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Lopez v. Gonzales: A Window on the Shortcomings of the Federal Appellate Process

Brent E. Newton

LOPEZ V. GONZALES: A WINDOW ON THE SHORTCOMINGS OF THE FEDERAL APPELLATE PROCESS

Brent E. Newton*

I. INTRODUCTION

Several years ago, I discussed in this journal[1] the Fifth Circuit's repeated error in dismissing as frivolous several strong legal arguments, among them the contention that an alien's state felony conviction for simple possession of illegal drugs was not a "drug trafficking"[2] crime that qualified as an "aggravated felony"[3] under the relevant provisions of the Immigration and Nationality Act.[4] Several other circuits, while not classifying it as outright frivolous, had by then also adamantly rejected this argument.[5]

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* Assistant Federal Public Defender, Southern District of Texas; Visiting Assistant Professor of Law, University of Houston Law Center. The author was co-counsel in *Toledo-Flores v. U.S.*, 547 U.S. 1054 (2006) (granting certiorari), and ___ U.S. ___, 127 S. Ct. 638 (2006) (dismissing certiorari as improvidently granted), which was the companion case to *Lopez v. Gonzales*, ___ U.S. ___, 127 S. Ct. 625 (2006). The views expressed in this article are solely the author's, and are not intended to express the views of the Federal Public Defender's office.

1. Brent E. Newton, *When Reasonable Jurists Could Disagree: The Fifth Circuit's Misapplication of the Frivolousness Standard*, 3 J. App. Prac. & Process 157 (2001).

2. 8 U.S.C. § 1101(a)(43)(B) (available at http://uscode.house.gov).

3. 8 U.S.C. § 1101(a)(43).

4. *See* Newton, *supra* n. 1, at 163-64 (citing *U.S. v. Morales-Ortiz*, No. 98-50179 (5th Cir. Oct. 21, 1998) (unpublished), and *U.S. v. Arizmende-Matias*, No. 98-50126 (5th Cir. Aug. 18, 1998) (unpublished), as examples of the Fifth Circuit's treatment of that argument as "frivolous"). A host of other Fifth Circuit cases took the same tack. *See e.g. U.S. v. Perez*, No. 01-50622 (5th Cir. Feb. 20, 2002) (unpublished); *U.S. v. Sanchez-Zuniga*, 232 F.3d 209 (tbl.), 2000 WL 1273341, at *1 (5th Cir. Aug. 23, 2000) (unpublished).

5. *See e.g. U.S. v. Simon*, 168 F.3d 1271, 1272 (11th Cir. 1999) (collecting cases).

Despite both the courts' treatment of the claim as entirely lacking merit during the 1990s, and the Fifth Circuit's mentioning the threat of sanctions to attorneys who continued to press the argument,[6] lawyers representing aliens continued to litigate the issue in virtually every circuit and, when they were unsuccessful, to seek review in the Supreme Court. Ultimately, nearly fifteen years after the issue was first decided by a federal appeals court,[7] and only after a multi-dimensional split among the circuits had developed, the Supreme Court addressed the issue. In a 2006 opinion that resoundingly rejected the position adopted by the majority of circuits, the Court held in *Lopez* that a state felony conviction for simple possession of drugs is not a drug trafficking crime constituting an aggravated felony under the immigration laws.[8]

The fifteen-year history of the litigation over this issue—a history that ended only with the Supreme Court's decision in *Lopez*—presents a compelling case study of significant shortcomings in the federal appellate process. First, it demonstrates that many federal appeals courts for well over a decade gave short shrift to a compelling legal argument, which resulted in the denial of relief to an extremely large class of litigants. Second, it demonstrates that the Supreme Court failed to intervene in a timely manner despite the importance of the legal issue and the thousands of litigants affected nationwide. Third, it demonstrates the Justice Department's failure to seek Supreme Court review of an important issue even after it became clear that review at the highest level was warranted. Finally, and of particular interest to practitioners reading this article, the history of the courts' treatment of the issue presented in *Lopez* also demonstrates the need for counsel to preserve for appeal a legal claim that, although foreclosed by adverse precedent in a particular jurisdiction, eventually may be found by the Supreme Court to be meritorious.

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6. *See Sanchez-Zuniga*, 2000 WL 1273341 at *1 (citing *U.S. v. Burleson*, 22 F.3d 93, 95 (5th Cir. 1994)). In *Burleson*, the Fifth Circuit had stated that "[t]his appeal is frivolous. We caution counsel. Federal Public Defenders are like all counsel *subject to sanctions*. They have no duty to bring frivolous appeals; the opposite is true." *Burleson*, 22 F.3d at 95 (citation omitted) (emphasis added).

7. *Amaral v. INS*, 977 F.2d 33, 35-36 (1st Cir. 1992).

8. *Lopez*, 127 S. Ct. at 627.

II. "DRUG TRAFFICKING" AS AN "AGGRAVATED FELONY" UNDER SECTION 101(a)(43)(B) OF THE IMMIGRATION AND NATIONALITY ACT

Under federal immigration law, a non-citizen (including a permanent resident alien) convicted of an aggravated felony offense[9] is virtually certain to be deported from the United States[10] and, if he thereafter were to return illegally and be discovered by immigration authorities, very likely would be prosecuted in federal court under 8 U.S.C. § 1326 and face prison time followed by another deportation.[11] Moreover, such an alien also would face dramatically more prison time than a

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9. Aggravated felony offenses include the crimes traditionally deemed the most serious, such as murder, rape, burglary, and drug trafficking. *See* 8 U.S.C. § 1101(a)(43) (available at http://uscode.house.gov). The history of the aggravated felony provision of the INA is discussed in Josh Adams, Student Author, *The Conundrum of Classifying State Drug Offenses Under the Immigration and Nationality Act: Guidelines Approach or Hypothetical Federal Felony Test?* 31 Vt. L. Rev. 185, 185-191 (2006), and in Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 Harv. L. Rev. 1936, 1936-62 (2000).

10. *U.S. v. Couto*, 311 F.3d 179, 189-90 (2d Cir. 2002).

11. Section 1326 reads in pertinent part:

> (a) In general
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> Subject to subsection (b) of this section, any alien who—
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> (1) has been denied admission, excluded, deported, or removed or has departed the United States while an order of exclusion, deportation, or removal is outstanding, and thereafter
>
> (2) enters, attempts to enter, or is at any time found in, the United States, unless (A) prior to his reembarkation at a place outside the United States or his application for admission from foreign contiguous territory, the Attorney General has expressly consented to such alien's reapplying for admission; or (B) with respect to an alien previously denied admission and removed, unless such alien shall establish that he was not required to obtain such advance consent under this chapter or any prior Act, shall be fined under Title 18, or imprisoned for not more than 2 years, or both.
>
> (b) Criminal penalties for reentry of certain removed aliens
>
> Notwithstanding subsection (a) of this section, in the case of any alien described in such subsection—
>
> (1) whose removal was subsequent to a conviction for commission of three or more misdemeanors involving drugs, crimes against the person, or both, or a felony (other than an aggravated felony), such alien shall be fined under Title 18, imprisoned not more than 10 years, or both;
>
> (2) whose removal was subsequent to a conviction for commission of an aggravated felony, such alien shall be fined under such Title, imprisoned not more than 20 years, or both. . . .

8 U.S.C. § 1326(a), (b) (available at http://www.uscode.house.gov).

previously deported alien who illegally reentered without having a prior conviction for an aggravated felony.[12] As the Supreme Court explained in *Lopez*

> An aggravated felony on [an alien's] criminal record has worse collateral effects than a felony conviction simple. Under the immigration statutes, for example, the Attorney General's discretion to cancel the removal of a person otherwise deportable does not reach a convict of an aggravated felony. [8 U.S.C.] § 1229b(a)(3). Nor is an aggravated felon eligible for asylum. [8 U.S.C.] §§ 1158(b)(2)(A)(ii), 1158(b)(2)(B)(i). And under the sentencing law, the Federal [Sentencing] Guidelines attach special significance to the "aggravated felony" designation: a conviction of unlawfully entering or remaining in the United States receives an eight-level increase for a prior aggravated felony conviction, but only four levels for "any other felony." United States Sentencing Commission, *Guidelines Manual* § 2L1.2 (Nov. 2005) (hereinafter USSG); *id.*, comment, n. 3 (adopting INA definition of aggravated felony).[13]

Although there are many types of aggravated felonies, one of the most common types arising in immigration cases during the past two decades has been a drug trafficking crime.[14] Since

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12. *See Lopez*, 127 S. Ct. at 627-28 (discussing the civil and criminal implications of an alien's conviction of an aggravated felony offense); *see also* 8 U.S.C. § 1326(b)(1), (2) (providing for 10-year maximum prison sentence for defendants with simple felony record; 20-year maximum prison sentence for defendants with aggravated felony record).

13. *Lopez*, 127 S. Ct. at 628.

