to defer to the BIA’s interpretation of 18 U.S.C. § 16(b) when deciding whether a certain offense constitutes a crime of violence.<sup>238</sup> It is not likely that the BIA relied on immigration expertise to interpret 18 U.S.C. § 16, which is a general federal criminal statute, and not an immigration law. Moreover, the BIA is not specifically charged with the administration of 18 U.S.C. § 16. Although the INA defines an aggravated felony in 8 U.S.C. § 1103(a)(43)(F) by reference to the definition of crime of violence under 18 U.S.C. § 16(b), such a reference does not make 18 U.S.C. § 16(b) a part of the INA.<sup>239</sup>

The next section will argue that, even though the circuit courts may not owe *Chevron* deference to the BIA’s interpretation of 18 U.S.C. § 16(b), the better interpretation of the language of the statute is that the statute includes felony DWI. Thus, while the Tenth Circuit may have been incorrect in deferring to the BIA’s interpretation of § 16(b),<sup>240</sup> it was correct in concluding that the BIA’s interpretation was reasonable.

## 2. Interpreting the Language of 18 U.S.C. § 16(b)

### a. “physical force . . . may be used”

The circuit courts that have held that felony DWI is not a crime of violence based their decisions primarily on the proposition that 18 U.S.C. § 16(b) requires specific intent to use physical force, which is absent from drunk-driving offenses. However, a better interpretation of the phrase “may be used” under § 16(b) is that it encompasses both accidental and intentional uses of force.

First, the Legislature’s use of the passive phrase “may be used,” rather than more definitively volitional language, suggests that it did

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237. *Hamdan v. INS*, 98 F.3d 183, 185 (5th Cir. 1996) (citation omitted).

238. *See Francis v. Reno*, 269 F.3d 162, 168 (3d Cir. 2001) (holding that the BIA’s determination that a particular conviction qualifies as a crime of violence is not entitled to any particular deference); *Sutherland v. Reno*, 228 F.3d 171, 174 (2d Cir. 2000) (same).

239. *See Francis*, 269 F.3d at 168 (“[18 U.S.C. § 16] is not transformed into an immigration law merely because it is incorporated into the INA by § 1101(a)(43)(F).”).

240. Even if the courts do not owe *Chevron* deference to the BIA’s interpretation of § 16(b), one could argue that some level of deference is due, such as *Skidmore* deference under *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (holding that the weight accorded to an administrative judgment “will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control”).

not intend § 16(b) to carry a specific-intent requirement. Moreover, the language of § 16(b) contains no specific-intent terms, and a court should “not presume that a statutory crime requires specific intent in the absence of language to that effect.”<sup>241</sup> Even if § 16(b) requires general intent, rather than the specific intent to use force, drunk-driving “accidents” would not occur if the intoxicated driver did not consciously decide to operate a vehicle while drunk. The circuits holding that felony DWI is not a crime of violence spend much time emphasizing that drunk driving is an “accidental, unintended event.”<sup>242</sup> According to the Seventh Circuit, “a drunk driving accident is not the result of plan, direction, or purpose, but of recklessness at worst and misfortune at best.”<sup>243</sup> To characterize a drunk driving accident as a “misfortune,” however, is an injustice to the thousands who have been injured or killed by drunk drivers. An intoxicated person who consciously decides to drive has the requisite plan, direction, and purpose to satisfy any general intent requirement under § 16(b).<sup>244</sup>

Second, although the dictionary definitions of “use” may generally refer to intentional acts, these definitions do not preclude non-intentional uses. As described in Part II.A, the Fifth and Seventh Circuits relied on a dictionary definition of “use” to conclude that the phrase “physical force . . . may be used” requires an intentional use of force.<sup>245</sup> The *Black’s Law Dictionary* defines “use” as the “application or employment of something.”<sup>246</sup> This definition does not indicate that the “application” must be intentional. Although a drunk driver who injures a pedestrian may not wish to say that he “used” his car to hurt someone,<sup>247</sup> nonetheless, the harm was the result of the *application* of force. The force is that of “the crashing of the drunk driver’s automobile” into the person or property of another.<sup>248</sup> The Fifth Circuit stated in *Chapa-Garza* that “the victim of a drunk driver may sustain physical injury from physical force being *applied* to his

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241. *United States v. Myers*, 104 F.3d 76, 81 (5th Cir. 1997); *see also United States v. Hicks*, 980 F.2d 963, 974 (5th Cir. 1992) (finding that Congress required only “general intent” by its failure to use words of specific intent); *United States v. Lewis*, 780 F.2d 1140, 1143 (4th Cir. 1986) (same).

