In re Robin Juraine CRAMMOND, Respondent

File A41 925 300 - San Pedro

Decided March 22, 2001

U.S. Department of Justice
Executive Office for Immigration Review
Board of Immigration Appeals

(1) A conviction for "murder, rape, or sexual abuse of a minor" must be for a felony offense in order for the crime to be considered an aggravated felony under section 101(a)(43)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(43)(A) (Supp. V 1999).

(2) In determining whether a state conviction is for a felony offense for immigration purposes, the Board of Immigration Appeals applies the federal definition of a felony set forth at 18 U.S.C. § 3559(a)(5) (1994).

FOR RESPONDENT: Laurack D. Bray, Esquire, Ventura, California

FOR THE IMMIGRATION AND NATURALIZATION SERVICE: Lori Bass, Assistant District Counsel

BEFORE: Board En Banc: SCHMIDT, Chairman; HOLMES, VILLAGELIU, GUENDELSBERGER, MOSCATO, BRENNAN, ESPENOZA, and OSUNA, Board Members. Concurring Opinions: FILPPU, Board Member; ROSENBERG, Board Member, joined by MILLER, Board Member. Dissenting Opinion: GRANT, Board Member, joined by DUNNE, Vice Chairman; SCIALABBA, Vice Chairman; HEILMAN, HURWITZ, COLE, MATHON, JONES, and OHLSON, Board Members.

GUENDELSBERGER, Board Member:

This matter was last before us on November 4, 1999, when we dismissed the respondent's appeal of an Immigration Judge's April 1, 1999, decision finding him subject to removal as charged and statutorily ineligible for the relief requested. On February 1, 2000, the respondent filed a motion to reopen with the Board. The motion will be granted and the record will be remanded to the Immigration Judge for further proceedings. The request for oral argument is denied. *See* 8 C.F.R. § 3.2(h) (2000).

I. FACTS AND PROCEDURAL HISTORY

The respondent is a native and citizen of Belize who entered the United States as a lawful permanent resident on March 7, 1988. The record reflects that the

respondent was convicted on March 23, 1998, in the Superior Court of California, Ventura County, of two separate crimes: (1) residential burglary, in violation of section 459 of the California Penal Code, for which he was sentenced to 210 days in jail and 3 years of probation; and (2) unlawful sexual intercourse, in violation of section 261.5(c) of the California Penal Code, for which he was sentenced to 90 days in jail, to run consecutive to his sentence for the burglary conviction, and 3 years of probation.

The respondent's motion to reopen relates solely to our November 4, 1999, determination that his conviction for unlawful sexual intercourse was for an "aggravated felony" within the meaning of section 101(a)(43)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(43)(A) (Supp. V 1999), and that he was consequently removable under section 237(a)(2)(A)(iii) of the Act, 8 U.S.C. § 1227(a)(2)(A)(iii) (Supp. V 1999), and ineligible for certain forms of relief as a result of that aggravated felony conviction. *See generally* 8 C.F.R. § 3.2(c)(1).

Specifically, the respondent argues that his March 23, 1998, conviction for "unlawful sexual intercourse" can no longer be considered a conviction for an "aggravated felony" under section 101(a)(43)(A) of the Act, because the state court reduced the offense from a felony to a misdemeanor. Consequently, he argues that he should be allowed to pursue relief from removal because he is not an "aggravated felon." In support of his motion, he has submitted a copy of a computer printout reflecting docket entries for October 21, 1999, in the Ventura County Superior Court, which indicate that the respondent's offense was reduced to a misdemeanor.[1]

II. ISSUE

The issue in this case is whether the respondent has been convicted of an "aggravated felony" under section 101(a)(43)(A) of the Act. This determination turns on whether that section includes a conviction for a misdemeanor, as opposed to a felony, and whether the misdemeanor/felony distinction is governed by state or federal law.

The issue we decide here concerns only the interpretation of section 101(a)(43)(A). Our examination of other sections is for the purpose of determining whether their language or structure may shed light on the intended scope of section 101(a)(43)(A). *See, e.g., Matter of Vasquez-Muniz*, Interim Decision 3440 (BIA 2000) (determining the meaning of "described in" under section 101(a)(43)(E) of the Act after reviewing use of the same or similar language in other provisions of the Act).

[1] The Service has not challenged the respondent's contention that his crime was reduced from a felony to a misdemeanor under state law.

III. ANALYSIS

A. Section 101(a)(43)(A) of the Act

Section 101(a)(43) of the Act defines the categories of offenses that Congress has determined merit treatment as "aggravated felonies" under the immigration laws. Section 101(a)(43)(A) includes the crime of "sexual abuse of a minor" within the definition of an aggravated felony. Specifically, the statute provides, in pertinent part, as follows:

> The term "aggravated felony" means—
> (A) murder, rape, or sexual abuse of a minor; [2]
> . . . .
> The term applies to an offense described in this paragraph whether in violation of Federal or State law . . . .

Section 101(a)(43)(A) of the Act. The issue before us is whether the language of the statute mandates that an offense described in section 101(a)(43)(A) be a "felony" offense.

Interpretation of statutory language begins with the terms of the statute itself, and if those terms, on their face, constitute a plain expression of congressional intent, they must be given effect. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). The legislative purpose is presumed to be expressed by the ordinary meaning of the words used. *INS v. Phinpathya*, 464 U.S. 183, 189 (1984). In discerning congressional intent, the words of a statute must be read in their context and with a view to their place in the overall statutory scheme, as the meaning (or the ambiguity) of certain words or phrases may only become evident when placed in context. *See Food and Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000).

We do not find a clear expression of congressional intent in the plain language of section 101(a)(43) of the Act. The choice of the term "aggravated felony," as opposed to more generic terms such as "aggravated offense" or "aggravated crime," does suggest that Congress intended to restrict the listed offenses to felonies. On the other hand, there is no explicit reference in section 101(a)(43)(A) requiring that the crimes included there be felonies.

Looking beyond section 101(a)(43)(A), some of the other aggravated felony provisions refer to other federal statutes, or they require minimum sentences or minimum monetary loss amounts for an offense to qualify as an aggravated felony. Specifically, section 101(a)(43)(B) requires, by reference to federal statutes regarding illicit trafficking in a controlled substance at 21 U.S.C. § 802

[2] The current version of section 101(a)(43)(A) results from the addition of the offenses of rape and sexual abuse of a minor by section 321(a)(1) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Division C of Pub. L. No. 104-208, 110 Stat. 3009-546, 3009-627 ("IIRIRA").

and drug trafficking at 18 U.S.C. § 924(c), that an offense be punishable as a felony. *See* section 101(a)(43)(B) of the Act; *Matter of K-V-D-*, Interim Decision 3422 (BIA 1999) (affirming *Matter of L-G-*, 21 I&N Dec. 89 (BIA 1995), and concluding that an alien convicted in Texas of simple possession of a controlled substance, which would be a felony under Texas law but a misdemeanor under federal law, is not convicted of an aggravated felony within the meaning of section 101(a)(43)(B) of the Act); *see also United States v. Zarate-Martinez*, 133 F.3d 1194 (9th Cir. 1998); *United States v. Garcia-Olmeda*, 112 F.3d 399 (9th Cir. 1997).

Section 101(a)(43)(F) of the Act refers specifically to the federal definition of a "crime of violence" in 18 U.S.C. § 16, which requires that any crime falling within § 16(b) be a felony but contains no such requirement for offenses falling within § 16(a). It further provides a specific minimum sentence of "at least 1 year" for the offense. Thus, this section has been found to include crimes that are not "felonies" within the federal definition of that term.[3] *See United States v. Pacheco*, 225 F.3d 148 (2d Cir. 2000) (finding, for sentence enhancement purposes, that a misdemeanor offense for which the alien had been sentenced to a 1-year suspended sentence was an aggravated felony within the meaning of the Act); *Wireko v. Reno*, 211 F.3d 833 (4th Cir. 2000) (finding that the plain language of section 101(a)(43)(F) contains no requirement that the offense have been a felony, and concluding that the alien's misdemeanor conviction for sexual battery was for an aggravated felony). Section 101(a)(43)(G) also defines as aggravated felonies theft or burglary offenses for which the sentence is "at least 1 year," without further qualification. *See* section 101(a)(43)(G) of the Act; *see also United States v. Pacheco*, *supra*; *United States v. Graham*, 169 F.3d 787 (3d Cir.) (finding, for sentence enhancement purposes, that a misdemeanor theft conviction for which the term of imprisonment is 1 year is an aggravated felony conviction under section 101(a)(43)(G)), *cert. denied*, 528 U.S. 845 (1999).

As indicated by the separate opinions in this case, the language of section 101(a)(43) of the Act can be read to support competing reasonable interpretations of whether an offense under subparagraph (A) must be a felony. These differing views are expressed in the concurring opinions of Board Members Filppu and Rosenberg, who agree that a subparagraph (A) offense must be a felony in order to meet the definition of an "aggravated felony," and in the dissenting opinion of Board Member Grant, who concludes that such offenses need not be felonies.

Where the language of the statute is ambiguous, we turn to traditional tools of statutory construction, such as the legislative history or other statutes where Congress may have spoken subsequently and more specifically regarding the issue at hand. *See Food and Drug Admin. v. Brown & Williamson Tobacco Corp.*, *supra*, at 133. Although legislative statements have less force than the

[3] The federal definition of a "felony" requires that the minimum term of imprisonment be "more than 1 year." 18 U.S.C. § 3559(a)(5) (1994).

plain language of the statute, such statements are helpful to corroborate and underscore a reasonable interpretation of the statute. *See generally, e.g.*, *Weinberger v. Rossi*, 456 U.S. 25, 32 (1982). There is little indication in other sections of the Act or in the overall statutory scheme of Congress' intentions concerning the offenses listed in section 101(a)(43)(A). However, the addition of section 237(a)(2)(E) of the Act as a ground of removability,[4] which includes such crimes against children as child abuse, child neglect, and child abandonment, suggests that Congress intended "sexual abuse of a minor" offenses under section 101(a)(43)(A) to be limited to felony offenses. This is indicated by the fact that lesser sexual abuse offenses would be covered under section 237(a)(2)(E).