14. The federal government has not published data on aliens deported as aggravated felons. According to the Transactional Records Access Clearinghouse, however, a recent request under the Freedom of Information Act by Syracuse University yielded some data concerning aliens' aggravated felony status in deportation proceedings. These data show that in the fifteen years before *Lopez* was decided, an estimated 300,000 aliens were deported as aggravated felons. A significant portion of those aliens (approximately one-third) had drug-related prior convictions, which could have been either for simple possession or for actual drug trafficking (as that term is commonly understood). Presumably, then, of those aggravated felony deportations, many thousands involved aliens whose most serious prior conviction was a state felony conviction for simple possession of illegal drugs. *See How Often is the Aggravated Felony Statute Used?* http://www.trac.syr.edu/immigration/reports/158 (accessed May 16, 2007; copy on file with Journal of Appellate Practice and Process); *New Data on the Processing of Aggravated Felons*, http://www.trac.syr.edu/immigration/reports/175 (accessed May 16, 2007; copy on file with Journal of Appellate Practice and Process).

Although a large percentage of these aliens would not have been deported based solely on prior state felony convictions for possession if the Board of Immigration Appeals

1990, 8 U.S.C. § 1101(a)(43)(B) has provided that an alien's conviction for "illicit trafficking in a controlled substance (as defined in section 802 of Title 21), *including a drug trafficking crime* (as defined in section 924(c) of Title 18)," qualifies as an aggravated felony.[15] While framing the issue to be decided in *Lopez*, the Supreme Court noted that 18 U.S.C. § 924(c) is the federal penal statute criminalizing the possession or use of a firearm in furtherance of a "drug-trafficking crime," and observed that

> The general phrase "illicit trafficking" is left undefined, but § 924(c)(2) of Title 18 identifies the subcategory by defining "drug trafficking crime" as "any felony punishable under the Controlled Substances Act" or under either of two other federal statutes having no bearing on this case. Following the listing, [8 U.S.C. § 1101(a)(43)] . . . provides in its penultimate sentence that "[t]he term [aggravated felony] applies to an offense described in this paragraph whether in violation of Federal or State law" or, in certain circumstances, "the law of a foreign country."[16]

As explained below, these statutory cross-references, implicating three different titles of the United States Code, spawned a tremendous amount of litigation that took a decade

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has followed its own favorable decisions in *In Re L—G—*, 21 I. & N. Dec. 89 (BIA 1995) (en banc), and *In Re K—V—D—*, 22 I. & N. Dec. 1163 (BIA 1999) (en banc), both of which are discussed later in this article, the BIA overruled these precedents in *In Re Yanez-Garcia*, 23 I. & N. Dec. 390 (2002) (en banc). Moreover, even before *Yanez-Garcia*, *L—G—* and *K—V—D—* were not followed in federal circuits that had issued decisions disagreeing with them. *See e.g. Amaral*, 977 F.2d 33. In addition, the BIA's favorable decisions did not apply in the criminal immigration context, where circuit precedent was almost uniformly against aliens charged under 8 U.S.C. § 1326. The latter point is further discussed later in this article.

15. 8 U.S.C. § 1101(a)(43)(B) (emphasis added). Section 924(c) provides in pertinent part that

> (c)(1)(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any . . . drug trafficking crime . . . for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime possesses a firearm, shall, in addition to the punishment provided for such . . . drug trafficking crime be sentenced to a term of imprisonment of not less than 5 years.
>
> (c)(2) For purposes of this subsection, the term "drug trafficking crime" means any felony punishable under 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 chapter 705 of title 46.

16. *Lopez*, 127 S. Ct. at 628.

and a half to resolve. During that time, many thousands of aliens were treated as aggravated felons in civil and criminal immigration proceedings only because of their prior state felony convictions for simple possession of illegal drugs.

III. THE UNNECESSARILY CONVOLUTED HISTORY OF LITIGATION OVER THE MEANING OF "DRUG TRAFFICKING"

A. The Justice Department's Position

Beginning in the early 1990s, the Justice Department[17] took the position in deportation proceedings that an alien's state conviction for simple possession of illegal drugs classified as a felony under the relevant state's penal laws[18] was drug trafficking under 8 U.S.C. § 1101(a)(43)(B), notwithstanding that simple possession generally is a misdemeanor under federal law and ordinarily is not considered "drug trafficking."[19] The Justice Department's argument was as follows:

- The statutory phrase "any felony punishable under the [federal] Controlled Substances Act" should be disassembled into its separate components of (1) "any felony" and (2) "punishable under the Controlled Substances Act;" and

17. In the earliest litigation, the Immigration and Naturalization Service, a branch of the Justice Department, announced the position of the Department, but it was later joined (in section 1326 criminal prosecutions) by the criminal section of the Justice Department. When the functions of the Immigration and Naturalization Service were transferred to the Department of Homeland Security in 2003, *see generally* 6 U.S.C. § 101 et seq. (codifying Homeland Security Act of 2002), DHS maintained the position of the former INS.

18. Unlike the federal government, the majority of states treat simple possession of any amount of any illegal drug (save marijuana) as a felony. *See* Brent E. Newton, *Compilation of Fifty States' Drug Laws* (unpublished working paper, Aug. 1, 2006) (on file with author).

19. "Simple possession" refers to the act of possessing illegal drugs (presumably for personal use) rather than possession with the intent to sell or otherwise illegally distribute the drugs. *See Salinas v. U.S.*, 547 U.S. 188 (2006) (per curiam). A first offense involving simple possession of illegal drugs (save certain quantities of crack cocaine and any amount of flunitrazepam, commonly known as the date-rape drug) is punished as a misdemeanor; a subsequent conviction is punishable as a felony offense. 21 U.S.C. § 844(a).

- so long as a state conviction satisfied both prongs independently, the underlying offense qualified as a drug trafficking crime, even if it involved simple possession instead of actual trafficking in illegal drugs; and thus

- because many states punished simple possession of illegal drugs as a felony (even though possession was, if a first offense, "punishable under the Controlled Substance Act" only in the sense that it was treated as a misdemeanor under 21 U.S.C. § 844(a)), a state felony conviction for simple possession should be treated as a drug trafficking crime under 8 U.S.C. § 1101(a)(43)(B).[20]

The Justice Department's position received mixed reviews in early litigation. Three-judge panels of the First and Second Circuits agreed with the Department, while the en banc Board of Immigration Appeals (the highest administrative tribunal within the INS) unanimously rejected it.[21] Because those initial decisions set the stage for subsequent litigation over the issue, they warrant close analysis.

B. The Early Decisions

1. The First Circuit's Initial Decision: Amaral

In *Amaral v. INS*,[22] the first court to address the issue provided alternative rationales for its decision that an alien's Rhode Island felony convictions for simple possession qualified as drug trafficking. After observing that the issue on appeal concerned the operative term "trafficking" in

20. *In Re L—G—*, 21 I. & N. Dec. 89, 92-93 (BIA 1995) (en banc) (discussing the legal position of the INS).

21. *Compare Jenkins v. INS*, 32 F.2d 11 (2d Cir. 1994) (agreeing with Justice Department's position) *and Amaral v. INS*, 977 F.2d 33 (1st Cir. 1992) (same), *with In re L—G—*, 21 I. & N. Dec. at 97-102 & n. 5 (disagreeing with *Jenkins* and *Amaral*).

22. 977 F.2d 33 (1st Cir. 1992).

8 U.S.C. § 1101(a)(43)(B), the court described the case as follows:

> Petitioner [an alien ordered deported] contends that the plain meaning of "trafficking" requires something more than simple possession. He contends that the harsh consequences accompanying aggravated felon status were intended only for serious drug traffickers and not simple users or possessors.
>
> Both the 1988 and 1990 definitions refer to 18 U.S.C. § 924(c)(2). The term "drug trafficking crime" is defined in 18 U.S.C. § 924(c)(2) to include "any felony punishable under the Controlled Substances Act (21 U.S.C. § 801 et seq.), the Controlled Substance Import and Export Act (21 U.S.C. § 951 et seq.), or the Maritime Drug Law Enforcement Act (46 U.S.C. § 1901 et seq.)." Thus, for a drug offense to come within 18 U.S.C. § 924(c)(2), and hence, in turn, to fit within the definition of aggravated felony, two criteri[a] must be met: 1) the offense must be punishable under one of the three enumerated statutes, and 2) the offense must be a felony.
>
> Petitioner does not dispute that the first criterion—an offense punishable under one of the three enumerated statutes—is met. Possession of drugs is punishable under 21 U.S.C. § 844(a), a part of the Controlled Substances Act. . . . Petitioner contends that the second criterion necessary for an offense to be considered a drug trafficking crime is not satisfied because his 1989 simple possession conviction should not qualify as a felony under § 844(a). A felony, however, is defined under the Controlled Substances Act as "any Federal or State offense classified by applicable Federal or State Law as a felony." 21 U.S.C. § 802(13). . . . The maximum penalty under 21 U.S.C. § 844(a) for simple possession without prior convictions is one year. Hence, absent prior convictions, simple possession is not a felony. However, one prior conviction turns possession into a felony since the maximum penalty increases to over a year. Here, Petitioner had two prior drug convictions which, under the literal application of §§ 844(a) and 3559(a), render the 1989 possession conviction a felony.[23]

23. *Amaral*, 977 F.2d at 35-36.

