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Accepting the Unacceptable: How *Jama v. Immigration and Customs Enforcement* Affects Deportation Policies with Non-Accepting Governments

By Jamie Norman*

I. INTRODUCTION

Imagine an alien so fearful for his or her life that they are forced to leave the country they were born in, the country of their ancestry, and the country of their citizenship, in order to seek refuge in the United States and escape death. The alien comes to the United States and commits a crime, whether under their own volition or not, which renders them removable by the United States Government. They do not indicate a country of choice, so the Attorney General elects to return them to the country of their origin – the very country they fled years back because of the imminence of death. Imagine the confusion and fear of that alien, now being told by the United States government that they are being returned to that country against their will, regardless of whether the government of that country is willing to accept them.

The Supreme Court's ruling in *Jama v. Immigration and Customs Enforcement* affects the Government's authority to elect destination countries when deciding where to deport removable aliens.¹ This note will explore the *Jama* decision. Part II details the procedural history of the case.² Part III details and sets forth the facts of the case.³ Part IV analyzes the majority opinion by Justice Scalia, as

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1. *Jama v. Immigration and Customs Enforcement*, 543 U.S. 335 (2005).

2. See *infra* Part II and accompanying notes.

3. See *infra* Part III and accompanying notes.

well as the dissenting opinion by Justice Souter.⁴ Part V considers *Jama*'s judicial, administrative and social impact.⁵ Finally, Part VI concludes the discussion of *Jama* and the deportation policy.⁶

II. HISTORICAL BACKGROUND

According to the statutory definition, an alien is "any person not a citizen or national of the United States."⁷ There are many different options for citizens or residents of foreign countries to acquire alien status in the United States.⁸ An alien who has been lawfully admitted into the United States, however, is subject to removal due to the commission of a criminal act.⁹ The aforementioned statute, 8 U.S.C. § 1227, states: "Any alien who is convicted of a crime involving moral turpitude committed within five years after the date of admission . . . is deportable."¹⁰ In the modern history of the United

4. See *infra* Part IV and accompanying notes.

5. See *infra* Part V and accompanying notes.

6. See *infra* Part VI and accompanying notes.

7. 8 U.S.C. § 1101(a)(3) (2005).

8. See Form I-485, "Application to Register Permanent Residence or Adjust Status," available at <http://uscis.gov/graphics/formsfee/forms/i-485.htm> (last visited Jan. 21, 2006). For example, a non-citizen may be eligible for permanent alien status within the United States if they are a family member, spouse or fiancé of a citizen of the United States, or if their employer has filed an application on their behalf. *Id.* It is also very common, as was the petitioner's situation in this case, for those seeking asylum or refugees who fled to the United States to seek permanent alien status after one year of residence. *Id.* There are a myriad of ways to gain alien status within the United States, such as diversity visa lotteries, which pertain to specific non-citizens and their unique situations. *Id.*

9. 8 U.S.C. § 1227(a) (2005). According to § 1227, any alien convicted of a crime is subject to order of removal by the Attorney General. *Id.* Aliens are deemed to have no rights to remain in the United States, and Congress retains the authority to remove them from the United States at any time. *Marcello v. Ahrens*, 212 F.2d 830, 836 (5th Cir. 1954). Congress also has the authority to order the deportation of aliens whose presence in the United States is deemed detrimental to its citizens, and may do so by instigating the necessary executive proceedings. *Ng Fung Ho v. White*, 259 U.S. 276, 280 (1922). As Justice Jackson stated, the ability to remove and deport aliens that behave contrary to our national ideals is "a weapon of defense and reprisal confirmed by international law as a power inherent in every sovereign state." *Harisides v. Shaughnessy*, 342 U.S. 580, 587-88 (1951).

10. § 1227(a)(2)(A)(i). A crime of moral turpitude is defined as an act that "shocks the public conscience as being inherently base, vile, or depraved, contrary

States, various statutory provisions have granted the authority to tackle the large issue of alien removal and deportation.¹¹ One major debate over the past century has been whether or not the United States must obtain the explicit acceptance of the acquiring country's government before removing a deportable alien. The following historical background will sketch the evolution and development of the acceptance requirement and the role it has played in removing aliens from the United States.

A. Immigration Act of 1917

Since the late 1800's and after the Civil War, there have been numerous changes in the statutory authority governing the issue of immigration, as well as the perceived effects of immigration. In 1875, the Supreme Court decided that the issue of immigration would no longer be state-governed, but rather would be delegated to the federal government.¹² Over the next few decades, the federal government passed various pieces of legislation to deal with the influx of immigrants and the economic problems caused by the laissez faire immigration policy.¹³ In 1917, Congress passed the

to the rules of morality and the duties owed between man and man, either one's fellow man or society in general." *Medina v. United States*, 259 F.3d 220, 227 (4th Cir. 2001). This concept of moral turpitude has existed in immigration cases for over a century. *Id.* See also *Jordan v. De George*, 341 U.S. 223 (1951) (describing the history of the term "moral turpitude," which was first used in the Act of March 3, 1891, ch. 551, 26 Stat. 1084 (1891)).

11. See Tim Schepers, Note, *Does the Punishment Fit the Crime? U.S. Alien Deportation and the Requirement of Acceptance in Jama v. I.N.S.*, 28 HAMLINE L. REV. 387 (2005) (providing a limited background to the evolution of immigration and alien removal statutes in United States history).

12. A HISTORICAL GUIDE TO THE U.S. GOVERNMENT 305 (George T. Kurian ed., Oxford Press 1998) (1998). Until the *Chy Lung v. Freeman* decision, the United States had a policy of accepting virtually free and open immigration. *Id.* (citing *Chy Lung v. Freeman*, 92 U.S. 275 (1875)). Any immigration policy that was created before the Supreme Court delegated the responsibility to the Federal government was asserted autonomously by individual states. Center for Immigration Studies, History, <http://www.cis.org/topics/history.html> (last visited April 15, 2006).

13. Kurian, *supra* note 12, at 305. Because the economic situations in many of the areas that experienced high immigration were adversely impacted, Congress began to issue various Acts in an attempt to counteract the problem. *Id.* Before the Immigration Act of 1917, these Acts generally focused on excluding certain

Immigration Act of 1917; in addition to setting forth a lengthy list of those classes excluded from immigration and detailing the taxes imposed by immigration, the 1917 Act also codified the policies regarding alien deportation.¹⁴ The Immigration Act of 1917 was one of the first comprehensive pieces of national legislation to detail both the reasons for deportation and the actual process of removal for deportable aliens.¹⁵

In the years after the Immigration Act of 1917 was codified, there were several cases handed down dealing with alien deportation and

categories of immigrants. For example, the Chinese Exclusion Act of 1882, along with the Alien Contract Labor Acts of 1885 and 1887, specified certain groups of immigrant workers that were prohibited from immigrating to the United States. *Id.* (citing Chinese Exclusion Act, ch. 126, 28 Stat. 1893-94 (1882) (amended 1884), repealed by Magnuson Act, ch. 344, § 1, 57 Stat. 600 (1943); Alien Contract Labor Acts 23 Stat. 332 (codified at 29 U.S.C. § 2164 (1901)), superseded by Act of Mar. 3, 1903, Pub. L. No. 162, 32 Stat. 1213. Also, the Immigration Act of 1882 disallowed such groups as "idiots, lunatics and convicts" from entering the country. *Id.* (citing Immigration Act of 1882, ch. 376, 22 Stat. 214 (1882)). Until 1892, the government attempted to enforce immigration laws through the auspices of the U.S. Treasury, primarily through the customs system already in place. *Id.* In 1892, with the implementation and utilization of Ellis Island, located in New York Harbor, the government put into effect its first national immigration policy, which evolved into that which we enforce today. *Id.*

14. Immigration Act of 1917, Pub. L. No. 301, 39 Stat. 874 (1917). Codifying the deportation policy, this Act stated that "the deportation of aliens provided for in this Act shall, at the option of the Secretary of Labor, be to the country whence they came, or to the foreign port at which such aliens embarked for the United States" *Id.* at 890. The Act implies a necessary degree of acceptance by stating:

[O]r if such aliens are held by the country from which they entered the United States not to be subjects or citizens of such country, and such country refuses to permit their reentry, or imposes any condition upon permitting reentry, then to the country of which such aliens are subjects or citizens, or to the country in which they resided prior to entering the country from which they entered the United States.

Id. Such language implies that there was an inherent requirement of acceptance in order to remove an alien to the country of their citizenship or birth, and if such acceptance was not offered another country would be selected that would accept the alien. *See United States ex rel. Hudak v. Uhl*, 20 F. Supp. 928 (N.D.N.Y. 1937) (holding that the United States can deport an alien to the country of his birth without question, a power which is limited only by native sovereignty's refusal to receive him).

15. Immigration Act of 1917, Pub. L. No. 301.

whether acceptance by the receiving country's government was required. In *Hajdamacha v. Karnuth*, the Western District Court of New York ruled that the Secretary of Labor had the sovereign authority, absent alien input, to elect the country of deportation, and would only change that election if the country did not accept the deported alien.¹⁶ Also, in *United States ex rel. Hudak v. Uhl*, the Eastern District Court of New York ruled that the United States could remove any alien deemed necessary without question; however the receiving state had the ultimate right to refuse the alien.¹⁷ These cases imply a requirement of acceptance from the receiving country before deportation can be completed. Although not expressly stated, the fact that both decisions relate to scenarios where the receiving country does not accept the alien, therefore requiring the Secretary of Labor to identify another country for deportation purposes, implies that an acceptance requirement should be read into the statutory language.

B. Immigration and Nationality Act of 1952: The McCarran-Walter Act

In an effort to re-codify and consolidate all of the pre-existing

16. *Hajdamacha v. Karnuth*, 23 F.2d 956, 958 (W.D.N.Y. 1927). Here, the District Court judge stated:

[t]he relator should be sent, not politely permitted to go as he pleases, to St. Nazaire, whence he sailed, or to France generally, whence he came, or, if France refuses him, to Mesopotamia, where he resided before he abode in France, or to Persia, the country of which he is a citizen.

Id. at 958 (quoting *United States ex rel. Karamian v. Curran*, 16 F.2d 958, 961 (2nd Cir. 1927)); see also *Saksagansky v. Weedon*, 53 F.2d 13, 16 (9th Cir. 1931) (setting forth the language of the Immigration Act of 1917 and requiring that the deportation be made in accordance to its statutory provisions).

17. *Hudak*, 20 F. Supp. at 929. In this case, District Court Judge Cooper opined that the Secretary of Labor had complete authority in selecting the country to which the alien would be deported. *Id.* However, he stated that the only limit on the Secretary's authority was the country's native sovereignty to refuse the alien's return, which would be absolute in the absence of a treaty. *Id.* He further stated that the alien had no right to contest the location of deportation in the courts of the United States. *Id.* Therefore, although there is no literal wording requiring acceptance from the receiving country's government, the court's decision implies that acceptance from the country is necessary to remove the alien.

immigration and naturalization policies, in 1952 Congress enacted the Immigration and Nationality Act, or the McCarran-Walter Act.¹⁸ The McCarran-Walter of 1952 is written differently than the Immigration Act of 1917, setting forth different policies and practices for deporting aliens from the United States.¹⁹ The different policies regarding deportation of aliens were significantly broadened, giving a wider range of deportation locations as well as more opportunity for the alien to elect the country that received him.²⁰ However, greater

18. Immigration and Nationality (McCarran-Walter) Act, 82 Pub. L. 414, 66 Stat. 163, 212 (1952) (amended 1996). For purposes of clarification, the 1952 Act shall be referred to as the "McCarran-Walter Act," and the current Act shall be referred to as the Immigration and Nationality Act ("INA").

19. *Id.* at 212-13. *Compare* Immigration Act of 1917 with the McCarran-Walter Act of 1952. The differences in language and policy are quite different in the 1952 Act. Primarily, the McCarran-Walter Act of 1952 sets forth a three-step process that separates the deportation process into different scenarios, each being governed by specific provision. *Id.* The first step allows the alien to suggest a country of their election to the Attorney General who will deport them, subject to various limitations and provided "that country is willing to accept him into its territory" *Id.* at 212. If the country the alien has elected refuses his admittance, the next step directs the Attorney General to focus the deportation on "any country of which such alien is a subject national, or citizen if such country is willing to accept him into its territory." *Id.* The first two steps of the deportation process, as written in the McCarran-Walter Act of 1952, explicitly make the ability to deport contingent on prior acceptance of the receiving country's government. *See* McCarran-Walter Act of 1952. The third step, which is used if the country fails to give the Attorney General reasonable notice as to whether or not they will accept the alien, authorizes the Attorney General to use discretion to select a country for deportation; this step provides suggestions to assist the Attorney General in making the country selection. McCarran-Walter Act of 1952. The third step of the deportation section is the most ambiguous with respect to the acceptance requirement; therefore, it produces various readings when interpreted by the courts. Seven possible locations for deportation are described in this step; however, only the language of the seventh step explicitly requires the acceptance of the receiving country. *Id.* at 213. That provision reads "if deportation to any of the foregoing places or countries is impracticable, inadvisable, or impossible, then to any country which is willing to accept such alien into its territory." *Id.* The fact that this is the only provision that requires prior acceptance by the receiving country causes confusion when determining whether or not the previous six provisions also require acceptance or if the Attorney General has complete discretion.

