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Casenote

Return to Sender: Supreme Court Authorizes Removal of Aliens Without Prior Consent from the Destination Country in *Jama v. ICE*

In a 5-4 decision in *Jama v. ICE*,¹ the United States Supreme Court rejected prior interpretations of alien removal statutes and held that the Secretary of Homeland Security² (the “Secretary”) may remove aliens without prior consent from the receiving country.³ The decision has important ramifications for both statutory interpretation and immigration law. The majority, written by Justice Scalia, concluded that in the new version of the removal statute, 8 U.S.C. § 1231,⁴ the rule of statutory interpretation, known as the last antecedent rule, precluded the court from reading an acceptance requirement into subsection

1. *Jama v. ICE*, 543 U.S. 335 (2005).

2. Although 8 U.S.C. § 1231 still refers to the Attorney General, the Secretary of Homeland Security has assumed responsibility for the Attorney General’s duties with respect to the removal of aliens. See Homeland Security Act of 2002 § 551(d)(2). This article will therefore refer to the Secretary where the Attorney General was once appropriate.

3. *Jama v. ICE*, 543 U.S. at 352; accord 8 U.S.C. § 1231(b)(2)(E) (2001).

4. 8 U.S.C. § 1231 (2001).

(b)(2)(E)(iv).⁵ In contrast, the dissent concluded that use of the last antecedent rule was inappropriate in light of prior statutory interpretations and agency decisions, and that Congress intended a requirement of acceptance throughout the entire statute.⁶ Not only did the Justices disagree on how to interpret the statute, but the majority's interpretation of section 1231(b)(2)(E) eliminated an important barrier in the alien removal process, one which has the potential to complicate U.S. foreign relations.

I. FACTUAL BACKGROUND

In 1979 Keyse Jama ("Jama") was born in Somalia.⁷ He and his family fled to Kenya in 1991 to escape inter-tribal warfare.⁸ A few years later, Jama applied for admission to the United States under refugee status and was accepted in 1996.⁹ Jama moved to Minnesota where he worked and attended school.¹⁰ Three years later, Jama was convicted of third degree assault, and was sentenced to one year in jail.¹¹ The state released him on probation for three years, but sent Jama to prison after he violated his probation.¹²

At the end of Jama's prison term, the Immigration and Naturalization Service¹³ ("INS") brought removal proceedings against him.¹⁴ The presiding immigration judge found Jama removable based on his conviction.¹⁵ During this proceeding, Jama attempted to avoid removal by: (1) filing for asylum, claiming he feared persecution if he was returned to Somalia; (2) filing an application for relief under the United Nations Convention Against Torture;¹⁶ and (3) filing an application for permanent resident status.¹⁷ The judge rejected Jama's claims for

5. *Jama v. ICE*, 543 U.S. at 343-45.

6. *Id.* at 355.

7. *Jama v. INS*, 2002 WL 507046 *1 (D. Minn. 2002), *rev'd*, *Jama v. ICE*, 543 U.S. 335. The relevant facts are undisputed and have not changed. *Id.*

8. *Id.* at *1.

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. The Department of Immigration and Naturalization Service ("INS") has merged and is now referred to as the Department of Immigration and Customs Enforcement ("ICE"). 6 U.S.C.A. §§ 542, 291 (2003). In addition, the Department of Homeland Security and its Bureau of Border Security assumed responsibility for the removal program in 2003. U.S.C. §§ 251(2), 252(a) (2000 & Supp. II).

14. *Jama v. INS*, 2002 WL 507046 at *1.

15. *Id.*

16. *Id.*; 8 C.F.R. § 208.16 (2005).

17. *Jama v. INS*, 2002 WL 507046 at *1.

relief, and ordered his removal.¹⁸ Jama elected not to choose a country for removal, and the judge ordered him removed to his birth country, Somalia, under section 1231(b)(2)(E)(iv).¹⁹ Jama appealed the order to the Board of Immigration Appeals ("BIA"), but the BIA affirmed.²⁰

Jama then filed a petition for habeas relief in the United States District Court for the District of Minnesota.²¹ He conceded that he was removable, but challenged the manner in which the INS planned to execute the order.²² Jama argued that under section 1231(b)(2)(E)(iv), the INS must receive authority from the Somalian government before sending him there.²³

Jama's arguments turned on the text of the removal statute, which sets out a step-by-step process to guide the Secretary in designating an alien's removal country.²⁴ According to the statute, the Secretary must

18. *Id.*

19. *Id.*

20. *Jama v. INS*, 2002 WL 507046 at *1. Jama did not appeal this decision to the court of appeals, deciding instead to bring collateral proceedings under the habeas statute, 28 U.S.C. § 2241. *Jama v. INS*, 2002 WL 507046 at *2.