Thus the First Circuit's initial rationale was specific to the facts of the case before it: Amaral had three sequential prior state felony convictions for simple possession of drugs, which meant that he could have been prosecuted (in the second and third cases) as a felony drug offender under federal law.[24] His criminal record arguably fit within the statutory definition of drug trafficking because his two subsequent state convictions for simple possession were concurrently "punishable" as felonies under the federal Controlled Substances Act,[25] and the First Circuit relied on this fact in reaching its primary holding.

However, in a footnote, the First Circuit continued by articulating an alternative reason for its decision:

> Moreover, possession is a felony under the applicable state law. In Rhode Island, the maximum imprisonment for possession is three years, R.I. Gen. Laws § 21-28-4.01(C)(1)(a), and any criminal offense punishable by imprisonment for more than one year is a felony, R.I. Gen. Laws § 11-1-2. Thus, under the definition of a felony in 21 U.S.C. § 802(13), Petitioner's possession convictions, which are felonies under Rhode Island law, are also considered felonies under the Controlled Substances Act.[26]

This second rationale—that any of Amaral's three state felony convictions qualified as drug trafficking—was dicta[27] entirely unnecessary to the court's holding that Amaral was an

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24. 18 U.S.C. § 844(a) (providing that a second or subsequent conviction for simple possession of drugs is a felony offense under federal law if the illegal act of possession occurred after the first conviction was final).

25. *See Amaral*, 977 F.2d at 35-36 (setting out the analysis quoted earlier in this section). The Supreme Court's decision in *Lopez* implicitly recognized but did not address the issue of whether an alien's second or subsequent state felony conviction for simple possession qualifies as drug trafficking insofar as it is "punishable under the Controlled Substances Act" *as a federal felony* (assuming the case had been prosecuted in federal court and the defendant had been subject to the recidivist enhancement provision in 21 U.S.C. § 851). *See Lopez*, 127 S. Ct. at 630 n. 6.

26. *Amaral*, 977 F.2d at 36 n. 3; *accord U.S. v. Forbes*, 16 F.3d 1294, 1301 (1st Cir. 1994) (citing *Amaral*).

27. *See U.S. v. Crawley*, 837 F.2d 291, 292-93 (7th Cir. 1989) (Posner, J.) (describing dictum as "a statement in a judicial opinion that could have been deleted without seriously impairing the analytical foundations of the holding—that, being peripheral, may not have received the full and careful consideration of the court that uttered it. . . . Dictum is a general argument or observation unnecessary to the decision. . . . The basic formula [for distinguishing holding from dictum] is to take account of facts treated by the judge as material and determine whether the contested opinion is based upon them.") (citations and internal quotation marks omitted).

aggravated felon. Despite its tenuous legal footing, however, the alternative rationale soon took on a life of its own.

2. The Second Circuit's Initial Decision: Jenkins

Soon after *Amaral* was decided, the Second Circuit uncritically adopted its dicta as the controlling rule in *Jenkins v. INS*,[28] which squarely raised the issue—whether a prior state felony conviction for simple possession should be treated as a drug trafficking crime under federal law—that had been peripheral in *Amaral*. The Second Circuit decided in *Jenkins* that a prior state conviction for mere possession should be so classified, and adopted the second of the First Circuit's *Amaral* rationales without significant analysis of its own.[29]

3. The BIA's Initial Decision: L—G—

A few months after the Second Circuit's decision in *Jenkins*, the BIA first addressed the issue. In *In Re L—G—*,[30] a panel of BIA judges, and eventually the en banc BIA,[31] unanimously concluded that an alien's state conviction for simple possession of powder cocaine, although classified as a felony under applicable state law, was not a drug trafficking offense under 8 U.S.C. § 1101(a)(43)(B) because it was punishable only as a misdemeanor under federal law. In reaching this decision, the BIA found fault with the logic applied by the First and Second Circuits in *Amaral* and *Jenkins*.[32]

Initially, the BIA stated that it was improper to rely on the definition of "felony" in 21 U.S.C. § 802(13)[33] because that definition was intended solely for use in determining whether a federal defendant's prior state drug conviction could serve as a predicate for a sentencing enhancement under the federal drug

28. 32 F.3d 14 (2d Cir. 1994).

29. *Jenkins*, 32 F.3d at 14 (citing footnote 3 of *Amaral*).

30. 20 I. & N. Dec. 905 (BIA 1994).

31. *In re L—G—*, 21 I. & N. Dec. 89 (BIA 1995) (en banc) (affirming BIA panel decision).

32. *Id.* at 93-102 (analyzing *Jenkins*); *see also id.* at 97 n. 5 (discussing *Amaral*).

33. *Id.* at 93-94.

laws.[34] The BIA concluded that, rather than look to Title 21's definition of "felony," it should use the more appropriate definition was found in Title 18. After all, the BIA reasoned, 8 U.S.C. § 1101(a)(43)(B)'s definition of drug trafficking was taken from 18 U.S.C. § 924(c)(2).[35] The definition of felony in Title 18 appears in 18 U.S.C. § 3559(a), which treats a felony (in different grades) as a federal offense punishable by more than one year in prison,[36] and does not broadly define felony as including crimes classified by a state as felonies if they are punishable by no more than one year in prison when prosecuted in federal court.[37] Relying on this narrower meaning of felony, the BIA concluded that "any felony," as used in 18 U.S.C. § 924(c)(2),

> refers to any class of *[federal]* felony found under 18 U.S.C. § 3559(a). A "drug trafficking crime" under 18 U.S.C. § 924(c)(2) is therefore any felony violation of the federal drug laws, i.e., any offense under those laws where the maximum term of imprisonment exceeds 1 year.[38]

And a first offense for simple possession would not so qualify under 21 U.S.C.§ 844(a).

Next turning to the legislative history of § 924(c)(2), the BIA observed that, prior to its 1988 amendment, "drug trafficking crime" was expressly defined in the statute as "any felony violation of Federal law involving the distribution, manufacture, or importation of any controlled substance."[39] The BIA then noted that the 1988 amendment to section 924(c)(2)—which deleted this definition—was labeled a "clarification" by Congress, and was "not intended to effect a major departure from prior law."[40]

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34. *Id.* at 93, 98-99 (discussing 21 U.S.C. § 801(13), and noting that it defines "felony" to include "any Federal or State offense classified by applicable Federal or State law as a felony").

35. *Id.* at 93-94.

36. 18 U.S.C. § 3559(a)(1)-(9) (listing five grades of felonies and four grades of misdemeanors).

37. *L—G—*, 21 I. & N. Dec. at 94 ("We find this comprehensive list of felony classes provides a more reasonable explanation for the term 'any felony' as used in 18 U.S.C. § 924(c)(2) than that [in 21 U.S.C. § 802(13)].").

38. *Id.* (citations omitted).

39. *Id.* (quoting the former statutory definition).

40. *Id.* (citing Pub. L. No. 100-690, § 6212, 102 Stat. 4181, 4360).

The BIA found the statute's former express definition relevant to the legal analysis in two ways: First, it explicitly referred to a "felony violation of *Federal* law," and second, "the [drug] offenses it described are those that . . . would [be] consider[ed] to be 'trafficking' as that term is commonly defined."[41] Therefore, the BIA concluded, the alien's prior Louisiana conviction for simple possession of powder cocaine was not a "drug trafficking crime"—and, thus, not an aggravated felony—under 8 U.S.C. § 1101(a)(43)(B) because it was punishable only as a misdemeanor under the Controlled Substances Act and did not involve any "distribution" element.[42]

Finally, after engaging in a thorough interpretation of the statute and a thorough analysis of the legislative history—something that the First and Second Circuits had not done in *Amaral* and *Jenkins*—the BIA also concluded that sound "policy reasons" also supported its interpretation. The BIA stressed that, absent a clear statement from Congress in enacting immigration legislation, "the Immigration and Nationality Act generally does not attach different treatment to [identical] state and federal . . . offenses."[43] Following the position articulated by the Justice Department and adopted by the First and Second Circuits would, then, "result in widely disparate consequences for similarly situated aliens based solely on differing state classifications of identical drug offenses" (such as where State A classifies simple possession of drugs as a "misdemeanor" but State B classifies the identical crime as a "felony" under its state law).[44]

Notably, despite the far-reaching effect of the BIA's administrative ruling, the Justice Department did not seek federal judicial review of *In Re L—G—*.[45] This meant that, as of 1995, immigration judges around the country were bound by the BIA's decision, while immigration judges in the First and Second Circuits (which include two major cities, Boston and New York, with large immigrant populations) were not. The resulting disparity in treatment of identically situated aliens in

41. *Id.* (emphasis added).

42. *Id.* at 96.

43. *Id.* at 100 (citations omitted).

