Deporting Nonviolent Violent Aliens:
Misapplication of 18 U.S.C. 16(B) to Aliens
Convicted of Driving under the Influence

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DEPORTING NONVIOLENT VIOLENT AliENS:
MISAPPLICATION OF 18 U.S.C. § 16(B) TO AliENS
CONVICTED OF DRIVING UNDER THE INFLUENCE

“If you call a tail a leg, how many legs has a dog? Five?
No; calling a tail a leg don’t make it a leg.”
— Abraham Lincoln

INTRODUCTION

Anselmo Garcia, a thirty-year resident of the United States and citizen of Mexico, had been sober for five years, determined to change his life following a string of Texas convictions for driving while intoxicated (DWI). He successfully completed a probated sentence resulting from his final conviction in 1993 and maintained a construction job to support his family. In 1998, however, Immigration and Naturalization Service (INS) officials confronted Garcia at a construction site in Dallas County, handcuffed him, and took him into custody. Later, INS officials initiated deportation proceedings against Garcia, exposing him to the threat of permanent separation from his wife, seven children, and seven grandchildren. Garcia’s plight would ultimately

2. The facts surrounding Anselmo Garcia’s plight are taken from Frank Trejo, Felony law stings some immigrants; Code’s use of deporting for past crimes disputed. Dallas Morning News, Oct. 3, 1998, at 30A.
3. Id.
4. The INS is a federal agency within the Department of Justice. It is charged with the administration of federal laws relating to admission, exclusion, deportation, and naturalization of aliens. For a general overview of the INS, see Robert James McWhirter, Immigration Law for Criminal Lawyers: Overview, 16 Crim. Just. 18 (2002).
5. The United States Supreme Court has long recognized the federal government’s exclusive power to form and administer immigration and deportation policies. See, e.g., De Canas v. Bica, 424 U.S. 351, 354 (1976) (noting that the “[p]ower to regulate immigration is unquestionably exclusively a federal power”).
be shared by more than two hundred legal aliens\(^8\) in Dallas County that had been convicted of at least three DWI\(^9\) offenses.\(^{10}\)

These unfortunate events had their genesis in *In re Magallanes-Garcia*,\(^11\) where the Board of Immigration Appeals (BIA)\(^12\) held that an aggravated DUI offense was an aggravated felony under the Immigration and Nationality Act of 1952 (INA).\(^13\) Aggravated felony is the most serious criminal classification within the INA, subjecting offenders to expedited deportation proceedings,\(^14\) mandatory detention during the deportation process,\(^15\) and permanent exclusion from the United States.\(^16\) Moreover, until the United States Supreme Court proscribed the practice in 2001,\(^17\) the aggravated felony classification

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\(^8\) The Immigration and Nationality Act of 1952 defines the term “alien” as any person who is “not a citizen or national of the United States.” 8 U.S.C. § 1101(a)(3) (2000). While the term itself is inherently derogatory, it is used throughout this Comment for sake of consistency with relevant statutory provisions and judicial opinions.

\(^9\) The offenses of driving while intoxicated (DWI) and driving under the influence (DUI) are used interchangeably throughout this Comment.

\(^10\) Trejo, *supra* note 2, at 30A.


\(^12\) The BIA is an administrative appellate board charged with reviewing and deciding those cases initiated and prosecuted by the INS. Its decisions are binding on the INS, and are subject to review or modification only by the Attorney General and the federal courts. *See BIA Interim Decisions*, at http://www.ins.usdoj.gov/graphics/lawsregs/biadec.htm (last visited Jan. 6, 2003).

\(^13\) *In re Magallanes-Garcia*, 22 I. & N. Dec. 3341. Notably, the BIA recently withdrew from its holding in *In re Magallanes-Garcia*. See *In re Ramos*, 23 I. & N. Dec. 336, 336 (B.I.A. Apr. 4, 2002). In *In re Ramos*, the BIA held that a DUI offense under Massachusetts law was not an aggravated felony under the INA. *Id.* The BIA noted, however, that in jurisdictions where the federal circuit court had already concluded that DUI offenses qualified as aggravated felonies, the law of the circuit would govern cases arising in that jurisdiction. *Id.* For a detailed discussion of *In re Ramos*, see infra notes 273-278 and accompanying text.

\(^14\) Section 1228(a)(1) of the INA “assures expeditious removal following the end of the alien’s incarceration” for various crimes, including aggravated felonies. 8 U.S.C. § 1228(a)(1) (2000).


\(^16\) *See* Lea McDermid, *Deportation is Different: Noncitizens and Ineffective Assistance of Counsel*, 89 CAL. L. REV. 741, 757 (2001):

> Aggravated felons, including lawful permanent residents, are barred from all forms of relief from deportation and are permanently inadmissible to the United States, regardless of the length of time they have resided in the U.S., regardless of the hardship to U.S. citizen and permanent resident family members, and regardless of whether the person will face persecution if returned to their country of origin.

*Id.* at 757.

\(^17\) *See* INS v. St. Cyr, 533 U.S. 289, 326 (2001). Prior to the Court’s decision in *St. Cyr*, numerous commentators condemned retroactive deportation laws. *See*, e.g., Melinda Smith, *Comment, Criminal Defense Attorneys and Noncitizen Clients: Understanding Immigrants, Basic Immigration Law & How Recent Changes in Those Laws May Affect Your Criminal Cases*, 33 AKRON L. REV. 163, 203 (1999) (noting that retroactive deportation “affects an extremely harsh penalty upon such a person who is forced out of what he considers his home country and sent to some ‘foreign’ country where he may not be acquainted with the language, customs, and peo-
could be applied retroactively. For Anselmo Garcia, then, it was of no consequence that his DUI offenses were not considered aggravated felonies at the time of their commission.

To many, it may seem fundamentally wrong, and perhaps unconstitutional, to use a relatively minor offense as the basis for deportation, especially where the offender has already completed the related sentence. Compounding the problem, however, is the inconsistency with which federal courts have classified felony DUI offenses under the INA. In a rash of recent jurisprudence, federal courts reviewing whether the aggravated felony provision of the INA encompasses felony DUI offenses have split sharply, rendering aliens deportable, or not, based solely on the geographic fortuity of their offenses. Such fortuity threatens the integrity of the deportation process in the United States and offends the Constitution’s basic instruction that Congress should “establish an uniform Rule of Naturalization.”

Quite naturally, the circuit court split has its roots in the broad statutory definition of the phrase “aggravated felony.” By reference to 18
U.S.C. § 16, that definition includes offenses that, by their nature, involve “a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.”23 This broad definition, however, is not the sole catalyst of the circuit split. Rather, the split has been engendered in large part by the varying levels of deference afforded the BIA in their interpretation of that definition.

Recently, the Courts of Appeals for the Second, Fifth, Seventh and Ninth Circuits have employed a de novo standard of review to the BIA’s conclusion that the aggravated felony provision of the INA encompassed felony DUI offenses.24 Each of these circuits rejected the BIA’s conclusion.25 In Tapia-Garcia v. INS,26 however, the Court of Appeals for the Tenth Circuit employed the highly deferential Chevron doctrine27 to the same BIA’s conclusion.28 The Chevron doctrine mandates that a reviewing court defer to an agency’s reasonable interpretation of an ambiguous statute it has been charged with administering.29 Thus, in Tapia-Garcia, because the Tenth Circuit concluded that the BIA’s finding was based on a reasonable interpretation of the aggravated felony provision of the INA, the court deferred to that interpretation.30

This Comment provides two bases for rejecting the Tenth Circuit’s holding in Tapia-Garcia v. INS. First, this Comment questions the Tenth Circuit’s cursory application of Chevron’s two-step inquiry in deferring to the BIA.31 Second, it further underscores the current fal-
libility of the Tenth Circuit’s holding by discussing In re Ramos, where the BIA recently withdrew from its previous administrative decisions and held that the aggravated felony provision does not encompass DUI offenses. Although not binding on a federal appellate court, In re Ramos certainly undermines the Tenth Circuit’s holding in Tapia-Garcia and suggests that court should join its sister circuits addressing the issue.

To place these arguments in context, Part II of this Comment provides a brief history of the aggravated felony provision of the INA and outlines the statutory scheme by which that provision incorporates 18 U.S.C. § 16, a federal criminal statute. Part II also summarizes early BIA administrative decisions interpreting 18 U.S.C. § 16(b) in the context of felony DUI offenses. Part III examines the current circuit split over whether the aggravated felony provision of the INA, by reference to 18 U.S.C. § 16(b), encompasses felony DUI offenses. Part IV introduces the Chevron doctrine and explores that doctrine’s two-step inquiry to determine whether deference to a particular agency interpretation of law is warranted. This part highlights the Tenth Circuit’s misapplication of the Chevron doctrine at each of Chevron’s


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. 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. § 1113(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.

Id. at 2137 (internal citations omitted). There is ample support for this argument. See, e.g., In re Ramos, 23 I. & N. Dec. at 348 (Filppu, concurring). Board member Filppu noted:

The meaning of the crime of violence provision in 18 U.S.C. § 16 is a question of federal criminal law. At its core, it does not become a question of civil immigration law merely because the statute incorporates it by reference in the “aggravated felony” definition in [the INA]. Because it is a question of federal criminal law, we owe deference to the construction given the statute by the federal circuit courts of appeals. Those courts do not owe deference to our reading of 18 U.S.C. § 16.

Id. See also Crandon v. United States, 494 U.S. 152, 177 (1990) (Scalia, J., concurring) (noting that deference is not owed to an agency interpretation of a criminal statute administered by the courts).

33. See infra notes 273-278 and accompanying text.
34. See infra notes 40-69 and accompanying text.
35. See infra notes 70-118 and accompanying text.
36. See infra notes 119-187 and accompanying text.
37. See infra notes 188-235 and accompanying text.
two steps. Finally, Part V provides several policy considerations suggesting the Tenth Circuit should revisit and withdraw from its opinion in Tapia-Garcia, thereby abrogating the current circuit split.

II. BACKGROUND

The INA provides the current statutory authority for the deportation of legal aliens. The INA provides the Attorney General with the power to initiate deportation proceedings against legal aliens residing within the United States based on the commission of certain predicate offenses. The list of offenses triggering deportation under the INA is quite expansive, including not only major felonies such as drug trafficking, weapons violations, and domestic abuse, but also such minor offenses as the failure to register a change of address. Additionally, the list includes several sweeping phrases, such as "crimes of moral turpitude" and "aggravated felonies."

A. The Aggravated Felony Provision

Congress originally incorporated the phrase "aggravated felony" into the INA by amendment in 1988. In its original form, the phrase encompassed only murder, drug trafficking, and weapons trafficking. Since then, however, Congress has amended the definition of aggravated felony on numerous occasions, each time decidedly broadening its scope. Quite representative of this trend, and of particular importance to this discussion, are a pair of amendments ratified by Congress in 1996: the Antiterrorism and Effective Death Penalty Act of

38. See infra notes 236-272 and accompanying text.
39. See infra notes 273-287 and accompanying text.
45. Anti-Drug Abuse Act of 1988 § 7342, 102 Stat. at 4469-70 (codified at 8 U.S.C. § 1101(a)(43) (2000)). Specifically, the Anti-Drug Abuse Act of 1988 defined the phrase aggravated felony to include "murder, any drug trafficking crime . . . or any attempt or conspiracy to commit any such act." Id.
46. One commentator has described the ever-expanding definition of the phrase-aggravated felony as "ballooning." Smith, supra note 17, at 199. See also Nancy Morawetz, Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms, 113 HARV. L. REV. 1936, 1939 (2000) (describing the ever-expanding definition of the phrase-aggravated felony as having qualities that are "Alice-in Wonderland-like").