The language in former section 212(c) of the Act, 8 U.S.C. § 1182(c) (1994), also supports the position that aggravated felony crimes are necessarily felony offenses. That section barred relief to an alien who was "convicted of one or more aggravated felonies and has served for such *felony or felonies* a term of imprisonment of at least 5 years."[5] The reference to "such felony" suggests that, at least at the time this amendment was enacted, aggravated felonies were considered felony offenses. Similarly, as discussed in Board Member Filppu's concurring opinion, the IIRIRA left intact at least one provision in the Act in which the term "such felon" is used in reference to a person convicted of an aggravated felony.

The legislative history of section 101(a)(43) of the Act indicates that Congress intended to include only the most serious offenses within the aggravated felony definition. The term "aggravated felony" was first introduced to the Act by section 7342 of the Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181, 4469 ("ADAA"). As stated in the House Conference Report accompanying S. 358, which resulted in amendments to the aggravated felony definition by section 501 of the Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978, 5048, the intent of the 1990 amendments was to "broaden[] the list of serious crimes, conviction of which results in various disabilities and preclusion of benefits under the Immigration and Nationality Act." H.R. Conf. Rep. No. 101-955 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6784, 6797.

Since the ADAA first used and defined the term aggravated felony in 1988, Congress has expanded the definition on several occasions, signaling its growing concern over criminal aliens. *See Matter of Truong*, Interim Decision 3416 (BIA 1999); *see also* Immigration and Nationality Technical Corrections Act of 1994, Pub. L. No. 103-416, § 222(a), 108 Stat. 4305, 4320. One of the bills containing amendments to the aggravated felony definition proposed limiting

[4] Section 237(a)(2)(E) of the Act was added by section 350 of the IIRIRA, 110 Stat. at 3009-640.

[5] This language was added to former section 212(c) by section 511 of the Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978, 5052. Section 212(c) was repealed by section 304(b) of the IIRIRA, 110 Stat. at 3009-597.

aggravated felonies to those crimes that would have a base offense level of 12 or more under the United States Sentencing Guidelines ("U.S.S.G."). *See* H.R. 22, 104th Cong. (1995). According to chapter 5, Part A, Zone D of the U.S.S.G. Sentencing Table, a base offense level of 12 provides, with one exception, for a minimum term of imprisonment of 12 to 18 months. *See* 18 U.S.C.A. ch. 5, pt. A (West 1996).

In the legislative history accompanying the bill that set forth the proposed amendments to section 101(a)(43)(A) of the Act that were eventually enacted in the IIRIRA, the Committee on the Judiciary referred to the offenses under that section as felonies. Specifically, in discussing the amendments precluding an alien convicted of an aggravated felony from applying for adjustment of status, the Committee noted that "[b]ecause of the expanded definition of 'aggravated felony' provided by sec. 161 of the bill, aliens who have been *convicted of most felonies*, if sentenced to at least 1 year in prison, will be ineligible for this relief." S. Rep. No. 104-249, at 40 (1996) (emphasis added).

Overall, the legislative history and other interpretive aids provide less than clear guidance as to whether Congress intended that offenses falling within the aggravated felony definition at section 101(a)(43)(A) should be limited to felony offenses.

It is not evident from the language of the statute or from the legislative history whether Congress intended that an offense listed in section 101(a)(43)(A) must be a felony in order to be considered an aggravated felony. We therefore turn to the "longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien." *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987) (citing *INS v. Errico*, 385 U.S. 214, 225 (1966); *Costello v. INS*, 376 U.S. 120, 128 (1964); *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948)). The consequences of a finding that a crime is an "aggravated felony" are severe. Congress has specifically noted its intention that aliens convicted of such crimes should be subjected to various disabilities under the immigration laws and precluded from nearly all forms of relief. In light of these harsh consequences, we resolve the ambiguity presented by this case in favor of the respondent. Thus, we find that if an alien has been convicted of an offense of "murder, rape, or sexual abuse of a minor," that conviction must be for a "felony" in order for the crime to be considered an "aggravated felony" under section 101(a)(43)(A) of the Act.

We recognize that the United States Court of Appeals for the Seventh Circuit has recently determined that section 101(a)(43)(A) of the Act encompasses state misdemeanor convictions for sexual abuse of a minor. *See Guerrero-Perez v. INS*, 2001 WL 210186 (7th Cir. 2001). The court in *Guerrero-Perez* noted that, although it would ordinarily defer to the Board's interpretation of immigration law, the Board's decision in the case before it was "silent with regard to the issue of whether Guerrero's misdemeanor conviction can be deemed an aggravated felony." *Id.* at *2. Therefore, the court addressed the issue as a matter of first impression. After examining the structure and evolution of section 101(a)(43), the court concluded that "Congress, since it did

not specifically articulate that aggravated felonies cannot be misdemeanors, intended to have the term aggravated felony apply to the broad range of crimes listed in the statute, even if these include misdemeanors." *Id.* at *9.

In *Guerrero-Perez*, the Seventh Circuit focused primarily upon two factors in reaching its conclusion. First, it found that the grouping of sexual abuse of a minor with murder and rape in section 101(a)(43)(A) was "a fairly strong indication, albeit a limited one" that Congress intended both misdemeanor and felony convictions for sexual abuse of a minor to be considered aggravated felonies. *Id.* at 8. Second, it emphasized the word "means" in the definition of aggravated felony. We find it difficult to accept these factors as dispositive. As to the first factor, the grouping of sexual abuse of a minor with murder and rape, crimes almost universally classified as felonies, appears to cut both ways, if not to provide greater support for the argument that Congress intended to cover only felony sexual abuse of a minor offenses. The second factor, the focus upon the term "means," does not necessarily resolve the issue of the significance of Congress' choice of the term "aggravated felony" to describe the overall category of offenses.

The Seventh Circuit confines its examination of the statute to section 101(a)(43) and does not address the use of the term "aggravated felony" in other sections of the Act. As discussed above, the term is used in other sections of the Act in contexts that suggest a focus on felony offenses. The Seventh Circuit does not address our decision and analysis in *Matter of Davis*, 20 I&N Dec. 536, 542-43 (BIA 1992), which emphasizes the importance, for purposes of uniformity, of a felony offense in order to have an aggravated felony under section 101(a)(43)(B) of the Act. Finally, the Seventh Circuit does not fully address the interpretive principle that we resolve doubts in favor of the more narrow construction of deportation statutes. For these reasons, after taking into account the analysis set forth in *Guerrero-Perez v. INS*, *supra*, we nevertheless conclude that an aggravated felony under section 101(a)(43)(A) of the Act must be a felony offense.

B. Respondent's Conviction

We have determined that an offense under section 101(a)(43)(A) of the Act must be a felony offense. The question remains whether the respondent's offense is a felony. Where a state criminal conviction is at issue, this determination turns on whether the state or the federal definition of a "felony" controls.

Important policy considerations favor applying a uniform federal standard in adjudicating removability and determining the immigration consequences of a conviction under the Act. The states use a variety of approaches in defining the term "felony."[6] To assure uniform treatment under the immigration laws, unless

[6] For example, California does not differentiate between felony and misdemeanor offenses (continued...)

otherwise directed, we turn to the federal definition of a felony in applying the terms of the aggravated felony provision. We have followed this approach in many recent decisions that interpret the Act. *See Matter of K-V-D-*, *supra*; *Matter of Punu*, Interim Decision 3364 (BIA 1998); *Matter of L-G-*, *supra*; *Matter of Davis*, *supra*. This system of classification provides a uniform benchmark against which to assess the immigration consequences of individual state convictions, and it frees us from the necessity of relying on "'the vagaries of state law.'" *Matter of K-V-D-*, *supra*, at 7 (quoting *Matter of A-F-*, 8 I&N Dec. 429, 446 (BIA, A.G. 1959)). Thus, we find it appropriate to apply the federal definition of a felony in determining whether a state offense is a felony for immigration purposes.

Under federal law, an offense is defined as a felony if it is one for which the maximum term of imprisonment authorized is, at a minimum, "more than 1 year." 18 U.S.C. § 3559(a)(5) (1994). An offense is classified as a misdemeanor if the maximum authorized term of imprisonment is "one year or less," and the minimum authorized term of imprisonment is 5 days. 18 U.S.C. §§ 3559(a)(6)-(8).

At the time of our November 4, 1999, decision, the conviction documents in the record indicated that the respondent had been convicted of a "felony charge" under section 261.5(c) of the California Penal Code and that he had entered a plea with the understanding that he could be sentenced to a maximum penalty of 3 years in prison for the offense.

In conjunction with his motion, however, the respondent has presented new evidence indicating that his offense has been reduced to a "misdemeanor." The pertinent language of the state statute at issue in this case provides as follows:

> Any person who engages in an act of unlawful sexual intercourse with a minor who is more than three years younger than the perpetrator is guilty of either a misdemeanor or a felony, and shall be punished by imprisonment in a county jail not exceeding one year, or by imprisonment in the state prison.