44. *Id.*

45. *Aguirre v. INS*, 79 F.3d 315, 317 (2d Cir. 1996) (noting "the Government's decision not to seek review of *In re L—G—*").

different federal circuits was a consequence of the fact that a decision of the BIA is binding on all immigration judges unless a federal appeals court issues a contrary decision. If that happens, and only if it happens, the BIA's decision does not control immigration judges within that circuit, for they must follow the contrary decision of the relevant court of appeals.[46]

4. The Second Circuit's Second Decision: Aguirre

Less than a year after the BIA decided *In re L—G—*, the Second Circuit reconsidered *Jenkins* in *Aguirre v. INS*.[47] The Second Circuit held there that the legal issue was "fairly debatable" in view of *L—G—*.[48] In addition, the court held that because it then appeared that the BIA's decision would be followed by immigration judges outside of the Second Circuit if *Jenkins* were not overruled, it should abandon the position that it had taken only two years earlier in the interest of national uniformity.[49] For the moment, this left the First Circuit standing alone.

5. The First Circuit's Second Decision: Restrepo-Aguilar

Unlike the Second Circuit, the First Circuit refused in the wake of *In Re L—G—* to reconsider the position it had first articulated in *Amaral*. The issue was presented—albeit in the criminal context instead of in the civil-deportation context—in *United States v. Restrepo-Aguilar*,[50] but the First Circuit explicitly adhered there to its prior dicta in *Amaral*. In rejecting the BIA's position in favor of its own, the First Circuit arguably mischaracterized the holding in *In Re L—G—* as "rest[ing] to a significant degree on policy concerns" (i.e., national uniformity in the application of the immigration laws), and ignored the BIA's extensive statutory interpretation and its analysis of the legislative history.[51] Thus, even after the Second Circuit's decision in *Aguirre*, identically situated aliens facing deportation

46. *See e.g. Singh v. Ilchert*, 63 F.3d 1501, 1508 (9th Cir. 1995).
47. 79 F.3d 315 (2d Cir. 1996).
48. *Id.* at 317.
49. *Id.*
50. 74 F.3d 361, 366-67 (1st Cir. 1996).
51. *Id.* at 366.

(i.e., those with single prior state felony convictions for simple possession) received disparate treatment depending on the circuits in which their proceedings were conducted. And the situation only got worse as time went on.

C. The State of the Law after Restrepo-Aguilar

1. Decisions in Other Circuits

The state of non-uniformity that emerged after the First Circuit's reaffirmation of *Amaral* in 1996 was exacerbated in the ensuing decade—both in the civil (deportation) context and the criminal (sentencing) context. In 1996, the Tenth Circuit, without mentioning the unanimous en banc decision in *In Re L—G—* that had been issued only the year before, agreed with the First Circuit; in 1997, the Fifth and Eighth Circuits followed suit.[52] In the following three years, two more circuits—the Ninth and Eleventh—followed the trail blazed by the First Circuit in the early 1990s.[53] Remarkably, such a growing consensus among federal circuit judges did not deter the en banc BIA in late 1999 from reaffirming *In Re L—G—* as correct when

52. *U.S. v. Cabrera-Sosa*, 81 F.3d 998 (10th Cir. 1996); *U.S. v. Hinojosa-Lopez*, 130 F.3d 691 (5th Cir. 1997); *U.S. v. Briones-Mata*, 116 F.3d 308 (8th Cir. 1997). These decisions were rendered in criminal appeals of sentences imposed under both 8 U.S.C. § 1326(b)(2), which provides for an enhanced sentence of up to twenty years in a criminal prosecution in which the alien was convicted of an aggravated felony before being deported and thereafter illegally reentering the United States, and a corresponding provision of the Sentencing Guidelines. But the reasoning in each case turned on the language of 8 U.S.C. § 1101(a)(43)(B), which applied equally to civil immigration cases. *See e.g. Ballesteros v. Ashcroft*, 452 F.3d 1153, 1157-58 (10th Cir. 2006) (applying *Cabrera-Sosa* in civil immigration appeal); *Garcia v. Pasquarell*, 117 Fed. Appx. 337, 339 (5th Cir. 2004) (applying *Hinojosa-Lopez* in civil immigration appeal); *Herrera-Soto v. INS*, 1999 U.S. App. LEXIS 8499 at *3 (8th Cir. 1999) (applying *Briones-Mata* in civil immigration appeal); *see also U.S. v. Hernandez-Avalos*, 251 F.3d 505, 507-10 (5th Cir. 2001) (following *Hinojosa-Lopez* in a criminal prosecution in which the alien-defendant collaterally attacked his prior deportation under *U.S. v. Mendoza-Lopez*, 481 U.S. 828 (1987)). Such a collateral attack in a federal criminal prosecution requires a court to interpret immigration statutes in the civil context. *See Hernandez-Avalos*, 251 F.3d at 509-10.

53. *U.S. v. Ibarra-Galindo*, 206 F.3d 1337 (9th Cir. 2000); *U.S. v. Simon*, 168 F.3d 1271(11th Cir. 1999). The Fourth Circuit joined this group of circuits in 2003. *See U.S. v. Wilson*, 316 F.3d 506, 512-14 (4th Cir. 2003).

deciding *In Re K—V—D—*.[54] The BIA's continued adherence to *In Re L—G—* meant that by 1999, in deportation proceedings outside of the First, Fifth, Eighth, Ninth, Tenth, and Eleventh Circuits, an alien with a single prior state felony conviction for simple possession was not treated as an aggravated felon.

2. The Second Circuit's Return to the Jenkins *Standard in Criminal Appeals:* Pornes-Garcia

At the same time that the BIA refused to adopt the contrary position of six circuits in the civil immigration context, another schism was developing among the federal courts of appeals themselves. After deciding in 1996 to follow *In Re L—G—* in civil immigration cases, the Second Circuit reverted in *United States v. Pornes-Garcia*[55] to its original position in criminal immigration cases, thus creating a double standard for aliens in civil and criminal immigration cases.

In *Pornes-Garcia*, the Second Circuit held that the meaning of "aggravated felony" in the criminal-sentencing context included state felony convictions for simple possession of drugs, while in civil immigration cases it did not.[56] Despite the fact that the term in the criminal context expressly drew its meaning from the definition used in the civil context,[57] the Second Circuit stated that "[t]his case presents one of those instances where different interpretations of the same term are warranted by the differing purposes of the provisions incorporating that term."[58] The court explained that its deference to the BIA in *Aguirre* had been primarily for purposes of "uniform application of immigration laws" rather than a matter of principle, and concluded that "[i]n the very different context of criminal sentencing, those concerns are not present."[59]

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54. 22 I. & N. Dec. 1163 (BIA 1999) (en banc).

55. 171 F.3d 142 (2d Cir.), *cert. denied*, 528 U.S. 880 (1999).

56. *Id.* at 146-47.

57. *Id.* at 145 (noting that USSG § 2L1.2 expressly incorporates the definition of aggravated felony from 8 U.S.C. § 1101(a)(43)); *see also* 8 U.S.C. § 1326(b)(2) (the criminal illegal reentry statute, which provides for increased maximum punishment for aliens who illegally reenter after a deportation that follows a conviction for an aggravated felony).

58. *Pornes-Garcia*, 171 F.3d at 147.

59. *Id.*

And as if the Second Circuit's approach in *Pornes-Garcia* were not itself a sufficient addition to the burgeoning confusion and inconsistency in the law, the Fifth Circuit eventually refused to follow the bifurcated approach for civil and criminal cases espoused in *Pornes-Garcia*. It held instead that a state felony conviction for simple possession was drug trafficking in both contexts,[60] while the Ninth Circuit eventually adopted in *Cazarez-Guiterrez v. Ashcroft*[61] the double standard that the Second Circuit had embraced in *Pornes-Garcia*.[62]

D. The Tide Begins to Turn: Judge Canby's Dissent in Ibarra-Galindo *and the Third Circuit's Decision in* Gerbier

By 2000, when the Ninth Circuit decided to follow the First Circuit's decision in *Amaral*, it appeared that there was an insurmountable wall of circuit precedent against the position taken five years earlier by the unanimous en banc BIA, so much so that the decisions of the Fifth, Eighth, Tenth, and Eleventh Circuits failed even to cite the BIA's decision in *In Re L—G—*.[63] In addition, some circuits claimed that the "plain language" of the relevant statutory provisions supported the Justice Department's position.[64] And, as noted at the outset of this article, the Fifth Circuit was by 2000 so entrenched in its position that it actually threatened to impose sanctions on appellate counsel who continued to contend that an alien's

60. *U.S. v. Hernandez-Avalos*, 251 F.3d 505, 510 (5th Cir.) ("[T]he statutory language is clear—and is the same—whether applied in sentencing or [civil] immigration cases."), *cert. denied*, 534 U.S. 935 (2001).

61. 382 F.3d 905 (9th Cir. 2004). This case is discussed more fully in section (III)(F) below.

62. *Id.* at 911-12.

63. *Simon*, 168 F.3d 1271; *Hinojosa-Lopez*, 130 F.3d 691; *Briones-Mata*, 116 F.3d 308; *Cabrera-Sosa*, 81 F.3d 998.

