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Sobering Consequences for Aliens Convicted of Felony DUI: Is Drunk Driving a Crime of Violence under 18 U.S.C. Sec. 16(B)

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SOBERING CONSEQUENCES FOR ALIENS CONVICTED OF FELONY DUI: IS DRUNK DRIVING A CRIME OF VIOLENCE UNDER 18 U.S.C. § 16(B)?

*"It is the upheaval of prior norms by a society that has finally recognized that it must change its habits and do whatever is required, whether it means but a small change or a significant one, in order to stop the senseless loss inflicted by drunken drivers."*¹

I. INTRODUCTION

Drinking and driving is a serious offense that poses grave consequences to drivers, victims, and the public at large.² Each year in the United States, an estimated half million people are injured in alcohol-related crashes.³ Annually, alcohol-related crashes cost the public over 114 billion dollars.⁴ To combat drunk driving, many states have enacted tough criminal penalties for driving under the influence (DUI).⁵ The tougher state laws are designed to deter drunk driving, punish offenders, and gain support for the idea that drinking and driving is socially unacceptable behavior.⁶

¹ Kelly v. Gwinnell, 476 A.2d 1219, 1229 (N.J. 1984) (quoting Chief Justice Wilentz).

² See Dalton v. Ashcroft, 257 F.3d 200, 208 (2d Cir. 2001) (discussing consequences of drunk driving). Drinking and driving takes an enormous toll on human life and is a nationwide problem. *Id.*

³ See *Drunk Driving in the United States* (providing statistical data on drunk driving from National Highway Traffic Safety Administration), at <http://www.madd.org/stats/0,1056,3726,00.html> (last visited Nov. 1, 2002). An estimated 513,000 people are injured in alcohol-related crashes each year, which is an average of 59 people per hour. *Id.*

⁴ See *Drunk Driving in the United States* (discussing economic impact of alcohol-related crashes), at <http://www.madd.org/stats/0,1056,3726,00.html> (last visited Nov. 1, 2002).

⁵ See Lewis R. Katz and Robert D. Sweeney, Jr., Note, *Ohio's New Drunk Driving Law: Halfhearted Experiment in Deterrence*, 34 CASE W. RES. LAW REV 239, 241 (discussing how states have addressed problem of drunk driving by amending state statutes). For the purposes of this note, driving under the influence (DUI) and driving while intoxicated (DWI) will be used interchangeably because both terms are used to describe the crime of drinking and driving.

⁶ See Katz and Sweeney, *supra* note 5, at 242 (detailing purpose of tougher drunk driving laws).

Unlike a citizen counterpart, a criminal alien that is convicted of DUI may face the additional punishment of deportation.⁷ Varying with jurisdiction, a criminal alien may be deported for his or her DUI conviction.⁸ The authority to deport criminal aliens convicted of DUI is created under a sub-category of deportable aggravated felonies labeled “crimes of violence.”⁹

Currently, a split exists among the United States Circuit Courts of Appeals over whether DUI convictions constitute a “crime of violence,” under 18 U.S.C. § 16(b).¹⁰

This Note asserts that 18 U.S.C. § 16(b) should not be interpreted to include a DUI conviction as a crime of violence. Absent a clear Congressional intent to deport aliens convicted of DUI, the ambiguous statutory language should be construed in favor of the criminal alien because of the severity of deportation. Part II of this Note traces the development of deportation legislation in the United States from early immigration legislation through the most current statutory changes. Part III addresses how 18 U.S.C. § 16(b) is interpreted and discusses the appropriate standard of review to apply and the use of the categorical approach to statutory interpretation. Part IV addresses the circuit split over whether DUI is a crime of violence under 18 U.S.C. § 16(b) and outlines the various methods the United States Courts of Appeals and Board of Immigration Appeals (BIA) use to interpret 18 U.S.C. § 16(b). Finally, Part V proposes a Congressional amendment to specifically classify DUI as a deportable offense because of the severity of the crime. A Congressional amendment is needed

⁷ See Daniel M. Kowalski, *A Crime Of Violence: Malum In Magallanes*, 46 Fed. Law. 5, 5 (January, 1999) (indicating that criminal records may be more problematic for non-citizens). A criminal record can “bar an alien from entry, and it can cause an alien to be deported.” *Id.* Beginning in 1998, the Immigration and Naturalization Service targeted non-citizen residents with old DUI convictions for deportation. *Id.*

⁸ Compare *Bazan-Reyes v. INS*, 256 F.3d 600, 602 (7th Cir. 2001) (ruling DUI conviction not grounds for deportation) and *United States v. Chapa-Garza*, 243 F.3d 921, 928 (5th Cir. 2001) (prohibiting deportation for DUI conviction), with *Tapia-Garcia v. INS*, 237 F.3d 1216, 1223 (10th Cir. 2001) (concluding DUI conviction constitutes permissible grounds for deportation).

⁹ See 8 U.S.C. § 1101 (a)(43)(F) (2001) (defining “crime of violence under 18 U.S.C. § 16 (1998)). A “crime of violence” is defined 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. 18 U.S.C. § 16 (1998).”

