No. 03-674

IN THE
Supreme Court of the United States

KEYSE G. JAMA,

Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

**On Writ Of Certiorari To
The United States Court Of Appeals
For The Eighth Circuit**

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether the Attorney General can remove an alien to one of the countries designated in 8 U.S.C. § 1231(b)(2)(E) without obtaining that country's acceptance of the alien prior to removal.

PARTIES TO THE PROCEEDING

The caption of this Petition contains the only named parties to the instant proceeding.

On March 1, 2003 the INS ceased to exist as an independent agency within the United States Department of Justice, and its functions were transferred to the Bureau of Immigration and Customs Enforcement in the newly formed Department of Homeland Security. *See* Homeland Security Act of 2002, Pub. L. No. 107-296, §§ 2, 101, 441, 442, codified at 6 U.S.C. §§ 101, 111, 251, 252.

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The Eighth Circuit's opinion (Pet. App. 1a) is reported at 329 F.3d 630. The Magistrate Judge's Report and Recommendation (Pet. App. 21a) is unreported. The District Court's Final Order (Pet. App. 42a) is unreported. The order of the Eighth Circuit denying the petition for rehearing and for rehearing en banc (Pet. App. 56a) is unreported. The order of the Eighth Circuit denying the motion to recall the mandate and stay the mandate pending filing of a petition for writ of certiorari (Pet. App. 57a) is unreported. The subsequent decision of the Eighth Circuit recalling the mandate on November 10, 2003 (J.A. 51) is also unreported.[1]

JURISDICTION

The judgment of the Eighth Circuit was entered on May 27, 2003. A timely petition for rehearing and for rehearing en banc was denied on August 6, 2003. A petition for writ of certiorari was granted on February 23, 2004. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant portion of the removal statute, 8 U.S.C. § 1231(b)(2) ("Countries to which aliens may be removed") provides:

> **(2) Other aliens**
>
> Subject to paragraph (3)—
>
> **(A) Selection of country by alien**
>
> Except as otherwise provided in this paragraph—
>
> **(i)** any alien not described in paragraph (1)

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[1] The district court and the Eighth Circuit also issued unreported opinions on the question of whether petitioner would be released from custody pending the outcome of this appeal. The Eighth Circuit denied release.

who has been ordered removed may designate one country to which the alien wants to be removed, and

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

(B) Limitation on designation

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

(C) Disregarding designation

The Attorney General may disregard a designation under subparagraph (A)(i) if—

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

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

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

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

(D) Alternative country

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

(i) does not inform the Attorney General or

the alien finally, within 30 days after the date the Attorney General first inquires or within another period of time the Attorney General decides is reasonable, whether the government will accept the alien into the country; or

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

(E) Additional removal countries

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

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

(ii) The country in which is located the foreign port from which the alien left for the United States or for a foreign territory contiguous to the United States.

(iii) A country in which the alien resided before the alien entered the country from which the alien entered the United States.

(iv) The country in which the alien was born.

(v) The country that had sovereignty over the alien's birthplace when the alien was born.

(vi) The country in which the alien's birthplace is located when the alien is ordered removed.

(vii) If impracticable, inadvisable, or impossible to remove the alien to each country described in a previous clause of this subparagraph, another country whose government will accept the alien into that country.

STATEMENT OF THE CASE

1. Somalia has been without a central government since the ouster of dictator Said Barre in 1991. *Ali v. Ashcroft*, 213 F.R.D. 390, 396 (W.D. Wash.), *aff'd*, 346 F.3d 873 (9th Cir. 2003). Over the last decade, warring factions have controlled portions of the country and a state of chaos persists. *See id.* The United States has no diplomatic relations with Somalia, maintains no embassy in Somalia, and has no consular relations with a government in Somalia. Ex. Vol. 203 & 216.[2] "Petitioner is a native and citizen of Somalia" who is subject to a final order of removal (i.e., deportation) from the United States. Br. in Opp'n 3; *see* 8th Cir. J.A. 37 n.16. Because Somalia is without a functioning government, the Attorney General concedes that it cannot get acceptance from Somalia for petitioner's return. *See* Br. in Opp'n (i); 8th Cir. J.A. 37; *see also* Pet. App. 6a.[3] The Attorney General cannot even obtain international travel documents, such as a

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[2] In its appeal to the Eighth Circuit, respondent submitted a Joint Appendix ("8th Cir. J.A.") (docketed July 12, 2002) and its district court exhibits ("Ex. Vol.") (docketed July 12, 2002).