20. *See supra* note 13 and accompanying text. The difference in direct alien participation regarding the selection of the country of deportation was greatly broadened in the McCarran-Walter Act of 1952. McCarran-Walter Act of 1952 at 212. *See supra* note 19 for additional information on the McCarran-Walter Act of

inconsistencies in interpretation when such procedures were reviewed in courts of law came along with these broader provisions regulating deportation procedures.

Following the consolidation of immigration and naturalization policies into the McCarran-Walter of 1952, the courts struggled with interpreting the third step of the Act, which gave the Attorney General the discretion to elect from seven different deportation provisions. In *United States ex rel. Tom Man v. Murff*, the Second Circuit Court of Appeals held that an alien cannot be deported to a non-accepting country under step three of § 243 because there is an implicit acceptance requirement governing all seven provisions of the INA.²¹ In most cases interpreting the third step of § 243, courts frequently cite the language set forth by Judge Learned Hand in *Tom Man*, or simply read the actual language of the statutory provision to find that acceptance is a necessary requirement.²² However, in an

1952. In the earlier Immigration Act of 1917, an alien was prohibited from suggesting a potential country and from contesting the election made by the Secretary of Labor. Immigration Act of 1917. In stark contrast, the McCarran-Walter Act of 1952 gives the alien an opportunity to elect the country he wishes to be deported to, subject to the approval of the Attorney General and the country itself. McCarran-Walter Act of 1952.

21. *United States ex rel. Tom Man v. Murff*, 264 F.2d 926, 928 (2d Cir. 1959). In this case, the subject was a native of China; the action was brought because he overstayed the permissible amount of time for a foreign seaman to remain ashore. *Id.* at 927. Upon commencement of deportation hearings, the subject specified that he wished to be removed to the country of Formosa. *Id.* Despite the National Chinese Government's refusal to accept him, the Attorney General decided to remove him to the mainland of China. *Id.* at 928. However, because the Attorney General had not inquired beforehand whether China would admit him, he was not removed there. *Id.* The court in *Tom Man* then stated that the third step of § 243(a) provided seven options, and that the subject would be covered by at least three. *Id.* However, in the opinion of Judge Learned Hand, "we think that deportation under any of these is subject to the condition expressed in the seventh subdivision: i.e. that the 'country' shall be 'willing to accept' him 'into its territory.'" *Id.* Since the *Tom Man* decision in 1959, § 243 of the McCarran-Walter Act of 1952 has been amended and codified in § 1231(b)(2)(E) of the current Immigration and Nationality Act. 8 U.S.C. § 1231(b)(2)(E) (2005). However, it has remained relatively unchanged.

22. See *Hom Sin v. Esperdy*, 209 F. Supp. 3, 4 (S.D.N.Y. 1962) (holding that the alien could not be deported to mainland China under step three without preliminary inquiry because "deportation may not be effected unless the country is 'willing to accept him into its territory'"); *United States ex rel. Wong Kan Wong v. Esperdy*, 197 F. Supp. 914 (S.D.N.Y. 1961) (interpreting the statutory language of

administrative hearing held by the Board of Immigration Appeals ("Board"), the Board interpreted the third step of § 243 as *not* requiring preliminary acceptance by the country to which the alien is being deported. In the *Matter of Niesel*, the Board held that the removal of the respondent was subject to step three of the INA of 1952, and that the first six provisions under that step did not require advance acceptance from the country selected for deportation.²³ Although there are more court decisions interpreting the third step of § 243 as requiring an underlying notion of acceptance for all seven provisions, it is evident that courts and judges remained unclear as to which provisions the acceptance requirement actually applied.

§ 243 and prior case law to require the Attorney General to receive acceptance from the receiving country before the deportation takes place); and *Lu v. Rogers*, 164 F. Supp. 320, 322 (D.D.C. 1958) (holding that "without communist China's expression of 'willingness to accept him,' the statute will not permit plaintiff's deportation to that country"). In addition to the case law and statutory interpretation, many courts have weighed issues of diplomacy in deciding the issue of whether the Attorney General can deport to a country without explicit acceptance under step three of this section. See, e.g., *Cheng, Pun Hoi v. I.N.S.*, 521 F.2d 1351, 1353 (3d Cir. 1975) (stating that "[n]ormally, the United States does not deport aliens to countries with whose governments we do not have diplomatic relations") and *Amanullah v. Cobb*, 862 F.2d 362, 368 (1st Cir. 1988) (Coffin, J., concurring) (stating that it is "sheer folly to send an alien into another country without any indication that the country will receive the alien, or . . . where there is explicit notice that it will not receive the individual").

23. *In re Matter of Niesel*, 10 I. & N. Dec. 57, 59 (B.I.A. 1962). In this case, the alien was found deportable because of a § 241(a)(2) violation and for remaining longer than authorized on a temporary visa. *Id.* at 57. Upon reaching step one of the hearing procedures, the respondent refused to elect a country to which she wanted to be deported. *Id.* The second step was precluded because Niesel was an East German national, but did not want to be removed there. Additionally, the United States did not recognize it as a legitimate government, which further precluded this step. *Id.* at 58. Finally, the Attorney General used his discretion and elected West Germany as the country for deportation. However the respondent's counsel argued that preliminary acceptance was required before removal. *Id.* The Board rejected this argument, claiming that:

[w]hen designating a country in step three as a place of deportation, there is no requirement that preliminary inquiry be addressed to the country to which deportation is ordered (other than perhaps to the seventh country in the list – a country which is willing to accept the alien into its territory).

Id. at 59 (citing *Lu*, 164 F. Supp. at 320). The court concluded that "[i]n the instant case, this preliminary inquiry is not required." *Matter of Niesel*, 10 I. & N. at 59.

C. *The Current Immigration and Nationality Act*

The current Immigration and Nationality Act ("INA"), which has been amended a number of times since the codification of the 1952 version, was created as a result of the Illegal Immigration Reform and Immigration Responsibility Act (IIRIRA).²⁴ Although it did not significantly change the substance of the policies, one of the more noticeable changes was the merger of the removal procedures for deportable and excludable aliens, which are now both contained in 8 U.S.C. § 1231(b).²⁵ Located in §1231(b)(2) of the current INA, the processes and procedures governing the deportation of aliens is the section of the statute that has caused the most confusion regarding the interpretation of an "acceptance" requirement. Section 1231(b)(2) defines a three-step process for determining the country to which an alien will be deported.²⁶ The first step of the statute allows the alien to elect a country of removal, subject to certain limitations regarding location, where the Attorney General shall deport the

24. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104-208, 110 Stat. 3009 (1996) ("IIRIRA"). The IIRIRA was enacted on September 30, 1996, in order to enhance the I.N.S.' presence and reorganize the process and provisions located within the Immigration and Naturalization Act of 1952. *Id.* There have been various minor amendments, which have made little substantive changes to the current language of the INA. *See, e.g.*, INA amendments, Pub. L. No. 85-316, 71 Stat. 639 (1957); INA amendments, Pub. L. No. 89-236, 79 Stat. 911 (1965); Refugee Act of 1980, 96 Pub. L. No. 212, 94 Stat. 102 (1980); INA amendments of 1981, Pub. L. No. 97-116, 95 Stat. 1611 (1981); Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (1986); Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 100 Stat. 1214 (1996); and Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (2000).

25. *Compare* 8 U.S.C. § 1231(b) (2005) with McCarran-Walter Act of 1952 at 200. The McCarran-Walter Act separates the Exclusion Provisions from the Deportation Provisions, the former being located in § 236 and the latter in § 243. McCarran-Walter Act of 1952 at 212. In the current version of the INA, the exclusion provisions and procedures are found in § 1231(b)(1) and the deportation provisions and procedures are found within § 1231(b)(2). § 1231(b)(1)-(2). Although the organization of the provisions is different than that of the original, the content has remained substantively similar. *See also* Ali v. Ashcroft, 346 F.3d 873, 883 n.3 (2d Cir. 1959) (stating that "[e]xcept for minor editorial revisions, the 1990 version is essentially unchanged from the original 1952 version").

26. § 1231(b)(2) (2005).

alien.²⁷ If for some reason the alien is not deportable to the country selected under step one, the second step of the process authorizes the Attorney General to remove the alien to “a country of which the alien is a subject, national, or citizen”²⁸ The final step of the process, and the one that has caused confusion in its interpretation with regards to the acceptance requirement, only becomes relevant if the removal is not fulfilled under the first two steps. The interpretation of step three, § 1231(b)(2)(E) of the INA, is the crux of the *Jama v. Immigration and Customs Enforcement* case.²⁹ The third step of § 1231(b)(2) states that:

(E) Additional removal countries. If an alien is not removed to a country under the previous subparagraphs of this paragraph, the Attorney General shall remove the alien to any of the following countries:

(i) The country from which the alien was admitted to the United States.

27. *Id.* Under this step of the statute, the alien may select one country where they would want to be removed. *Id.* Also, the limitations on designation revolve around contiguous lands and adjacent islands, which are only selectable if the alien is a native, citizen, subject or national of said land or island, or has previously resided there. *Id.* Additionally, the Attorney General has the authority to disregard the designation for reasons such as delay in selection, delay in acceptance from the government of the elected country (after thirty days), lack of acceptance from the country’s government, or other diplomatic reasons that would render the removal detrimental to the United States. *Id.*

28. *Id.* The Attorney General has the power to elect the country, provided it that fits into the statutory language governing this step, unless the country’s government fails to confirm their acceptance within thirty days or another reasonable time, or if the country explicitly refused acceptance of the alien. *Id.* This step of § 1231(b)(2), like the first step, carries an explicit acceptance requirement within the statute itself. *Id.* It is clear from the statutory language that removal under either section is contingent upon acceptance, and therefore the deportation cannot be fulfilled if such acceptance is lacking. *Id.*

29. *Jama v. Immigration & Customs Enforcement*, 543 U.S. 335 (2005). The parties in *Jama v. ICE* both agreed that the petitioner’s removal destination was subject to the implementation of the third step of § 1231. *Jama v. I.N.S.*, 329 F.3d 630 (8th Cir. 2003).

- (ii) The country in which is located the foreign port from which the alien left for the United States or for a foreign territory contiguous to the United States.
- (iii) A country in which the alien resided before the alien entered the country from which the alien entered the United States.
- (iv) The country in which the alien was born.
- (v) The country that had sovereignty over the alien's birthplace when the alien was born.
- (vi) The country in which the alien's birthplace is located when the alien is ordered removed.
- (vii) If impracticable, inadvisable, or impossible to remove the alien to each country described in a previous clause of this subparagraph, another country whose government will accept the alien into that country.³⁰

30. § 1231(b)(2)(E). The main dispute arises when interpreting whether or not the acceptance requirement, which is explicit in steps one and two, as well as in the seventh provision under the third step, should be implied to govern over each of the other six provisions of step three. *Compare Jama*, 329 F.3d at 630 (holding that acceptance is not required under the first six clauses of step three, but is confined to clause seven) *with Ali*, 346 F.3d at 873 (holding that clauses one through six of § 1231(b)(2)(E) require the same acceptance requirement as clause seven). The differences between the current section of exclusion and deportation procedures and the former section in the INA of 1952 are slight and have little more effect than organizational structure. *Compare* § 1231(b)(2) *with* McCarren-Walter Act of 1952. However, one important alteration arises in clause seven of step three, deemed the catchall clause. *Id.* Under the McCarren-Walter Act, that clause read “if deportation to any of the foregoing place or countries is impracticable, inadvisable, or impossible, then to any country which is willing to accept such alien” McCarren-Walter Act of 1952. There is a slight difference in the language of the current version of the INA, where that clause reads then to “another country whose government will accept the alien.” § 1231(b)(2)(E)(vii). *See Jama*, 543 U.S. at 343 n.3 (holding that addition of the word “another” in clause seven of step three is “attributable to nothing more than stylistic preference”). The petitioner in *Jama* proffers an argument that this change in the current version of the statute must signify that Congress meant “another country whose government will accept the alien,” thus reading an acceptance argument into clauses one through six. *Id.* at 341. However, writing for the majority, Justice Scalia rejected this argument, citing basic concepts of statutory interpretation, as well as the fact that the word was substituted “simply to rule out the countries already tried” *Id.* at 341.