¹⁰ See *Montiel-Barraza v. INS*, 275 F.3d 1178, 1180 (9th Cir. 2002) (upholding that DUI not crime of violence); *Dalton v. Ashcroft*, 257 F.3d 200, 208 (2d Cir. 2001) (holding DUI conviction under New York State law does not constitute crime of violence); *Bazan-Reyes v. INS*, 256 F.3d 600, 612 (7th Cir. 2001) (concluding DWI not a crime of violence); *United States v. Chapa-Garza*, 243 F.3d 921, 928 (5th Cir. 2001) (articulating DWI not crime of violence within meaning of 18 U.S.C. § 16). *But see Tapia-Garcia*, 237 F.3d at 1223 (holding DUI a crime of violence).

to resolve confusion over whether DUI is a deportable offense and to establish uniformity among the courts and the BIA.

II. HISTORICAL DEVELOPMENT OF DEPORTATION LAW

The United States Constitution gives Congress broad powers to make laws regulating immigration.¹¹ Congress's broad power to regulate immigration includes the right to deport aliens.¹² The right to deport aliens was unexercised for over one hundred years after the signing of the Constitution.¹³

In the late nineteenth century, Congress responded to years of unrestricted immigration by enacting several laws aimed at curbing immigration.¹⁴ The first successful piece of exclusion legislation was the Chinese Exclusion Act of 1882.¹⁵ The Chinese Exclusion Act only excluded Chinese immigrants, but it formed the basis for subsequent Congressional action in the immigration context.¹⁶ Congress, throughout the early twentieth century, enacted laws aimed at deporting aliens and established strict guidelines and procedures for entry into the United States.¹⁷ The most significant piece of comprehensive immigration legislation passed during this period was the Immigration and Nationality Act of 1952 (Act of 1952).¹⁸

¹¹ See U.S. CONST. art. I, § 8, cl. 4 (providing Congress with power to establish Uniform Rules of Naturalization); U.S. CONST. art. I, § 9, cl. 1 (addressing migration and importation of certain persons).

¹² See Julie Anne Rah, Note, *The Removal of Aliens Who Drink and Drive: Felony DWI As A Crime Of Violence Under § 18 U.S.C. 16(b)*, 70 *FORDHAM L. REV.* 2109, 2112 n.18 (2002) (indicating Congress' broad power to exclude aliens under War Powers Clause). In addition to its power under the War Powers Clause, Congress' power to control immigration may also be inferred from "the inherent right of a sovereign to control its borders." *Id.* at 2112.

¹³ See Christina LaBrie, Note, *Lack of Uniformity in the Deportation of Criminal Aliens*, 25 *N.Y.U. REV. L. & SOC. CHANGE* 357, 358 (1999) (indicating that Congress' power over immigration went largely unused for nearly one hundred years).

¹⁴ See 3A *AM. JUR. 2D Aliens and Citizens* § 2 (2001) (articulating Congressional intent to curb immigration was response to years of unrestricted immigration). The Alien Act of 1789 was the first Congressional response to unrestricted immigration. *Id.* The Alien Act of 1789 gave the President the authority to deport any alien "deemed dangerous," but it only remained in effect for two years. *Id.* The second, more lasting piece of legislation, was the Chinese Exclusion Act of 1882. *Id.*

¹⁵ See LaBrie, *supra* note 13, at 359 (discussing effectiveness and scope of Chinese Exclusion Act). The Act was passed to circumvent the increase in Chinese immigration to the United States. *Id.*

¹⁶ See LaBrie, *supra* note 13, at 359.

¹⁷ See Rah *supra* note 12, at 2113-15 (discussing myriad of immigration laws enacted prior to 1952).

¹⁸ See Rah *supra* note 12, at 2115 (characterizing Immigration and Nationality Act of 1952 as basic immigration law of United States). The Act of 1952 controls basic deportation laws. *Id.*

The Act of 1952 established permissible grounds for deportation, procedures for deportation, and forms of relief from deportation, in limited circumstances.¹⁹ Since its passage, the Act of 1952 has been amended numerous times.²⁰ Many of the most important amendments and changes to the Act of 1952, regarding deportation, have occurred in the last twenty years.²¹

Since the 1980's, Congress has sought to expand the categories of deportable offenses, to expedite deportation proceedings, and to limit the availability of relief for aliens.²² In 1988, Congress amended the Act of 1952 to increase penalties for aliens convicted of certain crimes and created a new class of deportable offenses: aggravated felonies.²³ In 1990, Congress expanded the definition of an aggravated felony when it passed the Immigration Act of 1990 (Act of 1990).²⁴ The Act of 1990 expanded the definition of an aggravated felony to include "crime of violence," as defined in 18 U.S.C. § 16.²⁵

Congress altered the definition of an aggravated felony again in 1996 with the passage of the Antiterrorism and Effective Death Penalty Act (AEDPA) and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA).²⁶ AEDPA and IIRAIRA expanded the aggravated felony category by adding numerous offenses to the aggravated felony category and by substantially lowering the requisite sentence for existing

¹⁹ See Rah *supra* note 12, at 2115-16 (discussing scope of Act of 1952 in relation to deportation proceedings).

²⁰ See LaBrie, *supra* note 13, at 360 (noting numerous changes to Act of 1952).

²¹ See LaBrie, *supra* note 13 at 360 (indicating importance of post-1980 legislation to deportation discussions).

²² See LaBrie, *supra* note 13 at 360 (discussing intent of Congress).