21. *Jama v. INS*, 2002 WL 507046 at *2

22. *Id.*

23. *Id.*

24. See 8 U.S.C. § 1231 (2001). The statute covering removal procedure, 8 U.S.C. § 1231(b) states that:

(2) Other aliens

Subject to paragraph (3)—

(A) Selection of country by alien

Except as otherwise provided in this paragraph—

- (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 in, 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.

first defer to the alien's choice of removal country.²⁵ However the Secretary may disregard the alien's choice if the country does not accept the alien or if the alien declines to choose a country for removal.²⁶ The Secretary will then designate the country of which the alien is a "subject, national, or citizen," unless the country does not accept the alien.²⁷ If the alien still cannot be removed under these previous steps, then the Secretary proceeds to section 1231(b)(2)(E), which states:

[T]he [Secretary] shall remove the alien to any of the following countries: (i) The country from which the alien was admitted to the United States. (ii) The country in which is located the foreign port from which the alien left for the United States . . . (iv) *The country in which the alien was born . . .* (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.²⁸

(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 a subject, national, or citizen unless the government of the country—

(i) does not inform the Attorney General or the alien finally, 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

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.

(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.

25. 8 U.S.C. § 1231(b)(2)(A) (2001).

26. *Id.* § 1231(b)(2)(C).

27. *Id.* § 1231(b)(2)(D).

28. *Id.* § 1231(b)(2)(E) (emphasis added).

If, after this designation, the alien cannot be removed, then the alien must either be detained or released in accordance with other statutory provisions.²⁹

Jama's argument, that section 1231(b)(2)(E)(iv) required the Secretary to receive acceptance from Somalia before removal, relied on the language in clause (vii) stating, "another country whose government will accept him"³⁰ Jama argued that the phrase modified not only clause (vii), but clauses (i) through (vi) as well.³¹ Jama further argued that because Somalia lacked a functioning government from which the Secretary could seek acceptance, he should not be removed until a Somalian government is created and affirmatively accepts him.³² Additionally, Jama argued that he should be released back into the United States because the Somalian government would not accept him in the foreseeable future.³³

In contrast, the INS argued that section 1231(b)(2)(E) did not require acceptance from the receiving country.³⁴ Specifically, the INS argued that although subsections (A)-(D) of section 1231(b)(2) may require acceptance, Congress did not explicitly require acceptance in subsection (E), and for this reason, removal could be effected without acceptance from the receiving country.³⁵

The district court rejected the INS's arguments and held that removal was inappropriate without advance consent from Somalia.³⁶ On appeal, the Eighth Circuit reversed, concluding that section 1231(b)(2)(E) did not require acceptance.³⁷ Jama appealed the Eighth Circuit decision, and the Supreme Court affirmed, finally settling Jama's removal to Somalia.³⁸

II. LEGAL BACKGROUND

The new version of the removal statute, 8 U.S.C. § 1231, was enacted fairly recently and few court decisions directly interpret the language at

29. See 8 U.S.C. § 1231(a) (2001).

30. *Jama v. ICE*, 543 U.S. 335, 342 (2005).

31. *Id.*

32. *Jama v. INS*, 2002 WL 507046 at *2.

33. See *id.* at *n. 1, *1, *2. Jama was detained beyond the statutory detention period for criminal aliens, and any stay of his removal would result in his release back into the United States. See 8 U.S.C. § 1231(a)(1).

34. *Jama v. INS*, 2002 WL 507046 at *2.

35. *Id.* at *4.

36. *Jama v. ICE*, 543 U.S. at 338.

37. *Id.*

38. *Id.* at 352.

issue in *Jama*.³⁹ However, the statute evolved from two similarly worded statutes, thereby providing a foundation for its analysis.⁴⁰

A. Historical Interpretations of Section 1231's Predecessors Included an Acceptance Requirement

The legislation that led to section 1231 was a combination of two previously distinct removal statutes; one for deportable aliens and one for excludable aliens.⁴¹ A "deportable" alien was one who had originally been accepted into the United States, but whose status was revoked for reasons such as committing a crime.⁴² An "excludable" alien, on the other hand, was one who had never been accepted into the United States, and was therefore removable even if present on American soil.⁴³ The removal statutes for deportable aliens and excludable aliens were very similar, but not identical, and when the statutes were combined into the removal statute, the language remained substantially unchanged.⁴⁴ Courts have generally read an acceptance requirement into the removal statute for deportable aliens as well as excludable aliens, and used interpretations for one statute interchangeably with the other.⁴⁵