242. *Dalton v. Ashcroft*, 257 F.3d 200, 208 (2d Cir. 2001) (quoting *United States v. Chapa-Garza*, 243 F.3d 921, 926 (5th Cir. 2001)).

243. *Bazan-Reyes v. INS*, 256 F.3d 600, 612 (7th Cir. 2001) (quoting *United States v. Rutherford*, 54 F.3d 370, 372) (7th Cir. 1995)).

244. The drunk driver typically intends to drink and drive. The intent to commit the risk-creating act conceivably may be “transferred” to the resulting harm just as in felony-murder cases.

245. *Chapa-Garza*, 243 F.3d at 926 (quoting 18 U.S.C. § 16(b) (2000)); *Bazan-Reyes*, 256 F.3d at 608.

246. *Black’s Law Dictionary* 1540 (7th ed. 1999).

247. *See Rutherford*, 54 F.3d at 372-73 (“A drunk driver who injures a pedestrian would not describe the incident by saying he ‘used’ his car to hurt someone. In ordinary English, the word ‘use’ implies intentional availment.”).

248. *Dalton v. Ashcroft*, 257 F.3d 200, 206 (2d Cir. 2001).



body as a result of collision with the drunk driver's errant automobile."<sup>249</sup> Although the Fifth Circuit argued that such force cannot be "used" unintentionally, it is clear that when one car slams into another (or into a pedestrian), the resulting force is what causes the injury.<sup>250</sup>

Moreover, *Chapa-Garza* seems to squarely contradict an earlier decision in which the Fifth Circuit interpreted § 16(b) to include both accidental and intentional uses of force. In *United States v. Galvan-Rodriguez*,<sup>251</sup> the Fifth Circuit held that the unauthorized use of a motor vehicle is a crime of violence under § 16(b) because of the

strong probability that the inexperienced or untrustworthy driver . . . will be involved in or will cause a traffic accident or expose the car to stripping or vandalism. In fact, when an illegal alien operates a vehicle without consent, a strong probability exists that the alien may try to evade the authorities by precipitating a high-speed car chase and thereby risking the lives of others, not to mention significant damage to the vehicle and other property.<sup>252</sup>

Thus, in *Galvan-Rodriguez*, the Fifth Circuit clearly relied on the risk that physical force may accidentally be used during the unauthorized operation of a vehicle, rather than solely on the risk that physical force may be used intentionally, to find the offense to be a crime of violence.

Attempting to explain the apparent contradiction, the Fifth Circuit claimed that *Chapa-Garza* and *Galvan-Rodriguez* are compatible because the unauthorized use of a vehicle does, in fact, involve a substantial risk that physical force will be used intentionally against a vehicle to obtain unauthorized access to it.<sup>253</sup> However, even a cursory reading of the court's reasoning in *Galvan-Rodriguez* indicates that the Fifth Circuit held the unauthorized use of a vehicle to be a crime of violence because of the potential unintended consequences associated with the act of driving an unauthorized vehicle, such as damaging property and injuring innocent victims, rather than the intentional act of breaking into the vehicle.<sup>254</sup> It is

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249. *Chapa-Garza*, 243 F.3d at 927 (emphasis added).

250. *Id.* For further illustration, someone who accidentally elbows a fellow basketball player in the mouth does not intentionally use force against that person, but it would not be unreasonable to say that force was "used" to knock out the player's teeth. On August 4, 2001, a New York City police officer killed three members of a family and an unborn child when he drove his minivan into them while driving drunk to work. See Shaila K. Dewan, *Police Officer Is Arraigned in Fatal Crash*, N.Y. Times, Aug. 6, 2001, at B1. Again, it is reasonable to assert that a great deal of force was used to mow down the three pedestrians in one swift blow. In both cases, it was the application, or "use," of force that caused the harm, whether that use was intentional or accidental.