²³ See Mary L. Sfasciotti, *Representing Aliens in Criminal Cases — Recent Amendments To The Immigration and Naturalization Act*, 79 ILL. B.J. 78, 80 (1991) (discussing Congressional amendments to Act of 1952). Under the Anti-Drug Abuse Act of 1988, Congress created a new category of deportable offenses that provided for the deportation of aliens convicted of aggravated felonies. *Id.* In 1990, Congress expanded the aggravated felony category to include illicit trafficking of a controlled substance, any offense related to money laundering, and any "crime of violence" as defined in 18 U.S.C. § 16 for which the term of imprisonment is at least five years. *Id.*

²⁴ See Brent Newcomb, Note, *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, 699 (1998) (outlining history of removal law since 1988). The Immigration Act of 1990 expanded the definition of an aggravated felony and decreased the availability of relief for aliens convicted of an aggravated felony. *Id.* at 699-700.

²⁵ See *id.* at 699 (indicating "crime of violence" included within definition of aggravated felony after 1990).

²⁶ See Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996); Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (1996).

crimes to qualify as an aggravated felony.²⁷ The IIRAIRA, in particular, lowered the previous five-year sentence requirement for a crime of violence to at least a one-year sentence requirement.²⁸ The reduction of the requisite sentence notably expanded this category of deportable offenses because crimes of violence that were previously outside the scope of deportation are now considered deportable offenses.²⁹

III. INTERPRETING 18 U.S.C. § 16(B)

A. *Standard of Review*

In *Chevron v. National Resources Defense Council*,³⁰ the Supreme Court opined that statutory interpretation begins with an examination of the statutory language itself.³¹ If the statutory language and the intent of Congress are unclear, a judicial construction of the statute must consider if the administrative agency, charged with administering the statute, provides a reasonable interpretation of the statute.³² The federal courts, under *Chevron*, must afford substantial deference to an agency's interpretation of a statute it administers.³³ Courts are not required to apply *Chevron* deference where an agency is interpreting a state or federal criminal statute, which it does not administer.³⁴

²⁷ See Richard L. Prinz, *Criminal Aliens Under the IIRAIRA*, SD61 A.L.I.-A.B.A. 319, 322-23 (1999) (outlining changes to definition of aggravated felonies). "Both the AEDPA and IIRAIRA have added new crimes and lowered the sentence required for existing crimes to the point that seemingly all convictions considered felonies under federal law will qualify as aggravated felonies." *Id.* at 322. In 1988, the original definition of an aggravated felony contained only one paragraph. *Id.* In contrast, the current definition includes twenty-one paragraphs. *Id.*

²⁸ See IIRAIRA, Pub. L. No. 104-208, § 321, 110 Stat. 3009 (reducing requisite sentence for crime of violence from five years to at least one year).

²⁹ See Prinz, *supra* note 27, at 329 (proffering reduction of requisite sentence from five years to one year is significant expansion).

³⁰ 467 U.S. 837 (1984).

³¹ See *Chevron v. Natural Res. Def. Council*, 467 U.S. 837, 843-44 (1984) (discussing how courts should review administrative agency's interpretation of statute). In reviewing a statute administered by an administrative agency, a court must address two questions: (1) Is Congressional intent clear, and (2) if Congressional intent is ambiguous, is the agency's interpretation of the statute permissible and can be deferred to. *Id.*

³² See *id.* at 843-44 (discussing if statute silent or ambiguous, reviewing court should consider agency's permissible construction of statute).

³³ See Rah, *supra* note 12, at 2136 (addressing when *Chevron* deference applied). *Chevron* deference only applies when an agency interprets a statute it is charged with administering. *Id.* Courts are not required to apply *Chevron* deference when an agency is interpreting a state or federal criminal statute. *Id.*

³⁴ See Rah, *supra* note 12, at 2136 (articulating that *Chevron* deference not applicable to interpretation of federal or state criminal laws).

A circuit court, reviewing an interpretation of 18 U.S.C. § 16(b) by the BIA, is not required to apply *Chevron* deference because although the Immigration and Naturalization Service (INS) defines “crime of violence” under 8 U.S.C. § 1101(a)(43)(F) with reference to 18 U.S.C. § 16, 18 U.S.C. § 16 is a federal criminal statute.³⁵ The court, therefore, may review a BIA interpretation of 18 U.S.C. § 16(b) *de novo*.³⁶

B. *Statutory Interpretation: A Categorical Approach*

Regardless of the standard of review applied, the United States Circuit Courts of Appeals and the BIA uniformly apply a categorical approach to determine whether an offense falls within the definition of a crime of violence under 18 U.S.C. § 16(b).³⁷ Pursuant to 18 U.S.C. § 16(b), a crime of violence is defined as: “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.”³⁸

To determine if an offense falls within the definition of a crime of violence, a fact finder must first decide whether the crime is a felony.³⁹ Second, if the offense is determined to be a felony, the fact finder must determine, based on the generic elements of the offense, whether the commission of the offense would likely present a “risk that physical force would be used against the person or property of another, irrespective of whether the risk develops or harm actually occurs.”⁴⁰ This two-part analysis is referred to as the categorical approach to statutory interpretation.⁴¹

³⁵ See *Dalton v. Ashcroft*, 257 F.3d 200, 203-04 (2d Cir. 2001) (establishing court’s ability to review interpretations of 18 U.S.C. § 16(b) *de novo* rather than applying *Chevron* deference). Courts will, generally, afford *Chevron* deference to BIA interpretations of the Immigration and Naturalization Act, except where the BIA interprets a state or a federal criminal statute. *Id.*

³⁶ See *id.* at 203-04. *But see* *Tapia-Garcia v. INS*, 237 F.3d 1216, 1220-21 (10th Cir. 2001) (applying *Chevron* deference to BIA interpretation of 18 U.S.C. § 16(b)). In *Tapia-Garcia*, the Tenth Circuit applied *Chevron* deference because 18 U.S.C. § 16(b) is ambiguous and BIA’s interpretation of the statute is reasonable. *Id.*

³⁷ See, e.g., *Bazan-Reyes v. INS*, 256 F.3d 600 (7th Cir. 2001); *Tapia-Garcia*, 237 F.3d at 1216; *Magallanes*, 22 I. & N. Dec. 1, 1998 WL 133301 (BIA March 19, 1998).

