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## Drunk Driving and Deportation – Should DUI Convictions Be Treated as Crimes of Violence for INS Removal Purposes?

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# **DRUNK DRIVING AND DEPORTATION— SHOULD DUI CONVICTIONS BE TREATED AS CRIMES OF VIOLENCE FOR INS REMOVAL PURPOSES?**

## I. INTRODUCTION

Drunk driving poses serious social problems in the United States.<sup>1</sup> In an attempt to combat this problem, several circuit courts have ruled that aliens convicted of multiple drunk driving offenses should be deported while other circuits have disagreed, allowing aliens with drunk driving convictions to remain in the U.S.<sup>2</sup> As a result of this circuit split, sentencing aliens with multiple drunk driving convictions has become unnecessarily difficult, confusing, and unfair.

According to U.S. immigration law, if an alien commits an aggravated felony under 8 U.S.C. § 1227,<sup>3</sup> he or she can be removed from the United States.<sup>4</sup> An aggravated felony is “a crime of violence for which the term of imprisonment is at least one year.”<sup>5</sup> 18 U.S.C. § 16 defines a crime of violence as:

- a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
- b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.<sup>6</sup>

Classifying drunk driving convictions as crimes of violence for immigration purposes has serious implications for many unsuspecting

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1. See David L. Marcus, *Three Times and Out—Some Face Deportation for Repeat Drunken Driving*, BOSTON GLOBE, Oct. 14, 1998, at A1.

2. See *Dalton v. Ashcroft*, 257 F.3d 200 (2d Cir. 2001); *United States v. Parsons*, 955 F.2d 858 (3d Cir. 1992); *United States v. Chapa-Garza*, 243 F.3d 921 (5th Cir. 2001); *Bazan-Reyes v. INS*, 256 F.3d 600 (7th Cir. 2001); *Park v. INS*, 252 F.3d 1018 (9th Cir. 2001); *United States v. Trinidad-Aquino*, 259 F.3d 1140 (9th Cir. 2001); *Tapia Garcia v. INS*, 237 F.3d 1216 (10th Cir. 2001); *Le v. U.S. Attorney General*, 196 F.3d 1352 (11th Cir. 1999).

3. 8 U.S.C. § 1227(a)(2)(A)(iii) (2001).

4. “Any alien who is convicted of an aggravated felony at any time after admission is deportable.” 8 U.S.C. § 1227(a)(2)(A)(iii) (2001).

5. 8 U.S.C. § 1101(a)(43)(F) (2001).

6. 18 U.S.C. § 16 (2001).

immigrants and their families.<sup>7</sup> David Balderrama,<sup>8</sup> a Mexican immigrant, moved to America, worked hard, and then retired. He expected to spend the rest of his life with his family.<sup>9</sup> Unfortunately, Balderrama also drove drunk on several occasions.<sup>10</sup> After Balderrama's third conviction, the United States Immigration Service raided<sup>11</sup> his home and informed him that he would be deported to Mexico.<sup>12</sup> In protesting his client's imminent deportation, Albert Armandariz Jr., Balderrama's attorney, argued that the "DWI rule punishes those who have already paid fines and gone through court-ordered rehabilitation programs. The deportations will needlessly break apart families and leave fatherless children with no option but welfare."<sup>13</sup> Countering Armandariz's argument, Dale Chavez, administrator of the Mothers Against Drunk Driving (MADD) chapter in El Paso responded, "if someone is deported, his family still has the opportunity to get together, even if it's in

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7. See *Three Times and Out—Some Face Deportation for Repeat Drunken Driving*, *supra* note 1; Frank Trejo, *Future Depends on Ruling: Deportations for 3 DWIs May be Halted*, THE DALLAS MORNING NEWS, Mar. 19, 2002, at 13A. Like Balderrama, Rosario Hernandez, a legal U.S. resident faces deportation for his three drunk driving convictions, the last of which occurred in 1994. *Id.* After pleading guilty following his third DWI arrest, the court ordered Mr. Hernandez to attend Alcoholics Anonymous meetings. *Id.* Hernandez is married to a U.S. born citizen with whom he has a four-month old son. *Id.* According to Hernandez, if he were deported, "our whole lives would be destroyed." *Id.* Facing the prospect of deportation, Mr. Hernandez says, "I know I made mistakes. But I feel I have paid for those mistakes and I have learned from them. If I am deported, I will lose everything, including my family. My wife is American. There is no reason why she would leave her country and go to Mexico. Even I no longer have anything in Mexico." *Id.*

8. See *Three Times and Out—Some Face Deportation for Repeat Drunken Driving*, *supra* note 1. In 1956, David Balderrama and his wife, Marina, along with their daughter Lucy, relocated to Texas from Mexico, their country of origin. *Id.* Once in the United States, they became legal U.S. residents. *Id.*

9. *Id.* Balderrama worked in a sheet metal factory during the day and then performed home repairs after finishing his 8-hour factory shift. *Id.*

10. *Id.* Between 1993 and 1998, Balderrama was arrested three times for drunk driving. Following each of his arrests, he pleaded guilty. *Id.* According to his family, "if he had known the three [guilty] pleas would haunt him in his old age, he might have requested a jury trial." *Id.* Because the decision to deport applies retroactively, Mark Cohen, an immigration lawyer, argues, "[m]any, if not most, of the immigrants affected entered into plea arrangements when federal immigration law defined conviction and aggravated felony differently. Had they known that pleading guilty or taking a deferred adjudication on a third DWI was going to render them arguably deportable, they probably would have made a different decision. The retroactive application . . . of the law to these individuals violates basic notions of fairness inherent to our Constitution, and specifically may violate their due process and equal protection rights." Frank Trejo, *2 Groups Defend DWI Deportations—INS, MADD Say Effort Necessary; Critics Call Actions Anti-Immigrant*, THE DALLAS MORNING NEWS, Sept. 4, 1998, at 33A.

11. Law enforcement agents referred to the raid, which occurred throughout the state of Texas, as Operation Last Call. *Id.* When the agents entered Balderrama's home, they were brandishing weapons. *Id.* When asked about the raid, Balderrama stated, "I'm not an outlaw. If they want to throw me out of the country, I won't fight them. But they don't have to storm my house and scare my family." *Id.*

12. *Id.*

13. *Id.*

another land. But if he kills somebody, then the victim's family can only get together at the graveyard."<sup>14</sup>

Although the Fifth Circuit Court of Appeal's decision in *United States v. Chapa-Garza* changed Texas law regarding the deportation of aliens with multiple drunk driving convictions,<sup>15</sup> Balderrama's experience and the experiences of other immigrants throughout the nation indicate that repeat drunk driving convictions have serious and often unexpected implications for immigrants and their families.<sup>16</sup> When an alien is deported, he must abandon his family, frequently leaving them unable to support themselves.<sup>17</sup> As a result, the remaining family members often must rely on government subsidies, including welfare, for survival. With limited financial resources, it will be virtually impossible for the family to travel to visit their deported family member, which will negatively affect their family relationships.<sup>18</sup> Because most aliens flee their native countries to escape substandard living conditions or political strife, it may be unsafe or unwise for them to return to their homeland. In extreme cases, deported aliens cannot return to their country of origin because the region is plagued by political instability. As a result, they may be sent to another country with which they have no ties. Therefore, resolving the conflict over whether drunk driving should be treated as a crime of violence under 18 U.S.C. § 16 must not only be accomplished quickly, but also with compassion for those whose lives it will dramatically and irrevocably affect.

