



U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals

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BAUTISTA, Robert
A038-509-855

Enclosed is a copy of the transcript for the Oral Argument hearing held on August 10, 2011, in the above-referenced case.

Very Truly Yours,

Christina Burghard
Oral Argument Coordinator
Office of the Clerk

cc: Mike P. Davis
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U.S. Department of Justice
Executive Office for Immigration Review
Board of Immigration Appeals

Matter of

File A 038 509 855

ROBERT BAUTISTA,)
Respondent) IN REMOVAL PROCEEDINGS
)
) Transcript of Hearing

Before EDWARD R. GRANT, Board Member
GARRY D. MALPHRUS, Board Member
HUGH MULLANE, Board Member

Date: August 10, 2011

Place: Falls Church, Virginia

Transcribed by DEPOSITION SERVICES, INC. at Germantown, Maryland

Official Interpreter:

Language:

Appearances:

For the Department of
Homeland Security:

Robert Tennyson, Esquire

For the Respondent:

Raymond Lahoud, Esquire

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1 BOARD MEMBER GRANT FOR THE RECORD

2 The Board of Immigration Appeals is now in session in
3 Falls Church, Virginia. Board member Edward R. Grant presiding.
4 Joining on today's panel are Board members Garry Malphrus to my
5 right and Hugh Mullane to my left. The matter before us is an
6 appeal by the respondent, Robert Bautista, A 038 509 855, from
7 the document of the Immigration Judge dated February 8, 2011.
8 Appearing on behalf of the respondent is Counsel Raymond Lahoud.
9 And appearing on behalf of the Department of Homeland Security is
10 Counsel Robert Tennyson. Each party has 30 minutes to present
11 oral argument, a portion of which may be reserved for rebuttal.
12 We prefer that time be reserved at the beginning of your oral
13 argument. Time will be kept on the bench, and a two-minute
14 warning will be given based on the amount of time that you've
15 reserved for rebuttal, if any. The panel would like to
16 acknowledge the assistance of Staff Attorney Stephen Cavell
17 (phonetic sp.) and oral argument coordinator Chrissy Burkhardt
18 (phonetic sp.).

19 BOARD MEMBER GRANT TO MR. LAHOUD

20 Q. Mr. Lahoud, I believe it's your appeal, so you may
21 commence.

22 MR. LAHOUD TO BOARD MEMBERS

23 Q. Good morning distinguished members of the Board of
24 Immigration Appeals. My name is Raymond Lahoud, and I am honored
25 and thankful to have this opportunity to appear before you to

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1 represent my client, Robert Bautista. The case before the Board
2 raises the question as to whether New York attempted arson in the
3 third degree is an aggravated felony pursuant to Section
4 101(a)(43) of the Immigration and Nationality Act. More
5 precisely, however, is whether New York Penal Law Section 110 and
6 150.10 fall within the purview of Title 8 Sections 844(f)(1) or
7 844(i). A New York attempt conviction requires that a person
8 engage in conduct which tends to affect the commission of an
9 underlying crime. Arson in New York is established when one
10 intentionally damages a building or motor vehicle by starting a
11 fire or causing an explosion. Attempted arson in the third
12 degree in New York clearly does not fall within the purview of
13 Sections 844(f) -- 844 (1) of (f) and (i) as both federal
14 sections require additional elements that are substantive in
15 nature and cannot be dispensed of. As a Supreme Court decision
16 noted, to deem a state crime an aggravated felony, one must
17 compare the elements of the state statute with the federal
18 aggravated felony statute. If there lacks certain material
19 elements, as in the case before the Board, then the state statute
20 cannot be deemed an aggravated felony. Of primary significance
21 today is that a comparison of both Sections 844(f)(1) and 844(i)
22 of Title 18 of the United States Code to the New York State arson
23 statute clearly indicates that the federal statute requires an
24 element of maliciousness. It requires malicious conduct as a
25 minimal mens rea, compared to the intentional conduct that is

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1 required in the New York statute. When drafting both 844(f)(1)
2 and 844(i), the United States Congress intentionally started the
3 paragraphs with any person who maliciously acts in a certain
4 manner shall be subject to a respective term of imprisonment.
5 The New York legislature, on the other hand, did not require any
6 malice with respect to arson in the third degree. New York
7 unambiguously wrote that an individual is guilty of third degree
8 arson with an intentional act and nothing more with respect to
9 the required mens rea. Malice, as the Honorable Board is well-
10 aware, is the intention or desire to cause harm to another
11 through an unlawful or wrongful act without any justification or
12 excuse. It requires an evil purpose. It requires an evil
13 motive. There is no excuse for what the individual is doing when
14 the individual acts maliciously. Intentional is simply a general
15 intent to commit an act for which an excuse or justification
16 could exist. To violate New York's third degree arson statute,
17 one must act with a conscious objective or purpose to cause
18 damage. There --

19 BOARD MEMBER MALPHRUS TO MR. LAHOUD

20 Q. Excuse me. So is that the basis upon which you're
21 distinguishing your situation? I thought your brief really
22 relied on the fact that the federal statute required interstate
23 commerce or it required a relating to federal property. But now
24 you're talking about kind of a different issue.

25 A. That's the second part of my argument. When

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1 looking at the whether or not the state statute is described in
2 the federal statute, we have to look at all elements of the state
3 statute and compare them to the federal statute. An important
4 element here is the issue of malice.

5 BOARD MEMBER GRANT TO MR. LAHOUD

6 Q. But I gather the question he's asking is, is do
7 you make this argument in your brief?

8 A. We do not touch this argument in the brief. We
9 went into the issue of -- the issue of intent didn't arise with
10 the Board -- with the Immigration Judge and the question of
11 malice and all. However, the Immigration Judge at that point
12 didn't decide whether or not malicious conduct and intentional
13 conduct were a distinction. In our brief, however, we do, we
14 discuss whether or not 844(f)(1) and 844(i) are described within
15 them, the New York attempted arson statute. If the Court wishes,
16 I could proceed to that argument or --

17 BOARD MEMBER MALPHRUS TO MR. LAHOUD

18 Q. Well, I just --

19 BOARD MEMBER GRANT TO MR. LAHOUD

20 Q. I'd like to -- go ahead.

21 BOARD MEMBER MALPHRUS TO MR. LAHOUD.

22 Q. No, I was just going to say, and you can do it
23 later or you can do it now, but I do want you to go to the second
24 prong of your argument, because I want you to distinguish Matter
25 of Vasquez --

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1 A. Okay.

2 Q. -- from that. From your situation.

3 BOARD MEMBER GRANT TO MR. LAHOUD

4 Q. But if you want to proceed with --

5 A. I can, I mean I'll just, actually I'll proceed,
6 I'll go along with the second argument and all if we do have
7 time.

