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Comment

DUI as a Crime of Violence Under 18 U.S.C. § 16(b); Does a Drunk Driver Risk “Using” Force?

*Michael G. Salemi**

I. INTRODUCTION

Courts and commentators agree that driving under the influence (“DUI”)¹ of alcohol is a serious offense that wreaks a huge toll on society in the form of loss of life, physical injury, and property damage.² Each year, drunk drivers cause over twenty-five thousand deaths, one million personal injuries, and more than five billion dollars in property damage.³ Residents of the United States commit the offense of DUI more frequently than almost any other offense.⁴ In 2000 alone, approximately 9.8 million people were arrested for DUI.⁵ In response to the threat that driving under the influence of alcohol poses, states have increased the penalties for DUI in the last twenty years.⁶

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1. This Comment will refer to the offense of drunken driving generically as “DUI” although many states refer to the offense by other names, such as “driving while intoxicated” or “driving while ability impaired.” See ROBERT S. REIFF, *DRUNK DRIVING AND RELATED VEHICULAR OFFENSES* 1 (2d ed. 1999).

2. See *Mich. Dep’t of State Police v. Sitz*, 496 U.S. 444, 451 (1990); *Dalton v. Ashcroft*, 257 F.3d 200, 208 (2d Cir. 2001) (describing drunk driving as “reprehensible conduct” that presents “an urgent, nationwide problem of staggering proportion”); *United States v. Rutherford*, 54 F.3d 370, 376 (7th Cir. 1995) (“Drunk driving, by its nature, presents a serious risk of physical injury.”).

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

4. LAWRENCE TAYLOR, *DRUNK DRIVING DEFENSE* § 1.0 (5th ed. 2000).

5. U.S. CENSUS BUREAU, *STATISTICAL ABSTRACT OF THE UNITED STATES* 211 tbl. 345 (120th ed. 2000).

6. See generally REIFF, *supra* note 1, at 1-2 (discussing increased penalties for DUI).

In order to convict for DUI, a state must prove that a defendant operated a motor vehicle upon a roadway within the jurisdiction of the court, and that the operation occurred while the defendant was either under the influence of intoxicants or driving with a blood alcohol concentration above the legal limit.⁷ Generally, DUI is a strict liability offense.⁸ That is, the state need not prove that the offender intentionally or recklessly drove under the influence.⁹ In addition, DUI is usually a misdemeanor, but it can be a felony when the offender causes personal injury to another or where the offender has prior DUI convictions.¹⁰

To say that DUI is a serious offense, however, does not necessarily mean that it is a crime of violence as defined by federal law.¹¹ Congress has defined a “crime of violence” as any felony offense “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.”¹² The United States Supreme Court has not defined the exact scope of the definition of crime of violence, but has noted that the definition is broad.¹³ Section 16(b) serves as the definition of crime of

7. REIFF, *supra* note 1, § 2-1, at 6-8.

8. *See, e.g.,* Brewer v. Kimel, 256 F.3d 222, 229 (4th Cir. 2001) (DUI “is a strict liability offense; one is guilty simply by virtue of operating a motor vehicle with a blood alcohol level higher than the legal limit, and there is no requirement that the state prove any mens rea as to intoxication as an element of the offense.”); State v. Hubbard, 751 So. 2d 552, 563 (Fla. 1999) (stating that the state need not prove negligence to prove the offense of DUI manslaughter); REIFF, *supra* note 1, § 2-1, at 8 (noting that in jurisdictions that define DUI as “driving with a blood or breath alcohol concentration above a prohibited level DUI is tantamount to a strict liability offense”); LAWRENCE TAYLOR, DRUNK DRIVING DEFENSE § 1.0 (4th ed. 1998) (noting that DUI is “an absolute liability offense,” and that the state need not prove “the intent to become intoxicated [or] the intent to operate a motor vehicle”); *cf.* 1 JOHN P. MCCAHEY ET AL., DEFENSE OF SPEEDING, RECKLESS DRIVING & VEHICULAR HOMICIDE § 1.06 (1992) (noting that “[s]peeding offenses are offenses of strict liability under which the element of criminal intent or scienter is irrelevant”).

9. *See* REIFF, *supra* note 1, § 2-1, at 8; TAYLOR, *supra* note 8, § 1.0.

10. 1 JOHN A. TARANTINO, DEFENDING DRINKING DRIVERS §§ 151, 151.2, 151.3 (2d ed. 1986).

11. Dalton v. Ashcroft, 257 F.3d 200, 208 (2d Cir. 2001) (stating that DUI should not be “shoehorn[ed] . . . into criminal statutes that were not designed to hold it”).

12. 18 U.S.C. § 16(b) (2000). Section 16 provides, in its entirety:

The term “crime of violence” means

- (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.

Id.

13. *See* INS v. St. Cyr, 533 U.S. 289, 296 n.4 (2001) (noting that the term “aggravated felony” has consistently been defined expansively and was broadened significantly by the Illegal

violence for all of Title 18 of the United States Code.¹⁴ As a result, whether DUI is a “crime of violence” under § 16 could have a significant impact on many areas of federal criminal law.¹⁵ In addition, whether DUI is a “crime of violence” has a significant impact on the nation’s immigration laws because aliens can be removed from the United States for committing a crime of violence.¹⁶ Finally, the definition of crime of violence under § 16 is similar or identical to the definitions of crime of violence used in other statutes.¹⁷ Whether DUI is a crime of violence under § 16(b) could impact the interpretation of these other definitions because courts generally interpret these alternate definitions in the same way they interpret § 16.¹⁸

Immigration Reform and Immigrant Responsibilities Act); *see infra* note 50 (noting crimes of violence are included in the definition of aggravated felony).

14. *United States v. Aragon*, 983 F.2d 1306, 1311 (4th Cir. 1993) (holding that assisting or instigating the escape or attempted rescue of a prisoner is a crime of violence under § 16(b)).

15. *See, e.g.*, 18 U.S.C. § 929(a)(1) (2000) (criminalizing possession of restricted ammunition in commission of a crime of violence); 18 U.S.C. § 1952(a)(2) (2000) (criminalizing the use of interstate travel, commerce, or mail with intent to commit a crime of violence); 18 U.S.C. § 1959(a)(4) (2000) (criminalizing threats, attempts, or conspiracies to commit a crime of violence in aid of racketeering activity); 18 U.S.C. § 3521(a)(1) (2000) (providing witness relocation protection when a crime of violence is directed at a witness); 18 U.S.C. § 3663A(c)(1)(A)(i) (2000) (providing mandatory restitution to victims of certain crimes, including crimes of violence); 18 U.S.C. § 5032 (2000) (discussing juvenile delinquency proceedings and transfer for criminal prosecution); 18 U.S.C. § 5038 (2000) (allowing preparation and use of juvenile records where the act committed, if it had been committed by an adult, would be a felony and a crime of violence). In addition, Congress has used the definition of crime of violence as found in § 16 of Title 18 in many other Titles. *See, e.g.*, 15 U.S.C. § 1245(b) (2000) (discussing the use of ballistic knife in commission of crime of violence); 20 U.S.C. § 1232g(b)(6) (2000) (allowing a postsecondary education institution to disclose results of disciplinary hearing of an alleged perpetrator to the victim of a crime of violence); 21 U.S.C. § 841(b)(7)(A) (2000) (providing penalty for use of controlled substance with intent to commit crime of violence); 25 U.S.C.A. § 3207(b) (West 2001) (discussing Indian child protection); 28 U.S.C. §§ 994(h), (i), (j) (1994 & Supp. 1999) (describing the duties of the United States Sentencing Commission); 40 U.S.C. § 212a (1994) (addressing the authority of Capitol Police to make arrests for crimes of violence). Many of these citations are collected in *In re Alcantar*, 20 I. & N. Dec. 801, 803-06 (B.I.A. 1994).

16. *See infra* notes 68-73 and accompanying text (discussing the impact that § 16’s definition of crime of violence has on immigration law).

17. *See, e.g.*, 18 U.S.C. § 924(c)(3) (2000) (defining the term “crime of violence” for the purpose of crimes involving firearms); 18 U.S.C. § 3156(a)(4) (2000) (defining crime of violence for the purposes of the Bail Reform Act); *see also* 18 U.S.C. §§ 3142(f)(1)(A), 3143(b)(2) (2000) (indicating the effect of crime of violence as defined under § 3156(a)(4) in determining pre-trial detention and detention pending appeal or sentence respectively).

18. *See, e.g.*, *United States v. Patino*, 962 F.2d 263, 267 (2d Cir. 1992) (finding analysis of 18 U.S.C. § 3156(a)(4) “dispositive” of analysis under 18 U.S.C. § 924(c)(3)); *United States v. Sloan*, 820 F. Supp. 1133, 1136 (S.D. Ind. 1993) (equating § 16 with 18 U.S.C. § 3156(a)(4)); *United States v. Marzullo*, 780 F. Supp. 658, 661 (W.D. Mo. 1991) (concluding that Congress meant for the definitions of crime of violence in § 16 and 18 U.S.C. § 3156(a)(4) to mean the

Currently, the United States Courts of Appeals are split as to whether DUI is a crime of violence as defined by § 16(b).¹⁹ The Second, Fifth, Seventh, and Ninth Circuits held that DUI is not a crime of violence under § 16(b).²⁰ The Tenth Circuit, on the other hand, held that DUI is a crime of violence under § 16(b).²¹ In addition, the Board of Immigration Appeals (“BIA”)²² ruled that a conviction for DUI is a conviction of a crime of violence under § 16(b).²³

same thing); *United States v. Clark*, 773 F. Supp. 1533, 1535 (M.D. Ga. 1991) (applying analysis of § 16(b) to 18 U.S.C. § 924(c)(3)).

19. *See United States v. Trinidad-Aquino*, 259 F.3d 1140, 1146 (9th Cir. 2001) (acknowledging the split).

20. *See id.* at 1144-46 (holding that DUI with injury to another is not a crime of violence under § 16); *Dalton v. Ashcroft*, 257 F.3d 200, 208 (2d Cir. 2001) (holding that DUI is not a crime of violence under § 16); *Bazan-Reyes v. INS*, 256 F.3d 600, 611 (7th Cir. 2001) (holding that DUI and homicide by intoxicated use of a vehicle are not crimes of violence under § 16); *United States v. Chapa-Garza*, 243 F.3d 921, 928 (5th Cir.) (per curiam) (holding that DUI is not a conviction of a crime of violence under § 16), *reh'g denied*, 262 F.3d 479 (5th Cir. 2001). In addition, the Third Circuit, in dicta, has suggested that it would also hold that DUI is not a crime of violence under § 16. *See United States v. Parson*, 955 F.2d 858, 866 (3d Cir. 1992) (suggesting, in dicta, that a conviction for driving under the influence would not be a conviction of a crime of violence under § 16).

21. *See Tapia Garcia v. INS*, 237 F.3d 1216, 1222 (10th Cir. 2001) (holding that an Idaho conviction for DUI is a crime of violence under § 16(b)). In addition, the Eleventh Circuit held that DUI with serious bodily injury is a crime of violence under § 16(a). *Le v. U.S. Att’y Gen.*, 196 F.3d 1352, 1354 (11th Cir. 1999) (per curiam) (holding that a Florida conviction for driving under the influence with serious bodily injury is a crime of violence under § 16(a)). This Comment will focus only on whether DUI is a crime of violence under § 16(b). The Eleventh Circuit is the only court to hold that a DUI-related offense is a crime of violence under § 16(a). *See id.* In *Le*, the Eleventh Circuit held that the Board of Immigration Appeals’ determination that DUI with serious bodily injury is a crime of violence under § 16(a) is a reasonable interpretation of that statute. *Id.* at 1353-54. In one short paragraph, the court analyzed the offense at issue and noted that serious bodily injury is an element of the offense. *Id.* at 1354. The court then concluded that DUI with serious bodily injury is a crime of violence under § 16(a) because an element of the offense includes the actual use of physical force. *Id.* The court did not decide whether DUI with serious bodily injury would be a crime of violence under § 16(b). *See id.*

No other court or agency followed the Eleventh Circuit’s decision in *Le*. *See Bazan-Reyes*, 256 F.3d at 609 (holding that DUI is not a crime of violence under § 16(a)); *Chapa-Garza*, 243 F.3d at 924 (implicitly holding that DUI is not a crime of violence under § 16(a)); *In re Magallanes-Garcia*, Interim Dec. No. 3341, File No. A90 219 200, slip op. at 4 (B.I.A. Mar. 19, 1998), available at <http://www.usdoj.gov/eoir/efoia/bia/Decisions/Revdec/pdfDEC/3341.pdf> (holding that DUI is not a crime of violence under § 16(a)).

22. *See infra* note 65 (discussing the BIA and its powers and duties).

23. *See generally In re Puentes-Salazar*, Interim Dec. No. 3412, File No. A36 582 517, slip op. at 14-15 (B.I.A. Sept. 29, 1999), available at <http://www.usdoj.gov/eoir/efoia/bia/Decisions/Revdec/pdfDEC/3412.pdf>; *In re Magallanes-Garcia*, Interim Dec. No. 3341, slip op. at 6.

Part II of this Comment begins with a discussion of the legislative history of the term “crime of violence.”²⁴ It then briefly explains the relationship between § 16’s definition of crime of violence and the definition of crime of violence contained in the *United States Sentencing Guidelines Manual* (“*Sentencing Guidelines*”).²⁵ Part II concludes with a discussion of how § 16(b)’s definition of crime of violence impacts the nation’s immigration laws and the approach that the BIA has taken in determining whether DUI is a crime of violence under § 16(b).²⁶ Part III canvasses the current split among the Courts of Appeals, as well as the different approaches each Circuit has taken in determining whether DUI is a crime of violence under § 16(b).²⁷ Part IV of this Comment analyzes the opinions focusing on whether DUI poses a risk that the drunk driver will use force in the course of committing the offense, as § 16(b) requires.²⁸ Finally, Part V of this Comment proposes that the split among the Courts of Appeals should be resolved by the United States Supreme Court or through both congressional amendments to § 16(b) and the acquiescence of the BIA.²⁹

II. BACKGROUND

The history and background of the statutory definition of crime of violence is necessary for an understanding of the current split among the Courts of Appeals over whether DUI is a crime of violence under § 16(b).³⁰ The legislative history of the definition of crime of violence suggests that Congress intended the term to cover violent offenses and those offenses that present a risk that an offender will use force in the course of committing the crime.³¹ In addition, an understanding of the definition of crime of violence under the *Sentencing Guidelines* is important because many of the courts involved in the current split have

24. See *infra* Part II.A (describing the legislative history of the definition of crime of violence).

25. See *infra* Part II.B (describing the evolution of the *Sentencing Guidelines*’ definition of crime of violence and its relation to § 16(b)’s definition).

26. See *infra* Part II.C (describing the impact that § 16(b)’s definition of crime of violence has on the nation’s immigration laws).

27. See *infra* Part III (describing the current split among the Courts of Appeals).

28. See *infra* Part IV (analyzing the circuit split and arguing that DUI is not a crime of violence under § 16(b)).

29. See *infra* Part V (proposing that the Tenth Circuit revisit the issue of whether DUI is a crime of violence under § 16(b)).

30. See *infra* Part II.A (describing the legislative history of the definition of crime of violence).

31. See *infra* Part II.A (discussing the evolution of the term “crime of violence”).

contrasted the *Sentencing Guidelines*' definition of crime of violence with § 16(b)'s definition of crime of violence.³² Finally, the implementation of the nation's immigration laws has affected the interpretation of the definition of crime of violence under § 16(b).³³ In order to better understand the current split among the Courts of Appeals, it is helpful to discuss the nation's immigration laws, as well as opinions of the BIA, which have held that DUI is a crime of violence under § 16(b).³⁴

A. *The Types of Offenses Congress Intended Crime of Violence to Include*

The legislative history of the term "crime of violence" suggests that Congress intended § 16 to cover violent offenses, such as rape and murder,³⁵ as well as offenses that, by their nature,³⁶ pose a risk that the offender will intentionally use force against the person or property of

32. See *infra* Part II.B (discussing the definition of crime of violence under the *Sentencing Guidelines*).

33. See *infra* Part II.C.I (discussing the impact of § 16(b) on the nation's immigration laws).

34. See *infra* Part II.C.2 (analyzing BIA precedent holding that DUI is a crime of violence under § 16(b)).

35. See Karen Crawford & Thomas Hutchins, *Ignoring Congress: The Board of Immigration Appeals and Crimes of Violence in Puente and Magallanes*, 6 BENDER'S IMMIGR. BULL. 67 (2001) (citing S. REP. NO. 98-225, at 19-20 (1984), reprinted in 1984 U.S.C.C.A.N. 3182, 3202-03).

36. Section 16(b) directs a court to determine whether an 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." 18 U.S.C. § 16(b) (2000). When determining whether an offense is a crime of violence under § 16(b), courts generally use the "categorical approach," inquiring only into the intrinsic nature of the crime rather than into the specific facts surrounding the commission of the offense. *United States v. Aragon*, 983 F.2d 1306, 1312 (4th Cir. 1993) (discussing the categorical approach and citing cases using the categorical approach). The phrase "by its nature" requires a court to use the categorical approach to determine whether an offense meets § 16(b)'s definition of crime of violence. *United States v. Velazquez-Overa*, 100 F.3d 418, 420-21 (5th Cir. 1996) "[E]ither a crime is violent 'by its nature' or it is not. It cannot be a crime of violence 'by its nature' in some cases, but not others, depending on the circumstances." *Id.* The categorical approach of statutory interpretation focuses on the "inherent potential for risk of physical force" in committing the offense rather than on any actual harm caused by the alien during the commission of the underlying offense. See *In re Alcantar*, 20 I. & N. Dec. 801, 809 (B.I.A. 1994) (citing *United States v. Gonzalez-Lopez*, 911 F.2d 542 (11th Cir. 1990) interpreting § 16(b) for the purposes of *U.S. Sentencing Guidelines Manual* § 4B1.2 prior to the November 1989 amendments). When using the categorical approach to determine whether an offense is a crime of violence under § 16(b), courts inquire only into whether the offense is a felony that creates a substantial risk of the possible use of physical force. *Aragon*, 983 F.2d at 1313. Courts generally do not look into the underlying facts of the offense, and it does not matter whether the risk of the use of force matured into actual use of force. See *In re Alcantar*, 20 I. & N. Dec. at 809. Under the categorical approach, an offense is a crime of violence if the minimum conduct necessary to sustain a conviction presents a risk of the use of physical force. *Dalton v. Ashcroft*, 257 F.3d 200, 204-05 (2d Cir. 2001).

another.³⁷ Congress enacted § 16's definition of crime of violence as a part of the Comprehensive Crime Control Act of 1984 ("CCCA").³⁸ A Senate Report that accompanied an early version of the CCCA stated that crimes of violence covered the same types of offenses described in a District of Columbia statute.³⁹ Specifically, the legislative history of the District of Columbia statute described crimes of violence as violent offenses such as murder, rape, and voluntary manslaughter.⁴⁰ Although

37. See DAN KESSELBRENNER & LORY D. ROSENBERG, IMMIGRATION LAW AND CRIMES § 7:28, at 7-100 n.34 (2001) (citing S. REP. NO. 98-225, at 307 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3486-87).

38. Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, Title II, ch. X, part A, § 1001(a), 98 Stat. 1976, 2136 (codified at 18 U.S.C. § 16 (2000)).

39. See S. REP. NO. 98-225, at 20-21, *reprinted in* 1984 U.S.C.C.A.N. 3182, 3203-04 (citing D.C. CODE ANN. §§ 23-1322(a), 23-1331(3), and 23-1331(4)); Crawford & Hutchins, *supra* note 35, at 70 (citing S. REP. NO. 98-225, at 19-20 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3202-03). Senate Report 98-225 stated that "the offenses set forth in [what was to be codified at 18 U.S.C. § 3142(f)(1)(A) through (C)] are crimes of violence . . . [and] are essentially the same categories of offenses described in the [District of Columbia Code] by the terms 'dangerous crime' and 'crime of violence.'" S. REP. NO. 98-225, at 20-21 (1994) (citing D.C. CODE ANN. §§ 23-1322(a), 23-1331(3), and 23-1331(4)). For the complete definition of crime of violence under the *District of Columbia Code Annotated*, see *infra* note 40.

The offenses set forth at 18 U.S.C. § 3142(f)(1)(A) through (C) are as follows:

....

(A) a crime of violence;

(B) an offense for which the maximum sentence is life imprisonment or death;

(C) an offense for which a maximum term of imprisonment of ten years or more is prescribed in the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.) . . .

Bail Reform Act of 1984, Pub. L. No. 98-473, Title II, ch. I, § 203(a), 98 Stat. 1976, 1979 (codified at 18 U.S.C. §§ 3142(f)(1)(A)–3142(f)(1)(C) (2000)).

Senate Report 98-225 also stated that the "term 'crime of violence' is defined in [18 U.S.C. § 3156], as amended by this title." S. REP. NO. 98-225, at 19, *reprinted in* 1984 U.S.C.C.A.N. 3182, 3202. The definition of crime of violence set forth in 18 U.S.C. § 3156(a)(4) is identical to the definition of crime of violence set forth in § 16. *Compare* Bail Reform Act of 1984, Pub. L. No. 98-473, Title II, ch. I, § 203(a), 98 Stat. 1976, 1979 (codified at 18 U.S.C. §§ 3142(f)(1)(A)–3142(f)(1)(C) (2000)), *with* Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, Title II, ch. X, part A, § 1001(a), 98 Stat. 1976, 2136 (codified at 18 U.S.C. § 16 (2000)).

40. See Crawford & Hutchins, *supra* note 35, at 69. In 1970, Congress enacted a different definition of crime of violence as a part of the District of Columbia Court Reform and Criminal Procedure Act. District of Columbia Court Reform and Criminal Procedure Act of 1970, Pub. L. No. 91-358, Title II, § 210(a), 84 Stat. 473 (1970), *reprinted in* 1970 U.S.C.C.A.N. 551, 764 (codified as amended D.C. CODE ANN. § 23-1331 (2001)). The District of Columbia Court Reform and Criminal Procedure Act of 1970 provided that:

The term 'crime of violence' means murder, forcible rape, carnal knowledge of a female under the age of 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, assault with a

not conclusive, these references in the legislative history of the CCA suggest that Congress intended § 16's definition of crime of violence to cover offenses that are of a different nature than DUI.⁴¹

The inclusion of burglary as an example of a crime of violence under § 16(b) is significant because several courts have compared the offense of burglary with DUI in order to determine whether DUI is a crime of violence under § 16(b).⁴² The legislative history states that offenses,

dangerous weapon, or an attempt or conspiracy to commit any of the foregoing offenses, as defined by any Act of Congress or any State law, if the offense is punishable by imprisonment for more than one year.