1. The Antiterrorism and Effective Death Penalty Act of 1996

President Bill Clinton signed the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) into law on April 24, 1996, just months after the 1995 Oklahoma City bombing. Among the AEDPA’s provisions, Congress added bribery of a witness, commercial bribery, counterfeiting, failure to appear before the court, forgery, illegal re-entry to the United States, various gambling offenses, obstruction of justice, perjury, prostitution crimes, and stolen vehicle trafficking to the list of offenses encompassed by the aggravated felony provision. While the addition of these enumerated offenses certainly increased the number of aliens subject to deportation, many of the AEDPA’s most sweeping changes affected aliens convicted of non-enumerated offenses.

Under the INA, criminal aliens not convicted of an enumerated aggravated felony might nonetheless be considered aggravated felons if they were convicted of a crime of violence, as defined in 18 U.S.C. § 16, and were sentenced to a minimum prison term. Prior to 1996, the INA defined “aggravated felony,” in part, as “a crime of violence (as defined in section 16 of Title 18 [of the United States Code], but not including a purely political offense) for which the term of imprisonment imposed (regardless of any suspension of imprisonment) is at

51. For more in-depth discussions of the AEDPA, see Dawn Marie Johnson, The AEDPA and the IIRIRA: Treating Misdemeanors as Felonies for Immigration Purposes, 27 J. Legis. 477 (2001); Howard F. Chang, The Economic Effects of Immigration and the Case for Liberalizing Reforms, 4:11 Bender’s Immigr. Bull. 497 (June 1, 1999).
least five years." The AEDPA amended this definition in two material respects.

First, the AEDPA reduced the minimum sentence upon which non-enumerated offenses could be classified as aggravated felonies from five years to one year. Second, the AEDPA eliminated the requirement that a judge impose actual incarceration for a convicted alien to be considered an aggravated felon. Rather, so long as the statute under which the alien is convicted carries a maximum sentence of at least one year, the threshold will be satisfied. The imposition of a suspended sentence or the granting of parole is irrelevant to this inquiry. Accordingly, the INA now defines the phrase "aggravated felony," in part, as "a crime of violence (as defined in section 16 of Title 18 [of the United States Code], but not including a purely political offense) for which the term of imprisonment [is] at least one year."

2. The Illegal Immigration Reform and Immigrant Responsibility Act of 1996

The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) was ratified shortly after the AEDPA and was intended to modify some of the AEDPA's "problematic immigration provisions." Like the AEDPA, the IIRIRA significantly expanded the scope of the aggravated felony provision and magnified the consequences of that classification.

Specifically, the IIRIRA provided for the mandatory administrative detention of aggravated felons, from the time of their release from incarceration to their actual deportation from the United States.

54. AEDPA § 401(e) (codified as amended at 8 U.S.C. §§ 1101(a)(43)(F), (G) (2000)).
55. AEDPA § 401(e) (codified as amended at 8 U.S.C. §§ 1101(a)(48)(A), (B) (2000)).
56. AEDPA § 401(e) (codified as amended at 8 U.S.C. §§ 1101(a)(48)(A), (B) (2000)). See also Morawetz, supra note 46, at 1940.
59. IIRIRA § 303 (codified at 8 U.S.C. § 1226(c)(1) (2000)). That section provides that the: Attorney General shall take into custody any alien who- (A) is inadmissible by reason of having committed any offense covered in section 1182(a)(2) of this title . . . when the alien is released, without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense.
60. 8 U.S.C. § 1226(c)(1) (2000). At least one scholar has asserted this provision was grounded on the belief that aliens convicted of aggravated felonies represented a "per se danger to the American public." Jason H. Ehrenberg, A Call for Reform of Recent Immigration Legislation, 32 U. MICH. J.L. REFORM 195, 200 (1998). The Supreme Court, however, has recently rejected the
Moreover, the IIRIRA removed from federal appellate courts the jurisdiction to review final orders of deportation against any alien convicted of an aggravated felony.\textsuperscript{60} Accordingly, positive equities, such as the alien's local family connections, business ties, property ties, employment status, and evidence of rehabilitation are today precluded from consideration on appeal.

Most significantly, however, the IIRIRA amended the aggravated felony provision of the INA to apply retroactively to crimes committed "before, on, or after" the effective date of the amendment.\textsuperscript{61} The result of this amendment on the number of aliens subject to deportation practice of indefinite detention of aliens awaiting deportation, finding instead that the INA contains an implicit six-month detention limit for resident aliens ordered deported from the United States. See Zadvydas v. Davis, 533 U.S. 678 (2001).

Although INS detainees have often completed their criminal sentences while they await deportation, the INS generally contracts with local penitentiaries for their "administrative" detention. See Human Rights Watch, Locked Away: Immigration Detainees in Jails in the United States, (Vol. 10, No. 1, III, Legal Standards, Sept. 1998), available at http://www.hrw.org/reports98/us-immig/ins989-05.html (last visited Jan. 13, 2003). According to a Human Rights Watch study, more than sixty percent of INS detainees were being held in criminal penitentiaries in 1998. Id. INS detainees are often confined to cells with inmates awaiting trial for serious, even capital, offenses. Id. Living conditions within those penitentiaries include spatial limitations, restricted exercise and recreation, lack of clothes, food, and supplies, restricted communication with relatives and attorneys, inadequate medical and dental care, and heightened exposure to physical mistreatment and infectious disease. Id.

\textsuperscript{60} IIRIRA § 306, 110 Stat. at 3009-607 (codified at 8 U.S.C. § 1252(a)(2)(C) (2000)). For a criticism of Congress's efforts to cut back on judicial review of deportation cases, see New Immigrant Law Threatens People and Principles, at http://www.aclu.org/issues/immigrant/lucasta.html (last visited Jan. 13, 2003) ("[T]here are areas where the deportation system can be improved. But attacking the courts and the oversight they provide to insure that system is run fairly and in compliance with our laws and the Constitution is a mistake. Making the INS less accountable is not the answer.").

\textsuperscript{61} 8 U.S.C. § 1101(a)(43) (2000). But see INS v. St. Cyr, 533 U.S. 289 (2001). In a limited holding, the Court in St. Cyr held that the IIRIRA's attempt to retroactively preclude convicted aliens from seeking habeas corpus relief was unconstitutional. Id. at 326. It is notable, however, that the Court did not proscribe retroactive deportation laws in the abstract, but only found that the IIRIRA, as drafted, did not explicitly provide for such retroactive treatment. Id. at 316-21.

Notwithstanding the obvious consequences of retroactive deportation laws, the Supreme Court has held that the Ex Post Facto Clause of the United States Constitution does not apply to the deportation of aliens. Galvan v. Press, 347 U.S. 522 (1954). The Court in Galvan reasoned:

"Policies pertaining to the entry of aliens and their right to remain here are peculiarly concerned with the political conduct of government. In the enforcement of these policies, the Executive Branch of the Government must respect the procedural safeguards of due process. But that the formulation of these policies is entrusted exclusively to Congress has become about as firmly imbedded in the legislative and judicial issues of our body politic as any aspect of government. And whatever might have been said at an earlier date for applying the Ex Post Facto Clause, it has been the unbroken rule of this Court that it has no application to deportation."

Id. at 531. Moreover, the Supreme Court has been loath to recognize deportation as punishment. See, e.g., Mahler v. Eby, 264 U.S. 32, 39 (1924) ("It is well settled that deportation, while it may be burdensome and severe for the alien, is not a punishment."). More recently, the Court noted that a "deportation proceeding is a purely civil action to determine eligibility to remain in
tion as aggravated felons was swift and severe. For example, during fiscal year 1996, the INS deported 37,399 criminal aliens from the United States. In contrast, during fiscal year 1997, after the IIRIRA had been effective for more than a year, the number of criminal deportations increased to 51,231.

B. The Aggravated Felony Provision and Driving Under the Influence

While the 1996 amendments to the INA added a multitude of offenses under the aggravated felony provision, driving under the influence was not among them. Accordingly, for such an offense to be classified as an aggravated felony, it must fall within a more generalized subcategory of the aggravated felony provision, a crime of violence. The INA defines the phrase “crime of violence” with reference to 18 U.S.C. § 16, a federal criminal statute. In turn, 18 U.S.C. § 16 defines the phrase “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

this country, not to punish...” INS v. Lopez-Mendoza, 468 U.S. 1032, 1038 (1984). Judge Learned Hand, however, concluded otherwise:

Whether the relator came here in arms or at the age of ten, he is as much our product as though his mother had borne him on American soil. He knows no other language, no other people, no other habits, than ours: he will be as much a stranger in Poland as any one born of ancestors who immigrated in the seventeenth century. However heinous his crimes, deportation is to him exile, a dreadful punishment.

Klonis v. Davis, 13 F.2d 630, 630-31 (2d Cir. 1926). See also Fong Yue Ting v. United States, 149 U.S. 698, 740 (1893) (Brewer, J., dissenting):

[It] needs no citation of authorities to support the proposition that deportation is punishment. Every one knows that to be forcibly taken away from home and family and friends and business and property, and sent across the ocean to a distant land, is punishment: and that oftentimes most severe and cruel.

Id. More recently, one commentator noted:

It has become evident in light of the [1996 amendments to the INA] that deportation is, in many cases, punitive. This may occur because the statutory framework is designed to deport individuals as a direct consequence of a conviction, without any possible consideration of the impact on United States citizen and permanent resident family members, or because the statutory framework as applied in an individual case is punitive. In such cases, the individual is entitled to the protection of at least some of the constitutional provisions that limit the government’s power to punish.


(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.\textsuperscript{65}

In addition to satisfying this definition, the INA requires that an offense meet a particular sentencing standard in order to classify as an aggravated felony.\textsuperscript{66} In this respect, the 1996 amendments to the INA were particularly damaging to those aliens convicted of felony DUI offenses.

As discussed above, before 1996 the INA required an imposed sentence of at least five years incarceration for a crime of violence to be considered an aggravated felony.\textsuperscript{67} The AEDPA amended this requirement in two respects. First, the AEDPA reduced the minimum sentence threshold from five years to one year.\textsuperscript{68} Second, the AEDPA eliminated the INA's reference to the sentence actually "imposed" by the presiding judge and replaced it with language that considers only the potential sentence under a specific criminal statute.\textsuperscript{69} Given the expansive nature of these changes, the eventual initiation of deportation proceedings against aliens convicted of felony DUI offenses became a reasonable certainty. In 1997, this certainly came to fruition, and in 1998, the BIA adjudicated the first challenges to deportation orders premised on the commission of felony DUI offenses.

\section*{C. Into the Quagmire: The Board of Immigration Appeals}

In two early, precedent-setting opinions addressing whether the aggravated felony provision of the INA encompassed felony DUI offenses, the BIA laid the foundation for the circuit split to follow. In \textit{In re Magallanes-Garcia}, the BIA upheld the deportation of an alien convicted of an aggravated DUI offense under Arizona law.\textsuperscript{70} In \textit{In re Puente-Salazar},\textsuperscript{71} the BIA considerably expanded its holding in \textit{In re Magallanes-Garcia}. There, the BIA upheld the deportation of an alien convicted of a felony DUI under Texas law, despite the fact that the alien was not actually driving an automobile at the time of his arrest.\textsuperscript{72}

\textsuperscript{67} See supra notes 52-53 and accompanying text.
\textsuperscript{68} See supra notes 54-57 and accompanying text.
\textsuperscript{69} See supra notes 54-57 and accompanying text.
\textsuperscript{70} In re Magallanes-Garcia, 22 I. & N. Dec. 3341.
\textsuperscript{72} Id. at 1014.
1. In re Magallanes-Garcia

In In re Magallanes-Garcia, the BIA reviewed and upheld an order of deportation premised upon the commission of an aggravated DUI offense under Arizona law. Although the aggravated felony provision of the INA did not specifically include aggravated DUI offenses, the BIA concluded that such offenses satisfied the subcategory of that provision encompassing crimes of violence, as defined in 18 U.S.C. § 16.