³⁸ 18 U.S.C. § 16(b) (1998).

³⁹ See *Matter of Alcantar*, 20 I. & N. Dec. 801, 812, 1994 WL 232083 (BIA May, 25 1994) (applying categorical approach to interpretation of 18 U.S.C. § 16(b)). Historically, there has been a dispute among the courts over whether courts should go beyond the mere generic elements of the offense and consider the underlying facts of the conviction. *Id.* at 810. Courts apply a categorical approach because 18 U.S.C. § 16(b) “contemplates a generic category of offenses which typically present the risk of injury to a person or property irrespective of whether the risk develops or harm actually occurs.” *Id.* at 809.

⁴⁰ 18 U.S.C. § 16(b) (1998); see *id.* at 812 (discussing second step in statutory interpretation).

⁴¹ See *id.* (articulating label of two-step analysis as categorical approach).

Offenses, typically within the parameters of 18 U.S.C. § 16(b), share the potential to result in harm to either the person or property of another.⁴² Violent offenses, such as armed robbery, assault, battery, and involuntary manslaughter, have typically been categorized as crimes of violence under 18 U.S.C. § 16(b).⁴³ Currently, the United States Circuit Courts of Appeals are divided over whether drunk driving is a crime of violence under 18 U.S.C. § 16(b).⁴⁴

IV. CIRCUIT SPLIT

The United States Circuit Courts of Appeals are split over the issue of whether DUI is a crime of violence as defined in 18 U.S.C. § 16(b).⁴⁵ The Second, Fifth, Seventh, and Ninth Circuits have held that DUI is not a crime of violence, while the Tenth Circuit has concluded that DUI is a crime of violence.⁴⁶

A. *BIA Historical Interpretation: DUI Is a Crime of Violence*

Historically, the BIA has held that DUI is a crime of violence under 18 U.S.C. § 16(b), and therefore, grounds for deportation.⁴⁷ In *Magal-*

⁴² See Alcantar, 20 I. & N. Dec. 801, 809, 1994 WL 232083, at *6 (BIA May 25, 1994) (discussing characteristic commonly shared by offenses included within definition of 18 U.S.C. § 16(b)). If a court determines that an offense involves the risk of harm, then that offense is classified under 18 U.S.C. § 16(b) as a crime of violence. *Id.* It is immaterial whether the risk of harm results in the infliction of actual harm. *Id.*

⁴³ See D, 20 I. & N. Dec. 827, 1994 BIA LEXIS 6, at *3-4 (BIA June 24, 1994) (holding respondents' convictions for armed robbery, assault, and battery constitute crimes of violence); Alcantar, 20 I. & N. Dec. 801, 813-14, 1994 WL 232083, at *10 (BIA May 25, 1994) (holding respondent's conviction for involuntary manslaughter constitutes a crime of violence under 18 U.S.C. § 16(b)).

⁴⁴ See *supra* note 10 and accompanying text (outlining circuit split).

⁴⁵ See *Montiel-Barraza v. INS*, 275 F.3d 1178, 1180 (9th Cir. 2002) (upholding DUI not crime of violence); *Dalton v. Ashcroft*, 257 F.3d 200, 208 (2d Cir. 2001) (holding DUI conviction under New York State law does not constitute "crime of violence"); *Bazan-Reyes v. INS*, 256 F.3d 600, 612 (7th Cir. 2001) (concluding DUI not a "crime of violence"); *United States v. Chapa-Garza*, 243 F.3d 921, 928 (5th Cir. 2001) (articulating DWI not crime of violence within meaning of 18 U.S.C. § 16); see also Ramos, 23 I. & N. Dec. 336, 2002 BIA LEXIS 7, *30 (BIA April 4, 2002) (reversing previous position that DUI crime of violence under 18 U.S.C. § 16(b)). *But see* *Tapia-Garcia v. INS*, 237 F.3d 1216, 1223 (10th Cir. 2001) (holding DUI a crime of violence); *Puente-Salazar*, 22 I. & N. Dec. 1006, 1999 WL 770709, at *21 (BIA September 29, 1999) (holding DUI crime of violence), *overruled by*, Ramos, 23 I. & N. Dec. 336, 2002 BIA LEXIS 7 (BIA April 4, 2002); *Magalanes*, 22 I. & N. Dec. 1, 1998 WL 133301 (BIA March 19, 1998) (finding DUI crime of violence), *overruled by*, Ramos, 23 I. & N. Dec. 336, 2002 BIA LEXIS 7 (BIA April 4, 2002).

⁴⁶ See *supra* note 44 and accompanying text (outlining circuit split).