[3] Acceptance of repatriation from foreign governments often occurs pursuant to the terms of an established mutual agreement between the receiving country and the United States. *See, e.g.*, *United States ex rel. Tom Man v. Murff*, 264 F.2d 926, 928 (2d Cir. 1959); *Ellis v. Ferro*, 549 F. Supp. 428, 433 (W.D.N.Y. 1982); *see also* Reciprocal Arrangement between United States and Canada for the Exchange of Deportees, OI 243.1(c)(2)(Appx.), *available at* http://uscis.gov/lpBin/lpext.dll/inserts/slb/slb-1/slb-44969/slb-51000?f=templates&fn=document-frame.htm#slb-aoi2431c2.

Acceptance also commonly comes in response to an inquiry to the receiving country, for example in the form of a letter from the Consul General of the designated country. *See, e.g.*, *Chi Sheng Liu v. Holton*, 297 F.2d 740, 744 (9th Cir. 1961); *Necessity that Country Accept Deported Alien*, 2 Immigration Law Serv. § 17:427. The grant of acceptance additionally may be evidenced by the issuance of travel documents by the receiving country to the deportee. *See United States ex rel. Lee Ming Hon v. Shaughnessy*, 142 F. Supp. 468 (S.D.N.Y. 1956); *Feng Yeat Chow v. Shaughnessy*, 151 F. Supp. 23, 26 (S.D.N.Y. 1957).

passport, which could be used for petitioner's passage outside the United States and entry to the removal country. *See* 8th Cir. J.A. 17; J.A. 37, 41.

Before the district court intervened, INS agents planned to remove petitioner to Somalia without any acceptance by a government. This planned removal involved placing petitioner on a commercial flight into Somalia from Dubai, in the United Arab Emirates. The INS agents would not have accompanied petitioner on the flight into Somalia, presumably because of the lack of a recognized government and because travel there is too dangerous. *See* J.A. 37, 44, 47.[4] During the time in question, news services were reporting people being killed "at the very airport where the INS seeks to drop [him]." Pet. App. 26a (quotation omitted). If and when he landed in Somalia, petitioner would have had no Somali travel or identity documents, and he would have arrived as a United States deportee into the war-torn country from which he fled as a child refugee over a decade ago.

Since 1991, the INS and its successor, the Bureau of Citizenship and Immigration Services ("BCIS"), part of the Department of Homeland Security ("DHS"),[5] has concluded

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[4] *See* Travel Warning – Somalia, DOS, Bureau of Consular Affairs, Oct. 31, 2003, *available at* http://travel.state.gov/somalia_warning.html.

[5] On March 1, 2003, functions of several border and security agencies, including certain functions formerly performed within the Department of Justice by the Immigration and Naturalization Service ("INS"), were transferred to the Department of Homeland Security ("DHS"). *See* Homeland Security Act of 2002, Pub. L. No. 107-296, §§ 441(2) & 451(b), codified at 6 U.S.C. §§ 251(2) & 271(b)). The reorganization consolidated the immigration-related functions into two bureaus: the BCIS, which is responsible for immigration benefits services, and the Bureau of Immigration and Customs Enforcement ("BICE"), of which the Office of Detention and Removal is a division. The Attorney General remains responsible for the administrative adjudication of removal cases by immigration judges and the Board of Immigration Appeals. *See Aliens and Nationality; Homeland Security; Reorganization of Regulations*, 68 Fed. Reg. 9,830-9,846 (Mar. 5, 2003), codified at

that the ongoing armed conflict in Somalia poses a serious threat to the personal safety of returning Somalis. *See DHS Extension of the Designation of Somalia under Temporary Protected Status Program*, 68 Fed. Reg. 43,147-43,150 (July 21, 2003). The DHS acknowledges that "an atmosphere of lawlessness" exists in Somalia. *Id.* at 43,148. "Major regions of the country are under the control of bandits and the population is beyond the reach of the rule of law." *Id.*[6] The DHS found that lacking a functioning government, Somalis within the country rely on family connections and collective security for survival and, as a result, "[n]ew arrivals, outside this network, would be extremely vulnerable." *Id.* These grim facts led the DHS to the conclusion that requiring the return of Somali aliens "would pose a serious threat to their personal safety." *Id.*[7] In fact, after one removal of several Somalis from the United States to Mogadishu in early 2002, the BBC reported "[t]he body of a man who was deported with others from the USA was discovered on Saturday near Mogadishu's milk factory [and]

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8 C.F.R. §§ 1001-1133 (Justice Department implementing regulations after enactment of the Homeland Security Act).