Cal. Penal Code § 261.5(c) (West 1998). As this language indicates, the statute is divisible, in that persons may be charged and convicted either for a crime punishable as a misdemeanor (with a maximum term of imprisonment in a county jail not exceeding 1 year) or for a crime punishable as a felony (by

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[6] (...continued)
with respect to the maximum authorized term of imprisonment. Rather, a felony is defined as "a crime which is punishable with death or by imprisonment in the state prison," and all other offenses are considered misdemeanors or infractions. Cal. Penal Code § 17(a) (West 2000). California law provides that an offense is a misdemeanor under various circumstances when discretion is left to the state court to determine whether the offense shall be punished by imprisonment in the state prison, by a fine, or by imprisonment in the county jail. *See* Cal. Penal Code § 17(b). Other states have similarly vague categorizations of crimes that are not necessarily tied to the maximum authorized term of imprisonment. *See, e.g.*, Mass. Gen. Laws Ann. ch. 274, § 1 (West 2000).

imprisonment in the state prison, if the term of imprisonment exceeds 1 year). Given the reduction of the respondent's crime to a "misdemeanor," we find that his conviction falls within that portion of the statute punishing misdemeanor offenses. The maximum term of imprisonment for the misdemeanor portion of section 261.5(c) of the California Penal Code is "imprisonment in a county jail not exceeding one year." Because the federal definition of a felony requires that the term of imprisonment be for "more than one year," 18 U.S.C. § 3559(a)(5), the respondent's conviction—if modified as indicated in the motion to reopen—would not be for an offense falling within the federal definition of a felony.

IV. CONCLUSION

In light of our determination that the new evidence presented by the respondent in conjunction with his motion constitutes prima facie evidence that the offense of which he was convicted, unlawful sexual intercourse, does not fall within the federal definition of a felony, we conclude that it is not an aggravated felony under section 101(a)(43)(A) of the Act. The new evidence is therefore material to the respondent's case, as the conviction would no longer appear to support a finding of removability under section 237(a)(2)(A)(iii) of the Act. Nor would it preclude him from seeking certain forms of relief from removal, for which he was previously found statutorily ineligible as a result of his conviction for an aggravated felony.

Accordingly, we find it appropriate to grant the respondent's motion to reopen and to remand this matter to the Immigration Judge for further proceedings. The following orders will be entered.

ORDER: The motion to reopen is granted.

FURTHER ORDER: The proceedings are reopened and the record is remanded to the Immigration Judge for further proceedings consistent with the foregoing opinion and for the entry of a new decision.

CONCURRING OPINION: Lauri Steven Filppu, Board Member

I respectfully concur.

I agree with the majority that current subparagraph (A) of the "aggravated felony" definition is limited to felony convictions and that we should apply the federal "felony" definition for convictions falling within this subparagraph. *See* section 101(a)(43)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(43)(A) (Supp. V 1999). Unlike the majority, however, I do not find this to be a case in which we must invoke the rule of lenity. The ordinary approach to questions of statutory construction provides an answer.

Section 101(a)(43)(A) of the Act provides that "[t]he term 'aggravated felony' means— (A) murder, rape, or sexual abuse of a minor." The respondent's unlawful sexual intercourse offense has been reduced from a

felony to a misdemeanor. We must determine whether it is an "aggravated felony." The plain or natural reading of the word "felony" would not include misdemeanors.

The statutory context in which the term "aggravated felony" was introduced confirms for me that it then applied only to felonies. This term had its origin in section 7342 of the Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 100 Stat. 4181, 4469 ("ADAA"), and was restricted to murder, drug trafficking crimes, illicit trafficking in firearms or destructive devices, and any attempts or conspiracies to commit such acts. These are obviously serious offenses. They are likely to be felonies, but perhaps not necessarily so.

Importantly, the ADAA also made other changes showing that the legislation was aimed at "felons." The ADAA revised the custody provisions of former section 242(a) of the Act, 8 U.S.C. § 1252(a) (1988), to require the Attorney General to take custody of "any alien convicted of an aggravated felony" and then directed that "the Attorney General shall not release *such felon* from custody." ADAA § 7343(a)(4), 102 Stat. at 4470 (emphasis added). The ADAA further added a new section 242A to the Act, which was designed to expedite the deportation of aliens convicted of aggravated felonies. *See* section 242A of the Act, 8 U.S.C. § 1252a (1994). New section 242A(b) provided in relevant part as follows:

> With respect to an alien convicted of an aggravated felony who is taken into custody by the Attorney General . . . , the Attorney General shall, to the maximum extent practicable, detain *any such felon* at a facility at which other such aliens are detained.

ADAA § 7347(a), 102 Stat. at 4471, 4472 (emphasis added). This provision currently appears as section 238(a)(2) of the Act, 8 U.S.C. § 1228(a)(2) (Supp. V 1999). The natural meaning of the term "aggravated felony" and these related statutory references to "such felon," which were part of the original enactment, seem to foreclose any reasonable argument that the term then was meant generally to include misdemeanors.

The analysis we used in *Matter of Davis*, 20 I&N Dec. 536 (BIA 1992), confirms the "felony" focus of the statutory phrase, even though the alien in *Davis* had been convicted under a state law misdemeanor provision of conspiracy to distribute a controlled substance. We found this state misdemeanor to be an aggravated felony, in significant part, because it was analogous to a federal felony and fit within our reading of what constituted a felony "drug trafficking crime." We explained that

> we would not conclude, based solely on the common definitions of "traffic" or "trafficking," and considering that the ultimate term in question is "aggravated *felony*," that an offense that is not a felony and/or an offense which lacks a sufficient nexus to the trade or dealing of controlled substances constitutes "illicit trafficking" in a controlled substance within the meaning of section 101(a)(43) of the Act.

Matter of Davis, *supra*, at 541. We followed our historical approach with respect to the "conspiracy" aspect of the alien's conviction by looking to the underlying offense. In *Davis*, we found that the "underlying offense is a felony," *id*. at 545, and consequently found the alien deportable for having been convicted of an "aggravated felony." Regardless of whether *Davis* reflects a correct understanding of the criminal law meaning of a "drug trafficking crime," *see Steele v. Blackman*, 236 F.3d 130 (3d Cir. 2001), we were mindful in our analysis that the term in question looked to a "felony." Indeed, much of that analysis would seem to have been unnecessary if we understood an "aggravated felony" to routinely include misdemeanor convictions.

That does not end the matter, however. The "aggravated felony" definition has undergone a series of amendments. Rape and sexual abuse of a minor were added to section 101(a)(43)(A) of the Act by section 321(a)(1) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Division C of Pub. L. No. 104-208, 110 Stat. 3009-546, 3009-627 ("IIRIRA"). New legislation, of course, may alter the character or meaning of existing statutory language. Importantly, in this respect, the IIRIRA also amended other subparagraphs of the "aggravated felony" definition such that a literal reading of several subparagraphs would cover certain misdemeanor convictions in addition to felony convictions. *See, e.g.*, section 101(a)(43)(G) of the Act (providing that theft or burglary offenses are aggravated felonies if the term of imprisonment is at least 1 year).

The IIRIRA's inclusion of language covering certain misdemeanors within various subparagraphs of the "aggravated felony" definition creates uncertainty as to whether the IIRIRA fundamentally changed the original meaning of the term. Consequently, we must look beyond the use of the word "felony" in the original enactment to determine whether misdemeanor convictions fall within subparagraph (A), as amended by the IIRIRA.

The United States Supreme Court directs us to look at a statute as a whole when construing language that appears to be ambiguous. *See Food and Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000); *John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank*, 510 U.S. 86, 94-95 (1993). The first place to look is in the IIRIRA itself, because the basic question to be resolved is whether the design of the IIRIRA effected a change in the prior meaning of the term "aggravated felony."

I find little guidance in section 321 or in section 322(a)(2) of the IIRIRA. *See* IIRIRA §§ 321, 322, 110 Stat. at 3009-627, 3009-629. These sections made the amendments to the aggravated felony definition. But no comprehensive design or pattern emerges to suggest that misdemeanor convictions were in general to be treated as "aggravated felon[ies]." Rather, sections 321 and 322(a)(2) of the IIRIRA extended the "aggravated felony" definition to some misdemeanors mainly by reducing the periods of imprisonment necessary for certain crimes to be treated as aggravated felonies. For example, prior to the IIRIRA, section 101(a)(43)(G) required the imposition of a 5-year sentence in order for a theft or burglary offense to be an

aggravated felony. After enactment of the IIRIRA, the term of imprisonment was reduced to "at least one year," literally covering only those misdemeanors receiving the maximum sentence. *See* section 101(a)(43)(G) of the Act.

The phrase "aggravated felony" is a term of art. It does not mandate that the crimes actually be felonies when the literal language of a particular subparagraph includes offenses that are misdemeanors. *See United States v. Christopher*, 239 F.3d 1191 (11th Cir. 2001); *United States v. Pacheco*, 225 F.3d 148 (2d Cir. 2000); *Wireko v. Reno*, 211 F.3d 833 (4th Cir. 2000); *United States v. Graham*, 169 F.3d 787 (3d Cir.), *cert. denied*, 528 U.S. 845 (1999). Further, there is room to argue that the term "aggravated felony" must *generally* bear a different meaning after enactment of the IIRIRA in order to give effect to the literal language of those subparagraphs that now include misdemeanors. *See Almendarez-Torres v. United States*, 523 U.S. 224, 237 (1998). Indeed, one court has ruled that misdemeanor convictions are encompassed within section 101(a)(43)(A), but I agree with the majority that the court did so without the benefit of the analysis we provide today. *Guerrero-Perez v. INS*, 2001 WL 210186 (7th Cir. 2001).