⁴⁷ See *Puente-Salazar*, 22 I. & N. Dec. 1006, 1999 WL 770709 (BIA September 29, 1999) (holding DUI crime of violence), *overruled by*, Ramos, 23 I. & N. Dec. 336, 2002

lanes,⁴⁸ the BIA first concluded that DUI is a crime of violence as defined in 18 U.S.C. § 16(b).⁴⁹ The BIA reasoned that drunk driving is a serious offense that, by its nature, presents a serious risk of physical harm to the general public.⁵⁰ The BIA concluded that DUI is a crime of violence because it is an offense that involves a “substantial risk of physical harm to persons and property.”⁵¹ In *Puente-Salazar*,⁵² the BIA, following its precedent in *Magallanes*, concluded that the respondent’s conviction for DWI, under Texas law, was a crime of violence because “operating a motor vehicle while intoxicated may create a substantial risk that physical force will be applied.”⁵³

B. *Drunk Driving Is a Crime of Violence Under 18 U.S.C. § 16(b)*

In *Tapia-Garcia v. INS*,⁵⁴ the Tenth Circuit Court of Appeals ruled that respondent’s conviction for DUI constituted a crime of violence as defined in 18 U.S.C. § 16(b).⁵⁵ Applying *Chevron* deference, the Tenth Circuit deferred to the BIA’s interpretation of the statute and concluded that drunk driving is properly categorized as a crime of violence because “the generic elements of the offense present a substantial risk that physical force . . . may be used.”⁵⁶ The Tenth Circuit reasoned that drunk driving is a reckless act that regularly results in injury.⁵⁷

BIA LEXIS 7 (BIA April 4, 2002); *Magallanes*, 22 I. & N. Dec. 1, 1998 WL 133301 (BIA March 19, 1998) (holding DUI crime of violence for deportation purposes), *overruled by*, *Ramos*, 23 I. & N. Dec. 336, 2002 BIA LEXIS 7 (BIA April 4, 2002).

⁴⁸ 22 I. & N. Dec. 1, 1998 WL 133301 (BIA March 19, 1998).

⁴⁹ See *Magallanes*, 22 I. & N. Dec. 1, 1998 WL 133301 (BIA March 19, 1998) (holding DUI crime of violence).

⁵⁰ See *id.* (observing that drunk driving dangerous activity that often results in harm). Drunk driving is a problem of great magnitude, and therefore, the state has a strong interest in eliminating the drunk driving epidemic. *Id.* “The risk of injury from drunk driving is neither conjectural or speculative” because “the dangers associated with drunk driving are well-known and well-documented.” *United States v. Rutherford*, 54 F.3d 370, 376 (7th Cir. 1995).

⁵¹ *Id.*

⁵² 22 I. & N. Dec. 1006, 1999 WL 770709 (BIA September 29, 1999).

⁵³ *Id.*

⁵⁴ 237 F.3d 1216 (10th Cir. 2001).

⁵⁵ See *Tapia-Garcia v. INS*, 237 F.3d 1216 (10th Cir. 2001) (concluding that respondent deportable based on DUI conviction). *Tapia-Garcia*, a legal permanent resident of United States and Mexican citizen, was convicted in Idaho for DUI. *Id.* at 1217. The INS commenced deportation proceedings after *Tapia-Garcia* served two months of his five-year sentence. *Id.* An immigration judge found that *Tapia-Garcia*’s DUI offense constituted a crime of violence under 18 U.S.C. § 16(b) and ordered deportation. *Id.* *Tapia-Garcia* appealed to the BIA, who dismissed his appeal. *Id.*

⁵⁶ See *Tapia-Garcia*, 237 F.3d at 1223 (concluding that DUI presents serious risk of injury to make it crime of violence).

⁵⁷ See *id.* at 1222 (referencing inherent risk of drunk driving). The court recognized that the “well-documented danger inherent in drunk driving supports the conclusion that a

Although the Tenth Circuit applied a deferential standard of review, the court also relied on its own independent justifications to support its conclusion that DUI is a crime of violence under 18 U.S.C. § 16(b).⁵⁸ Specifically, the Tenth Circuit recognized the inherent dangers of drunk driving, and thus supported the BIA's interpretation of DUI as a crime of violence.⁵⁹ The Tenth Circuit's reasoning suggests that it not only deferred to the BIA's interpretation of 18 U.S.C. § 16(b), but that it also agreed with the BIA's approach.⁶⁰

C. Drunk Driving Is Not a Crime of Violence Under 18 U.S.C. § 16(b)

In contrast to the Tenth Circuit, the Second, Fifth, Seventh, and Ninth Circuits, reviewing the issue *de novo*, have held that DUI does not constitute a crime of violence under 18 U.S.C. § 16(b).⁶¹ The Second, Fifth, Seventh, and Ninth Circuits have consistently ruled DUI is not a crime of violence, but have failed to adopt a uniform approach for analyzing 18 U.S.C. § 16(b).⁶² These circuit courts have endorsed varying approaches for determining what constitutes a crime of violence under 18 U.S.C. § 16(b).⁶³

DUI offense may also constitute a crime of violence." *Id.* at 1223.

⁵⁸ See Ramos, 23 I. & N. Dec. 336, 2002 BIA LEXIS 7, at *40 (BIA April 4, 2002) (Hurwitz, J., dissenting) (acknowledging that Tenth Circuit did not solely apply deferential standard). The "Tenth Circuit applied a deferential standard of review in evaluating our (BIA) ruling, but also inserted some of its own reasoning to support its conclusion that our interpretation of 18 U.S.C. § 16(b) was reasonable." *Id.* at *43.

⁵⁹ See *id.* at *43 (clarifying Tenth Circuit relied on its own statistical data to conclude DUI crime of violence).