Id.

41. See Crawford & Hutchins, *supra* note 35, at 70. For a review of several cases determining whether offenses are crimes of violence under § 16(b), see *Aragon*, 983 F.2d at 1311 (holding that an attempt to rescue or assist a prisoner to escape is a crime of violence under § 16(b) for purposes of 18 U.S.C. § 1952); *United States v. Patino*, 962 F.2d 263, 267 (2d Cir. 1992) (stating that kidnapping is a crime of violence under 18 U.S.C. § 924(c)(3)(A) and that conspiracy to commit kidnapping qualifies as a crime of violence under 18 U.S.C. § 924(c)(3)(B)); *United States v. Wilson*, 951 F.2d 586, 587-88 n.2 (4th Cir. 1991) (holding that robbery is a crime of violence under § 16(a) as incorporated by the *Sentencing Guidelines* prior to the November 1989 amendments); *United States v. Gonzalez-Lopez*, 911 F.2d 542, 548-49 (11th Cir. 1990) (holding that robbery is a crime of violence under § 16(a) and § 16(b) and that burglary is a crime of violence under § 16(b) for purposes of the *Sentencing Guidelines* prior to the November 1989 amendments); *United States v. Cruz*, 882 F.2d 922, 923 (5th Cir. 1989) (finding that burglary of a habitation is a crime of violence under the *Sentencing Guidelines* prior to the November 1989 amendments); *United States v. Diaz*, 778 F.2d 86, 88 (2d Cir. 1985) (finding that narcotics offenses are not crimes of violence under § 16 for purposes of 18 U.S.C. § 924(c)); *United States v. Marzullo*, 780 F. Supp. 658, 663 (W.D. Mo. 1991) (holding that arson is a crime of violence against both person and property under 18 U.S.C. §§ 3156(a)(4)(A) and (B)); *United States v. Clark*, 773 F. Supp. 1533, 1536 (M.D. Ga. 1991) (concluding that crime of extortion under color of official right as defined in 18 U.S.C. §§ 1951(a) and (b)(2) is not a crime of violence under 18 U.S.C. § 924(c)(3)); *United States v. Saunders*, 743 F. Supp. 444, 446 (E.D. Va. 1990), *aff'd*, 943 F.2d 388 (4th Cir. 1991) (finding that rape, armed robbery, felonious assault, and unlawful wounding are crimes of violence under § 16 for purposes of the *Sentencing Guidelines* prior to the November 1989 amendments); *In re Alcantar*, 20 I. & N. Dec. at 807 n.5 (citing *United States v. Reyes-Castro*, 13 F.3d 377 (10th Cir. 1993)) (stating that rape and attempted sexual abuse of a child are crimes of violence under § 16(b)).

42. See, e.g., *Dalton v. Ashcroft*, 257 F.3d 200, 209 (2d Cir. 2001) (Walker, C.J., dissenting); *Bazan-Reyes v. INS*, 256 F.3d 600, 611 (7th Cir. 2001); *United States v. Chapa-Garza*, 243 F.3d 921, 926 (5th Cir.) (per curiam) (citing *United States v. Parson*, 955 F.2d 858, 866 (3d Cir. 1992)), *reh'g denied*, 262 F.3d 479 (5th Cir. 2001). The United States Supreme Court has discussed at length the nature of the offense of burglary. See generally *Taylor v. United States*, 495 U.S. 575 (1990). In *Taylor*, the Supreme Court stated that the offense of burglary involves danger to others because the burglar may have to use violent force in order to complete the offense. See *id.* at 588. The court stated that burglary involves an

[i]nherent potential for harm to persons. The fact that an offender enters a building to commit a crime often creates the possibility of a violent confrontation between the offender and an occupant, caretaker, or some other person who comes to investigate. And the offender's own awareness of this possibility may mean that he is prepared to use violence if necessary to carry out his plans or to escape.

such as burglary, are crimes of violence under § 16(b) so long as the offenses involve the substantial risk of physical force against the person or against the property of another.⁴³ One of the dangers of the offense of burglary is that the offender may resort to using intentional force against another in order to complete the offense.⁴⁴ Some courts have cited the offense of burglary as an example of the type of offense that § 16(b) is designed to cover.⁴⁵ These courts have held that an offender must risk the use of intentional force in order to be found guilty of a crime of violence under § 16(b).⁴⁶

Id. Some commentators have drawn on the Supreme Court's discussion regarding burglary to argue that a DUI conviction should not be a crime of violence under § 16(b). See KESSELBRENNER & ROSENBERG, *supra* note 37, § 7:28, at 7-100. They argue that because DUI does not have the same mens rea as burglary, DUI cannot be a crime of violence in light of the fact that the legislative history gave burglary as an example of an offense that would be a crime of violence under § 16(b). See *id.* To commit the offense of burglary, specific intent is required. *Id.*; see also *infra* note 46 (defining "specific intent"). Because DUI does not include specific intent to use force, these commentators argue, DUI should not be considered a crime of violence under § 16(b). KESSELBRENNER & ROSENBERG, *supra* note 37, § 7:28, at 7-100.

43. See S. REP. NO. 98-225, at 307 (1983), reprinted in 1984 U.S.C.C.A.N. 3182, 3486-87.

44. See *Taylor*, 495 U.S. at 588; KESSELBRENNER & ROSENBERG, *supra* note 37, § 7:28, at 7-100.

45. See *Aragon*, 983 F.2d at 1313; *United States v. Raynor*, 939 F.2d 191, 196 (4th Cir. 1991); *United States v. Davis*, 881 F.2d 973, 976 (11th Cir. 1989).

46. See *Aragon*, 983 F.2d at 1313; *Raynor*, 939 F.2d at 196; *Davis*, 881 F.2d at 976. Because mens rea is frequently discussed in the decisions comprising the current split over whether DUI is a crime of violence under § 16(b), it is useful to quickly discuss and define mens rea and the levels of mens rea that courts generally recognize. *Black's Law Dictionary* defines "mens rea" as "an element of criminal responsibility: a guilty mind; a guilty or wrongful purpose; a criminal intent. Guilty knowledge and willfulness." BLACK'S LAW DICTIONARY 985 (6th ed. 1990). There is still substantial disagreement over how a court should "determine whether a particular criminal statute requires specific intent, general intent, or strict liability." Robert Batey, *Judicial Exploitation of Mens Rea Confusion, at Common Law and Under the Model Penal Code*, 18 GA. ST. U. L. REV. 341, 341-42 (2001).

Under the common law approach to defining and determining mens rea, the state must prove that a criminal defendant possesses intent (specific or general) to perform the unlawful act, or the defendant may be guilty under a theory of strict liability. *Id.* at 341. In addition, there are many other "shades" of mens rea "along the continuum upon which these three concepts reside." *Id.* "Specific intent" is "[t]he mental purpose to accomplish the specific act prohibited by the law. . . . [A] special mental element which is required above and beyond any mental state required with respect to the *actus reus* of the crime." BLACK'S LAW DICTIONARY 1399 (6th ed. 1990). For example, at common law, the offense of larceny "requires the taking and carrying away of the property of another, and the defendant's mental state as to this act must be established, but in addition it must be shown that there was 'an intent to steal' the property." *Id.*; see also Batey, *supra*, at 346 (stating that, at common law, a defendant must have an intention to steal). "General intent," on the other hand, is defined as "the general criminal state of mind manifested by the general conduct of the actor which constitutes a deviation from established standards of reasonable care and which implies a certain degree of 'foreseeability' that the acts performed are likely to produce certain harmful results." M. CHERIF BASSIOUNI, *SUBSTANTIVE CRIMINAL LAW* § 3.6.2, at 179 (1978). Some courts define general intent in terms of negligence. See Batey, *supra*, at 367-80 (discussing judicial attempts to define general intent). "[S]trict liability crimes"

Finally, there is some evidence suggesting that Congress did not intend § 16 to include DUI.⁴⁷ In 1990 and 1991, a senator proposed legislation that would have explicitly made DUI an offense subjecting an alien to deportation.⁴⁸ As noted below,⁴⁹ an alien convicted of a

are “[u]nlawful acts whose elements do not contain the need for criminal intent or *mens rea*.” BLACK’S LAW DICTIONARY 1422 (6th ed. 1990). That is, the state need not prove any *mens rea* with respect to the commission of the offense. See *Brewer v. Kimel*, 256 F.3d 222, 229 (4th Cir. 2001) (stating that DUI “is a strict liability offense; one is guilty simply by virtue of operating a motor vehicle with a blood alcohol level higher than the legal limit, and there is no requirement that the state prove any *mens rea* as to intoxication as an element of the offense”); see also *supra* note 8 and accompanying text (noting that DUI may be a strict liability offense).

Some jurisdictions have adopted the approach of the *Model Penal Code*, a project of the American Law Institute, which has influenced courts as well as legislatures. 1 WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., SUBSTANTIVE CRIMINAL LAW § 1.1(b) (1986). The *Model Penal Code* recognizes five levels of *mens rea*: purpose, knowledge, recklessness, negligence, and strict liability. MODEL PENAL CODE §§ 2.02, 2.03 (official draft and revised comments 1985); Batey, *supra*, at 341. Under the *Model Penal Code*,

A person acts purposely with respect to a material element of an offense when:

- (i) if the element involves the nature of his conduct or a result thereof, it is his conscious object to engage in conduct of that nature or to cause such a result; and
- (ii) if the element involves the attendant circumstances, he is aware of the existence of such circumstances or he believes or hopes that they exist.

MODEL PENAL CODE § 2.02(2)(a). Under the *Model Penal Code*, a person acts “knowingly” when:

- (i) if the element involves the nature of his conduct or the attendant circumstances, he is aware that his conduct is of that nature or that such circumstances exist; and
- (ii) if the element involves a result of his conduct, he is aware that it is practically certain that his conduct will cause such a result.

Id. at § 2.02(2)(b). The *Model Penal Code* defines “recklessly” as follows:

A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor’s conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor’s situation.

Id. at § 2.02(2)(c). Finally, the *Model Penal Code* defines “negligently” as follows:

A person acts negligently with respect to a material element of an offense when he should be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that the actor’s failure to perceive it, considering the nature and purpose of his conduct and the circumstances known to him, involves a gross deviation from the standard of care that a reasonable person would observe in the actor’s situation.

Id. at § 2.02(d).

47. See Crawford & Hutchins, *supra* note 35, at 75-76.

48. See *id.* Senate Bill 3230, introduced on October 22, 1990, would have amended the Immigration and Naturalization Act by making deportable any alien who had been convicted of DUI with serious bodily injury or in connection with a fatal traffic accident. See *id.*; see also 136 CONG. REC. S16467-68 (daily ed. Oct. 22, 1990) (statement of Sen. Pell); 137 CONG. REC. S7028 (daily ed. June 4, 1991) (statement of Sen. Pell).

crime of violence is removable for having committed an aggravated felony.⁵⁰ Both pieces of legislation were based on one senator's belief that aliens convicted of felony DUI could not be deported.⁵¹ The senator stated that it was his understanding that aliens convicted of felony DUI were not deportable for having committed a crime of "moral turpitude."⁵² If Congress understood § 16 to include the offense of DUI, then the proposed legislation would have been redundant.⁵³

B. The Definition of Crime of Violence Under the Sentencing Guidelines

The *Sentencing Guidelines'* definition of crime of violence can be relevant to determining the meaning of crime of violence under § 16 because courts have compared and contrasted the two definitions when interpreting one definition or the other.⁵⁴ Congress created the Sentencing Commission as a part of the Sentencing Reform Act of 1984.⁵⁵ Congress then directed the Sentencing Commission to promulgate guidelines to assure that defendants convicted of crimes of violence, among other offenses, received a sentence at or near the maximum term.⁵⁶ Congress did not define crime of violence in the Sentencing Reform Act of 1984, but courts generally held that § 16's

49. See *infra* notes 68-70 and accompanying text (discussing removal of aliens convicted of aggravated felonies, including crimes of violence under § 16).

50. 8 U.S.C. § 1101(a)(43)(F) (2000) (including a crime of violence under § 16 in the definition of "aggravated felony"); 8 U.S.C. § 1252 (2000) (subjecting alien to removal for commission of an aggravated felony).

51. See 137 CONG. REC. S7028 (daily ed. June 4, 1991) (statement of Sen. Pell); 136 CONG. REC. S16467-68 (daily ed. Oct. 22, 1990) (statement of Sen. Pell).

52. See 137 CONG. REC. S7028 (daily ed. June 4, 1991) (statement of Sen. Pell); 136 CONG. REC. S16467-68 (daily ed. Oct. 22, 1990) (statement of Sen. Pell). An alien who commits a crime of moral turpitude is removable under 8 U.S.C. § 1227(a)(2)(A)(i) (2000).

53. See Crawford & Hutchins, *supra* note 35, at 75-76. Congress did not pass the proposed legislation. *Id.*

54. See, e.g., Bazan-Reyes v. INS, 256 F.3d 600, 607-08 (7th Cir. 2001); Tapia Garcia v. INS, 237 F.3d 1216, 1223 (10th Cir. 2001); United States v. Parson, 955 F.2d 858, 863-66 (3d Cir. 1992).

55. Sentencing Reform Act of 1984, Pub. L. No. 98-473, Title II, ch. II, § 217(a), 98 Stat. 1987, 2017-26. The Sentencing Reform Act of 1984 was Chapter II of the CCCA, the same Act that defined crime of violence under § 16. For a general discussion of the United States Sentencing Commission and its duties, see *Mistretta v. United States*, 488 U.S. 361, 363-69 (1989). In *Mistretta*, the United States Supreme Court held that the Sentencing Commission and the *Sentencing Guidelines* are constitutional and are neither excessive delegations of legislative power nor violations of the separation of powers principle. *Id.* at 412.

56. *Mistretta*, 488 U.S. at 376 (quoting 28 U.S.C. § 994(h) (1994)).

definition of the term applied to the career offender statutes of the Sentencing Reform Act of 1984.⁵⁷

On November 1, 1989, the United States Sentencing Commission adopted a definition of crime of violence for the purposes of the *Sentencing Guidelines* that differed from § 16's definition.⁵⁸ The Sentencing Commission stated that its revision to the definition of crime of violence was intended only to clarify the terminology, not to substantively change its meaning.⁵⁹ Despite the Sentencing Commission's stated intention, courts have interpreted the two definitions differently because of their differing language.⁶⁰ Section 16(b)'s definition of crime of violence focuses on whether there is a risk that force will be used in the course of committing an offense.⁶¹ In contrast, the *Sentencing Guidelines* define a crime of violence in terms of whether the offense presents a risk of injury to others.⁶² Moreover, at least one court has held that DUI is a crime of violence under the *Sentencing Guidelines*' definition, while indicating, in dictum, that DUI would probably not be a crime of violence under § 16(b)'s definition.⁶³

57. *Parson*, 955 F.2d at 864; *see also supra* note 15 and accompanying text (discussing the impact § 16's definition of crime of violence has on federal law).

58. *Parson*, 955 F.2d at 864-65. The *Sentencing Guidelines* defines crime of violence as: any offense under federal or state law punishable by imprisonment for a term exceeding one year that—

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another, or

(ii) 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.

Id. at 863 (quoting U.S. SENTENCING GUIDELINES MANUAL § 4B1.2(1)).

59. *Id.* at 865 (citing U.S. SENTENCING GUIDELINES MANUAL app. C, at 111). This revised definition borrowed from the definition of "violent felony" in a federal firearms statute, 18 U.S.C. § 924(e)(2)(B). *Id.* (citing U.S. SENTENCING GUIDELINES MANUAL app. C, at 111 (2001)).

60. *See, e.g.*, *Bazan-Reyes v. INS*, 256 F.3d 600, 608 (7th Cir. 2001); *Parson*, 955 F.2d at 865.

61. *See* 18 U.S.C. § 16(b) (2000).

62. *See* U.S. SENTENCING GUIDELINES MANUAL § 4B1.2(a) (2001).

63. *Parson*, 955 F.2d at 874. Several courts have cited this opinion for its discussion of the different definitions of crime of violence. *See, e.g.*, *United States v. Chapa-Garza*, 243 F.3d 921, 926 (5th Cir.) (per curiam), *reh'g denied*, 262 F.3d 479 (5th Cir. 2001); *Bazan-Reyes*, 256 F.3d at 610-11. In *Parson*, the Third Circuit compared the definition of crime of violence under § 16(b) with the definition of crime of violence contained in the *Sentencing Guidelines*. *Parson*, 955 F.2d at 863-66. The court held that DUI is a crime of violence under the *Sentencing Guidelines*' definition, and suggested that DUI is not a crime of violence under § 16(b) because the offender does not intend to use physical force in order to harm others. *See id.* at 866.

C. Section 16's Definition of Crime of Violence and Immigration Law

Whether DUI is a crime of violence under § 16 has important ramifications in immigration law.⁶⁴ The BIA⁶⁵ has twice considered whether DUI is a crime of violence under § 16.⁶⁶ Each time, the BIA

64. See generally Jeffrey N. Brauerman & Stephen E. Mander, *IMMACT90 Revisions Regarding Immigration Consequences of Criminal Activity*, FLA. BAR J., May 1992, at 28 (demonstrating the impact that a conviction for "aggravated felony" has on an alien for the purposes of the INA). One commentator vividly described the stakes at risk in the interpretation and implementation of deportation law:

Imagine a person who has lived in the United States since early childhood as a lawful permanent resident, whose entire family is here, whose spouse and children are U.S. citizens, who speaks only English and knows no other culture but ours. Such a person can now be arrested by armed agents of the [INS], will have no right to appointed counsel, may be subjected to mandatory detention with no right even to apply for release on bail, and may be deported and banished forever. All this for a minor criminal offense committed years ago, which may not even have been a ground for deportation when it was committed and may not have been considered a conviction under the law of the state where it occurred.

Daniel Kanstroom, *Deportation and Justice: A Constitutional Dialogue*, 41 B.C. L. REV. 771, 773 (2000) (footnotes omitted).

65. The BIA is an adjudicative body that reviews decisions by the Immigration and Naturalization Service ("INS") to remove or exclude aliens. 1 CHARLES GORDON ET AL., *IMMIGRATION LAW AND PROCEDURE* § 3.05 (rev. ed. 2001). The BIA derives its power from the Attorney General of the United States. 1 *Id.* § 3.05[2]. The Attorney General of the United States is primarily responsible for the nation's immigration laws. 1 *Id.* § 3.02[1]. The Attorney General has broad authority to make final determinations regarding the exclusion or removal of aliens. 1 *Id.* § 3.05[1]. This authority has largely been delegated to other agencies, such as the INS. 1 *Id.* § 3.02[2]. The Attorney General has the power to review the removal and exclusion determination made by the INS, but this power has, for the most part, been delegated to the BIA. 1 *Id.* § 3.05[2]. The BIA is almost exclusively an appellate body that reviews the initial determinations regarding exclusion and removal. 1 *Id.* §§ 3.05[1]–[2]. The decisions of the BIA are binding on the INS unless modified or overruled by the Attorney General. 1 *Id.* § 3.05[2].

The Circuit Courts of Appeals have limited jurisdiction to review a final order of removal against an alien, including an order issued by the BIA. See *infra* note 70 and accompanying text (discussing the limited power of federal courts to review final orders of removal). When the courts review an order of removal, they will generally defer to the BIA's interpretation of the INA if that interpretation is reasonable. See *Tapia Garcia v. INS*, 237 F.3d 1216, 1220 (10th Cir. 2001) (citing *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984)). The deference owed to an agency by a reviewing court is commonly referred to as "*Chevron*" deference. See *Dalton v. Ashcroft*, 257 F.3d 200, 203 (2d Cir. 2001). When a court applies *Chevron* deference, the first step is to determine de novo whether the plain language of the statute clearly demonstrates the intent of Congress. *Tapia Garcia*, 237 F.3d at 1220–21 (citing *Chevron U.S.A., Inc.*, 467 U.S. at 842–43; *Onwuneme v. INS*, 67 F.3d 273, 275 (10th Cir. 1995)). If the statute does not clearly convey the intent of Congress and is susceptible to varying interpretations because it is ambiguous, then the second step is to determine whether the agency's interpretation is a permissible construction of the statute. *Id.* (citing *Chevron U.S.A., Inc.*, 467 U.S. at 843). However, when the BIA is interpreting a statute other than the INA, it is not entitled to any deference, and the courts are free to substitute their judgment for the judgment of the BIA. See *Dalton*, 257 F.3d at 203; Crawford & Hutchins, *supra* note 35, at 78–79.

held that DUI is a crime of violence under § 16, stating that DUI involves a substantial risk that physical force against the person or property of another may be used in the commission of the offense.⁶⁷

1. The Impact of § 16's Definition of Crime of Violence on Immigration Law

Whether DUI is a crime of violence under § 16 is significant because a crime of violence under § 16 is an "aggravated felony" under the Federal Immigration and Naturalization Act ("INA").⁶⁸ An alien⁶⁹ convicted of an aggravated felony, including a crime of violence, is subject to removal from the United States and is ineligible to seek judicial review of a removal order.⁷⁰ In addition, an alien convicted of

66. *In re Puente-Salazar*, Interim Dec. No. 3412, File No. A36 582 517, slip op. at 14-15 (B.I.A. Sept. 29, 1999), available at <http://www.usdoj.gov/eoir/efoia/bia/Decisions/Revdec/pdfDEC/3412.pdf>; *In re Magallanes-Garcia*, Interim Dec. No. 3341, File No. A90 219 200, slip op. at 6-7 (B.I.A. Mar. 19, 1998), available at <http://www.usdoj.gov/eoir/efoia/bia/Decisions/Revdec/pdfDEC/3341.pdf>.

67. *In re Puente-Salazar*, Interim Dec. No. 3412, slip op. at 12. In September 1998, prompted by the BIA's decision in *In re Magallanes-Garcia*, several Texas INS district offices initiated Operation "Last Call," an effort to deport immigrants with three or more DUI convictions. See William Branigan, *INS Reviews DWI Deportations; Texas Offices' Program Angers Immigrants' Rights Groups*, WASH. POST, Dec. 22, 1998, at A21; *Immigrants Facing Removal Through Operation "Last Call"*, COMMUNIQUE, Nov. 1998, at 6. Operation "Last Call" resulted in the arrest and removal of over 500 legal permanent residents residing in Texas. See *Immigrants Facing Removal Through Operation "Last Call," supra*, at 6.

