COMMENT

Deportation into Chaos: The Questionable Removal of Somali Refugees

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INTRODUCTION

Chaos rules the day in the coastal East African country of Somalia.[1] When dictator Mohamed Siad Barre fled the country in 1991, Somalia found itself in massive disarray and without a centralized government.[2] Opposing factions subdivided the country into a number of territories under varying degrees of military control.[3] More than a decade later, the situation remains unchanged.[4]

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[1] *See* BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, SOMALIA: COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES — 2002 (Mar. 31, 2003), *available at* http://www.state.gov/g/drl/rls/HRRPT/2002/18226.htm [hereinafter SOMALIA: HUMAN RIGHTS 2002] (describing endemic political violence and noncombatant victims of interfactional fighting); *Punishing Cycles of Violence In Somalia*, MSF REPORTS, Jan. 6, 2004, *available at* http://www.msf.org/countries/page.cfm?articleid=8A588531-6519-47C8-8ACC78944049DDB2 (depicting years of violence, displacement, drought, and flooding forcing Somalis to struggle to survive); *U.N. Condemns Killings of Women and Children*, AFR. NEWS, Jan. 27, 2004, *available at* http://archive.wn.com/2004/01/27/1400/p/0b/b00ae7f768976.html (reporting numerous brutal killings of women and children).

[2] *See* CENTRAL INTELLIGENCE AGENCY, THE WORLD FACTBOOK — SOMALIA, Aug. 1, 2003 [hereinafter THE WORLD FACTBOOK — SOMALIA], *available at* http://www.cia.gov/cia/publications/factbook/geos/so.html (describing "turmoil, factional fighting, and anarchy" following Barre's overthrow); U.S. DEP'T OF STATE, BUREAU OF AFRICAN AFFAIRS, BACKGROUND NOTE: SOMALIA (Apr. 2002), *available at* http://www.state.gov/r/pa/ei/bgn/2863.htm [hereinafter BACKGROUND NOTE: SOMALIA] (describing overthrow of Barre and subsequent civil unrest); *Puntland State of Somalia Opens Washington D.C. Office to Unify Somalia*, PR NEWSWIRE, Nov. 7, 2003, *available at* http://biz.yahoo.com/prnews/031107/nyf032_1.html [hereinafter *Puntland Opens D.C. Office*] (noting that violence and civil unrest regularly affect Somalis).

[3] *See* THE WORLD FACTBOOK — SOMALIA, *supra* note 2 (describing numerous sub-regions and self-declared independent states within Somalia); BACKGROUND NOTE: SOMALIA, *supra* note 2 (detailing regions and degrees of control exercised over each).

[4] *See* THE WORLD FACTBOOK — SOMALIA, *supra* note 2 (describing fighting lasting since January 1991); *Puntland Opens D.C. Office*, *supra* note 2.

The Somali people battle with each other and with their environment.[5] Somalis struggle to survive in a human rights disaster area.[6] Arbitrary arrests, countless restrictions on civil rights, female genital mutilations, and widespread child abuse occur regularly.[7] Famine, drought, and disease challenge efforts at developing the struggling agrarian economy.[8]

Conflict between clan leaders and insurgents exposes anyone in Somalia to deadly military and political crossfire.[9] The constant threat of violence is a part of daily life.[10] Furthermore, the unrest jeopardizes international humanitarian relief intended for Somalis.[11] Within the last decade, frequent harassment of aid workers forced the United Nations to

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[5] *See* REPORT OF THE SECRETARY-GENERAL ON THE SITUATION IN SOMALIA, *available at* http://AllPuntland.com/news1/eng/news_item.asp?NewsID=901 (describing armed conflict and criminality in Somalia); BACKGROUND NOTE: SOMALIA, *supra* note 2 (describing political unrest and difficult natural conditions).

[6] *See* SOMALIA: HUMAN RIGHTS 2002, *supra* note 1 (detailing unlawful deprivation of life, arbitrary detentions, and discrimination based on race and sex).

Of particular interest are the Somali Bantu, an ethnic minority whose members suffer ongoing persecution at the hands of the Marihan ethnic majority. *U.S. to Resettle Thousands of Somalis*, THE E. AFR., Jan. 21, 2002, *available at* http://www.nationaudio.com /News/EastAfrican/28012002/Regional/Regional5.html. Persecutors specifically targeted the Bantu after the fall of Siad Barre in 1991. *Id.* Clan fighting threatened the Bantus with extinction. *Id.* Recently, the U.S. government approved thousands of Bantu for resettlement in the United States. *Id.*

[7] SOMALIA: HUMAN RIGHTS 2002, *supra* note 1.

[8] *See* BACKGROUND NOTE: SOMALIA, *supra* note 2 (noting concerns with animal health and drought); *Punishing Cycles of Violence in Somalia*, *supra* note 1 (describing how drought and flooding brought agricultural development to standstill).

[9] *See* BACKGROUND NOTE: SOMALIA, *supra* note 2 (recommending that travelers not go to Somalia due to dangerous conditions); *Punishing Cycles of Violence in Somalia*, *supra* note 1 (explaining that civilians are routinely caught in frequent armed clashes between clan-based militias).

[10] *See* BACKGROUND NOTE: SOMALIA, *supra* note 2 (describing deteriorating roads, decimated communications infrastructure and difficulty of survival due to periodic livestock bans); *U.N. Condemns Killings of Women and Children*, *supra* note 1 (describing women and children dying as result of inter-factional warfare). Actually, both the Northwest "Somaliland" and Northeast "Puntland" regions have been able to maintain relative security under their respective de facto leaders. THE WORLD FACTBOOK — SOMALIA, *supra* note 2; *Puntland Opens D.C. Office*, *supra* note 2. The Transitional National Government has minimal authority in the southern regions of the country, effectively only controlling half of the capital city of Mogadishu. BACKGROUND NOTE: SOMALIA, *supra* note 2. The Transitional National Government has limited support on both a domestic and an international scale. *Id.*

[11] *See* REPORT OF THE SECRETARY-GENERAL ON THE SITUATION IN SOMALIA, *supra* note 5 (describing how armed conflict and criminality in Mogadishu consistently restrict humanitarian aid); *Punishing Cycles of Violence in Somalia*, *supra* note 1 (explaining that violence and lack of international funding hindered aid agencies from responding to needs of Somalis).

scale back its humanitarian efforts in Somalia.[12]

Meanwhile, the factions dominating Somalia lack significant popular support both within the country and internationally.[13] In the absence of a centralized Somali government, the United States has had no diplomatic relations with Somalia since 1991.[14] This raises a vexing question for U.S. courts deciding Somali alien deportation cases: Does the Immigration and Nationality Act ("INA") permit the deportation of a person to Somalia, even though there is no recognized government to accept the deportee?[15]

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[12] REPORT OF THE SECRETARY-GENERAL ON THE SITUATION IN SOMALIA, *supra* note 5 (describing that clan conflict, banditry, and weakness of most local administrations represent challenges to humanitarian aid workers south of Gaalkacyo region); *Somalia*, REUTERS ALERTNET, *available at* http://www.alertnet.org/thefacts/countryprofiles/220141.htm.

[13] *See* SOMALIA: HUMAN RIGHTS 2002, *supra* note 1 (explaining that Transitional National Government lacks support in southern region, leaders struggle to suppress armed conflict in Puntland region, and relatively stable Somaliland region lacks international recognition); THE WORLD FACTBOOK — SOMALIA, *supra* note 2 (explaining that civil strife hinders Puntland region's representative government and warlords still fight for control of Mogadishu).

[14] *See* Brief for Petitioner at *4, Jama v. INS, 2004 WL 1136529 (U.S. May 18, 2004) (No. 03-674) ("The United States has no diplomatic relations with Somalia, maintains no embassy in Somalia, and has no consular relations with a government in Somalia."); BACKGROUND NOTE: SOMALIA, *supra* note 1 ("U.S. Diplomatic Relations with Somalia were interrupted by the fall of the government and have not yet been reestablished."); *Tonelli Murder a Blow for Somaliland*, AFR. NEWS, Oct. 20, 2003 ("Leaders of [Somaliland] do not disguise their hope of eventually gaining recognition as a sovereign state, but they so far have not launched a full-scale campaign for backing from the U.S. and European governments.").

At least one group of Somali representatives is making efforts to encourage the United States to recognize its government. *Puntland Opens D.C. Office*, *supra* note 2. The northeastern state of Puntland recently opened an office in Washington, D.C. *Id.* Its mission is to attempt to bring a democratic government to Somalia that is recognized by the United States, to unify Somalia, and to raise international awareness of the plight of the Somali people. *Id.*

[15] *Compare* Ali v. Ashcroft, 346 F.3d 873 (9th Cir. 2003) (issuing injunction barring all deportations to Somalia), *and* Omar v. INS, No. 02-1387 (MJD/JGL), 2003 U.S. Dist. LEXIS 6327 (D. Minn. Feb. 5, 2003) (declining to recognize deportation to Somalia as valid), *and* Jama v. INS, No. CIV.01-1172 (JRT/AJB), 2002 WL 507046 (D. Minn. Mar. 31, 2002) (holding deportation order to Somalia could not be executed due to that country's lack of central government), *with* Jama v. INS, 329 F.3d 630 (8th Cir. 2003) (holding deportation to Somalia proper under INA). U.S. courts also deal with other cases stemming from Somalia's lack of central government. *See, e.g.*, Askir v. United States, 46 Fed. Cl. 438, 439 (2000) (explaining that disarray of Somali government does not preclude alien's ability to prosecute claim in his country's courts); Estate of Mohamud v. Monumental Life Ins. Co., 138 F. Supp. 2d 709 (E.D. Va. 2001) (discussing inability of insurance company to verify insured's death in Somalia); Int'l Rescue Comm. v. Reliance Ins. Co., 646 N.Y.S.2d 112, 114-15 (N.Y. App. Div. 1996) (Ellerin, J., dissenting) (disputing finding that insured's death fell under exception clause of insurance contract to injuries "arising out" of civil war, rebellion or insurrection

Deportations from the United States generally require, at the very least, a de facto acceptance by the receiving country, if not a statutorily mandated acceptance.[16] A country with even a minimally-functioning central government would balk if a deportee were "airdropped surreptitiously" within its borders.[17] Presently, thousands of deportation orders to Cuba, China, Laos, and Vietnam are unenforceable because the governments of those countries refuse to let deportees pass their borders.[18] The lack of a Somali central government, however, makes the surreptitious airdrop deportation of Somalis possible because there is no authority in place with the ability to refuse the person.[19] Thus, U.S. courts must answer the question of whether it is statutorily permissible to deport a person when there is no government to accept the deportee.[20]

Two federal courts of appeals have recently provided conflicting answers to the question.[21] Under the Eighth Circuit's reasoning, the INA does not always require a foreign government to accept a deportee.[22] The Ninth Circuit disagrees, holding that the INA requires a willing

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because there was no government to be overthrown).