⁶⁰ See *id.* at *44 (proffering Tenth Circuit did not find DUI crime of violence solely because of deferential review).

⁶¹ See *Montiel-Barraza v. INS*, 275 F.3d 1178, 1180 (9th Cir. 2002) (upholding DUI not crime of violence); *Dalton v. Ashcroft*, 257 F.3d 200, 208 (2d Cir. 2001) (holding DWI conviction under New York State law does not constitute "crime of violence"); *Bazan-Reyes v. INS*, 256 F.3d 600, 602 (7th Cir. 2001) (concluding DUI not a "crime of violence"); *United States v. Chapa-Garza*, 243 F.3d 921, 928 (5th Cir. 2001) (articulating DWI not crime of violence within meaning of 18 U.S.C. § 16(b)). *But see* *Tapia-Garcia v. INS*, 237 F.3d 1216, 1223 (10th Cir. 2001) (concluding DUI presents serious risk of injury to make it crime of violence under 18 U.S.C. § 16(b)).

⁶² See Ramos, 23 I. & N. Dec. 336, 2002 BIA LEXIS 7, at *44 (BIA April 4, 2002) (Hurwitz, J., dissenting) (highlighting that each circuit holding DUI not crime of violence has approached issue differently).

⁶³ See Ramos, 23 I. & N. Dec. 336, 2002 BIA LEXIS 7, at *44-45 (BIA April 4, 2002) (Hurwitz, J., dissenting) (enunciating different approaches taken by each circuit when analyzing 18 U.S.C. § 16(b)). The Fifth and Seventh Circuits have concluded that 18 U.S.C. § 16(b) only applies to offenses where "there is a substantial likelihood that the perpetrator will intentionally employ physical force against the person or property of another." *Id.* at *44. On the other hand, the Ninth Circuit concluded that "intentional conduct is not required" for an offense to be considered a crime of violence under 18 U.S.C. § 16(b). *Id.* The Second Circuit has remained silent on the intent requirement, but has held "that the

1. Fifth Circuit and Seventh Circuit Approach: Substantial Likelihood of Intentional Force

In *United States v. Chapa-Garza*,⁶⁴ the Fifth Circuit held that DWI is not a crime of violence.⁶⁵ In reaching this conclusion, the court rejected the government's suggested construction of 18 U.S.C. § 16(b).⁶⁶ The government argued that the court should interpret 18 U.S.C. § 16(b) in the same manner as § 4B1.2(a)(2) of the United States Sentencing Guidelines, but the court refused to construe 18 U.S.C. § 16(b) in the same manner because § 4B1.2(a)(2) of the sentencing guidelines contains more expansive language.⁶⁷

The court reasoned that, under § 4B1.2(a)(2) of the sentencing guidelines, any offense that involves a "conscious disregard of a substantial risk of injury to others" is a crime of violence.⁶⁸ Conversely, 18 U.S.C. § 16(b) requires only that there be a "substantial likelihood that the perpetrator will intentionally employ physical force against another's person or property."⁶⁹ 18 U.S.C. § 16(b) defines violent crimes more narrowly than the sentencing guidelines, and therefore, the two statutes cannot be inter-

risk inherent in drunk driving is not the risk that the driver will use physical force in the course of driving the vehicle." *Id.* at *45.

⁶⁴ 243 F.3d 921 (5th Cir. 2001).

⁶⁵ See *United States v. Chapa-Garza*, 243 F.3d 921, 928 (5th Cir. 2001) (holding that DWI not crime of violence under 18 U.S.C. § 16(b)).

⁶⁶ See *id.* at 924 (rejecting government's interpretation). The government urged the court to construe 18 U.S.C. § 16(b) in the same manner as § 4B1.2(a)(2) of the United States Sentencing Guidelines, which includes drunk driving within its definition of a crime of violence. *Id.* at 925. Under U.S.S.G. § 4B1.2(a)(2), "any offense that involves 'pure recklessness,' i.e. a conscious disregard of a substantial risk of injury to others, is a crime of violence." *Id.* The court concluded that 18 U.S.C. § 16(b), unlike U.S.S.G. § 4B1.2(a)(2), requires that "there be a substantial risk that the defendant will use physical force against another's person or property in the course of committing the offense." *Id.* The sentencing guidelines only require that "the offense involve conduct that poses a serious risk of physical injury to another person." *Chapa-Garza*, 243 F.3d at 925.

⁶⁷ See *id.* at 924 (discussing why 18 U.S.C. § 16(b) cannot be interpreted in same manner as sentencing guidelines). The court also rejected the government's construction of 18 U.S.C. § 16(b) for two other reasons. See *id.* First, under 18 U.S.C. § 16(b), the "substantial risk that physical force may be used" only contemplates reckless disregard for the probability that intentional force may be employed." *Id.* Second, "the physical force described in section 16(b) is that 'used in course of committing the offense,' not the force that could result from the offense having been committed." *Id.*

⁶⁸ *Chapa-Garza*, 243 F.3d at 925; see also U.S.S.G. § 4B1.2(a)(2) (1989). Section 4B1.2(a)(2) provides, in pertinent part: "The term 'crime of violence' means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that - (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."