Since the re-codification and reorganization of the current McCarren-Walter Act, the ambiguity found within the third step of §1231(b)(2) has led to a significant split between the Eighth and Ninth Circuit Courts of Appeals. In *Jama v. Immigration and Naturalization Services*, the Eighth Circuit Court of Appeals held that the applicable portion of the statute should be interpreted as written, and therefore should not include an acceptance requirement for clauses one through six of §1231(b)(2)(E).³¹ However, in *Ali v. Ashcroft*, the Ninth Circuit Court of Appeals held that acceptance is implicitly required for all removals, even those occurring under the auspices of step three of §1231(b)(2).³² Because of this circuit split,

31. *Jama*, 329 F.3d at 634. In this case, the alien was a refugee of Somalia who became deportable after committing a third degree assault, deemed by the Immigration and Naturalization Services (INS) to be a crime of moral turpitude. *Id.* at 631. Here, the parties agreed that *Jama's* removal was contingent upon step three of the removal process, so the court focused on §1231(b)(2)(E). *Id.* at 633. The INS claimed that there was no acceptance requirement when dealing within clauses one through six of step three, and because there are explicit acceptance requirements in steps one and two, as well as clause seven of step three, one should not be implied here. *Id.* at 634. However, *Jama* relied on *Tom Man* and the cases that followed its reasoning to posit that the acceptance requirement of clause seven applies to the preceding six. *Id.* (citing *Tom Man*, 264 F.2d at 928). The Eighth Circuit opinion, written by Judge Arnold, rejected *Jama's* argument, claiming that the cases he cited “disregard the plain language of the statute itself . . .” *Jama*, 329 F.3d at 634. Judge Arnold opines that “as [a] matter of simple statutory syntax and geometry, the acceptance requirement is confined to clause (vii), and does not apply to clauses (i) through (vi).” *Id.* The opinion concludes by stating that “Congress is free to fix the statute if it needs fixing, and Congress knows how to do so if it wishes.” *Id.* Thus, the Eighth Circuit takes on one side of the split in interpreting the statute quite literally. In reading only the words included within the clauses, the Eighth Circuit found no requirement of acceptance in clauses one through six of step three.

32. *Ali*, 346 F.3d at 881. Here, the petitioners were natives and citizens of Somalia. *Id.* at 877. Each was ordered to be deported from the United States at different times between 2000 and 2001. *Id.* However, each had been removed from the INS because returning them to Somalia was impossible due to the country's lack of a functioning government. *Id.* Upon renewed developments for their removal to Somalia, the petitioners sought to enjoin the removal on the basis that Somalia could not explicitly accept them, because there was no central government capable of doing so. *Id.* The INS argued that the literal language of step three of §1231(b)(2)(E), clauses one through six specifically, authorize the Attorney General to remove them without acceptance from the country's government. *Id.* at 881. However, the court, in an opinion by Judge Tashima,

the Supreme Court granted *certiorari* to determine whether or not an acceptance requirement must be implied in clauses one through six of §1231(b)(2)(E).

D. Fundamentals of Statutory Interpretation

In order to properly interpret the text of the McCarren-Walter Act, and fully grasp the difficulties experienced by the Circuit Courts in ascertaining its meaning, one must appreciate general fundamentals of statutory interpretation. Courts use general legal concepts and procedures when ascertaining the meaning of a statute. One of the most basic tenets is that, when statutory language is

concluded that acceptance was implicitly required for all removals. *Id.* The court reasoned that “to read §1231(b)(2)(E)(i)-(vi) as not requiring acceptance by the foreign government would render §1231(b)(2)(C) and (D) superfluous in the majority of instances” *Id.* It concluded by stating that “[t]he only logical interpretation of the plain meaning that gives effect to all sections of the statute is one that requires government acceptance from ‘additional’ countries listed in §1231(b)(2)(E)(i-vi).” *Id.* The majority’s opinion continues by analyzing factors that were not considered by the Eighth Circuit in *Jama*. *Id.* at 884-85. One such factor was INS Policy and Regulation, which explains how the INS’ interpretation of the statute in this case is not consistent with their policy. INS policy states that “‘deportation cannot be effected until travel documentation has been obtained’ from the country to which the alien is to be deported.” *Id.* at 884 (quoting INS Instructions 243.1, available at <http://www.immigration.gov>). The Ninth Circuit also analyzed various tenets of international law, including the United States Policy with Respect to the Involuntary Return of Persons in Danger of Subjection to Torture, which states:

It shall be the policy of the United States not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture, regardless of whether the person is physically present in the United States.

Ali, 346 F.3d at 886. (citing United States Policy with Respect to the Involuntary Return of Persons in Danger of Subjection to Torture, Pub. L. No. 105-277, § 2242(a), 112 Stat. 2681, 2681-822 (1998)). Thus, the Ninth Circuit assumes the opposite side of the split and uses the surrounding text of the statute, along with extrinsic evidence of INS and international policies, to color their decision that all deportations and removals require implicit acceptance.

ambiguous, courts will turn first to the plain meaning of the statute.³³ Many statutes illustrate the interpretation maxim "*expression unius est exclusio alterius*," or "expression of the one is the exclusion of the other."³⁴ Following the concept of analyzing the plain language, it is imperative that "[c]ourts are obligated to refrain from embellishing statutes by inserting language that Congress has opted to omit."³⁵

However, even if the statute appears clear on its face and the plain meaning is ascertainable, courts will often utilize interpretation principles that guide the meaning toward a particular policy. For example, most courts will not "interpret statutory text in a manner which leads to absurd results."³⁶ Also, with respect to international law, most courts will not interpret a statute in a manner that contradicts or overrides internationally accepted law or policy.³⁷ Following these general tenets of statutory interpretation, courts attempt to ascertain a meaning from ambiguous statutes that is

33. *United States v. Milk*, 281 F.3d 762, 766 (8th Cir. 2002) (stating that the plain language of the statute itself must be looked to, which is "the starting point in any question of statutory interpretation.").

34. *Jama*, 329 F.3d at 634. This maxim is well illustrated in *Jama* case, because Congress drafted an acceptance requirement into the first two steps, and also clause seven of step three, without drafting one into clauses one through six. *Id.* Therefore, by applying the logic of the statute, the fact that "Congress did not insert an acceptance requirement into the self-contained provisions that appear in clauses (i) through (vi)," but did include such a requirement in the surrounding clauses and steps, means that an acceptance requirement should not be read into clauses one through six. *Id.*

35. *Id.* (quoting *Root v. New Liberty Hosp. Dist.*, 209 F.3d 1068, 1070 (8th Cir. 2000)). Applying this concept in *Jama v. INS*, the Eighth Circuit opined that "Congress did not write the statute that way." *Jama*, 329 F.3d at 634 (quoting *United States v. Naftalian*, 441 U.S. 768, 773 (1999)).

36. *Id.* at 636 (Bye, J., dissenting) (quoting *Rowley v. Yarnall*, 22 F.3d 190, 192 (8th Cir. 1994)). In his dissenting opinion, Judge Bye illustrates this maxim by showing that, if there explicit, literal acceptance requirement, it is possible for the United States to deport aliens to countries who are not willing to accept them. *Id.* at 636. He continues "[t]hose deportees can attest to the practical difficulty, if not impossibility, of acting anyway when a request is refused." *Id.*

37. *Ali*, 346 F.3d at 886. The Court stated that "[a]lthough Congress *may* override international law in enacting a statute, we do not presume that Congress had such an intent when the statute can reasonably be reconciled with the law of nations." *Id.* (quoting *Kim Ho Ma v. Ashcroft*, 257 F.3d 1095, 1114 n.30 (9th Cir. 2001)).

complimentary to Congress' intentions and coincides with general policy.

III. CASE HISTORY

Keyse Jama was born in the country of Somalia and is currently a citizen of that country.³⁸ When Jama was twelve years old, his family fled to Kenya in order to escape the inter-tribal warfare ravaging Somalia.³⁹ While living in Kenya, his family received refugee status and was admitted to the United States.⁴⁰ In 2000, Jama's refugee status was terminated by reason of criminal conviction.⁴¹ The Immigration and Naturalization Service commenced an action against Jama to remove him from the United States because he had committed a "crime of moral turpitude."⁴² At the initial hearing before the administrative judge, Jama recognized that he was subject to deportation, but sought various means of relief

38. *Jama*, 543 U.S. at 336.

39. Brief of Petitioner at 8, *Jama v. Immigration & Customs Enforcement*, 543 U.S. 335, No. 03-674 (U.S. May 18, 2004). Petitioner Jama points out that Somalia has been without a functioning central government since 1991, when the dictator Said Barr was ousted from power. *Id.* at 4. Since that time, warring factions have controlled different pieces of the country, although a situation of ultimate chaos persists. *Id.* The United States has no diplomatic relations with Somalia, including no embassy or consular relations with any central government of that country. *Id.*

40. *Id.* at 8. See 8 U.S.C. § 1157 (2005) (stating that the requirement for refugee status is "well-founded fear of persecution on account of . . . membership in a particular social group"). Section 1157 is a renewable statute dealing with the annual admission of refugees and admission of refugees in emergency situations. It was originally effective in 1996, and has been renewed since that time.

41. *Jama*, 543 U.S. at 336; see also Brief of Petitioner, *supra* note 39, at 8-9 (noting that Jama was first eligible for removal when he was convicted for third-degree assault in 1999. Petitioner was sentenced to one year imprisonment, but the court stayed the sentence and gave him probation. The day after he was released, he was found intoxicated in violation of his probation and was ordered to perform the sentenced originally ordered. After he completed the year-long sentence, he was transferred to the custody of the INS in order to await further removal proceedings).

42. *Jama*, 543 U.S. at 336; see *supra* note 4 and accompanying text (setting forth the definition and history of "crime of moral turpitude").

from that judgment.⁴³ Jama neglected to elect a country where he would prefer to be deported.⁴⁴ In response to the petitioner's lack of preference, the Immigration Judge ordered that Jama be removed to Somalia, the country of his birth, as well as his citizenship.⁴⁵ The decision to deport petitioner Jama to Somalia was upheld by the Board of Immigration Appeals, and Jama sought no review of this decision in the Federal Court of Appeals.⁴⁶

Instead, Jama instituted collateral proceedings under the habeas statute.⁴⁷ He filed his petition challenging the designation of Somalia as his destination with the United States District Court for the District of Minnesota.⁴⁸ The petition alleged that, because Somalia lacked a functioning central government, it was therefore unable to grant consent in advance to his removal, and that the United States government was barred from ordering his removal to Somalia without such advance approval.⁴⁹ The District Court agreed with Jama on the grounds that he could not be removed to a country that had not consented in advance to receive him, and granted him habeas relief.⁵⁰ The Federal government appealed this ruling, and a divided

43. *Id.* at 337. Jama attempted to avoid removal by requesting adjustments of status, withholding of removal, relief under the United Nations Convention Against Torture, and asylum. *Id.* See also Brief of Petitioner, *supra* note 39, at 9-10. In his brief, Jama noted that, upon consideration of these alternative options presented by petitioner, the Immigration Judge found that the criminal conviction made Jama ineligible for asylum or withholding of removal. The Immigration Judge also ruled that due to the petitioner's criminal record, the Judge was required to decline adjustment of residential status. *Id.* Finally, because the petitioner neglected to include information that he would be tortured upon removal to Somalia, his application under the Convention Against Torture was also declined. *Id.*

44. *Jama*, 543 U.S. at 337.

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.* See also Brief of Petitioner, *supra* note 39, at 11 (describing how petitioner did not question the validity of his removal order, or even his eventual removal to Somalia, but based his argument on the premise that under 8 U.S.C. §1231(b)(2) the INS could not remove him to Somalia without first establishing that there was an existent central government that would accept him).

50. *Jama*, 543 U.S. at 337; see also *Jama*, 329 F.3d at 634; Brief of Petitioner, *supra* note 39, at 11-12 (describing the ruling of the District Court, where Judge Tunheim found that the habeas petition raised a "pure question of

panel of the Court of Appeals for the Eighth Circuit reversed, holding that 8 U.S.C. § 1231(b)(2) does not require actual acceptance by the government of the destination country.⁵¹ Jama then filed for review by the Supreme Court, and a writ of certiorari was granted.⁵²

IV. ANALYSIS OF OPINION

A. Majority Opinion

Justice Scalia delivered the majority opinion for the Court.⁵³ His analysis begins by clarifying that, once an alien has been declared ineligible to remain in the United States, 8 U.S.C. § 1231(b)(2) governs the process of determining to which country he should be removed.⁵⁴ The statute gives the alien an opportunity to designate a

law” and concerned only whether INS’s removal of Jama violated the authorizing statute). Additionally, Jama’s brief argued that the court “adopted a unified construction of the statutory provision, giving effect to all of its clauses, and held that the acceptance requirement applied to all of the sub-clauses listed in step three of the removal statute.” *Id.* at 12.

51. *Jama*, 543 U.S. at page 337 (citing *Jama*, 329 F.3d at 633-635). See also Brief of Petitioner, *supra* note 39, at 13. In the brief, Jama explained that, in arriving at this decision, the Eighth Circuit decided to disregard a line of decisions by other Courts of Appeals that held that an acceptance requirement should be read into § 1231(b)(2), and did so by claiming that they were neither bound nor persuaded by such previous rulings. The majority, in breaking with the traditional interpretation of the provision, understood that it would lead to the result where a country could refuse to accept an alien, and the Attorney General could turn around and force a removal to the same country regardless of acceptance. This possibility was rationalized by stating that it is not together uncommon to accomplish a task by following a polite rebuff with a forceful action. *Id.* The dissenting opinion below, written by Judge Bye, would have followed the “well-settled” application set forth by Judge Learned Hand in *Tom Man*, and stated vehemently that there were no circumstances that allowed removal without acceptance by the destination country’s government. Brief of Petitioner, *supra* note 39, at 14.