[16] *See Jama*, 329 F.3d at 636 (Bye, J., dissenting) (describing practical impossibility of deportations to countries that refuse to accept deportees).

[17] *Ali*, 346 F.3d at 881. In fact, the United States attempted a surreptitious airdrop to Ethiopia, a country with a recognized central government. As expected, Ethiopia balked. *See* Brief of Yusuf Ali Ali, Mohamed Aweys, Mohamed Hussein Hundiye, Gama Kalif Mohamud, and the Class of Individuals that they Represent as Amici Curiae in Support of Petitioner at *24, Jama v. INS, 2004 WL 1148635 (U.S. May 18, 2004) (No. 03-674) [hereinafter *Brief of Yusuf Ali Ali*] (citing Petition for Writ of Habeas Corpus, Abdulrahman v. Arrendale, http://pacer.txs.uscourts.gov (S.D. Tex. Sept. 10, 2003) (No. H-03-3849) (recounting how United States flew Abdulrahman to Ethiopia after district court denied prior habeas corpus petition (No. H-02-0743), despite Ethiopia's refusal to accept Abdulrahman, and returned Abdulrahman to detention in United States when Ethiopia refused his entry).

[18] Donald M. Kerwin, *Throwing Away the Key: Lifers in INS Custody*, 75 INTERPRETER RELEASES 649, 650-52 (1998).

[19] Ali v. Ashcroft, 213 F.R.D. 390, 397 (W.D. Wash. 2003); Brief for Petitioner, *Jama*, 2004 WL 1136529, at *5 ("The Attorney General cannot even obtain international travel documents, such as a passport, which could be used for petitioner's passage outside the United States and entry to the removal country.").

[20] *Ali*, 213 F.R.D. at 397.

[21] *Compare Ali*, 346 F.3d at 886 (holding there can be no deportations to Somalia because it lacks functioning government), *with Jama*, 329 F.3d at 635 (holding deportations to Somalia proper despite that country's lack of government). On February 23, 2004, the Supreme Court granted certiorari to review the decision of the Eighth Circuit's *Jama* decision. Jama v. INS, 124 S. Ct. 1407 (2004). Thousands of Somalis and their families in the United States anxiously await the disposition of this case. *E.g.*, Abukar v. Ashcroft, No. Civ. 01-242, 2004 WL 741759, at *3 (D. Minn. Mar. 17, 2004) (holding habeas corpus petition in abeyance until disposition of *Jama v. INS* in Supreme Court).

[22] *Jama*, 329 F.3d at 635.

foreign government for every deportation.[23] Because Somalia lacks a functioning, recognized government, the Ninth Circuit's formulation makes a deportation to Somalia statutorily impossible.[24]

This Comment examines the conflict between the Eighth and Ninth Circuits. Part I introduces the relevant statutory provision and case law. Part II discusses the Eighth Circuit's decision in *Jama v. INS* and the Ninth Circuit's decision in *Ali v. Ashcroft*. Part III argues that the statute does indeed require acceptance of a deportee by a receiving country's government in every situation and urges the Supreme Court to rule accordingly. Finally, Part IV argues that judges should refuse to allow deportation to a war-torn country like Somalia, in recognition of their roles as guardians of basic human rights.

I. BACKGROUND

The relevant INA statutory section,[25] 8 U.S.C. § 1231(b)(2), requires governmental acceptance by a destination country where the deportee designates a deportation country or where the Attorney General designates an alternative country of deportation.[26] The statute, however, does not explicitly speak to acceptance in section 1231(b)(2)(E), the portion relevant to Somali aliens, where the Attorney General also has authority to choose the country of deportation.[27] The uncertainty of the governmental acceptance requirement presents obvious difficulties for potential Somali deportees.[28]

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[23] *Ali*, 346 F.3d at 886.

[24] *Id.* The Attorney General's push to deport removable aliens in the post-9/11 era increased the need for a solution to the problem. *Ali*, 213 F.R.D. at 396. After the attacks of September 11, 2001, Attorney General John Ashcroft and other American officials tried to hasten the deportation of removable aliens. John Richardson, *Terrorist-funding Suspects Still in Jail*, PORTLAND PRESS HERALD, Jan. 14, 2002, at 1A. This was due to the federal government's growing fear of terrorist activity and some alleged connections between Somalia and certain terror organizations. *Id.* U.S. immigration officials deported nearly two hundred Somali nationals to Somalia from 1997-2002. *Ali*, 213 F.R.D. at 396; Chris McGann, *New Push to Deport Somalis is Suspected*, SEATTLE POST-INTELLIGENCER, Dec. 5, 2002, at B6.

[25] Unless otherwise indicated, all references to "section," "paragraph," and "subparagraph" are to 8 U.S.C.

[26] *Ali*, 346 F.3d at 880; *Jama*, 329 F.3d at 633. *See generally* 8 U.S.C. § 1231(b) (1996).

[27] *Ali*, 346 F.3d at 880-81; *Jama*, 329 F.3d at 633-34. *See generally* 8 U.S.C. § 1231(b).

[28] Currently, all Somali deportations are on hold pursuant to the Ninth Circuit's class-wide injunction. John Iwasaki, *Somalis Won't Be Deported for Now*, SEATTLE POST-INTELLIGENCER, Sept. 18, 2003, at B1. The *Ali* ruling affected approximately 2,750 Somalis with deportation orders. *Id.* Already, at least one Somali deportee died as a result of the civil unrest in Somalia. Chris McGann, *Lawsuit is Filed in Seattle to Bar All Somali Deportations*, SEATTLE POST-INTELLIGENCER, Nov. 8, 2002, at A1; *Somalia: Man Deported from*

Prior to the recent Somali alien cases, federal courts never specifically dealt with situations in which a country completely lacked a government with any ability to accept or deny a deportee.[29] However, section 1231(b)(2) and its procedurally-identical statutory predecessor, 8 U.S.C. § 1253(a),[30] have been interpreted in similar, though not identical, situations since Congress adopted section 1253(a) in 1952.[31] These situations arose most often during the Cold War, when the United States had minimal diplomatic relations with countries like the U.S.S.R., China, and East Germany.[32] Although the cases addressed the statutory acceptance requirement, none directly considered the possibility of deportation to a country without a government.[33]

Cases interpreting section 1253(a) are relevant to the Eighth and Ninth Circuits' decisions.[34] Those cases remain significant because the text of

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U.S. Killed in Mogadishu, BBC MONITORING INT'L REPORTS, May 14, 2002.

The Supreme Court's recent decision in *Zadvydas v. Davis*, 533 U.S. 678 (2001), is particularly relevant, given its impact on the prolonged detention of the Somali aliens awaiting deportation. *See also* Omar v. INS, No. 02-1387 (MJD/JGL), 2003 U.S. Dist. LEXIS 6327 (D. Minn. Feb. 5, 2003) (containing long discussion of applicability of *Zadvydas* to Somali aliens following holding that INA does not permit deportations to Somalia). *Zadvydas* held unconstitutional the indefinite detention of persons awaiting deportation because of the designated receiving country's refusal to accept the alien. *See Zadvydas*, 533 U.S. at 698. The Court imposed a reasonable time standard, considering the Due Process clause, constitutional rights of detainees, justification for judicial review, Congressional intent, and the legislative history of 8 U.S.C. § 1231. *See, e.g.*, Molly McGinty Borg, *Justice in a Changed World: Freedom from the Deprivation of Liberty: The Supreme Court Imposes Limitations on Indefinite Detention of Criminal Aliens* — Zadvydas v. Davis, 29 WM. MITCHELL L. REV. 951 (2003).

[29] *See, e.g., In re Linnas*, 19 I. & N. Dec. 302 (B.I.A. 1985) (lacking reference to any case which discussed country without government).

[30] 8 U.S.C. § 1253(a) (1952). The two statutes are substantively and procedurally identical. *Ali*, 346 F.3d at 881; *Jama*, 329 F.3d at 636 (8th Cir. 2003) (Bye, J., dissenting); Ali v. Ashcroft, 213 F.R.D. 390, 403 (D. Minn. 2003).

[31] *See, e.g.*, Chi Sheng Liu v. Holton, 297 F.2d 740, 743 (9th Cir. 1961) (noting that former section 1253(a) states that no deportation can occur unless foreign government is "willing to accept [deportee] into its territory"); United States *ex rel.* Tom Man v. Murff, 264 F.2d 926 (2d Cir. 1959) (requiring acceptance for all three steps under predecessor provision, section 1253); *In re* Niesel, 10 I. & N. Dec. 57 (B.I.A. 1962) (interpreting section 1253).

[32] *See, e.g., Tom Man*, 264 F.2d at 926 (2d Cir. 1959) (dealing with Communist China); *Linnas*, 19 I. & N. Dec. at 304 (considering U.S.S.R. and annexed Republic of Estonia); *Niesel*, 10 I. & N. Dec. at 57 (dealing with East Germany).

[33] *See, e.g., Linnas*, 19 I. & N. Dec. at 306 (citing numerous cases interpreting definition of "country" as requiring both territory and government, but recognizing none addressing situations with government-less countries) (citations omitted).

[34] *See Ali*, 346 F.3d at 882-84 (discussing relevant case law discussing section 1253(a)); *Jama*, 329 F.3d at 634-35 (discussing case law interpreting section 1253(a) and determining no settled judicial construction).

predecessor section 1253(a) is nearly identical to the recodified section 1231(b)(2).[35] Congress arguably implicitly adopted the interpretation of the case law by recodifying a nearly identical statute.[36] These cases laid the foundation for the Eighth and Ninth Circuit decisions, which considered both versions of the statute and pertinent case law.[37] This Part first discusses the relevant statutory section and then details the pertinent case law.

A. The Statute: 8 U.S.C. § 1231(b)(2)

Section 1231(b)(2) sets forth the procedure that the Attorney General of the United States must follow in selecting the country of deportation.[38] The statute progresses in three steps.[39] Under the first step, subparagraph (A)(i), the Attorney General must remove an alien to a country designated by the alien.[40] This designation is subject to conditions set forth in subparagraph (C), which provides:[41]

> (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

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[35] *See Ali*, 213 F.R.D. at 403 (holding that cases interpreting predecessor statute remain relevant despite statute's reenactment because both versions are substantively indistinguishable).