The United States Circuit Courts of Appeals are split as to whether drunk driving constitutes a crime of violence under § 16.<sup>19</sup> Persuaded by the

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14. *Id.*

15. Because, under *Chapa-Garza*, drunk driving no longer constitutes a crime of violence, neither Balderrama nor Hernandez are at further risk for deportation. 243 F.3d 921 (5th Cir. 2001). However, because both the Tenth and Eleventh Circuits still hold that drunk driving is a crime of violence, immigrants in the same position as Balderrama and Hernandez who drive drunk in those jurisdictions still face deportation. See *infra* Part II.b.2 and accompanying notes.

16. See *Three Times and Out—Some Face Deportation for Repeat Drunken Driving*, *supra* note 1.

17. *Id.*

18. *Id.*

19. See *Dalton*, 257 F.3d at 200 (holding under New York law, drunk driving does not require the use of physical force and thus does not constitute a crime of violence); *Parsons*, 955 F.2d at 858 (stating in dicta, 18 U.S.C. § 16 does not necessarily apply to negligent or criminal acts that result in injury.); *Chapa-Garza*, 243 F.3d at 921 (driving while intoxicated is not a crime of violence under 18 U.S.C. § 16); *Bazan-Reyes*, 256 F.3d at 600 (driving under the influence is not a crime of violence under 18 U.S.C. § 16 because defendant had no intent to use violent force); *Park*, 252 F.3d at 1018 (9th Cir. 2001) (holding that reckless mens rea sufficient to constitute a crime of violence under 18 U.S.C. § 16); *Trinidad-Aquino*, 259 F.3d at 1140 (holding the “use . . . against” requirement in 18 U.S.C. § 16 means that a defendant cannot commit a “crime of violence” if he negligently hits someone or something with a physical object and thus drunk driving does not constitute a crime of

argument that a crime of violence requires the intentional use of force, the Second, Third, Fifth, Seventh and Ninth Circuit Courts of Appeals have held that driving while intoxicated is not a crime of violence because it does not involve the use of intentional force.<sup>20</sup> Conversely, the Tenth and Eleventh Circuit Courts of Appeals have read the statute as requiring a reckless mens rea, not the intentional use of force, and have held drunk driving to be a crime of violence.<sup>21</sup> Recently, the Board of Immigration Appeals (“BIA”)<sup>22</sup> changed its position on the crime of violence issue.<sup>23</sup> According to the BIA’s decision in *In re Luis Manuel Ramos*, if a federal circuit court of appeals has ruled on the issue, the BIA should follow the rule of that circuit.<sup>24</sup> However, if the circuit has not yet resolved the issue, the BIA should classify offenses committed recklessly that involve a substantial risk that force would be used as crimes of violence under 18 U.S.C. § 16 and, thus, an aggravated felony for removal purposes under § 1227.<sup>25</sup>

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violence for deportation purposes); *Tapia Garcia*, 237 F.3d at 1216 (driving under the influence is a crime of violence under 18 U.S.C. § 16); *Le*, 196 F.3d at 1352 (driving under the influence with serious bodily injury constitutes a crime of violence).

20. *See supra* note 19 and accompanying text.

21. *See supra* note 19 and accompanying text.

22. In conjunction with the State Department, the Labor Department and the Department of Health & Human Services, the United States Justice Department plays a major role in administering the Immigration and Nationality Act. STEPHEN H. LEGOMSKY, IMMIGRATION AND REFUGEE LAW AND POLICY 1-2 (2d ed. 1997). The Immigration and Naturalization Service (“INS”), part of the Justice Department, enforces the law, inspects arriving immigrants, prosecutes at administrative hearings, processes and adjudicates certain applications, and educates the public. *Id.* at 1. Separate from the INS although also a part of the Justice Department, the Executive Office for Immigration Review (“EOIR”) deals solely with adjudication. The EOIR has three parts: (1) the Office of the Chief Immigration Judge, which coordinates the work of immigration judges in presiding over removal hearings, (2) the Board of Immigration Appeals, which hears appeals from both immigration judges and certain INS proceedings, and (3) the Office of the Chief Administrative Hearing Officer, which conducts evidentiary hearings in cases involving the employment of unauthorized aliens and certain forms of employment discrimination. *Id.* at 1.

23. *In re Luis Manuel Ramos*, Interim Decision 3468, 2002 WL 1001049 (BIA, Apr. 4, 2002) (holding that in circuits where the federal court of appeals has not resolved the crime of violence issue, an offense will be considered a crime of violence if it is committed recklessly and involves a substantial risk that the perpetrator may use force in carrying out the crime; however, in circuits where the issue has been adjudicated, the law of that circuit should be applied). Previously, the BIA applied different rules in different jurisdictions, following no discernible pattern. *See In re Magallanes-Garcia*, Interim Decision 3341, 1998 WL 133301 (BIA Mar. 19, 1998), *overruled by In re Luis Manuel Ramos*, Interim Decision 3468, 2002 WL 1001049 (BIA, Apr. 4, 2002) (concluding that the nature of drunk driving presents a risk that physical force would be used against another and, as a result, it constitutes a crime of violence for deportation purposes); *In re Puente-Salazar*, Interim Decision 3412, 1999 WL 770709 (BIA Sept. 29, 1999), *overruled by In re Luis Manuel Ramos*, Interim Decision 3468, 2002 WL 1001049 (BIA, Apr. 4, 2002) (operating a vehicle while under the influence constitutes a crime of violence because the nature of the crime creates a substantial risk that physical force will be applied).

24. *Id.*

25. *Id.*

Although the Tenth and Eleventh Circuits have determined that drunk driving does constitute a crime of violence, the Second, Third, Fifth, Seventh, and Ninth Circuits have held that drunk driving does not qualify as a crime of violence for deportation purposes.<sup>26</sup> Thus, under the BIA's current approach, an alien who lives within the jurisdiction of the Tenth Circuit will likely be deported while an alien convicted of drunk driving in the Third Circuit will be allowed to remain in the United States.<sup>27</sup> Because deportation decisions should not be made on the basis of geography, the split among the circuits must be resolved.

## II. HISTORY

### A. *The Statutes*

In 1988, the Anti-Drug Abuse Act<sup>28</sup> first used the term “aggravated felony” in relation to the Immigration and Nationality Act.<sup>29</sup> With the promulgation of 8 U.S.C. § 1227, which provides that “any alien who is convicted of an aggravated felony at any time after admission is deportable,” commission of an aggravated felony became grounds for an alien's deportation or removal.<sup>30</sup> As defined in 8 U.S.C. § 1101,<sup>31</sup> an aggravated felony is “a crime of violence (as defined in section 16 of Title 18) for which the term of imprisonment is at least one year.”<sup>32</sup> Therefore, if courts treat drunk driving as a crime of violence under 18 U.S.C. § 16, drunk driving would constitute an aggravated felony for purposes of 8 U.S.C. § 1227.<sup>33</sup>

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26. *See supra* note 19.

27. *Luis Manuel Ramos*, 2002 WL 1001049, at \*1.

28. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181 (1988) (currently 8 U.S.C. § 1101(a)(43) (Supp. III 1991)).

29. The Immigration and Nationality Act has been codified as 8 U.S.C. §§ 1101-1557.

30. 8 U.S.C. § 1227(a)(2)(A)(iii) (2001).