52. *Jama*, 543 U.S. at 338.

53. *Id.* at 338-353. Justice Scalia was joined in his opinion by Justices Rehnquist, C.J., O’Connor, Kennedy and Thomas.

54. *Id.* at 337 (quoting 8 U.S.C. § 1231(b)(2) (2005)), which states in relevant part:

(b) Countries to which aliens may be removed:

2. Other aliens. Subject to paragraph (3) –

(A) Selection of country by alien. Except as otherwise provided in this paragraph –

country of choice, and authorizes the Attorney General to select the country of removal if the alien makes no such designation.⁵⁵ Justice Scalia explains that the issue in the case at hand is whether this provision in § 1231(b)(2) “prohibits removing an alien to a country without the explicit, advance consent of that country’s government.”⁵⁶

Justice Scalia then explains the underlying facts for the *Jama* case

(i) any alien not described in paragraph (1) who has been ordered removed may designate one country to which the alien wants to be removed, and

(ii) the Attorney General shall remove the alien to the country the alien so designates.

(B) Limitation on designation. An alien may designate under subparagraph (A)(i) a foreign territory contiguous to the United States, an adjacent island, or an island adjacent to a foreign territory contiguous to the United States as the place to which the alien is to be removed only if the alien is a native, citizen, subject or national of, or has resided that designated territory or island.

(C) Disregarding designation. The Attorney General may disregard a designation under subparagraph (A)(i) if --

(i) the alien fails to designate a country promptly;

(ii) the government of the country does not inform the Attorney General finally, within 30 days after the date the Attorney General first inquires, whether the government will accept the alien into the country;

(iii) the government of the country is not willing to accept the alien into the country; or

(iv) the Attorney General decides that removing the alien to the country is prejudicial to the United States.

(D) Alternative country. If an alien is not removed to a country designated under subparagraph (A)(i), the Attorney General shall remove the alien to a country of which the alien is subject, national or citizen unless the government of a country --

(i) does not inform the Attorney General or the alien family, within 30 days after the date the Attorney General first inquires or within another period of time the Attorney General decides is reasonable, whether the government will accept the alien into the country; or

(ii) is not willing to accept the alien into the country.

(E) Additional Removal countries.

See *supra* note 30 and accompanying text.

55. § 1231(b)(2).

56. *Jama*, 543 U.S. at 338.

and the procedural history of how the case arrived before the Court.⁵⁷ He then sets forth the specific language of §1231(b)(2), which, as he identifies, details the procedure used by the Attorney General in selecting the country of destination once the alien is deemed removable.⁵⁸ At the onset of the opinion, Justice Scalia sets out the four consecutive removal commands found within the statute.⁵⁹ The first command states that “[a]n alien shall be removed to the country of his choice (subparagraphs (A) to (C)) unless one of the conditions eliminating that command is satisfied.”⁶⁰ The second removal command states “otherwise he shall be removed to the country of which he is a citizen (subparagraph (D)) unless one of the conditions eliminating that command is satisfied.”⁶¹ The third command says “otherwise he shall be removed to one of the countries with which he has a lesser connection (clauses (i) to (vi) of subparagraph (E)).”⁶² Finally, the fourth removal command states that “if that is ‘impracticable, inadvisable, or impossible,’ he shall be removed to ‘another country whose government will accept the alien into that country (clause (vii) of subparagraph (E)).”⁶³ Justice Scalia explains that the first two removal commands were not applicable in this case for two reasons. First, the petitioner neglected to designate a country of choice. Second, Somalia, the petitioner’s country of citizenship, did not inform the Attorney General of its willingness to accept him,

57. *Id.* See *supra* notes 38-52 and accompanying text.

58. *Id.* at 338-342. See *supra* note 54 and accompanying text. Justice Scalia also makes an important procedural point, stating that in March 2003, the Department of Homeland Security and its Bureau of Border Security assumed the authority and responsibility for instituting the removal program. *Jama*, 543 U.S. at 338 n.1. (citing Homeland Security Act of 2002, 116 Stat. 2192-2194 (codified at 6 U.S.C. §§ 251(2), 252(a) (2000 & Supp. II)). Due to this reallocation of authority, the discretion formerly vested in the Attorney General is now designated to the Secretary of Homeland Security. H.S.A. §551(d)(2). However, because petitioner’s removal proceedings occurred before this reallocation of authority, the opinion continues to refer to the Attorney General as the ultimate decision maker. *Jama*, 543 U.S. at 338 n.1.

59. *Id.* at 341 (citing § 1231(b)(2)).

60. *Id.* (citing § 1231(b)(2)).

61. *Id.* (citing § 1231(b)(2)).

62. *Id.* (citing § 1231(b)(2)).

63. *Id.* (quoting §1231(b)(2)).

therefore removing any obligation to send petitioner there.⁶⁴ Therefore, the removal in question fell under the third command, and Justice Scalia presents the question as “whether the Attorney General was precluded from removing petitioner to Somalia under the third step . . . because Somalia had not given its consent.”⁶⁵

Justice Scalia next analyzes the statutory interpretation used by the Court to determine that this statute does not include an acceptance requirement in step three.⁶⁶ Justice Scalia explains that the majority refuses to assume that Congress omitted requirements from the statute that it intended to be applied, and that the Court’s “reluctance is even greater when Congress has shown elsewhere in the same statute that it knows how to make such a requirement manifest.”⁶⁷ Justice Scalia notes that, throughout subparagraph (E), an explicit requirement of acceptance only appears in clause (vii), which is the final clause. This may only be exercised by the Attorney General after he determines that all other removal options are “impracticable, inadvisable or impossible.”⁶⁸ However, Justice Scalia reviews clauses (i) through (vi) first, making it clear that, both in the statutory language itself and the process of selecting a country for removal, there is no mention of an acceptance requirement within those clauses.⁶⁹ He points to the consequences produced by the acceptance requirements through the rest of paragraph 2, which he opines make the lack of such a requirement in subparagraph (E) appear intentional.⁷⁰ He concludes his analysis of this point by

64. *Jama*, 543 U.S. at 341. The petitioner’s lack of designation rendered sections (A)-(C) inapplicable, and the lack of response from Somalia rendered section (D)(i) inapplicable as well. *Id.*

65. *Id.* The particular section of the statute applied by Justice Scalia is clause (iv) of subparagraph (E). *Id.*

66. *Id.* See *supra* note 33-37 and accompanying text (noting many of the basic tenets of statutory interpretation utilized by the Court).

67. *Id.*

68. *Id.* at 342 (citing § 1231(b)(2)).

69. *Id.* (citing § 1231(b)(2)) (noting that the preliminary six clauses simply give the Attorney General authority to remove the alien to any one of the countries mentioned within).

70. *Id.* Justice Scalia further extrapolated by stating that subparagraph (C) tells the effect of non-acceptance in the first step; subparagraph (D) does the same for step two; and clause (vii) of subparagraph (E) has the same affect on step four. *Id.* at 342. Writing for the dissent, Justice Souter disagreed, claiming that there are

explaining that the presence of acceptance by the destination country may be a factor in determining whether the removal is impossible or impracticable, but that such acceptance alone is not a dispositive factor.⁷¹

Justice Scalia then analyzes the petitioner's argument that uses the word "another" in clause (vii) as a means of reading an acceptance requirement into the former six clauses ((i)-(vi)).⁷² The petitioner argued that, if the final option is "*another* country whose government will accept the alien," then the implication is that the countries discussed in the former six clauses were also countries "whose governments will accept the alien."⁷³ This argument, Justice Scalia notes, calls for an interpretation that is far too broad, and very similar to one recently rejected by the Court.⁷⁴ The Court rejects this argument on the grounds that it ran contrary to the "grammatical 'rule of the last antecedent,' according to which a limiting clause or phrase should ordinarily be read as modifying only the noun or phrase . . . that it immediately follows."⁷⁵ Justice Scalia concludes that the word "another" serves only to exclude the countries that had been previously considered under step three and referred to in the "conditional prologue of clause (vii)."⁷⁶

only three steps altogether, and that clause (vii) of subparagraph (E) simply part of step three, as opposed to its own step. *Id.* at 341 n.2 (Souter, J., dissenting). The majority rejected this proposal by stating that clause (vii) applies only after all other options within subparagraph (E) are exhausted, therefore constituting a distinct step in the selection process. *Id.*

71. *Id.* at 342 (majority opinion).

72. *Id.* (citing § 1231(b)(2)).

73. *Id.* at 343 (citing § 1231(b)(2)).

74. *Id.* (citing *Barnhart v. Thomas*, 540 U.S. 20, 26 (2003) (declining to read the limiting clause "which exists in the national economy" into the term "previous work"). See also *FTC v. Mandel Brothers, Inc.*, 359 U.S. 385, 389-390 (1959).

75. *Id.* (citing *Barnhart*, 540 U.S. at 26-28). In *Barnhart*, the Court refused to treat "any other" as the "apparently connecting modifier" that the dissent here believes "another" to be. *Jama*, 543 U.S. at 343 n.3.

76. *Id.* at 344 (citing § 1231(b)(2)). In addition to the interpretation of the word "another," the dissent put great importance on the textual differences between the 1996 legislation and the current version. *Id.* at 343 n.3. The dissent particularly emphasized how the statute read "any country" in 1996, but was amended to read "another country." *Id.* at 358 (Souter, J., dissenting). Justice Scalia dismissed this argument, claiming that there are numerous stylistic changes between the two versions, but none indicate any substantive changes. *Id.* at 343 n.3

In furtherance of the “last antecedent rule,” Justice Scalia notes that the structure of subparagraph (E) also suggests that no acceptance requirement should be read into the first six clauses.⁷⁷ He explains that each clause ends with a period, which infers that they are distinct. Therefore, he notes, it is unnecessary to read any further than each separate clause to understand its complete meaning.⁷⁸ Justice Scalia further states that, by reading an acceptance requirement into each of the first six clauses in subparagraph (E), it would nullify the Attorney General’s executive judgment in weighing practical and geopolitical concerns when selecting a destination country because any removal without acceptance would be *per se* “impractical, inadvisable, or impossible.”⁷⁹ Justice Scalia contend that the absence of advance consent would not necessarily render a removal impossible or impractical because there have been various occasions when a government has accepted a removed alien when he arrives at their border.⁸⁰

Justice Scalia then turns to petitioner’s argument that, even if no acceptance requirement is explicit in the text, there is one “manifest in the entire structure of §1231(b)(2).”⁸¹ The petitioner contended, if this were not the case, the Attorney General would be able to circumvent the acceptance requirements written into subparagraph (A) or (D) by removing the alien under subparagraph (E).⁸² The majority declared that this argument is too broad.⁸³ Justice Scalia explains that such circumvention can only occur when the “country

(majority opinion). He further opined that the dissent must explain why there are so many changes that are purely stylistic, yet the Court should give this change monumental impact on the actual meaning of the statute. *Id.*

77. *Id.* at 344.

78. *Id.* Justice Scalia, in footnote four, rebutted the cases set forth by the dissent on this point by showing that the “modifying clause appeared not in a structurally discrete statutory provision, but at the end of a single, integrated list.” *Id.* at 344 n.4 (citing *United States v. Bass*, 404 U.S. 336 (1971)).

79. *Id.* at 344.

80. *Id.* at 345. Justice Scalia stated that removal in this case would be as simple as putting the petitioner on a regularly scheduled flight to Dubai or Nairobi, and that such a process has been successfully undertaken various times. *Id.* (citing App. 36-40) (declaration of detention officer Eric O’Denius)).

81. *Id.* at 345 (citing § 1231(b)(2)).

82. *Id.*

83. *Id.* at 346.

of birth under clause (iv) is also the country of citizenship that was disqualified at step two for failure to accept the alien.”⁸⁴ While such a scenario is possible, it will not always be true, and the petitioner seeks “to impose an acceptance requirement on *all* removals under step three.”⁸⁵ Justice Scalia refutes this argument by claiming that the premise of an overarching acceptance requirement to be read into all of §1231(b)(2) is simply not accurate.⁸⁶ He explains that, although subparagraph (A) has an acceptance requirement, subparagraph (C) states that the Attorney General “‘may’ disregard” the designation set forth in (A) if the destination country’s acceptance is not timely.⁸⁷ According to Justice Scalia, the word “may” connotes discretion, and is used in direct contrast with the word “shall,” which illustrates that the petitioner’s consistent reading of acceptance throughout the entire statute is inaccurate.⁸⁸

Justice Scalia then sets forth an argument supporting the majority’s interpretation of the statute that stems from procedural efficiency and ensures that the removal process serves its purpose.⁸⁹ He states that the fact that acceptance requirement exists in the fourth step does not create any inference that the same requirement exists in

84. *Id.*

85. *Id.* at 344. Justice Scalia explained that this is also an argument set forth by the dissenting justices, who would like to set a blanket requirement of acceptance on all removals. *Id.* In this case, Justice Scalia states that several clauses under subparagraph (E) would describe Kenya, not Somalia, therefore showing how overly broad an acceptance requirement on all removals would be. *Id.*

86. *Id.* at 346.