In the end, I find the inclusion of some "top-end" misdemeanors and a few others (e.g., section 101(a)(43)(N) covers certain misdemeanor alien smuggling first offenses) to be scant evidence of a general design or objective to effect a significant departure from the meaning previously assigned to the term "aggravated felony." I would expect to find some mention of such a design in the legislative history of the IIRIRA.

Most importantly, the IIRIRA did not alter the term itself or make systematic changes to how the term is used elsewhere in the Act. The IIRIRA left it as an aggravated "felony." Had there been a broader intent to change the term's overall character, I would expect the term itself to have been amended in keeping with that intent, such that it might now be labeled an "aggravated crime" or an "aggravated offense."

The IIRIRA did amend former section 242A of the Act, dealing with expedited removal of aliens convicted of aggravated felonies, but the relevant changes were simply amendments to redesignate it as section 238 and to conform the cross-references to the new numbering system. *See* IIRIRA §§ 308(b)(5), (c)(1), 110 Stat. at 3009-615. The reference in redesignated section 238(a)(2) to "such felon" in relation to "an alien convicted of an aggravated felony" was unchanged. I would expect the IIRIRA to have revised the "such felon" reference if the IIRIRA had been attempting to fundamentally alter the character of the term "aggravated felony" to routinely include misdemeanor convictions.

Simply put, the overall design of the IIRIRA does not reflect any intent to change the original meaning of the term "aggravated felony" in general. The fact that the literal language of some subparagraphs would extend to a few misdemeanors is not a basis for concluding that all of the subparagraphs now cover misdemeanors too. The isolated inclusion by new legislation of a few misdemeanors within a lengthy catalogue of crimes does not, in my opinion,

signal a legislative shift in the meaning of the principal term being defined, particularly when the new enactment, as a whole, fails to reflect any overall effort to change the natural meaning of the words used in that term.

It is a "fair assumption that Congress is unlikely to intend any radical departures from past practice without making a point of saying so." *Jones v. United States*, 526 U.S. 227, 234 (1999); *see Green v. Bock Laundry Machine Co.*, 490 U.S. 504, 521 (1989) (stating that a "party contending that legislative action changed settled law has the burden of showing that the legislature intended such a change"). The literal language of a few subparagraphs reflects a departure, but the structure and design of the IIRIRA as a whole do not. Consequently, I believe we must continue to give effect to the original design of section 101(a)(43) of the Act, except where the literal language of a particular subparagraph requires otherwise.

Current subparagraph (A) does not contain any explicit language overriding the original felony character of the definition. Thus, I conclude that an offense under subparagraph (A) must be a felony in order to qualify as an "aggravated felony."

CONCURRING OPINION: Lory Diana Rosenberg, Board Member, in which Neil P. Miller, Board Member, joined

I respectfully concur.

I agree with the majority that the respondent's 1998 misdemeanor conviction for unlawful sexual intercourse is not a conviction for an aggravated felony. Section 101(a)(43)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(43)(A) (Supp. V 1999). Specifically, I agree that the term "aggravated felony" in subparagraph (A) includes only a *felony* conviction for murder, rape, or sexual abuse of a minor, and that the accepted federal definition of a "felony" under 18 U.S.C. § 3559(a) (1994) applies in determining whether the respondent's state conviction constitutes a felony. Therefore, I concur in the result reached by the majority.

However, I find that the statutory language and legislative history pertaining to the term "aggravated felony" in general, and to subparagraph (A) in particular, provides a sound and reasoned basis for these conclusions. While I agree that the term "aggravated felony" and the specific language of subparagraph (A) may not be altogether plain, the majority's own opinion belies its conclusion that "[t]here is little indication in other sections of the Act or in the overall statutory scheme of Congress' intentions concerning the offenses listed in section 101(a)(43)(A)." *Matter of Crammond*, 23 I&N Dec. 9, 13 (BIA 2001). In particular, I cannot agree that "[o]verall, the legislative history and other interpretive aids provide less than clear guidance as to whether Congress intended [to limit the offenses covered by subparagraph (A)] to felony offenses." *Id.* at 14. Similarly, I cannot agree that the language of the statute can

be read to support "competing reasonable interpretations," as though the dissenting opinion provides but another equally tenable view we simply have chosen not to adopt. *Id.* at 12.

To the contrary, I conclude that there is a significant expression of congressional intent favoring the conclusion reached by the majority and that a narrow construction of the statute limiting the reach of the aggravated felony provision is appropriate. Therefore, I write separately.

I. STATUTORY CONSTRUCTION OF SECTION 101(a)(43)(A) OF THE ACT

Section 101(a)(43)(A) of the Act provides that "[t]he term '*aggravated felony*' *means*— (A) murder, rape, or sexual abuse of a minor." (Emphasis added.) Presumably, Congress' intent is communicated by the language it employs. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984) (focusing first on the language of the statute to determine what Congress meant or intended); s*ee also Norfolk and W. Ry. Co. v. American Train Dispatchers' Ass'n*, 499 U.S. 117, 128 (1991) (emphasizing that statutory construction must begin with the language of the statute). In *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987), the Supreme Court addressed section 101(a)(42), another definitional provision of the Act, stating that "*[w]ith regard to this very statutory scheme*, we have considered ourselves bound to '"assume 'that the legislative purpose is expressed by the ordinary meaning of the words used.'"'" *Id.* at 432 (quoting *INS v. Phinpathya*, 464 U.S. 183, 189 (1984) (quoting *American Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982) (quoting *Richards v. United States*, 369 U.S. 1, 9 (1962)))) (emphasis added).

Term of art or not, the principle that "'[a] definition which declares what a term "means" . . . excludes any meaning that is not stated'" as readily—and more rationally—supports reading the term "aggravated felony" to exclude misdemeanors where Congress has not specifically stated their inclusion in the definition, than it does reading the term overinclusively to include misdemeanors because Congress did not affirmatively specify "misdemeanors not included." *Stenberg v. Carhart*, 530 U.S. 914, 120 S.Ct. 2597, 2615 (2000) (quoting *Colautti v. Franklin*, 439 U.S. 379, 393 n.10 (1979) (quoting 2A C. Sands, *Statutes and Statutory Construction* § 47.07 (4th ed. Supp. 1978))); *see Matter of Crammond, supra*, at 33 (Grant, dissenting). The ambiguity created by Congress' silence in subparagraph (A) as to whether the covered convictions are limited to felony offenses, and Congress' inclusion of particular minimum sentence requirements and minimum fine provisions in other subparagraphs of section 101(a)(43), gives rise to questions regarding the scope of the term "aggravated felony." Accordingly, I agree that an examination

of the statutory language and the legislative history accompanying the enactment and modification of the term "aggravated felony" and the crimes it covers is warranted.

A. Statutory Language

The absence of language specifying the degrees of offenses Congress intended to cover in articulating what "aggravated felony" means for purposes of subparagraph (A) leaves a gap which it is our role to fill. *Chevron , U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, *supra*, at 843. In interpreting statutes, we begin with the language of the statute itself. *Aragon-Ayon v. INS*, 206 F.3d 847, 851 (9th Cir. 2000). With respect to the provision before us, Congress used the words *"aggravated"* and *"felony"* prominently in the principal clause of the definition, referring to convictions for certain types of offenses included in the subparagraphs of the section. Since introducing it in 1988 to identify more serious offenses warranting more severe immigration consequences, Congress has not modified the term "aggravated felony." *See* Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7342, 102 Stat. 4181, 4469; *cf.* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Division C of Pub. L. No. 104-208, § 321(a)(1), 110 Stat. 3009-546, 3009-627 ("IIRIRA").

The commonly understood meaning of the word "felony" is plain: it refers to a degree of crime that is serious and that does not include misdemeanors. *See United States v. Graham*, 169 F.3d 787, 792-93 (3d Cir.) (acknowledging a uniformly accepted federal standard for differentiating between felonies and misdemeanors), *cert. denied*, 528 U.S. 845 (1999); *see also United States v. Pacheco*, 225 F.3d 148, 156 (2d Cir. 2000) (Straub, J., dissenting) ("[T]here can be little argument that the word 'felony' is commonly understood—and statutorily defined—to include crimes punishable by prison terms of *greater than* one year."). The term "felony" is also uniformly distinguished in the United States Sentencing Guidelines in U.S.S.G. § 2L1.2 cmt. 1, in *Black's Law Dictionary* 633 (7th ed. 1999), and in *Webster's Third New Int'l Dictionary* 836 (1993).

In addition, the word "aggravated" has a commonly accepted meaning. Typically, it modifies another word and means a situation that is worse, enhanced, or more severe in some manner. *See, e.g., Black's Law Dictionary*, *supra*, at 65 (defining the word "aggravated," when used to describe a crime, as "made worse or more serious by circumstances such as violence, the presence of a deadly weapon, or the intent to commit another crime"); *Webster's Third New Int'l Dictionary*, *supra*, at 41 (defining the verb "to aggravate" to mean "to make worse, more serious, or more severe"). Moreover, "it is quite clear that 'aggravated felony' defines a subset of the broader category 'felony.'" *United States v. Pacheco*, *supra*, at 157 (Straub, J., dissenting) ("Common sense and

standard English grammar dictate that when an adjective—such as 'aggravated'—modifies a noun—such as 'felony'—the combination of the terms delineates a subset of the noun.").