At the outset of its opinion, the BIA noted that it could not classify the DUI offense as a crime of violence under 18 U.S.C. § 16(a), as the Arizona statute at issue did not include as an element the use, attempted use, or threatened use of physical force. Accordingly, the BIA proceeded to review the respondent’s offense under 18 U.S.C. § 16(b). Pursuant to that section, the issue before the BIA was whether an aggravated DUI offense, 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.”

The BIA began its analysis of 18 U.S.C. § 16(b) with a quote from the United States Supreme Court:

> No one can seriously dispute the magnitude of the drunken driving problem or the States’ interest in eradicating it. Media reports of alcohol-related death and mutilation on the Nation’s roads are legion. The anecdotal is confirmed by the statistical. “Drunk drivers cause an annual death toll of over 25,000 and in the same time span cause nearly one million personal injuries and more than five billion dollars in property damage.”

Moreover, the BIA cited a pair of appellate decisions pronouncing that driving under the influence presented a serious risk of physical

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73. In re Magallanes-Garcia, 22 I. & N. Dec. 3341 (slip op. at 1). The DUI in In re Magallanes-Garcia was considered aggravated because the respondent’s license was suspended, revoked, or in violation of a restriction under Arizona state law. Id. (slip op. at 2).
74. Id. (slip op. at 1).
75. Id. (slip op. at 3).
76. Id.
77. Id. (quoting 18 U.S.C. § 16). In analyzing a particular offense under this statute, the BIA has recognized and accepted the propriety of a categorical approach. See, e.g., In re Magallanes-Garcia, 22 I. & N. Dec. 3341 (slip op. at 3-4). The categorical approach requires that “the nature of the crime—as elucidated by the generic elements of the offense—[must be] such that its commission would ordinarily 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.” Id. (quoting In re Alcantar, 20 I. & N. Dec. 801, 812 (B.I.A. 1994)).
On the basis of these opinions, statistics, and observations, the BIA concluded that the respondent was convicted of "an offense that is the type of crime that involve[d] a substantial risk of harm to persons and property." Accordingly, the BIA held that an aggravated DUI was a crime of violence under 18 U.S.C. § 16(b) and, therefore, an aggravated felony under the INA.

2. *In re Puente-Salazar*

The following year, in *In re Puente-Salazar*, the BIA affirmed and resolved an issue left open in *In re Magallanes-Garcia*: whether a state statute proscribing the "operation," but not necessarily the driving of a motor vehicle while intoxicated constituted a crime of violence under 18 U.S.C. § 16(b). The respondent in *In re Puente-Salazar*, a lawful resident of the United States and citizen of Mexico, forwarded two arguments on appeal. First, he asserted the Texas statute under which he was convicted was distinguishable from that considered in *In re Magallanes-Garcia*, as it encompassed conduct short of actually driving a motor vehicle. Therefore, under Texas law, a defendant could be convicted of a DWI offense even where his conduct arguably did not present a substantial risk of harm to another. Alternatively, the respondent contended that *In re Magallanes-Garcia* was wrongly decided, as 18 U.S.C. § 16(b) required specific intent to "use" force. Despite a strong dissenting opinion, the BIA rejected each of these arguments in turn, holding that *In re Magallanes-Garcia* was controlling.

79. *Id.* at 4-5 (citing United States v. Rutherford, 54 F.3d 370, 376 (7th Cir. 1995) (stating that "the risk of injury from drunk driving is neither conjectural nor speculative. Driving under the influence vastly increases the probability that the driver will injure someone in an accident.... Drunk driving, by its nature, presents a serious risk of physical injury."); United States v. Farnsworth, 92 F.3d 1001, 1008 (10th Cir. 1996) ("We have no difficulty in concluding that [driving under the influence] clearly was 'conduct that present[ed] a serious potential risk of physical injury to another.'") (quoting U.S. SENTENCING GUIDELINES MANUAL (U.S.S.G.) § 4B1.2(1)(ii)).


81. *Id.*


83. *Id.* at 1007-08.

84. *Id.* The Texas statute provided that a "person commits an offense if the person is intoxicated while operating a motor vehicle in a public place." TEX. PENAL CODE ANN. § 49.04(a) (West 2000).


86. *Id.* at 1014.
a. The Majority

The majority noted at the outset of its opinion that the issue presented was "whether merely operating a vehicle while intoxicated (which need not entail driving it) creates a substantial risk of physical force under Texas law."87 Deciding this issue in the affirmative, the majority in In re Puente-Salazar embarked in a truncated analysis of 18 U.S.C. § 16(b).88

First, the majority noted that the risks associated with the operation of a motor vehicle while intoxicated were indistinguishable from those associated with actually driving a motor vehicle.89 To support this finding, the majority reasoned:

The plain meaning of the word "operate" connotes an effort, or the doing of something by the operator. Texas case law defines the action of operating a motor vehicle while intoxicated as the exertion of personal effort to cause the vehicle to function, i.e., the defendant must take action to affect functioning of a vehicle in a manner that enables the vehicle's use.90 Accordingly, the majority concluded:

By its nature, operating a motor vehicle in a public place while under the influence involves a substantial risk that physical force against the person or property of another may be used in the commission of the offense and that such a crime, when a felony under Texas law, constitutes an aggravated felony.91

Next, the majority rejected the argument that 18 U.S.C. § 16(b) required specific intent on the part of the offender to "use" force.92 Partially relying on its previous opinion in In re Magallanes-Garcia, the majority noted that 18 U.S.C. § 16(b), when read in conjunction with § 16(a), could not possibly include a specific intent requirement.93 The majority recognized a "contextual distinction" between the term "use" in 18 U.S.C. § 16(a) and the phrase "may be used" in § 16(b).94 Specifically, "[t]he focus in § 16(a) is on the statutory elements of the offense, whereas the focus in § 16(b) is on the nature of the crime."95

87. Id. at 1012 (emphasis in original).
88. Id.
89. Id.
90. Id. (citing Denton v. State, 911 S.W.2d 388 (Tex. Crim. App. 1995); Barton v. State, 882 S.W.2d 456 (Tex. App. 1994)).
92. Id.
93. Id. at 1012-13.
94. Id. at 1012. For a similar argument, see Rah, supra note 31, at 2137-38 (asserting that "the phrase 'may be used' under § 16(b)" should be interpreted as encompassing "both accidental and intentional uses of force").
Accordingly, the majority concluded that 18 U.S.C. §16(b) did not require a specific intent to use force. 96

Finally, the majority attempted to clarify its holding in *In re Magallanes-Garcia.* 97 The respondent asserted that the BIA analyzed the DUI offense in *In re Magallanes-Garcia* in terms of "risk of physical injury to another," rather than "risk of use of force," which was the proper standard under 18 U.S.C. §16(b). 98 Despite the aesthetic appeal of this argument, the BIA maintained that the "potential for harm" was "determinative in finding a criminal offense a crime of violence under 18 U.S.C. §16(b)." 99 The BIA qualified this standard by requiring "a causal link between the harm and the force." 100 Applying that requirement in the context of DUI offenses, the BIA concluded that the "risk of injury is directly related to a substantial risk that the driver, while operating his motor vehicle, will use physical force to cause the injury." 101 Accordingly, the BIA found that the respondent's DUI offense was such that "its commission would ordinarily present a risk that physical force will be used against the person or property of another." 102

b. The Dissent

Board Member Rosenberg submitted a comprehensive and strongly worded dissent in *In re Puente-Salazar,* arguing that 18 U.S.C. §16(b) required specific intent on the part of the offender to "use" force. 103 To support this conclusion, Rosenberg compared 18 U.S.C. §16 with section 4B1.2(a) of the United States Sentencing Guidelines (U.S.S.G.). 104 Specifically, she noted that the first subsections of both statutes were virtually identical in that they limited a crime of violence to an offense that had, as an element, the use, attempted use, or threatened use of physical force. 105 Notably, though, the second subsections of both statutes were markedly different. Subsection (b) of 18 U.S.C. §16 required "a substantial risk that physical force against
the person or property of another may be used in the course of committing the offense."106 In contrast, subsection (2) of the U.S.S.G. required the offense involve "conduct that presents a serious potential risk of physical injury to another."107 Rosenberg criticized the majority for equating these subsections despite their obvious differences.108

Next, Rosenberg asserted that the word "use" within 18 U.S.C. § 16(b) implied a requirement of intentional implementation of force on the part of the offender.109 She rationalized:

In the context of 18 U.S.C. § 16(b), the term "use" refers to the conduct of the offender and connotes the likelihood of specific action on the offender's part—the potential that "physical force... may be used in the course of committing the offense." The "offense" is the crime the offender has set out to commit and it is he or she who may have to use physical force to commit it, even though physical force is not a necessary element of the offense. Thus, the substantial risk sanctioned by the statutory section is the risk that the offender may resort to force.110

To further buttress this argument, Rosenberg cited the Court of Appeals for the Seventh Circuit's opinion in United States v. Rutherford,111 as well as a pair of Supreme Court decisions construing the word "use" as requiring an intentional act.112

Finally, Rosenberg concluded that the Texas DWI statute did not even survive the majority's "risk of harm" test.113 Citing BIA precedent, she noted that "[i]f the offense, as defined, does not necessarily constitute a crime of violence under either subsection (a) or (b) of § 16 in every instance that could support a conviction, then the statute is considered to be divisible or ambiguous."114 A divisible statute, she continued, "cannot be a crime of violence 'by its nature' in some cases, but not others, depending on the circumstances."115 Concluding that the Texas DWI statute was divisible, Rosenberg explained that

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109. Id. at 1023 (Rosenberg, dissenting).
110. Id. at 1023-24 (Rosenberg, dissenting) (quoting 18 U.S.C. § 16(b)).
111. 54 F.3d 370 (7th Cir. 1995).
114. Id. (Rosenberg, dissenting) (citing In re Sweetser, 22 L. & N. Dec. 3390 6, 7 (B.I.A. 1999)). See also supra note 77 and accompanying text (discussing the BIA's categorical approach to statutory analysis under 18 U.S.C. § 16).
115. In re Puente-Salazar, 22 L. & N. Dec. 3412 (Rosenberg, dissenting) (citing United States v. Velasquez-Overa. 100 F.3d 418. 420 (5th Cir. 1996)).
the statute encompassed both operating and driving a vehicle.\textsuperscript{116} Rosenberg argued "one can 'operate' a vehicle in Texas without causing it to move and without being in actual physical control of the vehicle."\textsuperscript{117} Accordingly, Rosenberg would have found the Texas statute divisible and would have terminated the deportation proceedings.\textsuperscript{118}

Despite Rosenberg's strong dissenting opinion, the BIA in \textit{In re Puente-Salazar} affirmed the INS's position that 18 U.S.C. § 16(b) encompassed DWI offenses. In the interim, however, numerous courts of appeals have echoed Rosenberg's dissenting opinion and analysis.

III. \textbf{The Circuit Split Over Whether a Felony DUI Offense Constitutes a Crime of Violence}

In the months after \textit{In re Magallanes-Garcia} and \textit{In re Puente-Salazar}, numerous federal courts of appeals addressed whether a felony DUI offense was a crime of violence and, consequently, an aggravated felony under the INA. The Second, Fifth, Seventh and Ninth Circuits held that 18 U.S.C. § 16(b) did not encompass felony DUI offenses.\textsuperscript{119} Accordingly, in those circuits, felony DUI offenses cannot provide the basis for orders of deportation. In contrast, the Court of Appeals for the Tenth Circuit recently affirmed an order of deportation based on the commission of a felony DUI.\textsuperscript{120} In the Tenth Circuit, then, aliens convicted of such offenses face considerably higher consequences for their conduct.