87. *Id.* (citing § 1231(b)(2)).

88. *Id.* at 346 (citing § 1231(b)(2)). Justice Scalia also found that the reading of “may” as “shall” would be inappropriate in many circumstances. He further contends “[w]ould Congress really have wanted to preclude the Attorney General from removing an alien to his country of choice, merely because that country took 31 days rather than 30 to manifest its acceptance?” *Id.* Justice Scalia also questions whether the same incompatibility between discretion and direction would be present in subparagraph (D), given that the language says “shall remove an alien,” “unless” there is no timely acceptance. *Id.* at 347 n.7 (citing § 1231(b)(2)). Justice Scalia promptly dismisses this as a decision that does not need to be made now; however, it is enough to show that an acceptance requirement does not pervade the entire selection process. *Id.*

89. *Id.* at 347.

the third.⁹⁰ Justice Scalia explains that it would be incorrect to believe that, because Congress requires the Attorney General to obtain advance consent from those countries to which the alien has very little connection, Congress must also require the same advance consent from those countries to which the alien does have a connection.⁹¹ In order to allow the removal process to function properly, Justice Scalia describes, there must be an opportunity for a country to be selected under step three; otherwise he notes, the only opportunity is through step four, which clearly requires the destination country's acceptance.⁹² However, if no country is willing to accept the alien, he is left in the same "removable-but-unremovable limbo." After *Zadvydas v. Davis*, the alien must be allowed back into society within six months.⁹³ Because the alien has greater opportunity to remain in society, there is even less reason to read limitations in to the country-selection process. In particular, it is unnecessary to read limitations that Congress did not explicitly include, such as the third step of the process, which usually provides the Attorney General with the best option for removal.⁹⁴

Furthermore, Justice Scalia opines, if an acceptance requirement is read into each provision and clause of 8 U.S.C. §1231(b)(2), even though one has not been expressly included by Congress, it would undermine the time-tested policy of deferring to the President on matters of foreign affairs.⁹⁵ Through explicit authority granted by Congress in the statute, the Attorney General has the ability to avoid removals that would have negative diplomatic repercussions or would prove to be futile.⁹⁶ The Attorney General, in Justice Scalia's

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.* at 347-48 (quoting *Zadvydas*, 533 U.S. 678).

94. *Id.* at 348. Justice Scalia is clearly concerned with the efficiency and effectiveness of the removal process, and more specifically the country-selection process. If, as a result of reading further restrictions in the already established process, there is a greater chance for removal failing and more aliens being re-released into American society, Justice Scalia believes that we should strictly interpret the statute as written to enable a better success rate for alien removals. *Id.*

95. *Id.*

96. *Id.* Justice Scalia explains that removal decisions, including, but not limited to, selection of destination countries, "may implicate our relations with

estimation, is given the authority at each step of the selection process to pass over countries that may not accept the alien, or that refuse to assure that their border security forces will allow the alien to enter.⁹⁷ In addition to preserving Executive powers, it is not necessary to infer an acceptance requirement to ensure that the Attorney General will properly consider the conditions within the country selected for removal.⁹⁸ Justice Scalia continues by listing the remedies or alternatives available to removable aliens fearful for their lives, including asylum, withholding of removal, relief under international agreements prohibiting torture, and temporary protected status.⁹⁹ Compared with the petitioner's argument that silence from Somalia's government automatically translates into future mistreatment and justifies not removing anyone to that country with these alternative remedies, use of these alternative remedies "strikes a better balance" in removing inadmissible aliens and securing their safety.¹⁰⁰

The Court then analyzes the petitioner's final argument that there exists a "settled construction" of §1231(b)(2), as well as petitioner's belief that, due to its most recent re-enactment by Congress, the "settled construction" should be interpreted as law.¹⁰¹ However, Justice Scalia quickly disagrees with this argument. After presenting the two requirements necessary for Congressional ratification, Scalia

foreign powers' and require consideration of 'changing political and economic circumstances.'" *Id.* at 348 n.7 (quoting *Mathews v. Diaz*, 426 U.S. 67, 81 (1976)).

97. *Id.*

98. *Id.* This consideration by Justice Scalia is particularly interesting because it is one of the main concerns of the petitioner, who fears that removal to his native land of Somalia will be detrimental to his well-being. Justice Scalia notes that this something that the Attorney General has the authority to consider, but that it does not appear to hold much weight in the case at bar. Somalia is a country that has been suffering through Civil War; though it has had no central government for almost fifteen years, the Attorney General deems it proper to remove petitioner there.

99. *Id.* Justice Scalia mentions each of the remedies as alternatives to being sent to a place where the aliens are fearful for their lives. It is interesting that petitioner attempted to take advantage of such remedies and was denied. Hence, the petitioner is still being sent to the country that he is scared to return to, and, in his case, none of the proposed remedies to such a situation were of any use to him.

100. *Id.*

101. *Id.* at 349.

notes that neither was met in this situation.”¹⁰² He begins by explaining how the current removal procedure, located within §1231(b)(2), is actually a new creation formed by a combination of previous distinct procedures.¹⁰³ Justice Scalia continues to refute the petitioner’s argument by stating that the cases he relies on address only the McCarran-Walter Act’s deportation provision (the 1952 version of §1253), but not the exclusionary provision.¹⁰⁴ Thus, as

102. *Id.* The first of the two requirements is that “Congress . . . simply re-enact[ed] §1231(b)(2) without change.” *Id.* The second is that the “judicial consensus [was] so broad and unquestioned that we must presume Congress knew of and endorsed it. *Id.*

103. *Id.* Justice Scalia points out that the current removal procedure was created in 1996 by a merger of the previously utilized “deportation” and “exclusion” procedures. *Id.* (citing IIRIRA, §304(a)(3), § 1229(a)). Historically, the immigration laws and policies implemented by the United States’ government have distinguished between those aliens already residing in the United States and those who are attempting to enter this country. *Id.* (citing *Leng May Ma v. Barber*, 357 U.S. 185, 187 (1958)). The differentiation between the earlier procedures was set forth in Title II of the Immigration and Nationality Act, where a deportation proceeding was necessary to expel an alien already residing within the United States, and an exclusion proceeding was necessary to expel an alien seeking admission to the United States. *Id.* See also *Landon v. Plasencia*, 459 U.S. 21, 25-27 (1982) (explaining differences between deportation and exclusion proceedings). The petitioner, who was admitted into the United States to reside as a refugee, was subject to exclusion hearings when his refugee status was in question, as opposed to deportation proceedings. *Jama*, 543 U.S. at 349 (citing 8 C.F.R. § 207.8 (1995)). The petitioner was subject to exclusion proceedings instead of deportation hearings because his application for admission was ruled to have been made after his criminal conviction for third-degree assault; he had not applied for admission before that point. *Id.* at 349 n. 8. According to 8 U.S.C. §1159(a)(1), a refugee must undergo “inspection and examination for admission to the United States as an immigrant” in accordance with the former exclusion provision one year after entering the country. *Id.* (citing 8 U.S.C.S. § 1159(a)(1)). The district director performing this examination found that he was not admissible due to his criminal conviction, therefore subjecting him to expulsion and exclusion proceedings under pre-1996 law. *Id.*

104. *Jama*, 543 U.S. at 350 (citing *Tom Man*, 264 F.2d at 926; *Rogers v. Lu*, 262 F.2d 471 (D.C. Cir. 1958)). In both cases cited by the petitioner, the applicable Courts of Appeals barred deportation to China, with whom the United States lacked any diplomatic relations, without prior consent from China’s government. *Id.* (citing *Tom Man*, 264 F.2d at 928 (reading the acceptance requirement necessary for clause (vii) into the previous six clauses); *Rogers*, 262 F.2d at 471)). The dissent claims that the Board of Immigration Appeals followed the cited cases and adhered to the same decision. *Id.* at 351 n.10 (Souter, J., dissenting). Most of the

Justice Scalia points out, of the two former provisions that make up the current removal process, only one has an element of “‘settled construction,’” while the other has no such reading.¹⁰⁵

Justice Scalia further dissects the petitioner’s argument of “settled construction” by showing that there was no clear judicial consensus with respect to that provision.¹⁰⁶ He explains that the so-called “judicial consensus” consists of two Court of Appeals decisions, one of which was only a “two-sentence per curiam that considered step two, not step three.”¹⁰⁷ Justice Scalia states that, with regards to the new 1231(b)(2), the acceptance requirement “is ‘neither a settled judicial construction nor one which we would be justified in

time, the Board of Immigration Appeals follows the law within the circuit where the case surfaces. *Id.* Therefore, after the decision of *Tom Man*, the Board of Immigration Appeals adhered to the Second District’s decision. *Id.* However, in the case of *In re Niesel*, the Board of Immigration Appeals decided not to follow the circuit court’s decision and refused to read an acceptance requirement into step three. *Id.* (citing *In re Niesel*, 10 I. & N. Dec. 57, 59 (1962)). Justice Scalia explains that, at the same time the previous cases were handed down, other courts were refusing to employ an acceptance requirement with the exclusionary provision, which was found in the former 8 U.S.C. § 1227. *Jama*, 543 U.S. at 350 (majority opinion) (citing § 1227). *See, e.g.,* *Menon v. Esperdy*, 413 F.2d 644 (2d Cir. 1969). Finally, Justice Scalia explains that when Congress amended the exclusion provision, adding three new categories of destination countries as well as a last-resort possibility, courts were very dubious as to whether or not to read the acceptance requirement into the preceding clauses. *Id. See* *Walai v. INS*, 552 F. Supp. 998, 1000 (S.D.N.Y. 1982).

105. *Jama*, 543 U.S. at 352. Justice Scalia, in one of his footnotes, disassembles the dissent’s argument that §1231(b)(2) descends solely from the previous deportation provision (and not the exclusion provision). *Id.* at 352 n.11. He claims that the former exclusion provision had a descendant in §1231(b)(1), but that this provision applied only to aliens being removed immediately as they arrived at the border, and not to formerly excludable aliens who were granted access and admission into the country. *Id.* (citing §§ 1231(b)(1)(A), (c)(1)). Under the current system, all aliens are removed and their destination countries selected under §1231(b)(2), as opposed to the former system where some were excluded and some deported. *Id.* Therefore, according to Justice Scalia, it is clear that §1231(b)(2) is a descendant of not only the exclusion provision, but also the deportation provision. *Id.* (citing § 1231(b)(2)). Justice Scalia concludes by stating that the enactment of §1231(b)(2), contrary to what the dissenting opinion states, did in fact create a large change, whereas now refugees cannot be expelled without acceptance. *Id.* at 352 n.11.

106. *Id.* at 352.

107. *Id.* (citing *Rogers*, 262 F.2d at 471).

presuming Congress, by its silence, impliedly approved.”¹⁰⁸ He concludes the analysis of this argument by stating that the petitioner’s proof is too weak “to justify presuming that Congress endorsed it when the text and structure of the statute are to the contrary.”¹⁰⁹

Justice Scalia concludes the majority opinion by discussing the final position taken by the petitioner in his brief on the merits, which deals with the idea that Somalia is not a “country” under the statute because of its lack of functioning central government.¹¹⁰ Justice Scalia simply dismisses this potential argument, based on the premise that the Supreme Court did not grant certiorari on that point, and therefore the Court will not render an opinion on it.¹¹¹

B. Dissenting Opinion

Justice Souter wrote the dissenting opinion, and was joined by Justices Stevens, Ginsburg, and Breyer.¹¹² Justice Souter begins the dissent by laying out the contents of 8 U.S.C. §1231(b) and each of the steps that are taken while selecting a destination country for a removable alien.¹¹³ He states that, under the dissent’s interpretation, the acceptance requirement applies to all seven clauses of paragraph

108. *Id.* (quoting *United States v. Powell*, 379 U.S. 48, 55 n.13 (1964)).

109. *Id.*

110. *Id.* at 352 n.13; see Brief of Petitioner, *supra* note 39, at 15. This petitioner did not present this issue to the Court of Appeals.

111. *Jama*, 543 U.S. at 352 n.13.

112. *Id.* at 354 (Souter, J., dissenting).

113. *Id.* See *supra* note 54 and accompanying text. However, there is one major difference that Justice Souter raises in his analysis of the steps within §1231(b)(2), dealing primarily with the quantity of steps. *Id.* at 353 n.2. Justice Souter claims that there are actually only three steps, and that clause (vii) of paragraph (E) does not constitute a separate, fourth step. *Id.* He justifies this argument by stating that it would be “odd to view them as entirely distinct” as they are located within the same paragraph, but also because the limits placed on the seventh clause (“impracticable, inadvisable, or impossible”) pertain directly to those countries discussed in the previous six clauses. *Id.* at 353 n.2. Justice Souter believes that the majority counted four steps in order to better utilize the argument that “three of the four steps, but not step three, expressly address ‘the consequence of nonacceptance.’” *Id.* Additionally, he believes that separating into four steps makes it easier to discredit the petitioner’s argument that the acceptance requirement for clauses (i-vi) are rooted in clause (vii). *Id.* See also *Jama*, 329 F.3d at 633.