8 Q. I would be helpful on the first argument since
9 it's not presented in the brief --

10 A. Yes.

11 Q. -- if you have citations that you can give us
12 orally here on the federal court's construction of the element of
13 malice that you're relying --

14 A. I can provide some, yes. But I'll move on to the
15 second part of our argument that's actually in the brief and
16 hopefully --

17 Q. Okay.

18 A. -- we'll have more time.

19 Q. That's fine.

20 A. As with any issue related to statutory
21 interpretation, the Board must first defer to the clearly written
22 words in the statute. Section 844(f)(1) deals particularly with
23 damage or destruction by means of fire or an explosive of any
24 building, vehicle, or other personal or real property, in whole
25 or in part owned or possessed by or leased to the United States

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1 or owned or possessed by a private organization that receives
2 federal funding. A review of case law from across the nation
3 indicates that the property alleged to have been destroyed must
4 be Government property. The statute is intended to protect
5 property of the United States Government or any institution or
6 organization receiving federal financial assistance. The nexus
7 between the property and the federal government element is
8 necessary. Congress was very specific in its drafting the
9 statute and limited its application to a certain set of buildings
10 or motor vehicles. Those certain set of buildings or motor
11 vehicles are ones that are owned or leased by the Federal
12 Government or a private organization that receives funding from
13 the federal government. If Congress wanted to include all
14 property, it would have done just that when drafting the
15 legislation. Rather, Congress decided to limit --

16 BOARD MEMBER MULLANE TO MR. LAHOUD

17 Q. But, counsel, I mean isn't the reason why Congress
18 had to limit either to federal property or to interstate commerce
19 was because of the Constitution?

20 A. That is the truth here. I do agree with you on
21 that. They had to do that. But the question here is whether or
22 not the state statute as described in the federal statute, and
23 the key element in the federal statute that we cannot dispense
24 of, as happened in the case of Vasquez-Muniz, is that element of
25 the crime. We cannot dispense of that. It's not merely a

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1 jurisdictional question. It's a requirement. It's the act
2 that's required for the actual criminal action.

3 BOARD MEMBER GRANT TO MR. LAHOUD

4 Q. Are you asking us to distinguish or to overrule
5 and abandon Vasquez-Muniz?

6 A. I'm asking you to distinguish.

7 Q. Okay. And what's the distinction in this case?

8 A. The distinction --

9 Q. Particularly as regards -- I can see the
10 distinction with (f)(1). That does seem targeted towards a
11 federal building. It's more difficult, perhaps not impossible,
12 but more difficult to see the distinction in (i) of Section 844.
13 What would be the distinction in your view?

14 A. I apologize, Your Honor?

15 Q. What would be the distinction between the
16 interstate commerce element which we found to be non-substantive
17 in Vasquez-Muniz and the interstate commerce element in 844(i)
18 which you're claiming to be substantive? What about the language
19 in 844(i) makes it substantive in a way that the interstate
20 commerce element in 922(g)(1) was not substantive?

21 A. In 922(g)(1), Your Honor, of Title 18, the
22 interstate commerce provision, as the Board held, was deemed to
23 be mere surplusage. There, however, the interstate commerce
24 clause read as to shift or transport interstate or foreign
25 commerce or possess and, or affecting commerce any firearm or

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1 ammunition. In 844(i), the interstate clause make used of a
2 phrase, and the phrase is used in interstate commerce, interstate
3 or foreign commerce, or in any activity affecting interstate or
4 foreign commerce.

5 Q. But with your --

6 A. It does --

7 Q. Your argument then is the language, particularly
8 the word use in 844(i) is what distinguishes?

9 A. My argument, Your Honor, is that 844(i) deals with
10 the instrumentalities of interstate foreign commerce, while
11 922(g)(1) doesn't necessarily deal with the instrumentalities of
12 foreign commerce -- of interstate or foreign commerce. Here, in
13 844(i), it could be an individual who essentially blows, you know
14 attacks or creates a fire or an explosion in an Amtrak train.
15 He's affecting an item, a property, a motor vehicle that's
16 actually used in interstate commerce. And that's a distinction
17 between 922(g)(1) and 844(i). But furthermore, though, aside
18 from the instrumentalities, Congress was clear when drafting the
19 clause. And the Supreme Court in Jones v. The United States
20 stated that this clause is not to be ignored as it is a necessary
21 element as a whole. The court specifically said when examining
22 844(i), the court stated that the key word, the key, the most
23 important word in this section is the word used. And that word
24 doesn't appear in 922(g)(1).

25 BOARD MEMBER MULLANE TO MR. LAHOUD

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1 Q. But I guess, counsel, it would be just be helpful
2 if you could sort of separate, sort of a criminal prosecution
3 under those statutes versus sort of the immigration consequences
4 that flow from a conviction under those statutes. Because the
5 interstate commerce element in the gun provision is not
6 surplusage in the sense of you can be convicted without it,
7 right?

8 A. It's not. It is deemed surplusage in the -- with
9 respect to immigration given the Board's decision in Vasquez-
10 Muniz. However, according to the Supreme Court case in Taylor,
11 we have to review when comparing -- when determining whether a
12 state statute is an aggravated felony, we have to compare the
13 state statute with the federal statute. And an essential element
14 in the federal statute is the word use and is the phrase used in
15 interstate commerce. The commerce provision in 922(g)(1) is not
16 necessarily an essential element of the statute.

17 Q. But it's -- I mean is it an essential element in
18 the sense of you can't be convicted under federal law unless they
19 prove that element, right?

20 A. They would have to prove that element under
21 federal law. But you can -- it's our position that when
22 interpreting immigration laws or when comparing state laws to
23 immigration laws, you can't -- the Board shouldn't remove from
24 the actual statute or deem as surplusage words that are essential
25 to the actual statute. Like you need, according to the Jones

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1 court you need to have the element present, the element of the
2 interstate commerce element present in that statute.

3 Q. But you agree that Jones only stands for the
4 proposition of the actual federal criminal conviction; it's not
5 an immigration consequences case?

6 A. You are correct on that, Your Honor. But Jones
7 makes clear, however, that it's a key element that cannot, it
8 cannot be dismissed. It's necessary.

9 BOARD MEMBER GRANT TO MR. LAHOUD

10 Q. But isn't it a key element in order to establish
11 that the federal arson statute doesn't cover and essentially
12 supplant all the state and local arson statutes that may be out
13 there? I mean Justice Ginsburg says in that decision that if the
14 court were to affirm the Seventh Circuit's view, virtually any
15 property in the United States would be subject to the federal
16 statute. You know that there would be no structure.

17 A. I mean if we apply it to the immigration context
18 when it says virtually any state crime that deals with arson
19 could lead to deportation, the limits are endless. And when
20 Congress enacted the statute, it's hard for me to believe that
21 they envisioned the numbers of deportations to increase so
22 substantially. It creates --

23 Q. Well, I'm not so sure that's an accurate rendering
24 if you look at the final clause of the aggravated felony
25 definition, which specifically states that interstate or federal

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1 offenses may be covered. And I think it's at least a plausible
2 reading of what Congress was trying to do in 1996, if not the
3 definite reading to expand the deportation grounds for criminal
4 offenses.