\textsuperscript{116} \textit{Id.} at 1028 (Rosenberg, dissenting).
\textsuperscript{117} \textit{Id.} (Rosenberg, dissenting). Rosenberg criticized the majority's analysis because it led "to a conclusion that there is a substantial risk that physical force will be used by one who changes a flat tire while intoxicated or simply starts up the heater, or even lends his or her vehicle to another." \textit{Id.} at 1029 (Rosenberg, dissenting).
\textsuperscript{118} \textit{Id.} at 1030 (Rosenberg, dissenting).
\textsuperscript{119} \textit{See Dalton}, 257 F.3d at 202 ("The principal question on appeal is whether a felony DWI conviction under New York State law constitutes a 'crime of violence' under 18 U.S.C. § 16(b). We conclude that it does not and accordingly vacate the deportation order."). \textit{Chapa-Garza}, 243 F.3d at 928 ("We hold that because intentional force against the person or property of another is seldom, if ever, employed to commit the offense of felony DWI, such offense is not a crime of violence."). \textit{Bazan-Reyes}, 256 F.3d at 602 ("Because we conclude that the INS and the BIA erred in finding that petitioners' state [DUI] convictions are crimes of violence, we vacate the deportation orders."). \textit{Montiel-Barraza}, 275 F.3d at 1180 ("We therefore hold that Montiel-Barraza was not convicted of a 'crime of violence' and accordingly was not convicted of an aggravated felony as defined in 8 U.S.C. § 1101(a)(43)(F).”).
\textsuperscript{120} \textit{See Tapia-Garcia}, 237 F.3d at 1223 ("Because Mr. Tapia-Garcia's DUI offense constitutes a crime of violence under 18 U.S.C. § 16(b) and is therefore an aggravated felony under 8 U.S.C. § 1101(a)(43)(F), he is deportable.").
A. Circuit Courts Holding a Felony DUI Offense Does Not Constitute a Crime of Violence

1. The Fifth Circuit

In United States v. Chapa-Garza, the Court of Appeals for the Fifth Circuit became the first federal circuit court to hold that a felony DUI offense could not constitute a crime of violence and, accordingly, could not constitute an aggravated felony. 121 Chapa-Garza involved the appeal of five defendants-appellants who had their sentences enhanced after pleading guilty to unlawfully being in the United States after removal. 122 The U.S.S.G. provided a base offense level of eight for this offense, with an increase of sixteen offense levels if removal from the United States was premised on the commission of an aggravated felony, as defined in the INA. 123 In each defendant-appellant's case, the district court applied the sentence enhancement, finding the offense of driving while intoxicated under Texas law satisfied the crime of violence subcategory of the aggravated felony provision. 124 On appeal, the Fifth Circuit held that a Texas DWI was not a crime of violence under 18 U.S.C. § 16(b), and vacated the defendants-appellants' sentences. 125

First, the court rejected the government's proposed construction of 18 U.S.C. § 16(b) because it "require[d] that section 16(b) be construed the same as U.S.S.G. § 4B1.2(a)(2)." 126 In comparing these provisions, the court noted that § 16(b) required the substantial risk that physical force may be used, while U.S.S.G. required conduct that presents a serious potential risk of injury to another. 127 The court reasoned that U.S.S.G. § 4B1.2(a)(2) concerned "only the risk of one particular effect of the defendant's conduct," while 18 U.S.C. § 16(b)

121. Chapa-Garza, 243 F.3d at 928.
122. Id. at 923.
124. Chapa-Garza, 243 F.3d at 923.
125. Id. at 928.
126. Id. at 924. The government urged the court to interpret 18 U.S.C. § 16(b) in the same way the Seventh Circuit interpreted U.S.S.G. § 4B1.2(a), in United States v. Rutherford, 54 F.3d 370 (7th Cir. 1995). Chapa-Garza, 243 F.3d at 925. Section 4B1.2(a) of the U.S.S.G. provides:

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 use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

127. Chapa-Garza, 243 F.3d at 925.
“focused on the defendant’s conduct itself,” without a “requirement that there be a substantial risk that another’s person or property will sustain injury.” As further support for this distinction, the court stressed that U.S.S.G. § 4B1.2(a)(2) had been amended in 1989 to eliminate reference to 18 U.S.C. § 16(b). This amendment, the court concluded, “counsel[ed] against interpreting section 16(b) and guideline 4B1.2(a)(2) the same way.”

Next, the court interpreted 18 U.S.C. § 16(b) as requiring intentional conduct, not an accidental, unintended event. Citing The American Heritage College Dictionary, the court noted that the relevant definitions of the word “use” referred to “volitional, purposeful, not accidental, employment of whatever is being ‘used.’” Accordingly, the court held that “consonant with the ordinary meaning of the word ‘use,’ . . . a crime of violence as defined in 16(b) requires recklessness as regards the substantial likelihood that the offender will intentionally employ force against the person or property of another in order to effectuate the commission of the offense.”

Finally, the court applied this interpretation of 18 U.S.C. § 16(b) to the Texas DWI statute at issue and held that a felony DWI was not a crime of violence. In so holding, 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.” Moreover, the court noted a felony DWI under Texas law occurs when a person begins operating a motor vehicle while intoxicated. The court concluded, however, intentional force is “virtually never employed to commit this offense.” Accordingly, the court vacated the deportation orders before it.

128. Id. at 925 (emphasis in original).
129. Id. at 926.
130. Id.
131. Id. “The criterion that the defendant use physical force against the person or property of another is most reasonably read to refer to intentional conduct, not an accidental, unintended event.” Id.
132. Chapa-Garza, 243 F.3d at 926 (emphasis in original) (citing The American Heritage College Dictionary (3d ed. 1997)).
133. Id. at 927. The court reasoned further that the word “use,” when read in conjunction with the phrase “in the course of committing the offense,” referred “only to that physical force that may be used to perpetrate the offense.” Id.
134. Id.
135. Id.
136. Id.
137. Chapa-Garza, 243 F.3d at 927.
138. Id. at 928.
The Seventh Circuit

Just three months after the Fifth Circuit decided *Chapa-Garza*, the Seventh Circuit rendered a similar decision in *Bazan-Reyes v. INS*. In *Bazan-Reyes*, the court determined that Illinois, Indiana and Wisconsin DUI statutes did not qualify as crimes of violence under 18 U.S.C. § 16(b), primarily because § 16(b) required the intentional use of force.\(^{139}\) Accordingly, the court vacated the deportation orders of three petitioners that the INS and BIA previously found removable following the commission of felony DUI offenses.\(^{140}\)

The court focused the majority of its analysis on its previous holding in *United States v. Rutherford*.\(^{141}\) In *Rutherford*, the Seventh Circuit held that a conviction for causing serious bodily injury while driving under the influence qualified as a crime of violence under U.S.S.G. § 4B1.2(1).\(^{142}\) The government urged the court to find *Rutherford* controlling.\(^{143}\) Despite this invitation, the Seventh Circuit concluded that, while certain aspects of *Rutherford* were controlling, it’s holding was not.\(^{144}\)

First, the court agreed with the Fifth Circuit that there were significant and material differences between U.S.S.G. § 4B1.2(1)(ii) and 18 U.S.C. § 16(b).\(^{145}\) Specifically, the court reasoned that the phrase “may be used in the course of committing the offense” counseled against interpreting the two provisions in a like manner.\(^{146}\) The court reasoned that, in *Rutherford*, it determined the word “use” implied “intentional availment.”\(^{147}\) However, U.S.S.G. § 4B1.2(1)(ii), unlike 18 U.S.C. § 16(b), did not contain the word “use.”\(^{148}\) Furthermore, the court noted that the inclusion of the phrase “in the course of com-

\(^{139}\) *Bazan-Reyes*, 256 F.3d at 612.

\(^{140}\) *Id.* Although the three cases were consolidated for appeal, each petitioner’s road to the courthouse was certainly unique. Petitioner Maciasowicz pled guilty to two counts of homicide by intoxicated use of a motor vehicle under Wisconsin law. *Id.* at 603. Petitioner Gomez-Vela was charged with aggravated driving under the influence under Illinois law because of two previous drunk driving convictions. *Id.* Petitioner Bazan-Reyes pled guilty to operating a vehicle while intoxicated under Indiana law. *Id.* His offense was elevated to a felony charge because he had four previous convictions for the same offense. *Tapia-Garcia*, 256 F.3d at 603.

\(^{141}\) 54 F.3d 370 (7th Cir. 1995).

\(^{142}\) *Id.* at 376.

\(^{143}\) *Bazan-Reyes*, 256 F.3d at 609.

\(^{144}\) *Id.* at 609.

\(^{145}\) *Id.* at 610. The court cautioned that the presence of significant differences in the language of the two provisions did not mandate they be interpreted differently. *Id.* It did note, however, that such differences required the court “to carefully scrutinize the language of the two statutes before finding that the two provisions should be interpreted in the same manner.” *Id.*

\(^{146}\) *Id.* at 611.

\(^{147}\) *Bazan-Reyes*, 256 F.3d at 611.

\(^{148}\) *Id.*
mitting the offense” within 18 U.S.C. § 16(b) indicated a specific intent requirement.\textsuperscript{149} The court rationalized that the insertion of this phrase, coupled with the word “use,” indicated that 18 U.S.C. § 16(b) addressed those offenses that carried a substantial likelihood that the offender would intentionally resort to physical force to carry out the offense.\textsuperscript{150}

Next, the court stressed the practicality of its conclusion that 18 U.S.C. § 16(b) required specific intent to use force. It noted any contrary holding would mean “almost any felony offense that involves a substantial risk of physical harm—accidental or otherwise—would be a crime of violence under § 16(b) because physical harm is nearly always the result of some type of physical force.”\textsuperscript{151} The court cautioned:

Such an interpretation would include many offenses that are not generally thought of as violent crimes. For example, a felony conviction for involuntary manslaughter that was the result of speeding would become a crime of violence. While it is, of course, possible that Congress intended § 16(b) to reach conduct that is normally not considered violent, we will not make such a finding unless this interpretation is supported by the plain language of the statute.\textsuperscript{152}

Accordingly, the court refused to interpret 18 U.S.C. § 16(b) as encompassing accidental, negligent or reckless conduct. Rather, in joining the Fifth Circuit, the Seventh Circuit held that 18 U.S.C. § 16(b) required specific intent to use force.\textsuperscript{153}

3. The Second Circuit

In \textit{Dalton v. Ashcroft}, the Court of Appeals for the Second Circuit joined the Fifth and Seventh Circuits in holding that a felony DWI offense was not a crime of violence under 18 U.S.C. § 16(b).\textsuperscript{154} In \textit{Dalton}, the court considered the appeal of a citizen of Canada that had resided in the United States since 1958, when he was younger than one year old.\textsuperscript{155} The district court found him deportable pursuant to the commission of a felony DWI under New York law. The

\begin{enumerate}
\item\textsuperscript{149} Id.
\item\textsuperscript{150} Id.
\item\textsuperscript{151} Id. at 610.
\item\textsuperscript{152} Id. For this reason, the court commented that “the fact that the petitioners did employ intentional force at some point, in opening the car door or pressing the accelerator for example, does not constitute the use of physical force as required by the statute.” \textit{Bazan-Reyes}, 256 F.3d at 611.
\item\textsuperscript{153} Id. at 612.
\item\textsuperscript{154} \textit{Dalton}, 257 F.3d at 202.
\item\textsuperscript{155} Id.
\end{enumerate}
Second Circuit vacated the deportation order, finding that 18 U.S.C. § 16(b) required specific intent to use force.\(^{156}\)