1. Courts read an acceptance requirement into the former statute governing removal of "deportable" aliens. The Supreme Court interpreted the removal statute for deportable aliens as requiring acceptance from the receiving country.⁴⁶ In *Tom Man v. Murff*,⁴⁷ a Chinese alien entered the United States on a British ship, and "long overstayed the time permissible."⁴⁸ The alien was deemed deportable, but could not be removed because the United States did not recognize China's communist government, and therefore could not request acceptance from China's government.⁴⁹ The district court ordered the

39. *Jama v. ICE*, 543 U.S. 335, 349-50 (2005).

40. *Id.*

41. *Id.*; see also 8 U.S.C. §§ 1227, 1253 (1994).

42. See 8 U.S.C. § 1251 (1994).

43. See *id.*

44. See 8 U.S.C. §§ 1227, 1253; see also 8 U.S.C. § 1231 (2001).

45. See *Tom Man v. Murff*, 264 F.2d 926, 928 (1959) (reading acceptance requirement into deportation statute); *Amanullah v. Cobb*, 862 F.2d 362, 365 (1st Cir. 1988) (Coffin, C.J. and Aldrich, S.C.J., concurring) (relying on *Tom Man* and reading acceptance requirement into exclusion statute).

46. *Tom Man*, 264 F.2d at 928; *Rogers v. Lu*, 262 F.2d 471, 471 (D.C. Cir. 1958).

47. 264 F.2d 926 (1959).

48. *Tom Man*, 264 F.2d at 927.

49. *Id.* at 928.

release of the alien back into the United States, and the INS appealed.⁵⁰ The court of appeals affirmed the release of the alien, reasoning that "deportation under any of these [sections] is subject to the condition expressed in the seventh subdivision: i.e. that the 'country' shall be 'willing to accept him 'into its territory.'"⁵¹ Clearly, the court construed the statute as requiring acceptance throughout.⁵² In addition, the court noted that "it would be to the last degree cumbersome and oppressive to shuttle an alien back and forth on the chance of his acceptance, when it was possible to ascertain the truth in advance by inquiry."⁵³

2. Courts also read an acceptance requirement into the former removal statute governing "excludable" aliens, but judicial support for the requirement was less settled. The acceptance requirement for deportable aliens was relatively stable under the decision in *Tom Man*; however, the law was less settled in the area of excludable aliens.⁵⁴ For example, in *Amanullah v. Cobb*,⁵⁵ a majority of the First Circuit Court of Appeals held that acceptance was required prior to the removal of excludable aliens,⁵⁶ while the Second Circuit declined to require acceptance in *Menon v. Esperdy*.⁵⁷

The majority in *Amanullah* reasoned that when Congress adopted the exclusion statute, it "manifested its intent to establish a common procedure for both excludable and deportable aliens."⁵⁸ Thus, the court relied on *Tom Man* and held that acceptance by the receiving country was required for removal.⁵⁹ The court of appeals further reasoned that "Congress could not have intended to permit the United States government to engage in the practice of placing refugees in orbit: in flight from country to country, none willing to accept them."⁶⁰

Though concurring, Judge Aldrich vigorously disagreed with the majority's disregard of "the substantive difference, and interests, between refusing admission to an illegal alien, and expelling one that is

50. *Id.* at 927.

51. *Id.* at 928.

52. *Id.*

53. *Id.*

54. See, e.g., *Menon v. Esperdy*, 413 F.2d 644, 654 (2d Cir. 1969); *Amanullah*, 862 F.2d at 366 (Coffin, C.J. and Aldrich, S.C.J., concurring).

55. *Amanullah*, 862 F.2d at 362 (Coffin, C.J. and Aldrich, S.C.J., concurring).

56. *Id.* at 366.

57. *Esperdy*, 413 F.2d at 654.

58. *Amanullah*, 862 F.2d at 365.

59. *Id.* at 366.

60. *Id.* at 365.

already here.⁶¹ Judge Aldrich argued that the processes of removing a deportable alien and an excludable one were distinct and should be treated as such.⁶² He contended that aliens who entered the United States with permission and then became deportable should have greater rights than excludable aliens who were never admitted into the country in the first place.⁶³ Thus, he concluded that removal of a deportable alien may require acceptance from the receiving country, but removal of an excludable alien did not.⁶⁴

Although the acceptance requirement may have resolved some issues with the removal process, it engendered problems of its own. These problems are discussed in paragraph C, after a brief review of the rule of the last antecedent.