[36] Cannon v. Univ. of Chicago, 441 U.S. 677, 699 (1979) (holding that because courts can presume congressional familiarity with interpretory case law, Congress expects its enactments to be interpreted in conformity with them); S & M Inv. Co. v. Tahoe Reg'l Planning Agency, 911 F.2d 324, 326 (9th Cir. 1998) ("If the term at issue has a settled meaning, we must infer that the legislature meant to incorporate the established meaning, unless the statute dictates otherwise.").

[37] *Ali*, 346 F.3d at 882; *Jama*, 329 F.3d at 634-35.

[38] *See* 8 U.S.C. § 1231(b) (1996); Farah v. INS, No. Civ. 02-4725DSDRLE, 2002 WL 31866481, at *3 (D. Minn. Dec. 20, 2002).

[39] *See Jama*, 329 F.3d at 633.

[40] *See* 8 U.S.C. § 1231(b); *Jama*, 329 F.3d at 633.

[41] *See* 8 U.S.C. § 1231(b); *Jama*, 329 F.3d at 633.

> (iv) the Attorney General decides that removing the alien to the country is prejudicial to the United States.[42]

Thus, subparagraph (C)(iii) explicitly allows the Attorney General to disregard the country designated by the alien if the government of the country is not willing to accept the person into the country.[43]

If a subparagraph (A)(i) designation cannot be made, the Attorney General proceeds to step two of the statute.[44] In this step, the Attorney General may select an "[a]lternative country" consistent with subparagraph (D).[45] Subparagraph (D) provides:

> (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.[46]

Thus, the second step also explicitly conditions removal upon acceptance by the receiving country.[47] The Attorney General may remove the alien to a country where he is a "subject, national or citizen."[48] This step is relevant because the country of which an alien is a "subject, national, or citizen" is often the same as a country designated under the third step, described below.[49] Part of the disagreement between the circuits involves whether different restrictions must apply to the same country depending on which label the Attorney General happens to use.[50]

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[42] 8 U.S.C. § 1231(b)(2)(C).

[43] *See* 8 U.S.C. § 1231(b); *Jama*, 329 F.3d at 633.

[44] *See* 8 U.S.C. § 1231(b); *Jama*, 329 F.3d at 633.

[45] *See* 8 U.S.C. § 1231(b); *Jama*, 329 F.3d at 633.

[46] 8 U.S.C. § 1231(b)(2)(D).

[47] *See* 8 U.S.C. § 1231(b); *Jama*, 329 F.3d at 633.

[48] *See* 8 U.S.C. § 1231(b); *Jama*, 329 F.3d at 633.

[49] *Jama*, 329 F.3d at 634.

[50] *Compare* Ali v. Ashcroft, 346 F.3d 873, 881-82 (9th Cir. 2003) (asserting that because countries under steps two and three were often identical, they should be subjected to same acceptance requirement), *with Jama*, 329 F.3d at 634 (holding that because countries under steps two and three could be different, they were not necessarily subject to same requirements).

Finally, if there is still no country that satisfies the conditions of the first two steps, subparagraph (E) delineates the third and final step for determining the existence of "additional removal countries":

> (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.[51]

The circuit split discussed below arose because of subparagraph (E)'s failure to explicitly address an acceptance requirement in each of its subdivisions. While steps one and two clearly require acceptance by the foreign government of the receiving state, step three only expressly requires acceptance in one of its subparagraphs, subparagraph (E)(vii).[52] The Eighth and Ninth Circuits are split over whether an acceptance requirement should be read into the rest of subsection (E), thereby

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[51] 8 U.S.C. § 1231(b).

[52] *See Ali*, 346 F.3d at 880.

requiring a foreign government's existence and acquiescence.[53]

B. United States ex rel. Tom Man v. Murff

The first case to address step three's failure to explicitly address an acceptance requirement was *United States ex rel. Tom Man v. Murff.*[54] In *Tom Man,* the Second Circuit extended the acceptance requirement of the seventh subdivision of step three to all the other subdivisions of that step.[55] The Attorney General issued an order to deport an alien to Mainland China.[56] The immigration judge refused to issue the final removal order until the Attorney General made a preliminary acceptance inquiry of the Communist Government of China.[57]

The Second Circuit held that a deportation under any step three designation is "subject to the condition expressed in the seventh subdivision: i.e. that the 'country' should be willing to accept him 'into its territory.'"[58] Writing for the majority, Judge Learned Hand explained that a mutual agreement must exist between the United States and the receiving country, to facilitate an efficient deportation.[59] In the court's opinion, shuttling "an alien back and forth on the chance of his acceptance" would be cumbersome and oppressive.[60] *Tom Man* was the first case to unequivocally extend an acceptance requirement to step three of the statute.[61]

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[53] *Id.*; *Jama*, 329 F.3d at 635.

[54] 264 F.2d 926, 928 (2d Cir. 1959).

[55] *See* United States *ex rel.* Tom Man v. Murff, 264 F.2d 926, 928 (2d Cir. 1959). The case involved a sailor from China who overstayed his legally permitted shore leave. *See id.* at 927. A Board of Special Inquiry ordered him deported. *See id.* He specified "Formosa" as the country to which he wished to be deported. *See id.* The National Chinese Government refused to accept him. *See id.* The Attorney General then directed that he be sent to the "mainland of China." *See id.* at 927-28. The United States did not recognize Communist China at that time. *See id.* at 928. The district court judge refused to review a finding that Tom Man would not be subject to "physical persecution" because the Attorney General had not inquired whether the Communist Government of China was willing to "accept" the alien. *See id.* at 928.

[56] *See id.*

[57] *See id.*

[58] *See id.*

[59] *See id.*

[60] *See id.*

[61] *See id.*

C. In re Niesel

In *In re Niesel*,[62] the Board of Immigration Appeals ("BIA") explicitly rejected the contention that before designating a country under subparagraphs (i)-(vi) of step three, the Immigration and Naturalization Service ("INS")[63] must first establish that country's willingness to accept the person.[64] The alien in *Niesel* first designated East Germany, pursuant to step one of the statute.[65] She simultaneously applied to withhold her deportation based on her belief that she would face physical persecution if delivered to East Germany.[66] The BIA held that a designation followed by a request for withholding deportation constituted a withdrawal of the designation.[67] The BIA reached the same conclusion with regards to step two, following the alien's claim that East Germany was the country where she was a subject, national, or citizen.[68] Proceeding to the third step, the INS determined that West Germany was the appropriate receiving country.[69]

The alien argued that prior to ordering a deportation to a specific country, the INS must first demonstrate that the proposed country has agreed to accept the alien.[70] Without providing any significant rationale and without addressing *Tom Man*, the BIA recognized a preliminary inquiry requirement under step two, but refused to read such an inquiry into step three.[71] Thus, the BIA refused to require a preliminary inquiry by the INS.[72]

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[62] *In re* Niesel, 10 I. & N. Dec. 57 (B.I.A. 1962).

[63] At the time all the cases discussed in this Comment were filed, the INS was the governmental entity responsible for removing aliens. *See Agency Divided*, DAILY OKLAHOMAN, Mar. 1, 2003, at 6A; *Farewell, INS*, S.F. CHRON., Mar. 5, 2003, at A24. In March of 2003, the INS was abolished, and its immigration enforcement functions were transferred to the Bureau of Immigration and Customs Enforcement ("BICE"), an agency within the Department of Homeland Security. *See Agency Divided, supra; Farewell, INS, supra.* To avoid confusion, this Comment will refer to the organization under its former acronym "INS."

[64] *See Niesel*, 10 I. & N. Dec. at 58-59.

[65] *See id.* at 58.

[66] *See id.*

[67] *See id.*

[68] *See id.* at 58-59.

[69] *See id.*

[70] *See id.*

[71] *See id.* ("When 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).").

[72] *See id.*

D. In re Linnas

Twenty years after *Niesel*, the BIA took a different approach in *In re Linnas*.[73] In *Linnas*, the alien designated the "free and independent Republic of Estonia" as the country of designation under step one.[74] The Soviet Union, however, had annexed Estonia after World War II.[75] The alien contended that because the U.S.S.R. occupied the Republic of Estonia, the INS should deport him to the offices maintained by the Republic of Estonia in New York City.[76]

Finding the New York City offices an inappropriate country designation, the *Linnas* court stated that, at a minimum, the term "country" means "a foreign place with a 'territory' in a geographical sense and a 'government' in the sense of a political organization that exercises power on behalf of the people subjected to its jurisdiction."[77] This definition applies to the term "country" as it appears in each of the three steps of the statute.[78] Moreover, the BIA recognized that the "government" of the country selected under *any* of the three steps must indicate its acceptance of a deported alien into its "territory."[79] *Linnas* utilized the third step of the statute, because no country met the requirements of step two.[80] The BIA held that under step three, it was "authorized to order respondent to any country that is willing to accept

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[73] *In re* Linnas, 19 I. & N. Dec. 302 (B.I.A. 1985).

[74] *See id.* at 304.

[75] *See id.*

[76] *See id.*

[77] *See id.* at 306-07. The court noted that the definition of "country" used by courts varied according to its application in different situations. *See id.* at 306. For example, under step two, "country" meant a "foreign territory that is under the control of a de jure government recognized by the United States." Ng Kam Fook v. Esperdy, 320 F.2d 86, 88-89 (2d Cir. 1963); *Linnas*, 19 I. & N. Dec. at 306. Under step three, however, courts construe the term "country" to mean "merely a foreign territory that has a government with authority to accept a deportable alien." United States *ex rel.* Tom Man v. Murff, 264 F.2d 926, 928 (2d Cir. 1959); *Linnas*, 19 I. & N. Dec. at 306 (citing Chen Chuen v. Esperdy, 285 F.2d 353 (2d Cir. 1960)). Under this second construction, it was irrelevant whether the foreign government was recognized by the United States. *Linnas*, 19 I. & N. Dec. at 306. The former interpretation required official recognition by the United States. *See id.* The *Linnas* court left unresolved the question of whether the United States must recognize the "government" of a "country" for purposes of step three. *See id.* at 306. Nevertheless, at a minimum, it never once questioned that a foreign government, whether recognized or unrecognized, need be in place. *See generally id.* at 306-07.

[78] *Linnas*, 19 I. & N. Dec. at 306-07 (explaining that courts used more than one definition of "country" but that this court's definition encompassed all of them).

[79] *See id.* at 307 (citing *Tom Man*, 264 F.2d at 928).

[80] *Linnas*, 19 I. & N. Dec. at 307.

him."[81] The implication of *Linnas* is clear — step three is linked to an acceptance requirement.

II. CIRCUIT COURT SPLIT: *JAMA* AND *ALI*

The federal courts of appeals disagree as to whether the statute requires acceptance for each statutory step.[82] The Eighth Circuit held that the INS has statutory authority to remove aliens to Somalia without first establishing that Somalia will accept them.[83] Conversely, the Ninth Circuit held that the INS cannot deport aliens to Somalia because Somalia lacks a functioning central government to accept them.[84] These circuits take different approaches to both the statutory construction of the INA and case law interpretation.