(E), and that the majority's interpretation contradicts the text, structure and legislative history of the statute.¹¹⁴

Justice Souter first questions the majority's assertion that Congress left out an acceptance requirement from the text of the statute, and raises the issue of whether the acceptance requirement in the seventh clause should be read into the previous six.¹¹⁵ The petitioner interprets the language of "another" willing country from clause (vii) as applying the acceptance requirement to the previous six.¹¹⁶ Justice Souter accepts this reasoning by explaining that Congress had other drafting alternatives at their disposal when formulating clause (vii); if it had not wanted an overarching acceptance requirement to extend to clauses (i-vi), it could have used language that did not relate to the countries proposed in the preceding clauses.¹¹⁷ Justice Souter advocates for a reading of the statutory text that follows the decision in *United States v. Standard Brewery*, which set forth the standard that all Congressional language must be given due force and effect.¹¹⁸ Following this reasoning, if the statute was meant to be understood without the acceptance requirement extending to all seven clauses, it should not have been included in clause (vii) or Congress should have separated that clause altogether.¹¹⁹

Justice Souter opines that the majority attempted to avoid a

114. *Id.* at 353.

115. *Id.* See *supra* note 54 and accompanying text for the specific text of paragraph (E) and the seven clauses located therein.

116. *Id.* at 353-54.

117. *Id.* at 354. Justice Souter proposes that Congress could have utilized alternative language to draft clause (vii), such as "'a country whose government will accept the alien, or 'any country whose government will accept the alien,' or 'another country, if that country will accept the alien.'" *Id.* Any of the preceding suggestions would have supported the majority's interpretation that clause (vii) had no relation to the earlier clauses of paragraph (E). However, because the clause is not drafted in such a manner, the language of the seventh clause further supports Justice Souter's reading of an overarching acceptance requirement throughout all seven clauses. *Id.*

118. *Id.* at 355 (citing *United States v. Standard Brewery, Inc.*, 251 U.S. 210, 218 (1920)) (all words used in a legislative act are to be given force and meaning, and therefore qualifying words cannot be rejected or ignored).

119. *Id.* (citing *Standard Brewery*, 251 U.S. at 218) ("[i]f so the use of this phraseology was quite superfluous, and it would have been enough to have written the act without the qualifying words").

discussion of congressional language by leaning on the “last antecedent rule” as a grammatical reason why the acceptance requirement should be read in the final clause of paragraph (E), where it is expressly set out.¹²⁰ However, as Justice Souter explains, the “last antecedent rule” is not formulaically applied, but can “be overcome by other indicia of meaning.”¹²¹ The first indicia, according to Justice Souter, is the difference in language between clause (vii), which gives a final option for deportation, and the wording of the corresponding provision dealing with exclusion, found in the “adjacent and cognate paragraph of the same subsection.”¹²² Both paragraphs, the first dealing with exclusions and the second dealing with deportations, include last-resort provisions to determine a destination country when all of the preceding provisions fail.¹²³ However, as Justice Souter points out, there is a major difference in the two final-resort provisions: the one governing deportations states “another country whose government will accept the alien into that country,” while the provision governing over exclusions states “[a] country with a government that will accept the alien into the country’s territory.”¹²⁴ According to Justice Souter, this difference is significant because Congress uses two different words in parallel provisions of similar paragraphs, and would not have done so had they not meant different things by their different

120. *Id.* See *supra* notes 74-5 and accompanying text. In *Barnhart*, the test was defined as “a limiting clause or phrase . . . should ordinarily be read as modifying only the noun or phrase that it immediately follows . . .” *Barnhart*, 540 U.S. at 26. If such a rule applied here, according to Justice Souter, it would mean that the acceptance requirement of “whose government will accept,” would modify only the final option “country” set forth in clause (vii), and not any of the countries proposed in the first six clauses. *Jama*, 543 U.S. at 355.

121. *Id.* (citing *Barnhart*, 540 U.S. at 26). Justice Souter continues to explain that such indicia have instructed the court not to apply the last antecedent rule as many times as it has counseled the court to apply it. *Id.*

122. *Id.* See *supra* notes 103-04 and accompanying text. As explained by Justice Scalia in the majority opinion, the 1996 version of the Immigration and Nationality Act consolidated the prior statutes dealing with alien exclusions and the other dealing with alien deportation. *Id.* at 348 (majority opinion). Within the current statute, exclusion is discussed in paragraph (1), and deportation is discussed in paragraph (2), which is currently at issue in this case. *Id.*

123. *Id.* at 355 (Souter, J., dissenting). See § 1231(b)(1), (2).

124. *Jama*, 543 U.S. at 356 (quoting §§ 1231(b)(2)(E)(vii), 1231(b)(1)(C)(iv)).

usage.¹²⁵ Justice Souter attacks the majority's interpretation that these provisions should be read in exactly the same way by stating that the Court "runs afoul of the usual rule that when the legislature uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended."¹²⁶ He claims that the petitioner's interpretation, which the dissenting opinion adopts, is consistent with the theory that Congress distinctly chooses specific words for a reason.¹²⁷

Continuing with the general theory that Congress elects distinct words with distinct meanings, the dissenting opinion notes that it is clear that the explicit use of the word "another" was not a superfluous election.¹²⁸ Justice Souter explains that the 1952 version of the Immigration and Nationality Act described the country of last option with a neutral modifier, but that Congress amended it 1996 to

125. *Id.* See §§ 1231(b)(1)(C)(iv), 1231(b)(2)(E)(vii). Justice Souter points out that in the paragraph governing deportation, "'another country' with a willing government" is typically read to imply that the country named therein is similar to other countries named in earlier provisions. *Jama*, 543 at 356-57. Likewise, in the paragraph governing exclusion, "a country with a willing government" does not carry the same implication. *Id.*

126. *Id.* at 357 (quoting *Sosa v. Alvarez-Michain*, 542 U.S. 692, 712 (2004)); see also *Russello v. United States*, 464 U.S. 16, 23 (1983) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion").

127. *Jama*, 543 U.S. at 357. As Justice Souter notes, the majority opinion claims that the textual difference serves only the purpose of ruling out the countries that were proposed in the preceding clauses of the third step. *Id.* at 357 n.3. However, he explains, such a reading of the word "another" is unnecessary because the previously proposed countries are ruled out expressly by the language of clause (vii), which clearly states "[i]f impracticable, inadvisable, or impossible to remove the alien to each country described in a previous clause of this subparagraph." *Id.* Therefore, regardless of whether Congress used the words "a country" as opposed to the actual text of "another country," such words would not be necessary to make the exclusion of previously proposed countries clear, as the express language of the "impracticable" phrase performs that function. *Id.*

128. *Id.* at 358. Justice Souter opines that, by implementing this general theory of statutory interpretation that the Court usually employs, the use of "another" in clause (vii) was "unmistakably deliberate." *Id.*

explicitly change “any” to “another.”¹²⁹ The effort Congress undertook by changing the modifying language of the last-resort option cannot be simply written off as a superfluous change or one that was made only for aesthetic purposes.¹³⁰ Justice Souter criticizes the Court for dismissing this textual modification as nothing more than a fanciful amendment.¹³¹ The intended meaning of the changes made by Congress, according to Justice Souter, can be deduced and ascertained by looking at its legislative history.¹³² This change, he opines, was made by Congress simply to bring the explicit language of the text closer to the meaning they intended when drafting the statute, thereby including language that would imply an acceptance requirement into all deportation options of paragraph (E).¹³³ This argument is further bolstered by case law prior to the 1996 amendment, interpreting the predecessor to the current §1231(b)(2)(E)(i)-(vi); most of these cases read an acceptance requirement into the language of the sections corresponding to the current sections (i)-(vi).¹³⁴ As Justice Souter explains, this line of

129. *Id.* (citing McCarren-Walter Act, §243(a)(7)). The 1952 McCarren-Walter Act codified the last-option deportation as “to any country which is willing to accept such alien into its territory.” *Id.* (quoting McCarren-Walter Act).

130. *Id.*

131. *Id.*

132. *Id.* Justice Souter points out that there were various 1996 amendments that changed “any country” to “another country,” and that such textual changes were not intended to create any true substantive change in the law. *Id.* at 358-59. Justice Souter is implying that Congress was already under the impression that the deportation section of the Immigration and Nationality Act already included an acceptance requirement throughout all seven clauses, therefore they were simply changing the text to better express their understanding of the law. *Id.* at 359 n.4; see also H.R.REP. No. 104-469, at 234, pt.1 (1995) (describing the relevant section as merely “restat[ing]” the earlier provision).

133. *Jama*, 543 U.S. at 359 n.4. Justice Souter explains this concept further in a footnote which reads that Congress simply changed the text to bring it closer to its understood meaning and authority. *Id.* There was, in the words of Justice Souter, “no suggestion that the change created ‘a momentous limitation upon executive authority.’” *Id.*

134. *Id.* at 359; see also *Tom Man*, 264 F.2d at 926 (quoting Judge Learned Hand as opining that pre-1996 designations of destination countries are subject to that country’s prior acceptance to receiving alien). Justice Souter also cites to several other Circuit courts followed the same position as the Second Circuit. *Jama*, 543 U.S. at 359 (citing *Chi Sheng Liu v. Holton*, 297 F.2d 740, 743 (9th Cir. 1961) (citing *Tom Man* and describing the predecessor to §1231(b)(2) as providing

precedent was followed not only by the courts, but also by administrative agencies such as the Board of Immigration Appeals, and the Government in internal documents expressly interpreting the above-stated clauses.¹³⁵ He continues to further discredit the majority's argument by pointing out that neither the Court nor the Government cited one judicial decision other than the Eighth Circuit's decision of the current case that held or implied that an acceptance requirement should not apply to each clause in the third step.¹³⁶ It is fair to conclude, as Justice Souter opines, that when Congress amended the language in 1996, it chose language that

that "an alien cannot be deported to any country unless its government is willing to accept him into its territory").

135. *Id.* The Board of Immigration Appeals also followed this precedent in the case *In re Linnas*, where it was decided that "the language of that section expressly requires, or has been construed to require, that the 'government' of a country selected under any of the three steps must indicate it is willing to accept a deported alien into its 'territory.'" *Id.* (quoting *In re Linnas*, 19 I. & N. Dec. 307, 309 (1985)). Justice Souter disagrees with the majority's opinion that the Board of Immigration Appeals was simply following the circuit precedence, and contends that nowhere in the opinion does the Board state that they are following such precedence, where in other opinions they expressly state such guidance. *Id.* at 360 n.5. Justice Souter also points out that the Government was also interpreting the statutory language in line with these decisions. As recently as in 2003, the Justice Department's Office of Legal Counsel authored an opinion that indirectly stated that clauses (i) through (vi) required prior acceptance. *Id.* at 360 (quoting Memorandum Opinion for the Deputy Attorney General: Limitations on the Detention Authority of the Immigration and Naturalization Service 27, n.11 (Feb. 20, 2003), available at <http://www.usdoj.gov/olc/INSDetention.html>)).

136. *Id.* at 360. Justice Souter states how this very point was made by the District Court judge, who in his decision claimed "in fifty pages of briefing, the government has not cited a single case in which a federal court has sanctioned the removal of a legally admitted alien to a country that has not agreed to accept him." *Id.* (quoting *Jama v. INS*, 2002 U.S. Dist. LEXIS at *28). Justice Souter also emphasizes that Justice Scalia, in writing the Court's opinion, fails to cite a single case in support for this interpretation. *Id.* Justice Souter also uses the lack of supporting judicial decisions to further discredit the majority's argument by stating that the lack of supporting authority knocks out their sole rebuttal to petitioner's argument of a "settled construction." *Id.* at 361 n.6. He vehemently disagrees with the Court's reliance on *United States v. Powell*, which stated that there was no "settled construction" because there were other cases decided to the contrary. *Id.* (citing *Powell*, 379 U.S. at 48). Here, Justice Powell claims, Powell fails because there was an unanimous interpretation of the deportation procedures, therefore supporting petitioner's argument of "settled construction." *Id.*

would support its understanding that the statute required acceptance from the destination country's government.¹³⁷

Next, Justice Souter responds to the Court's argument that there is no sense of "settled construction" because the current removal procedure was formed from two separate procedures, those of deportation and exclusion, and therefore it would be "unsound to argue that Congress meant to preserve an acceptance requirement" after the merger.¹³⁸ This argument is misdirected, according to Justice Souter, because the language of the statutory provision in dispute, that of §1231(b)(2), is not the result of a merger, but remains virtually unchanged from its predecessor.¹³⁹ Therefore, the statutory provision in question is not a merger of separate, distinct provisions, but is actually unchanged language from the prior law that is supported by "settled judicial and administrative construction."¹⁴⁰ The majority claims that §1231(b)(2) must descend from the prior exclusion provision because that is what would have governed the removal of an alien in the petitioner's situation before the current version of §1231(b)(2) was amended.¹⁴¹ However, as Justice Souter points out, this argument is superfluous because the issue at hand is not who is covered by the process of removal, but what that process requires.¹⁴² Justice Souter concludes by stating that the text being

137. *Id.* at 361.

138. *Id.* See *supra* note 103 and accompanying text.