The court began its analysis by noting that, under relevant New York case law, a "defendant can be found guilty of driving while intoxicated even if he or she is asleep at the wheel of a car whose engine is not running and evidence is adduced at trial that the vehicle never moved."\(^{157}\) Moreover, the "vehicle itself need not even be operative in order to sustain a conviction for operating it while intoxicated."\(^{158}\) Based on these observations, the court concluded a defendant could be convicted under New York law for driving while intoxicated even where there was no risk that physical force would be used or that injury would result.\(^{159}\)

The court then questioned the government's argument that a felony DWI offense involved a substantial risk that the offender would use force, noting that, "in the context of driving a vehicle, it is unclear what constitutes the 'use of physical force.'"\(^{160}\) The court rationalized:

The physical force used cannot reasonably be interpreted as a foot on the accelerator or a hand on the steering wheel. Otherwise, all driving would, by definition, involve the use of force, and it is hard to believe that Congress intended for all felonies that involve driving to be "crimes of violence." The government likens, at different times, the "use of physical force" with speeding, crashing, harming others and/or possessing an out-of-control car. These interpretations tend to equate "physical force" with an accident. Under this definition, a drunk driver would not be "using" physical force unless he or she had an accident. This interpretation distorts language and our commonsense understandings insofar as an accident, by definition, is something that is neither planned nor foreseen—except perhaps in hindsight.\(^{161}\)

Finally, like the Fifth and Seventh Circuits before it, the Second Circuit rejected the government's position that 18 U.S.C. § 16(b) should be interpreted as consistent with the definition of crime of violence in U.S.S.G. § 4B1.2(1)(ii).\(^{162}\) The court agreed with the Fifth Circuit that the amendment to § 4B1.2(1)(ii), deleting reference to 18 U.S.C. § 16, counseled against interpreting "risk of the use of physical force" and

\(^{156}\) Id. at 206.

\(^{157}\) Id. at 205 (citing People v. Marriott, 37 A.D.2d 868 (N.Y. Sup. Ct. 1971)).

\(^{158}\) Id. (citing People v. David "W.", 83 A.D.2d 690 (N.Y. Sup. Ct. 1981)).

\(^{159}\) Id. at 206.

\(^{160}\) Dalton, 257 F.3d at 206.

\(^{161}\) Id. at 207.

\(^{162}\) Id.
"risk of injury" the same way.\textsuperscript{163} Moreover, the court noted there were many crimes that involved a substantial risk of injury, but lacked the use of force.\textsuperscript{164} Specifically, the court opined that "[c]rimes of gross negligence or reckless endangerment, such as leaving an infant alone near a pool, involve a risk of injury without the use of force."\textsuperscript{165} Therefore, the court refused to accept the government's position, noting the "logical fallacy inherent in reasoning that simply because all conduct involving a risk of the use of physical force also involves a risk of injury then the converse must also be true."\textsuperscript{166} For these reasons, the court vacated the deportation order before it.\textsuperscript{167}

4. The Ninth Circuit

The Court of Appeals for the Ninth Circuit became the latest court to enter the fray with its recent decision in \textit{Montiel-Barraza v. United States}.\textsuperscript{168} There, the court reviewed an order of deportation premised on the commission of a felony DUI under California law.\textsuperscript{169} Vacating the order before it, the Ninth Circuit joined the Second, Fifth and Seventh Circuits in holding that a felony DUI was not a crime of violence and, therefore, not an aggravated felony under the INA.\textsuperscript{170}

The Ninth Circuit primarily relied on its previous decision in \textit{United States v. Trinidad-Aquino}.\textsuperscript{171} In that case, the court held that a conviction for a felony DUI \textit{with injury to another} under California law did not constitute a crime of violence and, therefore, did not constitute an aggravated felony under the INA.\textsuperscript{172} In \textit{Montiel-Barraza}, however, the statute at issue did not even require proof of injury to another.\textsuperscript{173} The court reasoned, "If driving under the influence with injury to an-

\footnotesize{\textsuperscript{163} Id. (citing Chapa-Garza, 243 F.3d at 926).}
\footnotesize{\textsuperscript{164} Id.}
\footnotesize{\textsuperscript{165} Id.}
\footnotesize{\textsuperscript{166} Dalton, 257 F.3d at 207.}
\footnotesize{\textsuperscript{167} Id. at 202.}
\footnotesize{\textsuperscript{168} 275 F.3d 1178 (9th Cir. 2002).}
\footnotesize{\textsuperscript{169} Id. at 1179.}
\footnotesize{\textsuperscript{170} Petitioner's DUI offense was elevated to a felony because he had four DUI convictions within the previous seven years. Id.}
\footnotesize{\textsuperscript{171} 259 F.3d 1140 (9th Cir. 2001).}
\footnotesize{\textsuperscript{172} Id. at 1146.}
\footnotesize{\textsuperscript{173} Id. at 1146. The court in Trinidad-Aquino stressed that an offender could be convicted under the California statute even where his conduct involved pure negligence. Id. at 1141. The court determined the statute was inconsistent with the plain language of 18 U.S.C. § 16(b), which implied a requirement of volitional use of force. Id. at 1145. Such a requirement could not be construed to encompass negligent conduct. Id. Notably, however, the Ninth Circuit did not join the Second, Fifth and Seventh Circuits in holding that 18 U.S.C. § 16(b) required specific intent to use force. Rather, the court stated that the volitional requirement could be satisfied by purely reckless conduct. Id.}
\footnotesize{\textsuperscript{174} Montiel-Barraza, 275 F.3d at 1179.}
other does not amount to an aggravated felony, then logically a violation of the lesser offense cannot qualify as an aggravated felony.\textsuperscript{174} 

Moreover, the court rejected the government's contention that the statute at issue was distinguishable from that considered in \textit{Trinidad-Aquino}.\textsuperscript{175} The government argued that to charge an offender with a felony under the statute at issue in the immediate case, such offender must have been convicted of at least three separate DUI violations within the previous seven years.\textsuperscript{176} Thus, the government asserted that a recidivist offender charged with a felony DUI was “presumptively aware of the life-threatening nature of the activity and the grave risks involved.”\textsuperscript{177} The court, however, concluded that the enhancement of a DUI to a felony offense did not “alter the elements of the underlying offense.”\textsuperscript{178} Accordingly, the court found that its analysis in \textit{Trinidad-Aquino} applied equally to recidivists and held that the petitioner was not convicted of a crime of violence.\textsuperscript{179}

\textbf{B. The Tenth Circuit Holds a Felony DWI Offense Does Constitute a Crime of Violence}

In \textit{Tapia-Garcia v. INS},\textsuperscript{180} the Court of Appeals for the Tenth Circuit became the first and only federal circuit court to uphold a deportation order premised upon the commission of a felony DWI offense. At the outset of its opinion, the court noted that its review of the issue was governed by the two-step test of \textit{Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.},\textsuperscript{181} which mandated that a reviewing court defer to an agency’s reasonable interpretation of an ambiguous statute it has been charged with administering.\textsuperscript{182} The court noted that the BIA, in interpreting 18 U.S.C. § 16(b), previously held that that provision encompassed felony DWI offenses.\textsuperscript{183} Thus, in the Tenth Circuit’s view, the only issue on appeal was whether that interpretation was reasonable.\textsuperscript{184}
In holding the BIA reasonably construed 18 U.S.C. § 16(b) to include felony DWI offenses, the court noted that, "In analyzing the definition of crime of violence under the [United States] Sentencing Guidelines, the federal courts, including this court, have recognized the inherent danger in driving under the influence."[185] The court reasoned:

Although these cases hold that drunk driving constitutes a crime of violence under the Sentencing Guidelines (rather than the immigration statutes), the language of the relevant Guideline provision . . . is similar to that of 18 U.S.C. § 16(b). While 18 U.S.C. § 16(b) differs slightly from [the Sentencing Guideline], the well-documented danger inherent in drunk driving supports the conclusion that a DUI offense may also constitute a crime of violence under § 16(b).[186]

Accordingly, the Tenth Circuit held the BIA reasonably construed 18 U.S.C. § 16(b) to include felony DUI offenses, and upheld the order of deportation.[187]

Quite notably, the Tenth Circuit in Tapia-Garcia was the only federal circuit court to apply the Chevron doctrine and defer to the BIA’s conclusion that 18 U.S.C. § 16(b) included felony DUI offenses. Each of the other four circuits addressing the issue applied a de novo standard of review and, upon independent review of the statute, held that 18 U.S.C. § 16(b) did not encompass felony DUI offenses. Accordingly, Part IV of this Comment will introduce and explore the Chevron doctrine and will conclude that the Tenth Circuit misapplied each of that doctrine’s two steps.

IV. CHEVRON: A TWO-STEP INQUIRY

In 1984, the United States Supreme Court decided Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., significantly altering the landscape of judicial deference.[188] In Chevron, the Court consid-

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185. Id. at 1222.
186. Id. at 1222-23.
187. Id. at 1222.
The Court in *Chevron* grounded its holding in the notion that Congress not only engages in express delegation of interpretive authority, but that “[s]ometimes the legislative delegation to an agency on a particular question is implicit.” Federal agencies possess expertise in various fields that the courts might not, and are in a better position to consider ambiguous statutes in a more detailed and reasoned fashion. Furthermore, the Court reasoned, federal agencies are accountable to the public for their interpretations of ambiguous statutes due to their situation within the executive branch of the government. To effectuate this policy of judicial deference, Justice John Paul Stevens, writing for a unanimous Court, adopted a two-step approach:

First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.

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190. *Id.*
191. *Id.* at 844.
192. *Id.* at 865.
193. *Id.*
194. *Id.* at 842-43.
A. Step One

The first step of the Chevron inquiry requires a reviewing court to determine whether "Congress has directly spoken to the precise question at issue." Here, "if the intent of Congress is clear, that is the end of the matter." Despite this relatively clear mandate, one inherent weakness of the Chevron opinion is that the Court did not adequately articulate how best to undertake this inquiry. Rather, the Court merely directed reviewing courts to utilize their "traditional tools of statutory construction" to determine whether a statute embodies a clear congressional intent. In this respect, the Court in Chevron may have wrongly assumed a jurisprudential consistency in statutory interpretation. Nonetheless, an overview of the Supreme Court's jurisprudence on statutory interpretation, while certainly not uniform, reveals several tools regularly used to determine congressional intent.