A. The Eighth Circuit: Jama v. INS

In *Jama v. INS*, a divided Eighth Circuit refused to read an acceptance requirement into step three of the statute.[85] In *Jama*, the INS deemed Somali refugee Keyse Jama deportable after he conceded his own removability and rejected his application for humanitarian relief.[86] Jama filed a petition for a writ of habeas corpus to prevent execution of his removal order.[87] He argued that under section 1231(b)(2), he could not be removed to a country that had not agreed to accept him.[88] The district court for the District of Minnesota agreed with his position and granted habeas relief.[89]

On appeal, the Eighth Circuit reversed.[90] The court held that the acceptance requirements of the first two steps of section 1231(b)(2) do not extend to the third, and thus step three allows the INS to deport

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[81] *Id.*

[82] *Compare* Ali v. Ashcroft, 346 F.3d 873 (9th Cir. 2003) (upholding injunction barring all deportations to Somalia), *with* Jama v. INS, 329 F.3d 630 (8th Cir. 2003) (holding deportation to Somalia proper under INA). As previously stated, the United States Supreme Court recently granted a petition for a writ of certiorari in the *Jama* case. *See* Jama v. INS, 124 S. Ct. 1407, 1407 (2004).

[83] *See Jama*, 329 F.3d at 635.

[84] *See Ali*, 346 F.3d at 886.

[85] *See Jama*, 329 F.3d at 635.

[86] *Id.* at 631. Jama pleaded guilty to third degree assault in Minnesota state court. *Id.* As a result of this felony conviction, the INS initiated removal proceedings against him, as a refugee found guilty of a "crime involving moral turpitude." *Id.*

[87] *Id.*

[88] *Id.* at 634.

[89] *Id.* at 631.

[90] *Id.*

removable aliens to a country that has no government to accept them.[91] The Eighth Circuit rested its conclusion on statutory construction and prior case law.[92]

1. Statutory Construction

The Eighth Circuit first examined the plain language of the statute.[93] The court utilized the *expressio unius est exclusio alterus* principle of statutory construction that "expression of the one is exclusion of the other."[94] The majority reasoned that by expressly including acceptance requirements in steps one, two, and a limited portion of step three, Congress specifically intended to exclude an acceptance requirement from the other portions of the statute.[95] Quite simply, step three does not have an acceptance requirement because "Congress did not write the statute that way."[96] Thus, the Eighth Circuit would not question Congress' particular wording as a matter of "simple statutory syntax and geometry,"[97] nor would it embellish the statute with language that Congress chose to omit.[98]

The majority rejected the dissent's claim that it had read the acceptance provisions from the previous sections out of existence.[99] The

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[91] *Id.* at 634-35.

[92] *Id.*

[93] *Id.* at 634.

[94] *Id.*; *see, e.g.*, Walla Walla v. Walla Walla Water Co., 172 U.S. 1 (1898); Root v. New Liberty Hosp. Dist., 209 F.3d 1068, 1070 (8th Cir. 2000); Havemeyer v. Superior Court, 24 P. 121 (Cal. 1890).

The principle works in the following manner:

> [If] a statute enumerates the things upon which it is to operate, everything else must necessarily, and by implication, be excluded from its operation and effect. For instance, . . . if the statute directs that certain acts shall be done in a specified manner, . . . their performance in any other manner than that specified . . . is impliedly prohibited.

EARL T. CRAWFORD, THE CONSTRUCTION OF STATUTES, 334-35 (1940).

[95] *Jama*, 329 F.3d at 634.

[96] *Id.* (quoting United States v. Naftalin, 441 U.S. 768, 773 (1979)).

[97] *Id.*

[98] *Id.*

[99] *Id.* The *Jama* dissent derided the majority's statutory construction as absurd. *Id.* at 636 (Bye, J., dissenting). Judge Bye pointed out that deportees from China, Vietnam, Cambodia, Cuba, and other countries remain detained in the United States because of those countries' unwillingness to accept them. *Id.* at 636-37. Judge Bye also saw that the policy of "asking politely first, then [acting] anyway if the request is refused" was often frustrated by a point-blank refusal. *Id.* at 637. Thus, an alien's removal to a foreign country which has not accepted him is only possible when there is no functioning government to indicate

dissent argued that the country of the alien's birth (subparagraph (iv) of step three) and the "subject, national, or citizen" country (step two) were generally the same place.[100] Therefore, by not requiring acceptance from the alien's birth country, the court would effectively moot the acceptance requirement that attached to the country of which the alien was a subject, national, or citizen.[101] The majority observed, however, that the country in which a person is born is not *always* the country where she is a subject, national, or citizen.[102] Therefore, not requiring acceptance by an alien's birth country would not necessarily moot the acceptance requirement that attached to the alien's "subject, national or citizen" country in all cases.[103]

The majority also rejected the dissent's contention that its interpretation is absurd, noting that questions of political wisdom, efficiency, and considerateness fall outside its realm of decision-making authority.[104] If necessary, Congress has the power to fix an incorrectly interpreted statute.[105] The court further reasoned that its interpretation is not unreasonable because it is "not uncommon" practice among countries to "ask politely first, and then to act anyway if the request is refused."[106] The court, however, did not provide any evidence of such practice.

2. Case Law

In analyzing previous interpretations of section 1231(b)(2) and its predecessor statute, the Eighth Circuit found no "settled judicial construction" of the acceptance provision.[107] On the one hand, *United States ex rel. Tom Man v. Murff* requires acceptance in all situations.[108] On the other, *In re Niesel* does not.[109] Thus, because of conflicting precedent, the *Jama* court felt unrestricted by any particular interpretation.[110]

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acceptance or denial. *Id.*

[100] *Id.* at 634.

[101] *Id.*

[102] *Id.*

[103] *Id.*

[104] *Id.* at 635.

[105] *Id.*

[106] *Id.* at 634.

[107] *Id.* at 634-35 (citing *United States ex rel. Tom Man v. Murff*, 264 F.2d 926, 928 (2d Cir. 1959) (requiring prior acceptance) and *In re Niesel*, 10 I. & N. Dec. 57, 59 (B.I.A. 1962) (finding no preliminary inquiry required under step three).

[108] *Tom Man*, 264 F.2d at 928.

[109] *Jama*, 329 F.3d at 635; *Niesel*, 10 I. & N. Dec. at 59.

[110] *Jama*, 329 F.3d at 634-35.

The majority acknowledged, but declined to adhere to the Western District of Washington's reasoning in *Ali v. Ashcroft*[111] (not to be confused with the Ninth Circuit's subsequent disposition of the same case on appeal, discussed below).[112] In *Ali*, the district court distinguished a "final inquiry," required in all deportations, from a "preliminary inquiry," only necessary under the statute's first two steps.[113] The *Ali* court interpreted *Niesel* as requiring a "preliminary inquiry" only in the first two steps of the statute.[114] The *Ali* court, however, still required a final inquiry as to acceptance under all three steps.[115] The *Ali* court observed that in *Niesel*, the BIA simply ruled on the government's proper designation of a country without first inquiring whether that country would accept the deportee.[116]

The *Jama* majority rejected this construction, reasoning that the language of *Niesel* does not support the existence of a "final inquiry" requirement in every deportation.[117] Moreover, the court cursorily rejected the *Ali* district court's reliance on *In re Linnas*.[118] The Eighth Circuit pointed out that the BIA's language in *Linnas*, that the "statute . . . has been *construed* to require" acceptance in all three steps, is indefinite.[119] Thus, the Eighth Circuit concluded that prior judicial construction of the statute was indeed not settled.[120] Based on principles of statutory construction and an analysis of the relevant case law, the Eighth Circuit declined to read an acceptance requirement into the third step of the INA.[121]

B. The Ninth Circuit: Ali v. Ashcroft

The Ninth Circuit decision in *Ali v. Ashcroft* involved a class of Somali nationals designated by the INS for immediate deportation.[122] The district court for the Western District of Washington enjoined the

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[111] Ali v. Ashcroft, 213 F.R.D. 390 (W.D. Wash. 2003).

[112] *Jama*, 329 F.3d at 635.

[113] *Id.* (acknowledging idea that *Niesel* addresses only issue of initial inquiry); *Ali*, 213 F.R.D. at 403 (explaining *Niesel* only addressed issue of initial inquiry, not final acceptance).

[114] *Ali*, 213 F.R.D. at 403.

[115] *Id.*

[116] *Id.*

[117] *Jama*, 329 F.3d at 635.

[118] *Id.*

[119] *Id.*

[120] *Id.*

[121] *Id.*

[122] Ali v. Ashcroft, 346 F.3d 873, 876 (9th Cir. 2003).

Attorney General from carrying out the removal orders.[123] On appeal, the Ninth Circuit affirmed the injunction, holding that step three of section 1231(b)(2) requires an acceptance.[124] The court made its ruling after considering statutory construction, case law, INS policy, and international law.[125]

1. Statutory Construction

Looking at the text of the statute, the Ninth Circuit reasoned that not requiring acceptance in step three renders the express provisions of steps one and two moot.[126] The court rejected the Eighth Circuit's assertion that the step two acceptance provision would not be made superfluous because a country where the alien was a "subject, national or citizen" could possibly be different from the alien's birth country, one of the seven step three options.[127] The court countered that although it is possible that aliens will not always be subjects, nationals, or citizens of the countries in which they are born, cases in which the opposite is true are more frequent.[128] Therefore, where the country of birth and the

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[123] *Id.* The events leading up to the court's injunction reveal an unrelenting and often ruthless governmental effort to deport aliens to Somalia. *See Brief of Yusuf Ali Ali*, Jama v. INS at *19-24, 2004 WL 1148635 (U.S. May 18, 2004) (No. 03-674). Following September 11, 2001, the INS organized removal of aliens to Somalia, a country with supposed terrorist connections, in privately chartered aircraft. *Id.* at *19-20. One flight of twenty-four Somalis left the United States before the district court in Minnesota ruled that the removal of Keyse Jama violated section 1231(b)(2) because the INS could not obtain Somalia's consent. *Id.* at *20. Nevertheless, the government continued its efforts to deport aliens to Somalia, notifying Yusuf Ali Ali and others in November 2002 that their removals were imminent. *Id.* at *20. A few days later, on the day before the deportation was to occur, counsel for Ali filed a petition for habeas corpus and an emergency motion for a temporary restraining order with the United States District Court for the Western District of Washington. *Id.* at *21. The same day, the district court enjoined the government from deporting the aliens, and prepared to determine the briefing schedule for the preliminary injunction. *Id.* During the next few days, the Seattle attorneys for Ali discovered more attempts to deport people to Somalia. *Id.* With great difficulty, counsel located the detained Somalis (many of whom had been moved from state to state without notice to their families or anyone outside the government), found pro bono counsel for them, and won injunctions prohibiting their deportations in the Eastern and Western Districts of Louisiana. *Id.* Ali then amended his petition to request relief for the entire class of Somali detainees. *Id.* at *22. The government refused requests by Ali's counsel and the district court judge to refrain from proceeding with attempts to remove the Somalis. *Id.* The district court judge was forced to issue oral and written orders temporarily enjoining all removals to Somalia. *Id.* All of this occurred less than a month after Ali received the first removal notice from the government. *Id.*

[124] *Ali*, 346 F.3d at 876.