B. Statutory Interpretations of Similarly Structured Statutes Conformed to the Rule of the Last Antecedent

Interpretation of prior removal statutes was important to the decision in *Jama*, but the statutory text proved essential to its holding.⁶⁵ Early Supreme Court cases manifested the Court's willingness to interpret statutes similar to section 1231 (those with a catchall at the end of a series) by applying the catchall to every word in the series.⁶⁶ In *United States v. Standard Brewery*,⁶⁷ the Supreme Court analyzed a 1918 statute banning liquor production.⁶⁸ The statute prohibited the use of food products for making "beer, wine, or other intoxicating malt or vinous liquor."⁶⁹ The Standard Brewery Company ("Standard"), indicted for violating this statute, argued that the modifying clause, "other intoxicating liquors," applied to beer and wine, and because its beer did not contain enough alcohol to be intoxicating, the statute should not apply.⁷⁰ The Supreme Court agreed, reasoning that where several words are followed by a general expression, the expression applies to all words, not just the last.⁷¹ Therefore, the clause "intoxicating liquors"

61. *Id.* at 369 (Aldrich, J., concurring). Although Judge Aldrich disagreed with the majority's reasoning, he concurred for "special factual reasons." *Id.*

62. *Id.* (Aldrich, J., concurring).

63. *Id.* (Aldrich, J., concurring).

64. *Id.* (Aldrich, J., concurring).

65. See *Jama v. ICE*, 543 U.S. at 341-42.

66. See, e.g., *United States v. Standard Brewery, Inc.*, 251 U.S. 210, 218 (1920); *United States v. United Verde Copper Co.*, 196 U.S. 207 (1905).

67. *Standard Brewery, Inc.*, 251 U.S. at 210.

68. *Id.* at 214-15.

69. *Id.* at 217.

70. *Id.* at 215.

71. *Id.* at 218.

applied to the previous words, "beer and wine." Accordingly, the Supreme Court did not apply the statute to Standard's production of half percent alcohol.⁷² Supporting this conclusion, the Court noted that courts must give effect to every word in a statute, and therefore cannot ignore the word "other" in the statute.⁷³

However, recent cases interpreting similar statutes limited catchall phrases according to the rule of the last antecedent.⁷⁴ For example, in *F.T.C. v. Mandel Brothers, Inc.*,⁷⁵ the Supreme Court held that the last antecedent rule must be utilized when construing statutes.⁷⁶ Under the antecedent rule, "a limiting clause or phrase . . . should ordinarily be read as modifying only the noun or phrase that it immediately follows" ⁷⁷

The approach to statutory construction in *Mandel* was recently affirmed in *Barnhart v. Thomas*,⁷⁸ a case which analyzed a statute very similar in structure and grammar to the statute in *Jama*.⁷⁹ In *Thomas* the court analyzed a portion of the Social Security Act⁸⁰ which allowed a person with a disability to receive payments if "his . . . impairments are of such severity that he is not only *unable to do his previous work* but cannot . . . engage in *any other kind of substantial gainful work which exists in the national economy*."⁸¹ On appeal, the court of appeals held that the clause "exist within the national economy" modified not only "any other kind of substantial gainful work," but also the earlier words "previous work."⁸²

Justice Scalia, writing for a unanimous Supreme Court, reversed, stating that "[t]he Third Circuit's reading disregards—indeed, is precisely contrary to—the grammatical 'rule of the last antecedent.'"⁸³

72. *Id.* at 218. The half percent of alcohol in Standard's beverages did not render them intoxicating. *Id.* at 219-20.

73. *Id.* at 218.

74. *See, e.g., Barnhart v. Thomas*, 540 U.S. 20, 26 (2003); *Federal Trade Commission v. Mandel Bros., Inc.*, 359 U.S. 385, 389 (1959).

75. 359 U.S. 385 (1959).

76. *Id.* at 390.

77. *Thomas*, 540 U.S. at 26.

78. 540 U.S. 20 (2003).

79. *See* 42 U.S.C. § 423 (2001).

80. Social Security Act, 42 U.S.C. §§ 301-1399 (2001).

81. *Thomas*, 540 U.S. at 21-22 (emphasis added).

82. *See id.* at 23, 26.