1. The Statutory Language

The logical starting point of any statutory analysis is the language of the statutory provision itself. Naturally, if the language is capable of only one meaning, congressional intent must be presumed, for it is axiomatic that Congress does not act unconsciously of what it is doing. To this end, the growing practice within the Supreme Court has been to glean the ordinary meaning of a statutory term from com-

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195. Chevron, 467 U.S. at 842.
196. Id.
197. See Aaron P. Avila, Application of the Chevron Doctrine in the D.C. Circuit, 8 N.Y.U. ENVTL. L.J. 398, 400 (2000) (recognizing that "the Court [in Chevron] provided little illumination as to how a reviewing court should divine Congressional intent").
198. Id. at 843 n.9. The requisite level of clarity satisfying step one has been subject to some debate and continues to remain uncertain today. See Scalia, supra note 188, at 521 (predicting that "clarity" will be an issue at the forefront of "future battles over acceptance of agency interpretations").
199. See Carlos E. Gonzalez, Reinterpreting Statutory Interpretation, 74 N.C. L. REV. 585, 587 (2000) ("The hard truth of the matter is that American courts have no intelligible, generally accepted, and consistently applied theory of statutory interpretation.").
201. See, e.g., INS v. Cardoza-Fonseca, 480 U.S. 421, 432 n.12 (1987) (noting that if the statutory language is unambiguous, that language is regarded as conclusive absent a clearly expressed legislative intention to the contrary).
Words are often capable of numerous meanings depending on the context in which they are used.\textsuperscript{203} For example, the simple preposition “on” retains numerous dictionary definitions. The \textit{American Heritage Dictionary} provides that the preposition “on” can be “used to indicate contact with or extent over (a surface) regardless of position: \textit{a picture on a wall; a rash on my back}.”\textsuperscript{204} However, it can also be “used to indicate proximity: \textit{a town on the border}.”\textsuperscript{205} These two meanings are not interchangeable. Therefore, the employment of one definition of the preposition “on” could materially affect the meaning of a statutory provision.\textsuperscript{206} For similar reasons, the Supreme Court has often looked to the context and design of a statutory scheme to provide further evidence of congressional intent.\textsuperscript{207} The Court has noted:

\begin{itemize}
  \item \textsuperscript{202} See, e.g., Smith v. United States, 508 U.S. 223, 228-29 (1993) (citing \textit{Webster’s New International Dictionary} and \textit{Black’s Law Dictionary}); Ellen P. Aprill, \textit{The Law of the Word: Dictionary Shopping in the Supreme Court}, 30 Ariz. St. L.J. 275, 277 (1998) (“observing that Supreme Court’s use of dictionaries appears to be increasing and becoming more prominent”); \textit{Looking It Up: Dictionaries and Statutory Interpretation}, 107 Harv. L. Rev. 1437, 1440 (1994) (noting a “dramatic, sustained increase in citations to dictionaries” among members of the Supreme Court). For a criticism of this type of judicial recourse, see Cass R. Sunstein, \textit{Interpreting Statutes in the Regulatory State}, 103 Harv. L. Rev. 405, 418-19 (1990) (“To say that courts should rely on the words or on their ordinary meaning . . . is unhelpful when statutory words have more than one dictionary definition.”).
  \item \textsuperscript{203} See Smith, 508 U.S. at 229 (“Language . . . cannot be interpreted apart from context. The meaning of a word that appears ambiguous if viewed in isolation may become clear when the word is analyzed in light of the terms that surround it.”).
  \item \textsuperscript{204} The \textit{American Heritage Dictionary of the English Language} 1228 (4th ed. 2000).
  \item \textsuperscript{205} Id.
  \item \textsuperscript{206} Moreover, several federal circuit courts have recognized that a word used in different sections of a complex statute does not necessarily carry the same meaning in each context. See, e.g., Kennecott Copper Corp. v. Train, 526 F.2d 1149, 1154 n.20 (9th Cir. 1975); United States v. Stauffer Chem. Co., 684 F.2d 1174, 1185 (6th Cir. 1982).
  \item \textsuperscript{207} See, e.g., Booth v. Churner, 532 U.S. 731, 738 (2001) (“We find clearer pointers toward the congressional objective in two considerations, the first being the broader statutory context in which ‘available’ ‘remedies’ are mentioned.”); David A. Luigs, \textit{The Single-Scheme Exception to Criminal Deportations and the Case for Chevron’s Step Two}, 93 Mich. L. Rev. 1105, 1121 n.72 (citing Dole v. United Steelworkers, 494 U.S. 26, 42 (1990) (stating that “the statute, as a whole, clearly expresses Congress[’]s intention”)); Bethesda Hosp. Ass’n v. Bowen, 485 U.S. 399, 405 (1988) (“Our conclusion is also supported by the language and design of the statute as a whole.”); ETSI Pipeline Project v. Missouri, 484 U.S. 495, 514 (1988) (stating that “the language, structure, and legislative history of the Act fail to support the petitioners in this case . . . .”): NLRB v. United Food & Commercial Workers Union, 484 U.S. 112, 124 (1987) (“The words, structure, and history of the LMRA amendments to the NLRA clearly reveal” congressional intent.). See also FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 121 (2000) (“In determining whether Congress has specifically addressed the question at issue, the court should not confine itself to examining a particular statutory provision in isolation. Rather, it must place
Statutory construction . . . is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme—because the same terminology is used elsewhere in a context that makes its meaning clear, or because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law.\textsuperscript{208}

Professor Cass Sunstein has articulated this point in considerable detail, noting that “the meaning of any ‘text’ is a function not of the bare words, but of its context and the relevant culture. Because of context, words sometimes have a meaning quite different from what might be found in Webster’s or the Oxford English Dictionary.”\textsuperscript{209} Moreover, Professor Sunstein has concluded that “[l]egal words are never susceptible to interpretation standing by themselves, and in any case, they never stand by themselves.”\textsuperscript{210}

2. The Legislative History

When the text of a statute is ambiguous, the Supreme Court has historically evinced a willingness to examine legislative history to clarify congressional intent.\textsuperscript{211} However, opinions relying heavily on legislative materials often elicit scathing concurring and dissenting opinions.\textsuperscript{212} Justices frequently differ about whether such recourse is

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the provision in context, interpreting the statute to create a symmetrical and coherent regulatory scheme."); K Mart Corp. v. Cartier, Inc., 486 U.S. 281, 291 (1988) (noting that a reviewing court “must look to the particular statutory language at issue, as well as the language and design of the statute as a whole”).


\textsuperscript{209} Cass R. Sunstein, Principles, Not Fictions, 57 U. Chi. L. Rev. 1247, 1247 (1990) (quoting Judge Learned Hand in Cabell v. Markham, 148 F.2d 737, 739 (2d Cir. 1945)).

\textsuperscript{210} Id.


necessary and, if it is, how much weight should be afforded legislative materials. 213

Justice Antonin Scalia is the current Court's most formidable opponent of the unrestricted use of legislative materials to infer congressional intent, opting instead for strict textualism. 214 Textualists, like Justice Scalia, generally premise their arguments on the inherent under-representation of legislative materials and the prospect for manipulation of the historical record by reviewing courts. 215 These arguments find support in logic. Inferring congressional intent from legislative materials is an elusive concept, primarily because there is not one common, collective psyche of Congress. 216 Additionally, as

213. See Russell L. Weaver, Administrative Law and Discussion Forum: Teaching (and Testing) Administrative Law, 38 BRANDEIS L.J. 273, 279 (2000) ("Resort to legislative history does not make the interpretive process any more certain. The justices frequently differ about when it is proper to resort to such history. Even when the justices agree about the permissibility of using legislative materials, they do not always agree about how to evaluate such materials.").

214. See Aprill, supra note 202, at 279 (noting that "Justice Scalia's strict textualism . . . follows from his aversion to the search for legislative intent based on legislative history. Much of Justice Scalia's stated objection to legislative history centers on the process by which it is produced—without satisfying the constitutional requirements of bicameralism."). For a criticism of Justice Scalia's position, see William N. Eskridge, Jr. & Philip P. Frickey, The Supreme Court 1993 Term: Law as Equilibrium, 108 HARV. L. REV. 26, 77 (1994), noting that:

[T]he new, tougher version of textualism advocated by Justices Scalia and Thomas exacerbates the tension between democracy and the rule of law and ultimately serves as a cover for the injection of conservative values into statutes. Insisting that statutory interpretation ignore legislative history and adhering to dictionaries at the expense of common sense, the new textualism is insensitive to the expectations of elected representatives.

Id. Arthur Corbin articulated an additional criticism of strict textualism more than thirty-five years ago, albeit context of contract interpretation. Corbin asserted that "when a judge refuses to consider relevant extrinsic evidence on the ground that the meaning of written words is to him plain and clear, his decision is formed by and wholly based upon the completely extrinsic evidence of his own personal education and experience." Arthur L. Corbin, The Interpretation of Words and the Parol Evidence Rule, 50 CORNELL L.Q. 161, 164 (1965).


For "textualists" like Justice Scalia, statutory interpretation is objective, not subjective. A court's job is to ask what the ordinary reader of a statute would have understood the words to mean at the time of enactment, not what the intentions of the enacting legislators were. Thus, he is emphatic that the meaning of a statute is to be derived from its text, context, and structure, not from some "unlegislated intent" revealed by legislative history. Justice Scalia frowns on the widespread use of legislative history by judges to help decide congressional intent, and accuses such judges of trying to "psychoanalyze" Congress, rather than read its laws.

Id.

216. See William W. Buzbee & Robert A. Schapiro, Legislative Record Review, 54 STAN. L. REV. 87, 151 (2001) ("Mere weighing of words spoken in the legislative process cannot reveal what genuinely led the legislature to act as it did. Moreover, whatever legislative record exists can never reflect fully the relevant societal conditions or even the state of public opinion on a
Judge Frank H. Easterbrook has articulated, there is a more general reason for limiting recourse to legislative materials:

Few of the best-intentioned, most humble, and most restrained among us have the skills necessary to learn the temper of times before our births, to assume the identity of people we have never met, and to know how 535 disparate characters from regions of great political and economic diversity would have answered questions that never occurred to them.217

Notwithstanding these observations, recourse to legislative materials is not an entirely deficient practice. Most Supreme Court justices have, at one time or another, employed legislative history as indicia of congressional intent.218 Indeed, the Court in Chevron itself examined the legislative history of the Clean Air Act Amendments of 1977 in upholding the EPA's construction.219 In the interim, several principles have emerged. First, although legislative materials carry less weight than the plain language of a statutory provision, the Court has consistently used them to corroborate statutory interpretations.220 Second, the Court is likely to consider committee reports, conference committee reports, and statements by floor managers as the most persuasive legislative sources of congressional intent.221 Finally, the Court may consider alternative historical materials, such as current events or cir-
cumstances preceding the ratification of a statute, to reject or accept agency interpretations.222

3. Canons of Statutory Interpretation

A final recourse for a reviewing court is the consideration of “canons of statutory interpretation.” The canons are judicially-made policy determinations and are designed to help reviewing courts infer congressional intent embodied in a statute.223 For example, in reviewing ambiguous statutory provisions affecting Native Americans, the Supreme Court has recognized that “statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.”224 Other canons simply embody assumptions regarding the authorship of statutory provisions. For example, the Supreme Court has declared that, “[F]ew principles of statutory construction are more compelling than the principal that Congress does not intend sub silentio to enact statutory language that it has earlier discarded in favor of other language.”225 Additionally, the Court has declared that every clause and word of a statute should, if possible, be given effect.226

However, the Court has been articulate in pronouncing that the various canons are not mandatory rules. Rather, “they are guides that need not be conclusive.”227 They are to be considered only when the traditional tools of statutory construction do not evince congressional

222. See, e.g., Smith, 508 U.S. at 240 (“When Congress enacted the current version of [the statutory provision], it was no doubt aware that drugs and guns are a dangerous combination. In 1989, 56 percent of all murders in New York City were drug related . . . .”); Regents of Univ. of Cal., 485 U.S. at 595 (noting that Congress enacted the Private Express Statutes after the Attorney General issued an opinion concerning a Postal Department regulation allowing railroads to carry their own mail).


Rules of interpretation in the nature of presumptions are the hardest with which to deal. They are fictional rules of interpretation and frequently lead to results exactly opposite those which legislatures intend. At best they are judicial standards requiring a particular form of legislative expression. As such, they are within limits defensible.

Id.

intent. Nonetheless, the canons remain an important aspect of statutory interpretation and continue to be employed to resolve otherwise ambiguous statutory provisions.

B. Step Two

A reviewing court should proceed to step two of the Chevron analysis only after it has determined that the particular statutory provision at issue is ambiguous at step one. At step two, "the question for the court is whether the agency's answer is based on a permissible construction of the statute." Here, the court may not impose its own interpretation on the statute. Rather, agency determinations are to be "given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute."