[125] *Id.* at 881-86.

[126] *Id.*

[127] *Id.* at 881-82.

[128] *Id.*

alien's "subject, national or citizen" country are the same, requiring acceptance under one step and not the other allows the INS to subvert the acceptance requirements.[129]

2. Case Law

Addressing the relevant case law,[130] the Ninth Circuit dismissed the Eighth Circuit's assertion that section 1231(b)(2) previously lacked a settled judicial construction.[131] The Ninth Circuit cited the Second Circuit's holding in *Tom Man* as an unequivocal affirmative statement requiring acceptance of an alien in all deportation situations.[132] The Ninth Circuit then noted other cases which held that the receiving country's government must first accept the alien before the INS could execute the deportation order.[133] For example, in *Chi Sheng Liu v. Holton*, the Ninth Circuit held that the statute does not allow a deportation unless the country is willing to accept the alien into its territory.[134] Similarly, the D.C. Circuit, in *Rogers v. Lu*, held that a deportation cannot happen "until and unless" the foreign government indicates its willingness to accept the deportee.[135]

The court then repeated much of Judge Bye's reasoning in the *Jama* dissent.[136] Rejecting the Eighth Circuit's analysis of *In re Niesel*, the court reasoned that in *Niesel*, the BIA dealt only with a preliminary inquiry[137]

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[129] *Id.* at 882.

[130] *Id.*

[131] *Id.*

[132] *Id.*

[133] *Id.*; *see, e.g.*, Chi Sheng Liu v. Holton, 297 F.2d 740, 743 (9th Cir. 1961) (stating that former section 1253(a) "provides that an alien cannot be deported to any country unless its government is 'willing to accept him into its territory'"); Rogers v. Lu, 262 F.2d 471, 471 (D.C. Cir. 1958) (affirming, without explanation, judgment that Attorney General may not deport plaintiff to China "until and unless" government indicates its willingness to accept plaintiff); *cf.* Pelich v. INS, 329 F.3d 1057, 1061 (9th Cir. 2003) (stating that alien "can be deported to the country of his birth or to a country where he resided prior to entering the United States (assuming these countries would take him)") (citing section 1231(b)(2)(E)); Amanullah v. Cobb, 862 F.2d 362, 368 (1st Cir. 1988) (Coffin, J., concurring) (agreeing "that it is sheer folly to send an alien to another country without any indication that the country will receive the alien"); Lee Wei Fang v. Kennedy, 317 F.2d 180, 185 (D.C. Cir. 1963) (quoting Delany v. Moraitis, 136 F.2d 129, 131 (4th Cir. 1943)) ("It must be remembered . . . that the deportation of an alien is not a mere matter of taking him beyond the seas and setting him down on foreign soil. It must be carried out through arrangements made with the foreign government.").

[134] *Chi Sheng Liu*, 297 F.2d at 743.

[135] *Rogers*, 262 F.2d at 471.

[136] *Ali*, 346 F.3d at 882.

[137] *Id.* at 883; Jama v. INS, 329 F.3d 630, 636 (8th Cir. 2003) (Bye, J., dissenting); Ali v.

that occurred prior to selecting a country and not a final acceptance decision by the foreign government.[138] The Ninth Circuit also noted that the *Niesel* decision was superceded by *In re Linnas*,[139] wherein the BIA defined a "country" as requiring both "a foreign place with 'territory' in a geographical sense," and "a 'government' in the sense of a political organization that exercises power on behalf of the people subjected to its jurisdiction."[140] The Ninth Circuit found especially relevant *Linnas*'s statement that previous cases understood the statute to require that the "government" of the country selected must indicate its willingness to accept the alien into its territory.[141] The Ninth Circuit concluded that *Linnas* represented a BIA policy that required a government for every deportation.[142]

3. INS Policy and Regulations

The Ninth Circuit also looked at congressional intent within INS' plans and procedures, a factor not considered by the Eighth Circuit. It concluded that the INS itself functioned under the assumption that an acceptance is required.[143] The Ninth Circuit examined INS Operating Instruction 243.1(c)(1), which states that the INS must acquire travel documentation from the destination country before deporting an alien.[144] Section 241.4(k)(1) provides for a custody review if no country will accept the alien, even if the removal is otherwise proper.[145] Furthermore, section 1231(a)(7) states that once the INS designates an alien for removal, that alien cannot work in the United States unless the Attorney General makes a specific finding that all possible countries of designation under section 1231 refuse to accept the alien.[146] The Ninth Circuit construed these provisions as representing a governmental policy requiring that a foreign government accept a deportee in order for a

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Ashcroft, 213 F.R.D. 390, 403 (D. Minn. 2003) ("*In re Niesel* addressed only the issue of an initial inquiry, not final acceptance of the country to which a person would be returned."); Omar v. INS, No. 02-1387 (MJD/JGL), 2003 U.S. Dist. LEXIS 6327, at *24-25 (D. Minn. Feb. 5, 2003).

[138] *Ali*, 346 F.3d at 883.

[139] *Id.* at 883-84.

[140] *Id.* (quoting *In re* Linnas, 19 I. & N. Dec. 302, 307 (B.I.A. 1985)).

[141] *Id.* at 884.

[142] *Id.*

[143] *Id.* at 884-85.

[144] *Id.* at 884; INS Operating Instruction 243.1, *available at* http://uscis.gov/graphics/lawregs/instruc.htm.

[145] 8 C.F.R. § 241.4(k)(1) (2002); *Ali*, 346 F.3d at 884.

[146] 8 U.S.C § 1231(a)(7) (1996).

deportation to be valid.[147]

4. International Law

Finally, the Ninth Circuit found that international law supports its construction of the INA.[148] The court looked to the longstanding doctrine, articulated by the Supreme Court in *Murray v. The Schooner Charming Betsy*, that "an act of congress ought never to be construed to violate the law of nations, if any other possible construction remains."[149] In reconciling the INA with international law, the Ninth Circuit specifically looked at article 3 of the International Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("Torture Convention").[150] As a signatory to this treaty, the United States may not involuntarily send any person to a country when it believes substantial evidence exists that the person would be in danger of torture.[151] Because the INS did not contest the assertion that the Somali deportees would suffer human rights abuses, the court relied on this international human rights principle to support its construction.[152] The Ninth Circuit reasoned that although Congress has the power to override international law when enacting a statute, the court should not presume that Congress intends to do so when the statute can be

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[147] *Ali*, 346 F.3d at 884.

[148] *Id.* at 885.

[149] Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64 (1804); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 114 (1987) ("When fairly possible a United States statute is to be construed so as not to conflict with international law or with an international agreement of the United States."). For further discussion, see *infra* Part III.A.2.

[150] International Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. TREATY DOC. NO. 100-20 (1988), 1465 U.N.T.S. 85.

[151] *Ali*, 346 F.3d at 883 (quoting 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, 2681-22 (1998)); *see also* Kathleen M. Keller, *Note: A Comparative and International Law Perspective on the United States (Non) Compliance with its Duty of Non-Refoulement*, 2 YALE HUM. RTS. & DEV. L.J. 183 (1999) (criticizing United States approach with respect to immigrants with criminal backgrounds under Refugee Convention).

[152] *Ali*, 346 F.3d at 886. The district court listed three multilateral treaties to which the United States is a party. International Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, art. 3, S. TREATY DOC. NO. 100-20 (1988), 1465 U.N.T.S. 85; International Covenant on Civil and Political Rights, Dec. 19, 1966, arts. 6-7, S. EXEC. DOC. NO. 95-2 (1978), 999 U.N.T.S. 171; *Ali*, 213 F.R.D. 390, at 405 (W.D. Wash. 2003) (citing United Nations Convention Relating to the Status of Refugees, Apr. 22, 1954, art. 33, 19 U.S.T. 6259, 189 U.N.T.S. 137, *as incorporated by* Protocol Relating to the Status of Refugees, Oct. 4, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267).

reasonably reconciled with international law.[153] Therefore, because international human rights treaties forbid deportations when abuses are likely, reading the INA to require acceptance reconciles the statute with international law.[154]

III. WHY THE NINTH CIRCUIT'S INTERPRETATION IS CORRECT

In interpreting section 1231(b), the Supreme Court should follow the Ninth Circuit's *Ali* approach.[155] Principles of statutory construction and an analysis of the relevant case law dictate this interpretation. Moreover, the Ninth Circuit's approach is fair and just.

A. Statutory Construction

1. Proper Statutory Interpretation

By dismissing an acceptance requirement in the third step of the statute, the *Jama* court sets up an untenable framework that renders critical requirements in the first two steps ineffectual.[156] Requiring acceptance by the receiving country in steps one and two would be pointless if the United States could circumvent the acceptance requirement by simply deporting an alien to that same country under step three, after a country expressed unwillingness to accept a deportee.[157] Looking at the statutory scheme in its entirety supports the conclusion that section 1231(b)(2) requires acceptance for all deportations.[158] A person is most often a subject, national, or citizen of

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[153] *Ali*, 346 F.3d at 886.

[154] *Id.*

[155] *Id.*

[156] *Id.*

[157] *See id.* at 881-82 (stating that to read statute to not require acceptance in step three would "allow the INS to thwart the acceptance requirement of step one and step two by relying on step three").

[158] *Ali*, 213 F.R.D. 390, 402-03 (W.D. Wash 2003); *see also* CRAWFORD, *supra* note 94, at 287.

> Since the basic and underlying purpose of all legislation, at least in theory, is to promote justice, it would seem that the effect of the statute should be of primary concern. If this is so, the effect of a suggested construction is an important consideration and one which the court should never neglect.

CRAWFORD, *supra* note 94, at 287.