5 A. Plausible but not necessarily a definite reading
6 of what Congress wanted to do, however.

7 BOARD MEMBER MALPHRUS TO MR. LAHOUD

8 Q. Well, what do you think -- okay. Well, I was
9 going to ask, what do you think Congress meant then when they
10 said this, at the end of that 101(a)(43) they said the term
11 applies to an offense whether in violation of state or federal
12 law? What were they talking about?

13 A. There are certain crimes that are described in the
14 -- that are described in 101(a)(43). And those certain crimes
15 are described in there. Some of them we contend have to require
16 elements that simply cannot be dispensed of. And it is our
17 argument that in this case the element of foreign commerce, the
18 interstate commerce element is one here, given case law, that
19 simply cannot be dispensed of.

20 BOARD MEMBER MULLANE TO MR. LAHOUD

21 Q. But maybe getting back to the argument you sort of
22 started with about the malicious conduct versus the intentional
23 conduct, can you maybe just elaborate more on that point?

24 A. I will, yes. If I may, Your Honor. The New York
25 legislature with respect to malicious and intentional, the New

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1 York legislature did not require any malice with respect to arson
2 in the third degree. New York unambiguously wrote that an
3 individual is guilty of third degree arson with an intentional
4 act and nothing more with respect to it. They just stated
5 malice, and as I'm sure the Board is aware, malice is an
6 intention or a desire to cause harm to another through an
7 unlawful or wrongful act without any justification whatsoever.

8 Q. But then your position is is that the federal
9 statute requires malice on top of intent?

10 A. Malice on top of intent. Malice could -- malice,
11 intentional -- you can commit an intentional crime without having
12 malice. But malice could include intent.

13 BOARD MEMBER GRANT TO MR. LAHOUD

14 Q. Do you have case law citations you can give us
15 again since this is not in your brief?

16 A. I could provide it. I could provide to the --
17 yes.

18 Q. Do you have any you can give us now?

19 A. What we have is, we actually have New York
20 statutes that contain elements of intent without malice. The New
21 York statute, we have New York statutes that make distinctions
22 between malice and intent.

23 Q. You have New York case law. What I'm concerned
24 with is how the federal courts have construed the -- I mean we
25 can check that ourselves, but how the federal courts have

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1 construed the term maliciously, whether it really is distinct
2 from intent. Your assertion, and it sounds plausible, common
3 sense assertion that malice would be something on top of intent,
4 but what have the federal courts said about that? I think that's
5 more relevant than what the state court has said about the
6 difference between malice and intent.

7 A. If I may just provide an example to the Court?
8 For example, a terrorist who wants to attack a federal building
9 or wants to attack a building that's used in interstate commerce,
10 such as the World Trade Center or what happened in Oklahoma City,
11 his actions could amount to malicious conduct. However, an
12 individual could, an individual who has his entire family out in
13 the middle of woods, with no heat, with no housing, has his
14 vehicle there in the middle of the woods. And to keep his family
15 warm he has to start a fire in his vehicle, for example. He
16 intentionally started the fire in his vehicle. He didn't act
17 maliciously in doing that. He was justified in doing that. But
18 when you compare that to the terrorist attack in New York or
19 Washington and in Oklahoma City, the actions of those individuals
20 obviously evidenced a clear malicious intent that's there.

21 Q. The hypothetical is instructive but case law that
22 focuses on what the federal statute means when it says
23 maliciously is really what we need. And if you can't provide any
24 now, then a very quick submission of authority --

25 A. We will.

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1 Q. -- on that would be appropriate.

2 A. If I can continue that argument, though? You know
3 for example, in New York --

4 Q. What we really need is federal law because you're
5 asking us to take the word maliciously in the federal statute and
6 distinguish it from the requirement of intent. And in order to
7 be able to do that we would need authority that essentially says
8 about that word maliciously in the federal statute, that it means
9 something more than just intent, even perhaps the specific intent
10 to commit the crime.

11 A. That it requires the evil motive. If I may too, I
12 just want to reserve five minutes for rebuttal, though, if I
13 could, please.

14 Q. Then you have about two minutes left then.

15 BOARD MEMBER MALPHRUS TO MR. LAHOUD

16 Q. Well, let me ask you one other question then
17 before you sit down. Your brief argues that arson should not be
18 found an aggravated felony because it's long been held to be a
19 CIMT. And I don't understand that. Are you saying that a crime
20 cannot a CIMT and also be an aggravated felony?

21 A. I'm saying that case law across the United States
22 has never deemed attempted arson in the third to be, or arson at
23 all to be an aggravated felony. There could be times in the
24 future where it might amount to it. But in the matter before
25 this Court today, when the statute is read, I don't believe

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1 actually -- we aver that the, we submit to the Court that the
2 statute, the New York statute is not aggravated felony. It does
3 not rise to the level of an aggravated felony. It's not
4 described in 844(f)(1) or 844(i). It also requires -- you know
5 it's missing the requisite intentional rather than the malicious
6 conduct.

7 Q. I understand that. I just wanted to make sure
8 that agree that a crime could be an aggravated felony and a CIMT
9 both, in sum.

10 A. I feel that an aggravated felony could be a crime
11 of moral turpitude but not all crimes of moral turpitude are
12 aggravated felonies.

13 Q. Right. Okay.

14 BOARD MEMBER GRANT TO MR. LAHOUD

15 Q. If you have anything further, we'll --

16 A. I --

17 Q. You'll have about six minutes.

18 A. Yes. What we're asking from the Court is, from
19 the Board is that they defer to the clearly written words of
20 Congress and recognize that the 844(f)(1) and 844(i), there are
21 essential elements that are required to be there. And it's not
22 similar to the Board's former, the Board decision in 922(g)(1) in
23 that that was just deemed merely a jurisdictional element. These
24 are required substantive elements, and we can't just ignore them
25 or dismiss them as being just mere surplusage.

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1 Q. Thank you.

2 BOARD MEMBER GRANT TO MR. TENNYSON

3 Q. Mr. Tennyson?

4 A. Good morning. May it please the Board. My name
5 is Robert Tennyson and I represent the Department of Homeland
6 Security in this matter. The respondent, who has been convicted
7 of attempted arson, bears the burden of demonstrating that he has
8 not been convicted of an aggravated felony, so as to bar
9 cancellation of removal or render him ineligible for a waiver.
10 The Department submits that this, the respondent cannot do. Now
11 let me begin by responding to the respondent's argument with
12 regard to malice under 844(f)(1) and 844(i). Very quickly I'd
13 cite the Court to McFadden v. United States. It's a Third
14 Circuit case, so it's binding in the jurisdiction in which this
15 arose, where the court found that maliciously under 844(f) and
16 (i) means intentionally or with willful disregard of the
17 likelihood that damage or injury will result from the damaging or
18 I guess, what, from the damage or destruction to property.
19 Second, the respondent, as he has just stated, the respondent's
20 counsel has stated, has been convicted of intending to
21 intentionally damage a building or motor vehicle by starting a
22 fire or causing an explosion. Now this falls comfortably within
23 the definition of an aggravated felony for purposes of the
24 Immigration and Nationality Act under (a)(43).