68. See 8 U.S.C. § 1101(a)(43)(F) (2000). In 1990, Congress expanded the definition of "aggravated felony" to include, among other things, "any crime of violence (as defined in title 18, section 16 of the United States Code, not including a purely political offense) for which the term of imprisonment imposed (regardless of any suspension of such imprisonment) is at least 5 years." Immigration Act of 1990, Pub. L. No. 101-649, § 501(a)(3), 104 Stat. 4978, 5048 (codified as amended at 8 U.S.C. § 1101(a)(43)(F)). In 1996, Congress again expanded the definition of "aggravated felony." See *Illegal Immigration Reform and Immigrant Responsibility Act of 1996*, ("IIRIRA"), Pub. L. No. 104-208, § 321, 110 Stat. 3009-546 (codified as amended in scattered sections of 8 U.S.C. and 18 U.S.C.); Kurtis A. Kemper, Annotation, *What Constitutes "Aggravated Felony" For Which Alien Can be Deported or Removed Under § 237(a)(2)(A)(iii) of Immigration and Nationality Act (8 U.S.C.A. § 1227(a)(2)(A)(iii))*, 168 A.L.R. FED. 575, 588 (2001). First, the definition of "aggravated felony" under the INA was expanded to include any crime of violence for which the term of imprisonment is at least one year. See IIRIRA, Pub. L. No. 104-208, §§ 321(a)(3), 322(a)(2)(A). This is significant in the current context of determining whether DUI is a crime of violence under § 16 because many DUI convictions carry a sentence of at least one year. See generally JOHN H. WILLIAMSON, *THE ATTORNEY'S HANDBOOK ON DRINKING DRIVING DEFENSE* 324-401 (1991), 7-21 (Supp. 1993) (collecting and summarizing DUI penalties in all fifty states). Before 1996, DUI would generally not have qualified as an "aggravated felony" because most DUI convictions carry a sentence of less than five years. See generally *id.*

69. An alien is defined as "any person not a citizen or national of the United States." 8 U.S.C. § 1101(a)(3) (2000).

70. See 8 U.S.C. § 1252(a)(2)(C) (2000) (stating that "no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having

unlawfully reentering the United States after removal is subject to significant sentence enhancements if the alien was convicted of an aggravated felony, including a crime of violence, prior to removal.⁷¹

committed” an aggravated felony). In 1996, Congress significantly restricted the availability of the judicial review of final orders of removal of aliens ordered removed for having committed an aggravated felony under 8 U.S.C. § 1227 (a)(2)(A)(iii). Sonia Chen, Comment, *The Illegal Immigration Reform and Immigrant Responsibility Act of 1996: Another Congressional Hurdle for the Courts*, 8 IND. J. GLOBAL LEGAL STUD. 169, 188 (2000) (citing David Cole, *No Clear Statement: An Argument for Preserving Judicial Review of Removal Decisions*, 12 GEO. IMMIGR. L.J. 427, 429 (1998)).

Although on its face this provision seems to prevent a court from reviewing the final order of removal of an alien found deportable for having committed an aggravated felony, courts have uniformly retained jurisdiction to determine their own jurisdiction. See *Park v. INS*, 252 F.3d 1018, 1021 (9th Cir. 2001) (citing *Scales v. INS*, 232 F.3d 1159, 1161 (9th Cir. 2000)); see also *Dalton*, 257 F.3d at 203 (“We . . . retain jurisdiction . . . to review the question whether, as a matter of law, [the alien] committed an ‘aggravated felony’ under 8 U.S.C. § 1101(a)(43)(F) . . .”). Thus, the courts do review whether an offense is indeed an aggravated felony as defined by 8 U.S.C. § 1227(a)(2)(A)(iii) (2000). See, e.g., *Bazan-Reyes v. INS*, 256 F.3d 600, 604 (7th Cir. 2001). The INS appears to agree that this is the correct interpretation of the new provisions. See *Calcano-Martinez v. INS*, 533 U.S. 348, 350 n.2 (2001) (stating that the scope of the preclusion under 8 U.S.C. § 1252(a)(2)(C) “is not entirely clear” and noting that the INS conceded “that the courts of appeals have the power to hear petitions challenging the factual determinations thought to trigger the jurisdiction-stripping provision”).

71. See 8 U.S.C. § 1326(a) (2000); U.S. SENTENCING GUIDELINES MANUAL § 2L1.2 (2001). If the alien was previously deported, or unlawfully remained in the United States, after a conviction for an aggravated felony as defined in 8 U.S.C. § 1101(a)(43)(F), then the alien is subject to an increased sentence under the *Sentencing Guidelines*. See U.S. SENTENCING GUIDELINES MANUAL § 2L1.2(b)(1)(C) (2001); see also *United States v. Chapa-Garza*, 243 F.3d 921, 924 (5th Cir.) (per curiam) (applying U.S. SENTENCING GUIDELINES MANUAL § 2L1.2), *reh’g denied*, 262 F.3d 479 (5th Cir. 2001). An aggravated felony includes a crime of violence under § 16. See 8 U.S.C. § 1101(a)(43)(F); see also *supra* note 68 and accompanying text (discussing the expansion of the definition of aggravated felony to include a crime of violence under § 16).

Several courts have determined whether DUI is a crime of violence under § 16 in the course of applying *U.S. Sentencing Guidelines Manual* § 2L1.2. See, e.g., *Chapa-Garza*, 243 F.3d at 924. Courts generally review de novo a district court’s application of the *Sentencing Guidelines*. See, e.g., *United States v. Trinidad-Aquino*, 259 F.3d 1140, 1142 (9th Cir. 2001) (citation omitted). A court reviewing a removal order, on the other hand, will generally apply *Chevron* deference to the BIA’s interpretation of the INA. See, e.g., *Le v. U.S. Att’y Gen.*, 196 F.3d 1352, 1353-54 (11th Cir. 1999) (citation omitted); see also *supra* note 65 (discussing *Chevron* deference).

Under the *Sentencing Guidelines*, an alien is also subject to an increased sentence if the alien previously was deported, or unlawfully remained in the United States, after a conviction of a crime of violence as defined by the *Sentencing Guidelines*. See U.S. SENTENCING GUIDELINES MANUAL § 2L1.2(e)(1)(A)(ii) (2001). For the purposes of this section, the *Guidelines* define a crime of violence as:

- (I) . . . an offense under federal, state, or local law that has as an element the use, attempted use, or threatened use of physical force against the person of another; and
- (II) includes murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses (including sexual abuse of a minor), robbery, arson, extortion, extortionate extension of credit, and burglary of a dwelling.

Finally, an alien convicted of a “serious criminal offense,”⁷² which includes a crime of violence under § 16, cannot be admitted into the United States if he claims diplomatic immunity from prosecution for that offense.⁷³

2. BIA Decisions Holding that DUI is a Crime of Violence Under § 16(b)

The BIA has twice held that DUI is a crime of violence under § 16(b).⁷⁴ In *In re Magallanes-Garcia*,⁷⁵ the BIA held that a DUI conviction while driving on a suspended license was a crime of violence under § 16(b) because of the inherent risk of harm to others presented by the offense.⁷⁶ In *In re Puente-Salazar*,⁷⁷ the BIA clarified its decision in *In re Magallanes-Garcia* by holding that DUI involves a substantial risk that physical force may be used against the person or property of another during the commission of the offense.⁷⁸ Both of

U.S. SENTENCING GUIDELINES MANUAL § 2L1.2, cmt., n.1(B)(ii) (2001). Whether DUI is included under this definition of crime of violence is beyond the scope of this Comment.

72. 8 U.S.C. § 1101(h) (2000). Congress defined a “serious criminal offense” as:

- (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 of driving while intoxicated or under the influence of alcohol or of prohibited substances if such crime involves personal injury to another.

Id.

73. See 8 U.S.C. § 1101(h) (2000); 8 U.S.C. § 1182(a)(2)(E) (2000). In 1990, Congress expanded the grounds for excluding certain aliens from entry into the United States. Foreign Relations Authorization Act, Fiscal Years 1990 and 1991, Pub. L. No. 101-246, § 131, 104 Stat. 15, 31-32 (1990). The legislative history of this Act states that aliens may be denied admission into the United States where the alien has committed a serious crime in the United States, and the adjudication of that serious crime was prevented by the exercise of diplomatic immunity from criminal jurisdiction. H. CONF. REP. NO. 101-343, at 56 (1990), *reprinted in* 1990 U.S.C.C.A.N. 85, 98. The definition of “serious criminal offense” may be significant for the purposes of determining whether DUI is a crime of violence under § 16 because Congress chose to expressly include certain offenses related to DUI within the definition of “serious criminal offense.” See Crawford & Hutchins, *supra* note 35, at 68-72. It is possible that this illustrates that Congress understood DUI and related offenses to be distinct from crimes of violence under § 16. See *id.* at 72-75.

74. *In re Puente-Salazar*, Interim Dec. No. 3412, File No. A36 582 517, slip op. at 14-15 (B.I.A. Sept. 29, 1999), available at <http://www.usdoj.gov/eoir/efoia/bia/Decisions/Revdec/pdfDEC/3412.pdf>; *In re Magallanes-Garcia*, Interim Dec. No. 3341, File No. A90 219 200, slip op. at 6-7 (B.I.A. Mar. 19, 1998), available at <http://www.usdoj.gov/eoir/efoia/bia/Decisions/Revdec/pdfDEC/3341.pdf>.

75. *In re Magallanes-Garcia*, Interim Dec. No. 3341, slip op. at 1.

76. *Id.* slip op. at 6.

77. *In re Puente-Salazar*, Interim Dec. No. 3412, slip op. at 1.

78. *Id.* slip op. at 13-14.

these decisions drew on a prior BIA decision,⁷⁹ which held that an offender need not intend to use force in order to commit a crime of violence under § 16(b).⁸⁰

a. *In re Magallanes-Garcia*

In *In re Magallanes-Garcia*, the BIA held that aggravated DUI with a suspended license⁸¹ is a crime of violence under § 16(b) because the

79. *In re Alcantar*, 20 I. & N. Dec. 801, 813-14 (B.I.A. 1994). In *In re Alcantar*, the BIA held that § 16(b) does not require specific intent to commit a violent act, but rather requires at least reckless behavior that involves a substantial risk of physical force against another. *See id.* at 808-09 (citing *United States v. Springfield*, 829 F.2d 860 (9th Cir. 1987)). In *In re Alcantar*, the alien had been convicted in Illinois for involuntary manslaughter. *Id.* at 802. The BIA reasoned that involuntary manslaughter necessarily involves the death of another and is likely to be the result of violence. *Id.* at 813.

80. *In re Puente-Salazar*, Interim Dec. No. 3412, slip op. at 12 (citing *In re Alcantar*, 20 I. & N. Dec. at 813); *In re Magallanes-Garcia*, Interim Dec. No. 3341, slip op. at 6 (citing *In re Alcantar*, 20 I. & N. Dec. at 813).

81. The alien in *In re Magallanes-Garcia* was convicted under sections 28-692(A)(1) and 28-697(A)(1), (D), (E), (G)(1), (H), and (I) of the *Arizona Revised Statutes*. In *In re Magallanes-Garcia*, Interim Dec. No. 3341, slip op. at 2. Section 28-692(A)(1) of the *Arizona Revised Statutes* provided, in relevant part:

Driving or in actual physical control while under the influence of intoxicating liquor or drugs; violation; classification; definition

A. It is unlawful for any person to drive or be in actual physical control of any vehicle within this state under any of the following circumstances:

1. While under the influence of intoxicating liquor, any drug, a vapor releasing substance containing a toxic substance or any combination of liquor, drugs or vapor releasing substances if the person is impaired to the slightest degree.

Id. slip op. at 2-3 (quoting ARIZ. REV. STAT. ANN. § 28-692(A)(1) (West 1997)). Sections 28-697(A)(1), (D)(1), and (D)(2) of the *Arizona Revised Statutes* provided, in relevant part:

Aggravated driving or actual physical control while under the influence of intoxicating liquor or drugs; violation; classification; penalties; notice; definition

A. A person is guilty of aggravated driving or actual physical control while under the influence of intoxicating liquor or drugs if the person does either of the following:

1. Commits a violation of § 28-692 of this section while the person's driver's license or privilege to drive is suspended, canceled, revoked or refused, or the person's driver's license or privilege to drive is restricted as a result of violating § 28-692 or under § 28-694.

....

D. Aggravated driving or actual physical control while under the influence of intoxicating liquor or drugs committed under:

1. Subsection A, paragraph 1 or 2 of this section is a class 4 felony.

2. Subsection A, paragraph 3 of this section is a class 6 felony.

Id. slip op. at 3 (quoting ARIZ. REV. STAT. ANN. §§ 28-697(A)(1), (D)(1), (D)(2) (West 1997)). The alien in *In re Magallanes-Garcia* had been ordered deported by an immigration judge under 8 U.S.C. § 1251(a)(2)(A)(iii) (1994). *Id.* slip op. at 1. The alien, who represented himself pro se, made only minimal arguments on appeal. *See id.* slip op. at 1-2.

offense involves a substantial “risk of harm” to persons and property.⁸² The BIA applied the “categorical approach” to determine whether or not the alien’s conviction was a crime of violence.⁸³ The BIA then determined that DUI has the potential for resulting in harm and usually involves a risk that physical force will be used against the person or property of another.⁸⁴

In so holding, the BIA relied on *Michigan Department of State Police v. Sitz*,⁸⁵ a United States Supreme Court opinion that recognized drunk driving as a serious problem.⁸⁶ The BIA also relied on various Courts of Appeals decisions, articulating that DUI is an offense with an enormous potential to result in harm.⁸⁷ The BIA concluded that the statistics and cases provided incontrovertible evidence that the offense of DUI is inherently reckless because it exacts serious human tolls in the forms of death, injury, and property damage.⁸⁸ In a key footnote,⁸⁹ the BIA characterized DUI as not merely *malum prohibitum*, but *malum in se*.⁹⁰

82. *Id.* slip op. at 6. The BIA also determined that the Arizona offense in question was not a crime of violence under § 16(a) because the elements of the crime did not include “the use, attempted use, or threatened use of physical force against the person or property of another.” *Id.* slip op. at 4. One commentator has suggested that the *In re Magallanes-Garcia* decision spurred the INS to initiate Operation “Last Call,” “under which long-time permanent residents with old DUI convictions were targeted for deportation.” Daniel M. Kowalski, *A Crime of Violence: Malum in Magallanes*, FED. LAWYER, Jan. 1999, at 5.

83. *In re Magallanes-Garcia*, Interim Dec. No. 3341, slip op. at 4; see also *supra* note 36 (describing the categorical approach).

84. *In re Magallanes-Garcia*, Interim Dec. No. 3341, slip op. at 4-5 (quoting *In re Alcantar*, 20 I. & N. Dec. at 812).

85. Mich. Dep’t of State Police v. Sitz, 496 U.S. 444, 455 (1990).

86. *In re Magallanes-Garcia*, Interim Dec. No. 3341, slip op. at 5 (quoting *Sitz*, 496 U.S. at 451).

87. *Id.* slip op. at 5-6 (citing *United States v. Farnsworth*, 92 F.3d 1001, 1008 (10th Cir. 1996); *United States v. Rutherford*, 54 F.3d 370, 376 (7th Cir. 1995)). Neither of these cases addressed whether DUI is a crime of violence under § 16. See generally *Farnsworth*, 92 F.3d at 1008; *Rutherford*, 54 F.3d at 376.

88. *In re Magallanes-Garcia*, Interim Dec. No. 3341, slip op. at 6 (citing *Rutherford*, 54 F.3d at 375-77).

89. Kowalski, *supra* note 82, at 5.

90. *In re Magallanes-Garcia*, Interim Dec. No. 3341, slip op. at 6 n.2 (citing *Bronson v. Swinney*, 648 F. Supp. 1094, 1100 (D. Nev. 1986), *rev’d on other grounds sub nom.*, *Bronson v. McKay*, 870 F.2d 1514 (9th Cir. 1989)). Offenses that are *mala prohibita* are “[a]cts or omissions which are made criminal by statute but which, by themselves, are not criminal.” BLACK’S LAW DICTIONARY 659 (abridged 6th ed. 1991). Offenses that are *mala in se* are “[w]rongs in themselves; acts morally wrong; offenses against conscience.” *Id.*

b. *In re Puente-Salazar*

Just eighteen months after the BIA decided *In re Magallanes-Garcia*, the BIA again held that DUI is a crime of violence under § 16(b) in *In re Puente-Salazar*.⁹¹ The alien in *In re Puente-Salazar* was convicted under Texas law for DUI.⁹² He argued that the BIA improperly equated the “potential of resulting harm” and “serious risk of physical injury” with § 16(b)’s “substantial risk” language.⁹³ The alien further argued that § 16(b)’s language requiring that force may be used in the course of committing the offense requires specific intent to use such force.⁹⁴

91. *In re Puente-Salazar*, Interim Dec. No. 3412, File No. A36 582 517 (B.I.A. Sept. 29, 1999), available at <http://www.usdoj.gov/eoir/efoia/bia/Decisions/Revdec/pdfDEC/3412.pdf>. Recently, the BIA stayed an order of deportation so that it could consider what effect the Fifth Circuit’s decision in *United States v. Chapa-Garza*, 243 F.3d 921 (5th Cir. 2001), has on the BIA’s decision in *In re Puente-Salazar*. See *In re Herrera*, 23 I. & N. Dec. 43, 44 (B.I.A. 2001), available at <http://www.usdoj.gov/eoir/efoia/bia/Decisions/Revdec/pdfDEC/3445.pdf>.

92. *In re Puente-Salazar*, Interim Dec. No. 3412, slip op. at 2-3. The immigration judge had determined that the alien’s DUI conviction was a conviction for an aggravated felony. *Id.* slip op. at 3. Although it is not clear, presumably the immigration judge determined that the alien’s DUI conviction was a conviction of a crime of violence under § 16. See *id.* The alien was convicted under section 49.04 of the *Texas Penal Code Annotated* and received a sentence enhancement under section 49.09(b) of the *Texas Penal Code Annotated*. *In re Puente-Salazar*, Interim Dec. No. 3412, slip op. at 6-7 (citing TEX. PENAL CODE ANN. §§ 49.04, 49.09(b) (Vernon 1997)). Section 49.04 of the *Texas Penal Code Annotated* provides, in relevant part:

Driving While Intoxicated

- (a) A person commits an offense if the person is intoxicated while operating a motor vehicle in a public place.
- (b) Except as provided by Subsection (c) and Section 49.09, an offense under this section is a Class B misdemeanor, with a minimum term of confinement of 72 hours.
- (c) If it is shown on the trial of an offense under this section that at the time of the offense the person operating the motor vehicle had an open container of alcohol in the person’s immediate possession, the offense is a Class B misdemeanor, with a minimum term of confinement of six days.

Id. (quoting TEX. PENAL CODE ANN. § 49.04 (Vernon 1997)). The sentence enhancement provision of the *Texas Penal Code Annotated* provides, in relevant part:

Enhanced Offenses and Penalties

If it is shown on the trial of an offense under Section 49.04, 49.05, or 49.06 that the person has previously been convicted two times of an offense relating to the operating of a motor vehicle while intoxicated, an offense of operating an aircraft while intoxicated, or an offense of operating a watercraft while intoxicated, the offense is a felony of the third degree.

Id. (quoting TEX. PENAL CODE ANN. § 49.09(b) (Vernon 1997)).

93. *Id.* slip op. at 4. The alien also argued that the Arizona statute at issue in *In re Magallanes-Garcia*, Interim Dec. No. 3341, was distinguishable from the Texas statute under which he was convicted, and that his offense was not a crime of violence because under Texas law an additional provision requiring the use of a deadly weapon renders DUI an aggravated offense, and that this provision was not met in his case. *In re Puente-Salazar*, Interim Dec. No. 3412, slip op. at 3.

94. *Id.* slip op. at 4; see also *supra* note 46 (discussing and defining “specific intent”).

1. *The Majority Opinion in In re Puente-Salazar*

Following its previous decision in *In re Magallanes-Garcia*,⁹⁵ the BIA rejected all of the alien's arguments and held that his Texas conviction for DUI was a crime of violence under § 16(b).⁹⁶ The BIA again applied the categorical approach⁹⁷ to determine whether the alien's DUI conviction was a conviction for a crime of violence under § 16(b).⁹⁸ Texas law defines "operating" a vehicle broadly; an offender must merely "affect [the] functioning of a vehicle in a manner that enables the vehicle's use."⁹⁹ The alien argued that this broad definition of "operating" did not satisfy § 16(b)'s "substantial risk" language because the definition presented, at most, a potential risk of harm.¹⁰⁰ The BIA rejected the alien's argument, stating that § 16(b)'s "substantial risk" language must be read in conjunction with the nature of the actions underlying the offense and whether those actions may result in the use of physical force.¹⁰¹

The BIA also rejected the alien's argument that § 16(b)'s requirement that force "may be used in the course of committing the offense" created a requirement that the offender have specific intent to use such force.¹⁰² Citing *In re Alcantar*, the BIA noted that it previously held that § 16(b)'s "may be used" language could be satisfied by reckless conduct.¹⁰³ The BIA then invoked *In re Magallanes-Garcia* to support the proposition that the offense of DUI is inherently reckless.¹⁰⁴ Applying these prior holdings, the BIA held that the alien's conviction for DUI under Texas law was a crime of violence under § 16(b), and

95. *In re Puente-Salazar*, Interim Dec. No. 3412, slip op. at 14.

96. The BIA conceded that the alien's conviction was not a crime of violence under 18 U.S.C. § 16(a) because the offense did "not include as an element the use, attempted use, or threatened use of physical force against the person or property of another." *Id.* slip op. at 8.

97. See *supra* note 36 (discussing and defining the categorical approach).

98. *In re Puente-Salazar*, Interim Dec. No. 3412, slip op. at 9 (citing *In re Palacios-Pinera*, Interim Dec. No. 3373, File No. A90 284 849 (B.I.A. Dec. 18, 1998), available at http://www.usdoj.gov/eoir/vll/intdec/id_pdf/3373.pdf; *In re Alcantar*, 20 I. & N. Dec. 801 (B.I.A. 1994)).

99. *Id.* slip op. at 10 (citing *Denton v. State*, 911 S.W.2d 388 (Tex. Crim. App. 1995); *Barton v. State*, 882 S.W.2d 456 (Tex. Crim. App. 1994)).

100. *Id.*

101. *Id.* In *In re Magallanes-Garcia*, the BIA characterized the "nature" of the offense of DUI as *malum in se*. See *In re Magallanes-Garcia*, Interim Dec. No. 3341, File No. A90 219 200, slip op. at 6 n.2 (B.I.A. Mar. 19, 1998), available at <http://www.usdoj.gov/eoir/efoia/bia/Decisions/Revdec/pdfDEC/3341.pdf>; see also *supra* note 90 (defining "*malum in se*").