It is worth noting that the Office of Legal Counsel, an arm of the Department of Justice, subscribes to the interpretation supported by this Article. Office of Legal Counsel,

the country in which she was born.[159] Requiring acceptance for one and not the other creates an unworkable and illusory distinction.[160] Courts should not construe statutes so as to render certain parts null.[161] The reasonable interpretation of the INA requires acceptance under all three steps of the statute, thereby giving effect to all the statutory subsections.[162]

Contrary to the *Jama* court's interpretation, the maxim *expressio unius est exclusio alterius* does not properly apply to the INA.[163] This canon of interpretation only applies when a court has difficulty determining legislative intent.[164] The intent underlying section 1231(b) is unambiguous.[165] The Senate Committee's report for section 1253(a), the

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Limitations on the Detention Authority of the Immigration and Naturalization Service n.11 (Feb. 20, 2003), *available at* http://www.usdoj.gov/olc/INSDetention.htm ("Each of the [step three countries] would have to be separately negotiated with by the United States, and would also have to be given an appropriate amount of time — presumably 30 days — to decide whether to accept or reject the alien.").

[159] *Ali*, 213 F.R.D. at 403.

[160] *See id.* (acknowledging that circumstance where birth country and "subject, national or citizen" country are separate places would not moot acceptance requirement of first two steps).

[161] *Ali*, 213 F.R.D. at 402; Omar v. INS, No. 02-1387 (MJD/JGL), 2003 U.S. Dist. LEXIS 6327, at *21 (D. Minn. Feb. 5, 2003) ("Courts must interpret statutes so as to give effect to all the statute's provisions."). Sections 18(a) and 18(b) of the Uniform Statute and Rule Construction Act (1993) provide that a statute or rule must be construed so as to "avoid an . . . absurd . . . result" and "to give effect to its entire text." UNIFORM STATUTE AND RULE CONSTRUCTION ACT §§ 18(a)-(b) (1993). Moreover, the Commentary to Section 19 holds that, under the Golden Rule, if the unambiguous meaning of the statute leads to an absurd or unjust result, the construer should search further for the correct meaning and construe it so as to avoid the absurd or unjust result. *Id.* § 19, cmt.

[162] *Ali*, 346 F.3d at 881-82.

[163] *Id.*

[164] CRAWFORD, *supra* note 94, at 335. Judges should be cautious when applying the principle because the rule does not apply unless the language of the statute suggests a grant of general power that, in proper context, is not meant to be an exclusive list. *See* State *ex rel.* Curtis v. De Corps, 16 N.E.2d 459 (Ohio 1938) ("Like other canons of statutory construction it is only an aid in the ascertainment of the meaning of the law and must yield where a contrary intention on the part of the lawmaker is apparent.").

[165] *See Omar*, 2003 U.S. Dist. LEXIS 6327, at *24 (holding that section 1231(b)(2) is unambiguous and under Chevron U.S.A., Inc. v. Natural Res. Def. Council, 267 U.S. 837, 842 (1984), "courts need only defer to agency interpretations of statutes when Congressional intent is ambiguous"). With respect to the requirement of a foreign country's willingness, previous incarnations of this section were never questioned. *See Brief of Yusuf Ali Ali* at *2-10, Jama v. INS, 2004 WL 1148635 (U.S. May 18, 2004) (No. 03-674) (describing versions of deportation statute as codified in Immigration Act of 1917 and Internal Security Act of 1950 as being universally understood to require acceptance of deportee by foreign government in all cases); *see also* United States v. Spector, 343 U.S. 169, 171 (1952) (interpreting 1950 statute to mean that once "the country willing to receive the alien is identified, the mechanism for effecting his departure remains"); *Spector*, 343 U.S. at

predecessor to section 1231(b), indicates that when Congress adopted the INA, it never contemplated a system that eliminated an acceptance requirement.[166] Even in the midst of the Cold War, and facing intense security concerns (reminiscent of the post-9/11 era[167]), Congress recognized that the INS must secure travel documents from a receiving state prior to a deportation.[168] The government recognized it could not deport aliens without procuring a proper acceptance from the receiving country.[169]

Moreover, Congress silently adopted the broader interpretation by relying on settled judicial interpretation when it recodified the INA and

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179-80 (Jackson, J., dissenting) ("A deportation policy can be successful only to the extent that some other state is willing to receive those we expel."); United States *ex rel.* Hudak v. Uhl, 20 F. Supp. 928, 929 (N.D.N.Y. 1937) (interpreting 1917 statute to "be presumed in every case of deportation that the United States immigration authorities have obtained the consent of the native sovereignty to receive the deported alien").

[166] SENATE COMM. ON THE JUDICIARY, THE IMMIGRATION AND NATURALIZATION SYSTEMS OF THE UNITED STATES, S. Rep. No. 1515, at 629 (1950), *reprinted in* OSCAR M. TRELLES & JAMES F. BAILEY, 1 IMMIGRATION AND NATIONALITY ACTS, LEGISLATIVE HISTORIES & RELATED DOCUMENTS (1979).

[167] Kevin Cornfield, *Cold War Trail*, HARTFORD COURANT, July 21, 2002, at G2 (noting author's comparisons between post-September 11 and Cold War worlds); Charles Proctor, *UCLA Academic Activists Fear Greater Surveillance*, DAILY BRUIN, Dec. 4, 2003, (drawing comparisons between Cold War and post-September 11 era); *Evan Thomas Discusses President Bush's Plan to Reorganize the Federal Government* (National Public Radio, June 9, 2002) (replaying President's call for similar reorganization of Federal government post-September 11 just as President Truman employed during Cold War).

[168] SENATE COMM. ON THE JUDICIARY, *supra* note 166, at 629 ("In order to execute a warrant of deportation, a passport or travel document must be obtained from the representative of the foreign country to which the alien is to be deported. This leads to many complications . . . . If deportation is not effected within a reasonable time, the alien must be released.").

[169] *Id.*

> One of the most serious problems with which the Immigration and Naturalization Service is faced is the disposition of the aliens found deportable by the Service but who cannot be deported. The latest statistics show that there are 3,600 nonenforceable deportation orders, of which 1,365 involve Russians. The nature of the problem was described by the Immigration and Naturalization Service in its 1948 report: "Following an order of deportation a passport or other travel document must be procured for the alien in order for him to enter the country to which he is deported . . . If [the INS or State Department] is unsuccessful in such requests [for travel documents], the alien cannot be deported." It may be readily seen that this is an alarming situation. As one writer stated in a recent article, if Russia or any other country landed a planeload of aliens in the United States, such country would have every assurance that the aliens could roam the country at will in a very few months. All the country has to do is refuse to issue passports and the aliens cannot be deported.

Id. at 637-38.

1231(b).[170] Specifically, *Tom Man* and *Linnas* were both decided before the statute's recodification in 1996 and were thus incorporated by Congress.[171] Indeed, a number of the INS's own operating procedures continue to reflect a uniform assumption that the receiving country will indeed accept the alien.[172] Section 1231(b)'s practical application should reflect the INS's presupposition.

2. International Law Concerns

In the 2003-04 Term, the Supreme Court made a number of decisions that considered international law to be relevant, if not persuasive, authority.[173] The Court's majority made noticeable strides in indicating a greater role for international law norms in its own decisions.[174] The Court considered international legal material in a variety of cases involving international human rights, antitrust, immunity of foreign countries, availability of discovery for foreign litigants, and most prominently, the enemy combatant cases.[175] This approach, however, is

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[170] Cannon v. Univ. of Chicago, 441 U.S. 677 (1979) (holding that because courts can presume congressional familiarity with interpretory case law, Congress expects its enactments to be interpreted in conformity with them); S & M Inv. Co. v. Tahoe Reg'l Planning Agency, 911 F.2d 324, 326 (9th Cir. 1998) ("If the term at issue has a settled meaning, we must infer that the legislature meant to incorporate the established meaning, unless the statute dictates otherwise.").

[171] *See Cannon*, 441 U.S. at 677. *See generally* United States *ex rel.* Tom Man v. Murff, 264 F.2d 926 (2d Cir. 1959); *In re* Linnas, 19 I. & N. Dec. 302 (B.I.A. 1985).

[172] *See, e.g.*, 8 C.F.R. § 241.4(k)(1) (2002) (providing for "custody review . . . where the alien's removal, while proper, cannot be accomplished during the [removal] period because no country currently will accept the alien"); *id.* § 241.5(c)(1) (2000) (authorizing issuance of employment authorization to alien released from custody if "[t]he alien cannot be removed because no country will accept the alien"); *id.* § 241.13(f) (2001) (requiring INS, when deciding whether to release alien from custody, to consider "the views of the Department of State regarding the prospects for removal of aliens to the country or countries in question, and the receiving country's willingness to accept the alien into its territory"); INS Operating Instruction 243.1(c)(1), *available at* http://www.immigration.gov (stating that "deportation cannot be effected until travel documentation has been obtained from the country to which the alien is to be deported").

[173] *See* Amy Howe, *A Little Worldly*, LEGAL TIMES, July 5, 2004, at 50 (describing influence of international law in 2003-04 Supreme Court decisions); *Supreme Court Increasing Use of References to Foreign Law in Decisions* (National Public Radio, July 13, 2004) (discussing with legal scholars role of international law in Supreme Court cases).

[174] Howe, *supra* note 173, at 50; *Supreme Court Increasing Use of References to Foreign Law in Decisions*, *supra* note 173.

[175] *See, e.g.*, Sosa v. Alvarez-Machain, 124 S. Ct. 2739, 2747-68 (2004) (discussing generally application of international law in international human rights cases adjudicated in United States); Rasul v. Bush, 124 S. Ct. 2686 (2004) (holding that detainees at Guantanamo Bay could use U.S. courts to challenge detentions and claim violations of international law); Intel Corp. v. Advanced Micro Devices, Inc., 124 S. Ct. 2644 (2004)

not new to American jurisprudence.[176] In fact, in 1900, the Supreme Court unanimously ruled that "international law is part of our law."[177] The vitality of this principle remains intact, having been reaffirmed in the Court's most recent term.[178]

Consistent with the inclusion of international law in American law is the traditional American rule of statutory construction outlined by the Supreme Court in *Murray v. The Schooner Charming Betsy*,[179] which holds that courts generally may not interpret a congressional statute in a way that violates international law.[180] According to this doctrine, while international law should not be used to override statutory language, it should be taken into account as further support for a particular interpretation.[181] Although Chief Justice Marshall cited no authority other than "principles [that] are believed to be correct" when he created

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(discussing European Commission and availability of discovery for foreign litigants); Hamdi v. Rumsfeld, 124 S. Ct. 2633 (2004) (discussing issue of "enemy combatants" and detentions under Geneva Convention); F. Hoffman-LaRoche Ltd. v. Empagran, 124 S. Ct. 2359 (2004) (discussing influence of foreign decisions in foreign commerce and antitrust litigation); Republic of Austria v. Altmann, 124 S. Ct. 2240 (permitting U.S. citizen to sue Austrian government in U.S. courts). *See generally* Howe, *supra* note 173; *Supreme Court Increasing Use of References to Foreign Law in Decisions*, *supra* note 173.