⁶⁹ See *Chapa-Garza*, 243 F.3d at 925.

preted in the same way.⁷⁰ Utilizing an 18 U.S.C. § 16(b) analysis, DUI is not a crime of violence because intentional force against the person or property of another is rarely used to commit a felony DUI.⁷¹

The Seventh Circuit, following the reasoning of the Fifth Circuit, also concluded that DUI is not a crime of violence as defined in 18 U.S.C. § 16(b).⁷² The court reviewed the BIA's decision that 18 U.S.C. § 16(b) includes offenses that involve reckless behavior and found that 18 U.S.C. § 16(b) only requires that "there is a substantial likelihood that the perpetrator will intentionally employ physical force against another's person or property."⁷³ The court rejected the argument that 18 U.S.C. § 16(b) covers "all felonies that involve a substantial risk of one object exerting force upon another."⁷⁴ According to the Seventh Circuit, intentional violent force is necessary before an offense can be categorized as a crime of violence.⁷⁵

2. Second Circuit: Inherent Risk in Drunk Driving Is Not That the Driver Will Use Physical Force

The Second Circuit, in *Dalton v. Ashcroft*,⁷⁶ ruled de novo that DUI is not a crime of violence within the meaning of 18 U.S.C. § 16(b).⁷⁷ The

⁷⁰ See *id.* at 925-27 (indicating that § 4B1.2(a)(2) and 18 U.S.C. § 16(b) cover different types of conduct). The Sentencing Guidelines definition of a crime of violence covers conduct that "presents a serious risk of injury," while 18 U.S.C. § 16(b) includes felonies that "by nature involve a substantial risk that physical force ... may be used." *Id.* at 926.

⁷¹ See *id.* at 928 (stating conclusion DWI not crime of violence).

⁷² See *Bazan-Reyes v. INS*, 256 F.3d 600, 612 (7th Cir. 2001) (holding DWI not crime of violence). *Bazan-Reyes*, a citizen of Mexico, was convicted of Class D felony for driving while intoxicated. *Id.* at 602-03. He was sentenced to three years in prison. *Id.* INS commenced removal proceedings, charging *Bazan-Reyes* with "removability" based on his DWI conviction. *Id.* The BIA found him removable based on his DWI conviction because the "term crime of violence as articulated in § 16(b) is not limited to crimes of specific intent, but also includes offenses that involve reckless behavior." *Id.* at 606. *Bazan-Reyes* challenged this interpretation on the grounds that 18 U.S.C. § 16(b) requires a substantial risk of intentional force and that DWI is not an offense that normally involves a substantial risk of intentional force. See *Bazan-Reyes*, 256 F.3d at 606.

⁷³ *Id.* at 610.

⁷⁴ *Id.* The Seventh Circuit refused to endorse a broad interpretation of 18 U.S.C. § 16(b). See *id.* The court noted that a broad interpretation would categorize many offenses that are generally not considered violent crimes as crimes of violence. See *id.* For example, the court indicated that a conviction for involuntary manslaughter, which is the result of speeding, would qualify as a violent crime, even though it is not typically classified as a violent crime. See *Bazan-Reyes*, 256 F.3d at 610.

⁷⁵ See *id.* at 611 (describing force necessary to trigger 18 U.S.C. § 16(b)). "The force necessary to trigger 18 U.S.C. § 16(b) is more than merely opening a car door." *Id.* The force used must be actually violent in nature. *Id.*

⁷⁶ 257 F.3d 200 (2d Cir. 2001).

⁷⁷ See *Dalton v. Ashcroft*, 257 F.3d 200, 208 (2d Cir. 2001) (ruling felony DWI conviction not crime of violence).

court reasoned that the language of 18 U.S.C. § 16(b) “fails to capture the nature of the risk inherent in drunk driving” because the risk associated with DUI is the risk of an accident, not the risk that a driver will use force in the course of driving the vehicle.⁷⁸ The court rejected the argument that the “use of physical force” can be equated with an accident because, although an accident may involve force, a person who causes an accident does not “use force” in the same manner as “one might use force to pry open a heavy, jammed door.”⁷⁹ The court, instead, concluded that under 18 U.S.C. § 16(b) a crime of violence must involve the application of force, and not the mere risk that force will be used.⁸⁰

Although the Second Circuit joined the Fifth and Seventh Circuits in their ultimate conclusion, the Second Circuit adopted its own approach to interpreting 18 U.S.C. § 16(b).⁸¹ Unlike the Fifth and Seventh Circuits, the Second Circuit did not specifically address the intent issue.⁸² The Second Circuit merely indicated, “the risk inherent in drunk driving is not the risk that the driver will use physical force in the course of driving the vehicle.”⁸³

3. Ninth Circuit: Intentional Conduct Not Required

The Ninth Circuit is the most recent circuit court to conclude that DUI is not a crime of violence.⁸⁴ In *Montiel-Barraza*,⁸⁵ the Ninth Circuit concluded that DUI is not a crime of violence because it can be violated through negligence alone.⁸⁶ In contrast to the Fifth and Seventh Circuits, the Ninth Circuit failed to conclude that intentional force is required for an offense to be classified as a crime of violence.⁸⁷

⁷⁸ See *id.* at 206 (indicating that language of 18 U.S.C. § 16(b) does not cover DWI). It is not clear what constitutes the “use of physical force” with respect to driving a vehicle. *Id.* “Physical force cannot be reasonably interpreted as a foot on the accelerator or a hand on the steering wheel.” *Id.* It is unlikely that Congress intended all felonies that involve any sort of driving to be categorized as crimes of violence. *Id.*

⁷⁹ See *Dalton*, 257 F.3d at 206 (interpreting accident to mean use of force distorts common sense meaning of accident).

⁸⁰ See *id.* at 207 (concluding application of force not risk of force necessary to have crime of violence).