64. *See Ibarra-Galindo*, 206 F.3d at 1340; *Simon*, 168 F.3d at 1272 (same); *see also Briones-Mata*, 116 F.3d at 310 (asserting that "Congress made a deliberate policy decision to include as an 'aggravated felony' a drug crime that is a felony under state law but only a misdemeanor" under federal law); *Hinojosa-Lopez*, 130 F.3d at 694 (same); *Hernandez-Avalos*, 251 F.3d at 510 (5th Cir. 2001) (same). The Fourth Circuit concluded that "any ambiguity in the statute is minimal at best." *Wilson*, 316 F.3d at 514 n. 5.

single state felony conviction for simple possession was not a drug trafficking offense and thus not an aggravated felony.[65]

Yet despite this seemingly solid wall of circuit authority, a small crack appeared. In *United States v. Ibarra-Galindo*,[66] a criminal immigration case in which the Ninth Circuit majority claimed that "the plain meaning" of the "unambiguous" statutory provisions at issue supported its position,[67] Judge Canby dissented.[68]

The majority in *Ibarra-Galindo* "decline[d] to heed the discordant pronouncement of the BIA, but rather [followed] the unanimous chorus of six circuits,"[69] so Judge Canby began his dissent by acknowledging that "[i]t is a somewhat daunting exercise to conclude that the majority has reached an incorrect result when six other circuits agree with it."[70] He proceeded, however, to offer several reasons supporting his decision to dissent:

1) the language in 8 U.S.C. § 1101(a)(43)(B) and 18 U.S.C. § 924(c)(2) was not plain and, indeed, could just as easily be read to mean that a state felony conviction for simple possession had to be punishable as a felony under the federal Controlled Substances Act to qualify as drug trafficking;

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65. For additional discussion of the Fifth Circuit's position, see note 6, *supra*, addressing *Sanchez-Zuniga*, 2000 WL 1273341. Sanchez-Zuniga's appellate brief acknowledged the Fifth Circuit's prior decision in *Hinojosa-Lopez*, but contended that it was wrongly decided (and in support of that position cited the BIA's decisions in *In Re L—G—* and *In Re K—V—D—*). The brief specifically stated that

> Mr. Sanchez-Zuniga must raise this issue here if he wishes to seek review in the United States Supreme Court. *See McKnight v. General Motors Corp.*, 511 U.S. 659, 659-60 (1994) (per curiam) (holding that raising an issue on appeal that is foreclosed by circuit precedent is the only way to preserve it for possible Supreme Court review).

Br. of Appellant, *U.S. v. Sanchez-Zuniga*, 2000 WL 34214474 (5th Cir. Aug. 23, 2000), at *10-*11 n. 3. It appears that the Fifth Circuit continued to deem this legal argument "frivolous" for at least another year and a half. *See U.S. v. Perez*, No. 01-50622 (5th Cir. Feb. 20, 2002) (unpublished).

66. 206 F.3d 1337 (9th Cir. 2000).

67. *Id.* at 1340 & n. 2.

68. *Id.* at 1341-45 (Canby, J., dissenting).

69. *Id.* at 1340-41 (same).

70. *Id.* at 1341 (same).

2) "common sense rebels at the thought of classifying" simple possession "as a drug trafficking crime";

3) the legislative history of section 924(c)(2) showed that Congress did not intend to abolish its former express definition of "drug trafficking," which described trafficking as conduct that would qualify as a *federal* felony offense;

4) the definition of felony in 21 U.S.C. § 802(13) was "utterly irrelevant" to the meaning of felony when used in 18 U.S.C. § 924(c); and

5) the penultimate sentence of 8 U.S.C. § 1101(a)(43)—which states that any aggravated felony listed in that statute includes violations of state *or* federal law—did not mean that a state felony drug offense concurrently "punishable" under federal law as a misdemeanor was a drug trafficking offense.[71]

Judge Canby's legal analysis, of course, was very similar to that of the en banc BIA's decision in *In Re L—G—*, which he cited in support of his dissent.[72] And he concluded by stating that if substantial doubt remained about the meaning of "drug trafficking" after analyzing the language of the statute and its legislative history, then the rule of lenity required an interpretation that favored the defendant in a criminal case.[73]

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71. *Id.* at 1341-44 (same).

72. *Id.* at 1344 (same).

73. The rule of lenity is a hoary maxim of statutory construction providing that, if a court still has doubts about a criminal statute's meaning after analyzing its language and its legislative history, the statute is ambiguous and must be construed in favor of a criminal defendant. *See e.g. U.S. v. Granderson*, 511 U.S. 39, 53-54 (1994) (applying the rule). A similar doctrine of statutory construction applies to ambiguous immigration statutes. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987) (requiring courts to "construe any lingering ambiguities in deportation statutes in favor of the alien"); *cf. Leocal v. Ashcroft*, 543 U.S. 1, 11 n. 8 (2004) (holding that immigration statutes that apply in both civil and criminal cases are subject to the rule of lenity and must be interpreted the same way in both contexts).

The intellectual force of Judge Canby's dissent caused the small crack in the wall of adverse circuit precedent to grow. The following year, the majority of a Third Circuit panel broke ranks with the circuits still following *Amaral* and concluded in *Gerbier v. Holmes*[74] that—at least in the civil immigration context—a state felony conviction for simple possession was not drug trafficking and, thus, was not an aggravated felony. Unlike the Second Circuit in *Aguirre*, the Third Circuit did not simply defer to the position of the BIA in civil immigration cases solely to promote uniform application of the immigration laws. Instead, like Judge Canby's dissenting opinion in *Ibarra-Galindo*, the Third Circuit's opinion in *Gerbier* followed the legal analysis of *In Re L—G—* and explored alternative interpretations of the operative statutory language: "any felony punishable under the Controlled Substances Act."[75]

In concluding that a state felony conviction for simple possession was not drug trafficking, the Third Circuit looked not only to the relevant statutory language—in particular, 18 U.S.C. § 924(c)(2)—but also to the legislative history behind the statute.[76] In addition, the Third Circuit, like the BIA and Judge Canby, rejected the other circuits' reliance on the definition of felony in Title 21 (in which the Controlled Substances Act appears) in favor of the definition in Title 18.[77] Finally, the Third Circuit stated that its interpretation promoted the uniform application of the immigration laws by treating all aliens in accordance with a definition of drug trafficking that did not depend on the vagaries of state law.[78]

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74. 280 F.3d 297 (3d Cir. 2002). Fifth Circuit Judge Thomas M. Reavley, sitting by designation on the Third Circuit, dissented in a one-paragraph opinion; he contended that "too many circuit courts have chosen the other way and I would follow them in the interest of consistency and uniformity of federal law." *Id.* at 318 (Reavley, J., dissenting).

Because *Gerbier* did not implicate any criminal immigration statutes or the Sentencing Guidelines, the Third Circuit addressed only the civil immigration context. *See id.* at 307 ("Whatever may be the proper construction in a Sentencing Guidelines case, we do not agree that the plain meaning of 'drug trafficking crime' under § 924(c) in the deportation context encompasses state felony convictions that would merely be misdemeanors under federal law when there is otherwise no trafficking component to the state law conviction.").

75. *Id.* at 302-18.

76. *Id.* at 308-09.

77. *Id.* at 309-11, 315-16.

78. *Id.* at 311-13.

The developing split among the circuits laid bare by *Gerbier* provided a sound basis for the Justice Department to seek either en banc review by the full Third Circuit or Supreme Court review of the Third Circuit's decision. Inexplicably, however, the Justice Department sought neither,[79] and so litigation over this issue continued in the lower courts.

E. A Retreat by the BIA: Yanez-Garcia

Shortly after the Third Circuit decided *Gerbier*, the en banc BIA decided *In Re Yanez-Garcia*,[80] a deportation case arising in the Fifth Circuit's jurisdiction. In that case, the BIA abandoned the position it first articulated in *In Re L—G—* and affirmed in *In Re K—V—D—*, and observed that

> [t]he clear trend among the [federal] circuit courts has been toward interpreting the term "felony," as used in § 924(c)(2), by reference to the definition set forth in 21 U.S.C. § 802(13), which permits a state drug offense to qualify as a felony under the CSA even if it could only be punished as a misdemeanor under federal law.[81]

Although recognizing that the Third Circuit's two-to-one decision in *Gerbier* had adopted its reasoning in *In Re L—G—*, the BIA ultimately concluded that "the best approach" was "one of deference" to the majority of federal circuits.[82] In a lengthy and cogent dissenting opinion, however, Board Member Lory Diana Rosenberg (who had joined the unanimous decision in *In Re L—G—*, and who wrote the majority opinion in *In Re K—V—D*), chastised the majority for abandoning its earlier position in favor of "expediency and acquiescence."[83] "If we are going to opt for a changed interpretation," she contended, "we need better reasons," especially considering the fact that the BIA's new position would have draconian consequences for

79. *See* 3d Cir. Elec. Docket, Appeal No. 00-2335 (available on PACER).

80. 23 I. & N. Dec. 390 (BIA 2002) (en banc), *on petition for review, Yanez-Garcia v. Ashcroft*, 388 F.3d 280 (7th Cir. 2004).

81. *Id.* at 394-95.

82. *Id.* at 396.

83. *Id.* at 402 (Rosenberg & Espenoza, JJ., dissenting).