31. 8 U.S.C. § 1101(a) includes a list of 21 categories of aggravated offenses, including the murder, rape or sexual abuse of a minor, illicit trafficking in a controlled substance, illicit trafficking in firearms or destructive devices, money laundering, a crime of violence, a theft or burglary offense, the demand of ransom, child pornography, racketeering, owning or controlling a prostitution business, transmitting national defense information, fraud, smuggling, counterfeiting, failure to appear to serve a sentence, obstructing justice, failing to appear pursuant to a court order, and conspiracy. *Id.*

32. *Id.*

33. *Id.*

## B. *The Cases*

### 1. *Drunk Driving—Not a Crime of Violence*

When asked to interpret 18 U.S.C. § 16, the circuits have split as to whether drunk driving constitutes a crime of violence.<sup>34</sup> The Second, Third, Fifth, Seventh and Ninth Circuits, believing a crime of violence requires the intentional use of force, have held that drunk driving does not constitute a crime of violence under § 16 because it does not involve the use of intentional force.<sup>35</sup>

In *Dalton v. Ashcroft*,<sup>36</sup> the Court of Appeals for the Second Circuit considered whether Thomas Dalton, a Canadian citizen and lawful U.S. resident,<sup>37</sup> committed an aggravated felony when he violated New York law (the “New York statute”) by operating a vehicle while intoxicated and therefore was deportable under 8 U.S.C. § 1227.<sup>38</sup> The court believed that a crime of violence should be analyzed using the categorical approach,<sup>39</sup> which requires an examination of the “intrinsic nature of the offense rather than . . . the factual circumstances surrounding [a] violation.”<sup>40</sup> In analyzing the New York statute,<sup>41</sup> the court stated that the DWI offense does not require the use

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34. See *Dalton*, 257 F.3d at 200; *Parsons*, 955 F.2d at 858; *Chapa-Garza*, 243 F.3d at 921; *Bazan-Reyes*, 256 F.3d at 600; *Park*, 252 F.3d at 1018; *Trinidad-Aquino*, 259 F.3d at 1140; *Tapia Garcia*, 237 F.3d at 1216; *Le*, 196 F.3d 1352.

35. *Dalton*, 257 F.3d at 200; *Parsons*, 955 F.2d at 858; *Chapa-Garza*, 243 F.3d at 921; *Bazan-Reyes*, 256 F.3d at 600; *Park*, 252 F.3d at 1018; *Trinidad-Aquino*, 259 F.3d at 1140.

36. 257 F.3d at 200.

37. Dalton, who was born in Canada, had been living in the U.S. as a lawful resident since 1958. *Dalton*, 257 F.3d at 202.

38. While Dalton was serving the prison sentence, the INS began removal proceedings against him. The INS charged that he was removable under 8 U.S.C. § 1227 because he had convicted of an aggravated felony. *Id.* at 203. Following a removal hearing, the Immigration Judge ordered Dalton to be sent back to Canada. *Id.* Dalton appealed and the BIA affirmed. *Id.*

39. Under the categorical approach to statutory interpretation, “the singular circumstances of an individual petitioner’s crimes should not be considered, and only the minimum criminal conduct necessary to sustain a conviction under a given statute is relevant.” *Id.* at 204. Furthermore, “any conduct falling within the purview of the statute must by its nature entail moral turpitude.” *Id.*

40. *Id.* The court stated:

Based upon the language of the statute requiring analysis of the “nature” of the crime, as well as by analogy to the Circuit’s law regarding moral turpitude, we believe that the categorical approach is appropriate for determining whether an offense is a crime of violence under § 16(b) in the context of deportation proceedings. Furthermore, the categorical approach is especially appropriate in the current context where the relevant facts may be up to ten years old and may never have been developed in the trial court.

*Id.* at 204-05.

41. The statute, NYVTL § 1192.3, states “[n]o person shall operate a motor vehicle while in an intoxicated condition.” *Id.* at 205. A person could conceivably be convicted under the statute “even where there is no risk that force may be used or . . . injury might result.” *Id.*

of physical force.<sup>42</sup> The court focused on the notion of an accident as involving the use of physical force and differentiated the risk of force from the risk of injury.<sup>43</sup> Holding that drunk driving does not constitute a crime of violence, the court recognized the inherent societal dangers posed by drunk drivers, stating “nothing in our decision today in any way underestimates the toll that drunk driving has taken on human life; it is an urgent, nationwide problem of staggering proportion.”<sup>44</sup>

In *United States v. Parsons*,<sup>45</sup> the Court of Appeals for the Third Circuit addressed the definition of a crime of violence under the United States Sentencing Guidelines (“USSG”). In dicta, the court stated that 18 U.S.C. § 16 does not necessarily apply to negligent or criminal acts that result in injury.<sup>46</sup> The court’s statement indicates that driving while intoxicated should not be treated as a crime of violence because there is no risk of committing a specific intent crime.<sup>47</sup> Subsequently, the Fifth Circuit in *Chapa-Garza* and the Seventh Circuit in *Bazan-Reyes* followed the *Parsons* reasoning and held that committing the crime of drunk driving does not involve the formation of intent necessary to commit a crime of violence.<sup>48</sup>

In *United States v. Chapa-Garza*,<sup>49</sup> the Fifth Circuit Court of Appeals addressed whether Texas felony DWI constitutes a crime of violence.<sup>50</sup> After

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42. *Id.* at 205.

43. *Id.* at 206. According to the court, “[a]lthough an accident may . . . be said to use force, one cannot be said to use force in an accident as one might use force to pry open a heavy . . . door.” *Id.*

44. *Id.* Additionally, the court indicated that “shoehorning such reprehensible conduct into criminal statutes that were not designed to hold it . . . risk[s] an equivalent harm of usurping federal and state legislative roles.” *Id.*

45. 955 F.2d at 858. *Parsons*, a repeat offender, pled guilty to possession with the intent to distribute cocaine base. *Id.* at 861. Expanding the congressional definition of a crime of violence under the career offender sentencing guideline to include actual, attempted, or threatened use of physical force directly against persons or crimes aimed at seeking or damaging property, the court sentenced the defendant as a career offender under U.S.S.G. § 4B1.1. *Id.* at 874. In reaching its decision, the court further stated:

[C]rimes such as drunk driving and child neglect present a serious risk of physical harm to a victim and therefore qualify as predicate “crimes of violence” for purposes of the career offender Guideline. We are concerned by the possibility that a defendant could be deemed a career violent offender on the basis of two such convictions, even when he or she never intended harm, nor was there a substantial risk that he or she would have to use intentional force . . . we urge that the [Sentencing] Commission reconsider its career offender Guidelines to the extent that they cover such “pure recklessness” crimes.

*Id.*

46. *Id.* at 866.

47. *Id.*

48. *Chapa-Garza*, 243 F.3d at 921; *Bazan-Reyes*, 256 F.3d at 600.

49. 243 F.3d at 921.

50. *Id.* at 923. In *Chapa-Garza*, the defendants had all pled guilty to violating 8 U.S.C. § 1326(a) by unlawfully remaining in the United States after having been deported. *Id.* The United States Sentencing Guidelines provides a base offense level of eight (8) for violations of § 1326. *Id.* However,



examining the Texas statute,<sup>51</sup> the court determined that, according to Texas law, driving while intoxicated is not a crime of violence under 18 U.S.C. § 16 because the “substantial risk” language in 18 U.S.C. § 16 “refers only to those offenses involving a substantial likelihood that the perpetrator will intentionally employ physical force.”<sup>52</sup> According to the court, “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 at all, much less in order to perpetrate any crime, including the crime of felony DWI.”<sup>53</sup> Therefore, the court stated that while a defendant may intentionally drive while intoxicated and, as a result, cause an accident, he does not do so with intent to use physical force to cause an injury to another. Without the requisite intent, the perpetrator’s actions do not satisfy the 18 U.S.C. § 16 definition of a crime of violence, and thus he cannot be convicted of an aggravated felony.<sup>54</sup> *Chapa-Garza*, a seminal decision, essentially defined the conflict between the circuits in addressing the definition of a crime of violence.<sup>55</sup>

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if § 1326 violators were removed because of an aggravated felony conviction, the base level increases sixteen (16) offense levels. *Id.* Because the defendants had all been convicted of felony DWI, the court had to determine whether the crime constituted a crime of violence, thereby warranting a stiffer punishment under the USSG. *Id.* at 924.