83. *Id.* at 26. Scalia applied the rule of the last antecedent to the facts of the case: "[T]he . . . rule of the last antecedent" states that "a limiting clause or phrase (here, the relative clause 'which exists in the national economy') should ordinarily be read as modifying only the noun or phrase that it immediately follows (here, 'any other kind of substantial gainful work')." *Id.* at 26. Scalia analogized to parents, about to leave town,

When presented with a similar statute in *Jama*, Justice Scalia would again rely on the rule of the last antecedent to interpret section 1231.

C. The Court's holding in Zadvydas v. Davis set the Stage for a New Interpretation of the Removal Procedure

This section turns now to the issues engendered by the acceptance requirement in the alien removal statute. Because cases like *Tom Man* and *Amanullah* required affirmative acceptance prior to an alien's removal, aliens remained in detention for long periods of time when the Secretary could not find an accepting country.⁸⁴ The former removal statutes therefore became vulnerable to constitutional attacks by aliens detained for indefinite periods of time.⁸⁵ Because the current section 1231 evolved from the former removal statutes, it was similarly vulnerable to constitutional attacks.⁸⁶

Section 1231(a)(1)(A) states that, except as otherwise provided, "when an alien is ordered removed, the Attorney General shall remove the alien from the United States within a period of 90 days. . . ."⁸⁷ However, the statute permits an alien to be detained beyond the removal period if the alien is a risk to the community or unlikely to comply with an order of removal.⁸⁸ The statute does not expressly limit the extended removal period and, as a result, aliens who could not be removed, for example due to lack of acceptance from the receiving country, spent indefinite periods of time imprisoned.⁸⁹

In *Zadvydas v. Davis*,⁹⁰ an alien had been ordered removed, but no country would accept him.⁹¹ Concerned about his release back into the United States, the INS refused to release him from confinement.⁹² The

warning their children against having parties—he stated:

[f]or example . . . parents, who, before leaving their teenage son alone in the house for the weekend, warn him, "You will be punished if you throw a party or engage in any other activity that damages the house." If the son nevertheless throws a party and is caught, he should hardly be able to avoid punishment by arguing that the house was not damaged. The parents proscribed (1) a party, and (2) any other activity that damages the house.
Id. at 27.

84. See, e.g., *Zadvydas v. Davis*, 533 U.S. 678, 689 (2001).

85. See Kevin Costello, *Without a Country: Indefinite Detention as a Constitutional Purgatory*, 3 U. PA. J. CONST. L. 503, 538, (2001); see also *Zadvydas*, 533 U.S. at 682.

86. See Costello, *supra* note 85, at 512.

87. 8 U.S.C. § 1231(a)(1)(A) (2001).

88. 8 U.S.C. § 1231(a)(6) (2001).

89. See Costello, *supra* note 85, at 504.

90. *Zadvydas*, 533 U.S. at 678.

91. *Id.* at 684-85.

92. *Id.*

alien challenged the extended detention period as violating due process.⁹³ The Supreme Court construed the removal period based on the “cardinal principal’ of statutory interpretation . . . that when an Act of Congress raises ‘a serious doubt’ as to its constitutionality, ‘th[e] Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.’”⁹⁴ The majority, therefore, read the statute as “limit[ing] the alien’s post-removal-period detention to a period *reasonably necessary* to bring about that alien’s removal from the United States.”⁹⁵ Under this holding, aliens from countries without functioning governments could be released back into the United States because an acceptance would not likely occur in a reasonable period of time.

This interpretation resolved the constitutional attacks against the removal statute, but raised important policy issues, some of which were highlighted by Justice Scalia’s dissent in *Zadvydas*.⁹⁶ Justice Scalia argued that a criminal alien who claims a constitutional right to be released back into the United States just because no other country has accepted the alien was “at bottom a claimed right of release into this country by an individual who *concededly* has no legal right to be here” and that “[t]here is no such constitutional right.”⁹⁷ This argument echoed Judge Aldrich’s concurrence in *Amanullah*, which stressed the lack of rights granted to excludable aliens.⁹⁸ Justice Scalia may not have convinced the majority in *Zadvydas* that releasing criminal aliens was inappropriate, but he had another opportunity to persuade the majority a few years later in *Jama*.

III. COURT’S RATIONALE

In *Jama* the Supreme Court analyzed whether the removal statute required advance acceptance from a destination country prior to alien removal.⁹⁹ Specifically, the Court addressed whether the phrase, “another country whose government will accept the alien” modified clauses (i) through (vi) of section 1231, or whether it applied only to the last clause, (vii).¹⁰⁰

93. *See id.* at 685.

94. *Id.* at 689 (quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932)).

95. *Id.* (emphasis added).