"thousands of [aliens] who have been convicted of simple possession of controlled substances."[84]

F. The Shift in Jurisprudence Immediately Preceding Lopez

Within two years of the BIA's switch in position based on what it perceived as near consensus among the circuits, however, change came rapidly in the courts. In *Cazarez-Gutierrez*[85] the Ninth Circuit, recognizing that it had in *Ibarra-Galindo* taken an inconsistent approach in the criminal immigration context, concluded that the Third Circuit's decision in *Gerbier* was the better approach.[86] The Ninth Circuit also delved into the legislative history—something it had not done earlier in *Ibarra-Galindo*—which indicated that Congress never intended "drug trafficking" to include a state felony conviction for simple possession that would be punished only as a misdemeanor under federal law.[87] This change at the Ninth Circuit was soon followed by the Sixth Circuit's decision in *United States v. Palacios-Suarez*[88] and the Seventh Circuit's decision in *Gonzales-Gomez v. Achim*.[89] In *Palacios-Suarez*, the Sixth Circuit held that a state felony conviction for simple possession was not a drug trafficking offense and, thus, not an aggravated felony in the criminal immigration context,[90] while the Seventh Circuit held in *Achim* that it was not an aggravated felony in the civil immigration context.[91]

After engaging in legal analysis similar to that undertaken by the BIA back in 1995—refusing to incorporate the definition of "felony" from Title 21; refusing to follow other circuits'

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84. *Id.* at 409, 418.

85. 382 F.3d 905.

86. *Id.* at 910-18. In addition to citing *Gerbier* with approval, the Ninth Circuit relied on the reasoning of BIA Board Member Rosenberg's dissenting opinion in *Yanez-Garcia*. *See id.* at 917.

87. *Compare Cazarez-Gutierrez*, 382 F.3d at 914-17 (examining the legislative history of the statute), *with Ibarro-Galindo*, 206 F.3d at 1340 n. 2 ("Because the statutory text is unambiguous, we must decline . . . the dissent's invitation to reach a contrary result by resorting to the text of the congressional committee reports.").

88. 418 F.3d 692 (6th Cir. 2005).

89. 441 F.3d 532 (7th Cir. 2006).

90. 418 F.3d at 696-97.

91. 441 F.3d at 533-34.

facile interpretation of "any felony punishable under the Controlled Substances Act"; looking to the legislative history; and seeking to promote national uniformity in the application of the immigration laws—both the Sixth Circuit in *Palacios-Suarez* and the Seventh Circuit in *Gonzales-Gomez* disagreed with the position then embraced by a majority of other circuits.[92] Judge Posner, who wrote for the Seventh Circuit, described the Justice Department's interpretation of the relevant statutes as a "strained reading of the statutory language" and, in a more general manner, stated that "[t]he only consistency that we can see in the government's treatment of the meaning of 'aggravated felony' is that the alien always loses."[93]

By early 2006, even the Justice Department acknowledged that it was necessary for the Supreme Court to address the issue of whether a state felony conviction for simple possession was an aggravated felony. In *Lopez v. Gonzales*,[94] a civil immigration appeal, the Solicitor General, although contending that the petitioner was not entitled to relief, nonetheless agreed that his petition for writ of certiorari should be granted because of an "entrenched and multi-dimensional" circuit split.[95] The Court then granted certiorari in both *Lopez* and *Toledo-Flores v. United States*,[96] a companion criminal-immigration appeal raising the same issue. The two cases were consolidated for oral argument.[97]

IV. *LOPEZ* AND *TOLEDO-FLORES*

A. The Government's Position

Before the Supreme Court, the Justice Department essentially echoed the arguments it had made in the courts of

92. *Gonzalez-Gomez*, 441 F.3d at 533-36; *Palacios-Suarez*, 418 F.3d at 695-701.

93. *Gonzalez-Gomez*, 441 F.3d at 533, 535.

94. 417 F.3d 934 (8th Cir. 2005), *cert. granted*, 126 S. Ct. 1651 (2006).

95. Br. of Respt. in Response to Pet. for Writ of Cert., *Lopez v. Gonzales*, No. 05-547, 2006 WL 173274, at *9-*10 (Jan. 24, 2006).

96. 126 S. Ct. 1652 (2006) (granting certiorari to review the Fifth Circuit's decision in *U.S. v. Toledo-Flores*, 149 Fed. Appx. 241 (5th Cir. 2005)).

97. *See id.*

appeals since the early 1990s with one exception: The government conceded at last that the definition of felony in Title 21 was irrelevant.[98] The government persisted, however, in contending that the meaning of the pertinent statutory language—"any felony punishable under the Controlled Substances Act"—was "plain," and that it clearly included an alien's state-law felony conviction for simple possession that was concurrently punishable (even as a misdemeanor) under federal law.[99] In support of its position, the government relied not only on this purportedly plain language, but also on a portion of 8 U.S.C. § 1101(a)(43), which provided that "[t]he term [i.e., aggravated felony] applies to an offense described in this paragraph whether in violation of Federal or State law."[100] According to the government, this language demonstrated that Congress intended "any felony" drug offense—including simple possession—to qualify as "drug trafficking" under § 1101(a)(43)(B) so long as the state labeled the offense a "felony" *and* it was concurrently "punishable" under the federal drug laws, albeit as a misdemeanor under 21 U.S.C. § 844(a).[101] In sum, the government contended that, because the statutory language was "plain" and "unambiguous," the Court should eschew application of both the rule of lenity and its equivalent doctrine in the civil immigration context.[102] Finally, the government claimed that the petitioners' position would not in fact promote uniformity in the application of the immigration laws. "[T]he dispute here is not between uniformity and disuniformity," the government claimed. Rather, it was "a dispute about different baselines for uniformity."[103]

98. *See* Br. of Respts., *Lopez v. Gonzales*, Nos. 05-547 & 05-7664, 2006 WL 2474082, at *25 (Aug. 23, 2006) ("We agree with Lopez . . . that the term 'felony' in Section 924(c)(2) takes its meaning from within the framework of Title 18, rather than from Title 21.") [hereinafter Government Brief].

99. *See id.* at *13-*49.

100. *See id.* at *22-*23 (referring to penultimate sentence of 8 U.S.C. § 1101(a)(43)).

101. *See id.* at *22-*39.

102. *See id.* at *43-*45.

103. *Id.* at *45.

B. The Petitioners' Position

The government was of course responding to an argument made in the opening briefs of the petitioners in both *Lopez* and *Toledo-Flores*: that the common meaning of drug trafficking cannot be fairly interpreted to include simple possession.[104] They also contended that the language and structure of 18 U.S.C. § 924(c)—which was incorporated into 8 U.S.C. § 1101(a)(43)(B) as its definition of drug trafficking—indicated that Congress intended "drug trafficking crime" as used here to be limited to *federal* felony drug offenses.[105]

In particular, the petitioners pointed out, section 924(c)(1)(A) refers to drug trafficking crimes "for which [a defendant] may be prosecuted in a court of the United States."[106] In that regard, they observed that the government previously had conceded that using a firearm during and in relation to a simple possession offense was insufficient to support a conviction under section 924(c) because actual drug trafficking activity was required as an essential element of the offense contained in that section.[107] They also noted that, prior to its amendment in 1988, section 924(c) expressly defined "drug trafficking crime" as "any felony violation of federal law involving the distribution, manufacture, or importation of a controlled substance," and that the legislative history of the 1988 amendment reveals that Congress intended the amendment to be merely a "clarification of the [existing] definition of drug trafficking crimes."[108] They also pointed out that the grammatical structure of section 924(c)(2)—"any felony *punishable under* the Controlled Substances Act"—was virtually identical to that of § 924(k)(2), in which the phrase "punishable under the Controlled

104. Br. of Petr., *Lopez v. Gonzales*, 2006 WL 1696179 (June 19, 2006), at *18-*19 [hereinafter Lopez Brief]; Br. of Petr., *Toledo-Flores v. U.S.*, 2006 WL 1858831 (June 19, 2006), at *15-*16 [hereinafter Toledo-Flores Brief].

105. Lopez Brief, *supra* n. 104, at *21-*23; Toledo-Flores Brief, *supra* n. 104, at *20-*24.

106. 18 U.S.C. § 924(c)(1)(A).

107. Toledo-Flores Brief, *supra* n. 104, at *20-*21 (citing *Price v. U.S.*, 537 U.S. 1152 (2003) (per curiam)).

108. Lopez Brief, *supra* n. 104, at *30; Toledo-Flores Brief, *supra* n. 104, at *30-*31. It bears noting that the legislative history contains no explanation for Congress's deletion of the established definition of "drug trafficking crime" from the clarifying legislation passed in 1988.