102. *In re Puente-Salazar*, Interim Dec. No. 3412, slip op. at 12.

103. *Id.* (citing *In re Alcantar*, 20 I. & N. Dec. at 801).

104. *Id.* (citing *In re Magallanes-Garcia*, Interim Dec. No. 3341).

that specific intent to use force was not necessary to satisfy § 16(b).¹⁰⁵ The BIA found that, by its nature, DUI involves a substantial risk that physical force may be used against the person or property of another in the commission of the offense and thus concluded that DUI is a crime of violence under § 16(b).¹⁰⁶

Finally, the BIA addressed the alien's argument that the BIA had ascertained and applied the wrong definition of crime of violence in its prior decision in *In re Magallanes-Garcia*.¹⁰⁷ The alien argued that, in *In re Magallanes-Garcia*, the BIA had improperly conflated the term "risk of physical injury to another" with § 16(b)'s requirement that there be a "risk of use of force."¹⁰⁸ Tracking the language of the statute, the alien argued that in order for DUI to be a crime of violence under § 16(b), there must be a "risk of use of force" rather than a "risk of physical injury to another," as the BIA had held in *In re Magallanes-Garcia*.¹⁰⁹ The BIA recognized that in *In re Magallanes-Garcia* it had held that "the potential for harm" is the determinative factor in finding that an offense is a crime of violence under § 16(b).¹¹⁰ Emphasizing that the reasoning and the conclusions of *In re Magallanes-Garcia* were not altered by its decision in *In re Puente-Salazar*, the BIA clarified the *In re Magallanes-Garcia* holding.¹¹¹ The BIA stated that there must be a causal link between the harm and the force in order for an offense to be a crime of violence under § 16(b).¹¹² The BIA reasoned that not all criminal offenses that have the potential for harm carry a substantial risk that force will be used in their commission.¹¹³ Therefore, under *In re Puente-Salazar*, the "potential for harm" must be connected with the risk of the use of force in order for an offense to be a crime of violence under § 16(b).¹¹⁴

Illustrating this clarified principal in the context of DUI cases, the BIA ultimately stated that in DUI cases the risk of injury to others is directly related to a substantial risk that the offender will use physical

105. *Id.*

106. *Id.*

107. *Id.* slip op. at 12-14.

108. *Id.* slip op. at 12-13.

109. *Id.*

110. *Id.* slip op. at 13 (citing *In re Magallanes-Garcia*, Interim Dec. No. 3341, File No. A90 219 200 (B.I.A. Mar. 19, 1998), available at <http://www.usdoj.gov/eoier/efoia/bia/Decisions/Revdec/pdfDEC/3341.pdf>).

111. *Id.*

112. *Id.*

113. *Id.*

114. *See id.*

force to cause that injury.¹¹⁵ The focus, the BIA held, should be on the conduct that is required for a conviction under the relevant DUI statute, not on the consequences of the alien's offense.¹¹⁶ Signaling that it would apply *In re Magallanes-Garcia* to other DUI convictions, the BIA concluded that the alien's DUI conviction in Texas was a conviction for a crime of violence under § 16(b).¹¹⁷

2. Member Rosenberg's Dissent in *In re Puente-Salazar*

Board Member Lory Diana Rosenberg filed a dissenting opinion arguing that DUI is not necessarily a crime of violence under § 16(b) because DUI does not present a risk that physical force will be used in the course of committing the offense.¹¹⁸ She opined that the BIA inappropriately blurred the distinction between the substantial risk that physical force would be used in the course of the commission of the crime under § 16(b) and the risk of injury or harm that is required under the *Sentencing Guidelines'* definition of crime of violence.¹¹⁹ Member Rosenberg then reasoned that § 16(b) requires the substantial risk that physical force be *used*, not that there exists the risk of physical injury or harm.¹²⁰ Next, she argued that § 16(b)'s requirement that "force may be used" requires deliberate action taken by the offender.¹²¹ In addition, she argued that § 16(b)'s requirement that the force be used "in the

115. *Id.*

116. *Id.*

117. *Id.* slip op. at 14. Board Member Edward R. Grant filed a concurring opinion in which Board Member Lauri S. Filppu joined. *Id.* slip op. at 15 (Grant, concurring). Member Grant wrote separately to address in more detail the argument the alien raised regarding whether the "use of force" that § 16(b) requires must be the result of specific intent to use that force. *Id.* slip op. at 16 (Grant, concurring). Member Grant recognized that the Courts of Appeals for the Seventh and Third Circuits had, at the time that he was writing, suggested that DUI may not be a crime of violence under § 16(b) because the offense does not require specific intent to use force. *Id.* (Grant, concurring) (citing *United States v. Rutherford*, 54 F.3d 370, 377 (7th Cir. 1995); *United States v. Parson*, 955 F.2d 858, 866 (3d Cir. 1992)). Recognizing that the BIA's decision in *In re Puente-Salazar* was in tension with those Circuits and that the BIA's decision would have precedential effect in the entire nation, Member Grant desired to explain further why the BIA had determined that § 16(b) did not require specific intent to use force. *Id.* (Grant, concurring).

Member Grant opined that § 16(b)'s command to inquire into the "nature" of the offense shifts the focus away from the mens rea of the offender and to the generic nature of the offense. *Id.* slip op. at 17 (Grant, concurring). Member Grant opined that the BIA should focus on the *nature* of the offense, rather than on the mens rea of the offender because determining whether an offender had specific intent to use force would be speculative and unmanageable. *Id.* (Grant, concurring).

118. *Id.* slip op. at 19-20 (Rosenberg, dissenting).

119. *Id.* slip op. at 22-23 n.5 (Rosenberg, dissenting). Member Rosenberg noted that the majority in *In re Puente-Salazar* had conceded that the DUI conviction was not a crime of violence under § 16(a). *Id.* at 23 (Rosenberg, dissenting).

120. *Id.* slip op. at 24 (Rosenberg, dissenting).

121. *Id.* slip op. at 29 (Rosenberg, dissenting).

course of committing the offense” requires that the force be used to accomplish the criminal end.¹²² Finally, Member Rosenberg argued that the DUI statute under which the alien was convicted is a “divisible”¹²³ offense that may not constitute a crime of violence.¹²⁴

Arguing that the BIA erred in its decision in *In re Magallanes-Garcia*,¹²⁵ Member Rosenberg stated that the BIA overemphasized the nature of DUI in relation to the risk that injury might occur.¹²⁶ Member Rosenberg contended that the BIA should have focused on whether the nature of DUI includes a substantial risk that physical force may be used in the course of committing the offense, as required by the terms of § 16(b).¹²⁷

Member Rosenberg then argued that the “physical force” required by § 16(b) is more than the simple movement necessary to satisfy the operating requirement under the Texas DUI statute.¹²⁸ Citing *United States v. Rodriguez-Guzman*¹²⁹ and the definition of “force” included in *Black’s Law Dictionary*,¹³⁰ she stated that § 16(b)’s “physical force”

122. *Id.* slip op. at 30 (Rosenberg, dissenting).

123. A “divisible” statute “encompasses offenses that include as an element the use, attempted use, or threatened use of physical force against the person or property of another, as well as offenses that do not.” *In re Sweetser*, Interim Dec. No. 3390, File No. A30 437 320, slip op. at 6 (B.I.A. May 19, 1999) (citations omitted), available at <http://www.usdoj.gov/eoir/efoia/bia/Decisions/Revdec/pdfDEC/3390.pdf>. In *In re Sweetser*, the BIA held that “[w]here a statute under which an alien was convicted is divisible, [the BIA] look[s] to the record of conviction, and to other documents admissible as evidence in proving a criminal conviction, to determine whether the specific offense of which the alien was convicted” is a crime of violence under § 16. *Id.* slip op. at 7.

124. *In re Puente-Salazar*, Interim Dec. No. 3412, slip op. at 20-21 (Rosenberg, dissenting) (citing *In re Sweetser*, Interim Dec. No. 3390).

125. *In re Magallanes-Garcia*, Interim Dec. No. 3341, File No. A90 219 200 (B.I.A. Mar. 19, 1998), available at <http://www.usdoj.gov/eoir/efoia/bia/Decisions/Revdec/pdfDEC/3341.pdf>.

126. *In re Puente-Salazar*, Interim Dec. No. 3412, slip op. at 22 (Rosenberg, dissenting).

127. *Id.* slip op. at 30 (Rosenberg, dissenting).

128. *Id.* slip op. at 25 (Rosenberg, dissenting). Under the Texas DUI statute, a defendant “operates” a vehicle when he “perform[s] a function, or operation, or produce[s] an effect.” *Id.* (Rosenberg, dissenting) (quoting *Reddie v. State*, 736 S.W.2d 923, 926 (Tex. Crim. App. 1987)).

129. *United States v. Rodriguez-Guzman*, 56 F.3d 18, 20 n.8 (5th Cir. 1995). In *Rodriguez-Guzman*, the Fifth Circuit interpreted the word “force” in § 16(b) as “destructive or violent force.” *Id.*

130. Member Rosenberg quoted the definition of “force” as: “[p]ower, violence, compulsion, or constraint exerted upon or against a person or thing. . . . [S]trength directed to an end. Commonly the word occurs in such connections as to show that unlawful or wrongful action is meant.” *In re Puente-Salazar*, Interim Dec. No. 3412, slip op. at 25 (Rosenberg, dissenting) (alterations in original) (quoting BLACK’S LAW DICTIONARY 644 (6th ed. 1990)). Member Rosenberg also relied upon the definition of “physical force,” which *Black’s Law Dictionary* defines as “[f]orce applied to the body; actual violence.” *Id.* (Rosenberg, dissenting) (alterations in original) (quoting BLACK’S LAW DICTIONARY 1147 (6th ed. 1990)). Finally,

language requires violent or destructive physical force.¹³¹ Member Rosenberg also noted that under § 16(b), the verb “use” refers to the offender’s conduct and suggests that the offender must risk taking specific, violent action.¹³² Compiling cases construing the term “use” as requiring some sort of intentional conduct on the part of the offender,¹³³ Member Rosenberg urged that in order to satisfy the “use” requirement, the offender must have actively undertaken a course of action with the awareness that his conduct may result in the need to use force to perpetrate the crime.¹³⁴ Member Rosenberg thus concluded that DUI is not a crime of violence under § 16(b) because a drunk driver does not take deliberate action or create the risk of using force in order to complete the crime.¹³⁵

Member Rosenberg also argued that the Texas DUI statute does not satisfy § 16(b)’s requirement that the force be used “in the course of committing the offense.”¹³⁶ She reasoned that DUI does not involve a risk that force will be used “in the course of committing the offense” because DUI is committed at the point that the offender begins to operate the vehicle within the meaning of the DUI statute.¹³⁷

Finally, Member Rosenberg argued that the Texas DUI statute is divisible under the BIA’s decision in *In re Sweetser*¹³⁸ and that the BIA

Member Rosenberg also relied on the definition of “violence,” which *Black’s Law Dictionary* defines as:

“[u]njust or unwarranted exercise of force, usually with the accompaniment of vehemence, outrage, or fury . . . Physical force unlawfully exercised; abuse of force; that force which is employed against common right, against the laws, and against public liberty. . . . The exertion of any physical force so as to injure, damage or abuse.”

Id. (Rosenberg, dissenting) (alterations in original) (quoting BLACK’S LAW DICTIONARY 1570-71 (6th ed. 1990)).

131. *Id.* (Rosenberg, dissenting).

132. *Id.* slip op. at 26 (Rosenberg, dissenting).

133. *Id.* (Rosenberg, dissenting) (citing *Bailey v. United States*, 516 U.S. 137, 148 (1995)) (holding that “use” requires more than mere possession of a firearm by a person who commits a drug offense); *see also* *Smith v. United States*, 508 U.S. 223, 228-29 (1993) (quoting dictionary definitions of “use” suggesting intentional conduct is implied by the term); *United States v. Rutherford*, 54 F.3d 370, 372 (7th Cir. 1995) (stating that “use” implies intentional availment); *United States v. Parson*, 955 F.2d 858, 866 (3d Cir. 1992) (stating that “[u]se of physical force is an intentional act” requiring specific intent to use force).

134. *In re Puente-Salazar*, Interim Dec. No. 3412, slip op. at 28 (Rosenberg, dissenting) (citing *Bailey*, 516 U.S. at 144).

135. *Id.* slip op. at 29 (Rosenberg, dissenting).

136. *Id.* (Rosenberg, dissenting).

137. *Id.* slip op. at 30 (Rosenberg, dissenting).

138. *In re Sweetser*, Interim Dec. No. 3390, File No. A30 437 320 (B.I.A. May 19, 1999), available at <http://www.usdoj.gov/eoir/efoia/bia/Decisions/Revdec/pdfDEC/3390.pdf>. In *In re Sweetser*, the BIA held that when a statute under which an alien was convicted is divisible, it will look to the record of conviction to determine whether the offense is a crime of violence under §

should have looked into the underlying factual circumstances of the alien's conviction instead of applying the categorical approach.¹³⁹ Member Rosenberg argued that the Texas DUI statute is divisible because it criminalizes both operating and driving a vehicle, and because the alien's record of conviction does not disclose whether the alien had been convicted based on "driving" or "operating" a vehicle while under the influence.¹⁴⁰ Because the record of conviction presented to the BIA on appeal did not contain specific information about the underlying factual circumstances of the conviction, Member Rosenberg contended that the BIA should have determined the minimal course of conduct necessary to constitute the offense.¹⁴¹ Member Rosenberg ultimately concluded that the minimum conduct required in order to sustain a conviction under the Texas DUI statute at issue does not satisfy the definition of crime of violence under § 16(b) because merely "operating" a vehicle does not present a risk of the use of force.¹⁴²

III. DISCUSSION

The Courts of Appeals are split over whether DUI presents a risk that the offender will "use" force within the meaning of § 16(b). The Tenth Circuit has held that DUI is a crime of violence under § 16(b) and that a drunk driver risks the use of force in the course of committing the offense.¹⁴³ The Second, Fifth, Seventh, and Ninth Circuits have held that DUI is not a crime of violence under § 16(b) because § 16(b) requires volitional conduct that DUI generally does not satisfy.¹⁴⁴ Specifically, the Second, Fifth, and Seventh Circuits require that the offense include a risk that the offender will intentionally use force

16. *Id.* slip op. at 6; *see also supra* note 123 and accompanying text (providing further explanation of divisible statutes).

139. *See In re Puente-Salazar*, Interim Dec. No. 3412, slip op. at 32-33 (Rosenberg, dissenting).

140. *Id.* slip op. at 33-34 (Rosenberg, dissenting).

141. *Id.* slip op. at 34 (Rosenberg, dissenting) (citing *In re Sweetser*, Interim Dec. No. 3390).

142. *Id.* slip op. at 35 (Rosenberg, dissenting).

143. *See Tapia Garcia v. INS*, 237 F.3d 1216, 1222 (10th Cir. 2001); *see also infra* notes 147-67 and accompanying text (discussing the Tenth Circuit's decision in *Tapia Garcia*). The BIA is in accord with the Tenth Circuit's determination that DUI is a crime of violence under § 16(b). *See, e.g., In re Puente-Salazar*, Interim Dec. No. 3412. As noted in Part I, the Eleventh Circuit determined that a DUI-related offense is a crime of violence under § 16(a). *See Le v. U.S. Att'y Gen.*, 196 F.3d 1352, 1354 (11th Cir. 1999) (*per curiam*); *see also supra* note 21 (discussing *Le*). Whether DUI-related offenses are crimes of violence under § 16(a) is beyond the scope of this Comment.

144. *See supra* note 20 (explaining the holdings of the Second, Fifth, Seventh and Ninth Circuits).

against the person or property of another.¹⁴⁵ The Ninth Circuit, however, requires that the offense present a risk that the offender will intentionally or recklessly apply force against another in the course of committing the offense.¹⁴⁶

A. *Tapia Garcia v. INS: DUI is a Crime of Violence Under § 16(b)*

In *Tapia Garcia v. INS*,¹⁴⁷ the Tenth Circuit held that DUI could be a crime of violence under § 16(b) because the generic elements of DUI present a substantial risk that physical force may be used.¹⁴⁸ The *Tapia Garcia* court did not specifically address whether the verb “use” included in § 16(b) implied that the offender must risk committing an intentional act of force.¹⁴⁹ In this case, the alien had been convicted in Idaho of DUI.¹⁵⁰ An immigration judge concluded that the alien’s conviction for DUI was a crime of violence under § 16(b) and ordered the alien removed.¹⁵¹ The alien subsequently appealed to the BIA, and the BIA dismissed the appeal.¹⁵²

The court reviewed the BIA’s interpretation of “immigration statutes” applying the *Chevron*¹⁵³ deference. The court stated that because § 16(b) is subject to differing interpretations, the court would defer to the

145. *Dalton v. Ashcroft*, 257 F.3d 200, 208 (2d Cir. 2001) (holding that a New York conviction for operating a vehicle while intoxicated is not a conviction of a crime of violence under § 16); *United States v. Chapa-Garza*, 243 F.3d 921, 928 (5th Cir.) (per curiam) (holding that a Texas conviction for driving while intoxicated is not a conviction of a crime of violence under § 16), *reh’g denied*, 262 F.3d 479 (5th Cir. 2001); *Bazan-Reyes v. INS*, 256 F.3d 600, 612 (7th Cir. 2001) (holding that an Indiana conviction for operating a vehicle while intoxicated, a Wisconsin conviction for homicide by intoxicated use of a vehicle, and an Illinois conviction for driving under the influence were not convictions for “crimes of violence” under § 16).

146. *United States v. Trinidad-Aquino*, 259 F.3d 1140, 1146 (9th Cir. 2001).

147. *Tapia Garcia*, 237 F.3d 1216.

148. *Id.* at 1223.

149. *See id.*

150. *Id.* at 1217. At the time, the Idaho DUI statute provided in relevant part:

It is unlawful for any person who is an habitual user of, or under the influence of any narcotic drug, or who is under the influence of any other drug or any combination of alcohol and any other drug to a degree which impairs the driver’s ability to safely operate a motor vehicle within this state, whether upon a highway, street or bridge, or upon public or private property open to public use.

Id. at 1221 n.5 (quoting IDAHO CODE §18-8004(5) (Michie 1999)). “In order for an offense under this section to qualify as a felony, the defendant must have pled guilty or been found guilty of two previous violations for driving under the influence within five years.” *Id.* (citing IDAHO CODE § 18-8005(5) (Michie 1999)).

151. *Id.* at 1217.

152. *Id.* The BIA agreed with the immigration judge that the alien’s DUI conviction constituted a crime of violence under § 16(b). *Id.*

153. *Id.* at 1220; *see also Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984); *supra* note 65 (describing the *Chevron* deference owed to the BIA).

BIA if it had reasonably interpreted the statute.¹⁵⁴ In determining whether the alien's conviction for DUI was a crime of violence under § 16(b), the court applied the categorical approach, considering only the generic elements of the offense and refusing to look into the underlying factual circumstances of the conviction.¹⁵⁵ The court noted that the BIA also applied a categorical approach to determine whether an offense is a crime of violence under § 16(b) and did not inquire into the factual circumstances of the underlying conviction.¹⁵⁶ The court then summarized the BIA's decision in *In re Puente-Salazar*,¹⁵⁷ and stated that the BIA emphasized that the definition of crime of violence under § 16(b) does not require intentional conduct.¹⁵⁸

The court then held that the BIA reasonably construed § 16(b) as including the offense of DUI, finding support for this holding in other federal decisions interpreting the definition of crime of violence under the *Sentencing Guidelines*.¹⁵⁹ The court stated that these cases

154. *Tapia Garcia*, 237 F.3d at 1220-21. In addition to determining whether DUI is a crime of violence under § 16(b), the court also determined that the alien's appeal was not moot because his deportation had "collateral consequences" making his case a controversy cognizable on appeal. *Id.* at 1218. At the time of the appeal, the alien had already been deported and resided in Mexico. *Id.* at 1217. The court held that although the alien was "no longer subject to deportation and [was] not being detained by the INS," his appeal was not moot because of the collateral consequences of his deportation. *Id.* at 1218. The alien's "removal and status as an aggravated felon render him permanently inadmissible" unless certain unlikely requirements are met and this "inability to reenter and reside legally in the United States with his family is a collateral consequence of his deportation because it is clearly a concrete disadvantage imposed as a matter of law." *Id.* Finally, the court also held that it retained jurisdiction to determine whether the INA's jurisdictional bar applied. *Id.* at 1218-20; *see also supra* note 70 and accompanying text (discussing the amendments to the INA limiting judicial review of final orders of removal in certain cases). That is, the court retained jurisdiction to determine whether the petitioner was an alien deportable for committing an aggravated felony. *Tapia Garcia*, 237 F.3d at 1218-20.

155. *Tapia Garcia*, 237 F.3d at 1221-22 (citing; *Lopez-Elias v. Reno*, 209 F.3d 788, 791 (5th Cir. 2000); *United States v. Reyes-Castro*, 13 F.3d 377, 379 (10th Cir. 1993)); *see also supra* note 36 (discussing the categorical approach as it is applied by the BIA in the context of § 16).

156. *Tapia Garcia*, 237 F.3d at 1222 (citing *In re Magallanes-Garcia*, Interim Dec. No. 3341, File No. A90 219 200 (B.I.A. Mar. 19, 1998), available at <http://www.usdoj.gov/eoir/efoia/bia/Decisions/Revdec/pdfDEC/3341.pdf>).

157. *In re Puente-Salazar*, Interim Dec. No. 3412, File No. A36 582 517 (B.I.A. Sept. 29, 1999), available at <http://www.usdoj.gov/eoir/efoia/bia/Decisions/Revdec/pdfDEC/3412.pdf>; *see also supra* notes 91-142 and accompanying text (discussing *In re Puente-Salazar*, Interim Dec. No. 3412).

158. *Tapia Garcia*, 237 F.3d at 1222 (citing *In re Puente-Salazar*, Interim Dec. No. 3412).