25 BOARD MEMBER MULLANE TO MR. TENNYSON

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1 Q. Do you know of any cases in which a state arson
2 crime has been found to be an aggravated felony?

3 A. There are --

4 Q. Under this provision?

5 A. State arson crimes are found to be an aggravated
6 felony?

7 Q. Under this provision.

8 A. Under this provision. Not in any published Board
9 decisions. Not in any published circuit decisions. There is an
10 unpublished Board decision out there, I don't have the name of it
11 here, which refers to it. But if you want me to, I can certainly
12 provide you a cite to it later.

13 Q. Thank you.

14 BOARD MEMBER MALPHRUS TO MR. TENNYSON

15 Q. Are you aware of Board decisions that have only
16 held that it is or that it's not?

17 A. My memory is that it held that it was an
18 aggravated felony. But, again, I don't --

19 BOARD MEMBER GRANT TO MR. TENNYSON

20 Q. Under this subsection.

21 A. Under this subsection. Right.

22 Q. Okay.

23 A. Not under the crime of violence subsection.

24 Q. Okay.

25 BOARD MEMBER MULLANE TO MR. TENNYSON

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1 Q. Why didn't DHS charge him with an aggravated
2 felony as a ground of removability?

3 A. Right. It looks like, one, he wasn't sentenced to
4 a year. He was sentence to probation. Second --

5 Q. Why would that matter?

6 A. Under the aggravated felony provision, under the
7 -- what? Under 101(a)(43)(F), a crime of violence, it has to be
8 a crime involving that --

9 Q. Right.

10 A. A crime of violence involving more than a year.
11 At least a --

12 BOARD MEMBER GRANT TO MR. TENNYSON

13 Q. Not under this provision.

14 A. But not under this provision, no. You don't have
15 the year requirement under this provision. So you have, one, the
16 one-year sentencing requirement, term of imprisonment
17 requirement.

18 Q. Just it's, you know we've -- it's been 15 years
19 since IIRIRA. Personally I've been here for most of that period.
20 I don't recall -- I've seen arson cases.

21 A. Right, right.

22 Q. We've seen them as CIMTs. We've seen them as
23 crime of violence cases. This does appear almost to be a case of
24 first impression.

25 A. It does, it does.

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1 Q. Which is one of the reasons we're here today.

2 A. Yes.

3 Q. And we're just wondering what the thinking of DHS,
4 you know has been. Why now as an aggravated felony? Of course
5 you're not charging it, so maybe, you know that may send a signal
6 that you're not clear on this question.

7 A. Right, right. I honestly do not know why we chose
8 particular this and why this is sort of the first run case that
9 we've really had here.

10 Q. But you still have, as my brother Mullane has
11 pointed out, you, even in this case you still have not charged
12 the person as being an aggravated felon under the provision.

13 A. Right. Right, right. Rather we've presented,
14 we've used aggravated felony as a bar to cancellation --
15 BOARD MEMBER MALPHRUS TO MR. TENNYSON

16 Q. May I just --
17 BOARD MEMBER GRANT TO MR. TENNYSON

18 Q. I just wonder why, you know it's, you're asking us
19 essentially if, well, I understand the burden of proof is on the
20 respondent here.

21 A. Right.

22 Q. But you're asking us essentially to make a finding
23 that this is an aggravated felony. That's been the argument.
24 And yet I think our own experience and the lack of citations,
25 you're not able to present any cases where DHS has actually

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1 charged anyone as an aggravated felon for a state arson crime
2 under this provision.

3 A. Right.

4 Q. I'm just wondering what is there -- I would think
5 there has to be a reason for that.

6 A. Right. I, you know I don't know why we've not
7 charged this so much, not charged this very much in the past. I
8 know why, you know it's not been charged -- it was never charged
9 in this case because he was an arriving alien, and under 212(a)
10 the grounds for inadmissibility, aggravated felony isn't there.
11 So that was the reason there. My guess is that typically we fall
12 back on crime of violence and maybe it wasn't available in this
13 case.

14 BOARD MEMBER MULLANE TO MR. TENNYSON

15 Q. I mean to ask this in sort of another way, does
16 your argument turn on the burden of proof issue? I mean if you
17 had the burden of proof, would the respondent win?

18 A. No. This is clearly a legal issue as to whether
19 or not the respondent's conviction is an aggravated felony under
20 101(a)(43)(E)(i). It's primarily, it's a legal question.

21 Q. Okay.

22 BOARD MEMBER MALPHRUS TO MR. TENNYSON

23 Q. Well, speaking of being a legal question, how does
24 the plain language of 101(a)(43)(E) support a finding that state
25 arson is an aggravated felony?

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1 A. Right. I mean the referenced statute, the
2 described in offense that we've identified as the aggravated
3 felonies, and that is two sections, two subsections of 18 U.S.C.
4 844. And 844(f) and 844(i) both cover the malicious damage or
5 destruction or attempt to damage or destroy any, what, by fire or
6 an explosive, you know any building or vehicle or real or other
7 property. I mean substantively it seems to have a fair amount of
8 -- it seems it does have a great deal coverage over the New York
9 statute. And it does clearly include the types of elements that
10 are arson. So it seems to me that that, on that grounds alone it
11 is a comfortable fit. The only thing that is at issue here, I
12 believe, is whether or not that jurisdictional provision, the
13 jurisdictional hook as it was, to bring it within Congress'
14 authority to regulate these sorts of arsons within the states,
15 either under the property clause under Article 3, section --
16 wait. I believe it's Article 4, Section 3, Clause 2 for 844(f)
17 crimes, or under the interstate clause at Article 1, Section 8, I
18 think it's Clause 3 relating to interstate and foreign commerce
19 under 844(i), whether those jurisdictional hooks are necessary
20 elements of the offense described in those statutes for purposes
21 of the aggravated felony definition of the INA.

22 BOARD MEMBER GRANT TO MR. TENNYSON

23 Q. Can you really plausible argue that this is, that
24 the respondent's offense is analogous to a conviction under
25 844(f)? I mean isn't that specifically directed at protecting

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1 federal property just as a statute which protects assaults
2 against members of the Board and other federal employees are, you
3 know directly intended to affect and protect the persons of
4 federal employees and officers?