Substances Act" was intended to refer only to federal offenses, and not to state-law offenses.[109]

The petitioners next invoked the well-established canon of statutory construction providing that, unless Congress plainly indicates otherwise, federal statutes must not be construed to "make the application of the federal act dependent on [the vagaries of] state law," and pointed out that this was particularly true in the context of immigration law, where the importance of national uniformity is suggested by the Constitution itself.[110] Therefore, they contended, "any felony punishable under the Controlled Substances Act" should be construed to mean only conduct punishable as a federal felony. Congress, they pointed out, had not plainly indicated that "any felony" included a state felony concurrently punishable only as a federal misdemeanor.[111] With respect to the Justice Department's reliance on the penultimate sentence of section 1101(a)(43), which states that section 1101(a)(43)'s list of "aggravated felonies" applies to offenses described there "whether in violation of Federal or State law," the petitioners argued that this clause did not alter the meaning of section 1101(a)(43)(B)'s definition of drug trafficking (which incorporated the 18 U.S.C. § 924(c) definition).[112] Finally, the petitioners contended that, if any doubt remained, the rule of lenity and its immigration-law counterpart required the Court to interpret the statutory provisions at issue in their favor.[113]

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109. Toledo-Flores Brief, *supra* n. 104, at *25-*26 (pointing out that section 924(k) speaks of conduct "punishable under the Controlled Substances Act" *or* "that violates any state law relating to any controlled substance"). Thus, the argument was that another provision of the same statute showed that Congress knew how to indicate that state as well as federal offenses were implicated, and that Congress had not done so in section 924(c)(2).

110. Toledo-Flores Brief, *supra* n. 104, at *29 (quoting *Jerome v. U.S.*, 318 U.S. 101, 104 (1943)); *see also* Lopez Brief, *supra* n. 104, at *33-*35 (quoting U.S. Const. art. I, § 8: "The Congress shall have the Power to . . . establish a uniform Rule of Naturalization"), *37-*38 (referring to the established presumption that Congress intends to adopt uniform definitions of offenses, and citing *Taylor v. U.S.*, 495 U.S. 575, 590-92 (1990)).

111. Toledo-Flores Brief, *supra* n. 104, at *15; *see also* Lopez Brief, *supra* n. 104, at *25-*26.

112. Reply Br. of Petr., *Lopez v. Gonzales*, 2006 WL 2688754, at *12 (Sept. 18, 2006); Reply Br. of Petr., *Toledo-Flores v. U.S.*, 2006 WL 2710733, at *13-*14 (Sept. 18, 2006).

113. Lopez Brief, *supra* n. 104, at *37-*38; Toledo-Flores Brief, *supra* n. 104, at *38-*39.

C. The Supreme Court's Decision

In late 2006, the Supreme Court issued its decision on the merits in *Lopez* and dismissed the petition for writ of certiorari in *Toledo-Flores* as improvidently granted,[114] likely because Toledo-Flores had been deported after certiorari was granted.[115] By a vote of eight to one, with Justice Souter writing the opinion and only Justice Thomas dissenting, the Court agreed with Lopez and rejected the Justice Department's arguments. At the outset, the Court stated that the Justice Department's position created "incoherence with any commonsense conception of 'illicit [drug] trafficking,' the term ultimately being defined."[116] And it pointed out in addition that "[r]eading § 924(c) the Government's way . . . would often turn simple possession into trafficking, just what the English language tells us not to expect."[117] The Court acknowledged that "Congress can define an aggravated felony of illicit trafficking in an unexpected way," but added that "Congress would need to tell us so, and there are good reasons to think it was doing no such thing here."[118]

First, the Court noted that, if Congress had intended to treat "any felony punishable under the Controlled Substances Act" as including a state law felony concurrently punishable only as a misdemeanor under 21 U.S.C. § 844(a), Congress "would have found a much less misleading way to make the point" than the Justice Department's tortured statutory interpretation.[119] Recognizing that other provisions in section 924 demonstrate Congress's ability to incorporate state law offenses alongside federal offenses when it intends to do so, the Court concluded that the "any felony" phrase does not sweep in all state felony offenses concurrently "punishable" under federal law.[120]

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114. *See Lopez*, 127 S. Ct. 625; *Toledo-Flores*, 127 S. Ct. 638.

115. Toledo-Flores's deportation raised a mootness issue that the Court appeared unwilling to address. *See* Government Brief, *supra* n. 98, at *10-*13 (contending that Toledo-Flores's appeal was moot because he had been deported following the grant of certiorari).

116. *Lopez*, 127 S. Ct. at 629-30.

117. *Id.* at 630.

118. *Id.* (footnote omitted).

119. *Id.* at 630-31.

120. *Id.* at 631(comparing sections 924(g)(3) and 924(k)(2) to section 924(c)(2)).

The Court next rejected the Justice Department's reliance on the penultimate sentence of 8 U.S.C. § 1101(a)(43), stating that the government was "wrenching the expectations raised by normal English usage" by interpreting it to mean that Congress intended a state felony conviction for possession to qualify as a drug "trafficking" crime.[121] That sentence, the Court explained, simply covers state offenses that otherwise would qualify under the definition of aggravated felonies listed in the first part of the statute; it does not, however, broaden the specific definitions to include state offenses (such as simple possession) that do not otherwise qualify under section 1101(a)(43).[122]

The Court next stressed that the interpretation advanced in the Justice Department's arguments contradicted its own history of applying a different definition in section 924(c) prosecutions:

> [T]he Government admits that it has never begun a prosecution under 18 U.S.C. § 924(c)(1)(A) where the underlying "drug trafficking crime" was a state felony but a federal misdemeanor . . . . This is telling: the failure of even a single eager Assistant United States Attorney to act on the Government's interpretation of "felony punishable under the [Controlled Substances Act]" in the very context in which the phrase appears in the United States Code belies the Government's claim that the interpretation is the more natural one.[123]

Finally, the Court addressed the issue of uniformity, noting that the Justice Department's position "would render the law of alien removal . . . and the law of sentencing for illegal reentry into the country . . . dependent on varying state criminal classifications."[124] The Court agreed that Congress was free to enact such a scheme if it wished, but that Congress appeared not to have done so in section 1101(a)(43)(B), which specifically incorporated federal statutory definition of "drug trafficking."[125] As the Court put it, "We cannot imagine that Congress took the trouble to incorporate its own statutory scheme of felonies and

121. *Id.*

122. *Id.* at 631-32.

123. *Id.* at 632 (footnotes omitted); *see also* Transcr. of Oral Argument, *Lopez v. Gonzales*, 2006 WL 3069258, at *27-*28 (Oct. 3, 2006).

124. *Lopez*, 127 S. Ct. at 632.

125. *Id.* at 632-33.

misdemeanors if it meant courts to ignore whenever a State chose to punish given act more heavily."[126]

Although its dismissal of *Toledo-Flores* meant that the Court never directly decided whether its interpretation of section 1101(a)(43)(B) in *Lopez* was equally applicable to federal criminal immigration cases, it seems implicitly to have recognized that this holding applies in both civil and criminal contexts. And the courts of appeals have so far read and applied *Lopez* this way.[127]

After fifteen years of litigation that resulted in a multidimensional split involving federal appeals courts and immigration judges, the Supreme Court resolved the issues raised by *Lopez* in aliens' favor. During that period, however, many thousands of aliens were erroneously treated as aggravated felons in the civil and criminal contexts, which resulted in countless deportations and enhanced prison sentences that otherwise would never have occurred.

V. LESSONS LEARNED FROM *LOPEZ*

In our common law system, reasonable jurists frequently will differ about a complicated legal issue involving federal law, and litigation over such an issue will take some time to culminate in a decision by the Supreme Court.[128] Nevertheless,

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126. *Id.* And in a footnote, the Court stated that the Justice Department had "wisely concede[d]" that the definition of "felony" in 21 U.S.C. § 802(13), was inapplicable and that the traditional Title 18 dichotomy between felonies and misdemeanors applied instead. *Id.* at 631 n. 7.

127. *See U.S. v. Estrada-Mendoza*, 475 F.3d 258, 260-61 (5th Cir. 2007) (concluding, after analyzing *Lopez*, that it "ineluctably applies with equal force to immigration and criminal cases"); *accord U.S. v. Martinez-Macias*, 472 F.3d 1216 (10th Cir. 2007); *U.S. v. Serratos-Marentes*, 2007 WL 582505 (9th Cir. Feb. 22, 2007) (unpublished) (accepting government's concession that *Lopez* applied to criminal immigration appeal); *see also Leocal v. Ashcroft*, 543 U.S. 1, 11 n. 8 (2004) (holding that immigration statutes that apply in both civil and criminal contexts must be interpreted in the same manner in both).

128. *See e.g. McCray v. N.Y.*, 461 U.S. 961, 961-32 (1983) (Stevens, J., respecting the denial of certiorari, joined by Blackmun & Powell, JJ.) ("My vote to deny certiorari in these cases does not reflect disagreement with Justice Marshall's appraisal of the importance of the underlying issue—whether the Constitution prohibits the use of peremptory challenges to exclude members of a particular group from the jury, based on the prosecutor's assumption that they will be biased in favor of other members of the same group. I believe that further consideration of the substantive and procedural ramifications of the problem by other courts will enable us to deal with the issue more wisely at a later

what occurred in the federal appellate system from the early 1990s through the Supreme Court's decision in *Lopez* in late 2006 is remarkable in several respects. The blame fairly can be laid at the feet of several institutional players.