251. 169 F.3d 217 (5th Cir. 1999).

252. *Id.* at 219-20.

253. See *Chapa-Garza*, 243 F.3d at 927-28.

254. See *supra* text accompanying note 252.

difficult to believe that the Fifth Circuit in *Galvan-Rodriguez* held that the unauthorized use of a vehicle is a crime of violence solely because of the risk of harm associated with gaining access to the vehicle. In fact, in a recent decision, the Fifth Circuit itself wrote that “*Galvan-Rodriguez* holds that [the unauthorized use of a vehicle’s] risk to persons and property is sufficiently high to constitute a § 16 crime of violence,” noticeably emphasizing the risk of harm, rather than the intentional use of force.<sup>255</sup> The Fifth Circuit, as well as the other circuits, should have applied the *Galvan-Rodriguez* reasoning to find that felony DWI is a crime of violence under § 16(b), because the inherent risks of drunk driving are at least as substantial and severe as joyriding, and perhaps, even more imminent.<sup>256</sup>

b. “*in the course of committing the offense*”

Another requirement of the “crime of violence” definition under § 16(b) is that force be used “in the course of committing the offense.” The Fifth Circuit construed this phrase to refer to the force necessary to effectuate, or begin, the offense.<sup>257</sup> The court then held that felony DWI is not a crime of violence, because a driver commits the offense once he begins operating the car, an act that rarely, if ever, involves the use of force.<sup>258</sup> The Seventh Circuit agreed, stating that using intentional force to open the car door or press the accelerator, for example, does not constitute the requisite use of physical force under the statute.<sup>259</sup>

These interpretations, however, are disturbing. Although a drunk driver may not use physical force to begin the commission of the offense—i.e., starting the car—the risk is that he will use physical force “*in the course of committing the offense.*” The better interpretation of this phrase is that it encompasses the force used *while* committing the offense, including the time spent on the road. Indeed, an individual is guilty of DWI as soon as he begins operating the vehicle and sometimes even earlier, but the offense clearly continues as long as he continues to drive.<sup>260</sup> Thus, the analysis of whether a drunk-driving offense involves a substantial risk of physical

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255. *United States v. Jackson*, 220 F.3d 635, 639 (5th Cir. 2000).

256. *See, e.g., Francis v. Reno*, 269 F.3d 162, 173 (3d Cir. 2001) (noting that the “unauthorized use of an automobile [involves] all of the attendant dangers of high speed chases, speeding, and recklessness. . . . The dangers of operating an automobile while one’s faculties are impaired by drugs or alcohol are *all too obvious, and too common to require further elaboration.*” (emphasis added)); *see also infra* text accompanying notes 273-81.

257. *Chapa-Garza*, 243 F.3d at 927.

258. *Id.*

259. *Bazan-Reyes v. INS*, 256 F.3d 600, 611 (7th Cir. 2001).

260. *See United States v. Chapa-Garza*, 262 F.3d 479, 484 (5th Cir. 2001) (Barksdale, J., dissenting) (“A driver exerts personal effort not only when he begins operation of the vehicle but also ‘while’ he operates it.”).

force should encompass the entire continuum of the offense, from starting the ignition to driving to turning the engine off. Such an analysis would then support a finding that drunk driving indeed involves a “substantial risk that physical force . . . may be used in the course of committing the offense.”

c. *“by its nature, involves a substantial risk”*

Even if felony DWI involves a risk that physical force may be used against the person or property of another, § 16(b) requires that the offense, “*by its nature*,” involve a “*substantial risk*” that such force be used.<sup>261</sup> As previously discussed, the language “*by its nature*” requires the courts to analyze the elements of the felony in the abstract, rather than the particular facts of each individual commission of the offense.<sup>262</sup> When analyzing the phrase “*substantial risk*,” courts have stated that it is not necessary that “[the risk] *must* occur in every instance; rather, a substantial risk requires only a strong probability that the event, in this case the application of physical force during the commission of the crime, will occur.”<sup>263</sup> The task, then, is to determine whether felony DWI offenses<sup>264</sup> categorically involve a strong probability that physical force against the person or property of another will occur. The following discussion will show that felony DWI is an offense that, by its nature, involves a substantial risk of the use of physical force.