51. In analyzing § 16, the court, like the Second Circuit in *Dalton*, applied the categorical approach, stating “[t]he proper inquiry is whether a particular defined offense, in the abstract is a crime of violence under 18 U.S.C. § 16(b).” *Id.* at 924.

52. *Id.* at 926. Furthermore, “[t]he 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.*

53. *Id.* at 927. The court further elaborated:

The crime of Texas felony DWI is committed when the defendant, after two prior DWI convictions, begins operating a vehicle while intoxicated. *Intentional* force against another’s person or property is virtually never employed to commit this offense.

*Id.* (emphasis added).

54. After the *Chapa-Garza* decision, the INS issued a statement, noting that the Fifth Circuit’s decision conflicted with the BIA’s decision in *In re Magallenes-Garcia*, which held an alien could be removed for a felony DWI conviction. Such a conviction constituted a crime of violence and thus an aggravated felony warranting removal under 8 U.S.C. § 1227. 78 No.10 INTERPRETER RELEASES 489 (Mar. 12, 2001). According to the statement: “INS is examining the applicability of the Fifth Circuit[s] . . . removal decisions and awaiting a determination by the Department of Justice whether or not to seek further review of the decision.” *Id.* Furthermore, the INS indicated that it would “[c]ontinue removing aliens convicted of multiple drunk driving offense, notwithstanding the *Chapa-Garza* ruling.” *Id.*

55. Courts both in and outside of the Fifth Circuit frequently cite *Chapa-Garza* for its well-reasoned analysis of the crime of violence issue. In *United States v. Hernandez-Neave*, 2001 WL 1643945, the Fifth Circuit addressed whether a defendant’s prior conviction for unlawfully carrying a firearm in a place licensed to sell alcohol constitutes a crime of violence. Salvador Hernandez-Neave, a foreign national, was in the United States illegally. *Id.* at 1. Although Hernandez-Neave had been deported in 1998, he illegally reentered the U.S. in 1999 and was again apprehended. *Id.* While in the

In *Bazan-Reyes v. INS*,<sup>56</sup> the Seventh Circuit addressed a case where the petitioners, Jose Bazan-Reyes,<sup>57</sup> Wincenty Maciasowicz<sup>58</sup> and Arnoldo Gomez-Vela,<sup>59</sup> sought review of INS and BIA decisions<sup>60</sup> ordering them removed due to their state DWI convictions.<sup>61</sup> After reviewing its decision in *United States v. Rutherford*,<sup>62</sup> the court stated that like the language of the

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United States originally, he had been convicted in 1984 of carrying a firearm in an establishment licensed to sell alcoholic beverages and in 1993 for driving while intoxicated. *Id.* At Hernandez-Neave's arraignment for illegally reentering the United States, the government asked for a conviction "[w]ith sentencing guideline offense level increases consonant with a prior aggravated felony." *Id.* Under the sentencing guidelines, the court can only apply the sixteen-level increase requested by the government if one of the defendant's prior convictions constitutes a crime of violence. *Id.* Following its holding in *Chapa-Garza*, the Fifth Circuit held that Hernandez-Neave's DWI conviction did not constitute a crime of violence. *Id.* at 3. As for the firearm conviction, the court relied on the reasoning of *Chapa-Garza*, stating:

Under [the] categorical approach to determining crimes of violence, we do not look to either possible physical violence nor to any particular conduct by a defendant, violent or otherwise. The inquiry is simply into the nature of the crime. In the case of unlawfully carrying a firearm onto premises licensed for the sale of alcoholic beverages, physical force against the person or property of another need not be used to complete the crime. Simply stepping over the threshold while carrying such a weapon completes the crime.

*Id.* Ultimately, the court held that the firearm charge did not constitute a crime of violence and remanded the case for resentencing. *Id.*

56. 256 F.3d at 600.

57. In 1972, Bazan-Reyes, a Mexican citizen, came to the United States. *Id.* at 602. In 1988, he applied for temporary resident alien status, but because he failed to provide information about his criminal record, which included four (4) DWI convictions, the INS denied his application. *Id.* After another conviction for operating a vehicle while intoxicated in 1999, the INS commenced removal proceedings against him, arguing that his DWI conviction constituted a crime of violence. *Id.* at 602-03.

58. A Polish citizen, Maciasowicz was admitted as a permanent U.S. resident in 1993. *Id.* at 603. Five years later he pled guilty to two counts of vehicular homicide. *Id.* Shortly thereafter, the BIA found that "homicide by intoxicated use of a vehicle under Wisconsin [s]tatute . . . [constituted] an aggravated felony and ordered [him] removed . . ." *Id.*

59. In 1971, Gomez-Vela, a Mexican resident, was admitted to the U.S. as a lawful permanent resident. *Id.* In 1997, he was arrested for driving under the influence and, because he had two previous DWI convictions, he was charged with aggravated DWI. *Id.* After Gomez-Vela pled guilty and was sentenced to twenty-six months in prison, the INS commenced removal proceedings against him. *Id.* at 604. The Immigration Judge found that "aggravated driving under the influence is a crime of violence as defined in 18 U.S.C. § 16(b), and therefore is an aggravated felony." *Id.* As a result of his convictions, Gomez-Vela was ordered removed. *Id.*

60. According to the BIA, § 16(b) crimes of violence are not "[l]imited to crimes of specific intent, but . . . include . . . offenses that involve reckless (and possibly negligent) behavior." *Id.* at 606. On appeal, the petitioners argued that § 6(a) "requires intentional force" while § 16(b) "requires a substantial risk of intentional force." *Id.* (emphasis added).

61. *Id.* at 602.

62. 54 F.3d 370 (7th Cir. 1995). In *Rutherford*, the court examined whether a conviction for causing serious bodily injury while driving under the influence constituted a crime of violence for U.S.S.G. purposes. *Id.* The court held that the phrase "use of physical force" in the U.S.S.G. means "an intentional act rather than the mere application or exertion of force." *Id.* at 372-73. The court further stated that:

Force is exerted in many instances where it is not employed for any particular purpose. For

United States Sentencing Guidelines, the phrase “may be used” in § 16(b) contains an intent requirement. This phrase requires that the physical force used to commit the offense be accompanied by intent to use that force.<sup>63</sup> Furthermore, according to the court, “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.”<sup>64</sup> In analyzing 18 U.S.C. § 16, the court stated that the statutory language “simply does not support a finding that a risk that one object will apply force to another is enough to constitute a crime of violence under the statute.”<sup>65</sup> Ultimately, the court held that the crimes of driving while intoxicated under Indiana law, homicide by the intoxicated use of a vehicle under Wisconsin law, and aggravated driving under the influence under Illinois law do not constitute “crimes of violence” and thus do not support removal because they do not normally require the use of intentional force.<sup>66</sup> Recognizing the severity of drunk driving related crimes, the court stated, “our decision today does not minimize the seriousness of crimes involving drunk driving. There is no question that drunk driving ‘exact[s] a high societal toll in the forms of death, injury and property damage.’ [T]his fact does not . . . change our observation in *Rutherford* that ‘a drunk driving accident is not the result of plan, direction or purpose, but of recklessness at worst and misfortune at best.’”<sup>67</sup>

The Ninth Circuit has decided two cases dealing with issues related to drunk driving and crimes of violence, *Park v. INS*<sup>68</sup> and *United States v. Trinidad-Aquino*.<sup>69</sup> In *Park v. INS*,<sup>70</sup> the Ninth Circuit addressed whether an alien’s conviction for involuntary manslaughter constituted a crime of violence under 18 U.S.C. § 16, thus rendering the alien deportable for the

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example, earthquakes and avalanches involve the exertion of a tremendous amount of force . . . Referring to a randomly occurring avalanche as a “use” of force would torture the English language . . . A drunk driver who injures a pedestrian would not describe the incident by saying he “used” his car to hurt someone. In ordinary English, the word “use” implies intentional availment. No availment of force in order to achieve an end is present in a drunk driving accident.

*Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.* The court identified the dilemma inherent in holding that drunk driving does constitute a crime of violence under § 16(b), stating if drunk driving were a crime of violence under 16(b), “[a]lmost 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.” *Id.* at 372.

67. *Id.* at 372 (quoting *In re Magallenes*, Interim Decision 3341, 1998 WL 133301 (BIA 1998)).

68. 252 F.3d at 1018.

69. 259 F.3d at 1140.

70. 252 F.3d at 1018.

commission of an aggravated felony.<sup>71</sup> On appeal, Park argued that involuntary manslaughter did not constitute a crime of violence and thus was not a deportable offense.<sup>72</sup> In analyzing the issue, the Ninth Circuit used the categorical approach, assessing whether “the full range of conduct encompassed by [the statute] . . . constituted an aggravated felony.”<sup>73</sup> Contrary to the Second, Third, Fifth and Seventh Circuits, which interpreted § 16 to require the intentional use of physical force,<sup>74</sup> the Ninth Circuit interpreted 18 U.S.C. § 16 to require only a reckless mens rea in the involuntary manslaughter context.<sup>75</sup> After determining that the alien’s involuntary manslaughter conviction qualified as a crime of violence, the court concluded the conviction constituted an aggravated felony, rendering the alien deportable.<sup>76</sup>

In another recent opinion, *United States v. Trinidad-Aquino*, the Ninth Circuit held that drunk driving does not constitute a crime of violence for USSG purposes.<sup>77</sup> However, in reaching its decision, the court examined whether a conviction for driving under the influence of alcohol with injury to another constitutes a crime of violence under 18 U.S.C. § 16.<sup>78</sup> According to the court, if Trinidad-Aquino could have been convicted under the DUI statute without committing an aggravated felony, the district court’s decision would be correct.<sup>79</sup> Because the court believed that the “definition of crime of violence found at § 16 contains a volitional requirement absent from

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71. Park, a South Korean citizen and native, came to the United States in December 1983 on a student visa. 252 F.3d at 1020. She received a theology degree from California Union College and a master’s degree from Linda Vista Baptist Bible College & Seminary. *Id.* In 1996, she pled guilty to and was subsequently convicted of involuntary manslaughter for her role in the beating death of a young woman during an exorcism. *Id.* After she was taken into custody, the INS began removal proceedings and ultimately ordered her deported. *Id.*

72. *Id.*

73. *Id.* at 1021.

74. *See supra* note 19.

75. *Park*, 252 F.3d at 1025. However, the court clarified that they did not intend to “hold that every crime in which recklessness or criminal negligence is the mens rea necessarily qualifies as a ‘crime of violence’ within the meaning of § 16(b) . . . however, the crime at issue here requires a sufficiently culpable mens rea to qualify . . . and, in this context, an *intentional* use of physical force is not required.” *Id.* (emphasis in original).

76. *Id.* at 1025.

77. 259 F.3d at 1140.

78. *Id.* at 1142. The defendant, Trinidad-Aquino, pled guilty to illegally re-entering the United States following his deportation for driving under the influence with bodily injury. *Id.* The Sentencing Guidelines provide for a sixteen-level base increase if the defendant was originally deported for an aggravated felony. *Id.* Because it believed that Trinidad-Aquino’s conviction for driving while intoxicated required merely a negligent mens rea and was thus not an aggravated felony, the district court sentenced him to twenty-one months in prison, the maximum available at the unadjusted base sentencing level. *Id.*

79. *Id.* at 1143.

negligence,”<sup>80</sup> the court stated that “it does not make sense to say that [a] person is volitionally using physical force against someone or something when he neither intended to hit the person or thing nor consciously disregarded the risk that he might do so.”<sup>81</sup> Holding that “the presence of the volitional ‘use . . . against’ requirement in both prongs of 18 U.S.C. § 16 means that a defendant cannot commit a crime of violence if he negligently rather than intentionally or recklessly hits someone or something with a physical object,” the court found that felony DUI does not constitute a “crime of violence” in applying the United States Sentencing Guidelines.<sup>82</sup> In reaching its conclusion, the Ninth Circuit also stated that the *Trinidad-Acquino* holding did not conflict with *Park v. INS* because “*Park’s* assertion that an intentional use of physical force is not required is perfectly compatible with our analysis . . . [that] crime of violence definitions do not require an intentional use of force, but they do require a volitional act. The crime need not be committed purposefully or knowingly, but it must be committed at least recklessly.”<sup>83</sup> In holding that drunk driving lacks the requisite intent to constitute a crime of violence, the Ninth Circuit analyzed the “use . . . against” language, determining that the language indicated that a volitional act was required. Meanwhile, the court criticized the Tenth and Eleventh Circuits for reaching the conclusion that crimes committed with a negligent mens rea can be “crimes of violence” without even addressing the “use . . . against” language.<sup>84</sup>

## 2. *Drunk Driving as a Crime of Violence*

Conversely, the Tenth and Eleventh Circuits have interpreted § 16 to require a reckless mens rea, and consequently have held drunk driving to be a crime of violence.<sup>85</sup>

In *Tapia Garcia v. INS*,<sup>86</sup> the Tenth Circuit examined whether drunk driving constituted a crime of violence warranting removal under 8 U.S.C.

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80. According to the court’s analysis, definitions of “use,” as well as “converting, employing, availing oneself of, carrying out a purpose or action, and putting into action or service to attain an end, contain a volitional requirement. Under ordinary, contemporary, and common understanding, one cannot do any of these things negligently; that is, without some volition to perform the act.” *Id.* at 1145.

81. *Id.*

82. *Id.* at 1145-47.

83. *Id.* at 1146.

84. *Id.*

85. *Tapia Garcia*, 237 F.3d at 1216; *Le*, 196 F.3d at 1352.

86. 237 F.3d at 1216.

§ 1227.<sup>87</sup> On appeal, the alien argued that a conviction under Idaho's DUI statute does not necessarily indicate that a crime of violence has been committed because drunk driving does not "by its nature involve a substantial risk that physical force . . . may be used in the course of committing the offense."<sup>88</sup> Like the circuits finding that drunk driving did not constitute a crime of violence, the Tenth Circuit applied the categorical approach in analyzing whether a conviction constitutes a crime of violence under 18 U.S.C. § 16.<sup>89</sup> According to the court, the inherent danger of driving under the influence of alcohol lies in the risk of injury from drunk driving, a risk that is neither conjectural nor speculative.<sup>90</sup> The court further drew a parallel between the definition of a crime of violence for immigration and for sentencing purposes, holding that the inherent danger present in drunk driving supported the conclusion that a DUI offense constituted a crime of violence under 18 U.S.C. § 16 because the generic elements of the offense present a "substantial risk that physical force may be used."<sup>91</sup> Ultimately, the court concluded that Tapia-Garcia's DUI offense, which it categorized as an aggravated felony, constituted a crime of violence under 18 U.S.C. § 16(b), and ordered him deported under 8 U.S.C. § 1227.<sup>92</sup>

The Eleventh Circuit held that drunk driving constituted a crime of violence warranting removal in *Le v. U.S. Attorney General*.<sup>93</sup> Under Florida law, driving under the influence has two elements:

1. The defendant must operate a motor vehicle while under the influence and

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87. Tapia-Garcia, the petitioner, was legally a permanent resident of the United States and a citizen of Mexico. *Id.* at 1217. He was convicted in Idaho for driving under the influence of alcohol. *Id.* After he was convicted, the INS began removal proceedings against him, arguing that he should be removed pursuant to 8 U.S.C. § 1227 because his DUI offense constituted a "crime of violence." *Id.* Following a hearing, the immigration judge concluded that Tapia-Garcia's DUI offense constituted a crime of violence under 18 U.S.C. § 16 and ordered the petitioner removed from the country. *Id.*

88. *Id.* at 1221.