5 A. Right. One of the things -- let me give you two
6 answers to that. First, when the statute was enacted, when they
7 discussed this sort of property provision it was largely
8 discussed within the context of Congress' power and having,
9 giving Congress additional power to reach out and address these
10 kinds of offenses. Secondly, in cases that have actually
11 addressed this statute, uniformly they call this provision --

12 Q. Well, let me --

13 A. -- jurisdictional.

14 Q. Let me go to that first point. That may very well
15 be true, but it's true in the same sense that Congress probably
16 does not have authority. It's unclear whether Congress would
17 authority to enact a statute protecting the Governor of
18 California, whereas Congress clearly has the authority to
19 protect, to enact a statute protecting the body of the President
20 of the United States. That's --

21 A. Right, right.

22 Q. So I think it really begs the question, you know
23 Congress is asserting its authority, yes, under the property
24 clause to protect federal property. But that doesn't mean that
25 it's a nugatory jurisdictional provision. What I'm getting at

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1 really is if you look at the cases involving firearms, if a
2 firearm is manufactured in Wisconsin in 1942, and enters the
3 Commonwealth of Pennsylvania in 1947, and is used in an armed
4 robbery last week, you know that's a federal crime. You know the
5 basis for interstate, the touch to interstate commerce has to be
6 minimal. I'm not sure reading the Jones case that the Supreme
7 Court gives such a de minimus reading to the required interstate
8 commerce element under 844(i). I'm going to switch to 844(i) in
9 my questioning.

10 A. You want to switch to 844(i)?

11 Q. Well, I, you know I think the property one is
12 weaker. Your stronger argument is 844(i). I think you'd --

13 A. Right.

14 Q. -- probably have to acknowledge that. Certainly
15 out of Vasquez-Muniz your stronger hook is the 844(i).

16 A. Yes, absolutely. Vasquez-Muniz the same way and
17 it dealt with an interstate commerce clause requirement there.
18 Under 844(i) we're still dealing with interstate commerce clause
19 jurisdictional provision. I would still maintain that the
20 property jurisdiction provision and the way that courts have
21 utilized it have interpreted it as truly jurisdictional, that we
22 still have a strong argument that that is in fact meant to be a
23 jurisdictional nexus; not meant to be any kind of substantive
24 requirement of the crime. And in fact, if we try to imply it
25 into state offenses, we don't find state offenses that have this.

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1 We've attempted to do a comprehensive search and we found
2 effectively two. A California wild winds burning statute and
3 also a D.C. statute that includes among the various kinds of
4 offenses that could be, you know the various kinds of buildings
5 that could be burned for the arson offense, United States
6 Government property. And the reason why that's the case is
7 because to insert that jurisdictional provision into the state
8 statutes would be utterly meaningless. I mean the states don't
9 have any reason to particularly protect property. Second, Your
10 Honor, on (i), switching over to Jones, again other Supreme Court
11 cases, for example Russell, have discussed this provision in (i)
12 as being jurisdictional in nature. So too has the Third Circuit.
13 United States v. Williams, 299 F.3d 250, refers to the interstate
14 commerce element as being jurisdictional and requiring a case by
15 case inquiry into whether or not the commerce clause elements
16 have been met. In fact --

17 BOARD MEMBER MULLANE TO MR. TENNYSON

18 Q. Counsel, though, is there an argument that if
19 Jones had sort of ruled for the Government, meaning that, you
20 know this house was covered, that it would have almost read out
21 the jurisdictional element? And the fact that it decides it the
22 way that it does means that it's a jurisdictional element?

23 A. Yes, I would agree, Your Honor. I think that's
24 correct that Jones read this down so that it would be an
25 effective jurisdictional element, yes.

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1 BOARD MEMBER GRANT TO MR. TENNYSON

2 Q. But it also rejected in Jones the Government's
3 arguments, I think there were three, that various aspects of the
4 use of this property affected interstate commerce.

5 A. Right.

6 Q. And I guess this gets back to my question on the
7 gun. Is it more than de minimus? In other words, you know the
8 gas that came into the house came from overseas. The insurance
9 contract -- not overseas but from another state. The insurance
10 contract insuring the house came from another state, and of
11 course they would be implicated, you know in the reconstruction
12 of the house and that sort of thing. And the Supreme Court just
13 didn't buy that. Doesn't that suggest that it's more than a de
14 minimus contact? I realize we're not dealing with interstate
15 commerce law here, but to some extent I mean you're resting this
16 on the analogy to 922(g)(1), and if there's a distinction here,
17 it's a distinction between whether this is purely
18 jurisdictional --

19 A. Jurisdictional plus.

20 Q. Purely jurisdictional.

21 A. Right.

22 Q. The fact that the word use which seems to -- and
23 you know the court uses the word active employment. I don't
24 think there's an active employment construct to the interstate
25 commerce element in 922(g)(1).

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1 A. Right. But --

2 Q. And in fact it's clear from the case law,
3 voluminous case law that there is no active employment element.
4 If the gun, 50 years ago, you know came from another state --

5 A. Right, Your Honor.

6 Q. -- it's a federal offense.

7 A. Right. I would agree with regard to that there's
8 no active element, Your Honor, in the 922(g)(1) circumstance,
9 whereas with regard to Jones, Jones has stated that there is this
10 sort of, that the proper inquiry is into the function of the
11 building itself, right, before you turn to the determination of
12 whether that function affects interstate commerce. But at the
13 same time, the way in which they were reading it is, again, and
14 interpreting it, they recognized that regardless of whatever
15 boundaries Congress put on it, the mere fact that Congress puts
16 boundaries on its jurisdiction does not transform a
17 jurisdictional statute into something else; that it remains
18 jurisdictional. It's just that Congress has asserted, has
19 determined not to extend the full reach of that jurisdiction.
20 And in fact, one of the things that's come out subsequently is
21 that the Government in these (i) offenses need not prove that the
22 individual had knowledge that the property was used in interstate
23 commerce. And part of the justification for that finding that
24 that knowledge requirement is not required -- that knowledge
25 required is not imported in, is that the statute itself or that

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1 provision is purely jurisdictional. So I mean for a number of
2 reasons the federal case law -- and let me give you a case on
3 that. That would United States v. Soy.

4 BOARD MEMBER MULLANE TO MR. TENNYSON

5 Q. Soy?

6 A. Soy, S-O-Y, yes. As in the in drink. Or in the
7 bean. 454 F.3d 766. And it's a Seventh Circuit case. Also, if
8 you want to look for one on the (f)(1) context, there is United
9 States v. Salameh, and that's 152 F.3d 88. And that's a Second
10 Circuit case from 1988. You know I'm not sure if I reserved two
11 minutes of time, so just to be on the safe side --

12 Q. Okay.

13 A. -- I'll go ahead and do that now.

14 BOARD MEMBER MALPHRUS TO MR. TENNYSON

15 Q. But let me ask you, though, if we were to say that
16 the New York statute here was an aggravated felony under
17 101(a)(43)(E), wouldn't we be dramatically expanding aggravated
18 felonies under immigration law? I mean --

19 A. I would say -- that's a great question, Your
20 Honor. Thanks for asking it. Let me step back and say the
21 penultimate sentence of 101(a)(43), the aim of it is to have this
22 broad coverage, is to -- when you refer to generic crimes or when
23 the statute refers to a federal offense, that the offense
24 described there, as the sentence itself states, the offense
25 described in the paragraph is supposed to reach, you know a broad

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1 compass of state and foreign law as well. I mean it's not
2 supposed to cut that out. To read the jurisdictional provision
3 in would essentially make that the penultimate sentence insofar
4 as it applies to the (E)(i) context completely nugatory. Because
5 you have the jurisdictional provision it would take, it would
6 essentially take those state and foreign offenses out of the
7 equation. It seems to me that a reading that includes the
8 jurisdictional nexus would instead of -- would impermissibly
9 shrink the meaning of the aggravated felony or the intended
10 meaning of the aggravated felony interpretation, rather than
11 reading it out, would impermissibly expand that definition.