Commonly understood terms mean what they appear to mean. *See United States v. Pacheco*, *supra*, at 157 (Straub, J., dissenting) ("[I]t is a well-settled maxim of statutory construction that '[w]here Congress uses terms that have accumulated settled meaning under . . . the common law, *a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms*.'" (emphasis added) (quoting *NLRB v. Amax Coal Co.*, 453 U.S. 322, 329 (1981))); *see also United States v. United States Gypsum Co.*, 438 U.S. 422, 437 (1978) ("Congress will be presumed to have legislated against the background of our traditional legal concepts . . . ."). In addition, courts routinely look to legislative history and canons of construction to determine the meaning of statutory language, even when such language, standing alone, may appear to be plain. *INS v. Cardoza-Fonseca*, *supra*, at 432; *see also id.* at 448 ("'If a court, *employing traditional tools of statutory construction*, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.'" (emphasis added) (quoting *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, *supra*, at 843 n.9)). Reference to the statute and to legislative history reflects Congress' intent that subparagraph (A) cover only felony convictions. Consequently, it is incorrect to say, as the dissent claims, that "[t]he majority identifies *no clear evidence* that Congress has ever intended the term 'felony' to impose such a limiting construction." *Matter of Crammond*, *supra*, at 35 (Grant, dissenting) (emphasis added).

I know of no rule of construction that requires Congress to have affirmatively specified that in using the self-evident, commonly understood word "felony," it meant "only a felony offense," and not offenses of all levels. Put another way, I know of no rule of law or logic holding that the absence of a particular designation means the presence of a different designation.[1] "Not X" does not mean "Y," or even "possibly Y." This is a classic logical fallacy.

We have acknowledged that "[o]ur task is not to improve on the statute or to question the wisdom of it, but rather to interpret the language that was enacted as law." *Matter of Campos-Torres*, Interim Decision 3428, at 6 (BIA 2000) (citing *Richards v. United States*, *supra*, at 10 (asserting that courts "are bound to operate within the framework of the words chosen by Congress and not to question the wisdom of the latter in the process of construction")). As the opinions of the majority and my concurring colleague note, even when Congress amended the Act in 1990, 1994, and 1996 to expand the range of offenses

[1] Incredibly, the dissent appears to attempt to invoke a "plain language" analysis to argue in favor of such a conclusion. *Matter of Crammond, supra*, at 35-36 n.7 (Grant, dissenting); *see also id.* at 37 (arguing that "the proper rule—that there is no overarching requirement that a crime . . . under section 101(a)(43) be a felony—[is] inherent in the text of the statute"); *cf. Guerrero-Perez v. INS*, 2001 WL 210186 (7th Cir. 2001).

included within the aggravated felony definition, Congress did not amend the term "aggravated felony" to a more generic term, such as "aggravated offense," or make systematic changes to how the term is used elsewhere in the Act. *See Matter of Crammond*, *supra*, at 11; *id.* at 20 (Filppu, concurring); *see also United States v. Pacheco*, *supra*, at 158 (Straub, J., dissenting).

The content of subparagraph (A) must be read together with the principal phrase, "The term 'aggravated felony' means–," as this term is applicable to all subparagraphs in the section. Section 101(a)(43) of the Act.[2] It is reasonable to expect Congress to have revised the references to "aggravated *felony*" or "such *felon*" if it intended to fundamentally alter the character of the term "aggravated felony" so as to routinely include misdemeanor convictions. Similarly, it is difficult to conceive of Congress using the word "aggravated" other than to restrict the categories of felony offenses covered by the term "aggravated felony." Therefore, I conclude that Congress' continued use of the words "felony" and "aggravated" in the term "aggravated felony" is a powerful indication that the term continues to refer to a certain category of offenses—felony offenses.

B. Legislative History

Not only does the overall statutory language support the conclusion reached by the majority, but relevant legislative history supports the conclusion that Congress has consistently intended the term "aggravated felony" to refer to felony convictions. *See INS v. Cardoza-Fonseca*, *supra*, at 432 n.12 (looking to the statutory language and legislative history to determine whether a "'clearly expressed legislative intention'" requires questioning the strong presumption that Congress expresses its intent through the language it chooses (quoting *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980))). None of the amendments made to the Act since the term "aggravated felony" was introduced have expressly modified the term, and no legislation has altered a reasonable interpretation of the statutory language as reflecting Congress' intent that the covered offenses encompass only felony convictions. *Id.*

For example, as early as 1993, Congressman Bill McCollum proposed adding three additional substantive categories of "alien *felons*" to the definition of aggravated felony. 139 Cong. Rec. E749-50 (1993) (emphasis added) (proposing to add felons who have committed serious immigration-related crimes, participated in serious criminal activities and enterprises, and

[2] The suggestion of the United States Court of Appeals for the Seventh Circuit that statutory language following the word "means," in a provision defining terms used in the statute, is not subject to further examination is not supported by the Supreme Court's, interpretation of other definitional provisions of the Act. *See INS v. Cardoza-Fonseca*, *supra* (interpreting "the term 'refugee' means" at section 101(a)(42) of the Act); *cf. Guerrero-Perez v. INS*, *supra*.

committed serious white-collar crimes). At the same time, Congressman McCollum proposed increasing penalties from 15 years to 20 years for aggravated felons who reenter the United States. *Id.* As for "an alien convicted of a *felony* other than an aggravated felony," he proposed increasing the maximum sentence to 10 years, and extending this penalty also to "aliens convicted of three or more *misdemeanors*." *Id*. (emphasis added).

In 1994, Congress expanded the aggravated felony definition to cover these additional classes of "alien felons." Immigration and Nationality Technical Corrections Act of 1994, Pub. L. No. 103-416, § 222(a), 108 Stat. 4305, 4320. Congress also enacted the increased penalties for illegal reentry after deportation based on whether the prior deportation was subsequent to a conviction for (1) an aggravated felony, (2) *a felony other than an aggravated felony*, or (3) three or more *misdemeanors*. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 130001(b), 108 Stat. 1796, 2023. The language and legislative history of these amendments show that Congress used the term "aggravated felony" to identify a group of serious felony offenses distinguishable from other felony offenses, and from misdemeanor offenses.

Furthermore, major proponents of the 1996 criminal alien amendments to the Act, such as Senator Spencer Abraham and Senator William Roth, specifically referred to the proposed provisions in the IIRIRA as covering "*felonious* acts," "convicted *felons*," and "serious *felonies*," in addition to "aggravated felonies" and "aggravated felons." 142 Cong. Rec. S. 4598-4600 (1996). In a floor exchange 6 months later, Senator Hatch explained to Senator Abraham that a partial restoration of discretionary relief to aliens who had *not* been convicted of an aggravated felony was meant to alleviate earlier restrictions in the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, which had eliminated former section 212(c) relief "for virtually any alien who had been convicted of any crime, *including some misdemeanors*." 142 Cong. Rec. S12295 (1996) (emphasis added).

II. REASONABLE BOARD INTERPRETATION OF AGGRAVATED FELONY

As I agree with the majority that we are only deciding the meaning of section 101(a)(43)(A) of the Act, I do not see the need to contrast subparagraph (A) with any of the other subparagraphs in section 101(a)(43) in order to determine its meaning.[3] Perhaps the majority only means to support its conclusion that the terminology in subparagraph (A) is ambiguous. Nevertheless, the majority's "[l]ooking beyond" subparagraph (A) to decisions addressing other subparagraphs of section 101(a)(43) of the Act in the sentence enhancement context suggests that it may view other paragraphs as encompassing

[3] Notably, the majority expressly eschews interpreting the other subparagraphs of section 101(a)(43) of the Act in deciding the issue before us. *Matter of Crammond*, *supra*, at 10.

misdemeanor convictions. *See Matter of Crammond, supra,* at 11; *cf. id.* at 35-36 (Grant, dissenting).

Even assuming that the majority draws no distinction between the language in subparagraph (A) and other subparagraphs of section 101(a)(43) of the Act, my concurring and dissenting colleagues exercise no such restraint. Both presume that certain subparagraphs of section 101(a)(43) of the Act, such as those referring to a sentence of "at least one year," necessarily encompass misdemeanor convictions. *See, e.g.*, sections 101(a)(43)(F), (G) of the Act; *see also Matter of Crammond, supra*, at 20 (Filppu, concurring) (referring to "top-end" misdemeanors); *id.* at 33, 34 (Grant, dissenting).

I take issue with such conclusions, as there is no need to differentiate certain other subparagraphs of section 101(a)(43) as encompassing misdemeanor convictions in order to reach a reasonable interpretation of the scope of subparagraph (A). *See Matter of Devison,* Interim Decision 3435, at 21 (BIA 2000, 2001) ("We decide those issues that lead to the resolution of the cases before us."). To do so improperly predetermines matters not at issue without giving the interested parties notice or an opportunity to be heard on those issues. *See Matter of Perez*, Interim Decision 3432 (BIA 2000) (limiting our holding to matters at issue and avoiding matters not briefed or argued); *see also Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 399 (1821) (Marshall, C.J.) ("It is a maxim . . . that general expressions . . . are to be taken in connection with the case in which those expressions are used. . . . [They] ought not to control the judgment in a subsequent suit when the very point is presented for decision."); *Singh v. INS*, 213 F.3d 1050, 1053 (9th Cir. 2000) (criticizing the Board for applying a new standard that went beyond the terms of the regulation without giving the respondent notice or an opportunity to comply).

Although we are not deciding such issues today, the dissent raises some points regarding the construction of other subparagraphs of section 101(a)(43) of the Act that warrant a preliminary response. Principally, it is important to note that there are alternate readings of the 1996 amendments to certain subsections of the aggravated felony definition that are more than reasonable —and more reasonable than the construction posited by the dissent. Simply put, there is no reason to conclude that Congress meant for both misdemeanor and felony convictions to be included in the "aggravated felony" definition simply because Congress reduced the sentence requirement associated with felony convictions covered in certain subparagraphs from 5 years to 1 year.