[6] The DHS reports that the ongoing conflict in Somalia has prevented much of the humanitarian relief from reaching some areas where the need is greatest. 68 Fed. Reg. at 43,148. "Some 500,000 people are currently threatened by severe food shortages. 72 percent of the population has no access to healthcare, and 77 percent lack access to clean, potable water." *Id.* An estimated 400,000 are displaced within the country itself, and Somalia's institutions are not able to adequately address the demands of a ravaged population. *Id.*

[7] The DHS made this finding in connection with its notice extending the designation of Somalia under the Temporary Protected Status program ("TPS"). Under the TPS program eligible Somali aliens in the United States can apply to receive TPS benefits, including temporary protection against removal from the United States and work authorization. 68 Fed. Reg. 43,149. But petitioner is not eligible for the program because of his criminal conviction. *See* 8 U.S.C. § 1254(c)(2)(B).

[r]eports say that the man was kidnapped in Bulo Huubey District the previous evening." Somalia: Man Deported from U.S. Killed in Mogadishu, BBC WORLDWIDE MONITORING, May 14, 2002, *available at* LEXIS, MDEAFR Library, BBCMIR File; *see also* Janine Di Giovanni, *How American Dream Faded in Downtown Mogadishu*, TIMES LONDON, Feb. 26, 2002, *available at* 2002 WL 4184793.

2. The effort to remove petitioner must be viewed in historical context. Over the years, the INS has been unable to deport thousands of aliens to countries such as China, Vietnam, Cambodia, Laos, Cuba, Iran, Iraq, North Korea, Libya, and the former Soviet Union because acceptance could not be obtained. *See* Donald M. Kerwin, *Throwing Away the Key: Lifers in INS Custody*, 75 No. 18 Interpreter Releases 649, 650 n.10 (May 11, 1998).[8] Many aliens with final removal orders whom the INS at different periods has been unable to remove came from countries with which the United States did not have full or normal diplomatic relations (e.g., Cuba, Iran, Iraq, and North Korea). Like Somalia, those countries had no government that would accept their nationals whom the United States wished to deport. *Id*. at 651. Other long-term detainees are "stateless" persons, such as former Soviet citizens who do not meet the citizenship requirements of the now-independent former Soviet republics. *Id.*; *see also Zadvydas v. Davis*, 533 U.S. 678, 663 (2001). In addition, the INS traditionally has not deported removable aliens to countries with which the United States developed diplomatic ties but that nevertheless refused to accept the return of their nationals (e.g., Vietnam, Laos, Cambodia, and the People's Republic of China). Kerwin, *supra*, at 650 n.10; *see also Zadvydas*, 533 U.S. at 686

[8] The United States currently has diplomatic relations with the governments of a number of these countries and is now able to obtain acceptance for removals.

(noting that there was "no realistic chance" of removal to Cambodia, which had no repatriation treaty with the U.S.).

In the late 1990s INS districts started removing small numbers of Somalis to Somalia despite the conditions in that country and this inability to gain acceptance. Mary Beth Sheridan, *For Somalis, a Home and Haven; Residents of U.S. Fight Deportation as Too Dangerous*, Wash. Post, Dec. 27, 2002, at A4, *available at* 2002 WL 104309228.[9] Thus, in the case of Somalia, the INS has abandoned its historical practice of gaining acceptance from the country of removal. Despite Somalia's current problems, however, it is only a matter of time before Somalia once again has a central government or governments of successor states emerge, which will be able to tender the requisite acceptance in compliance with the removal statute, 8 U.S.C. § 1231(b)(2).

3. Petitioner Keyse Jama is a Somali native and citizen born in that country in 1979. In 1991, at age 12, he and his family traveled to Kenya to escape inter-tribal warfare in Somalia. J.A. 10. While in a refugee camp in Kenya, petitioner and his family applied for admission to the United States. They were found to meet the definition of "refugees," *see* 8 U.S.C. § 1157 (having a well-founded fear of persecution on account of membership in a particular social group, i.e., clan), and resettled in the United States. Petitioner was inspected and admitted as a refugee at one of the New York City airports in February 1996. J.A. 30. He and his family later came to Minnesota and settled in the Twin Cities area, where petitioner worked and attended school. Pet. App. 43a.