Other recent cases that cited to international materials include Atkins v. Virginia, 536 U.S. 304, 316 n.21 (2002) (noting that world community condemns capital punishment for mentally disabled), *Lawrence v. Texas*, 539 U.S. 558, 573 (2003) (citing case from European Court of Human Rights in striking down anti-sodomy laws), and *Grutter v. Bollinger*, 539 U.S. 306, 344 (2003) (Ginsburg, J., concurring) (explaining that upholding affirmative action coincides with "international understanding").

[176] Martha F. Davis, *Lecture: International Human Rights and United States Law: Predictions of a Courtwatcher*, 64 ALB. L. REV. 417, 418-19 (2000) (noting application of international norms in American political asylum and refugee law and cases involving foreign defendants).

[177] The Paquete Habana, 175 U.S. 677, 700 (1900).

[178] *Sosa*, 124 S. Ct. at 2746, 2764-68 (discussing principle introduced in *The Paquete Habana*).

[179] Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804); *see also* Kim Ho Ma v. Ashcroft, 257 F.3d 1095, 1114 (9th Cir. 2001) (discussing "well-established *Charming Betsy* rule of statutory construction which requires that courts generally construe congressional legislation to avoid violating international law" out of respect for other nations).

[180] Ali v. Ashcroft, 346 F.3d 873, 885 (9th Cir. 2003); *see also* Mojica v. Reno, 970 F. Supp. 130, 151-52 (E.D.N.Y. 1997); Curtis A. Bradley, *The Charming Betsy Canon and Separation of Powers: Rethinking the Interpretive Role of International Law*, 86 GEO. L.J. 479, 485-91 (1998); Ralph G. Steinhardt, *The Role of International Law As a Canon of Domestic Statutory Construction*, 43 VAND. L. REV. 1103, 1109-12 (1990); Jonathan Turley, *Dualistic Values in the Age of International Legisprudence*, 44 HASTINGS L.J. 185, 211-14 (1993); Michael F. Williams, *Charming Betsy, Chevron, and the World Trade Organization: Thoughts on the Interpretive Effect of International Trade Law*, LAW & POL'Y INT'L BUS. 677, 693-97 (2001).

[181] See *Kim Ho Ma*, 257 F.3d at 1114; RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 114 (1987).

this rule, the doctrine remains a relevant canon of statutory construction today.[182] The Supreme Court and lower federal courts invoke the doctrine in a wide variety of contexts, including immigration, diplomatic relations, and employment discrimination.[183]

According to the stated policy of the United States and the international community, consciously returning a person to a place where she will likely suffer civil and human rights violations is itself a violation of human rights.[184] United Nations treaties to which the United States is a party speak directly to this international understanding.[185] Reading the INA to permit a deportation tainted by a significant possibility of torture is incongruous with international human rights concerns.[186]

Specifically, article 3 of the Torture Convention expressly prohibits countries from deporting a person to another state where there are "substantial grounds" that the person would be a victim of torture.[187] Additionally, article 33 of the Convention Relating to the Status of Refugees ("Refugee Convention") requires a closer inspection of deportations to war-torn countries like Somalia.[188] The Refugee Convention deals specifically with those who fear persecution on the basis of race, religion, nationality, political opinion, or membership in a particular social group, and protects against threats to life or freedom.[189] Significant threats of persecution or harm undoubtedly confront people returning to Somalia.[190] Armed clan conflict frequently claims the lives

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[182] *Murray*, 6 U.S. (2 Cranch) at 118.

[183] *Bradley*, *supra* note 180, at 488.

[184] *See, e.g.*, International Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *supra* note 152; International Covenant on Civil and Political Rights, *supra* note 152; United Nations Convention Relating to the Status of Refugees, *supra* note 152.

[185] *See* International Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *supra* note 152; International Covenant on Civil and Political Rights, *supra* note 152; United Nations Convention Relating to the Status of Refugees, *supra* note 152; U.S. DEP'T OF STATE, 2002 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES, Preface (2003) ("[H]uman rights are universal" and "their protection worldwide serves a core U.S. national interest.").

[186] Ali v. Ashcroft, 213 F.R.D. 390, 404-05 (W.D. Wash. 2003).

[187] International Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *supra* note 152; Ellen Y. Chung, Comment, *A Double-Edged Sword: Reconciling the United States' International Obligations Under the Convention Against Torture*, 51 EMORY L.J. 355, 361 (2002).

[188] United Nations Convention Relating to the Status of Refugees, *supra* note 152.

[189] *Id.*

[190] SOMALIA: HUMAN RIGHTS 2002, *supra* note 1; *Punishing Cycles of Violence in Somalia*, *supra* note 1; *Somalia: Man Deported from U.S. Killed in Mogadishu*, *supra* note 28.

of civilians and relief workers.[191] Even more upsetting is the regularity with which women and children become the targets of militia groups.[192] No one is safe from the violence.[193] Other provisions of immigration law incorporate these treaties, which specifically protect against those dangers.[194] It would not make sense to allow the INA to circumvent these provisions by narrowly interpreting section 1231(b).

Though Congress does have authority to override international law, when a reasonable interpretation of a statute can be read to correspond with international law, it should be construed that way.[195] Congress did not intend, as the Eighth Circuit suggests, to promote an international policy of asking politely first then acting anyway if the request for acceptance is denied.[196] As discussed above, numerous safeguards in section 1231(b) and other statutory sections repeatedly emphasize the necessity of a foreign government's acceptance.[197]

B. The Ninth Circuit Correctly Interpreted Prior Case Law

Requiring acceptance in all deportations is consistent with all prior analogous case law addressing this question.[198] A long line of cases from various circuits holds an acceptance requirement necessary for every

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[191] *See* REPORT OF THE SECRETARY-GENERAL ON THE SITUATION IN SOMALIA, *supra* note 5 (describing how violence continues to restrict humanitarian access); *Punishing Cycles of Violence in Somalia*, *supra* note 1 (describing deaths of aid workers); *U.N. Condemns Killings of Women and Children*, *supra* note 1 (describing women and children dying as result of inter-factional warfare).

[192] *See U.N. Condemns Killings of Women and Children*, *supra* note 1 (describing victimization of women and children). The U.N. High Commission for Refugees plans to issue a report on the removal of people to Somalia. Salad F. Duhul, *U.N. Mission Set to Visit Somalia, Neighbors to Study Arms Embargo*, ARAB NEWS, Nov. 14, 2003, *available at* http://www.aljazeerah.info. New Zealand is freezing all deportations to Somalia until the U.N. issues that report. *Id.*

[193] *See Punishing Cycles of Violence in Somalia*, *supra* note 1 (describing regularity with which civilians are caught in crossfire).

[194] *See, e.g.*, 8 U.S.C. § 1252(b)(3) (1996) (allowing courts to consider provisions under Torture Convention during review of final removal order); 8 C.F.R. § 208.14(c)(2) (2000) (providing asylum in accordance with Article 33 of Refugee Convention).

[195] Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804); Ali v. Ashcroft, 346 F.3d 873, 885-86 (9th Cir. 2003).

[196] Jama v. INS, 329 F.3d 630, 637 (8th Cir. 2003) (Bye, J., dissenting).

[197] *Ali*, 346 F.3d at 884-85. The need for safeguards is especially great in a situation where there is no government in place, as human rights violations are more likely to occur in that case. Brief Amici Curiae of International Human Rights Organizations and International Law Professors in Support of the Petitioner, Jama v. INS at *7-8, 2004 WL 1153712 (U.S. May 18, 2004) (No. 03-674) (arguing that in absence of government, human rights laws will never be enforced).

[198] *Ali*, 346 F.3d at 883-84.

deportation.[199] In *Tom Man*, the Second Circuit unequivocally held that the correct reading of step three of the statute included applying an acceptance requirement to that step.[200] *Tom Man* and its progeny assumed the necessity of governmental acceptance for every deportation.[201]

By rejecting the distinction between a preliminary inquiry and a final removal, the Eighth Circuit misreads *Niesel*.[202] In *Niesel*, the BIA allowed the Attorney General to make a designation prior to making the final acceptance request.[203] In its analysis, *Niesel* clearly separated the final inquiry and preliminary inquiry concepts by distinguishing between a deportation and a designation.[204] Specifically, the BIA stated that the Attorney General need not make a *preliminary inquiry* when "designating a country in step three as a place of deportation."[205] The BIA then stated that "perhaps" there is a preliminary inquiry requirement for the *seventh subsection* of step three,[206] which unlike the rest of step three, explicitly requires acceptance in its text.[207] This indicates that the BIA viewed the text of the statute as the source of the preliminary inquiry requirement. If the BIA meant to exclude a *final inquiry* requirement from the six previous subdivisions of step three, it would not have so clearly contradicted the statute by stating that "perhaps" the seventh subdivision required a final acceptance inquiry.[208] In other words, the BIA did not unequivocally reject the acceptance requirement in step three as suggested by the Eighth Circuit.

In addition, *In re Linnas* represents the BIA's subsequent acknowledgement of the acceptance requirement as it pertained to

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[199] Pelich v. INS, 329 F.3d 1057, 1061 (9th Cir. 2003) (stating that alien "can be deported to the country of his birth or to a country where he resided prior to entering the United States (assuming these countries would take him)"); Lee Wei Fang v. Kennedy, 317 F.2d 180, 185 (D.C. Cir. 1963) (quoting Delany v. Moraitis, 136 F.2d 129, 131 (4th Cir. 1943)) ("It must be remembered . . . that the deportation of an alien is not a mere matter of taking him beyond the seas and setting him down on foreign soil. It must be carried out through arrangements made with the foreign government.").

[200] United States *ex rel.* Tom Man v. Murff, 264 F.2d 926, 928 (2d Cir. 1959).

[201] *See, e.g.*, Chi Sheng Liu v. Holton, 297 F.2d 740, 743 (9th Cir. 1961); Rogers v. Lu, 262 F.2d 471, 471 (D.C. Cir. 1958).

[202] *Ali*, 346 F.3d at 884.

[203] *See Jama*, 329 F.3d 630, 636 (8th Cir. 2003) (Bye, J., dissenting); *In re* Niesel, 10 I. & N. Dec. 57, 59 (B.I.A. 1962).

[204] *See Niesel*, 10 I. & N. Dec. at 59 (using "deportation" and "designation" separately).

[205] *Id.*

[206] *Id.*

[207] 8 U.S.C. § 1231(b)(2)(E)(vii) (1996).

[208] *Niesel*, 10 I. & N. Dec. at 59.