139. *Id.* (Souter, J., dissenting). Justice Souter explains that the language of the previous expulsion provisions remains substantively the same, with the exception of a few minor changes, codified in §1231(b)(1), while the language of the current deportation provision, codified in §1231(b)(2), tracks the language of its predecessor almost identically. *Id.* Compare §1231(b)(1) with §1227(a). Also compare §1231(b)(2) with § 1253(a).

140. *Jama*, 543 U.S. at 362. Justice Souter's comment here casts great doubt on the majority's argument, as it is clear that although the current Immigration and Nationality Act does bring together the separate exclusion and deportation provisions of the predecessor Act, the separate provisions remain virtually untouched in their separate provisions. Therefore, the judicial history and case law interpreting the previous deportation provision should correspond directly and accurately to the identical language in the current version, which is simply organized differently.

141. *Id.*

142. *Id.* at 364. The question at hand, Justice Souter claims, is what the process codified in §1231(b)(2) requires when removing aliens from the United States. *Id.* The point raised here by the majority deals with who the process

considered has always been interpreted as requiring acceptance from the destination country, and the only textual change in that language actually bolsters that interpretation by not intending any substantive change in the law.¹⁴³

Justice Souter next argues that the Court too quickly disregarded the possibility that, by not requiring an overarching acceptance requirement in paragraph (E), it would be easy for the Government to circumvent the acceptance requirements located in paragraphs (A) and (D).¹⁴⁴ The majority states that a situation allowing circumvention will rarely arise.¹⁴⁵ However, as Justice Souter points out, a similar opportunity to circumvent will be available for the Government to use whenever the country of citizenship is one of the destination options detailed in the previous six clauses of paragraph (E).¹⁴⁶ The petitioner argues that, by not including an acceptance

pertains to, and therefore is outside the scope of what is being decided in this case. Justice Souter argues that whether or not “changes to other sections of the Act . . . enlarged the class of aliens subject to the process is irrelevant” to what the process itself requires. *Id.* at 362.

143. *Id.* Justice Souter continues by stating “[t]ext, statutory history, and legislative history support reading the clause (vii) language . . . as providing that “any country mentioned in the six preceding clauses” must also submit prior acceptance before deportation can be authorized. *Id.*

144. *Id.* at 364. *See id.* at 346-47 (majority opinion)). *See supra* notes 82-88 and accompanying text. The Government claims that paragraph (D) in fact does not contain an acceptance requirement, however Justice Souter discredits this argument by stating that such an argument is simply “untenable.” *Id.* at 362 n.8 (Souter, J., dissenting).

145. *Id.* at 346 (majority opinion). *See supra* notes 84-5 and accompanying text. Justice Souter notes that the only time this would occur is if the alien’s country of citizenship is the same as the country of birth that refused to accept him. *Id.* at 362 (Souter, J., dissenting).

146. *Id.* at 364. *See also id.* at 346-47 (majority opinion). Justice Souter gives the example of an alien who resided in the country of his citizenship for some amount of time before entering the United States: the United States government would not need acceptance from that country under step three because of clause (i) if he came directly from that country, or clause (iii), if he came by way of other countries. *Id.* at 363 (Souter, J., dissenting). Justice Souter continues in a footnote by saying that the importance of this point is not that the Government will pick a country that will allow it to circumvent the earlier acceptance requirements, but that it “will always, or almost always,” have that option available. *Id.* at 363 n.9. The Government, as Justice Souter points out, also recognizes that the country of citizenship will always be covered in one of the first six clauses of paragraph (E). *Id.*

requirement in paragraph (E), the Government would be able to circumvent the explicit acceptance requirements included in paragraph (A) or (D).¹⁴⁷ Justice Souter argues that the Court misconstrued this argument and therefore only replied that “there is no unconditional acceptance requirement at every stage before step three.”¹⁴⁸ The petitioner’s argument, as Justice Souter explains, is not based on any similarity between paragraphs (A) and (D), but on the second step included in paragraph (D).¹⁴⁹

According to Justice Souter, the majority incorrectly dismissed the petitioner’s argument by claiming that deciding whether or not subparagraph (D) has an acceptance requirement was not necessary at that time.¹⁵⁰ However, as Justice Souter opines, it is an extremely timely and important decision because, if there is an acceptance requirement in step two, it makes the possibility of Government circumvention even more problematic.¹⁵¹ The Court, in Justice Souter’s opinion, simply refutes this contention by stating that “other factors suffice to refute the dissent’s more limited contention.”¹⁵²

Justice Souter continues his dissenting opinion by analyzing the Government’s argument that subparagraph (D) requires acceptance only when the Secretary is removing the alien to the country of citizenship, but does not apply an acceptance requirement when the

147. *Id.* at 364.

148. *Id.* See *id.* at 346-47 (majority opinion). See also *supra* notes 88-9 and accompanying text.

149. *Id.* at 364 (Souter, J., dissenting). Justice Souter points out that the petitioner’s circumvention argument did not revolve around paragraphs (A) and (D), but simply on step two of the removal process, which he contended could be circumvented by step three. *Id.* at 364 n.10; see Brief of Petitioner, *supra* note 39, at 27. Justice Souter also explains that the Ninth Circuit relied heavily on this argument when ruling that step three did require acceptance from the destination country. *Jama*, 543 U.S. at 364 n. 10. The Ninth Circuit, in its decision, stated that if the Government’s argument was accepted, then even though a government denied accepting a particular alien, that alien could be airdropped into that country under step three. Brief of Petitioner, *supra* note 39, at 28. Justice Souter criticizes the majority’s dismissal of petitioner’s argument because of his advancement of alternative arguments; the Government refused to credit the second argument and only gave weight to the first. *Jama*, 543 U.S. at 364 n.10.

150. *Id.* at 365.

151. *Id.*

152. *Id.* (quoting *Jama*, 543 U.S. at 347 n. 7 (majority opinion)).

Secretary is granted discretionary authority.¹⁵³ Justice Souter finds this reasoning and interpretation flawed for two reasons.¹⁵⁴ The first reason derives from the textual differences between steps one and two.¹⁵⁵ The first step includes further discretion for the Secretary if the destination country refuses to accept the alien, whereas the second step does not include the discretionary language granted to the Secretary in the absence of acceptance.¹⁵⁶ Justice Souter opines that the discretionary language included in step one shows that Congress was aware of and capable of “preserv[ing] the discretion to act in disregard of a country’s nonacceptance,” and therefore should be interpreted as demonstrating that Congress did not intend to allow the Government to ignore a destination country’s nonacceptance within step two.¹⁵⁷

Justice Souter then explains the second reason to reject the

153. *Id.* (Souter, J., dissenting). Justice Souter describes the Government’s argument as stating that “[w]hen acceptance is not forthcoming . . . the Secretary still has discretion to do what is merely no longer obligatory.” *Id.* at 366.

154. *Id.*

155. *Id.*

156. *Id.* Step one, under subparagraph (C), states that “[t]he Secretary may disregard [an alien’s] designation [of a country] if . . . the government of the country is not willing to accept the alien” *Id.* (quoting § 1231(b)(2)(C)). In contrast, the second step, under subparagraph (D), states that “the [Secretary] shall remove the alien to a country of [citizenship] unless the government of the country . . . is not willing to accept the alien” *Id.* (quoting § 1231(b)(2)(D)). The first step gives discretion whether or not the acceptance requirement is fulfilled, whereas the second step only grants the Secretary authority if the destination country accepts. *Id.*

157. *Id.* Justice Souter points out that the Court relies on similar statutory interpretation in other parts of their argument, where it contends that because an express acceptance requirement was included in parts of § 1231(b)(2), then no such requirement should be read into § 1231(b)(2)(E)(i)-(vi), where a requirement is not express. *Id.* at 366 n.11. The Court feels that there should be even greater reluctance to imply an acceptance requirement when Congress has expressly included one elsewhere in the statute. *Id.* at 341 (majority opinion) (quoting Brief of Petitioner, *supra* note 39). However, as Justice Souter explains, the Court’s reasoning is incorrect because the use of “another” in subparagraph (E)(vii), which attaches an acceptance requirement throughout the first six clauses of the subparagraph. *Id.* at 367 n.11 (Souter, J., dissenting). Justice Souter points out that it is curious how the Court is willing to grant flexibility in other sections of the statute when Congress has explicitly shown that knows how to make such express grants elsewhere in the statute. *Id.*

majority's reasoning and interpretation, which derives from the text of the McCarren-Walter Act of 1952.¹⁵⁸ The text of this statute, the predecessor to the current INS statute, stated that, when there was no acceptance under step two, the Government had to resort to the procedures found in step three.¹⁵⁹ Under the predecessor statute, the Attorney General did not have the same level of discretion as he now claims; this is significant because the legislative history surrounding the amendment indicate that no substantive change was desired.¹⁶⁰ Therefore, as Justice Souter proclaims, given the lack of contradictory language within the text of the statute to Congress's documented intent, the current statute should be interpreted as was the predecessor version.¹⁶¹

The final topic that Justice Souter raises in his dissent is a response to the Court's final argument stating that a ruling in the petitioner's favor would "abridge the exercise of the Executive judgment" and therefore remove the President's power over matters of foreign concern.¹⁶² Justice Souter rejects this argument by pointing out that Congress has expressly limited the Executive's discretion by enacting a limited process that must be followed when

158. *Id.* at 367.

159. *Id.* The text of the McCarren-Walter Act of 1952, in its relevant part, reads:

[i]f the government of the country of citizenship fails finally to advise the Attorney General or the alien within three months . . . whether that government will or will not accept such alien into its territory, then such deportation shall be directed by the Attorney General within his discretion and without necessarily giving any priority or preference because of their order as herein set forth to one of the countries now listed in subparagraph (E).

Id. (quoting McCarren-Walter Act of 1952, § 243(a)).

160. *Id.* Justice Souter points out that the two House Reports on the bill that amended the old Immigration and Nationality Act of 1952 to the current version state that no substantive changes were intended. *Id.* See *supra* note 133 and accompanying text.

161. *Id.*

162. *Id.* at 344, 348 (majority opinion); see *supra* note 96-101 and accompanying text. The Court claims that the petitioner's approach would lead to the lessening of the President's discretion of foreign policy. *Id.*

removing aliens.¹⁶³ Therefore, a discussion over how much discretion the Executive has over the removal of aliens does not advance the task at hand, as the discussion should simply be how much discretion Congress has chosen to appoint it.¹⁶⁴ Justice Souter concludes by stating his opinion that the judgment of the Court of Appeals should be reversed.¹⁶⁵

V. IMPACT

The repercussions and ramifications of the Supreme Court's decision in *Jama v. Immigration and Customs Enforcement*¹⁶⁶ have already had great impact on many lives and will continue to affect many more.¹⁶⁷ After the terrorist attacks of September 11, 2001, and the growing concern to halt illegal immigration and remove aliens who may pose a threat to national security, the ramifications of this decision may reach farther than expected.¹⁶⁸ When the Supreme Court handed down the decision, the New York Times referred to the petitioner's situation as "one of the stickiest political and moral quandaries" confronting the United States government.¹⁶⁹ In light of

163. *Id.* at 368 (Souter, J., dissenting). Congress has the authority to establish such a process, as the Constitution grants Congress's authority over matters dealing with aliens. *Id.* See U.S. Const. art. I, § 8, cl. 4.

164. *Jama*, 543 U.S. at 368.

165. *Id.* at 369.

166. *Id.*

167. See DECISIONS: *Jama v. Immigration and Customs*, 125 S. Ct. 694, 27 NAT'L L.J. 16 (2005) (stating that the decision set forth by the Court will "hasten the return of more than 8,000 Somalis being held in the United States who are subject to deportation or are awaiting hearings").

168. See U.S. Immigration and Customs Enforcement, <http://www.ice.gov/graphics/dro/index.html> (last visited Jan. 6, 2005) (relating the Office of Detention and Removal's mission as "promot[ing] public safety and national security by ensuring the departure from the United States of all removable aliens through the fair and effective enforcement of the nation's immigration laws").

169. Jodi Wilgoren, *Refugees in Limbo: Ordered Out of U.S., but With Nowhere to Go*, N.Y. TIMES, June 4, 2005, at A1; see also A. Gaffar Peang-Meth, *Immigration Law Leaves Certain Detainees in Legal Twilight Zone*, PAC. DAILY NEWS, July 13, 1005 at 20A (quoting a member of the American Immigration Lawyers Association as stating "[i]t's a serious problem because there's nowhere to send them, and if there's nowhere to send them, they go into this strange limbo."

the domestic concerns regarding immigration and terrorism, the Court's ruling that acceptance is not necessary when selecting a country for removal under §1231(b)(2)(E) may become much more important.

A. Judicial Impact

The most logical judicial impact of the *Jama v. Immigration and Customs Enforcement* decision is the effect it will have on pending lawsuits involving Somali refugees who have been ordered removed by the United States government.¹⁷⁰ In many of these cases, the judge has decided to postpone removal to Somalia, the refugees' country of origin, due to the lack of functioning government and the risk of further injury or death upon arrival. Immediately after the handing down of this decision, these immigrants found that they no longer had a defense to their removal to Somalia because the Court ruled that their humanitarian concerns were not sufficient to preclude removal.¹⁷¹ Therefore, it is likely that there will be more actions to deport removable aliens to their country of origin, regardless of the political condition of that country, as well as a greater likelihood of class action lawsuits brought to remove large numbers of removable aliens.¹⁷²

The article also poses the question for the government of "[w]hat to do with people who have no legal right to stay, yet no political route out").