12 Q. Well, I understand what you're saying. But is
13 there any legislative history to support such a broad reading
14 of --

15 A. Right.

16 Q. -- this?

17 A. When this provision, this specific
18 101(a)(43)(E)(i) provision was initially added to the Act, it was
19 added in 1994 as part of technical amendments, I guess -- what,
20 as a Technical Amendments Act. Let's see, Senator, I believe it
21 was Alan Simpson had been trying to get this into, the
22 aggravated felony definition into the Act throughout the entire
23 term. This had been in like a piece of legislation he had
24 presented. He had attempted to attach it to a crime bill. It
25 had gotten pulled out in the conference. And then it was

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1 enacted. But in none of these three occasions where the senator
2 presented the bill is there any legislative history that
3 expressly discusses this provision.

4 Q. But I guess the question I have is, is it DHS'
5 view that most state arson crimes are aggravated felonies?

6 A. It would be most state arson crimes where you have
7 an intent or willful disregard of the risk of damage or
8 destruction to property. So in fact that intent standard
9 actually raises the bar a bit. So it wouldn't be every
10 aggravated felony. For example, if the respondent had been
11 charged under, I believe under the fourth degree felony, it
12 doesn't rise to that standard. It requires merely a reckless
13 burning, for example. So that if you have, you know mere
14 reckless arson where someone burns, starts a fire with, you know
15 and it happenstantially burns a building, for instance. Any of
16 those things would be outside the scope of the statute. So it
17 wouldn't encompass, you know a wide, you know it wouldn't
18 encompass everything. It would encompass offenses that do have
19 that intentional and willful disregard standard. I would say
20 that it does encompass a broad degree of property. It is
21 intended to be broad in that respect because it covers buildings,
22 vehicles, and other real and personal property, which seems to be
23 a very, very broad expansive definition of the property that
24 needs to be damaged or destroyed under the statute, so.

25 BOARD MEMBER GRANT TO MR. TENNYSON

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1 Q. I'm wondering how far the is described language
2 can go. For example, Section 101(a)(340) -- 101(a)(43)(M)(ii)
3 says an offense that is described in Section 7201 of the Internal
4 Revenue Code in which revenue loss to the Government exceeds
5 \$10,000. Now obviously, again, there's a jurisdictional thing
6 here. The Congress would not be empowered, I think, to prosecute
7 tax evasion in the State of Virginia, the State of West Virginia,
8 the State of New Jersey, et cetera. But let's say the elements
9 of a state tax evasion crime in Virginia, West Virginia, or New
10 Jersey were virtually identical to those in Section 7201 and the
11 loss to that state government was in excess of \$10,000. Would
12 that state tax evasion offense be an offense described in Section
13 7201?

14 A. Your Honor, I honestly don't know. And if you
15 want me to, I can provide you a supplemental briefing on that
16 issue.

17 Q. No, I'm just, you know I understand the --
18 obviously we authored Vasquez-Muniz. I understand the, you know
19 the jurisdictional element. But as you look through the list of
20 aggravated felonies, a lot of them are pegged to federal
21 statutes. As far as the argument that state and local crimes as
22 well as federal crimes can be covered, there's a number of
23 aggravated felony provisions that aren't tied to a federal
24 statute, that more generically describe a crime of violence or an
25 offense relating to the owning, controlling, managing, or

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1 supervising of prostitution. Crimes involving fraud and deceit,
2 that would be (m)(1).

3 A. Right.

4 Q. Et cetera, et cetera, et cetera. So there's
5 plenty of things that that could refer to if we took off --

6 A. Right.

7 Q. -- the table any of the cases where it says is
8 described. I mean if that were somehow removed, or it wouldn't
9 be, that clause would not be nugatory.

10 A. Right.

11 Q. So it seems that we're on a continuum here. I
12 know you want us to lock in, know Vasquez-Muniz; this is a
13 jurisdictional provision just like the one in Vasquez-Muniz. But
14 would you agree at least that as we look at the scope of
15 offenses, and it's a pretty long list that come under the is
16 described rubric in the aggravated felony definition, that there
17 are some that were probably just referring to that federal
18 offense?

19 A. I think the answer is probably, the answer is
20 going to be probably yes. But at the same time there's going to
21 be a reason why that answer is yes. For example, in Vasquez-
22 Muniz, one of the key points with regard to the described in
23 language is if we stuck in the jurisdictional provision here,
24 would we entirely cut out any state convictions that could be,
25 that could potentially be described in the statute? And the

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1 answer was, well, yes. State or foreign convictions. And the
 2 same sort of question can be asked here. And the answer is --
 3 despite that fact that, you know given the legislative history of
 4 Organized Crime Control Act of 1970, that the two of them would
 5 be largely coextensive. The federal authority almost encroached
 6 entirely on state authority, so much so that Congress felt the
 7 need to put an anti-preemption provision in there, in fact. That
 8 despite this ostensible coverage of conduct and ostensible
 9 duplicity of crimes, that it would be peculiar and bizarre to, or
 10 peculiar to read in that jurisdictional element so as to
 11 completely take those state offenses off the table for purposes
 12 of an offense described in (E)(i).

13 Q. Do the arson and felony possession crimes both
 14 come out of the 1970 Act?

15 A. The arson crime -- are you talking about the
 16 respondent? The federal --

17 Q. The 844 -- no, the federal --

18 A. Oh, they both come out of 1970. Right. The
 19 original crime --

20 Q. They both come out of that statute. Okay.

21 A. Right, right. And in fact, the arson -- a little
 22 legislative history side note, the 1970 Act actually only
 23 contained by explosion, by explosives. And by the late '80s
 24 there was a circuit split over whether or not that actually
 25 included arson, despite the fact that the -- despite that the

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1 legislative history clearly indicated that they were interested
2 in arson crimes as well. Ultimately, Congress rectified that in
3 1982 by including the language or arson in these provisions as
4 well. But it's pretty clear that given that coextensive nature,
5 it would be very -- it would be perverse to read the
6 jurisdictional provision in so as to just take those state
7 offenses off the table. There might be other circumstances where
8 we don't have a clear jurisdiction; where we have -- there's
9 obviously a jurisdictional element -- there's obviously a
10 question of federal jurisdiction lingering in the background.
11 But the federal jurisdiction, aspect of federal jurisdiction is
12 never even an element of the offense, where the purely
13 jurisdictional nexus is never an element of the offense. In that
14 case you have an offense without a jurisdictional element, you
15 know with elements A, B, and C, and we can quite plainly just
16 transfer the, you know flip a switch and transfer that over and
17 do our categorical analysis based off the federal statute. But we
18 do have to figure in the -- we do have to factor in whether or
19 not that described in language has meaning. And in some
20 instances that described in language will have practically no
21 meaning where you don't have a jurisdictional element, and in
22 some cases it will where you have an ostensible jurisdictional
23 element in the statute. And that's where it gets its leverage
24 and that's where it works.