In support of their holding that felony DWI is not a crime of violence, the Second and Seventh Circuits noted that an offense, such as drunk driving, that includes behavior posing little or no risk cannot “*by its nature*” constitute a crime of violence.<sup>265</sup> Indeed, some courts have interpreted drunk-driving offenses to include minimally threatening conduct, such as passing out at the wheel of a car before the vehicle ever moves, or intending to operate a vehicle that is nonetheless unable to move.<sup>266</sup>

Contrary to the reasoning of the Second and Seventh Circuits, however, other courts have held that an offense can be a crime of violence even if the offense includes conduct involving little or no risk.

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261. 18 U.S.C. § 16(b) (2000) (emphasis added).

262. See *supra* Part I.C.2.

263. *United States v. Rodriguez-Guzman*, 56 F.3d 18, 20 (5th Cir. 1995); see also *United States v. Alas-Castro*, 184 F.3d 812, 813 (8th Cir. 1999); *United States v. Velazquez-Overa*, 100 F.3d 418, 420 (5th Cir. 1996).

264. As noted earlier, for the purposes of this Note, felony DWI refers to those drunk-driving offenses which rise to a felony because of prior drunk-driving convictions. See *supra* note 8 for examples of felony DWI statutes. The various felony DWI statutes require at least one and up to five prior DWI convictions. See *supra* note 8.

265. See *Dalton v. Ashcroft*, 257 F.3d 200, 205 (2d Cir. 2001); *Bazan-Reyes v. INS*, 256 F.3d 600, 611-12 (7th Cir. 2001).

266. See *Dalton*, 257 F.3d at 205.

For example, in *United States v. Payne*,<sup>267</sup> the Sixth Circuit held larceny to be a crime of violence under the sentencing guidelines, because it presented a serious potential risk of physical injury, even when committed against a sleeping or unconscious victim.<sup>268</sup> The court reasoned that these situations still involve a serious potential risk of injury, because the victim might “notice the pickpocketing act, wake from her sleep, or not be unconscious after all.”<sup>269</sup> Similarly, the Fourth Circuit held that burglary of a temporarily unoccupied dwelling constituted a crime of violence because of the possibility that the absent resident will return home during the commission of the crime.<sup>270</sup> The likelihood that a driver who passes out at the wheel of a non-moving vehicle will awaken and start driving while still legally intoxicated seems at least as great as the chance that an absent resident will return home, or that an unconscious larceny victim will awaken and suddenly be exposed to physical harm. Thus, if crimes such as larceny and burglary are sufficiently risky, based on hypothetical harms, to qualify as crimes of violence, certainly felony DWI should qualify as well.

In his dissent to *Dalton*, Chief Judge Walker also suggests that a better view of the categorical approach is one that considers the nature of the offense to include the risks associated with the “proscribed conduct in the mainstream of prosecutions brought under the statute.”<sup>271</sup> Indeed, it is the risk of harm from drunk drivers on the road that compelled the enactment of drunk-driving statutes, rather than the protection of victims from intoxicated would-be drivers who fall asleep behind the wheel of a disabled car. Thus, when contemplating whether the “nature” of felony DWI involves the requisite risk of force against the person and property of another, courts should consider what type of conduct is being targeted—the operation of a vehicle while intoxicated—rather than focus on the outer reaches of the statute.

As to whether felony DWI constitutes a “*substantial risk*” that physical force may be used, repeated convictions for drinking and driving create a “strong probability that . . . the application of physical force . . . will occur.”<sup>272</sup> The fact that a driver’s use of alcohol increases the risk of crashing is commonly known and well-documented. From 1999 to 2000, traffic deaths in alcohol-related accidents rose by four percent,<sup>273</sup> which is the largest recorded

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267. 163 F.3d 371 (6th Cir. 1998).

268. *Id.* at 375 n.3.

269. *Id.*

270. *United States v. Raynor*, 939 F.2d 191, 196 (4th Cir. 1991).

271. *Dalton*, 257 F.3d at 209 (Walker, C.J., dissenting).

272. *United States v. Rodriguez-Guzman*, 56 F.3d 18, 20 (5th Cir. 1995); *see also United States v. Alas-Castro*, 184 F.3d 812, 813 (8th Cir. 1999); *United States v. Velazquez-Overa*, 100 F.3d 418, 420 (5th Cir. 1996).