Petitioner became removable from the United States pursuant to 8 U.S.C. § 1182(a)(2)(A)(i)(I) as a result of a conviction for third-degree assault. In June 1999 petitioner

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[9] Respondent has no knowledge about the fate of any Somalis returned to Somalia.

observed through his apartment window a friend being attacked by members of another clan, and came to his friend's assistance. J.A. 14. In the ensuing fight, a number of people sustained injuries, including stab wounds. Petitioner's friend escaped but the police arrested the others, including petitioner. *Id*. Petitioner pled guilty in September 1999 to one count of third-degree assault—a felony under Minnesota law—and was sentenced to one year and one day in prison. The court stayed petitioner's sentence and placed him on probation. *Id*. The day petitioner was released, however, he was found intoxicated in violation of the conditions of his probation and was ordered to serve the remainder of his sentence in state prison. *Id*. at 15. After completing his sentence in June 2000, petitioner was transferred to the custody of the INS where he remains.

The INS initiated removal proceedings against petitioner in November 1999 as a result of his felony conviction. J.A. 5. At a June 5, 2000 immigration hearing, petitioner admitted that he is a native of Somalia and conceded removability based on his criminal conviction. *Id*. Petitioner declined to designate a country for removal, as was his right, and instead stated that he intended to apply for relief from removal based on fear of persecution and torture in Somalia. *Id.* The Immigration Judge then selected Somalia as the country of removal. *Id*. Petitioner filed an application for asylum dated July 5, 2000. Ex. Vol. 85-92. He also filed applications for permanent resident alien status and waiver, for withholding of removal under 8 U.S.C. § 1231(b)(3)(B)(ii), and for relief under Article 3 of the United Nations Convention Against Torture ("C.A.T."). J.A. 5-7.

In August 2000, the Immigration Judge conducted a hearing to consider petitioner's applications for relief from removal. Petitioner's criminal conviction made him ineligible for asylum and withholding of removal. Therefore, the Immigration Judge did not, and could not, review the

merits of these claims. J.A. 5-6, 20-23. The Immigration Judge also declined to adjust petitioner's status to permanent resident on the basis of petitioner's criminal record. *Id.* at 20. The Immigration Judge concluded that petitioner had not sustained his claim that he would be tortured upon his return to Somalia. *Id.* at 23-24. Petitioner appealed the decision denying his application under the C.A.T. to the Board of Immigration Appeals ("BIA").

The BIA affirmed the decision of the Immigration Judge denying petitioner's applications for C.A.T. relief as well as for asylum, withholding of removal, and adjustment of status. J.A. 26-27. The BIA's decision made petitioner's removal order final as of May 9, 2001.[10]

On May 25, 2001, the INS issued a Warrant of Removal and Warning to Alien Ordered Removed authorizing its agents "to take into custody and remove" petitioner from the United States "pursuant to the law." J.A. 30-34. The warning states that petitioner may be removed "[a]t any time." *Id*. at 34. Neither document identifies a country to which petitioner could be removed. Immigration officers, however, confirmed imminent plans to remove petitioner to Somalia. Accordingly, petitioner filed this petition for writ

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[10] Petitioner contests the government's repeated assertions that the immigration proceedings, which reviewed on the merits only the narrow C.A.T. claim, definitively established that petitioner faces little or no risk of persecution or other abuse of his human rights were he returned to Somalia. *See, e.g.*, Brief in Opp'n 14-15. To the contrary, the DHS's conclusion of unique danger to returning Somalis necessitating 13 years of temporary protected status for the entire country demonstrates high risk of persecution and violence awaiting petitioner should he return under present conditions. Although not relevant to petitioner's exhausted asylum and C.A.T. claims, this information regarding the lack of government and dangerous conditions in Somalia, and the threat removal there poses to petitioner, emphasizes the importance of the congressionally mandated acceptance requirement. *See* Pet. App. 26a; *see also Ali*, 213 F.R.D. at 400.

of habeas corpus pro se on June, 28, 2001 pursuant to 28 U.S.C. § 2241. Pet. App. 13a.[11]

4. Petitioner's petition for writ of habeas corpus sought to prevent his removal to Somalia until a government in Somalia had agreed to accept his repatriation. The petition did not challenge the validity of the removal order or even petitioner's eventual removal to Somalia. Rather, petitioner argued that under 8 U.S.C. § 1231(b)(2) the INS could not remove him to Somalia without first establishing that a government in Somalia would accept him. Pet. App. 13a.