For example, merely because the amendment to section 101(a)(43)(G) of the Act "'[l]owers fine and imprisonment thresholds in the definition (from 5 years to 1 year . . .), thereby broadening the coverage of . . . theft . . . .' S.Rep. No. 249, 104th Cong., 1996 WL 180026," does not mean that Congress intended to include misdemeanors in that category. *United States v. Graham, supra,* at 792 (alteration in original); *see also* section 101(a)(43)(F) of the Act (imposing an imprisonment threshold of 1 year). In particular, section 162 of Senate bill S. 1664 succinctly states: "Because of the expanded definition of 'aggravated felony' provided by sec. 161 of the bill, aliens who have been

convicted of most *felonies, if sentenced to at least 1 year in prison*, will be ineligible" for relief barred by conviction for an aggravated felony. S. 1664, 104th Cong., § 162 (1996) (emphasis added); S. Rep. No. 104-249, at 17 (1996); *see also* H.R. Conf. Rep. No. 104-828, at 223 (1996) (House recedes to Senate amendment section 161). This language suggests that the Senate was concerned only with the range of sentences that would make a *felony* conviction an "aggravated felony."[4] There is no suggestion that crimes classified as misdemeanors are to be transformed into "aggravated felonies" merely because of the sentence imposed. As the *Graham* court emphasized, "There is no evidence that Congress noticed that it was breaking the time-honored line between felonies and misdemeanors." *United States v. Graham, supra*, at 792.

My dissenting colleague completely misconstrues the import of our holding in *Matter of Davis*, 20 I&N Dec. 536 (BIA 1992). It is not that we "had no difficulty concluding that a misdemeanor offense was included within" the scope of section 101(a)(43) of the Act. *Matter of Crammond, supra*, at 35 (Grant, dissenting) (citing *Matter of Davis, supra*). It is that in *Davis*, we found that the statute required the conviction to be for a felony and adopted a federal standard as to whether an offense is a felony regardless of the label used by the state. In following this standard, some state misdemeanors have been treated as felonies and some state felonies have been treated as misdemeanors. *See Matter of K-V-D-*, Interim Decision 3422 (BIA 1999). In *Davis*, we found that a state misdemeanor was an aggravated felony because it qualified under the federal definition as a *felony*.

The question posited here is whether an offense that qualifies as a *misdemeanor* according to a federal standard can be an aggravated felony. *See United States v. Pacheco, supra*, at 158 (Straub, J., dissenting) ("*If a felony is a crime punishable by more than one year, how, then, can an 'aggravated' felony include crimes punishable by just one year?"* (emphasis added)). I could not agree more with Judge Straub's view that "[t]o include misdemeanors within the definition of 'aggravated felony' turns the plain meaning of the word 'aggravated' entirely on its head, since in addition to not *being* felonies in the first place, misdemeanors are conventionally understood as being *less severe* than felonies, as well." *Id.*

It is entirely consistent with the meaning of the word "aggravated" and the meaning of the word "felony" to conclude that Congress meant only for persons who are convicted of a felony and sentenced for that felony to at least 1 year in prison to be affected by the definition. As Judge Straub emphasizes, one would never suggest that by adding the adjective "blue" to the noun "car," one could be

[4] Although the *Graham* court ultimately concluded that a conviction for theft in which the sentence imposed is 1 year's imprisonment amounts to an aggravated felony whether the underlying crime is a misdemeanor or a felony, the court observed that "it is still possible for a felon to avoid being an aggravated felon if he or she receives a six-month sentence for a theft crime with a maximum possible sentence over one year." *United States v. Graham, supra*, at 792.

attempting to define items that are not, in the first instance, cars. *See United States v. Pacheco*, *supra*, at 157 (Straub, J., dissenting). It makes far more sense to conclude that any *felony* conviction for murder, rape, or a crime involving sexual abuse of a minor qualifies as an "aggravated felony" conviction, even if the actual sentence imposed is less than 1 year. By contrast, it is reasonable that in decreasing the maximum sentences from 5 years to 1 year for offenses such as shoplifting or assault, Congress intended only for a felony conviction in these categories that is serious enough to result in at least a 1-year sentence to be classified as an aggravated felony conviction.[5]

The Board's role is to interpret and apply the provisions of the Act narrowly, not expansively. The edict of the Supreme Court in *Fong Haw Tan v. Phelan*, 333 U.S. 6 (1948), is no less applicable and no less binding today than it was 53 years ago when first pronounced: "*We resolve the doubts in favor of that [more narrow] construction* because deportation is a drastic measure and at times the equivalent of banishment or exile[.]" *Id.* at 10 (citing *Delgadillo v. Carmichael*, 332 U.S. 388 (1947)). Thus, given a choice of constructions, we are obliged to opt for the more narrow reading—the one that will less often result in deportation or removal.

The Supreme Court in *Fong Haw Tan v. Phelan*, *supra*, did not reach this conclusion as a last resort because the legislative history was unclear or because application of the ordinary canons of construction failed to clarify the ambiguities in the statutory language. *See Matter of Crammond*, *supra*, at 14; *id*. at 19 (Filppu, concurring). Rather, the Court explained that

> to construe this statutory provision less generously to the alien might find support in logic. But since the stakes are considerable for the individual, we will not assume that Congress meant to trench on his freedom *beyond that which is required by the narrowest of several possible meanings of the words used.*

Fong Haw Tan v. Phelan, *supra*, at 10 (emphasis added); *see also Costello v. INS*, 376 U.S. 120, 128 (1964) ("If, however, despite the impact of § 241(b)(2),

[5] Despite the fact that United States Courts of Appeals for the Second, Third, Fourth, and Eleventh Circuits have reached a different result than the one I posit here, I note that the opinions of the Second and Third Circuits each addressed issues arising in criminal prosecutions and involved the United States Sentencing Guidelines. *See Matter of K-V-D-*, *supra*; *see also United States v. Ibarra-Galindo*, 206 F.3d 137 (9th Cir. 2000) (differentiating a construction of the aggravated felony provision for purposes of sentence enhancement). In addition, neither the opinion of the Third Circuit in *United States v. Graham*, *supra*, which struggled with the seeming incongruence between the federal definition of a felony under 18 U.S.C. § 3559 and the presumed aggravated felony definition under the Act, nor that of the Second Circuit in *United States v. Pacheco*, *supra*, which was subject to a comprehensive dissent, reflects a level of certainty that would foreclose further discussion of the issue. I note, in addition, that the recent opinion of the Eleventh Circuit in *United States v. Christopher*, 239 F.3d 1191 (11th Cir. 2001), merely adopts the position of the *Graham* court. *See also Wireko v. Reno*, 211 F.3d 833 (4th Cir. 2000).

it should still be thought that the language [of that section] and the absence of legislative history continued to leave the matter in some doubt, we would nonetheless be constrained by accepted principles of statutory construction in this area of the law to resolve that doubt in favor of the petitioner."). In other words, the Court looked specifically to the nature of deportation statutes, and, in light of the harsh consequences of deportation, specifically eschewed a broader reading of the statutory language where more than one interpretation might have been possible. Instead, the Court ruled that the most narrow construction of the language used by Congress was the reading to be adopted in interpreting deportation statutes.

This approach to interpreting deportation statutes has not been altered by the Supreme Court's intervening decisions in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, *supra*, and its progeny. For example, in interpreting the definitional term "refugee," the Supreme Court considered both the statutory language and the relevant legislative history and concluded that "[w]e find these ordinary canons of statutory construction compelling, even without regard to the longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien." *INS v. Cardoza-Fonseca*, *supra*, at 449 (citing *INS v. Errico*, 385 U.S. 214, 225 (1966); *Costello v. INS*, *supra,* at 128; *Fong Haw Tan v. Phelan*, *supra*, at 10). Thus, in interpreting a definitional section of the statute, the Court found not only that the statutory language and legislative history adequately reflected congressional intent, but acknowledged the narrow construction principle. *See* section 101(a)(42) of the Act.

We have recognized and applied this rule with approval in over 30 precedent decisions issued since 1949. *See, e.g., Matter of Farias*, 21 I&N Dec. 269, 274 (BIA 1996; A.G., BIA 1997)); *Matter of Tiwari*, 19 I&N Dec. 875 (BIA 1989); *Matter of Baker*, 15 I&N Dec. 50 (BIA 1974); *Matter of Andrade*, 14 I&N Dec. 651 (BIA 1974); *Matter of G-*, 9 I&N Dec. 159 (BIA 1960); *Matter of K-*, 3 I&N Dec. 575 (BIA 1949). In doing so, we have found consistently that questions of deportability must be resolved in the alien's favor. *Matter of Serna*, 20 I&N Dec. 579, 586 (BIA 1992); *Matter of Chartier*, 16 I&N Dec. 284, 287 (BIA 1977) (expressing reluctance "to read implied restrictions into the statute, particularly in the context of a deportation proceeding").

The Court's reference to the narrow construction principle in *INS v. Cardoza-Fonseca*, *supra*, indicates that this principle is not a "last resort" canon of construction, as my concurring colleague insists and as the majority implies. *See Matter of Crammond, supra*, at 14; *id*. at 17 (Filppu, concurring). Notably, neither the *Fong Haw Tan v. Phelan* Court nor any of the courts subsequently invoking the narrow construction principle made any allusion to the "rule of lenity," a rule originating in criminal procedure. *See Ladner v. United States*, 358 U.S. 169, 178 (1958) ("This policy of lenity means that the Court will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended."). This is significant because

the rule of lenity is applicable in only very limited situations.[6] By contrast, the narrow construction principle affords guidance to interpreting deportation statutes from the beginning.