273. Nat’l Highway Traffic Safety Admin., U.S. Dep’t of Transport., Traffic Safety

percentage increase in alcohol-related fatalities.<sup>274</sup> In 2000, there were 16,653 alcohol-related fatalities, representing forty percent of the total traffic fatalities in 2000 and an average of one alcohol-related death every thirty-two minutes.<sup>275</sup> An estimated 310,000 persons suffered injuries in crashes where police reported the presence of alcohol.<sup>276</sup>

Moreover, empirical evidence shows that a driver who is intoxicated is significantly more likely to cause injury or death. The risk of a driver being killed in a crash at 0.10% blood alcohol concentration ("BAC") is at least twenty-nine times higher than that of drivers without alcohol in their system.<sup>277</sup> An experiment sponsored by the National Highway Traffic Safety Administration ("NHTSA") further supports the proposition that intoxication sufficiently impairs a driver's performance to present a substantial risk of harm to himself, to others, or to property.<sup>278</sup> Using a broad sampling of the driving population,<sup>279</sup> the study showed that major driving skills were impaired at BACs as low as 0.02% on some important measures for a majority of subjects.<sup>280</sup> A person who drives with such impaired skills inevitably causes a risk that physical force may be used against the person or property of another. The results also indicated that as BACs rose, the percentage of individuals exhibiting impaired skills, as well as the magnitude of the impairment, increased.<sup>281</sup> Thus, in the case of a driver with a BAC of 0.10%, the risk of the use of force is arguably "substantial."<sup>282</sup>

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Facts 2000, Alcohol, <http://www.nhtsa.dot.gov/departments/nrd-30/ncsa/factsheet.html> [hereinafter NHTSA 2000 Traffic Sheets]. The NHTSA defines a fatal traffic crash as alcohol-related if a driver or a pedestrian has a blood alcohol concentration ("BAC") of 0.01% or greater in a reported traffic crash. *Id.* The NHTSA considers those involved in fatal crashes with a BAC of 0.10% or greater to be intoxicated. *Id.* Most states deem a person with a 0.10% BAC legally intoxicated. *Id.*

274. Statement of Millie I. Webb, *New Government Research Shows Nation's Largest Percentage Increase in Alcohol-Related Traffic Fatalities* (Sept. 24, 2001), <http://www.madd.org/news/0,1056,2326,00.html>.

275. NHTSA 2000 Traffic Sheets, *supra* note 273.

276. *Id.*

277. Mothers Against Drunk Driving, Stats and Resources, BAC, available at <http://www.madd.org/stats/0,1056,1767,00.html> (last visited Feb. 21, 2002). Although 18 U.S.C. § 16(b) requires that the risk of the use of physical force be against the person or property of *another*, one can suppose that a crash sufficiently serious to cause the death of the driver involves a substantial risk to other drivers, pedestrians, and property.

278. See H. Moskowitz et al., U.S. Dep't of Transport., *Driver Characteristics and Impairment at Various BACs at ii* (2000). The purpose of this laboratory study was to determine the extent of driving skill impairment at BACs from zero to 0.10%, and whether certain driver characteristics affect alcohol impairment. See *id.*

279. The study examined the effects of alcohol on driving skills in a sample of 168 subjects of different ages, genders, and drinking practices. *Id.*

280. *Id.* at 22.

281. *Id.*

282. In an earlier study, the NHTSA systematically estimated relative risk for intoxicated drivers with BACs between 0.08% and 0.10% and, based on the results, concluded that "drinking and driving at BACs under 0.10% is very dangerous." See

The requirement of prior convictions inherent in felony DWI offenses also increases the risks associated with the crime. Although the prior convictions may not necessarily increase the chance that the defendant will cause injury the third or fourth time, the risk that the defendant will cause injury on one of his several drunk-driving incidents is greater than if he had committed only one prior offense.<sup>283</sup> In fact, in 1999, one out of nine intoxicated drivers involved in fatal crashes had previously been convicted for DWI within the prior three years.<sup>284</sup> Thus, drunk driving undoubtedly involves a substantial risk of the use of physical force against the person or property of another.