Before reaching the merits of petitioner's claim, the United States District Court for the District of Minnesota (Tunheim, J.) rejected respondent's assertion that it lacked habeas jurisdiction to review petitioner's claim. Pet. App. 45a. The court found that the habeas petition raised a "pure question of law" and reviewed only the question of whether the INS's planned imminent removal to Somalia violated the authorizing statute. *Id*. at 48a.

The parties and the court agreed that 8 U.S.C. § 1231(b)(2) sets forth a three-step process for selecting the countries to which the Attorney General may remove an alien. In "step one," § 1231(b)(2)(A)-(C), the alien may or may not designate a country. If the alien does not designate a country or that country does not grant timely acceptance, the Attorney General moves to "step two," § 1231(b)(2)(D), which requires removal to the country of which the alien is a "subject, national, or citizen," unless that country does not grant timely acceptance. When no acceptance is forthcoming, § 1231(b)(2)(E) authorizes additional removal countries in "step three."

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[11] Petitioner's current pro bono counsel began representing petitioner shortly after he filed his pro se habeas petition. Petitioner had separate counsel during the immigration proceedings.

Respondent conceded that Somalia has been without a functioning central government since 1991. *See* Br. in Opp'n (i); 8th Cir. J.A. 13. Nevertheless, Respondent claimed that under § 1231(b)(2)(D) (mandating removal to the country of which an alien is a "subject, national, or citizen"), the acceptance requirement under that clause is irrelevant because Somalia has no government. 8th Cir. J.A. 37 n.16; *see* Pet. App. 34a n.7. Respondent also asserted that § 1231(b)(2)(E)(i)-(vi) does not require acceptance before sending petitioner back to Somalia, where he was born. *See* Br. in Opp'n 9; Resp't Appeal Br. to 8th Cir. 42; *see also* Pet. App. 48a.[12]

The district court, adopting the Report and Recommendation of the Magistrate Judge, Pet. App. 21a, granted habeas relief in favor of petitioner. It found that respondent's interpretation of step three, § 1231(b)(2)(E), would have rendered step two, § 1231(b)(2)(D), which explicitly requires acceptance by a country of which the alien is a "subject, national, or citizen," meaningless. Pet. App. 51a. Therefore, the court adopted a unified construction of the statutory provision, giving effect to all of its clauses, and held that the acceptance requirement applied to all of the sub-clauses listed in step three of the removal statute. *Id.*

Respondent appealed. A panel of the Eighth Circuit unanimously held that habeas jurisdiction obtained and that the petition was properly before the court. Pet. App. 1a-4a. In so holding, the court of appeals rejected respondent's argument, based upon principles of default and waiver, that petitioner should have challenged the INS's decision to

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[12] Respondent has taken the alternative positions below that the INS received acceptance by virtue of being able to physically accomplish removal, arguing that statutory "acceptance" occurs when the flight crew of a plane from Dubai to a city in Somalia accepts the deportee, J.A. 47, or when the deportee is allowed to deplane in Somalia and is not returned to the United States. *See* Resp't Appeal Br. to 8th Cir. 45; *see also* Pet. App. 34a.

remove him to Somalia in the immigration proceedings below. *Id*. at 2a-3a. The court acknowledged that petitioner was not seeking to challenge the final removal order itself, or the constitutionality of the INA. And the court declined to apply the INA's limits on judicial review of the Attorney General's discretionary decision to petitioner's purely legal claims. Pet. App. 3a (holding that petitioner sought review of "a purely legal question of statutory construction"). In reaching this conclusion, the court relied upon "the principles set forth in *INS v. St. Cyr*, *Calcano-Martinez v. INS*, and *Demore*." Pet. App. 3a (citations omitted).

The panel split, however, on the merits of petitioner's claim and the majority reversed the district court's holding regarding the acceptance requirement. Pet. App. 1a. The majority reasoned that, because Congress inserted an acceptance requirement into steps one and two of the removal statute, the absence of an explicit acceptance requirement in all the individual subparts but the final one of step three indicated that the statute does not require acceptance by the removal country. *Id.* at 6a. In so holding, the majority rejected previous decisions of various Courts of Appeals: "We are not bound by these decisions; indeed, we are not persuaded by them * * * ." *Id*.