25 BOARD MEMBER MALPHRUS TO MR. TENNYSON

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1 Q. You said earlier that this was a matter of first
2 impression, right, on this issue?

3 A. Yes.

4 Q. Well, then why did DHS just file a motion for
5 summary affirmance of the judge's decision?

6 A. At the time I -- the way in which these cases are
7 processed in DHS, that sometimes occurs in response to a
8 respondent's brief. So I really can't speak to why that was
9 necessarily filed in this case.

10 BOARD MEMBER MULLANE TO MR. TENNYSON

11 Q. I guess as sort of a side note to that, you know
12 you do have the opportunity to file a brief once we schedule oral
13 argument. It really behooves you to do so.

14 A. Right, Your Honor. We actually, when we were
15 preparing for this, we were considering whether or not
16 intentionally to file a supplemental brief or not. And in fact,
17 given -- there are actually a wealth of issues in this case. We
18 wanted to wait, and there was no question presented in the
19 request for oral argument, we wanted to wait until after -- to
20 see if it was possible after the briefing, I mean after the oral
21 argument to see what issues were emergent in the oral argument to
22 try and brief those based upon what issues were the focus here.

23 Q. I think as sort of a matter of advice, you could
24 always file a brief after. It's very helpful to file them
25 before.

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1 A. All right. Thank you, Your Honor.

2 Q. So just to clarify that --

3 A. Oh, no. Thank you very much, Your Honor.

4 Q. -- for future thinking.

5 A. Yes.

6 BOARD MEMBER GRANT TO MR. TENNYSON

7 Q. I'd say that to all that parties. And I think the
8 -- I'll add to that since at the request of both Government and
9 respondent's counsel over the years that we diminish the number
10 of affirmants without opinions that we issue, that the practice
11 of filing routinely motions for summary affirmances when
12 respondents appeal is not helpful to the Board in its
13 deliberations. If that message can go back to the Agency. I
14 know that's not your doing --

15 A. Thank you, Your Honor.

16 Q. -- particularly. But if you could carry that
17 message back, that would be greatly appreciated.

18 A. Thank you, Your Honor. Will do.

19 Q. I think we're -- we have jointly consumed your
20 time without -- but we will reserve the two minutes --

21 A. Thank you very much.

22 Q. -- and hear from Mr. Lahoud for a few minutes
23 here.

24 A. Thank you.

25 MR. LAHOUD TO BOARD MEMBERS

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1 Q. Thank you, Your Honors. First, Your Honor, I just
2 want to address the fact that if the Honorable Board was to find
3 that the New York attempted arson statute in the third degree is
4 an aggravated felony under 844(i) or 844(f)(1), it's going to
5 lead a dramatic increase in the amount of deportations. In
6 reviewing, you know in the past I've reviewed, you know several
7 state arson laws and some of them simply just don't amount to
8 what we feel or what commons sense tells us would be deemed an
9 aggravated felony. And by the Board ruling in -- by the Board
10 deciding that the attempted arson statute falls within the
11 purview of 844(i) and 844(f)(1), it's going to lead to a dramatic
12 increase in deportations.

13 BOARD MEMBER GRANT TO MR. LAHOUD

14 Q. Well, why do you think it's going to be a dramatic
15 increase? I mean do you see that many --

16 A. I do, Your Honor.

17 Q. -- state arson --

18 A. I do, Your Honor.

19 Q. -- convictions for --

20 A. I, myself have several state arson convictions
21 that were never charged by the Department of Homeland Security as
22 aggravated felonies until this time. Well, actually they didn't
23 charge it this time. They brought it up as a defensive to my
24 cancellation of removal. You know I have several clients in New
25 York, in Pennsylvania, and New Jersey. And the arson statutes

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1 aren't dramatic, aren't as extreme. And it definitely will cause
2 a huge increase in the amount of deportations for crimes that
3 shouldn't even amount to aggravated felonies. The penalties of
4 being deemed an aggravated felony are so extreme. And being
5 deported from this country is such a dramatic, such a huge issue
6 that this Court, the Board should consider the impact on the
7 amount of deportations that could possibly happen from the
8 expansion of this.

9 Q. And I guess to ask it another way, you don't have
10 any other, you don't have any empirical evidence, it's just your
11 experience?

12 A. My experience and the experience of my firm.
13 We've been practicing for of 50 years. That we've had several
14 arson issues. And if the Board was to open up this door right
15 now, it's just sliding that scale down that kind of started at
16 922(g)(2) and it just becomes what's next? What's going to be
17 deemed an aggravated felony by the Government? Where does it
18 stop? You know it seems as though the Department of Homeland
19 Security has decided to sort of take the role of Congress and
20 deem certain things aggravated felonies that Congress clearly
21 intended that they did not want to be aggravated felonies. If
22 they wanted a certain -- as I had said earlier, the statutes
23 844(i) and 844(f)(1), contrary to what the Department of Homeland
24 Security has stated, I believe and the respondent believes that
25 the elements that they claim are jurisdictional are not

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1 jurisdictional elements. And there's substantial case law across
2 the United States, particularly with respect to 844(f)(1) that
3 states that there must be Government property involved for this
4 crime to happen. Further, Congress did not state arson. It did
5 not state relating to. It did not state involved. An
6 interpretation that the Department of Homeland Security wants us
7 to give is going to be overly broad. The Board had mentioned
8 101(a)(43)(M) with respect to the \$10,000. And subsection (ii)
9 of that where it deals with Section 7201, there, Congress was
10 very direct in what it said. It established and there is case
11 law that indicates, case law in the Third Circuit that says that
12 this is what Congress says and this is what the aggravated felony
13 is. So just as, you know the Department of Homeland Security is
14 trying to compare 922(g)(2) to 844(f)(1) and 844(i), we have the
15 argument that Congress was clear in writing, in drafting
16 844(f)(1) and 844(i), just as they were clear in writing
17 101(a)(43)(M) and they established the element. There's
18 essential elements that are there that just can't be disregarded.
19 And they're not purely jurisdictional. And the door is going to
20 be open. We're going to be deporting a lot of people from this
21 country who committed very minimal crimes. The impacts on this
22 are far-reaching.