"countries" under the predecessor statute.[209] A country consists of both a territory and a government.[210] Somalia obviously cannot be designated as a country under this definition.[211] Moreover, the BIA recognized that there must be acceptance by the foreign government of the alien into its territory.[212] The Eighth Circuit incorrectly stated that no "settled judicial construction" of section 1231(b) existed.[213] The case law, including *Niesel*, consistently holds in favor of reading the provision the only way that makes sense — requiring acceptance by a foreign government in all deportation cases.[214]

IV. THE IMPORTANCE OF AN INDEPENDENT JUDICIARY

This Part examines courts as guardians of basic rights and enforcers of constitutional checks on executive authority. Subpart A addresses the judiciary as a necessary harness on executive power. Subpart B discusses the duty of judges to strive for justice according to changing fairness ideals.

A. Check on Executive Authority

One of the hallmarks of our system of government is the assurance of a free and independent judiciary.[215] Exercising its duty to interpret statutes that govern executive authority is an essential judicial function.[216] The structure of checks and balances requires the judiciary to ensure that the executive branch stays within the statutory limits imposed upon it by the legislative branch.[217] This function is especially crucial when the executive's own interpretation represents a construction

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[209] *In re* Linnas, 19 I. & N. Dec. 302 (B.I.A. 1985).

[210] *Id.* at 306-07.

[211] *Background Note: Somalia*, *supra* note 2 ("Somalia has no national government at present.").

[212] *Linnas*, 19 I. & N. Dec. at 307.

[213] Ali v. Ashcroft, 346 F.3d 873, 883-84 (9th Cir. 2003).

[214] *Id.* at 884.

[215] N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 58 (1982) ("The Federal Judiciary was designed by the Framers to stand independent of the Executive and Legislature to maintain the checks and balances of the constitutional structure and also to guarantee that the process of adjudication itself remained impartial.").

[216] Nat'l Treasury Employees Union v. Nixon, 492 F.2d 587, 604 (D.C. Cir. 1974) (holding that failure to determine law because executive speaks would be nonperformance of judicial duty).

[217] *See id.* ("[T]he judicial branch of the Federal Government has the constitutional duty of requiring the executive branch to remain within the limits stated by the legislative branch.").

contrary to the legislature's intent.[218]

The Attorney General performs executive functions as chief administrator of section 1231(b)(2).[219] As such, he is subject to oversight by the judicial branch.[220] The position currently taken by the Attorney General and INS disregards Congress' acceptance inquiry requirement under the INA.[221] Thus, it is necessary for the judiciary to curtail the executive branch's attempt to overstep its statutory authority.[222]

The underlying rationale for the system of checks and balances is the protection of people from unwarranted impositions by any one branch of government.[223] There is no clearer assault on human dignity than deportation to a war-torn country like Somalia.[224] In his *Jama* dissent, Judge Bye warned that to "act anyway" by allowing the Attorney General to deport aliens to a country that has not accepted them represents an abandonment of principles of order and liberty.[225] The judiciary is charged with preventing the other branches of government from abusing their "great strength at the expense of the weak."[226] Indeed, the Supreme Court supports this approach, having committed itself and the lower federal courts to protecting those powerless against the excesses of the political process.[227]

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[218] *See id.*

[219] *See* 8 U.S.C. § 1231(b)(2) (1996).

[220] *Nat'l Treasury Employees Union*, 492 F.2d at 611-12.

[221] *See supra* notes 165–72 and accompanying text.

[222] Nat'l Automatic Laundry & Cleaning Council v. Shultz, 443 F.2d 689 (D.C. Cir. 1971) ("In our overall pattern of government the judicial branch has the function of requiring the executive (or administrative) branch to stay within the limits prescribed by the legislative branch.").

[223] Davis v. Passman, 442 U.S. 228, 241-42 (1979) (quoting 1 ANNALS OF CONG. 439 (1789)) ("If [these rights] are incorporated into the Constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the Legislative or Executive."); ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 1 (2002) (explaining that purpose of separation of powers is to prevent possibility of tyrannical rule).

[224] Jama v. INS, 329 F.3d 630, 637 (8th Cir. 2003) (Bye, J., dissenting).

[225] *Id.* Judge Bye wrote:

> I fear if we 'act anyway' by deporting Mr. Jama to Somalia, we abuse our great strength at the expense of the weak. With this change in policy, we abandon a stateless person without a passport or traveling documents in a war-torn country victimized by battling warlords and without a central government. By doing so, I fear we abandon order and risk the doom of liberty.

Id.

[226] *Id.*

[227] William Wayne Justice, *Two Faces of Judicial Activism*, 61 GEO. WASH. L. REV. 1, 5

B. Understandings of Fairness

A judiciary that allows a deportation, knowing that there is a significant probability that the alien will be exposed to physical danger, evades its duty to rule justly.[228] As Professor Ronald Dworkin asserts, the Framers instilled in the Constitution their interest in values like fairness.[229] Their theory was one that would adapt to new understandings of fairness.[230] Just as the Warren Court's approach in *Brown v. Board of Education*[231] addressed the needs of a rapidly changing society,[232] courts today should react to the human rights violations that affect today's world.[233]

The "judicial activism" advocated here is much more benign than the "dramatic doctrinal innovations"[234] of *Gideon v. Wainright*,[235] *Mapp v. Ohio*,[236] *Katz v. United States*,[237] and *Miranda v. Arizona*.[238] Reading an acceptance requirement into the statute, in recognition of the right to be free from persecution in a chaotic environment, does not represent extreme judicial activism.[239] It embodies a logical approach to reaching a

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(1992) (citing United States v. Carolene Prods. Co., 304 U.S. 144, 153 n.4 (1938)).

[228] *See id.* at 13 ("If the law makes empty promises of justice and courts stand by . . . then we do not fulfill the promises of equal protection and due process."); Andrew M. Scoble, *Enforcing the Customary International Law of Human Rights in Federal Court*, 74 CALIF. L. REV. 127, 128 (1986) (describing approach that would open federal courts to protection of human rights already recognized by international law).

[229] Sotirios A. Barber, *The New Right Assault on Moral Inquiry in Constitutional Law*, 54 GEO. WASH. L. REV. 253, 254 (1986) (citing RONALD DWORKIN, TAKING RIGHTS SERIOUSLY ch. 5 (1977)).

[230] *Id.* at 254.

[231] Brown v. Bd. of Educ., 347 U.S. 483 (1954).

[232] *See id.* at 492-93 (considering education "in the light of its full development and its present place in American life throughout the Nation"); David I. Gold, *The Context of Judicial Activism, The Endurance of the Warren Court Legacy in a Conservative Age: A Fresh Perspective*, 22 T. JEFFERSON L. REV. 121, 123 (1999) (book review) (quoting FREDERICK LEWIS, THE CONTEXT OF JUDICIAL ACTIVISM at Preface (1999)).

[233] *See* SOMALIA: HUMAN RIGHTS 2002, *supra* note 1.

[234] Gold, *supra* note 232, at 123.

[235] Gideon v. Wainwright, 372 U.S. 335 (1963) (granting Sixth Amendment right to counsel to indigent criminal defendants).

[236] Mapp v. Ohio, 367 U.S. 643 (1961) (finding Fourth Amendment right against unlawful searches and seizures applies to states).

[237] Katz v. United States, 389 U.S. 347 (1967) (basing Fourth Amendment protection on reasonable expectation of privacy).

[238] Miranda v. Arizona, 384 U.S. 436 (1966) (ensuring procedural safeguards to protect Fifth Amendment right against self-incrimination).

[239] *See, e.g.*, Justice, *supra* note 227, at 10 (noting case that established "little, if any, new law" because every aspect of relief ordered was based on evidence presented in court).

well-justified conclusion.[240]

Following the Ninth Circuit's *Ali* approach while considering human rights and basic fairness does not usurp legislative authority by reading a requirement into a statute.[241] As District Court Judge William Justice has articulated, "the adversarial nature of the judicial process . . . enables the court to order remedies that are neither arbitrary, tyrannical, nor the products of its own imagination, but rather remedies that flow logically from the court's findings in the case."[242] Concluding that the INA requires a foreign government to accept a deportee in every instance is reasonable, fair, and, more importantly, provides access to the procedural safeguards of the judicial system.[243] This approach cannot be faulted for also reaching a result that accords with society's concern for human rights abuses.[244]

CONCLUSION

The resolution of this disagreement between the circuits will affect the fates of hundreds of Somali immigrants and perhaps thousands of unknown others in future lands subject to chaotic, war-torn environments.[245] Understanding the general purpose of the statute leads to only one conclusion: The INA requires acceptance by a foreign government in every deportation. Congress enacted this statute to ensure that selection of a deportation country would proceed in a reasonable manner, in accordance with general international law and the procedures of the federal government. When applied to this statute, fundamental statutory interpretation doctrines reveal a poorly constructed, yet not indecipherable, statute. Applying the statute

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[240] *See generally id.* (stating that judicial "determination results from the application of judicial precedents and factual reality, which the adversarial process is designed to foster").

[241] *Cf.* Gary L. McDowell, *1983 Survey of Books Relating to the Law: II. The Federal Courts and the Constitution: Equity and the Constitution*, 81 MICH. L. REV. 859, 859 (1982) (describing criticism of *Brown* as judicial legislation).

[242] Justice, *supra* note 227, at 7.

[243] *See, e.g., id.* at 12 (arguing that protections of judicial decision-making make it "more likely" that judges' decisions are reliable and well-considered).

[244] JULIO C. CUETO-RUA, JUDICIAL METHODS OF INTERPRETATION OF THE LAW 239 (1981) (citing Cossio, *La Justicia*, 126 REVISTA JURIDICA ARGENTINA LA LEY 1043 (1967) ("A judge is just in his decision, and he therefore realizes justice, when in each case submitted to him for settlement he chooses that solution which brings about the best social understanding.").

[245] Already, the *Ali* decision has found application in post-Saddam Hussein Iraq. Jabir v. Ashcroft, No. Civ.A. 03-2480, 2004 WL 60318, at *8 (E.D. La. Jan. 8, 2004) (finding that Somalia and Iraq are similar because "in neither country is there a national government authorized to receive the removable alien").

literally requires courts to engage in unreasonable assumptions and leads to absurd results. Many courts recognized the flaw and properly rectified it through an interpretation which read the acceptance requirement into all parts of the statute. Additionally, international law, as a recently reaffirmed factor for judicial consideration, encourages this interpretation. Finally, the judiciary should recognize the opportunity to exercise its power as a check on the executive's excessive use of authority. The Supreme Court must resolve the split by adopting the Ninth Circuit's logical interpretation of the statute. To do otherwise would permit the deportation of aliens into the midst of chaos, which is not the sign of a just and humanitarian nation.