The majority recognized that its interpretation would lead to the anomalous result in which a country could refuse to accept one of its subjects, nationals, or citizens for removal under step two and the Attorney General could then forcibly remove the alien to that same country as an "additional country" under step three. The majority rationalized this result by stating that "between countries, it is not uncommon behavior to attempt to accomplish a task by asking politely first, and then to act anyway if the request is refused." *Id*. at 7a.

Judge Bye dissented. The dissent would have followed the "well-settled" interpretation of the statutory provision at

issue, most prominently articulated by Judge Learned Hand in *Tom Man*, 264 F.2d 926, that there were "no circumstances under which the statue allowed the United States to deport an alien unless the receiving country was 'willing to accept' him." Pet. App. at 9a. The dissent first explained that there was an established and consistent body of case law interpreting the removal statute to require acceptance. It also noted that Congress had often amended or reenacted the statute, without substantive change, aware of this settled construction. The dissent refused to read into the statute a statelessness exception, stating that "we require a functioning central government as an 'essential aspect' of a 'country' to which an alien can be deported." *Id*. at 11a-12a. The very definition of "country," wrote the dissent, requires a functioning government. *Id*. at 12a.

5. Respondent argued below that it is important to interpret the removal statute in issue to permit removal to Somalia without acceptance by a government in order to assist the DHS in the fight against terrorism. However, the Attorney General merely attempts a routine administrative removal of petitioner.[13] As a matter of general policy, entirely separate immigration statutory provisions deal with the subject of "alien terrorists." *See* 8 U.S.C. § 1537 *et seq*. Specifically, § 1537(b)(2) (reproduced at Appendix C, 7a), sets forth a streamlined procedure for removal of an "alien terrorist." If an appropriate country is not determined by the alien's designation at § 1537(b)(2)(A), then the statute immediately authorizes the Attorney General to remove an alien "to any country willing to receive such alien." § 1537(b)(2)(B).

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[13] The district court has noted in this case that the government's "too-frequent references to terrorism [do not lead to the administration of justice] and are not useful to the resolution of this matter." Dist. Ct. Order, Jan. 12, 2004 (01-1172, dkt # 83) 6 n.8.

SUMMARY OF ARGUMENT

The government seeks to remove (i.e., deport) petitioner, who is a native and citizen of Somalia, to Somalia despite the lack of a functioning government which could accept petitioner. In 8 U.S.C. § 1231(b)(2) ("Countries to which aliens may be removed"), Congress authorized the Attorney General to remove a deportable alien pursuant to a specific country selection process, upon which Congress placed specific limitations. If the alien fails to designate a country of removal, the Attorney General shall remove the alien to "a country of which the alien is a subject, national, or citizen" as long as that country is willing to accept the alien. § 1231(b)(2)(D). Somalia is currently a war-torn society with no central government. As a result, it is undisputed that acceptance cannot be obtained from a government in Somalia for petitioner's removal to that country. Since the requirement of § 1231(b)(2)(D) that a government in Somalia accept petitioner cannot be met, removal to Somalia cannot take place until there is a government willing to accept petitioner into Somalia.

The Attorney General claims that it can ignore the statutory requirements of § 1231(b)(2)(D) and remove petitioner to Somalia, despite the lack of a functioning government willing to accept petitioner, under the last step of the removal process, § 1231(b)(2)(E), because Somalia is the country where petitioner was born. § 1231(b)(2)(E)(iv). However, the proper interpretation of § 1231(b)(2)(E) is that there must be a government willing to accept the removable alien in any of the "additional removal countries" in § 1231(b)(2)(E), including the country where the alien was born. The plain language of the statute establishes that each of the countries listed as additional removal countries in step three, § 1231(b)(2)(E), must have a government willing to accept the alien. Respondent's statutory interpretation would render the acceptance requirement in step two—where acceptance is required from the country of which the alien is

a subject, national, or citizen—superfluous because the Attorney General could eliminate the need for acceptance by choosing the same country as an additional removal country in step three. Moreover, "country" as used in the statute means a state with a central government and Somalia has none.

The requirement that there be a government in the country of removal which is willing to accept the alien has been part of the statute authorizing removal since the progressive, three-step removal process was authorized by Congress in 1952 and part of the law of deportation for far longer. There has been a consistent body of statutory interpretation by the federal courts construing the statute to require acceptance from the governments of the various countries listed in the statute as alternative step-three countries of removal. Historically, the government has not deported thousands of removable aliens, because, as here, the Attorney General could not obtain the acceptance of a receiving government. Despite this, Congress has made numerous amendments and in 1996 recodified the paragraph at issue without substantive change to the statutory language requiring acceptance.