170. See, e.g. *Farah v. Gonzalez*, 140 Fed. Appx. 406 (3d Cir. 2005); *Ali v. Gonzalez*, 421 F.3d 795 (9th Cir. 2005); *Jama v. Gonzalez*, 431 F.3d 230 (5th Cir. 2005).

171. See *Jama*, 543 U.S. at 348 (majority opinion) (stating that an acceptance requirement is unnecessary for the Attorney General to consider conditions of the destination country because other measures such as asylum, withholding of removal, and relief from torture exist).

172. Many circuits have already implemented the decision from the *Jama* case in ordering that concerns regarding the lack of a central government will not stand to preclude the Government from deporting aliens back to Somalia. See *Jama v. Gonzalez*, 431 F.3d at 231 (stating that "we conclude that Somalia's unwillingness or inability to consent in advance to appellants' removal did not preclude their removal to Somalia as the country of their birth."). In *Ali v. Gonzalez*, the Fifth Circuit ruled that:

In *Ali v. Ashcroft* . . . we held that the United States cannot remove aliens to Somalia because 8 U.S.C. §1231 does not permit removal if the country does not have a functioning

An example of the judicial impact is the *Ali v. Ashcroft* case, in which approximately 4,000 Somali refugees, all of whom deportable, now find themselves subject to removal after the *Jama* decision.¹⁷³ The *Ali* case involved a class action lawsuit against 4,000 refugees in Seattle, Washington, whose removal orders had been disregarded due to the lack of functioning government in Somalia to accept the aliens.¹⁷⁴ However, the government appealed, arguing that there was no acceptance requirement and the fact that there was no central government to accept the aliens should not preclude their removal.¹⁷⁵ Therefore, as a result of *Jama*, each of those immigrants now faces removal back to Somalia, a country with no government where they fear for their lives daily.¹⁷⁶ This case is just one example that shows the potential impact of the *Jama* decision upon those who are fearful of returning to their country of origin, and the drawn-out legal battles that may ensue.

B. Administrative Impact

The *Jama v. Immigration and Customs Enforcement* ruling may

government to accept the aliens The Supreme Court subsequently held that Somalia's inability to accept a person does not preclude the alien's removal from the United States *Jama* thus has fore-closed the claim that the Government may not remove aliens to Somalia.

Ali, 421 F.3d at 796. Therefore, the majority of deportable Somali refugees who have not been removed because of the earlier interpretation of §1231 are now subject to removal. *See id.*

173. *See id.*

174. *See id.*

175. *See id.* It was not until the *Jama* decision, when the Court veered sharply from the interpretation it had implemented for decades, that the preclusion of removing to Somalia was overturned. *See Jama*, 543 U.S. at 348.

176. *See* Darryl Fears and Mary Beth Sheridan, *Court Rules Against the Detention of Cubans; Justices Back Deportation of Somali*, WASH. POST, Jan. 13, 2005, at A12 (quoting Nick Gellert, attorney for the Somali refugees, stating that "it would be our sincere hope that Homeland Security doesn't proceed to remove people to Somalia under the current conditions there...It's not just a matter of legal principle...It's a matter of humanitarian issues." In addition, a local Somali leader, Yusuf Ahmed, alluded to the affect on local Somali's by stating "[t]here is no government back home. The refugees who come here run for their lives. I'm sure that when they go back, they will be facing harsh situations of killing, raping or bad things.").

have great impact upon the administrative law system of deportation and removal. The Department of Homeland Security, which has come into existence since this case was initially filed within the court system, has delegated the authority of alien removal to the Office of Detention and Removal.¹⁷⁷ The main goal of this Office is to facilitate the timely removal of deportable aliens in order to maintain and secure the safety of the United States.¹⁷⁸ However, one of the primary issues impeding this mission has been raised by the attempts to remove Keyse Jama subsequent to the *Jama* ruling: even though the Government may legally remove an alien to a country without that country's acceptance, it cannot force them to physically accept our unwanted alien.¹⁷⁹ Due to this logistical quandary, it appears that the newly formed Department of Immigration and Customs Enforcement will face additional backlog and confusion when determining where to send removable aliens who simply are not accepted by the attempted destination country.¹⁸⁰ In fact, the *Jama*

177. See U.S. Immigration and Customs Enforcement, <http://www.ice.gov/graphics/news/factsheets100604ice.htm> (last visited Jan. 7, 2006). The Department of Immigration and Customs Enforcement was established on March 1, 2003 as part of the Department of Homeland Security. *Id.* The Department of Immigration and Customs Enforcement is headed by Assistant Secretary Michael Garcia, who has the authority over immigration and customs issues. *Id.* The Office of Detention and Removal is a subset within the ICE that deals specifically with matters concerning the process of alien removal. *Id.*

178. See U.S. Immigration and Customs Enforcement, *supra* note 168. Officially, the goal of the DRO is to promote public safety and national security by "provid[ing] adequate and appropriate custody management to support removals, to facilitate the processing of illegal aliens through the immigration court, and to enforce their departure from the United States." *Id.*

179. See *supra* note 179-80 and accompanying text.

180. U.S. Immigration and Customs Enforcement, *supra* note 168. This raises further questions regarding the international humanitarian issues invoked through simply returning aliens to their native countries regardless of potential danger. Justice Souter alludes to this issue when he discusses the ability for aliens to be "airdropped surreptitiously" into a country that has refused their entry. *Jama*, 543 U.S. at 364 n.10 (Souter, J., dissenting). Even the Department of Homeland Security has acknowledged that there existed "ongoing armed conflict within Somalia that would pose a serious threat to the personal safety of returning nationals of Somalia (or aliens having no nationality who last habitually resided in Somalia). See Extension of the Designation of Somalia Under Temporary Protected Status Program, 68 Fed. Reg. 139 (July 21, 2003). It has generally been the policy of the United States Government to not conflict with international law,

decision appears to do little to clarify how to deal with and remove such aliens, and further complicates the process of deportation.¹⁸¹

In addition to the judicial impact of forcing many thousands of refugees to now return to their country of origin, there is the equally important logistical dilemma of how the United States will deliver said aliens.¹⁸² For example, approximately four months after the Court made its ruling, the United States Immigration and Customs Enforcement Agency (ICE) unsuccessfully attempted to remove Jama to Puntland, Somalia.¹⁸³ The dissenting opinion, written by Justice Souter, alludes to this difficulty when stating that "even though a government has actually refused acceptance of a removable person . . . the person could be airdropped surreptitiously into that same country."¹⁸⁴ This begs the very difficult and puzzling question of how the Court foresees removal to countries who do not accept the aliens that the United States is attempting to remove.¹⁸⁵ It can be

and therefore not return aliens to their native country when harm or injury may result. See Brief of Petitioner, *supra* note 39, at 42. However, it appears that after the Jama ruling, the United States is free to neglect international law, which may seriously strain the United States' relations with other foreign nations.

181. As a result of the ruling, the Office of Removal and Detention now has even more destination options, which may appear more attractive than unrelated countries, but pose much greater risk and difficulty to effectuate. As was the case with Keyse Jama, it make take much more time and resources to attempt to remove an alien to their native country without acceptance than simply removing them to another country that does acquiesce. This process is further complicated after the *Zadvydas v. Davis* ruling, which held that the United States government may not detain an alien for more than six months unless there is a "reasonable likelihood" of removal in the near future. *Zadvydas*, 533 U.S. at 701.

182. See Eric Black, *Somalia Refuses to Admit Deported Refugee; The United States Had Been Trying to Send Keyse Jama Away for Four Years*, STAR TRIBUNE, Apr. 23, 2005 at 7A (detailing the difficulties in removing an alien after the *Jama* decision stating that acceptance is not necessary).

183. See *id.* The ICE had hired two men to fly Jama from Kenya to the autonomous state of Puntland, Somalia, in order to drop him into his country of origin. *Id.* However, Puntland officials did not respect the legality of Jama's removal, and therefore wouldn't accept him, requiring the ICE to transport him back and replace him in custody. *Id.* In addition to this attempt, there have also been attempts to deliver him to Bossasso, a port city of Puntland, in order to reunite him with members of his clan, however that has also proved difficult. *Id.*

184. *Jama*, 543 U.S. at 364 n.10 (Souter, J., dissenting).

185. See Wilgoren, *supra* note 169 at A1. According to Manny Van Pelt, the spokesman for the Bureau of Immigration and Customs Enforcement, "[i]t can be

expected that there will be much trial and error in determining the best manner of removing such aliens, in order to deliver them safely and effectively from the United States.

In addition to the logistical difficulties presented by the *Jama* decision, the Department of Homeland Security may also face a severe increase in workload and backlog due to appeals of new removal orders. Now that there is no acceptance required, thousands of aliens from China, Cuba, Vietnam and Cambodia are in the position of being removed to their country of origin, against their will, even though they were originally irremovable.¹⁸⁶ In addition to the potential appeals of new removal orders and destinations, the Department of Homeland Security may also be faced with additional appeals and backlog each time a deportation is attempted and refused by the destination country, as was the case with Keyse Jama.¹⁸⁷ The potential for increased workload and complications for the Department of Homeland Security as an administrative agency is very probable, which may in turn have adverse affects on the security and safety of the United States.

Another manner in which the *Jama* decision may impact the administrative processes of the Department of Homeland Security concerns the subject of terrorism, and alien terrorists, which is an extremely important concern in current society. The ruling set forth by the Supreme Court may have a positive impact on the safety of the United States by allowing the Government to remove any harmful or

very challenging removing people to these countries . . . [t]he American public thinks it's just putting a person on a plane and letting him go." *Id.* When asked about how quickly such deportations would occur, a spokesperson for the Bureau of Immigration and Customs Enforcement said the agency was still examining the ruling, but did not allude to any specific timeframe. Florangela Davila, *Ruling Could Lead to Deportations*, SEATTLE TIMES, Jan. 13, 2005 at B3.

186. See Donald M. Kerwin, *Throwing Away the Key: Lifers in INS Custody*, 75 INTERPRETER RELEASE 649, 650-52 (1998).

187. See *supra* note 178-80 and accompanying text. Each time a deportation to a country which has refused acceptance is attempted and rebuffed by that country, the alien being detained may appeal that detention, as well as the length of time they have been detained. It is inevitable that there are going to be more and more refusals, as the United States Government is now encouraged to return aliens to those countries that are unwilling to accept them. Those aliens who are subject to removal "can attest to the practical difficulty, if not impossibility, of acting anyway when a request is refused." *Jama v. I.N.S.*, 329 F.3d at 637 (Bye, J., dissenting).

dangerous alien to the country of their origin, without having to secure that country's acceptance before doing so.¹⁸⁸ However, this new ability to simply return dangerous aliens to their countries of origin worries many, as it would nullify the United States' ability to detain and monitor them, and would therefore allow them to resume their terror-laden activities.¹⁸⁹ There are valid arguments for both removing or continuing to monitor 'dangerous' aliens and there is potential for the Department of Homeland Security to elect either approach as the one they will implement when removing those aliens suspected of terrorist activity.

VI. CONCLUSION

The Supreme Court's decision in the *Jama v. Immigration and Customs Enforcement* case will have ramifications reaching far beyond the impact of the petitioner Keyse Jama. The decision will impact the lives of thousands of aliens in the United States, most notably and imminently those from Somalia awaiting deportation. Although both the majority and dissent laid out very strong arguments for the interpretation they had wished to see, it was the majority's desire to strictly interpret the text of the statute that prevailed. Given the current climate of our country with regards to immigration and our concerns with national safety, the decision of this case appears to be very timely. It will have great impact on our ability to remove those aliens deemed harmful or dangerous, and gives greater latitude to potential destinations for such removals. However, neither the majority nor dissent touched upon how this would directly impact the war on terrorism, or how it would affect our relationships with other world powers. Is it possible that an easier removal process not requiring acceptance may be more

188. See Darryl Fears and Mary Beth Sheridan, *Court Rules Against Detention of Cubans; Justices Back Deportation of Somali*, WASH. POST, Jan. 13, 2005, at A12 (stating that the inability to remove aliens to Somalia would be concerning in light of that country's link to terrorism).

189. See 8 U.S.C. § 1537(b)(2)(C) (2005) (granting the Attorney General the ability to continue detaining alien's suspected of terrorism when "no country is willing to receive such an alien" until an accepting country is found. This continued detention allows the Government to monitor their activities and maintain the safety of the United States).

detrimental to national security than simply detaining them until there is a country that is willing to receive them? Will other nations become agitated at the United States use of power when simply “dumping” harmful or unwanted aliens upon those countries less equipped to protest, therefore increasing disdain for the United States? The policies utilized by the Department of Homeland Security and the decisions of lower courts following this standard may have an incredible impact upon national security and foreign relations for years to come.