Although the Court did not find it necessary to invoke the narrow construction principle in *INS v. Cardoza-Fonseca*, its acknowledgment that statutory construction of the immigration provision in favor of the alien was compelling "even without regard" to the principle reflects its view of the principle as an interpretive guide rather than as a last resort. *INS v. Cardoza-Fonseca*, *supra*, at 449. Similarly, in *Matter of Vasquez-Muniz*, Interim Decision 3440, at 8, 11-12 n.7 (BIA 2000), even where we found the statutory language "described in" to have an ordinary meaning in common usage, we acknowledged the narrow construction principle. I reach the same conclusion here: even putting aside the principle that we construe deportation statutes in favor of the respondent, the ordinary canons of statutory interpretation provide a compelling basis to conclude that the statutory language was intended to cover only felony convictions.

Not too long ago, I invoked the words of the venerable President Abraham Lincoln to illustrate the proposition that one cannot turn a thing into something it is not. I quoted Abraham Lincoln as having once said, "If you call a tail a leg, how many legs has a dog? Five? No; calling a tail a leg don't make it a leg." *Bartlett's Familiar Quotations* 458 (Morley ed. 1951); *see also Matter of Nolasco*, Interim Decision 3385, at 14-15 n.1 (BIA 1999) (Rosenberg, concurring). Certainly, calling a conviction for a misdemeanor offense an aggravated felony does not make it an aggravated felony. Accordingly, with these additional considerations, I concur with the opinion of the majority.

DISSENTING OPINION: Edward R. Grant, Board Member, in which Mary M. Dunne, Vice Chairman; Lori L. Scialabba, Vice Chairman; Michael J. Heilman, Gerald S. Hurwitz, Patricia A. Cole, Lauren R. Mathon, Philemina McNeill Jones, and Kevin A. Ohlson, Board Members, joined

I respectfully dissent. The decision of the majority too narrowly limits the scope of section 101(a)(43) of the Immigration and Nationality Act, 8 U.S.C.

[6] The rule of lenity does not apply simply because a statute requires interpretation. *See Caron v. United States*, 524 U.S. 308, 316 (1998) (stating that the rule is "not invoked by a grammatical possibility"); *Muscarello v. United States*, 524 U.S. 125, 138 (1998) (stating that the rule only applies if "'after seizing everything from which aid can be derived,' . . . we can make 'no more than a guess as to what Congress intended'" (quoting *Reno v. Koray*, 515 U.S. 50, 65 (1995) (quoting *Smith v. United States*, 508 U.S. 223, 239 (1993), and *Ladner v. United States*, *supra*, at 178))). Thus, the rule of lenity is inapposite unless a statutory ambiguity looms, and *a statute is not ambiguous for this purpose simply because some courts or commentators have questioned its proper interpretation*. *See Reno v. Koray*, *supra*, at 65.

§ 1101(a)(43) (Supp. V 1999), by glossing over the contextual meaning of the statute's provisions, and is contrary to the holdings in several federal appellate decisions. These decisions properly conclude that the term "aggravated felony" is a term of art employed by Congress that encompasses *both* felonies *and* misdemeanors. Indeed, in the very recent case of *Guerrero-Perez v. INS*, 2001 WL 210186 (7th Cir. 2001), which is directly on point with the case before us, the United States Court of Appeals for the Seventh Circuit found that a misdemeanor conviction for criminal sexual abuse of a minor is an aggravated felony under subparagraph(A) of section 101(a)(43). In light of these decisions, and in light of the history and construction of the statute at issue, I would find that the respondent's conviction for a crime of sexual abuse of a minor is an aggravated felony, regardless of whether it is classified by the state court as a misdemeanor or a felony offense.

The term "aggravated felony" was first used in a much shorter version of section 101(a)(43) of the Act in 1988. In 1996, Congress expanded the aggravated felony definition in three significant ways: first, it expanded the list of offenses that constitute aggravated felonies by specifically adding offenses that were misdemeanor offenses under federal statutes;[1] second, it trimmed from 5 years to 1 year the threshold sentence upon which crimes of violence and generic offenses such as theft and burglary may be considered aggravated felonies (thus allowing certain misdemeanor offenses to be included based on the sentence imposed);[2] and third, it added categories of offenses—for example, commercial bribery, counterfeiting, forgery, obstruction of justice, and perjury—for which a sentence of 1 year in prison brings the offense within the definition.[3] *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Division C of Pub. L. No. 104-208, §§ 321(a)(3), (4), 110 Stat. 3009-546, 3009-627 ("IIRIRA"); Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, §§ 440(e)(7), (8), 110 Stat. 1214, 1278 ("AEDPA").

The Seventh Circuit recently held that Congress' choice of the term to be defined—aggravated felony—cannot trump the definition that Congress has

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[1] As amended, section 101(a)(43)(N) of the Act includes misdemeanor alien smuggling convictions under section 274(a)(2) of the Act, 8 U.S.C. § 1324(a)(2) (1994 & Supp. V 1999), including first offenses under section 274(a)(2)(A), and only provides an exception for those persons convicted of a first offense if the smuggling involved the alien's spouse, child, or parent. Thus, a person convicted of an alien smuggling first offense that does not involve one of those specified family members has been convicted of an aggravated felony. *See Matter of Ruiz-Romero*, Interim Decision 3376 (BIA 1999). In addition, section 101(a)(43)(O), as amended, provides that convictions under section 275(a) of the Act, 8 U.S.C. § 1325(a) (1994), which includes misdemeanor convictions for the first offense of entry without inspection, are aggravated felony convictions if the alien was previously deported as an aggravated felon.

[2] *See* sections 101(a)(43)(F), (G) of the Act.

[3] *See* sections 101(a)(43)(R), (S) of the Act.

proceeded to assign to that term. *Guerrero-Perez v. INS*, *supra*, at *9. In doing so, the court stated:

> The structure of [section 101(a)(43)] reveals a desire on Congress' part not to limit aggravated felonies to only felony convictions. . . . The critical term in this section of the statute [deportability] is "aggravated felony" and Congress could have decided not to define this term, as it chose not to do so with regard to the term moral turpitude. However, rather than leave the question of what constitutes an aggravated felony open-ended, Congress said, "The term 'aggravated felony' means—. . ." and proceeded to list what crimes would be considered aggravated felonies. It is important to note that the term aggravated felony is placed within quotation marks and Congress then used the word "means" after this term. What is evident from the setting aside of aggravated felony with quotation marks and the use of the term "means" is that [section 101(a)(43)] serves as a definition section. As a consequence, Congress had the option to use a variety of terms to reach the crimes listed within [section 101(a)(43)]. . . . Congress had the discretion to use whatever term it pleased and define the term as it deemed appropriate. *See Stenberg v. Carhart*, 530 U.S. 914, 120 S.Ct. 2597, 2615 (2000) ("When a statute includes an explicit definition, we must follow that definition, even if it varies from that term's ordinary meaning."). The statute functions like a dictionary, in that it provides us with Congress' definition of the term "aggravated felony."

Id. (citation omitted). The Seventh Circuit thus rejected arguments identical to those presented in this case—that a misdemeanor conviction for sexual abuse of a minor cannot constitute a conviction for an "aggravated felony" because the crime is not a felony under state law. The majority's lean attempt to distinguish *Guerrero-Perez* begs the question that is asked and answered in the text quoted above: Congress' choice of a term to be defined has no meaning beyond that which is assigned by the subsequent definition, for "'[a] definition which declares what a term "means" . . . excludes any meaning that is not stated'." *Id.* (quoting *Colautti v. Franklin*, 439 U.S. 379, 393 n.10 (1979) (quoting 2A C. Sands, *Statutes and Statutory Construction* § 47.07 (4th ed. Supp. 1978))).[4]

Other circuit courts of appeals have agreed that the term "aggravated felony" is a definitional term of art, and that Congress is free to include any crime, including misdemeanors, in that definition. *See United States v. Christopher*, 239 F.3d 1191, 1194 (11th Cir. 2001) (finding, in the sentence enhancement context, "a clear intent in the statute to include as an 'aggravated felony' any theft offense for which the term of imprisonment is at least one year" and concluding that misdemeanors can qualify as aggravated felonies); *United States v. Pacheco*, 225 F.3d 148, 154 (2d Cir. 2000) (finding, in the sentence enhancement context, that the clear intent of Congress was to classify certain misdemeanors as aggravated felonies, that the convictions were aggravated

[4] The Supreme Court's decision in *Stenberg v. Carhart*, 530 U.S. 914, 120 S.Ct. 2597, 2615 (2000), is particularly instructive here, for the Court rejected a state's attempt to place a narrowing (and saving) interpretation on a statutory provision by reference to the common meaning of what that statutory provision defined.

felonies under sections 101(a)(43)(F) and (G) of the Act, and that the "whole act" rule of statutory construction favors this conclusion); *Wireko v. Reno*, 211 F.3d 833, 835 (4th Cir. 2000) (finding, in habeas corpus proceedings, that a misdemeanor sexual battery offense was a crime of violence for which the alien had been sentenced to 1 year in prison, and was an aggravated felony under section 101(a)(43)(F) of the Act); *United States v. Graham*, 169 F.3d 787, 792-93 (3d Cir.) (concluding, in the sentence enhancement context, that Congress was "defining a term of art, 'aggravated felony,' which in this case includes certain misdemeanants who receive a sentence of one year" and that the alien's petit larceny conviction was for an aggravated felony under section 101(a)(43)(G) of the Act), *cert. denied*, 528 U.S. 845 (1999). All have rejected the premise of the majority holding in this case—that the word *felony* in the term "aggravated felony" places a limiting construction on any provision within that definition.