89. *Id.* at 1221-22.

90. *Id.* at 1222. Specifically, the court stated that "drunk driving is a reckless act that often results in injury, and the risks of driving while intoxicated are well known." *Id.*

91. *Id.* at 1223.

92. *Id.* at 1223. Although the court determined that Tapia-Garcia was subject to deportation, it dismissed the case for lack of jurisdiction. *Id.*

93. 196 F.3d at 1352. The petitioner, Duan Le, a citizen of Vietnam, was convicted of two third-degree felonies including driving under the influence with serious bodily injury and driving with a suspended license. *Id.* at 1353. Following his conviction, the INS began removal proceedings against him. *Id.* The immigration judge ordered Le deported because he had been convicted of an aggravated felony. Le appealed to the Board of Immigration Appeals, which affirmed the immigration judge's order. *Id.*

2. As a result of operating the motor vehicle, the defendant caused serious bodily injury to another.<sup>94</sup>

Therefore, according to the court, serious bodily injury was an element of the offense.<sup>95</sup> The court stated, “Mr. Le’s conviction for driving under the influence with serious bodily injury satisfies the definition of a crime of violence under section 16(a) of Title 18 because one element of the offense includes the actual use of physical force.”<sup>96</sup> Therefore, according to the Eleventh Circuit, the crime of driving under the influence, which poses the risk of death or serious bodily injury to the defendant as well as innocent victims, constitutes a crime of violence as well as an aggravated felony for removal purposes.<sup>97</sup>

In *In re Luis Manuel Ramos*,<sup>98</sup> the Board of Immigration Appeals<sup>99</sup> clarified its position on the crime of violence issue and overturned two previous decisions, *In re Magallanes-Garcia*<sup>100</sup> and *In re Puente-Salazar*.<sup>101</sup>

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94. *Id.* at 1354.

95. *Id.*

96. *Id.*

97. *Id.*

98. *Luis Manuel Ramos*, 2002 WL 1001049, at \*1.

99. The Board of Immigration Appeals hears appeals based upon removal decisions issued by immigration judges throughout the United States. LEGOMSKY, *supra* note 22, at 540. During the initial immigration hearing, the immigration judge hears from the parties, the INS and the alien. *Id.* At the hearing, the alien bears the burden of proving that he or she is lawfully present in the U.S. by clear and convincing evidence. *Id.* at 541. The burden then shifts to the INS to prove by clear and convincing evidence that the alien should be deported. *Id.* After hearing all the evidence, the immigration judge, who resembles but is not an Article III judge, issues an opinion. This opinion is usually given orally and is made in the presence of the parties. *Id.* at 540-41.

Once a decision has been entered, either the alien or the INS may appeal to the Board of Immigration Appeals. *Id.* at 542. The Board of Immigration Appeals sits in Falls Church, Virginia. *Id.* It consists of a Chair and fourteen other permanent members. *Id.* The BIA procedural rules require that the appellant file a notice summarizing the grounds for the appeal with the immigration judge who made the initial ruling within 30 days of the issuance of the decision. *Id.* The parties then file detailed briefs and have the opportunity to file various motions. *Id.* Although the BIA has discretion to hold oral arguments, this rarely occurs. *Id.* Because the BIA does not usually hold oral arguments, its review is confined to the record. It does, however, have the power to make an independent substitution of judgment. *Id.*

Once the BIA has reviewed the record and the parties’ briefs and motions, it issues a written opinion binding all immigration judges and, in this particular case, the INS. *Id.* at 543. If the BIA designates the opinion as precedent, it is also binding in similar cases. *Id.* Ultimately, the Attorney General has the power to review decisions issued by the BIA. *Id.* However, the Attorney General only exercises this power when the case deals with a critical legal or political issue. *Id.*

100. *Magallanes-Garcia*, 1998 WL 133301, at \*1. The respondent, Carlos Istalin Magallanes-Garcia, was lawfully granted permanent residence in the United State in 1989. *Id.* In 1995, Magallanes-Garcia was convicted of aggravated driving under the influence while his license was suspended, revoked or in violation of a restriction. *Id.* Thereafter, an immigration judge found the respondent deportable under § 241(a)(2)(a)(iii) of the Immigration and Nationality Act and ordered him deported back to Mexico. *Id.*

In analyzing whether a conviction constitutes a crime of violence under 18 U.S.C. § 16, the BIA

First, the BIA generally addressed the crime of violence issue.<sup>102</sup> Specifically, the BIA held that, in circuits that have adjudicated the issue, it must follow the law of the circuit, thereby overturning *In re Magallanes-Garcia* and *In re Puente-Salazar*.<sup>103</sup> However, in circuits that have yet to address the matter, the BIA stated that, to constitute a crime of violence, the alien's criminal conviction must be based on a statute that requires at least recklessness and a substantial risk that force would be used in the

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indicated that the statutory requirements for conviction "do not include as an element the use, attempted use or threatened use of physical force against the person or property of another. Accordingly, the respondent's conviction does not satisfy the test set forth in 18 U.S.C. § 16 (a)." *Id.*

To determine whether the conviction met the § 16(b) requirements, the BIA applied a categorical approach. *Id.* According to the Board of Immigration Appeals, "for the respondent's crime to fall within the purview of 18 U.S.C. § 16(b), the offense must be one for which the nature of the crime involves a substantial risk that physical force may be used against the person or property of another during the commission of the offense . . . the crime must have the potential of resulting in harm." *Id.* The BIA ultimately concluded that the nature of drunk driving is such that it presents a risk that physical force would be used against another and, as a result, determined that drunk driving constituted a crime of violence for removal purposes. *Id.*

101. *Puente-Salazar*, 1999 WL 770709, at \*1. In *Puente-Salazar*, the respondent was a native and citizen of Mexico who had lawfully entered the U.S. as a permanent resident in 1979. *Id.* In 1997, he was convicted of driving while intoxicated. *Id.* Shortly thereafter, the INS began removal proceedings against him. *Id.* The Immigration Judge determined that "the record of conviction presented by the [INS] supported the allegation regarding the respondent's DWI conviction . . . the respondent had been convicted of an aggravated felony . . . [and] ordered [the respondent] removed from the United States to Mexico." *Id.*

In *In re Puente-Salazar*, the BIA had to determine whether a conviction for the crime of driving while intoxicated under § 49.04 of the Texas Penal Code constituted a crime of violence and therefore an aggravated felony. *Id.* On appeal, the respondent argued that the Texas DWI statute encompassed conduct that is less than that required for an aggravated felony. *Id.* The BIA noted that, because the Texas DWI statute does not include as an element the use, attempted use, or threatened use of physical force against the person or property of another, 18 U.S.C. § 16(a) did not apply to this case. *Id.*