159. *Id.* (citing *United States v. DeSantiago-Gonzalez*, 207 F.3d 261, 264 (5th Cir. 2000); *United States v. Farnsworth*, 92 F.3d 1001, 1008-09 (10th Cir. 1996); *United States v. Rutherford*, 54 F.3d 370, 376 (7th Cir. 1995)). Since the *Tapia Garcia* decision, two of the three circuits that decided these cases have held that DUI is not a crime of violence under § 16. *See Bazan-Reyes v. INS*, 256 F.3d 600 (7th Cir. 2001); *United States v. Chapa-Garza*, 243 F.3d 921, 924 (5th Cir.) (per curiam), *reh'g denied*, 262 F.3d 479 (5th Cir. 2001). In addition, the Fifth Circuit's decision in *DeSantiago-Gonzalez* expressly recognized that the interpretation of crime

recognized the inherent danger involved in the offense of DUI.¹⁶⁰ The court noted that the definition of crime of violence at issue in those cases¹⁶¹ differed slightly from the definition of crime of violence under § 16(b).¹⁶² Despite the differing definitions, the court followed the reasoning of those cases by applying the *Sentencing Guidelines*' definition of crime of violence.¹⁶³ The court relied on prior Tenth Circuit precedent, finding the rationale of a case interpreting § 16(b) persuasive in analyzing whether an offense constitutes a crime of violence under the *Sentencing Guidelines*.¹⁶⁴ Noting the inherent danger involved in DUI and relying on cases finding that DUI is a crime of violence under the *Sentencing Guidelines*' definition, the court held that a DUI offense may constitute a crime of violence under § 16(b) because the generic elements of DUI present "a substantial risk that physical force . . . may be used."¹⁶⁵ After determining that the alien's conviction was a crime of violence under § 16(b) and, therefore, an "aggravated felony" under the INA, the court dismissed the alien's appeal for lack of jurisdiction.¹⁶⁶

B. The Second, Fifth, Seventh, and Ninth Circuit Decisions Holding that DUI is not a Crime of Violence Under § 16(b)

Since the Tenth Circuit held that DUI is a crime of violence under § 16(b),¹⁶⁷ four Courts of Appeals have held that DUI is not a crime of violence under § 16(b).¹⁶⁸ Each of these courts found that the inclusion

of violence under § 16 was not controlling for the purposes of interpreting the *Sentencing Guidelines*. See *infra* note 187 (discussing the Fifth Circuit's reference to *DeSantiago-Gonzalez* in its interpretation of § 16).

160. *Tapia Garcia*, 237 F.3d at 1222.

161. Those cases were interpreting the definition of crime of violence under the *Sentencing Guidelines*, which includes "conduct that presents a serious potential risk of physical injury to another." See U.S. SENTENCING GUIDELINES MANUAL § 4B1.2 (2001). In addition, "the commentary accompanying [the *Sentencing Guidelines*] defines crime of violence in part as an offense involving 'by its nature . . . a serious potential risk of physical injury to another.'" *Tapia Garcia*, 237 F.3d at 1223 n.6 (quoting U.S. SENTENCING GUIDELINES MANUAL § 4B1.2, cmt. 2).

162. *Tapia Garcia*, 237 F.3d at 1222-23; see also *supra* notes 58-63 and accompanying text (discussing the evolution of the definition of crime of violence under the *Sentencing Guidelines*).

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

164. *Id.* (citing *United States v. Coronado-Cervantes*, 154 F.3d 1242, 1244 (10th Cir. 1998)).

165. *Id.*

166. *Id.*; see also *supra* note 70 and accompanying text (discussing an alien's inability to seek judicial review of a final order of removal where the alien is convicted of an aggravated felony).

167. *Tapia Garcia*, 237 F.3d at 1223; see also *supra* notes 147-66 and accompanying text (discussing the Tenth Circuit's decision in *Tapia Garcia*).

168. See *United States v. Trinidad-Aquino*, 259 F.3d 1140, 1146 (9th Cir. 2001) (holding that DUI with injury to another is not a crime of violence under § 16); *Dalton v. Ashcroft*, 257 F.3d 200, 206 (2d Cir. 2001) (holding that DUI is not a crime of violence under § 16); *Bazan-Reyes v.*

of the verb “use” in § 16(b)’s definition of crime of violence implied that an offender must risk the volitional use of force in order to commit a crime of violence.¹⁶⁹ Each court held that DUI is not a crime of violence because a drunk driver does not risk the use of volitional force in the course of committing the offense.¹⁷⁰ The Second, Fifth, and Seventh Circuits held that in order for an offense to be a crime of violence under § 16(b), the offender must risk the use of intentional force.¹⁷¹ In contrast, the Ninth Circuit held that an offense could meet § 16(b)’s definition of crime of violence where an offender risks recklessly applying force against another in the course of committing the crime.¹⁷²

1. *Chapa-Garza*: The Fifth Circuit Holds that DUI is not a Crime of Violence

Citing three reasons, the Fifth Circuit determined that felony Texas DUI is not a crime of violence under § 16(b).¹⁷³ First, holding that DUI

INS, 256 F.3d 600, 612 (7th Cir. 2001) (holding that DUI and homicide by intoxicated use of a vehicle are not crimes of violence under § 16); *United States v. Chapa-Garza*, 243 F.3d 921, 924 (5th Cir.) (per curiam) (holding that DUI is not a conviction of a crime of violence under § 16), *reh’g denied*, 262 F.3d 479 (5th Cir. 2001). In addition, the Third Circuit, in dictum, has suggested that it too would hold that DUI is not a crime of violence under § 16. *See United States v. Parson*, 955 F.2d 858 (3d Cir. 1992).

169. *See Trinidad-Aquino*, 259 F.3d at 1146; *Dalton*, 257 F.3d at 206; *Bazan-Reyes*, 256 F.3d at 612; *Chapa-Garza*, 243 F.3d at 924.

170. *Trinidad-Aquino*, 259 F.3d at 1146; *Dalton*, 257 F.3d at 206; *Bazan-Reyes*, 256 F.3d at 612; *Chapa-Garza*, 243 F.3d at 924.

171. *Dalton*, 257 F.3d at 206; *Bazan-Reyes*, 256 F.3d at 612; *Chapa-Garza*, 243 F.3d at 924.

172. *Trinidad-Aquino*, 259 F.3d at 1146.

173. *Chapa-Garza*, 243 F.3d at 924. Judge Barksdale filed an opinion dissenting from the denial of rehearing. *United States v. Chapa-Garza*, 262 F.3d 479, 480 (5th Cir. 2001) (Barksdale, J., dissenting). Judge Jones concurred in Judge Barksdale’s dissent “to the extent that the difficulty of statutory construction in [the] case and the far-reaching significance of the panel decision should have motivated [the] court to rehear [the] case en banc.” *Id.* at 480 n.1 (Barksdale, J., dissenting). Judge Barksdale opined that the court erroneously held that felony DUI is not a crime of violence under § 16(b) and that the court should have reheard the case because it was an issue of national importance. *Id.* at 480-81 (Barksdale, J., dissenting).

Judge Barksdale agreed that the categorical approach was proper for determining whether an offense is a crime of violence under § 16(b), but argued that the *Chapa-Garza* court reached the wrong result by parsing the language of § 16 and overlooking the common-sense meaning of the statutory language. *Id.* at 482 (Barksdale, J., dissenting). For Judge Barksdale, the distinction between the “risk of injury” language contained in the *Sentencing Guidelines*’ definition of crime of violence and the “risk of force” language contained in § 16(b) was immaterial because the distinction merely distinguishes the cause from the effect. *Id.* at 481 (Barksdale, J., dissenting).

Judge Barksdale opined that the verb “use” does not require intentional conduct, stating that it is possible to unintentionally use force. *Id.* at 482 (Barksdale, J., dissenting). Judge Barksdale stated that the verb “use” in combination with the phrase “substantial risk” suggests that an offender can commit a crime of violence without intending to use force. *Id.* (Barksdale, J.,

is a crime of violence under § 16(b) would require that the provision be construed in the same way as the significantly broader definition of crime of violence contained in the *Sentencing Guidelines*.¹⁷⁴ Second, the court determined that because § 16(b) requires that, to be a crime of violence, an offense include a substantial risk that physical force may be used, an offender must recklessly disregard the probability that intentional force may be employed.¹⁷⁵ The court held that the offense of DUI does not meet this requirement.¹⁷⁶ Third, the physical force described in § 16(b) is the force that is “used in the course of committing the offense” and not the force that may be a result of the offense.¹⁷⁷

dissenting). Relying on a list of synonyms for the verb “use,” Judge Barksdale stated that one can unintentionally use force. *Id.* at 482 n.2 (Barksdale, J., dissenting) (citing WEBSTER’S THIRD INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED (1986)). Also, Judge Barksdale found the burglary analogy advanced in *United States v. Parson*, and quoted in *Chapa-Garza*, unpersuasive because the dangers presented by the offense of burglary arise from intentional acts, while the dangers involved in DUI result from unintentional acts. *Id.* at 483 (Barksdale, J., dissenting) (citing *United States v. Parson*, 955 F.2d 858 (3d Cir. 1992)). Judge Barksdale further stated that a drunk driver can foresee the substantial risk of the potential use of force during the commission of DUI. *Id.* (Barksdale, J., dissenting).

Judge Barksdale also found error in the *Chapa-Garza* court’s interpretation of § 16(b)’s requirement that the force be used “in the course of committing the offense.” *Id.* at 483-84 (Barksdale, J., dissenting). Judge Barksdale opined that § 16(b) did not refer to the force required in order to complete the offense, but rather referred to the force used while completing the offense. *Id.* at 484 (Barksdale, J., dissenting). Finally, Judge Barksdale stated that in order to be convicted of felony DUI under the Texas statute, the offender must have committed at least three DUI offenses. *Id.* (citing TEX. PENAL CODE ANN. § 49.09(b) (Vernon 1997)). Judge Barksdale opined that although not every DUI may be a crime of violence under § 16(b), a felony DUI is a crime of violence because an offender who has been arrested three times for DUI presents a real and great risk to society. *Id.* (Barksdale, J., dissenting).

174. *Chapa-Garza*, 243 F.3d at 924. The *Sentencing Guidelines* defines crime of violence similarly, but not identically to the definition of crime of violence under § 16. See U.S. SENTENCING GUIDELINES MANUAL § 4B1.2(a) (2001); *supra* notes 58-63 and accompanying text (discussing the evolution of the definition of crime of violence under the *Sentencing Guidelines*).

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

176. *Id.*

177. *Id.* The court decided *Chapa-Garza* less than eight months after it withdrew its opinion in *Camacho-Marroquin v. INS*. See *Camacho-Marroquin v. INS*, 188 F.3d 649 (5th Cir. 1999), *withdrawn*, 222 F.3d 1040 (5th Cir. 2000). In *Camacho-Marroquin*, the court held that DUI is a crime of violence under § 16(b), relying on “the federal courts’ recognition of the substantial risk that force may be used by drunk drivers.” *Camacho-Marroquin*, 188 F.3d at 652 (citing *Mich. Dep’t of State Police v. Sitz*, 496 U.S. 444, 451 (1990) (noting that drunk drivers annually cause over 25,000 deaths, approximately one million personal injuries, and more than \$5 billion in property damage); *United States v. Rutherford*, 54 F.3d 370, 376 (7th Cir. 1995) (“Drunk driving, by its nature, presents a serious risk of physical injury.”)). The *Chapa-Garza* court acknowledged that it had previously decided that DUI is a crime of violence, but refused to follow the withdrawn opinion. *Chapa-Garza*, 243 F.3d at 924. The court withdrew *Camacho-Marroquin* “at the alien’s request to enable the [INS] to proceed with his deportation in lieu of incarceration.” *Kemper*, *supra* note 68, at 611.

In *United States v. Chapa-Garza*, the court reviewed the consolidated appeal of five aliens who pled guilty to unlawfully being in the United States after removal.¹⁷⁸ The aliens appealed the district courts' imposition of longer sentences under the *Sentencing Guidelines*.¹⁷⁹ They argued that the district courts incorrectly determined that felony DUI is a crime of violence under § 16(b), thus subjecting them to longer sentences under the *Sentencing Guidelines*.¹⁸⁰ The court reviewed the district courts' interpretation of the *Sentencing Guidelines* de novo.¹⁸¹ The court focused on the definition of crime of violence contained in § 16(b), stating that it was the only justification for the increased sentences that each alien received.¹⁸² Noting § 16(b)'s "by its nature" language, the court applied the categorical approach to determine whether Texas felony DUI is a crime of violence under § 16(b).¹⁸³

The court refused to interpret § 16(b)'s definition of crime of violence in the same way that the Seventh Circuit had interpreted the *Sentencing Guidelines*' definition of the term.¹⁸⁴ The court noted that

178. *Chapa-Garza*, 243 F.3d at 923. Unlawfully remaining in the United States after removal is a violation of 8 U.S.C. § 1326(a). *Id.*

179. *Id.* The district courts in all of the underlying proceedings had sentenced each alien to a longer sentence under the *Sentencing Guidelines*. *Id.* (citing U. S. SENTENCING GUIDELINES MANUAL § 2L1.2 (1998)). Under § 2L1.2, an alien is subject to a longer sentence for unlawfully being in the United States after removal therefrom, where removal from the United States was preceded by an "aggravated felony" as defined in 8 U.S.C. § 1101(a)(43). *Id.* In each case, the district court had determined that the aliens' prior convictions for Texas felony DUI were crimes of violence under § 16(b) and applied the increased sentences called for in § 2L1.2. *Id.*

180. *Id.* The aliens also argued that the Supreme Court's recent decision in *Apprendi v. New Jersey* put into doubt the continuing vitality of the Supreme Court's earlier decision in *Almendarez-Torres v. United States*. *Id.* at 923-24 (citing *Apprendi v. New Jersey*, 530 U.S. 466 (2000); *Almendarez-Torres v. United States*, 523 U.S. 224 (1998)). In *Almendarez-Torres*, the Supreme Court "held that the enhanced penalties contained in [8 U.S.C. §] 1326(b) were mere sentencing factors and not elements of a separate offense." *Id.* at 928 (citing *Almendarez-Torres*, 523 U.S. at 235). The aliens argued "that Justice Thomas, one of the five justices who joined in the Supreme Court's *Almendarez-Torres* opinion, may no longer support its holding." *Id.* (citing *Apprendi*, 530 U.S. at 520 (Thomas, J., concurring)). If the enhanced penalties contained in 8 U.S.C. § 1326(b) were elements of a separate offense, the aliens argued, then "the fact that triggers the higher maximum sentence . . . [must be] alleged in the indictment." *Id.* at 924. Holding that the *Almendarez-Torres* decision "is not overruled unless and until the United States Supreme Court says it is," the court rejected the aliens' argument that the *Apprendi* decision prevented "them from being sentenced to a term of imprisonment of more than two years." *Id.* at 928.

181. *Id.* at 924 (citing *United States v. Cho*, 136 F.3d 982, 983 (5th Cir. 1998)).

182. *Id.*

183. *Id.*; see also *supra* note 36 (providing a more detailed discussion of the categorical approach).

184. *Chapa-Garza*, 243 F.3d at 925 (citing *United States v. Rutherford*, 54 F.3d 370 (7th Cir. 1995)); see also *supra* note 58 (quoting the *Sentencing Guidelines*' definition of crime of violence).

the Seventh Circuit held that DUI is a crime of violence under the *Sentencing Guidelines*' definition because DUI is an inherently reckless act that often results in physical injury.¹⁸⁵ Comparing the definition of crime of violence included in the *Sentencing Guidelines* with the definition found in § 16(b), the court emphasized that the *Sentencing Guidelines*' definition only requires that the offense involve conduct that presents a serious risk of physical injury to another person.¹⁸⁶ In contrast, § 16(b) requires that there be a substantial risk that the offender will use physical force against the person or property of another in the course of committing the offense.¹⁸⁷ The court also noted that, prior to 1989, the *Sentencing Guidelines* incorporated § 16's definition of crime of violence by reference, but that the Sentencing Commission had since amended the *Sentencing Guidelines*' definition of crime of violence.¹⁸⁸ The court stated that this amendment counseled against interpreting the definitions under § 16(b) and the *Sentencing Guidelines* in the same way.¹⁸⁹

The court also held that DUI is not a crime of violence under § 16(b) because § 16(b)'s definition includes only those offenses in which there is a substantial likelihood that the offender will intentionally employ physical force.¹⁹⁰ The court read § 16(b) as requiring a risk of intentional conduct, not accidental or unintended events.¹⁹¹ In so holding, the court focused on the inclusion of the verb "use" in § 16(b)'s definition of crime of violence.¹⁹² Relying on the dictionary definition of the verb "use," the court determined that "use" refers to "volitional, *purposeful*, not accidental, employment of whatever is being 'used.'"¹⁹³ The court also noted that its understanding of "use" under §

185. *Chapa-Garza*, 243 F.3d at 925 n.7 (quoting *Rutherford*, 54 F.3d at 376-77).

186. *Id.* at 925.

187. *Id.* The court also discussed its previous decision in *United States v. DeSantiago-Gonzalez*, in which the court recognized that the definitions of crime of violence found in § 16 and the *Sentencing Guidelines* were "similar . . . but not identical" and that the interpretation of one did not control the interpretation of the other. *Id.* at 925-26 (quoting *United States v. DeSantiago-Gonzalez*, 207 F.3d 261, 264 (5th Cir. 2000)).

188. *Id.* at 926.

189. *Id.* The court, however, failed to note that the Sentencing Commission had stated that the change was meant to clarify the terminology rather than to effect a substantive change in the definition of crime of violence. See *supra* note 59 and accompanying text (discussing the Sentencing Commission's reasons for revising the *Sentencing Guidelines*' definition of "crime of violence").

190. *Chapa-Garza*, 243 F.3d at 926.

191. *Id.*

192. *Id.*

193. *Id.* (emphasis added). The definition of the verb "use" that the court relied on was:

16(b) was in accord with the Third Circuit's opinion in *United States v. Parson*¹⁹⁴ and quoted at length from the discussion in *Parson*, which compared and contrasted § 16(b)'s definition of crime of violence with the *Sentencing Guidelines*' definition of crime of violence.¹⁹⁵

Finally, the court held that the force necessary to satisfy § 16(b) is the force necessary to perpetrate the offense.¹⁹⁶ The court focused on §

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

Id. (quotations omitted) (quoting THE AMERICAN HERITAGE COLLEGE DICTIONARY (3d ed. 1997)).

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

195. *Chapa-Garza*, 243 F.3d at 926 (citing *Parson*, 955 F.2d at 866). In *Parson*, the Third Circuit compared the definition of crime of violence contained in the *Sentencing Guidelines* with § 16(b)'s definition of crime of violence. *Parson*, 955 F.2d at 863-67. The court emphasized that the revised definition included in the *Sentencing Guidelines* mixes the "use of force" language included in § 16(b) with the "risk of physical injury" language. *Id.* at 865-66. The court noted that the first branch of the revised *Sentencing Guidelines*' definition of crime of violence "retains the focus on 'use of physical force' . . . categorically includ[ing] offenses having 'as an element the use, attempted use, or threatened use of physical force.'" *Id.* at 866. The court stated that the use of physical force is an intentional act and suggested that the definition of crime of violence under § 16(b) requires that an offender must be willing to risk committing a crime of specific intent in order to complete the offense. *See id.* The distinction is a crucial one that has been discussed in later cases. *See, e.g., Chapa-Garza*, 243 F.3d at 924. The Third Circuit expanded on the difference between the "use of force" language included in § 16(b) and the "risk of physical injury" language included in the *Sentencing Guidelines*:

At first blush, the difference in phrasing appears trivial because most physical injury comes from the use of physical force. But the distinction is significant. Use of physical force is an intentional act, and therefore the first prong of both definitions requires specific intent to use force. As to the second prong of the original definition, a defendant's commission of a crime that, by its nature, is likely to require force similarly suggests a willingness to risk having to commit a crime of specific intent. For example, a burglar of a dwelling risks having to use force if the occupants are home and hear the burglar. In such a case, the burglar has a mens rea legally nearly as bad as a specific intent to use force, for he or she recklessly risks having to commit a specific intent crime.

In contrast, under the second prong of the revised definition, criminals whose actions merely risk causing physical injury may have a lower mens rea of "pure" recklessness: they may lack an intent, desire or willingness to use force or cause harm at all. For example, a parent who leaves a young child unattended near a pool may risk serious injury to the child, but the action does not involve an intent to use force or otherwise harm the child. Similarly, a drunk driver risks causing severe injury to others on the road or in the car, but in most cases he or she does not intend to use force to harm others.

Parson, 955 F.2d at 866; *see also supra* note 46 (defining and discussing "mens rea" and "specific intent").

196. *Chapa-Garza*, 243 F.3d at 927 (quoting *United States v. Velazquez-Overa*, 100 F.3d 418, 422 (5th Cir. 1996)). In *Velazquez-Overa*, the court "held that the crime of indecency with a child involving sexual contact was a crime of violence as defined in 18 U.S.C. § 16(b) because it

16(b)'s requirement that the risked force be "used in the course of committing the offense."¹⁹⁷ DUI does not present a risk that the offender will use force in the course of committing the offense; rather DUI presents a risk that force may result from the commission of the offense.¹⁹⁸

The court concluded by holding that a drunk driver does not risk the intentional use of force against the person or property of another by driving under the influence.¹⁹⁹ Rather, the risk that a drunk driver takes is the risk of getting into an accident with the person or property of another.²⁰⁰ Any physical force that is the result of an accident with a drunk driver has not been intentionally "used" against the other person, and was not "used" in order to perpetrate the offense.²⁰¹

2. *Bazan-Reyes v. INS*: The Seventh Circuit Holds that a Crime of Violence Requires "Volitional Conduct" not Present in the Offense of DUI

In *Bazan-Reyes v. INS*,²⁰² the Seventh Circuit found that DUI is not a crime of violence under § 16(b) because a drunk driver does not risk the intentional use of force within the meaning of the provision.²⁰³ The court found that, in order to be a crime of violence under § 16(b), the offender must risk the intentional use of physical force in the course of committing the offense.²⁰⁴ The Seventh Circuit primarily relied on its

was likely that the perpetrator would find it necessary to use physical force to 'ensure the child's compliance' and 'perpetrate the crime.'" *Id.* (quoting *Velazquez-Overa*, 100 F.3d at 422).

197. *Id.* at 924.

198. *Id.*

199. *Id.* at 927.

200. *Id.*

201. *Id.* In so holding, the court noted that its decision was compatible with its earlier decision in *United States v. Galvan-Rodriguez*, in which it "held that unauthorized use of another's motor vehicle, or joy riding, was a crime of violence as defined by section 16(b)." *Id.* (citing *United States v. Galvan-Rodriguez*, 169 F.3d 217, 219 (5th Cir. 1999)). The court stated that the holdings were consistent because "there is a substantial risk that physical force will be used against a vehicle in order to obtain the unauthorized access to it that is necessary for the commission of the offense of joy riding." *Id.* at 928. Section 16(b) embraces offenses that involve "a substantial risk that physical force against the person or *property* of another may be used in the course of committing the offense." 18 U.S.C. § 16(b) (2000) (emphasis added).

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

203. *Id.* at 612.