96. *See id.* at 702-05 (Scalia and Thomas, JJ., dissenting).

97. *Id.* at 703 (Scalia and Thomas, JJ., dissenting).

98. *See Amanullah*, 862 F.2d at 369 (Aldrich, J., concurring).

99. *Jama v. ICE*, 543 U.S. 335, 341 (2005).

100. *Id.* at 341-42.

A. The Majority Relied Heavily on the Text of the Statute and Utilized the Rule of the Last Antecedent to Arrive at its Conclusion

As a framework for its analysis, the majority, written by Justice Scalia, separated section 1231(b) into "four consecutive removal commands."¹⁰¹ Section 1231(b)(2)(A)-(C) constituted step one; section 1231(b)(2)(D) constituted step two; section 1231(b)(2)(E)(i)-(iv) constituted step three; and section 1231(b)(2)(E)(vii) constituted step four.¹⁰² Because steps one and two did not apply to *Jama*, the majority analyzed step three and concluded that Congress did not intend an acceptance requirement.¹⁰³ The Court reasoned that because steps one, two, and four of the statute contained an express acceptance requirement, the absence of an express requirement in step three must have been intentional.¹⁰⁴ The Court stated that it "do[es] not lightly assume that Congress has omitted from its adopted text requirements that it nonetheless intends to apply, and our reluctance is even greater when Congress has shown elsewhere in the same statute that it knows how to make such a requirement manifest."¹⁰⁵

The Court also relied on *Thomas*, concluding that the last antecedent rule required that the modifier "another country willing to accept the alien" applied only to the immediately preceding noun or phrase.¹⁰⁶ The Court also distinguished *Standard Brewery* and like cases because the statute in *Standard Brewery* contained a series separated by commas, not periods.¹⁰⁷

B. Foreign and Domestic Policy Concerns Weighed Heavily in the Majority's Decision

The majority also addressed the constitutionality concerns noted in *Zadvydas*. The Court recognized that if acceptance is required at every

101. *Id.* at 341.

102. *Id.*

103. *Id.* at 341-42.

104. *Id.*

105. *Id.* at 341.

106. *Id.* at 342-43. For additional support, the Court noted that in step three, each clause (i) through (vi)) was distinct because each ends with a period, "strongly suggesting that each may be understood completely without reading any further." *Id.* at 344.

107. *Id.* at 345 n.4. The Court also stated that the term "another" may not even operate, in this context, as a connector, but instead, just a "term of differentiation." *Id.* at 343 n.3. Congress could have placed the word "another" in the last clause to mean a country not previously tried before. *Id.* The Court also concluded that although clause (vii) was amended in 1996 from "any country" to "another country," the change was "attributable to nothing more than stylistic preference." *Id.*

step, then aliens will suffer the “removable-but-unremovable limbo,” which invariably resulted in the release of criminal aliens into American society.¹⁰⁸ To this proposition, the majority responded: “If this is the result that obtains when the country-selection process fails, there is every reason to refrain from reading restrictions into that process that do not clearly appear—particularly restrictions upon the third step, which will often afford the Attorney General his last realistic option for removal.”¹⁰⁹

The majority also noted that its interpretation of the statute adhered to the customary policy of deference to the President in matters of foreign affairs.¹¹⁰ The Court stated that because removal decisions implicate American relations with foreign powers, rules not clearly mandated by Congress should not be read into the statute.¹¹¹ The majority reasoned that the Secretary’s discretion should be given great deference to decide whether removal is appropriate or inappropriate, and that such discretion “strikes a better balance between securing the removal of inadmissible aliens and ensuring their humane treatment. . . .”¹¹² Further, the majority concluded that the Secretary should have enough flexibility to take practical and geopolitical concerns into account when selecting the removal country, and that an acceptance requirement would “abridge that exercise of Executive judgment.”¹¹³

C. *The Majority Discussed Legislative History and Prior Interpretations of the Removal Statute*

The last portion of the majority opinion discussed legislative history and prior interpretations of the removal statute.¹¹⁴ The Court highlighted the evolution of the removal statute, from its previously distinct deportation and exclusion statutes, and ultimately concluded that Jama would have been “excludable” rather than “deportable.”¹¹⁵ This conclusion allowed the majority to ignore deportation case law like *Tom Man*, which clearly required acceptance at every step, and scrutinize exclusion cases like *Amanullah* and *Esperdy* more fully.¹¹⁶ Ultimately, the

108. *Id.* at 347.

109. *Id.* at 348.