In examining whether a Texas DWI constituted a crime of violence under 18 U.S.C. § 16(b), the BIA applied the categorical approach. *Id.* The BIA emphasized that a statutory definition of a crime of violence under 18 U.S.C. § 16 did not require intentional conduct. *Id.* Focusing on the nature of the crime, the BIA concluded that the operation of a motor vehicle while under the influence was a crime that "by its nature involves a substantial risk that physical force against the person or property of another may be used," reaffirming its previous determination that drunk driving constituted a crime of violence for deportation purposes. *Id.* Provided that a conviction rises to a felony under state law, the court held that a state offense for operating a vehicle while under the influence constituted a crime of violence because "the nature of the crime of operating a motor vehicle while intoxicated may create a substantial risk that physical force will be applied." *Id.*

In reaching its conclusion, the BIA considered both the Seventh Circuit's opinion in *Rutherford* and the Third Circuit's opinion in *Parsons*. *Id.* Regarding *Rutherford*, the BIA stated, "the court concluded that the offense of causing a serious bodily injury when driving while intoxicated does not have as an element the "use, attempted use, or threatened use of physical force." *Id.* When the *Rutherford* court made its statement, it was analyzing a USSG that resembled 18 U.S.C. § 16(a). *Id.* However, the BIA conducted its *Puente-Salazar* analysis under 18 U.S.C. § 16(b). *Id.* As for the Third Circuit's decision in *Parsons*, the BIA simply stated that the court's analysis was persuasive. *Id.*

102. *Luis Manuel Ramos*, 2002 WL 1001049, at \*1.

103. *Id.*



commission of the crime.<sup>104</sup>

In reaching its conclusion, the BIA reviewed both the federal circuit court of appeals' crime of violence decisions and the legislative history of 18 U.S.C. § 16. Through its review, the BIA determined that, in resolving crime of violence issues, a categorical approach that focuses on statutory definitions rather than the underlying circumstances of the crime must be used.<sup>105</sup> Furthermore, in determining whether a substantial risk existed, the defendant's conduct, not the consequences of the crime are relevant.<sup>106</sup> Specifically, the BIA indicated, "the use of physical force' is an act committed by a criminal defendant, while 'the risk of physical injury' is a consequence of the defendant's acts."<sup>107</sup> In addition, the use of force must be intentional, not volitional.<sup>108</sup> Thus, for the BIA to find an alien committed a crime of violence, his conviction must be based on a statute that requires both recklessness and a substantial risk that force will be used in committing the crime.<sup>109</sup>

Second, the BIA specifically addressed Luis Manuel Ramos' deportation.<sup>110</sup> After reviewing the Massachusetts General Law under which Ramos was convicted, the BIA determined that his conviction was not based on a crime that, "by its nature, involve[d] a substantial risk that the perpetrator may use force against the person . . . to carry out the particular offense."<sup>111</sup> According to the BIA's analysis, while there may be a risk that driving drunk will result in an accident, the Massachusetts law did not require that Ramos intentionally or volitionally use force against another to be convicted.<sup>112</sup> In addition, the law did not require that Ramos actually cause an accident while driving drunk.<sup>113</sup> Thus, because the use of a substantial risk of force was not a requirement for a conviction under the Massachusetts law, the BIA vacated Ramos' deportation order.<sup>114</sup>

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104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. Luis Manuel Ramos, a native and citizen of Portugal, became a United States resident in 1969. *Id.* On March 22, 2002, he was convicted of operating a motor vehicle while under the influence of intoxicating liquor and sentenced to a two year prison sentence. *Id.* On April 28, 2002, based on Ramos' conviction for a crime of violence, the INS began removal proceedings. *Id.* The Immigration Judge found Ramos removable, and Ramos appealed. *Id.* The BIA affirmed the removal order. *Id.* Ramos then moved for reconsideration. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

### III. ANALYSIS

#### A. *Drunk Driving—Attitudes & Punishment*

In the United States, drinking and driving is one of the most common crimes committed, charged, and adjudicated.<sup>115</sup> Although states punish convicted drunk drivers differently, the penalties have increased nationwide.<sup>116</sup> Public perception of drinking and driving has also shifted.<sup>117</sup> The National Highway Traffic Administration regularly conducts a nationwide survey of attitudes toward drinking and driving which reveals an increasing American awareness of the consequences of a DUI conviction.<sup>118</sup> Many courts and administrative agencies, including the BIA,<sup>119</sup> have recognized the issue's seriousness. Commenting on the impact of driving under the influence, the United States Supreme Court stated, "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 damage."<sup>120</sup> While it would be inappropriate to decide drunk driving does not

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115. Rebecca Snyder Bromley, *Jury Leniency in Drinking and Driving Cases Has it Changed? 1958 Versus 1993*, 20 LAW & PSYCHOL. REV. 27, 29 (1996).

116. *Id.* at 30. Conceding to pressure from the federal government, all states have raised their minimum drinking age to twenty-one. *Id.* Possible drunk driving penalties include mandatory jail sentences, steep fines, license revocation, and mandatory attendance at alcohol education and treatment classes. *Id.* at 31. Under certain circumstances, civil liability has also been imposed against both tavern owners and social hosts. *Id.*

117. *Id.* at 32. "The formation of organizations such as Mothers Against Drunk Driving, Remove Intoxicated Drivers, and Students Against Drunk Driving in the 1980s ushered in an era of high-level media publicity" which created a "public climate of moral opprobrium." *Id.* Despite the increased media attention regarding dangers inherent in drunk driving, the majority of the American public continues to have an inconsistent attitude regarding drinking and driving. *Id.* In some instances, individuals are sympathetic to drunk drivers, believing: "There, but for the grace of God, go I." *Id.* Furthermore, the "American culture is very intertwined with the automobile and also has a generally tolerant attitude towards alcohol, unlike most other drugs." *Id.* at 33. While most Americans remain conflicted in their attitudes toward drinking and driving, the level of alcohol consumed continues to increase. *Id.* at 35.

118. National Highway Traffic Administration, *National Survey of Drinking and Driving Attitudes and Behavior: 1995: Part III* (1995), at <http://www.ncadd.com/tsra/abstracts/0.11.html>. The 1995 survey revealed that nine out of ten people believe that it is likely that they would receive some sort of punishment if they were stopped for drinking and driving. *Id.* Additionally, three-fourths of the driving public believes that the punishment would be severe. *Id.* Furthermore, most people think that first time offenders should receive license suspension or revocation and a fine. *Id.* For repeat offenders, sixty percent of the driving age public recommend license suspension and revocation, and forty-five percent recommend jail time. *Id.*

119. *See In re Magallanes-Garcia*, 1998 WL 133301, at \*1; *Michigan State Police v. Sitz*, 496 U.S. 444, 451 (1990) (quoting 4 W. LaFare, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 10.8(d), at 71 (2d ed. 1987)); *Rutherford*, 54 F.3d at 375-77.