Step two requires a reviewing court to examine the agency's interpretation to determine whether it extends beyond the scope of available ambiguity. To this end, the text of the statute remains the focus of the inquiry and imposes a check on the agency's interpretation. This stage of the Chevron analysis, however, is quite different from the statutory analysis at step one. The court has already determined from the text and legislative history of the statute that congressional intent cannot be gleaned. The inquiry at step two, then, is whether the agency's interpretation logically fits within the ambiguous provisions of the statute. If the agency's interpretation is contrary to the text of

228. See United States v. Bass, 464 U.S. 336, 347 (1971) (noting that the rule of lenity is reserved for cases where the court is "left with an ambiguous statute"); Daniel A. Farber, Statutory Interpretation and Legislative Supremacy, 78 Geo. L.J. 281, 317 (1989) (noting that when a reviewing court considers an ambiguous statute, it is free to consider "any additional factors it deems appropriate, including its own view of public policy").

229. See Dole v. United Steelworkers of Am., 494 U.S. 26, 36 (1990) (recognizing the canon that words grouped in a list should be given related meaning); Traynor v. Turnage, 485 U.S. 535, 547-48 (1988) (recognizing the canon that a statute dealing with a narrow subject is not affected by a broader subsequent statute).

230. See Chevron, 467 U.S. at 843.

231. Id. at 843.

232. Id. at 843-44.

233. Id. at 844.

234. See, e.g., John Hancock Mut. Life Ins., Co. v. Harris Trust & Sav. Bank, 510 U.S. 86, 109 (1993) (rejecting an agency's request for Chevron deference because, "by reading the words 'to the extent' to mean nothing more than 'if,' the Department has clearly exceeded the scope of available ambiguity"); City of Chicago v. Envtl. Def. Fund, 511 U.S. 328 (1994) (rejecting an agency's request for Chevron deference because the agency's interpretation "goes far beyond whatever ambiguity [the statute] contains"). See also Luigs, supra note 207, at 1124 ("At step two, the court proceeds to compare the most ordinary and natural meaning of the text to the interpretation advanced by the administrative agency.").
the statute, or exceeds the scope of available ambiguity, a reviewing court should not defer to that interpretation.235

Mindful of these principles, an analysis of the Tenth Circuit’s decision in Tapia-Garcia v. INS reveals that the court erred in applying each of Chevron’s two steps. Proper application would have led to the conclusion that Congress did not intend 18 U.S.C. § 16(b) to encompass felony DUI offenses.

C. The Tenth Circuit Erred at Step One of the Chevron Inquiry

At step one of the Chevron inquiry, the Tenth Circuit in Tapia-Garcia v. INS noted that “we first apply de novo review in determining whether the plain language of the applicable statutory provisions clearly demonstrates Congress’s intent.”236 Nevertheless, the court seemingly abandoned this approach several sentences later by declaring 18 U.S.C. § 16(b) ambiguous without analysis or support.237 The court declared, “Because the statute that Mr. Tapia-Garcia challenges is arguably subject to differing interpretations, we will defer to the BIA’s interpretation provided it is reasonable.”238 Notably, the court did not cite the plain language of 18 U.S.C. § 16(b), the legislative history of that provision, or any canons of statutory construction in reaching this conclusion. Rather, the court merely pronounced the provision ambiguous and advanced to step two of the Chevron inquiry.239 Proper analysis at step one, however, would have revealed that Congress did not intend 18 U.S.C. § 16(b) to include felony DUI offenses.

1. The Plain Language of 18 U.S.C. § 16(b)

As discussed previously, the logical starting point of any statutory analysis is the language of the statutory provision itself.240 To this end, 18 U.S.C. § 16(b) provides that an offense is a crime of violence if, “by its nature,” it “involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.”241 While the Tenth Circuit found this definition subject to more than one interpretation, an analysis of the plain language of 18 U.S.C. § 16(b) compels a different result.

235. See Harris, 510 U.S. at 109.
237. Id. at 1220-21.
238. Id.
239. Id.
240. See supra note 200 and accompanying text.
First, as the Court of Appeals for the Fifth Circuit initially recognized, common dictionary definitions of the word "use" imply a specific intent requirement. For example, the *Oxford American Dictionary and Language Guide* defines the verb "use" as "cause to act or serve for a purpose," "employ," and "seek or achieve an end by means of." Likewise, *The American Heritage Dictionary of the English Language* defines the verb "use" as "put into purpose or apply for a purpose," "employ," and "seek or achieve an end by means of." These definitions are consistent, and support the conclusion that the verb "use," as embodied within 18 U.S.C. § 16(b), implies a specific intent requirement.

Second, ordinary sentence construction lends further support to the conclusion that Congress intended 18 U.S.C. § 16(b) to include a specific intent requirement. The verb "use," as incorporated into normal dialogue, is primarily utilized to express intentional conduct. For example, one might declare that "the student used a study guide to prepare for the examination," or that "the carpenter will use a hammer to pound the nail into the board." In contrast, the verb "use" is rarely, if ever, utilized to describe accidental, negligent, or reckless conduct. Thus, one who accidentally fell off a rooftop would not ordinarily say he used the force of gravity to carry him to the ground. Or, as the Seventh Circuit noted in *Bazan-Reyes v. Ashcroft*, a "drunk driver would not describe the incident by saying that he 'used' his car to hurt someone." In ordinary usage, the word "use" implies intentional conduct.

Finally, the word "use" when read in conjunction with the phrase "in the course of committing the offense" also suggests that 18 U.S.C. § 16(b) includes a specific intent requirement. Such a reading does not render 18 U.S.C. § 16(a) superfluous. Section 16(a) focuses only on those offenses that have, as an element, the use, attempted use, or threatened use of physical force. Section 16(b) compliments § 16(a) by including all other offenses that carry a substantial risk that the offender will resort to the use of force to complete the offense, even though such force is not itself a necessary element of the charging instrument.

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244. *Bazan-Reyes*, 256 F.3d at 608. *See also Dalton*, 257 F.3d at 206 ("Although 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.").
246. 18 U.S.C. § 16(b).
Under *Chevron*, where the language of a statute is clear, that is the end of the matter.\footnote{Chevron, 467 U.S. at 842.} As the above discussion demonstrates, the plain meaning of the verb “use” unambiguously excludes DUI offenses from 18 U.S.C. § 16(b). Accordingly, the Tenth Circuit in *Tapia-Garcia* should have denied deference to the BIA. Even assuming a degree of ambiguity, however, the legislative history of the phrase “crime of violence” is resolute in confirming this conclusion.\footnote{At least one commentator has suggested 18 U.S.C. § 16(b) carries a degree of ambiguity. See Rah. *supra* note 31, at 2138 (noting that “although the dictionary definitions of ‘use’ may generally refer to intentional acts, these definitions do not preclude non-intentional uses”).}

2. The Legislative History of 18 U.S.C. § 16


[T]he term “crime of violence” means murder, forcible rape, carnal knowledge of a female under the age sixteen, taking or attempting to take immoral, improper, or indecent liberties with a child under the age of sixteen years, mayhem, kidnapping, robbery, burglary, voluntary manslaughter, extortion or blackmail accompanied by threats of violence, arson, assault with intent to commit any offense, or an attempt or conspiracy to commit any of the foregoing offenses ... if the offense is punishable by imprisonment for more than one year.\footnote{Pub. L. No. 91-358, § 210, 84 Stat. 473 (1970). See also Crawford & Hutchins. *supra* note 249, at 68-70 (describing the evolution of the 1970 bail reform law).}


\begin{footnotes}
  \item[247.] *Chevron*, 467 U.S. at 842.
  \item[248.] At least one commentator has suggested 18 U.S.C. § 16(b) carries a degree of ambiguity. See Rah. *supra* note 31, at 2138 (noting that “although the dictionary definitions of ‘use’ may generally refer to intentional acts, these definitions do not preclude non-intentional uses”).
  \item[252.] Crawford & Hutchins, *supra* note 249, at 68-69.
  \item[253.] Id. at 69. *See also* S. REP. No. 98-225 (1983), reprinted in 1984 U.S.C.C.A.N. 3182.
\end{footnotes}
Moreover, Donald Santrilli, Department of Justice spokesman, testified before the Senate subcommittee that DUI offenses were precisely the type of offenses not encompassed by the 1970 Code.\textsuperscript{255} When questioned about the reach of the crime of violence provision, Santrelli testified that no rational court could find that provision encompassed DUI offenses.\textsuperscript{256} Specifically, he noted that the "court could say that a petty larceny or petty offense was dangerous to the community, the guy was a drunk driver for example, and this was dangerous to the community. Such a conclusion, however, would be simply unreasonable."\textsuperscript{257} Santrelli concluded that "drunk driving or marihuana smoking would not be of sufficient magnitude . . . to be dangerous."\textsuperscript{258}

Finally, in enacting §101(h) of the INA, Congress again indicated that DUI offenses were not encompassed by 18 U.S.C. §16. Section 101(h) addressed the problem of diplomatic immunity from prosecution and defined several offenses not covered by such a defense.\textsuperscript{259} That section reads:

\begin{quote}
[T]he term "serious criminal offense" means—
(1) any felony;
(2) any crime of violence, as defined in section 16 of title 18 of the United States Code; or
(3) Any crime of reckless driving or driving while intoxicated or under the influence of alcohol or of prohibited substances if such crime involves personal injury to another.\textsuperscript{260}
\end{quote}

Plainly, if Congress felt DUI offenses were encompassed by 18 U.S.C. §16, the inclusion of subsection (3) of §101(h) would have been redundant.\textsuperscript{261}

In sum, then, Congress has repeatedly indicated that DUI offenses are not encompassed by 18 U.S.C. §16. Therefore, even assuming a degree of ambiguity in the language of 18 U.S.C. §16(b), the legislative history of the phrase "crime of violence" clearly indicates that

\textsuperscript{255} Id. at 71.
\textsuperscript{256} Id.
\textsuperscript{257} Id. (quoting Preventive Detention Hearings Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary, 91st Cong. 314 (1970)).
\textsuperscript{258} Crawford & Hutchins, supra note 249, at 71 (quoting Preventive Detention: Hearings Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary, 91st Cong. 314 (1970)).
\textsuperscript{259} See Crawford & Hutchins, supra note 249, at 73.
\textsuperscript{260} Id. (quoting 8 U.S.C. §101(h) (2000)).
\textsuperscript{261} See Crawford & Hutchins, supra note 249, at 73 ("In order to avoid redundancy with subsection (1), subsections (2) and (3) must indicate misdemeanor offenses. That eliminates [crimes of violence] under 18 U.S.C. §16(b), which by definition must be felonies.").
§ 16(b) excludes DUI offenses. As discussed below, this conclusion is strengthened by a canon of statutory construction.

3. A Canon of Construction

While the plain language and legislative history of 18 U.S.C. § 16(b) indicate that provision excludes DUI offenses, one particular canon of statutory construction erases all doubt. Many years ago, the Supreme Court established that ambiguous immigration statutes are to be construed in a manner most favorable to the alien.262 The Court has reasoned that "deportation is a drastic measure and at times the equivalent of banishment or exile . . . . Since the stakes are considerable for the individual, we will not assume that Congress meant to trench on his freedom beyond that which is required by the narrowest of several possible meanings of the words used."263

Indeed, the BIA itself has recognized that the “principle of construing any lingering ambiguities in deportation statutes in favor of the alien” is appropriate.264 The BIA has reasoned:

The consequences of finding that a crime is an “aggravated felony” are severe. Congress has specifically noted its intention that aliens convicted of such crimes should be subjected to various disabilities under the immigration laws and precluded from nearly all forms of relief. In light of these harsh consequences we resolve the ambiguity presented . . . in favor of the [alien].265

This canon of construction counsels the conclusion that DUI offenses are not encompassed by 18 U.S.C. § 16(b). Such a determination most protects the interests of the alien. In contrast, the BIA’s interpretation of 18 U.S.C. § 16(b) least protects the interests of the alien by increasing the likelihood of deportation. Accordingly, at step one of the Chevron analysis, the Tenth Circuit should have resolved any ambiguity in 18 U.S.C. § 16(b) in favor of the alien.