The preceding analysis of the plain language and structure of 18 U.S.C. § 16 shows that the better interpretation of the statute is that felony DWI constitutes a crime of violence.

### B. *Congressional Policies Regarding Removal: A Hard-Line Approach to the Problem of Criminal Aliens*

This section will argue that, although Congress has not expressly included felony DWI as a crime of violence, such an inclusion is nonetheless consistent with congressional policies regarding removal.

In delegating its constitutional authority over immigration, Congress has clearly taken a hard-line position against criminal aliens. Since the 1980s, Congress has focused particular attention on criminal aliens, expanding removal grounds, decreasing the availability of discretionary relief, expediting removal procedures, and restricting judicial review of removal orders.<sup>285</sup> Although there has been some support for a more sympathetic position,<sup>286</sup> a majority of Congress has shown approval for the tough attitude it has taken toward criminal aliens. For example, in 1990, the House Judiciary Committee stated that it was “deeply disturbed that INS has not placed a higher priority on the criminal alien problem. . . . The Committee is convinced that among the classes of aliens deserving of deportation no class should receive greater attention than aliens convicted of serious criminal offenses.”<sup>287</sup> A statement by Senator Graham further illustrates Congress’s sentiment towards criminal aliens:

[T]housands of . . . aliens in our criminal justice system . . . have somehow escaped justice or deportation. . . . It is the Federal

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P.L. Zador et al., Nat’l Highway Traffic Safety Admin., *Relative Risk of Fatal and Crash Involvement by BAC, Age and Gender* 10 (2000).

283. *Dalton v. Ashcroft*, 257 F.3d 200, 210 (2d Cir. 2001) (Walker, C.J., dissenting).

284. *Mothers Against Drunk Driving*, Stats and Resources, DUI, <http://www.madd.org/madd/stats/0,1056,1784,00.html> (last visited Feb. 21, 2001).

285. *See supra* Part I.B.3.

286. Rep. Barney Frank (D. Mass) called the congressional attitude toward deportation “inhumane, disruptive not just to individuals, but to other countries, and wholly unjustified.” 143 Cong. Rec. H7012 (daily ed. Sept. 9, 1997).

287. H.R. Rep. No. 101-681, pt. 1, at 145 (1990).

Government's responsibility to protect our borders. If the Government fails to prevent dangerous aliens from crossing our borders, it then becomes the responsibility of the Federal Government to help the States cope with the crime and the costs of prosecuting criminal aliens. Finally, the Federal Government must make sure that dangerous aliens are not on the streets, not allowed to commit new crimes, and not caught in a lengthy deportation process.<sup>288</sup>

Thus, although its legislation is sometimes less than clear, Congress has been explicit in its message that it will not favor more lenient policies towards criminal aliens at the cost of the rights and liberties of American citizens.<sup>289</sup>

The courts, however, traditionally have been more sympathetic to the criminal alien and have displayed some hesitation in wholeheartedly supporting congressional desire.<sup>290</sup> Indeed, some of the offenses Congress has considered sufficiently serious to warrant removal are questionable—i.e., gambling offenses. Nonetheless, for the sake of a uniform policy between the branches and, more importantly, considering Congress's broad authority over immigration, the courts should be compelled to "acknowledge and implement [Congress's] will."<sup>291</sup>

Granted, it is not clear whether Congress specifically intended a deportable crime of violence to include felony DWI. However, the hard-line position that Congress has taken with regard to criminal aliens suggests that the inclusion of felony DWI as a deportable crime would not be beyond the scope of congressional desire. Arguably, a Congress that has made certain gambling offenses a deportable crime would not balk at the idea of deporting an alien for felony DWI, which is generally a more dangerous and iniquitous offense. Certain reckless conduct can be just as dangerous as intentional conduct, and it is likely that Congress intended some dangerous, reckless criminal acts to qualify as crimes of violence for removal purposes. However, Congress must draft its legislation carefully to reflect its intent more clearly.<sup>292</sup>

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288. 136 Cong. Rec. S17741 (daily ed. Oct. 27, 1990) (statement of Sen. Graham).