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.* at 344. The majority grounded its executive deference in the text of section 1231. For instance, the majority concluded that much of the statute uses the word “may,” a word commonly associated with discretion. *Id.* at 346.

114. *Id.* at 349-52.

115. *Id.* at 349.

116. *Id.* at 350-51.

majority concluded that prior judicial construction of the alien removal statute was not "settled" as Jama argued, but rather "too flimsy to justify" reading acceptance into the statute when the text and structure demanded otherwise.¹¹⁷

D. The Dissent Analyzed the Statutory Text and Ultimately Rejects the Last Antecedent Rule

The dissent, written by Justice Souter and joined by Justices Stevens, Ginsberg, and Breyer, argued that the INS must receive acceptance prior to removing an alien to that country.¹¹⁸ In its analysis, the dissent split the removal process into three steps—not four.¹¹⁹ The dissent referred to the majority's method of dividing the statute into four sections as merely a persuasive device, noting that no court had ever split the statute in such a manner.¹²⁰ The dissent argued that by using four steps instead of three, the majority could state that step three lacked an explicit acceptance requirement; however, when viewed as three steps instead of four, every step contains an acceptance requirement.¹²¹

Acknowledging that its own interpretation countered the rule of the last antecedent, the dissent argued that the rule is not always controlling; rather, it can "assuredly be overcome by other indicia of meaning."¹²² The dissent found such indicia of meaning in the text, structure, history, and legislative history of the statute.¹²³ First, the dissent noted the language in the statute "naturally read[s] as alluding to a common characteristic of all the countries in the series, a willingness to take the alien."¹²⁴ Relying on cases such as *Standard Brewery*, the dissent concluded the modifier in clause (vii) must apply to clauses (i) through (vi).¹²⁵

117. *Id.* at 349, 351-52.

118. *Id.* at 354 (Souter, Stevens, Ginsburg and Breyer, JJ., dissenting).

119. *Id.* at 352-53 (Souter, Stevens, Ginsburg and Breyer, JJ., dissenting).

120. *Id.* at 353 n.2 (Souter, Stevens, Ginsburg and Breyer, JJ., dissenting).

121. *Id.* (Souter, Stevens, Ginsburg and Breyer, JJ., dissenting).

122. *Id.* at 355 (Souter, Stevens, Ginsburg and Breyer, JJ., dissenting).

123. *Id.* at 354 (Souter, Stevens, Ginsburg and Breyer, JJ., dissenting).

124. *Id.* (Souter, Stevens, Ginsburg and Breyer, JJ., dissenting).

125. *Id.* at 354-55 (Souter, Stevens, Ginsburg and Breyer, JJ., dissenting).

E. The Dissent Relied on the Prior Interpretations of Removal Statutes

The dissent agreed with the majority that the current removal statute combined the prior exclusion and deportation statutes.¹²⁶ However, unlike the majority, the dissent concluded that the present statute "in no way resulted from a textual merger of two former provisions."¹²⁷ Rather, the dissent explained that the current statute represented the unchanged language of both deportation and exclusion statutes, each represented in a different paragraph.¹²⁸ This argument allowed the dissent to utilize the strong body of case law interpreting the previous deportation and exclusion statutes, cases such as *Tom Man* and *Amanullah*, as evidence of settled law requiring acceptance before removal.¹²⁹ Further, the dissent argued that Jama would have been considered a "deportable" alien, and thus, deportation case law, such as *Tom Man*, should stand as precedent to compel the same result.¹³⁰

Moreover, the dissent argued that the majority's interpretation gave the government too much power, beyond that which Congress had intended to grant.¹³¹ The dissent noted that the majority's interpretation allows the government to avoid the explicit acceptance requirement in step two by removing an alien to the same country without acceptance in step three.¹³² This interpretation, the dissent concluded, would render step two of the statute superfluous.¹³³ Moreover, this interpretation would allow aliens to be "airdropped surreptitiously" into a country which has explicitly refused to accept the alien, a prospect which the dissent firmly disagreed with.¹³⁴

F. Summary

Both the majority and dissent had strong rationales supporting their respective opinions, but for now, the majority has settled the construction of section 1231(b)(2)(E) by holding that no acceptance is required by the destination country prior to removal.

126. See *id.* at 356 (Souter, Stevens, Ginsburg and Breyer, JJ., dissenting).

127. *Id.* at 361 (Souter, Stevens, Ginsburg and Breyer, JJ., dissenting).

128. *Id.* at 361-62 (Souter, Stevens, Ginsburg and Breyer, JJ., dissenting).