120. *Sitz*, 496 U.S. at 451 (quoting 4 W. LaFare, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 10.8(d), at 71 (2d ed. 1987)).

constitute a crime of violence because deciding otherwise would have serious deportation consequences for convicted aliens, the public policy ramifications should be considered.<sup>121</sup> It is inequitable to impose a harsher penalty against an alien than an American when both individuals have committed substantively the same crime.<sup>122</sup>

In punishing aliens convicted of drunk driving, courts have taken two basic approaches to analyzing whether drunk driving constitutes a crime of violence.<sup>123</sup> Generally, the courts agree that the categorical approach is the correct method to use in analyzing the issue.<sup>124</sup> However, the circuits applying the categorical approach have viewed the issue from different perspectives. In reaching their conclusions, the circuits holding that drunk driving does not constitute a crime of violence have focused on the “use” language of 18 U.S.C. § 16 and asserted that, in order to be convicted of drunk driving, a defendant does not have to intend to use force.<sup>125</sup> Because of

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121. See *Three Times and Out—Some Face Deportation for Repeat Drunken Driving*, *supra* note 1; see also *Future Depends on Ruling: Deportations for 3 DWIs May be Halted*, *supra* note 7. If aliens with multiple drunk driving convictions are deported, family ties will be severed. *Id.* In addition, many families will be forced to seek public subsidies to survive. *Id.*

122. While many aliens with multiple drunk driving convictions face deportation, Americans convicted of drunk driving often face far more lenient punishment. Andy Rose, *Judge’s Arrest Not Expected to Affect Post*, L.A. TIMES, Dec. 10, 1997, at B1. In Ventura, California, Superior Court Judge Robert C. Bradley was arrested for drunk driving. *Id.* Following his arrest, Judge Bradley was taken to the County Jail and given a blood alcohol level test. *Id.* The test showed his blood alcohol level to be 0.21, which is more than twice the legal limit. *Id.* Rather than keep Judge Bradley in jail overnight, California Highway Patrol officials drove him home. *Id.* Historically, judges charged with drunk driving have faced “action ranging from private censure to public reprimand.” *Id.* If Judge Bradley should decide to plead guilty or is convicted, he faces a \$2,000 fine. *Id.* He could also serve up to “48-hours in jail or five days of work release as well as enrollment in a school for drinking drivers.” *Id.* Clearly, the penalties faced by Judge Bradley are far less severe in comparison to those faced by aliens. As an officer of the court, Judge Bradley should have a comprehensive understanding of drunk driving laws and the consequences of breaking those laws. However, he is held to a lower standard than aliens who may not understand the American judicial system or the consequences of a guilty plea. See *supra* note 10.

123. Courts that hold drunk driving does not constitute a crime of violence generally follow the categorical approach. *Ashcroft*, 257 F.3d at 200; *Parsons*, 955 F.2d at 858; *Chapa-Garza*, 243 F.3d at 921; *Bazan-Reyes*, 256 F.3d at 600; *Park*, 252 F.3d at 1018; *Trinidad-Aquino*, 259 F.3d at 1140. When applying the categorical approach, the proper inquiry requires consideration of whether a particular defined offense, in the abstract is a crime of violence under 18 U.S.C. § 16(b). *Chapa-Garza*, 243 F.3d at 921. Conversely, courts finding drunk driving constitutes a crime of violence have also applied the categorical approach, but focus on the likelihood that bodily harm will result during the commission of the crime in conducting their analysis. *Tapia-Garcia*, 237 F.3d at 1216; *Le*, 196 F.3d at 1352. Because there is a “well-documented danger inherent in drunk driving,” the generic elements of the offense present a “substantial risk that physical force may be used.” *Tapia-Garcia*, 237 F.3d. at 1223.

124. *Dalton*, 257 F.3d at 200; *Parsons*, 955 F.2d at 858; *Chapa-Garza*, 243 F.3d at 921; *Bazan-Reyes*, 256 F.3d at 600; *Park*, 252 F.3d at 1018; *Trinidad-Aquino*, 259 F.3d at 1140; *Tapia Garcia*, 237 F.3d at 1216.

125. See *Dalton*, 257 F.3d at 200; *Parsons*, 955 F.2d at 858; *Chapa-Garza*, 243 F.3d at 921; *Bazan-Reyes*, 256 F.3d at 600; *Park*, 252 F.3d at 1018; *Trinidad-Aquino*, 259 F.3d at 1140.

the inherent nature of the crime of drunk driving, it would be illogical to state that those individuals who drive drunk intend to cause serious bodily injury to others.<sup>126</sup> While their actions might result in the infliction of serious bodily injury upon others, it seems ludicrous to suggest that the “average” intoxicated driver gets behind the wheel with an intention to harm others.<sup>127</sup> However, the circuits holding drunk driving constitutes a crime of violence<sup>128</sup> argue that the act of driving while intoxicated poses an inherent risk of death or serious bodily harm,<sup>129</sup> thereby meeting the definition of crime of violence in 18 U.S.C. § 16(b).<sup>130</sup>

Even if drunk driving is not classified as a crime of violence for purposes of 18 U.S.C. § 16, both aliens and Americans alike are subject to severe punishment.<sup>131</sup> Therefore, a decision holding that drunk driving does not constitute a crime of violence would not render drunk drivers immune to punishment.<sup>132</sup> Instead, deportation would simply be eliminated as a potential penalty for aliens repeatedly convicted of drunk driving. When considered in conjunction with the dire effects of deportation and the availability of alternate penalties, classification of drunk driving as a crime of violence

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126. *Id.*

127. In attempting to explain why he drives drunk, Willie C. Mosely, a 60-year old Alabama native serving a sentence for his second conviction for DUI murder, stated:

Most of the time when you drink, you ain't hardly satisfied, and you'll be wanting to go somewhere and do something when you ain't got no business doing it. At the time, you don't be thinking because you just say I'll run right over here and run right back and ain't nothing going to happen. But it really just don't pay to go.

T. Brad Bishop, *Drinking and Driving in Alabama: The Facts, The Laws and Possible Solutions*, ALABAMA LAWYER, Sept. 1998, at 304.

128. *Tapia Garcia*, 237 F.3d at 1216; *Le*, 196 F.3d at 1352.

129. In *Rutherford*, 54 F.3d 370 (7th Cir. 1995), the court addressed the likelihood that driving drunk will result in death or serious bodily injury, stating:

The dangers of drunk driving are well-known and well documented. Unlike other acts that may present some risk of physical injury, such as pick pocketing . . . or perhaps child neglect or certain environmental crimes like the mishandling of hazardous wastes or pollutants, the risk of injury from drunk driving is neither conjectural or speculative. Driving under the influence vastly increases the probability that the driver will injure someone in an accident. Out of the more than 34,000 fatal traffic accidents in 1992, 36.1 percent involved a driver with a blood alcohol concentration . . . over .10 percent and another 9 percent with a BAC of between .01 and .09 percent.

*Id.* at 376.

130. 18 U.S.C. § 16(b) (2001) defines as a crime of violence “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.”

131. *See supra* note 118.

132. Although convicted defendants no longer face deportation, they will still be sentenced for their crimes. Bromley, *supra* note 115, at 31 (1996). Possible sentencing options include license revocation, jail time, mandatory alcohol treatment, and potential societal censure or any combination thereof. *Id.*

seems excessive.

Although no solution will be perfect, it seems essential that the issue of classifying drunk driving be resolved expediently. Based on the number of circuit court and BIA opinions drafted on the issue in the last two years, the issue clearly needs to be resolved both to provide clarity to the courts and also to provide notice to aliens who risk deportation when they choose to drive under the influence.<sup>133</sup>

#### IV. RESOLUTION

In order to resolve the split among the circuits and the Board of Immigration appeals, Congress should amend 18 U.S.C. § 16 to include the mental states required for the commission of a crime of violence, specifically excluding crimes like drunk driving which do not involve the intentional use of force. In addition, a comprehensive legislative history discussing the rationale behind Congress's choice to amend the statute would also prove invaluable to courts and administrative agencies charged with interpreting 18 U.S.C. § 16. Not only would Congress's action expediently resolve the current problem involving the classification of drunk driving, but this would also address any future problems that may develop in classifying other "crimes of violence."

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133. In combating drunk driving, public awareness of the penalties associated with DWI arrests has been found to be especially important in effective enforcement, deterrence and sanctioning. <http://www.ncadd.com/tsra/abstracts/legal.html>.

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