289. Congress continues to promote programs that successfully identify and deport criminal aliens. See 143 Cong. Rec. H2617 (daily ed. May 14, 1997) (discussing a successful INS pilot program in California that identified and deported criminal aliens in city detention facilities); see also 143 Cong. Rec. E1439 (daily ed. July 16, 1997) (statement of Rep. Ron Packard) (expressing outrage at former Attorney General Janet Reno's unilateral decision to suspend a large number of deportation proceedings).

290. Newcomb, *supra* note 22, at 718.

291. *Guerrero-Perez v. INS*, 242 F.3d 727, 737 (7th Cir. 2001); see also *Hampton v. Mow Sun Wong*, 426 U.S. 88, 101 n.21 (1976) ("[T]he power over aliens is of a political character and therefore subject only to narrow judicial review." (citing *Fong Yue Ting v. United States*, 149 U.S. 698, 713 (1893))).

292. Another reason that Congress should draft its legislation more clearly is to

C. *A Proposed Amendment to 8 U.S.C. § 1101(a)(43)(F)*

Part III.A argued that the plain language of 18 U.S.C. § 16(b) does not require specific intent to use physical force, thus allowing within its scope some non-intentional conduct, such as drunk-driving felonies. Part III.B then suggested that Congress's apparent intent and policy to deal harshly with criminal aliens supports the inclusion of felony DWI among the long list of removable offenses Congress has already established. This Note concludes by proposing that Congress amend 8 U.S.C. § 1101(a)(43)(F) by dropping the reference to 18 U.S.C. § 16 and incorporating the language of section 4B1.2(a)(2) of the U.S. Sentencing Guidelines.<sup>293</sup> Such an amendment would clarify the immigration law's definition of crime of violence to include some non-intentional conduct, such as felony DWI.

Initially, the "crime of violence" definitions found in section 4B1.2 and 18 U.S.C. § 16 were identical, because the Sentencing Guidelines defined crime of violence by referring to the definition found in 18 U.S.C. § 16.<sup>294</sup> This changed in 1989 when the Sentencing Commission adopted the definition of crime of violence now found in section 4B1.2.<sup>295</sup> Although the language of the first prongs of the two definitions, i.e., section 4B1.2(a)(1) and § 16(a), are still nearly identical, the language of section 4B1.2(a)(2) is now distinct from § 16(b).<sup>296</sup>

In amending the Sentencing Guidelines, the Sentencing Commission noted that it did not intend to change the substance of the guideline, but only to clarify its meaning.<sup>297</sup> Likewise, the

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prevent the courts from having to invoke the Rule of Lenity as embodied in "the longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987). When interpreting the scope of a criminal statute, the court must discern the intent of Congress from the statute's language, structure, and legislative history. *Garrett v. United States*, 471 U.S. 773, 779 (1985). Where a reasonable doubt remains regarding a statute's intended scope, the court will apply the Rule of Lenity and construe the statute in favor of the defendant. *Moskal v. United States*, 498 U.S. 103, 107-08 (1990). This rule is based on the premise that a penal statute must "define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited, and in a manner that does not encourage arbitrary and discriminatory enforcement." *United States v. Chatman*, 869 F.2d 525, 527 (9th Cir. 1989) (quoting *Kolender v. Lawson*, 461 U.S. 352, 357 (1983)), *overruled on other grounds* by *Taylor v. United States*, 495 U.S. 575 (1990).

The courts may find that 18 U.S.C. § 16(b) is sufficiently ambiguous to apply the Rule of Lenity. Moreover, Congress has been noticeably silent as to whether the specific crime of felony DWI constitutes a crime of violence under 18 U.S.C. § 16. The courts then would be required to construe the statute in the light most favorable to the criminal alien, and hold that felony DWI is not a crime of violence.

293. See *supra* note 101.

294. See U.S. Sentencing Guidelines Manual app. C at 106-07 (1997).

295. See *id.*

296. Compare 18 U.S.C. § 16's definition of crime of violence in Part I.C.1 with the Sentencing Commission's definition in *supra* note 101.