129. *Id.* at 359-60 (Souter, Stevens, Ginsburg and Breyer, JJ., dissenting).

130. See *id.* (Souter, Stevens, Ginsburg and Breyer, JJ., dissenting).

131. *Id.* at 368 (Souter, Stevens, Ginsburg and Breyer, JJ., dissenting).

132. *Id.* at 363 (Souter, Stevens, Ginsburg and Breyer, JJ., dissenting).

133. *Id.*

134. *Id.* at 364 & n.10.

IV. IMPLICATIONS

The majority's decision in *Jama* reserves a large amount of discretion to the Secretary in matters of foreign policy and essentially eliminates the constitutional purgatory highlighted in *Zadvydas*. Although solidifying and resolving some key issues in immigration law, the decision also leaves new issues for future court resolution.

The United States, mainly out of respect for foreign governments, generally does not defy a foreign country's choice not to accept an alien.¹³⁵ Although the decision in *Jama* seemingly allows the Secretary to trample over this delicate framework of foreign policy, in reality, the decision merely preserves the discretion which the Secretary always had. The Secretary likely will not defy a foreign country's wishes by surreptitiously dropping an alien off at its border, nor will the Secretary have many opportunities for such defiance.¹³⁶ Rather, in situations where a country has been silent on the issue of acceptance, or where a country has no functioning government, the Secretary will then resort to removal without prior consent.¹³⁷

The decision in *Jama* also eliminates the constitutional concerns raised in *Zadvydas*, but in a manner most likely more amenable to the United States government and to the American public. Prior to the decisions in *Jama* and *Zadvydas*, aliens found themselves trapped in a type of "constitutional purgatory" whereby they were detained indefinitely because they had been found removable, but could not be removed because the United States had not procured the foreign country's consent.¹³⁸ The Court in *Zadvydas* responded to these concerns by mandating the release of criminal aliens back into American society if their removal would not occur in the reasonably foreseeable future.¹³⁹ This decision worried those who did not favor the idea of releasing criminals back into the public just because the government could not secure their removal due to a lack of foreign policy.¹⁴⁰ However, under the *Jama* decision, aliens likely will no longer suffer indefinite prison

135. See Brief for the Respondent at 15, *Jama v. ICE*, 543 U.S. 335, No. 03-674 (2005).

136. *Id.* at 14.

137. See *id.*

138. Kevin Costello, in his article *Without a Country: Indefinite Detention as a Constitutional Purgatory*, described the horrors of "constitutional purgatory" that aliens endured when no country would accept them. Costello, *supra* note 85, at 503-07. Costello's term, "constitutional purgatory," was the removable—but—unremovable limbo referred to in *Zadvydas*. *Id.* at 505. Costello described the limbo as an "awkward posture," which forced an alien's freedom to depend on U.S. foreign policy. *Id.*

139. *Zadvydas v. Davis*, 533 U.S. 678, 689 (2001).

140. See *id.* at 709 (Kennedy, Rehnquist, Scalia, and Thomas, JJ., dissenting).

terms, nor be released back into American society when no country has accepted them. Instead, under the *Jama* ruling, the Secretary can proceed to remove aliens to countries he or she deems proper, despite a lack of acceptance from the government of the receiving country.

In response to *Jama*, one author has proffered that sending aliens to countries who have not accepted them may subject aliens to possible persecution in the removal country.¹⁴¹ In addition, sending an alien to a country which will just reject them and send them back is not only inhumane, but inefficient.¹⁴² However, a country will often accept an alien at its borders even though the country has not given advance acceptance.¹⁴³ In addition, there are several other provisions in the Immigration and Naturalization Act which allow a stay of removal or adjustment of status where the alien may suffer persecution in another country.¹⁴⁴

Although *Jama* has eliminated both constitutional and public policy concerns, there still remain future issues embedded in section 1231(b). The majority hinted at one of these issues which had not been certified for review. Future cases may analyze whether the term "country" in section 1231 implicitly requires a functioning government. Although the Court did not reach this issue, this Court would likely find that the term country does not require a functioning government. This interpretation would correspond to this Court's willingness to remove barriers in the alien removal process.

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141. See Eric Jeffrey Ong Hing, Comment, *Deportation into Chaos: The Questionable Removal of Somali Refugees*, 38 U.C. DAVIS L. REV. 309, 341 (2004); see also 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, 422 (2005).

142. See *Tom Man v. Murff*, 264 F.2d 926, 928.

143. *Jama v. ICE*, 543 U.S. at 345.

144. See 8 U.S.C. § 1231(b)(3) (2001).