204. *See id.* In addition, the court noted that intentional force used by the offenders to open the car door or press the accelerator "does not constitute the use of physical force as required by" § 16(b) because the "physical force" used must be "actual violent force." *Id.* at 611 (following *Solorzano-Patlan v. INS*, 207 F.3d 869 (7th Cir. 2000)).

decision in *United States v. Rutherford*,²⁰⁵ the Third Circuit's dicta in *United States v. Parson*,²⁰⁶ and the Fifth Circuit's decision in *United States v. Chapa-Garza*²⁰⁷ in holding that DUI is not a crime of violence

205. *United States v. Rutherford*, 54 F.3d 370 (7th Cir. 1995). In *Rutherford*, the Seventh Circuit held that DUI is a crime of violence under the *Sentencing Guidelines*. *Id.* at 376-77. In *Rutherford*, the Seventh Circuit reviewed the district court's determination that the defendant's Alabama conviction for first-degree assault, which includes DUI with causing serious bodily injury to another, was a crime of violence under the *Sentencing Guidelines*. *Id.* at 371-72.

The court focused on what level of mens rea the *Sentencing Guidelines*' definition of crime of violence requires. *See id.* at 372-74 (citing U.S. SENTENCING GUIDELINES MANUAL § 4B1.2(1)(i)(ii)). The defendant argued that the inclusion of the word "use" in the first prong of the definition of crime of violence under the *Sentencing Guidelines* implies that the defendant must perform an intentional act. *See id.* at 372 (discussing U.S. SENTENCING GUIDELINES MANUAL § 4B1.2(1)(i)). Drawing on the dictionary definitions of "use," the court agreed and found that the verb "use" implies "intentional availment." *Id.* at 372-73 n.6 (citing WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 1299 (1986); 19 THE OXFORD ENGLISH DICTIONARY 350 (2d ed. 1989)). The court noted that a drunk driving accident is generally not the result of a plan, but rather is usually the result of recklessness. *See id.* at 372. It also noted that in everyday English, few would say that a drunk driver who caused an accident "used" his car to cause harm or hurt someone. *Id.* This interpretation of the first prong of the definition of crime of violence under the *Sentencing Guidelines* accords with the interpretation of two other courts that have discussed the definition. *Id.* at 373 (citing *United States v. Young*, 990 F.2d 469, 471 (9th Cir. 1993); *United States v. Parson*, 955 F.2d 858, 866 (3d Cir. 1992)).

The court went on to determine whether vehicular assault is a crime of violence under the second prong of the *Sentencing Guidelines*' definition. *See id.* at 374-77 (discussing U.S. SENTENCING GUIDELINES MANUAL § 4B1.2(1)(ii)). The defendant argued that crimes of recklessness should not be considered crimes of violence and that the conduct underlying his assault conviction did not create a "serious potential risk of physical injury to another" within the meaning of the *Sentencing Guidelines*. *See id.* at 374. The court rejected both of the defendant's arguments and held that the defendant's conviction was a crime of violence under the second prong of the definition, affirming the district court's decision to apply an increased sentence. *See id.* at 374, 377. The court rejected the defendant's first argument, stating that the second prong of the amended definition of crime of violence includes some reckless criminal acts that are dangerous. *Id.* at 374 (citing *United States v. Rutledge*, 33 F.3d 671, 674 (6th Cir. 1994); *Parson*, 955 F.2d at 861, 873). Addressing the defendant's second argument, the court found that by driving under the influence, the defendant "presented a serious potential risk of physical injury to another" within the meaning of the *Sentencing Guidelines*. *Id.* at 376 (citing U.S. SENTENCING GUIDELINES MANUAL § 4B1.2(1)(ii)). Because drunk driving is a reckless act that frequently results in injury, the court held that the defendant's Alabama conviction for first-degree assault was a conviction of a crime of violence under the *Sentencing Guidelines*. *Id.* at 376-77 (discussing U.S. SENTENCING GUIDELINES MANUAL § 4B1.2(1)(ii)).

Judge Easterbrook concurred in the result, but did not join in the opinion of the majority. *See id.* at 377-79 (Easterbrook, J., concurring). He disagreed with the majority's finding that the verb "use" required some volitional conduct. *See id.* at 378 (Easterbrook, J., concurring). Judge Easterbrook stated that the act forbidden by the definition of a crime of violence is the use of force against a person. *Id.* (Easterbrook, J., concurring). He argued that the majority incorrectly found a mens rea requirement in § 16(b)'s definition of crime of violence instead of focusing on the forbidden act. *Id.* at 379 (Easterbrook, J., concurring).

206. *Parson*, 955 F.2d 858; *see also supra* notes 63 & 195 (discussing the Third Circuit's decision in *Parson* in detail).

207. *United States v. Chapa-Garza*, 243 F.3d 921 (5th Cir.) (per curiam), *reh'g denied*, 262 F.3d 479 (5th Cir. 2001).

under § 16(b).²⁰⁸ In *Bazan-Reyes*, the Seventh Circuit reviewed the consolidated appeals of three aliens, whom the INS and BIA found removable as a result of state DUI convictions.²⁰⁹ Each of the aliens sought review of the INS and BIA decisions finding him removable.²¹⁰ The aliens argued that their convictions for DUI and DUI-related offenses were not crimes of violence under § 16(b).²¹¹

208. *Bazan-Reyes*, 256 F.3d at 607-12.

209. *Id.* at 602. One of the aliens, a citizen of Mexico, had been ordered removed by the INS after the alien had pled guilty to Indiana felony DUI. *Id.* at 602-03. This alien had been convicted under Indiana Code section 9-30-5-3, which provides, in relevant part: “A person commits a Class D felony if: (1) the person has a previous conviction of operating while intoxicated; and (2) the previous conviction of operating while intoxicated occurred within the five (5) years immediately preceding the occurrence of the violation of section 1 or 2 of this chapter.” *Id.* at 602 n.1 (quoting IND. CODE § 9-30-5-3 (1998)). Section 1, referred to in the previously quoted section provides: “(a) A person who operates a vehicle with at least ten-hundredths percent (0.10%) of alcohol by weight in grams in: (1) one hundred (100) milliliters of the person’s blood; or (2) two hundred ten (210) liters of the person’s breath; commits a Class C felony.” *Id.* (quoting IND. CODE § 9-30-5-1 (1998)). An immigration judge ordered the other two aliens, one a citizen of Poland and the other a citizen of Mexico, removed from the United States. *Id.* Each of these two aliens then appealed that order to the BIA, which dismissed both appeals. *Id.* at 603-04. The Mexican citizen pled guilty to Illinois aggravated felony DUI. *Id.* At the time of the offense, the Illinois statute provided, in relevant part:

(d)(1) Every person convicted of committing a violation of this Section shall be guilty of aggravated driving under the influence of alcohol or drugs or a combination of both if:

(A) the person committed a violation of this Section, or a similar provision of a law of another state or a local ordinance when the cause of action is the same as or substantially similar to this Section, for the third subsequent time

Id. at 604 n.3 (quoting 625 ILL. COMP. STAT. 5/11-501(d)(1) (1997)). (The court incorrectly cited the statute as “ILL. COMP. STAT. Ch. 625, § 5/511-501(d)(1) (1997).” There is no such statute.) The Polish citizen pled guilty to “two counts of homicide by intoxicated use of a vehicle,” a Wisconsin felony. *Id.* at 603. The Wisconsin statute provided in relevant part:

Homicide by intoxicated use of vehicle or firearm

(1) Any person who does any of the following is guilty of a Class C felony:

(a) Causes the death of another by the operation or handling of a vehicle while under the influence of an intoxicant.

(b) Causes the death of another by the operation of a vehicle while the person has a prohibited alcohol concentration, as defined in sec. 340.01(46m).

Id. at 603 n.2 (quoting WIS. STAT. § 940.09 (1996)).

210. *Id.* at 604.

211. *Id.* The aliens argued that the offenses were not crimes of violence under § 16(b) and therefore not “aggravated felonies” within the meaning of 8 U.S.C. § 1101(a)(43)(F) and that they were, therefore, not removable under 8 U.S.C. § 1227(a)(2)(A)(iii). *Id.*; see also *supra* notes 68-70 and accompanying text (discussing the removal of aliens convicted of aggravated felonies). The court also determined that, under IIRIRA, it retained jurisdiction to review the removal order in order to determine the threshold issue of whether the aliens’ DUI convictions were “aggravated felonies” under 8 U.S.C. § 1227(a)(2)(A)(iii). *Bazan-Reyes*, 256 F.3d at 604 (citing *Solarzano-Patlan v. INS*, 207 F.3d 869, 872 (7th Cir. 2000); *Xiong v. INS*, 173 F.3d 601, 604 (7th Cir. 1999)). In addition, the court rejected one of the alien’s argument that, as a parolee, he could not

The court reviewed de novo the INS and BIA orders finding the aliens removable for having committed aggravated felonies,²¹² but noted that the BIA is entitled to *Chevron* deference when it is interpreting a statute that it administers.²¹³ Because each of the aliens was sentenced to a year or more of imprisonment, the only issue left to determine was whether each alien's state DUI conviction was a conviction for a crime of violence as defined in § 16.²¹⁴ The court applied the categorical approach²¹⁵ in examining whether the generic elements of the offense under which the aliens were convicted constituted a crime of violence under § 16.²¹⁶ In determining whether DUI is a crime of violence under § 16(b), the court focused squarely on the mens rea required to satisfy the crime.²¹⁷ The court reviewed the BIA decisions that held that crimes of recklessness, such as DUI, are crimes of violence under § 16(b).²¹⁸ The aliens argued that the BIA's interpretation of crime of violence was incorrect and that § 16(b) requires a substantial risk that intentional force will be used.²¹⁹ The court noted the circuit split,²²⁰ explaining that the Seventh Circuit had never directly addressed the issue of whether DUI is a crime of violence under § 16.²²¹

be placed in expedited removal proceedings under 8 U.S.C. § 1228(b), holding that “[n]othing in that section prohibits its application to parolees.” *Id.* at 605.

212. *Bazan-Reyes*, 256 F.3d at 605 (citing *Xiong*, 173 F.3d at 605).

213. *Id.* (citing *Guerrero-Perez v. INS*, 242 F.3d 727, 730 (7th Cir. 2001)). *But see Dalton v. Ashcroft*, 257 F.3d 200, 203-04 (2d Cir. 2001) (arguing that a court should review de novo, without applying deference to the BIA's interpretation of crime of violence under § 16 because § 16 is not a part of the INA). *See also supra* note 65 (discussing when courts owe *Chevron* deference to the BIA).

214. *Bazan-Reyes*, 256 F.3d at 605-06.

215. *See supra* note 36 (discussing the categorical approach of statutory interpretation).

216. *Bazan-Reyes*, 256 F.3d at 606 (citing *Lara-Ruiz v. INS*, 241 F.3d 934, 941 (7th Cir. 2001)).

217. *Id.* at 606-07.

218. *Id.* at 606 (citing *In re Puente-Salazar*, Interim Dec. No. 3412, File No. A36 582 517 (B.I.A. Sept. 29, 1999), available at <http://www.usdoj.gov/eoir/efoia/bia/Decisions/Revdec/pdfDEC/3412.pdf>; *In re Sweetser*, Interim Dec. No. 3390, File No. A30 437 320 (B.I.A. May 19, 1999), available at <http://www.usdoj.gov/eoir/efoia/bia/Decisions/Revdec/pdfDEC/3390.pdf>; *In re Magallanes-Garcia*, Interim Dec. No. 3341, File No. A90 219 200 (B.I.A. Mar. 19, 1998), available at <http://www.usdoj.gov/eoir/efoia/bia/Decisions/Revdec/pdfDEC/3341.pdf>; *In re Alcantar*, 20 I. & N. Dec. 801 (B.I.A. 1994)).

219. *Id.*

220. *Id.* at 607 (citing *Park v. INS*, 252 F.3d 1018, 1023, 1024 (9th Cir. 2001); *United States v. Chapa-Garza*, 243 F.3d 921 (5th Cir.) (per curiam), *reh'g denied*, 262 F.3d 479 (5th Cir. 2001); *Tapia Garcia v. INS*, 237 F.3d 1216 (10th Cir. 2001); *Le v. U.S. Att'y Gen.*, 196 F.3d 1352 (11th Cir. 1999); *United States v. Parson*, 955 F.2d 858 (3d Cir. 1992)).

221. *Id.* The court held that DUI is not a crime of violence under § 16(a). *Id.* at 609. The court also held that homicide by intoxicated use of a vehicle is not a crime of violence under §

Noting that both parties agreed that the Seventh Circuit's decision in *Rutherford*²²² was central to deciding the issue, the court launched into an extended analysis of that case and of the different definitions of crime of violence in both § 16(b) and the *Sentencing Guidelines*.²²³ First, the court reviewed the history of the definition of crime of violence contained in the *Sentencing Guidelines*.²²⁴ Then, the court concluded that the definition of crime of violence included in the second prong of the *Sentencing Guidelines*' definition²²⁵ is distinct from the definition of crime of violence under § 16(b).²²⁶ The court emphasized that in *Rutherford*, it held that specific intent to use force was not required by the second prong of the *Sentencing Guidelines*' definition.²²⁷ As a result, DUI is a crime of violence under the *Sentencing Guidelines*' definition because of the risk of injury that DUI presents.²²⁸

The court rejected the government's argument that *Rutherford* required the court to hold that DUI is a crime of violence under § 16(b) because the language of § 16(b) is substantially similar to the language of the *Sentencing Guidelines*' definition.²²⁹ The government argued that the Sentencing Commission did not intend to change the meaning of crime of violence when it amended the *Sentencing Guidelines*' definition.²³⁰ The court specifically dismissed this argument, stating that the evolution of the term "crime of violence" under the *Sentencing*

16(a) because the offense does not require the intentional use of force against the person or property of another. *Id.* The court held that its determination in *Rutherford* that the verb "use" requires volitional conduct controlled its application of § 16(a) because the language of § 16(a) is nearly identical to the language of the *Sentencing Guidelines*. *Id.* (citing U.S. SENTENCING GUIDELINES MANUAL § 4B1.2(1)(i) (2001)).

222. *United States v. Rutherford*, 54 F.3d 370 (7th Cir. 1995); *see also supra* note 205 (discussing the Seventh Circuit's decision in *Rutherford*).

223. *Bazan-Reyes*, 256 F.3d at 607-12 (citing U.S. SENTENCING GUIDELINES MANUAL § 4B1.2(1) (2001)).

224. *See id.* at 608.

225. U.S. SENTENCING GUIDELINES MANUAL § 4B1.2(1)(ii) (2001).

226. *Bazan-Reyes*, 256 F.3d at 608.

227. *Id.*; *see also* U.S. SENTENCING GUIDELINES MANUAL § 4B1.2(1)(ii) (2001).

228. *Bazan-Reyes*, 256 F.3d at 608-09.

229. *Bazan-Reyes*, 256 F.3d at 608-09; U.S. SENTENCING GUIDELINES MANUAL § 4B1.2(1) (2001).

230. *Id.* at 609 (citing U.S. SENTENCING GUIDELINES MANUAL app. C at 106-07 (1991)). Until 1989, the *Sentencing Guidelines* incorporated by reference § 16's definition of crime of violence. *See* U.S. SENTENCING GUIDELINES MANUAL app. C at 106-07 (1991).

Guidelines did not control its decision because the court was interpreting § 16(b) and not the *Sentencing Guidelines*.²³¹

In addition, the court refused to follow the Tenth Circuit holding that DUI is a crime of violence under § 16(b).²³² Instead, the court relied on the Fifth Circuit's decision in *Chapa-Garza*²³³ and the Third Circuit's decision in *Parson*.²³⁴ Following these decisions, the court concluded that § 16(b)'s requirement that the force "be used in the course of committing the offense" counseled against interpreting § 16(b) in the same way as the *Sentencing Guidelines*' definition of crime of violence.²³⁵ In addition, the court followed its determination in *Rutherford* that the verb "use" implies intentional availment.²³⁶ The court concluded that § 16(b)'s use of the verb "use" also implies an intent requirement.²³⁷ Therefore, the court held that, in order for an offense to be a crime of violence under § 16(b), the offender must risk the intentional use of physical force in the course of committing the offense.²³⁸ The court explained that this interpretation does not render § 16(a) and § 16(b) redundant.²³⁹ The court noted that burglary does not

231. *Bazan-Reyes*, 256 F.3d at 609. The court, however, stated that it agreed with the Third Circuit's decision in *United States v. Parson*, which held that the Sentencing Commission, despite its stated intent, actually expanded the definition of crime of violence when it amended the section in 1989. *Id.* (citing *United States v. Parson*, 955 F.2d 858 (3d Cir. 1999)); *see also supra* notes 58-63 and accompanying text (describing the evolution of the *Sentencing Guidelines*' definition of crime of violence).

232. *Bazan-Reyes*, 256 F.3d at 610; *see also* *Tapia Garcia v. INS*, 237 F.3d 1216, 1222-23 (10th Cir. 2001); *supra* notes 147-66 and accompanying text (discussing the Tenth Circuit's determination in *Tapia Garcia* that DUI is a crime of violence under § 16(b)). The court also refused to follow the Eleventh Circuit's determination that a DUI-related offense is a crime of violence under § 16(a). *Bazan-Reyes*, 256 F.3d at 610; *see also* *Le v. U.S. Att'y Gen.*, 196 F.3d 1352, 1354 (11th Cir. 1999); *see supra* note 21 (describing the Eleventh Circuit's decision in *Le*).

233. *United States v. Chapa-Garza*, 243 F.3d 921, 924 (5th Cir.) (per curiam), *reh'g denied*, 262 F.3d 479 (5th Cir. 2001); *see also supra* notes 173-201 (discussing the Fifth Circuit's decision in *Chapa-Garza*).

234. *Parson*, 955 F.2d 858; *see also supra* note 195 (noting that the Third Circuit's analysis in *Parson* distinguished between "use of force" and "risk of physical injury").

235. *Bazan-Reyes*, 256 F.3d at 610-11; U.S. SENTENCING GUIDELINES MANUAL § 4B1.2(1)(ii) (2001). As noted above, both the Seventh Circuit and the Third Circuit held that DUI is a crime of violence under the *Sentencing Guidelines*. *See* *United States v. Rutherford*, 54 F.3d 370 (7th Cir. 1995); *Parson*, 955 F.2d at 858; *see also supra* notes 195 & 205 (discussing the distinction between risking the "use of force" and risking physical injury).

236. *Bazan-Reyes*, 256 F.3d at 611 (citing *Rutherford*, 54 F.3d at 372-73).

237. *Id.*

238. *Id.* In addition, the court noted that intentional force used by the offenders to open the car door or press the accelerator "does not constitute the use of physical force as required by [§ 16(b)]" because the "physical force" used must be "actual violent force." *Id.* (following *Solorzano-Patlan v. INS*, 207 F.3d 869 (7th Cir. 2000)).

239. *Id.* at 612.

have as an element the intentional use of force, as required under § 16(a), but does involve a substantial risk that intentional force may be used in the course of committing that offense, as required under § 16(b).²⁴⁰ Applying its interpretation of § 16(b) to the offenses at issue in *Bazan-Reyes*, the court held that none of the offenses were crimes of violence under § 16(b), because offenders rarely intentionally use force to commit them.²⁴¹

3. *Dalton v. Ashcroft*: The Second Circuit Holds that a DUI Offender does not “Use” Force Within the Meaning of § 16(b)

In *Dalton v. Ashcroft*,²⁴² the Second Circuit held that DUI is not a crime of violence under § 16(b) because DUI presents a risk of an ensuing accident, not the risk that the offender will use force in the course of committing the crime.²⁴³ Like the Seventh and Fifth Circuits, the court focused on an intent requirement implied by § 16(b)’s inclusion of the verb “use.”²⁴⁴ In *Dalton*, the court reviewed the BIA’s determination that DUI is a crime of violence under § 16(b).²⁴⁵ The court reviewed de novo the BIA’s interpretation of § 16, applying *Chevron* deference only to the BIA’s interpretation of the INA.²⁴⁶ In addition, the court applied the categorical approach in whether an offense is a crime of violence under § 16.²⁴⁷

240. *Id.*

241. *Id.* (quoting *United States v. Chapa-Garza*, 243 F.3d 921, 927 (5th Cir.) (per curiam), *reh’g denied*, 262 F.3d 479 (5th Cir. 2001)).

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

243. *Id.* at 206.

244. *Id.*

245. *Id.* at 202. In *Dalton*, the alien, a Canadian citizen, pled guilty to DUI. *Id.* The statute provides, in relevant part, that “no person shall operate a motor vehicle while in an intoxicated condition.” N.Y. VEH. & TRAF. LAW § 1192.3 (McKinney 1996). The conviction at issue became a felony under New York law because the alien had two prior convictions within the ten years preceding the third conviction. *Id.* at 205 & n.7; *see also* N.Y. VEH. & TRAF. LAW § 1193.1(c)(ii) (McKinney 2002). The INS initiated removal proceedings against the alien and ordered the alien removed. *Dalton*, 257 F.3d at 203. The alien appealed this decision to the BIA, which affirmed the alien’s removal order. *Id.*

246. *Dalton*, 257 F.3d at 203 (citing *Sutherland v. Reno*, 228 F.3d 171, 173-74 (2d Cir. 2000)). The court first determined that it retained jurisdiction to determine whether the alien committed an “aggravated felony” despite the recent amendments limiting judicial review of final orders of removal against aliens removable by reason of having committed an aggravated felony. *Id.* (citing 8 U.S.C. § 1252(a)(2)(C) (2000)); *see also supra* note 70 (discussing recent amendments to the INA limiting judicial review of orders removing aliens convicted of an aggravated felony).

247. *Dalton*, 257 F.3d at 204; *see also supra* note 36 (discussing the categorical approach of statutory interpretation).

The court held that DUI is not a crime of violence under § 16(b), because crime of violence is defined in terms of real, substantial risks, not by hypothetical harms.²⁴⁸ Quoting the New York Court of Appeals, the court noted that the New York DUI statute at issue is sweeping and broad.²⁴⁹ The court held that, under this DUI statute, a defendant could be convicted even when there is no risk that the offender will use force or that an injury may result.²⁵⁰ The court relied on several New York cases establishing that the DUI statute criminalized conduct that did not present a risk that the offender would use force in the course of committing the offense.²⁵¹

The court then held that a drunk driver does not risk the “use” of force within the meaning of § 16(b) because a drunk driver does not risk the intentional use of force, but risks an unintentional accident.²⁵² The court emphasized that the risk inherent in the offense of DUI is not the risk that the offender will “use physical force” in the course of driving, but the risk of an ensuing accident.²⁵³ The court stated that interpreting the phrase “use of physical force” to include an accidental collision distorts the English language.²⁵⁴ The court also found that the minimal force necessary to operate a vehicle, such as maneuvering the steering wheel, does not satisfy § 16(b).²⁵⁵ The court reasoned that such an interpretation of force would make any felony that involves driving a crime of violence under § 16(b).²⁵⁶

The court compared the definition of crime of violence under § 16(b) with the definition of crime of violence under the *Sentencing Guidelines*,²⁵⁷ highlighting the difference between the phrases “risk of injury”²⁵⁸ and a risk of the “use of physical force” under § 16(b).²⁵⁹

248. *Dalton*, 257 F.3d at 206.