A. A Lesson for the Federal Courts of Appeals

First and foremost, judges on numerous federal appeals courts gave short shrift to arguments that should have received in-depth, meaningful consideration. Particularly troublesome is the cursory approach to the issue taken in the 1990s by the First, Fifth, Eighth, Tenth, and Eleventh Circuits.[129] It is not as if those courts were following a seminal, well-reasoned opinion of one circuit without any contrary position having been articulated, as is frequently the case when a solid wall of circuit authority develops. Instead, the guiding principle supposedly appearing in the First Circuit's *Amaral* decision was dicta in a footnote that offered virtually no legal analysis and was more in the form of an *ipse dixit*.[130] Moreover, in 1995, the unanimous en banc Board of Immigration Appeals offered a lengthy, well-reasoned, and well-researched opinion explaining its disagreement with the First Circuit's position.[131] The Second Circuit was alone in recognizing—at least to some degree—the force of the BIA's position,[132] while the other circuits either summarily dismissed the BIA's reasoning[133] or simply ignored it[134] after claiming that the relevant statutory language plainly or unambiguously favored the government's position.[135]

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date. There is presently no conflict of decision within the federal system."); *see generally* Margaret Meriwether Cordray & Richard Cordray, *The Philosophy of Certiorari: Jurisprudential Considerations in Supreme Court Case Selection*, 82 Wash. U. L.Q. 389 (Summer 2004).

129. *See* text accompanying nn. 23-29 and 47-53, *supra*.

130. *Amaral*, 977 F.2d at 35-36 & n. 3 .

131. *In Re L—G—*, 21 I. & N. Dec. 89.

132. *Aguirre*, 79 F.3d at 317-18; *but cf. U.S. v. Pornes-Garcia*, 171 F.3d 142 (refusing to adopt BIA's approach in criminal immigration cases).

133. In a single short paragraph, the First Circuit, in a decision after *In Re L—G—*, commented that "the text of the relevant [statutory] provisions . . . forecloses" the BIA's position. *U.S. v. Restrepo-Aguilar*, 74 F.3d at 364.

134. *U.S. v. Simon*, 168 F.3d 1271; *U.S. v. Hinojosa-Lopez*, 130 F.3d 691; *U.S. v. Briones-Mata*, 116 F.3d 308; *U.S. v. Cabrera-Sosa*, 81 F.3d 998 .

135. *See e.g. Simon*, 168 F.3d at 1272 (referring to "plain language").

In the Seventh Circuit's 2006 decision disagreeing with the earlier phalanx of circuit courts, Judge Posner dismissed the Justice Department's legal arguments in part by noting that "[t]he only consistency that we can see in the government's treatment of the meaning of 'aggravated felony' is that the alien always loses."[136] And to the extent that many other circuits uncritically adopted the Justice Department's untenable position, Judge Posner's censure seems applicable to them as well. In mitigation of the courts' failings here, however, it must be acknowledged that the modern federal appellate system, with its burgeoning caseloads (composed in some significant part of immigration-related appeals[137]), is hard-pressed to generate the generally higher quality product of an earlier era.[138]

B. A Lesson for the Justice Department

The Justice Department deserves blame, not only for the reason articulated by Judge Posner, but also because it failed to ensure that the many thousands of aliens convicted for simple possession received equal treatment—in civil and criminal immigration cases—across the country. As early as the mid-1990s, when the BIA expressly disagreed with the First Circuit

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136. *Gonzalez-Gomez*, 441 F.3d at 535.

137. *See e.g.* John R.B. Palmer, *The Nature and Causes of the Immigration Surge in the Federal Courts of Appeals: A Preliminary Analysis*, 51 N.Y.L. Sch. L. Rev. 13 (2006-07); Peter H. Schuck & Theodore Hsien Wang, *Continuity and Change: Patterns of Immigration Litigation in the Courts, 1979-1990*, 45 Stan. L. Rev. 115 (Nov. 1992).

138. *See* Jeffrey O. Cooper & Douglas A. Berman, *Passive Virtues and Casual Vices in the Federal Courts of Appeals*, 66 Brook. L. Rev. 685, 687-88 (2000). As Professors Cooper and Berman have explained,

> [t]he practices of the lower federal courts have also changed, particularly operations in the courts of appeals. With a much smaller caseload, decision-making in the federal circuit courts could reasonably aspire to what has been described as "the Learned Hand model"—a model in which cases are decided by a panel of collegial judges, following full briefing and oral argument, through a published opinion crafted by one of the judges after receiving considerable input from other circuit judges. But while many still long for this idealized model of appellate decision-making, there is no doubt that the modern courts of appeals cannot and do not operate in this manner (to the extent that they ever did so).

Id. at 688 (footnote omitted); *see also* Arthur D. Hellman, *The View from the Trenches: A Report on the Breakout Sessions at the 2005 National Conference on Appellate Justice*, 8 J. App. Prac. & Process 141, 178-202 (2006) (summarizing and analyzing discussions among judges, lawyers, and academics about issues relating to "Volume, Process, and the Responsibility for Decision").

when deciding *In Re L—G—*, the Justice Department was faced with disparate treatment of identically situated aliens that depended solely upon the federal circuits in which their immigration cases were being litigated. This disparate treatment only increased over the years, initially when the Second Circuit sided with the BIA and diverged from the First Circuit, and later when the Third Circuit split with the numerous other circuits that had followed the First. Inexplicably, the Justice Department never sought review of either the BIA's decision in *In Re L—G—* or the BIA's 1999 reaffirmation of that case in *In Re K—V—D—*, despite the fact that cases involving scores of identically situated aliens that were then being treated differently only because they had been filed in different circuits. Nor did the Justice Department seek Supreme Court review of the Third Circuit's 2002 decision in *Holmes*.[139] It was not until the Sixth, Seventh, and Ninth Circuit joined the Second and Third Circuits in 2005 and 2006 that the Justice Department finally agreed that the Supreme Court should intervene and resolve the circuit split.

The Justice Department made no attempt to seek Supreme Court review of this issue despite the fact that it serves a unique role in our system through the Office of the Solicitor General, which is recognized as a virtual adjunct to the Supreme Court when performing its role in identifying important federal law issues of national importance and presenting them for review.[140] In the decade before 2006, the Department failed to discharge this duty in the litigation that culminated in *Lopez*.

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139. Not only did the Justice Department fail to seek review when it lost in the lower courts, it opposed Supreme Court review of the issue in a Fifth Circuit in 2002. *See* Br. of U.S. in Opposition, *Amaya-Matamoros v. U.S.*, No. 01-8643 (May 24, 2002) 10-13 (copy on file with author).

140. *See e.g.* Robert L. Stern et al., *Supreme Court Practice*, 221 & n. 6 (8th ed. 2002) (generally discussing the great influence that the Solicitor General has in instigating Supreme Court review, and citing numerous illustrative examples); *see also* U.S. Dept. of J., *About the Office of the Solicitor General*, http://usdoj.gov/osg/about_us.htm (stating that "[t]he task of the Office of the Solicitor General is to supervise and conduct government litigation in the United States Supreme Court. Virtually all such litigation is channeled through the Office of the Solicitor General and is actively conducted by the Office. The United States is involved in approximately two-thirds of all the cases the U.S. Supreme Court decides on the merits each year. The Solicitor General determines the cases in which Supreme Court review will be sought by the government and the positions the government will take before the Court. . . . Another responsibility of the Office is to review all cases decided adversely to the government in the lower courts to determine whether they should be appealed and, if so, what position should be taken.").

C. A Lesson for the Supreme Court

Finally, the Supreme Court itself should accept some share of responsibility for the unnecessarily protracted litigation that ultimately led to resolution of the issue addressed in *Lopez*. The Court had several earlier opportunities to resolve the issue in both the civil and criminal contexts, but failed repeatedly to do so even after a circuit split had developed.[141] Countless aliens were as a result erroneously treated as aggravated felons.

D. A Lesson for Practitioners

Despite these failures by institutional failures, there is a silver lining in this cloud. From the mid-1990s until *Lopez* was decided in late 2006, counsel for aliens in both civil and criminal cases continued to preserve and litigate the aggravated-felony issue, even in the face of threatened sanctions for raising what one circuit court deemed a "frivolous" claim.[142] That perseverance eventually persuaded Judge Canby to dissent in *Ibarra-Galindo*, and it also persuaded the Third Circuit to diverge in *Holmes* from what was then the clear majority position; at that point, the tide seemed to turn and a wider circuit split developed. The Supreme Court eventually issued a near-unanimous opinion that rejected the Justice Department's arguments, vindicating the work of the lawyers who had argued for years that the Justice Department had taken the wrong position on this extremely important issue. That vindication, however, came too late for the thousands of aliens wrongly treated as aggravated felons during the fifteen years before *Lopez* was decided. One can only hope that in future cases the same institutional players will not repeat the errors so vividly apparent in the history of the litigation culminating in *Lopez*.

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141. *See e.g. Pornes-Garcia v. U.S.*, 528 U.S. 880 (1999) (denying certiorari); *Hernandez-Avalos v. U.S.*, 534 U.S. 935 (2001) (same).

142. *See supra* n. 6; *see also* Brent E. Newton, *An Argument for Reviving the Actual Futility Exception to the Supreme Court's Procedural Default Doctrine*, 4 J. App. Prac. & Process 521, 559-60 (2002) (discussing the need for counsel to prepare for changes in appellate precedent by preserving legal issues that, although apparently foreclosed, may have merit for future appeals).