297. See U.S. Sentencing Guidelines Manual app. C at 107 ("The purpose of this



Legislature should clarify the immigration law's definition of crime of violence by adopting language similar to the "otherwise" clause of section 4B1.2(a)(2). The immigration law's definition of crime of violence at 8 U.S.C. § 1101(a)(43)(F) would then read:

(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(b) any other offense that is a felony and *involves conduct that presents a serious potential risk of physical injury to another.*

The new language of the Sentencing Guidelines has proven more clear than the language of 18 U.S.C. § 16(b). Since Congress amended section 4B1.2(a)(2), the courts have held that, unlike § 16(b), section 4B1.2(a)(2) clearly includes both intentional and non-intentional conduct. For example, in *United States v. Rutherford*,<sup>298</sup> the Seventh Circuit held that section 4B1.2(a)(2) does not require the specific intent to use force, but encompasses reckless conduct that presents a serious risk of injury.<sup>299</sup> The court then held that drunk driving constitutes a crime of violence under section 4B1.2(a)(2), because the "risk of injury from drunk driving is neither conjectural nor speculative."<sup>300</sup> The Second and Fifth Circuits also distinguished the two statutes and found that section 4B1.2(a)(2) contains broader language than § 16(b) in that it defines a crime of violence by its "resultant injury" rather than by the use of force.<sup>301</sup> The Third Circuit agreed, stating that the revised language of section 4B1.2(a)(2) includes conduct involving a "lower mens rea of 'pure' recklessness: . . . lack[ing] an intent, desire, or willingness to use force or cause harm at all."<sup>302</sup> The Third Circuit then cited drunk driving as an example of an offense that would be includable under the new language, because a "drunk driver risks causing severe injury to others on the road or in the car, [even though] he or she does not intend to use force to harm others."<sup>303</sup> Thus, the agreement of the courts in their interpretation of section 4B1.2(a)(2) suggests that adopting similar language in 8 U.S.C. § 1101(a)(43)(F) would clarify the immigration law's "crime of violence" definition to include certain reckless conduct that is particularly dangerous, such as felony DWI.

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amendment is to clarify the definition[] of crime of violence . . .").

298. 54 F.3d 370 (7th Cir. 1995).

299. *Id.* at 374.

300. *Id.* at 376.

301. *Dalton v. Ashcroft*, 257 F.3d 200, 207 (2d Cir. 2001); *United States v. Chapa-Garza*, 243 F.3d 921, 925 (5th Cir. 2001).

302. *United States v. Parson*, 955 F.2d 858, 866 (3d Cir. 1992).

303. *Id.*

## CONCLUSION

Undoubtedly, those who make and administer the laws must consider the harsh consequences of removal in determining which crimes warrant such a penalty. However, the acknowledgement that "deportation is a drastic measure" must be balanced with the need to protect America and its citizens from serious crimes committed by alien criminals.<sup>304</sup> Although some may think it unfair, nowhere is the phrase "[o]bedience to the law is demanded as a right" more true than in the case of the criminal alien.<sup>305</sup> The American government has and will continue to deal harshly with aliens who commit serious crimes in the United States. The difficult question, however, is determining which crimes are sufficiently serious to warrant removal from the United States.

Felony DWI is a sufficiently violent and dangerous offense to warrant removal as a crime of violence under 18 U.S.C. § 16(b) and a deportable aggravated felony under 8 U.S.C. § 1101(a)(43)(F). The plain language of 18 U.S.C. § 16(b) can reasonably be read to conclude that felony DWI, which "exact[s] a high societal toll in the forms of death, injury, and property damage,"<sup>306</sup> involves a "substantial risk that physical force . . . may be used."<sup>307</sup> Congress's consistently firm policies towards criminal aliens further support such a conclusion. To better reflect its intent, however, Congress should amend the immigration law's definition of crime of violence to include more clearly some particularly dangerous reckless conduct. Such an amendment would allow the courts to recognize that repeatedly drinking and driving at the risk of harming property and innocent victims is, in fact, a crime of violence warranting removal from the United States.

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304. See *supra* text accompanying note 1 and Introduction.

305. See *supra* text accompanying note 2. Indeed, the Supreme Court has stated that, in the exercise of its broad power over immigration and naturalization, "Congress regularly makes rules that would be unacceptable if applied to citizens." *Mathews v. Diaz*, 426 U.S. 67, 80 (1976).

306. *In re Magallanes-Garcia*, Interim Decision 3341, at 6 (BIA 1998).

307. 18 U.S.C. § 16(b) (2000).