⁸¹ See *Ramos*, 23 I. & N. Dec. 336, 2002 BIA LEXIS 7, at *44-45 (BIA April 4, 2002) (Hurwitz, J., dissenting) (noting Second Circuit took different approach in concluding DUI not crime of violence).

⁸² See *id.* (distinguishing approach taken by Second Circuit).

⁸³ *Id.* at *45.

⁸⁴ See *Montiel-Barraza v. INS*, 275 F.3d 1178, 1180 (9th Cir. 2002).

⁸⁵ 275 F.3d 1178 (9th Cir. 2002).

⁸⁶ See *Montiel-Barraza*, 275 F.3d at 1180 (holding if DUI with injury to another not crime of violence, then DUI alone not crime of violence).

⁸⁷ See *Ramos*, 23 I. & N. Dec. 336, 2002 BIA LEXIS 7, at *44-45 (BIA April 4, 2002) (highlighting differences between circuit court approaches).

The United States Circuit Courts of Appeals agree that the level of intent required for an offense to qualify as a crime of violence is more than negligence, even though their approaches to reaching the conclusion that DUI is not a crime of violence vary.⁸⁸ An offense is a crime of violence if it involves a volitional application of force, rather than an accidental application of force.⁸⁹ There is still disagreement, however, over whether a mens rea of recklessness or “recklessness plus” is the appropriate level of requisite intent.⁹⁰

D. BIA Current Interpretation: DUI Is Not a Crime of Violence

On April 4, 2002, the BIA in *Ramos*,⁹¹ changed its position with respect to whether DUI is a crime of violence and held that DUI will no longer be considered a crime of violence.⁹² The BIA adopted the view of the majority of circuit courts and concluded that it will follow the law of the circuits that have addressed the issue, but in those circuits that have not ruled on the issue, it will require that “there is a substantial risk that the perpetrator may resort to the use of force” before a crime qualifies as a crime of violence under 18 U.S.C. § 16(b).⁹³

V. CONCLUSION: PROPOSAL TO AMEND 8 U.S.C. § 1101(A)(43)

Congress should amend 8 U.S.C. § 1101(a)(43) to allow for the deportation of aliens convicted of a felony DUI. DUI is a serious offense and deportation is an appropriate remedy for a DUI conviction. Deportation is

⁸⁸ See *Ramos*, 23 I. & N. Dec. 336, 2002 BIA LEXIS 7, at *25 (BIA April 4, 2002) (concluding that more than negligence required before offense qualifies as crime of violence).

⁸⁹ See *id.*

⁹⁰ *Id.* at *24. An offense does not qualify as a crime of violence, under 18 U.S.C. § 16(b), if the crime is committed negligently. See *id.* at *25. The crime, at a minimum, must be committed recklessly. See *id.* The decisions’ of Fifth and Seventh Circuits indicate that something more than simple recklessness is needed to classify the offense as a crime of violence. See *Ramos*, 23 I. & N. Dec. 336, 2002 BIA LEXIS 7, at *24 (BIA April 4, 2002). The Ninth Circuit, on the other hand, ruled that simple recklessness is enough to make up a crime of violence. See *id.* at *25. The Second Circuit did not specifically address the intent requirement. See *id.*

⁹¹ 23 I. & N. Dec. 336, 2002 BIA LEXIS 7 (BIA April 4, 2002).

⁹² See *Ramos*, 23 I. & N. Dec. 336, 2002 BIA LEXIS 7, at *1 (BIA April 4, 2002) (withdrawing from BIA precedent to conclude that DUI not crime of violence). The court withdrew from its decisions in *Puente* and *Magallanes* and concluded that DUI is not a crime of violence. See *id.* at *28. The view of the majority of circuit courts that DUI is not a crime of violence and the interest in establishing uniformity heavily influenced the BIA decision. See *id.*

⁹³ See *id.* at *29 (articulating BIA’s new position on DUI as crime of violence). Additionally, the BIA will require that an offense be committed “at least recklessly.” *Id.*

a harsh penalty, and therefore, while it is appropriate to deport aliens based upon a DUI conviction, congressional intent to deport aliens convicted of DUI must be clear. Currently, Congressional intent to deport aliens for DUI convictions is not clear under 18 U.S.C. § 16(b).

The BIA's recent reversal on the position of DUI is illustrative of the confusion amongst the United States Circuit Courts of Appeals and the BIA over how to interpret 18 U.S.C. § 16(b). The majority of circuit courts and BIA reasonably interpret 18 U.S.C. § 16(b) to not include DUI as a crime of violence because drinking and driving does not always result in harm to persons or property, and therefore, is not typically considered a violent crime. While the majority's interpretation of the statute is rational, the result is not. The dangers associated with drinking and driving are well-known, and criminal aliens who choose to act in reckless disregard for the safety of others should be subject to deportation.

8 U.S.C. § 1101(a)(43), the statute that defines aggravated felonies, should be amended to specifically include DUI convictions. An amendment would allow the United States Circuit Courts of Appeals and the BIA to deport aliens for DUI convictions unequivocally and uniformly across jurisdictions. Additionally, clear statutory language would place the criminal alien on notice that his or her DUI conviction will result in deportation.

Ultimately, Congress is charged with defining criminal offenses, not the courts. Congress should exercise this power carefully to avoid inconsistent interpretations by the courts. The most effective way to remedy inconsistency is through a clear congressional mandate in the form of an amendment.

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