23 Q. I guess I understand the common sense argument
24 here. I guess some might dispute whether, you know crimes of
25 arson are minimal crimes or -- you know the statute in York, for

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1 example, provides exceptions for, you know essentially starting a
2 fire that you don't intend to damage anything and, you know winds
3 up you know damaging more than you intended. So --

4 A. Just as --

5 Q. -- I mean the one that was convicted under here.
6 I mean I don't know the facts of this particular offense at the
7 moment. But it seems to be at least when you're talking about,
8 you know we're not talking about fifth degree arson in this case;
9 we're talking about third degree arson. It seems just reading
10 that statute that that, you know is a crime that when we look at
11 the spread of aggravated felonies I realized this a large debate
12 we have whether some crimes, you know that are considered, you
13 know what is determine to be aggravated felonies aren't what, you
14 know a man on the street, on the street might consider to be
15 aggravated felonies. But I think we're, you know we're past that
16 point in the jurisprudence. So I think you have to recognize
17 that.

18 A. What -- I apologize.

19 Q. Go ahead. No, no.

20 A. I mean the Government has stated that, you now if
21 the New York District Attorney would have charged the respondent
22 with violating 150.01, arson in the firth degree, arson in the
23 fourth degree, those might not be deemed aggravated felonies.
24 And there's a difference between 150.10 and 150.15, where between
25 arson in the third degree and arson in the second degree. I'll

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1 concede to the Court that arson in the second degree requires
2 intentional damage of a building or motor vehicle when another
3 person who is not a participant in the crime is present in such
4 building or motor vehicle. That's more of an aggravated felony
5 than 150.10. So you know if response to the Government's
6 argument that they could have charged him something less that
7 wouldn't have been deemed an aggravated felony here, well, they
8 could have charged him with something more that could have been
9 deemed an aggravated felony. So now we're stuck on the third
10 degree charge, which is -- provides affirmative defenses to it.

11 Q. Right.

12 A. And is not much different than the arson in the
13 fourth degree and arson in the fifth degree. If I just may --
14 may I add, Your Honor?

15 Q. It's just -- you have just about 30 seconds here.

16 A. All right. If I may just add, though, Your Honor,
17 with respect to the interstate commerce clause, the Third Circuit
18 Court of Appeals in U.S. v. Reid, it was an unpublished decision,
19 I believe, Your Honor. It was an individual who had brought up
20 the Jones case. He had a crime involving a firearm, and he
21 brought up the Jones case as a defense to him not being charged
22 given the whole commerce clause provision. In there, the Third
23 Circuit Court of Appeals, which is binding, said that the Jones
24 case does not apply here because the way it's been interpreted
25 that it's a required element of 844(i), while the commerce clause

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1 in 922(g)(2) may not have been a required element. So there's
2 actually Third Circuit case law where an individual has tried to
3 say hey, the Jones case gets me out of this 922(g)(2) clause
4 because there's no commerce clause issue there. But the Third
5 Circuit Court of Appeals has rejected that argument and said the
6 Jones didn't apply there. I guess what we're asking for on
7 behalf of the respondent, Your Honor, is that there are times
8 when an individual should be deported for crimes and there are
9 times when they shouldn't. And in this case here the charge of
10 attempted arson simply does not fit in within the aggravated
11 felony statute. It's not described in.

12 Q. Thank you, counsel.

13 A. There was no malice. Yes, Your Honor.

14 Q. Thank you.

15 BOARD MEMBER MALPHRUS TO MR. LAHOUD

16 Q. Yes.

17 MR. TENNYSON TO BOARD MEMBERS

18 Q. A couple of points. First, in response to your
19 question earlier in the argument, I think the position of the
20 Board is that (M), 101(a)(43)(M)(ii) would cover the Virginia tax
21 offense. Second, in response to his comment that this would be a
22 dramatic increase, some sort of arson statutes that are charged
23 as aggravated felonies, it actually would be a marginal increase.
24 It would certainly pick up those offenses where the term of
25 imprisonment was less than a year. But at the same time, you

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1 know with the -- a lot of things can be already charged a crime
2 of violence. There's not -- there will be some growth. It's not
3 going to be nearly as dramatic as he states.

4 BOARD MEMBER GRANT TO MR. TENNYSON

5 Q. Aren't there some problems with charging arson as
6 a crime of violence at least in some circuits?

7 A. There is. For example, in the Third Circuit there
8 has to be, with regard to the specific intent there has to be, I
9 mean there's a specific intent requirement that comes with
10 whether there's a substantial risk of, I guess, what, of violent
11 force at the back end. Definitely that's the case. And this
12 would actually, this would fill in the back end of that, yes.
13 But Congress thought arson --

14 Q. But it seems to me that having tried a crime of
15 violence avenue on arson and with at best mixed results, that now
16 you know a different tack may be emerging. Again, you didn't
17 charge in this case for the reasons you stated. But you know
18 isn't that kind of what's happening here?

19 A. Right. I mean, yes. And because the statute has
20 so many provisions. I mean this is -- the statute was designed
21 to enable us to define the various provisions and sometimes they
22 would be coextensive among the various aggravated felonies that
23 are on the enumerated list. So and Congress, I mean by adding
24 the arson provision, by adding the reference to the explosive
25 materials provisions, it -- I think they thought arson was bad

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1 that it wanted capture it, sans the one-year requirement, outside
 2 of that. Finally, let me note one thing about what his response
 3 that this wasn't considered so bad of an offense. A Class C
 4 felony under New York law, under New York Penal Law Section 7, I
 5 guess 70.00 in 2003, the maximum term of an indeterminate
 6 sentence, which is what you would get for the Class C felony,
 7 shall be at least three years and the term shall be fixed by the
 8 court and shall not exceed 15 years. So it's a three- to 15-year
 9 range on the indeterminate sentence. That doesn't sound
 10 insignificant to me. Finally, I'd like to note at the end that
 11 the burden is on the respondent. He is the one seeking
 12 cancellation of removal here or a waiver. And as the burden is
 13 on him, he does have to establish that he is entitled to relief.
 14 Thank you very much.

15 Q. Thank you, counsel.

16 BOARD MEMBER GRANT TO COUNSEL

17 Q. Our session is adjourned. We thank counsel for a
 18 very spirited and informative oral argument. Thank you.

19 HEARING CLOSED

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CERTIFICATE PAGE

I hereby certify that the attached proceeding
before BOARD OF IMMIGRATION APPEALS in the matter of:

ROBERT BAUTISTA

A 038 509 855

Falls Church, Virginia

was held as herein appears, and that this is the original
transcript thereof for the file of the Executive Office for
Immigration Review.

Kimberly A. Hawkins
Kimberly A. Hawkins (Transcriber)

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August 16, 2011
(Completion Date)