As the above discussion indicates, the plain language of 18 U.S.C. § 16(b), the legislative history of the phrase “crime of violence,” and the canon that ambiguous statutes are to be construed in favor of aliens, all support the conclusion that Congress has excluded DUI offenses from 18 U.S.C. § 16(b). Even assuming, however, that the Tenth Circuit correctly stated 18 U.S.C. § 16(b) was ambiguous at step one of the Chevron inquiry, the Tenth Circuit erred at step two.

263. Fong Haw Tan, 333 U.S. at 10.
265. Id.
D. The Tenth Circuit Erred at Step Two of the Chevron Inquiry

In Tapia-Garcia, the Tenth Circuit concluded that the BIA reasonably construed 18 U.S.C. § 16(b) to include DUI offenses. In so finding, the court relied on the inherent and documented danger in driving under the influence. As dangerous as driving under the influence may be, however, the Tenth Circuit misinterpreted the analysis at step two of the Chevron inquiry. In Chevron, the Supreme Court determined that, at step two, agency interpretations “are to be given controlling weight unless they are arbitrary, capricious or manifestly contrary to the statute.” Accordingly, a reviewing court must examine the particular statute to determine whether the agency’s interpretation exceeds the scope of available ambiguity.

Applying this proper analysis, it again becomes evident that 18 U.S.C. § 16(b) cannot include DUI offenses. First, by its terms, 18 U.S.C. § 16(b) requires the use of force. As the Second Circuit noted in Dalton, it is questionable whether “force” can be associated with driving under the influence. The Second Circuit reasoned that “physical force cannot reasonably be interpreted as a foot on the accelerator or a hand on the steering wheel. Otherwise, all driving would, by definition, involve the use of force.” Furthermore, “force” resulting from an accident cannot qualify because, by definition, an accident is an unforeseen, sudden incident. Therefore, the offender cannot logically be said to use or employ force in the commission of the offense.

The language of 18 U.S.C. § 16(b) plainly excludes DUI offenses as such offenses do not involve the “use of physical force.” Accordingly, the Tenth Circuit should have concluded at step two of the Chevron inquiry that the BIA’s interpretation of 18 U.S.C. § 16(b) exceeded the scope of available ambiguity.

266. Tapia-Garcia, 237 F.3d at 1222.
267. See id. (quoting United States v. Farnsworth, 92 F.3d 1001, 1008-09 (10th Cir. 1996), for the proposition that “the risk of injury from drunk driving is neither conjectural nor speculative .... Drunk driving is a reckless act that often results in injury, and the risks of driving while intoxicated are well known.”).
268. Chevron, 467 U.S. at 844.
270. Dalton, 257 F.3d at 206.
271. Id.
272. But see Rah. supra note 31, at 2138-39 (noting that “it is clear that when one car slams into another, the resulting force is what causes the injury”).
V. POLICIES FAVORING A WITHDRAWAL FROM TAPIA-GARCIA

As this Comment has demonstrated, the Tenth Circuit in Tapia-Garcia v. INS erroneously deferred to the BIA's conclusion that 18 U.S.C. § 16(b) encompassed felony DUI offenses. Accordingly, DUI offenses remain grounds for deportation in that jurisdiction. Aside from that court's erroneous application of the Chevron doctrine, several factors warrant the Tenth Circuit's withdrawal from Tapia-Garcia.

A. The BIA's Recent Holding in In re Ramos

Perhaps the most logical reason for the Tenth Circuit to revisit and withdraw from its decision in Tapia-Garcia is the BIA's subsequent holding in In re Ramos. There, the BIA overruled its earlier decisions in In re Magallanes and In re Puente-Salazar and held that 18 U.S.C. § 16(b) does not encompass DUI offenses. The BIA noted that a "majority of the federal circuit courts that have addressed whether driving under the influence is a crime of violence, and therefore an aggravated felony under [the INA], have, either explicitly or implicitly, disagreed with our reasoning in . . . Puente-[Salazar]." Given this observation, and citing a "strong interest in ensuring that aliens receive uniform treatment nationwide," the BIA withdrew from In re Magallanes and In re Puente-Salazar.

While the BIA's holding in In re Ramos is certainly not binding on the Tenth Circuit, it calls into question any future application of Tapia-Garcia. Notably, the Tenth Circuit premised its opinion in Tapia-Garcia on deference to the BIA. Citing In re Magallanes and In re Puente-Salazar, the court noted that the BIA had twice held that driving under the influence was a crime of violence under 18 U.S.C. § 16(b). The BIA's recent withdrawal from In re Magallanes and In re Puente-Salazar, however, has undermined the precedential effect of Tapia-Garcia. Moreover, given the Tenth Circuit's stated willingness to defer to the BIA on the issue of whether 18 U.S.C. § 16(b) includes

274. Id. at 345.
275. Id. at 346. Notably, however, the BIA did not hold in In re Ramos that 18 U.S.C. § 16(b) required specific intent to use force. Rather, so long as the offense was committed with a mens rea of at least recklessness, the statute could apply. Id.
276. In jurisdictions that had independently addressed and decided the issue, the BIA noted that it was "unquestionably bound to follow these rulings," Id. at 341 (citing In re K-S-, 20 I. & N. Dec. 715 (B.I.A. 1993); In re Anselmo, 20 I. & N. Dec. 25 (B.I.A. 1989)). Accordingly, the BIA limited its holding to jurisdictions where the court of appeals had not yet decided the issue. In re Ramos, 23 I. & N. Dec. at 336.
278. Id. at 1222.
DUI offenses, Tapia-Garcia compels deference to the BIA’s decision in *In re Ramos*. Accordingly, the Tenth Circuit should revisit and withdraw from its opinion in *Tapia-Garcia* and hold that 18 U.S.C. § 16(b) does not encompass felony DUI offenses.

**B. Uniformity in Deportation Consequences**

Quite naturally, the Tenth Circuit’s decision in *Tapia-Garcia* has the most direct and detrimental impact on aliens convicted of felony DUI offenses within that jurisdiction. While the INS cannot initiate deportation proceedings against aliens convicted of felony DUI offenses in any other circuit, it remains free to do so in the Tenth Circuit. This circumstance presents precisely the type of nonuniformity that courts, agencies, and government officials alike have endeavored to eradicate.²⁷⁹

Nonuniform implementation of deportation laws impact the very predictability aliens rely on in adjusting to rules and customs within the United States. The Eleventh Circuit has noted, for example, “[T]he laws that we administer and the cases we adjudicate often affect individuals in the most fundamental ways. We think that all would agree that to the greatest extent possible our immigration laws should be applied in a uniform manner nationwide . . . .”²⁸⁰ Likewise, in passing the Immigration Reform and Control Act of 1986,²⁸¹ Congress articulated that “the immigration laws of the United States should be enforced vigorously and uniformly.”²⁸² Finally, the BIA has declared that “important policy considerations favor applying a uniform federal standard in adjudicating and determining the consequences of a conviction under the [INA].”²⁸³

The Tenth Circuit’s decision in *Tapia-Garcia*, however, has thwarted these important goals. Its holding results directly in the unjust and unfounded deportation of those unfortunate aliens convicted of felony DUI offenses in that circuit. Meanwhile, similarly situated aliens convicted of the same offenses in sister circuits remain free to rebuild

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²⁷⁹ See infra notes 280-283 and accompanying text.
²⁸⁰ Jamarillo v. INS, 1 F.3d 1149, 1155 (11th Cir. 1993). See also Moon Ho Kim v. INS, 514 F.2d 179, 180-81 (D.C. Cir. 1975) (concluding that the “legislative history of the [INA] and the plethora of definitions incorporated in it . . . leave little doubt that Congress was seeking uniformity”).
their lives and take positive steps toward citizenship. The precise number of aliens subject to this nonuniformity is difficult to ascertain. Each year in the United States, however, more than one million people are arrested for driving under the influence. If even a small percentage of those arrested annually in the Tenth Circuit’s jurisdiction were aliens with three or more DUI offenses, the number of aliens affected would reach the thousands.

C. The Potential for Greater Nonuniformity

The Tenth Circuit’s holding in Tapia-Garcia not only fosters nonuniform treatment of aliens convicted of felony DUI offenses, but inherently carries the potential for the nonuniform treatment of a wide range of other offenses. In Tapia-Garcia, the Tenth Circuit essentially endorsed the equation of 18 U.S.C. § 16(b)’s “use of force” requirement with the “risk of harm” language contained in § 4B1.2(1)(ii) of the Sentencing Guidelines. Section 4B1.2(1)(ii), however, has proven difficult in application.

For example, circuit courts are currently split on the issue of whether burglary of a building other than a dwelling constitutes a crime of violence under § 4B1.2(1)(ii) of the Sentencing Guidelines. Likewise, circuit courts are split on the issue of whether possession of a firearm by a felon constitutes a crime of violence under that provision. These observations illustrate the inherent subjectivity associated with the “risk of harm” test. Applying such a test within the context of immigration law only increases the prospect of nonuniformity, as the INS prosecutes and seeks to deport aliens based on the commission of an ever-expanding list of criminal offenses. Therefore, the Tenth Circuit’s endorsement of the “risk of harm” test as the proper inquiry under 18 U.S.C. § 16(b) further underscores the necessity for that court to revisit and withdraw from its holding in Tapia-Garcia.

286. Compare United States v. Smith, 10 F.3d 724, 733 (10th Cir. 1993) (holding that burglary of a non-dwelling is not a crime of violence under the Sentencing Guidelines), with United States v. Fiore, 983 F.2d 1, 4-5 (1st Cir. 1992) (holding that conspiracy to burglarize a non-dwelling is a crime of violence under the Sentencing Guidelines).
287. Compare United States v. O’Neal, 937 F.2d 1369, 1374-75 (9th Cir. 1990) (holding that possession of a firearm by a felon is a crime of violence under the Sentencing Guidelines), with United States v. Chapple, 942 F.2d 439 (7th Cir. 1991) (holding that possession of a firearm by a felon is not a crime of violence under the Sentencing Guidelines).
VI. Conclusion

This Comment has argued that, upon proper application of the Chevron doctrine, the Tenth Circuit in Tapia-Garcia should have denied deference to the BIA’s interpretation of 18 U.S.C. § 16(b). It has provided two arguments to support this conclusion, one at each of Chevron’s two steps. At step one, it is clear from the plain language of 18 U.S.C. § 16(b) that Congress did not intend that provision to include felony DUI offenses.288 This conclusion is further supported by the unequivocal legislative history of the phrase “crime of violence,” as well as the canon of statutory construction interpreting ambiguous immigration provisions to the benefit of aliens.289 At step two of the Chevron inquiry, the Tenth Circuit’s interpretation is unreasonable because it exceeds the scope of any lingering ambiguity.290

This misapplication of the Chevron doctrine has produced a circuit split that renders some aliens deportable for the commission of felony DUI offenses, while others are not. Outside the Tenth Circuit, the weight of authority, including the BIA, now maintains that 18 U.S.C. § 16(b) does not encompass felony DUI offenses. Accordingly, the Tenth Circuit should revisit and withdraw from its erroneous decision in Tapia-Garcia, thereby abrading the current circuit split on the issue.

Mark Bradford*

288. See supra notes 240-247 and accompanying text.
289. See supra notes 249-265 and accompanying text.
290. See supra notes 266-272 and accompanying text.
* Thank you Mom, Dad, Bill, Amy, Karen, and Korena—for believing in me.