249. *Id.* at 205 (quoting *People v. Prescott*, 745 N.E.2d 1000 (N.Y. 2001)).

250. *Id.*

251. *Id.* (citing *Prescott*, 745 N.E.2d 1000 (holding that a person can be found guilty under the statute without knowing how to operate the vehicle); *People v. David W.*, 442 N.Y.S.2d 278, 279 (N.Y. App. Div. 1981) (holding that a vehicle does not need to be operable in order to obtain a conviction under the statute); *People v. Marriot*, 325 N.Y.S.2d 177, 178 (N.Y. App. Div. 1971) (holding that a person can be convicted under the statute when he is asleep at the wheel, the engine is not running, and the vehicle never moved)).

252. *Id.* at 206.

253. *Id.*

254. *Id.* For example, the court noted that a drunk driver who causes an accident did not “use” force in the same way that one might intentionally use force to pry open a jammed door.
Id.

255. *Id.*

256. *Id.*

257. U.S. SENTENCING GUIDELINES MANUAL § 4B1.2(a)(2) (2001).

258. *Dalton*, 257 F.3d at 207.

Noting that the Seventh Circuit came to the same conclusion in *Rutherford*,²⁶⁰ the court stated that “use of physical force” is not the same as “risk of injury.”²⁶¹ The court held that the difference between “risk of injury” and risk of the “use of physical force” is significant because there are crimes that involve a substantial risk of injury to others but do not involve the use of force by the offender.²⁶² Following the Fifth Circuit’s opinion in *Chapa-Garza*,²⁶³ the court stated that the Sentencing Commission’s revision of the *Sentencing Guidelines*’ definition of crime of violence²⁶⁴ counsels against interpreting the words “use of physical force” in the same way as the phrase “risk of injury.”²⁶⁵

The court refused to follow the Tenth Circuit’s decision in *Tapia Garcia* for two reasons.²⁶⁶ First, the Tenth Circuit applied *Chevron* deference to the BIA’s interpretation of § 16.²⁶⁷ As noted above, the Second Circuit did not apply *Chevron* deference to the BIA’s interpretation of crime of violence under § 16 because the BIA was not interpreting the INA, the statute that it administers.²⁶⁸ Next, the Second Circuit found the reasoning underlying the Tenth Circuit’s decision in *Tapia Garcia* unpersuasive.²⁶⁹ The *Dalton* court disagreed with the Tenth Circuit’s conclusion that the definitions of crime of violence under § 16 and the *Sentencing Guidelines* were “functionally similar.”²⁷⁰ The court noted that the Tenth Circuit cited *United States v. Coronado-Cervantes*²⁷¹ in support of this proposition.²⁷² The court read

259. *Id.*

260. *United States v. Rutherford*, 54 F.3d 370 (7th Cir. 1995); *see also supra* note 205 (discussing the Seventh Circuit’s decision in *Rutherford*).

261. *Dalton*, 257 F.3d at 207.

262. *Id.* By way of illustration, the court noted that “[c]rimes of gross negligence or reckless endangerment, such as leaving an infant near a pool, involve a risk of injury without the use of force.” *Id.*

263. *United States v. Chapa-Garza*, 243 F.3d 921, 924 (5th Cir.) (per curiam), *reh’g denied*, 262 F.3d 479 (5th Cir. 2001); *see also supra* notes 173-201 and accompanying text (discussing the Fifth Circuit’s decision in *Chapa-Garza*).

264. *See supra* notes 58-59 and accompanying text (discussing the changes made in the definition of crime of violence in the *Sentencing Guidelines*); *see also Chapa-Garza*, 243 F.3d at 926 (noting the differences between § 16(b)’s definition of crime of violence and the *Sentencing Guidelines*’ definition).

265. *Dalton*, 257 F.3d at 207 (citing *Chapa-Garza*, 243 F.3d at 926).

266. *Id.* at 208 n.9.

267. *Id.*

268. *See supra* note 246 and accompanying text (discussing the *Dalton* court’s limitation of *Chevron* deference to the BIA’s interpretation of the INA).

269. *Dalton*, 257 F.3d at 208 n.9.

270. *Id.*

271. *United States v. Coronado-Cervantes*, 154 F.3d 1242, 1244 (10th Cir. 1998).

the *Coronado-Cervantes* decision as establishing nothing more than the proposition that “where there is the risk of use of force, there is the risk of injury.”²⁷³ The *Dalton* court stated that, from this proposition, it does not necessarily follow that all offenses that involve a risk of injury also involve the use of force.²⁷⁴ The court reasoned that just because DUI involves a risk of injury, it does not follow that DUI also involves a risk of the use of force within the meaning of § 16(b).²⁷⁵ The court concluded by acknowledging that drunk driving has taken a tremendous toll on human life, but argued that by “shoehorning” the offense of DUI into criminal statutes not designed to include it, courts risk usurping federal and state legislative roles.²⁷⁶

4. *United States v. Trinidad-Aquino*: The Ninth Circuit Holds that DUI Based on “Negligence” is not a Crime of Violence Under § 16

In *United States v. Trinidad-Aquino*,²⁷⁷ the Ninth Circuit held that DUI with bodily injury is not a crime of violence under § 16(b) when the defendant can be convicted of the offense with a negligent mens rea.²⁷⁸ The court held that § 16(b)’s inclusion of the word “use”

272. *Dalton*, 257 F.3d at 208 n.9.

273. *Id.*

274. *Id.*

275. *Id.*

276. *Id.* at 208. Judge Walker dissented, opining that the majority incorrectly applied the categorical approach and argued for a broader, common sense definition of crime of violence that takes into account the risks associated with the criminal conduct. *Id.* at 209 (Walker, C.J., dissenting). Judge Walker reasoned that the risk of injury to others from the use of force by drunk drivers was the impetus for legislation criminalizing DUI. *Id.* (Walker, C.J., dissenting).

Judge Walker would have held that DUI is a crime of violence under § 16(b) because, even assuming that the word “use” implies intentional availment, the offense of DUI involves the intentional use of force by the offender. *Id.* at 209-10 (Walker, C.J., dissenting). Judge Walker stated that because the offender intends to use mechanized force to propel the vehicle, that force does not stop being “used” if the offender causes an accident. *Id.* at 209 (Walker, C.J., dissenting). Judge Walker reasoned that the simple act of driving involves some risk that “physical force may be used against the person or property of another,” and the fact that a driver is drunk makes that risk “substantial” within the meaning of § 16(b). *Id.* at 209-10 (Walker, C.J., dissenting). Finally, Judge Walker opined that the fact that the New York law requires two prior convictions in order to constitute a felony necessitates holding that the offense is a crime of violence under § 16(b). *Id.* at 210 (Walker, C.J., dissenting) (stating that “the risk that injury will occur on one of three occasions is greater than on any one occasion considered alone”). The increased risk associated with three offenses made the third offense one that “by its nature” involves a substantial risk that the offender will use force. *Id.* (Walker, C.J., dissenting).

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

278. *Id.* at 1146; *see also supra* note 46 (discussing and defining mens rea and the various levels of mens rea). In two prior decisions, the Ninth Circuit held that an offense requiring a “reckless” mens rea could be a crime of violence under § 16. *See Park v. INS*, 252 F.3d 1018 (9th Cir. 2001); *United States v. Ceron-Sanchez*, 222 F.3d 1169 (9th Cir. 2000).

required a defendant to engage in some volitional conduct and that merely negligent conduct did not satisfy this requirement.²⁷⁹ The court distinguished prior decisions holding that offenses requiring “reckless” mens rea could be crimes of violence under § 16(b).²⁸⁰ The court stated that reckless or criminally negligent acts involve some volitional conduct on the part of the offender, thus satisfying § 16(b)’s requirement that the offender risk the “use” of force.²⁸¹ Judge Kozinski dissented, arguing that the court’s decision in *Trinidad-Aquino* conflicted with prior precedent that established that reckless or criminally negligent conduct satisfied § 16(b)’s definition of crime of violence.²⁸²

In *Trinidad-Aquino*, the alien had been convicted of DUI with bodily injury under California law.²⁸³ He was subsequently convicted of illegally re-entering the United States following removal.²⁸⁴ The district court did not apply an increased sentence under the *Sentencing Guidelines*,²⁸⁵ finding that the defendant’s prior DUI conviction was not an aggravated felony triggering the increased sentence.²⁸⁶ The

In *Ceron-Sanchez*, the Ninth Circuit held that an offense based on reckless conduct could be a crime of violence under § 16(b) where the offense poses a substantial risk that physical force may be used against another. See *Ceron-Sanchez*, 222 F.3d at 1173. The court held that attempted aggravated assault with a deadly weapon or dangerous instrument, an Arizona felony, is a crime of violence under § 16(a) and § 16(b). *Id.* at 1172-73. The court emphasized that a “dangerous instrument” as defined under Arizona law must be “‘readily capable of causing death or serious physical injury’” under the circumstances in which it is used. See *id.* at 1172 (quoting ARIZ. REV. STAT. § 13-105(8)).

In *Park*, the Ninth Circuit held that involuntary manslaughter, an offense based on “criminally negligent” conduct, could be a crime of violence under § 16(b). *Park*, 252 F.3d at 1022. The definition of “criminal negligence” at issue in *Park* was substantially similar to the definition of “recklessness” at issue in *Ceron-Sanchez*. *Id.* at 1024-25.

279. *Trinidad-Aquino*, 259 F.3d at 1145.

280. *Id.* at 1145-46.

281. *Id.* at 1146.

282. *Id.* at 1147-48 (Kozinski, J., dissenting).

283. *Id.* at 1142. The alien had also been convicted of “hit and run resulting in death or injury” under California Vehicle Code § 20001. *Id.* This conviction, however, was not at issue in this case “[b]ecause the government did not pursue its argument under the hit and run statute on appeal.” *Id.* The DUI statute under which the alien was convicted provided, in relevant part:

(a) It is unlawful for any person, while under the influence of any alcoholic beverage or drug, or under the combined influence of any alcoholic beverage and drug, to drive a vehicle and concurrently do any act forbidden by law, or neglect any duty imposed by law in driving the vehicle, which act or neglect proximately causes bodily injury to any person other than the driver.

Id. at 1143 (quoting CAL. VEH. CODE § 23153(a) (West 2000)).

284. *Id.* at 1142 (violating 8 U.S.C. § 1326 (2000)).

285. U.S. SENTENCING GUIDELINES MANUAL § 2L1.2(b)(1)(A) (2001).

286. *Trinidad-Aquino*, 259 F.3d at 1142.

government appealed the district court's decision not to increase the defendant's sentence, arguing that the alien's DUI conviction was a crime of violence and, thus, an aggravated felony.²⁸⁷ Reviewing the district court's decision de novo, the Ninth Circuit held that the alien's prior DUI conviction was not a crime of violence under § 16(b) and, thus was not an aggravated felony subjecting the alien to an increased sentence under the *Sentencing Guidelines*.²⁸⁸

The court applied the categorical approach²⁸⁹ and first found that negligent conduct could support a conviction under the California DUI statute at issue.²⁹⁰ The court then characterized the issue before it as whether negligent conduct satisfies § 16(b)'s definition of crime of violence.²⁹¹ The government argued that the court's prior decision in *Ceron-Sanchez* was controlling and that the court should extend this holding to cover negligent conduct as well.²⁹² The court rejected the government's arguments, finding that § 16(b) requires volitional conduct, which is not present when a defendant acts with a mens rea of negligence.²⁹³

The court held that § 16(b)'s requirement that there be a risk that the offender "use" force required some volitional conduct on the part of the offender.²⁹⁴ In support of its holding that the verb "use" implies some volitional conduct, the court referred to the dictionary definition of "use."²⁹⁵ The court noted that the ordinary understanding of the verb

287. *Id.*

288. *Id.* at 1146.

289. *See supra* note 36 (discussing the categorical approach to statutory interpretation as used by the BIA in § 16 cases). In addition, the court noted that it had "developed two alternative methodologies for defining . . . 'aggravated felonies.'" *Trinidad-Aquino*, 259 F.3d at 1143. The Ninth Circuit has developed two methods of applying the categorical approach. *Id.* One method is to look to the ordinary meaning of the terms in the statute that the offender had been convicted under. *Id.* (citing *United States v. Baron-Median*, 187 F.3d 1144, 1146 (9th Cir. 1999)). The other method is to look to the common law for a "uniform definition" of the offense. *Id.* at 1143-44 (citing *Yea v. INS*, 214 F.3d 1128, 1131 (9th Cir. 2000)). In this case, the court decided to look to the ordinary meaning of the language defining crime of violence because crime of violence is not a traditional common law crime. *Id.* at 1144.

290. *Trinidad-Aquino*, 259 F.3d at 1143.

291. *Id.*

292. *Id.* at 1144.

293. *Id.*

294. *Id.* at 1144-45.

295. *See id.* at 1145 & n.2 (quoting AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1966 (3d ed. 1992); BLACK'S LAW DICTIONARY 1541 (6th ed. 1990); THE WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2523-24 (1986)). The definitions of "use" relied upon were: "To make use of, to convert to one's service; to employ; to avail oneself of; to utilize; to carry out a purpose or action by means of; to put into action or service, especially to attain an end." *Id.* at 1145 (quoting BLACK'S LAW DICTIONARY 1541 (6th ed. 1990)). "To put

“use” implies some volitional conduct on the part of the “user” and that one cannot “use” force within the meaning of § 16(b) negligently.²⁹⁶ Interpreting § 16(b)’s requirement that physical force be used against another, the court concluded that it is inaccurate to say that an offender is volitionally using physical force during a DUI offense when the offender did not intend to hit the other person and did not consciously disregard the risk that he may do so.²⁹⁷

The court then attempted to reconcile its holding that negligent conduct does not satisfy § 16(b) with its prior holdings that criminally negligent or reckless conduct satisfies § 16(b)’s definition of crime of violence.²⁹⁸ The court stated that its holding in *Trinidad-Aquino* did not affect these prior decisions.²⁹⁹ Specifically, the court stated that an offender cannot commit a crime of violence under § 16(b) if he negligently, as opposed to intentionally or recklessly, hits the person or property of another.³⁰⁰ Drawing on the definition of “recklessness” under the *Model Penal Code*,³⁰¹ the court held that recklessness requires the conscious disregard of a risk of harm of which the offender is aware.³⁰² The court stated that this conscious disregard of a risk of harm is a volitional component, not present when an offender acts negligently.³⁰³

The court noted that its decision was consistent with the holdings of the other circuits that had substantively considered the mens rea required by § 16(b), but specified that it did not follow the *Rutherford*

into service or apply for a purpose, employ.” “To avail oneself of; practice.” *Id.* at 1145 n.2 (quoting THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1966 (3d ed. 1992)). “[T]o put into action or service,” “employ,” “to carry out a purpose or action by means of.” *Id.* (quoting WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 2523-24 (1986)).

296. *Id.* at 1145.

297. *See id.* at 1145-46.

298. *Id.*

299. *Id.*

300. *Id.* at 1145.

301. The *Model Penal Code* defines “recklessness” as follows:

A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor’s conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor’s situation.

MODEL PENAL CODE § 2.02(2)(c) (official draft and revised comments 1985); *see also supra* note 46 (discussing mens rea, the *Model Penal Code*, and the different levels of mens rea).

302. *Trinidad-Aquino*, 259 F.3d at 1146.

303. *Id.*

and *Parson* decisions in requiring that the offender have specific intent to use force.³⁰⁴ The court emphasized that, under its analysis, § 16(b) requires a volitional act at least equivalent to recklessness.³⁰⁵ The court acknowledged that the Tenth Circuit held that DUI is a crime of violence under § 16(b), but refused to follow that court, noting that the Tenth Circuit had not addressed whether the “use” language in § 16(b) requires a volitional act on the part of the offender.³⁰⁶

IV. ANALYSIS

Although DUI certainly involves a risk that an accident will occur as a result of the crime, it simply does not fit into the definition of crime of violence under § 16(b).³⁰⁷ The Second, Fifth, and Seventh Circuits correctly determined that DUI is not a crime of violence under § 16(b) because a drunk driver will rarely, if ever, risk “using” force in the course of committing the offense.³⁰⁸ The Ninth Circuit also correctly held that DUI is not a crime of violence under § 16(b), but it incorrectly held that offenses risking the reckless application of force may be

304. *Id.* (citing *United States v. Chapa-Garza*, 243 F.3d 921, 925-27 (5th Cir.) (per curiam), *reh'g denied*, 262 F.3d 479 (5th Cir. 2001)); *United States v. Rutherford*, 54 F.3d 370, 371-74 (7th Cir. 1995); *United States v. Parson*, 955 F.2d 858, 866 (3d Cir. 1992)); *see also supra* note 46 (defining “specific intent” and “general intent”).

305. *Trinidad-Aquino*, 259 F.3d at 1146.

306. *Id.* (citing *Tapia Garcia v. INS*, 237 F.3d 1216 (10th Cir. 2001)). Judge Kozinski dissented, stating that DUI is a crime of violence under § 16(b) because the statute does not punish simple negligent conduct, but punishes negligent acts committed while a driver is legally intoxicated. *Id.* at 1147 (Kozinski, J., dissenting). For Judge Kozinski, the California DUI statute does not punish merely the negligent acts of the driver, but also the reckless conduct of drinking and driving that causes the negligence. *See id.* (Kozinski, J., dissenting). He emphasized the dangers of drunk driving and the vastly increased chances that the offender will commit a negligent act resulting in injury to another. *Id.* at 1147-48 (Kozinski, J., dissenting). Judge Kozinski also opined that the Ninth Circuit’s prior decisions in *Ceron-Sanchez* and *Park* cannot be distinguished and should control the outcome in *Trinidad-Aquino*. *Id.* at 1147 (Kozinski, J., dissenting). He noted that it is unlikely that California’s *criminal* statutes require a mens rea less than criminal negligence, and thus the DUI offense would fall under *Park*’s holding that “criminal negligence” satisfies § 16(b). *Id.* at 1147 n.* (Kozinski, J., dissenting). He characterized the majority opinion’s emphasis on § 16(b)’s “use” requirement as “nit-picking the words of [§] 16 in a futile effort to distinguish” the Ninth Circuit’s prior decisions. *Id.* at 1147 (Kozinski, J., dissenting).

307. *See, e.g., Dalton v. Ashcroft*, 257 F.3d 200, 208 (2d Cir. 2001).

308. *Id.* (holding that a New York conviction for operating a vehicle while intoxicated is not a conviction of a crime of violence under § 16); *Bazan-Reyes v. INS*, 256 F.3d 600 (7th Cir. 2001) (holding that an Indiana conviction for operating a vehicle while intoxicated, a Wisconsin conviction for homicide by intoxicated use of a vehicle, and an Illinois conviction for driving under the influence are not convictions for “crimes of violence” under § 16); *United States v. Chapa-Garza*, 243 F.3d 921 (5th Cir.) (per curiam) (holding that a Texas conviction for driving while intoxicated is not a conviction of a crime of violence under § 16), *reh'g denied*, 262 F.3d 479 (5th Cir. 2001).

crimes of violence under § 16(b).³⁰⁹ Burglary is an excellent example of the type of offense that § 16(b) covers.³¹⁰ In contrast, the definition of crime of violence under the *Sentencing Guidelines* provides a superb example of a definition of crime of violence that includes DUI.³¹¹

A. DUI is not a Crime of Violence Because the Drunk Driver does not Risk the Intentional Use of Force

DUI is not the type of offense that presents a substantial risk that the offender will use force against another in order to complete the crime.³¹² Rather, DUI involves a risk that an accident causing injury to others will occur as a result of the offense.³¹³ As the Second, Fifth, and Seventh Circuits correctly determined, DUI is not a crime of violence under § 16(b) because a drunk driver does not risk “using” force in the course of committing the offense.³¹⁴ These Courts of Appeals correctly determined that the inclusion of the verb “use” in § 16(b)’s definition implies the intentional application of force.³¹⁵ These courts also correctly determined that the offenses that § 16(b) is designed to cover are those offenses in which the elements reveal that the offender is willing to risk the intentional use of force against the person or property of another.³¹⁶ Section 16(b)’s requirement that the offender risk “using” force covers only those offenses in which the offender risks intentionally using force against the person or property of another.³¹⁷ The verb “use” implies volitional conduct on the part of the offender.³¹⁸

309. *Trinidad-Aquino*, 259 F.3d at 1145.

310. *See United States v. Aragon*, 983 F.2d 1306, 1313 (4th Cir. 1993).

311. *See United States v. Parson*, 955 F.2d 858, 863-64 (3d Cir. 1992).

312. *See Dalton*, 257 F.3d at 207.

313. *Id.*

314. *See id.* at 208; *Bazan-Reyes v. INS*, 256 F.3d 600 (7th Cir. 2001); *United States v. Chapa-Garza*, 243 F.3d 921 (5th Cir.) (per curiam), *reh’g denied*, 262 F.3d 479 (5th Cir. 2001); *see also supra* notes 173-276 (discussing the Second, Fifth, and Seventh Circuit opinions holding that DUI is not a crime of violence under § 16).

315. *See, e.g., Bazan-Reyes*, 256 F.3d at 611 (holding that, in order to be a crime of violence under § 16(b), the offender must risk intentionally availing himself of the use of force); *In re Puente-Salazar*, Interim Dec. No. 3412, File No. A36 582 517, slip op. at 24 (B.I.A. Sept. 29, 1999) (Rosenberg, dissenting), *available at* <http://www.usdoj.gov/eoir/efoia/bia/Decisions/Revdec/pdfDEC/3412.pdf>.

316. *Dalton*, 257 F.3d at 206 (holding that DUI is not a crime of violence because a drunk driver does not risk the intentional use of force); *Bazan-Reyes*, 256 F.3d at 611 (holding that, in order to be a crime of violence under § 16(b), the offender must risk intentionally availing himself of the use of force); *Chapa-Garza*, 243 F.3d at 924 (holding that, in order to commit a crime of violence under § 16, an offender must recklessly risk the intentional use of force).

317. *See Dalton*, 257 F.3d at 207-08 (holding that a New York conviction for operating a vehicle while intoxicated is not a conviction of a crime of violence under § 16).

318. *Bazan-Reyes*, 256 F.3d at 608.