The majority is quick to move from the language of the aggravated felony definition itself to an attempt to discern the intent underlying the legislation. A careful examination of the language used by Congress in this section, however, allows us to interpret the meaning of the aggravated felony definition through general principles of statutory construction. Section 101(a)(43) has been, since its introduction into the Act, a single compound sentence listing a variety of offenses, not all of which constituted felonies. The definition was first enacted by section 7343 of the Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 100 Stat. 4181, 4470 ("ADAA"), and included four categories of offenses: murder; drug trafficking; illicit trafficking in firearms or destructive devices; and any attempt or conspiracy "to commit any such act."[5] Section 501(a) of the Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4798, among other changes, added two new categories of offenses: money laundering and crimes of violence, as defined in 18 U.S.C. § 16, for which the term of imprisonment imposed was at least 5 years.

The aggravated felony definition was further amended by section 222(a) of the Immigration and Nationality Technical Corrections Act of 1994, Pub. L. No. 103-416, 108 Stat. 4320 ("INTCA"), which completely revised section 101(a)(43) from a single paragraph listing the 5 general categories of offenses, plus the "attempt and conspiracy" offenses, to a heterogenous compendium of offenses catalogued in 15 subparagraphs.[6] Although restructured, the offenses

[5] Included in the original aggravated felony definition was the category of crimes "illicit trafficking in any firearms or destructive devices," which included no felony requirement, either explicitly or by reference to a federal statute. Thus, that category could also conceivably include offenses that are misdemeanors.

[6] The INTCA added a category of firearms offenses under 18 U.S.C. § 922(n), which are misdemeanors in that they are only punishable under 18 U.S.C. § 924(d) by forfeiture of the goods. *See* section 101(a)(43)(E)(ii) of the Act. By this point in the history of section 101(a)(43), the original offenses included in the definition had been subsumed in just 4 of

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nevertheless remained a single sentence modified by the following introductory phrase: "The term aggravated felony means— ."

The Supreme Court has recently concluded that it is improper to adopt a construction of the text of a statute that attributes different meanings to the same phrase within the same sentence. *See Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 329-30 (2000). The definition contained in section 101(a)(43) is a single sentence that defines the term of art "aggravated felony." Through the various amendments over time, Congress has broadened the scope of the definition and has included various categories of crimes within this definition, both felonies and misdemeanors. Reading a felony limitation into the term "aggravated felony" for some parts of the definition but not for others is contrary to this principle of statutory construction. The term "aggravated felony," for our purposes, "means," without limitation, any of the offenses listed in the various subparagraphs of section 101(a)(43).

In 1992, prior to the more expansive amendments to the aggravated felony definition contained in the INTCA and the 1996 amendments, the Board examined a state misdemeanor "conspiracy" offense. *Matter of Davis*, 20 I&N Dec. 536 (BIA 1992). There, the Board held that a state misdemeanor conviction for conspiracy to distribute a controlled substance (cocaine) was an aggravated felony conviction because the underlying substantive offense constituted a "drug trafficking crime" under 18 U.S.C. § 924(c)(2). *Id.* at 545. The Board rejected an Immigration Judge's holding that the conspiracy offense would qualify as an aggravated felony only if the elements of that offense were analogous to the conspiracy provisions of the federal Controlled Substances Act. *Id*. at 539, 544-45. While it is true, as noted by the concurring opinion of Board Member Filppu, that this holding was premised on precedents dealing with convictions for conspiracy to commit crimes involving moral turpitude, *see id*. at 544-45, it is no less significant that the Board, in one of its first precedents construing section 101(a)(43), had no difficulty concluding that a misdemeanor offense was included within its scope.

The majority identifies no clear evidence that Congress has ever intended the term "felony" to impose a limiting construction. Rather, it posits that such a construction is possible due to the alleged "ambiguity" of a statute that uses the term "felony," but then lists myriad offenses, including ones which can be prosecuted as misdemeanors.[7] The reluctance to classify a particular offense

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[6] (...continued)
these 15 subparagraphs.

[7] The concurrence of Board Member Filppu concludes, unlike the majority, that it was the clear intent of Congress in originally enacting section 101(a)(43) to limit its scope to felony offenses. Arguing from the "urtext" of the definition, which the concurrence asserts did not specifically include misdemeanor offenses, as well as from the Act's references to those covered by the definition as "felons," the concurrence concludes that this felony limitation remains in force — but only for those subparagraphs of the current definition that do not

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as an aggravated felony—with all of the attendant consequences that the Act imposes on an alien who has committed such an offense—may be understandable, but it is inherently subjective. Notably, from the entire history of judicial and administrative construction of this term, the majority cites no case which finds the ambiguity it has discovered here. The majority cites as evidence of "ambiguity" the fact that the Board has divided into four separate opinions in *this* case. I submit that it is the lack of clarity in the majority's opinion, and not any ambiguity in the statute, which has so fractured the Board on this occasion.

This lack of clarity is disturbing, and threatens great uncertainty in the administrative jurisprudence. The majority *appears* to propose that the term "aggravated felony" be given one meaning when applied to section 101(a)(43)(A) (i.e., that it be construed as a felony requirement), but that it be attributed another meaning when applied to those subparagraphs that include misdemeanor offenses, either explicitly or by reference (i.e., that it be construed as making no such additional requirement due to the conflict with the specific terms of the provision in question). Yet, on careful examination, the majority stops short of a firm conclusion on this point. The majority acknowledges a string of decisions by United States courts of appeals which find that misdemeanor convictions can constitute aggravated felonies (all involving offenses other than those listed in section 101(a)(43)(A) of the Act). It does not, however, state its own agreement with this finding. Thus, the majority decision not only improperly segregates subparagraph (A) from the rest of section 101(a)(43), but clearly leaves open the possibility that it could construe the term "aggravated felony" to impose a felony prerequisite with respect to all crimes in the remaining subparagraphs of that section.

The majority thus leaves the Board on the horns of an untenable dilemma: either it presages an ultimate determination that Congress, in enacting and amending section 101(a)(43) of the Act, did not mean what it said when it included offenses that may be prosecuted as misdemeanors; or it leads to a future in which section 101(a)(43) will be interpreted by patchwork analysis, a felony prerequisite applying to some offenses and not to others. The first alternative is in derogation of the meaning of the Act. The second violates principles of statutory construction, improperly adopting a construction of the

[7] (...continued)
specifically list offenses that may be prosecuted as misdemeanors. As explained in the text, such assignment of different meaning with the same sentence of the Act is impermissible as a matter of statutory construction. The clear and unambiguous language of the *current* statute relieves us of the need to rely on the unexpressed intent of Congress in enacting the original version of section 101(a)(43), or to examine whether the subsequent amendments are consistent with that "original intent." *Cf. Seatrain Shipbuilding Corp. v. Shell Oil Co.*, 444 U.S. 572, 596 (1980) (providing that, while the views of subsequent Congresses cannot override the unmistakable intent of the enacting one, such views are entitled to significant weight when the precise intent of the enacting Congress is obscure).

text that attributes different meanings to the same phrase within the same sentence. The Supreme Court has rejected such statutory construction, and the Board should do so as well. *See Reno v. Bossier Parish Sch. Bd.*, *supra*.

The second alternative also carries the seeds of its own collapse. If there is an overarching requirement, stemming from the phrase "aggravated *felony*," that certain listed offenses be felonies, that requirement should logically apply to *all* listed offenses. The outcome of this decision, as adumbrated by the concurring opinion of Board Member Rosenberg, could well lead to a conclusion that *no* offense may be classified as an "aggravated felony" unless that offense has been classified as a felony either by the convicting jurisdiction or by reference to a federal standard. However much I disagree with that outcome, it seems more logical than an approach that invests the phrase "aggravated *felony*" with the power to limit the reach of the definition in certain cases, e.g., convictions for sexual abuse of a minor, but not in others, e.g., a crime of violence under 18 U.S.C. § 16(a). *See* sections 101(a)(43)(A), (F) of the Act. Both sexual abuse of a minor and "§ 16(a)" crimes of violence can be prosecuted as misdemeanors. The rule, it seems, should be consistent for both.

I find the proper rule—that there is no overarching requirement that a crime listed or categorized under section 101(a)(43) be a felony—inherent in the text of the statute. Without endorsing the majority's analysis-in-isolation of subparagraph (A), I note that this provision requires only that an offense be a crime of "murder, rape, or sexual abuse of a minor" in order to constitute an "aggravated felony." The offenses of "rape" and "sexual abuse of a minor" were added to subparagraph (A) by section 321 of the IIRIRA. *See* IIRIRA § 321, 110 Stat. at 3009-627. This provision contains no explicit requirement that the offenses listed therein be felony offenses, nor reference to a federal statute containing such a requirement. Although murder and rape were clearly felonies under the common law, the textual proximity of "sexual abuse of a minor" in section 101(a)(43) should not be used to infer that such is a requirement for any crime listed in that subparagraph. We have already determined that the phrase "sexual abuse of a minor" is to be given a broad reading, *Matter of Rodriguez-Rodriguez*, Interim Decision 3411 (BIA 1999), and in doing so have recognized the clear intent of Congress to impose severe immigration consequences on aliens who commit offenses of this type. That is consistent with finding that Congress intended to impose no "felony" limitation when it added this offense.

For these reasons, I would find that the new evidence the respondent seeks to submit for consideration, indicating that his felony offense has been reduced to a misdemeanor, is not material to our determination that his conviction was for an aggravated felony within the meaning of section 101(a)(43)(A) of the Act. I would find that his crime of sexual abuse of a minor is an aggravated felony under subparagraph (A), regardless of whether it is classified as a misdemeanor or a felony offense. Consequently, I would deny the motion to reopen.