Simply put, one does not “use” anything unintentionally.³¹⁹ In addition, the Second, Fifth, and Seventh Circuits’ determination that “use” implies intentional availment is in accord with the Supreme Court’s determination that “use” suggests intentional conduct.³²⁰

The Second, Fifth, and Seventh Circuits correctly identified burglary, an offense mentioned in the legislative history of the term “crime of violence,”³²¹ as an example of the kind of offense that meets § 16(b)’s definition of crime of violence.³²² A burglar must be prepared to use force should he discover the occupant of the dwelling during the course of the burglary.³²³ As the United States Supreme Court explained in *Taylor v. United States*, the offense of burglary is dangerous because of the risk that the offender may discover someone in the dwelling during the burglary and respond with intentional force against that person.³²⁴ This is exactly the type of offense that § 16(b)’s definition covers.³²⁵ Another example of an offense that properly falls within the definition of crime of violence under § 16(b) is the offense of indecency with a child involving sexual contact, mentioned by the Fifth Circuit in *Chapa-Garza*.³²⁶ This offense is a crime of violence under § 16(b) because the offender may find it necessary to use physical force against the child in order to force the child to comply with the sexual contact.³²⁷

In contrast to these offenses, DUI does not present a danger that a drunk driver will use force in order to complete the crime.³²⁸ DUI is dangerous because a drunk driver is more likely to collide with pedestrians or other vehicles, causing an accident.³²⁹ In the terms of the *Sentencing Guidelines*’ definition of crime of violence, DUI presents a

319. *See id.*; *contra Chapa-Garza*, 262 F.3d at 482 (Barksdale, J., dissenting) (stating that “force may be used accidentally”).

320. *See Smith v. United States*, 508 U.S. 223, 228-29 (1993) (quoting dictionary definitions of “use” suggesting intentional conduct is implied by the term).

321. *See S. REP. NO. 98-225*, at 307 (1983), *reprinted in* 1984 U.S.C.A.N. 3182, 3486-87.

322. *See supra* notes 42-46 and accompanying text (discussing the inclusion of burglary as an example of a crime of violence in the legislative history of the term “crime of violence”).

323. *Taylor v. United States*, 495 U.S. 575, 581 (1990); KESSELBRENNER & ROSENBERG, *supra* note 37, § 7:28, at 7-100 n.34; *see also supra* note 42 (discussing the Supreme Court’s treatment of the offense of burglary).

324. *Taylor*, 495 U.S. at 585.

325. *See KESSELBRENNER & ROSENBERG, supra* note 37, § 7:28, at 7-100 n.34.

326. *United States v. Chapa-Garza*, 243 F.3d 921, 927 (5th Cir.) (per curiam) (citing *United States v. Velazquez-Overa*, 100 F.3d 418, 422 (5th Cir. 1996)), *reh’g denied*, 262 F.3d 479 (5th Cir. 2001).

327. *Id.*

328. *Id.*

329. *See id.* *Cf. Mich. Dep’t of State Police v. Sitz*, 496 U.S. 444, 451 (1990) (citing statistics demonstrating the number of alcohol-related accidents).

“risk of physical injury.”³³⁰ DUI does not, in § 16(b)’s terms, present a risk that force will be “used.”³³¹

In addition, DUI is not a crime of violence under § 16(b) because any force risked as a result of driving under the influence is not used “in the course of committing the offense,” as § 16(b) requires.³³² Any risk of force that DUI presents is a risk that there will be a collision as a result of the offense.³³³ It cannot be said that a drunk driver uses force in committing the offense when the drunk driver causes an accident, which, in turn, causes violent force.³³⁴

B. The Ninth Circuit Incorrectly Determined that § 16(b) Includes Offenses Presenting the Risk of Reckless Force

The Ninth Circuit correctly determined that DUI is not a crime of violence under § 16(b), but for the wrong reasons.³³⁵ The court recognized that the verb “use” in § 16(b) requires some volitional conduct.³³⁶ The court erred, however, when it attempted to find that the risk of volitional use of force could occur due to recklessness.³³⁷ The Ninth Circuit stated that DUI could be a crime of violence when the offender recklessly or intentionally risks “hitting” another object.³³⁸ The court failed to recognize that risking recklessly hitting another with an automobile is not the same as risking the “use of force” as § 16(b) requires. The offender’s conscious disregard of the risk of an accident does not transform the DUI into an offense that presents a risk that the offender will intentionally use force within the meaning of § 16(b).³³⁹ The Ninth Circuit strained to distinguish its decision in *Trinidad-Aquino* from its prior precedent establishing that an offender can risk the reckless use of force within the meaning of § 16(b).³⁴⁰ This reasoning is not persuasive because, in the context of DUI, the offender consciously disregards the risk that *an accident might occur*.³⁴¹ The offender does

330. U.S. SENTENCING GUIDELINES MANUAL § 4B1.2(1)(ii) (2001).

331. 18 U.S.C. § 16(b) (2000).

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

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

334. *Id.*

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

336. *Id.* at 1144-45.

337. *Id.* at 1145-46.

338. *Id.* at 1145.

339. *Cf. Chapa-Garza*, 243 F.3d at 927 (stating that the risk of a collision is not the risk that the drunk driver will use force).

340. *See Trinidad-Aquino*, 259 F.3d at 1146.

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

not consciously disregard the risk that he may need to use physical force in order to perpetrate the crime, as § 16(b) requires.³⁴² Thus, the Ninth Circuit's argument that recklessness can satisfy § 16(b) should be rejected.

C. The Tenth Circuit and the BIA Incorrectly Determined that DUI is a Crime of Violence Under § 16(b)

DUI is not a crime of violence under § 16(b) because a drunk driver does not risk the use of force in the course of committing the offense.³⁴³ The Tenth Circuit and the BIA misinterpreted § 16(b)'s definition by holding that a drunk driver risks "using" force within the meaning of § 16(b).³⁴⁴ The Tenth Circuit and the BIA improperly equated the risk that an accident will result with the risk that an offender will use force to commit the crime.³⁴⁵ The Tenth Circuit relied on the fact that DUI is inherently dangerous when it held that DUI is a crime of violence under § 16(b).³⁴⁶ The Tenth Circuit mistakenly concluded that DUI is a crime of violence based on the inherent danger involved in DUI.³⁴⁷ While DUI certainly is dangerous and presents a risk that an accident or physical harm will result from the offense, DUI rarely, if ever, presents a risk that the drunk driver will "use" force.³⁴⁸ Also, the Tenth Circuit improperly relied on prior precedent applying the *Sentencing Guidelines*' materially different definition of crime of violence when it interpreted § 16(b).³⁴⁹ The Tenth Circuit relied on these cases despite the fact that it recognized that the *Sentencing Guidelines*' definition of crime of violence differs from § 16(b)'s definition.³⁵⁰ The Tenth Circuit regarded the different wording of the two definitions as unimportant.³⁵¹ The court failed to discern the important differences in the two

342. *Id.*

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

344. *Tapia Garcia v. INS*, 237 F.3d 1216 (10th Cir. 2001); *In re Puente-Salazar*, Interim Dec. No. 3412, File No. A36 582 517 (B.I.A. Sept. 29, 1999), available at <http://www.usdoj.gov/eoir/efoia/bia/Decisions/Revdec/pdfDEC/3412.pdf>; *In re Magallanes-Garcia*, Interim Dec. No. 3341, File No. A90 219 200 (B.I.A. Mar. 19, 1998), available at <http://www.usdoj.gov/eoir/efoia/bia/Decisions/Revdec/pdfDEC/3341.pdf>.

345. See *In re Magallanes-Garcia*, Interim Dec. No. 3341, slip op. at 6; see generally *Tapia Garcia*, 237 F.3d at 1222; *In re Puente-Salazar*, Interim Dec. No. 3412, slip op. at 10-12.

346. *Tapia Garcia*, 237 F.3d at 1222-23.

347. *Id.*

348. *United States v. Chapa-Garza*, 243 F.3d 921, 927 (5th Cir.) (per curiam), *reh'g denied*, 262 F.3d 479 (5th Cir. 2001).

349. *Tapia Garcia*, 237 F.3d at 1222-23 (relying on cases applying the *Sentencing Guidelines*' definition of crime of violence).

350. *Id.*

351. *Id.*

definitions. DUI is a crime of violence under the *Sentencing Guidelines* because that definition requires a “risk of physical harm.”³⁵² DUI, however, is not a crime of violence under § 16(b) because § 16(b) requires that the offender risk the “use” of force.³⁵³

In addition, the Tenth Circuit relied on the BIA’s decision in *In re Puente-Salazar*³⁵⁴ to support its finding that DUI is a crime of violence under § 16(b).³⁵⁵ However, the Tenth Circuit’s reliance is misplaced because the BIA also failed to properly distinguish between the risk of physical harm and the risk that an offender will use force.³⁵⁶ In one telling excerpt from the BIA’s decision in *In re Magallanes-Garcia*, the BIA held that DUI is a crime of violence under § 16(b) because it involves a “substantial risk of harm to persons and property.”³⁵⁷ The BIA attempted to clarify this holding in its decision in *In re Puente-Salazar*,³⁵⁸ but the language that the BIA used in *In re Magallanes-Garcia* is significant because the BIA explicitly equated “risk of harm” with the requirement in § 16(b) that there be a risk that physical force is used.³⁵⁹ The BIA improperly based its initial determination that DUI is a crime of violence under § 16(b) on its finding that DUI involves an inherent risk of harm to others, even though § 16(b) requires that the offense present a risk that force will be used against the person or property of another.³⁶⁰ The BIA’s later attempt, in *In re Puente-Salazar*, to clarify this holding is also unpersuasive.³⁶¹ In *In re Puente-Salazar*, the BIA attempted to argue that DUI is a crime of violence under § 16(b) because there is a causal link between the potential for harm it had recognized in *In re Magallanes-Garcia* and the risk of the use of force.³⁶² This reasoning is still not persuasive because the BIA

352. Cf. *United States v. Parson*, 955 F.2d 858 (3d Cir. 1992) (citing U.S. SENTENCING GUIDELINES MANUAL § 4B1.2).

353. 18 U.S.C. §§ 16(a), (b) (2000).

354. *In re Puente-Salazar*, Interim Dec. No. 3412, File No. A36 582 517 (B.I.A. Sept. 29, 1999), available at <http://www.usdoj.gov/eoir/efoia/bia/Decisions/Revdec/pdfDEC/3412.pdf>.

355. *Tapia Garcia*, 237 F.3d at 1222 (citing *In re Puente-Salazar*, Interim Dec. No. 3412).

356. *In re Puente-Salazar*, Interim Dec. No. 3412, slip op. at 22–23 n.5.

357. *In re Magallanes-Garcia*, Interim Dec. No. 3341, File No. A90 219 200, slip op. at 6 (B.I.A. Mar. 19, 1998), available at <http://www.usdoj.gov/eoir/efoia/bia/Decisions/Revdec/pdfDEC/3341.pdf> (emphasis added).

358. See *supra* notes 107-16 and accompanying text (analyzing the BIA’s discussion of *In re Magallanes-Garcia* in the *In re Puente-Salazar* decision).

359. *In re Puente-Salazar*, Interim Dec. No. 3412, slip op. at 22-23 n.5 (Rosenberg, dissenting).

360. *In re Magallanes-Garcia*, Interim Dec. No. 3341, slip op. at 6 (B.I.A. Mar. 19, 1998), available at <http://www.usdoj.gov/eoir/efoia/bia/Decisions/Revdec/pdfDEC/3341.pdf>.

361. See *In re Puente-Salazar*, Interim Dec. No. 3412.

362. *Id.* slip op. at 12-13.

failed to address the implications of § 16(b)'s inclusion of the verb "use." Even though DUI presents a potential for harm that is causally linked with the "force" of an accident, it does not follow that the DUI offender risks the use of force as required by § 16(b).

Finally, both the Tenth Circuit and the BIA failed to take into account § 16(b)'s requirement that the use of force be risked in the course of committing the offense.³⁶³ The requirement that force be used in the course of committing the offense suggests that the force must be used during the offense or in order to complete the offense.³⁶⁴ DUI does not present a risk that force will be used in the course of committing the offense; rather DUI presents a risk that force may result from the commission of the offense.³⁶⁵ In holding that DUI is a crime of violence under § 16(b), the Tenth Circuit and the BIA failed to discern this distinction.

Because DUI does not present a risk that the offender will intentionally use force against the person or property of another in the course of committing the offense, DUI is not a crime of violence under § 16(b).³⁶⁶ The inclusion of the verb "use" in § 16(b)'s definition reveals Congress' intent to cover conduct, like burglary, that presents a risk that the offender will use intentional force against another.³⁶⁷ The Ninth Circuit incorrectly held that § 16(b) covers the reckless application of force against the person or property of another.³⁶⁸ The Tenth Circuit and the BIA improperly held that DUI is a crime of violence under § 16(b) because they equated the risk of harm created by

363. *Tapia Garcia v. INS*, 237 F.3d 1216 (10th Cir. 2001); *In re Puente-Salazar*, Interim Dec. No. 3412.

364. *United States v. Chapa-Garza*, 243 F.3d 921, 924 (5th Cir.) (per curiam), *reh'g denied*, 262 F.3d 479 (5th Cir. 2001); *In re Puente-Salazar*, Interim Dec. No. 3412, slip op. at 30 (Rosenberg, dissenting).

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

366. *See United States v. Trinidad-Aquino*, 259 F.3d 1140 (9th Cir. 2001) (holding that a California conviction for driving under the influence of alcohol with injury to another is not a conviction of a crime of violence under § 16); *Dalton v. Ashcroft*, 257 F.3d 200 (2d Cir. 2001) (holding that a New York conviction for operating a vehicle while intoxicated is not a conviction of a crime of violence under § 16); *Bazan-Reyes v. INS*, 256 F.3d 600 (7th Cir. 2001) (holding that an Indiana conviction for operating a vehicle while intoxicated, a Wisconsin conviction for homicide by intoxicated use of a vehicle, and an Illinois conviction for driving under the influence were not convictions for "crimes of violence" under § 16); *Chapa-Garza*, 243 F.3d 921 (5th Cir.) (holding that Texas conviction for driving while intoxicated is not a conviction of a crime of violence under § 16).

367. *Dalton*, 257 F.3d at 200 (holding that a New York conviction for operating a vehicle while intoxicated is not a conviction of a crime of violence under § 16).

368. *See Trinidad-Aquino*, 259 F.3d at 1140.

DUI with § 16(b)'s requirement that the offender risk the use of force.³⁶⁹

V. PROPOSAL

Since the Tenth Circuit's decision in *Tapia Garcia*,³⁷⁰ four Courts of Appeals have held that DUI is not a crime of violence under § 16(b).³⁷¹ The weight of authority now clearly goes against the Tenth Circuit's determination that DUI is a crime of violence under § 16(b). Thus, the Tenth Circuit should consider revisiting the issue in light of the recent decisions. In addition, the BIA should acquiesce to the Second, Fifth, Seventh, and Ninth Circuits' determination that DUI is not a crime of violence under § 16(b). In the event that the BIA and the Tenth Circuit cling to their determination that DUI is a crime of violence under § 16(b), the United States Supreme Court should resolve the split by determining that DUI is not a crime of violence under § 16(b). In addition, Congress could amend § 16 and specify whether DUI and related offenses are crimes of violence under § 16.

A. The Tenth Circuit Should Revisit the Issue and the BIA and INS Should Acquiesce and Cease Removing Aliens Convicted of Felony DUI

The clear weight of authority now goes against the Tenth Circuit's determination that DUI is a crime of violence under § 16(b). Since the Tenth Circuit decided *Tapia Garcia*,³⁷² four circuits have determined that DUI is not a crime of violence under § 16(b).³⁷³ These decisions, with the exception of the Ninth Circuit's holding in *Trinidad-Aquino*,³⁷⁴ are more persuasive in their treatment of this issue.

Particularly persuasive is the Second, Fifth, and Seventh Circuits' determination that the verb "use" in § 16(b) implies that the offender must risk intentionally using force in the course of committing the

369. *Bazan-Reyes*, 256 F.3d at 606-07.

370. *Tapia Garcia v. INS*, 237 F.3d 1216, 1222-23 (10th Cir. 2001).

371. *Trinidad-Aquino*, 259 F.3d at 1146; *Dalton*, 257 F.3d at 208; *Bazan-Reyes*, 256 F.3d at 611; *Chapa-Garza*, 243 F.3d at 924.

372. *Tapia Garcia*, 237 F.3d at 1222-23.

373. See *supra* note 366 (discussing the Courts of Appeals post-*Tapia Garcia* decisions holding that DUI is not a crime of violence under § 16(b)). In addition, the Third Circuit has stated in dicta that DUI is not a crime of violence under § 16(b). See *United States v. Parson*, 955 F.2d 858, 866 (3d Cir. 1992).

374. *Trinidad-Aquino*, 259 F.3d at 1140.

offense.³⁷⁵ As the Second Circuit correctly recognized in *Dalton*, one does not “use” violent physical force in an automobile accident.³⁷⁶ In contrast, the Tenth Circuit in *Tapia Garcia* failed to inquire into the meaning and implications of the word “use” in § 16(b)’s definition of crime of violence.³⁷⁷ The Tenth Circuit’s determination that DUI is a crime of violence under § 16(b) stands in the way of the uniform implementation of the nation’s immigration laws.³⁷⁸ Given the stakes, the Tenth Circuit should revisit the issue of whether DUI is a crime of violence under § 16(b), concentrating on whether § 16(b)’s inclusion of the verb “use” implies that the offender must risk the intentional use of force.

In addition, the BIA should cease removing aliens convicted of felony DUI. The BIA has already determined that it will no longer remove aliens convicted of felony DUI from the Fifth Circuit.³⁷⁹ The BIA should correspondingly decide to cease removing aliens convicted of DUI from the Second, Seventh, and Ninth Circuits. In order to insure the uniform implementation of the nation’s immigration laws, the BIA should go further and altogether cease removing aliens solely for felony DUI convictions.

B. The Supreme Court Should Resolve the Split

If the BIA and the INS refuse to acquiesce to the definition of crime of violence advanced by the Second, Third, Fifth, Seventh, and Ninth Circuits, then the United States Supreme Court should resolve the circuit split. The Supreme Court should follow the interpretation of crime of violence advanced by these circuits and hold that DUI is *not* a crime of violence under § 16. As argued above, the Second, Fifth, and Seventh Circuits’ determinations that DUI is not a crime of violence is

375. See *supra* note 316 and accompanying text (discussing the Second, Fifth, and Seventh Circuits’ determination that § 16(b)’s definition of crime of violence requires that the offense present a risk of the intentional use of force).

376. *Dalton*, 257 F.3d at 206.

377. See generally *Tapia Garcia*, 237 F.3d at 1216.

378. Cf. *United States v. Chapa-Garza*, 262 F.3d 479, 480-81 (5th Cir. 2001) (Barksdale, J., dissenting).

379. See *In re Olivares-Martinez*, 23 I. & N. Dec. 148, 149, 150 (B.I.A. 2001), available at <http://www.usdoj.gov/eoir/efoia/bia/Decisions/Revdec/pdfDEC/3453.pdf> (“The Board historically follows a court’s precedent in cases arising in that circuit . . . Accordingly, we will not apply our decision in [*In re Puente-Salazar*], in cases arising within the jurisdiction of the Fifth Circuit.”).

more persuasive than the Tenth Circuit's determination that DUI is a crime of violence.³⁸⁰

If the issue should reach the Supreme Court on an appeal from the BIA, the Supreme Court does not owe *Chevron* deference³⁸¹ to the BIA on this issue.³⁸² The BIA is not entitled to deference because § 16 is an independent federal statute, not a part of the immigration laws that the BIA administers.³⁸³ The Supreme Court should review de novo the BIA's determination that DUI is a crime of violence, draw on the analysis of the Second, Fifth, and Seventh Circuits, and hold that DUI is not a crime of violence under § 16. The Supreme Court should follow the reasoning of those Courts of Appeals and hold that the inclusion of the verb "use" in § 16(b)'s definition implies that an offender must risk "intentional availment" of force.³⁸⁴

*C. Congress Should Amend § 16 to Specify the Level of Mens Rea
Necessary to Commit a Crime of Violence*

In the event that the Tenth Circuit does not revisit the issue and the United States Supreme Court does not chose to resolve it, then Congress should consider amending § 16(b) by specifying what level of mens rea is required in order to commit a crime of violence. In the alternative, Congress could amend the definition of a crime of violence to specifically include or exclude DUI and related offenses. Finally, if Congress is solely concerned with the impact that this issue has on the area of immigration law, Congress could amend the definition of "aggravated felony" by specifying that DUI is, or is not, included in that definition.³⁸⁵

380. See *supra* notes 307-69 and accompanying text (arguing that the Second, Fifth, and Seventh Circuits correctly determined that DUI is not a crime of violence under § 16(b)).

381. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984); see *supra* note 65 (discussing the BIA and when courts owe it *Chevron* deference).

382. See *Dalton v. Ashcroft*, 257 F.3d 200, 203 (2d Cir. 2001); *Crawford & Hutchins*, *supra* note 35, at 78-79.

383. See *Dalton*, 257 F.3d at 203.

384. *Bazan-Reyes v. INS*, 256 F.3d 600, 611 (7th Cir. 2001); *United States v. Rutherford*, 54 F.3d 370, 372-73 (7th Cir. 1995).

385. A simple clause within 8 U.S.C. § 1101(a) providing that a state conviction for DUI is not an "aggravated felony" would resolve the issue in the area of immigration law, which is where the current controversy is centered. This addition would advance the uniform implementation of the nation's immigration laws with respect to whether or not a DUI conviction subjects an alien to deportation. If Congress does amend either § 16(b)'s definition of crime of violence or the definition of "aggravated felony," Congress should be careful to take into account the effect the amendment will have on many of the statutes that incorporate those definitions by reference.

VI. CONCLUSION

There is widespread agreement that DUI is a serious offense that exacts a large human and financial toll on society. This does not necessarily mean, however, that the offense fits into the definition of crime of violence under § 16(b). Section 16(b)'s definition suggests that an offense is a crime of violence when the offender risks using intentional force on another in the course of committing the offense. DUI simply does not fit into this definition of crime of violence. The Second, Fifth, and Seventh Circuits correctly determined that DUI is not a crime of violence under § 16(b) because a drunk driver does not risk the use of force in the course of committing the offense. The Tenth Circuit and the BIA incorrectly conflated the risk of injury that DUI presents with the risk of use of force, which § 16(b) requires. The Tenth Circuit should revisit this issue and follow the courts that have held that DUI is not a crime of violence under § 16(b). In addition, the BIA should acquiesce and refrain from removing aliens convicted of felony DUI.