The decision of the divided Eighth Circuit panel below broke with the history of statutory interpretation. The Eighth Circuit, creating a split in the circuits, held that an alien could be removed to the country of birth although no government accepted the alien, even if that country was the same country of which the alien was a subject, national, or citizen. The decision of the Eighth Circuit should be reversed.

ARGUMENT

THE REMOVAL STATUTE REQUIRES ACCEPTANCE FROM THE RECEIVING COUNTRY

I. The Statute Does Not Grant The Executive Discretion To Remove Petitioner To Somalia Without Acceptance.

Section 1231(b)(2) serves three purposes: it cabins the discretion of the Executive Branch; it provides an orderly, progressive process for the selection of a receiving country; and it ensures a safe transfer of the alien to the government of the receiving country.

Congress maintains plenary power over the admission and removal of aliens and over the role of the Executive Branch in removing aliens from the United States, particularly its interaction with other governments or countries. U.S. Const. Art. I, § 8, cl. 4; *INS v. Chadha*, 462 U.S. 919, 940 (1983). Where Congress has plenary power, the Executive Branch may carry out its duties only to the extent of its Congressional grant of authority. *See Zadvydas*, 533 U.S. at 695; *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 161 (2000). As Congress has enacted an authorizing statute, the Executive Branch does not have unfettered discretion to determine where to remove a deportable alien. To the contrary, this grant of power may only be exercised within the limits imposed by Congress:

> [N]o matter how important, conspicuous, and controversial the issue, and regardless of how likely the public is to hold the Executive Branch politically accountable, an administrative agency's power to regulate in the public interest must always be grounded in a valid grant of authority from Congress. And in our anxiety to effectuate the congressional purpose of protecting the public, we

> must take care not to extend the scope of the statute beyond the point where Congress indicated it would stop.

Food & Drug Admin., 529 U.S. at 161 (citations and quotations omitted).

In 8 U.S.C. § 1231(b)(2) ("Countries to which aliens may be removed"), Congress authorized the Attorney General to remove deportable aliens pursuant to a explicit country selection process, upon which Congress placed specific limitations. The Attorney General must follow a progressive three-step process in finding a country to which the alien can be removed, with priority placed upon the country with the most significant connection to the alien.

The three-step process mandated by the statute begins by allowing the alien to designate a country to which he or she may be sent. § 1231(b)(2)(A). If the alien fails to designate a country, or if the designated country does not give its acceptance, the Attorney General must move to the second step. § 1231(b)(2)(C). That step requires the Attorney General to remove the alien to "a country of which the alien is a subject, national, or citizen" as long as that country is willing to accept the alien. § 1231(b)(2)(D). If no country satisfies the requirements of step two, the Attorney General must move to step three, which allows removal to a country with a more attenuated connection to the alien, again as long as the country is willing to accept the alien. § 1231(b)(2)(E).

The outer limit of the Attorney General's authority, then, which circumscribes the selection of any country, is that the government of the country of removal must be willing to accept the alien. The fact of this minimum standard is evidenced by the precise language of the last sentence of the statutory three-step process, which limits the final possible removal country to "*another* country whose government will accept the alien into that country." § 1231(b)(2)(E)(vii) (emphasis added).

"A deportation policy can be successful only to the extent that some other state is willing to accept those we expel." *See United States v. Spector*, 343 U.S. 169, 179-80 (1952) (Jackson, J., dissenting). It is clear that Congress directed the Attorney General to obtain acceptance from the receiving country in § 1231(b)(2)(D) ("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—* * * is not willing to accept the alien into the country" (emphasis added)). Congress presumably enacted this requirement to further the interests of the United States. The acceptance requirement is necessary to ensure an orderly, safe transfer of the alien to the receiving country. Thus, it fosters the interest of the United States in both respect for sovereignty of nations and the orderly transfer of persons between governments. When the removal country has a government recognized by the United States, the acceptance requirement affirms a respect for sovereignty that is in the interest of the United States. When there is no recognized government or, as here, no central government at all, maintaining the acceptance requirement may create the inconvenience of waiting for a government to form that can accept repatriation. However, removal can then take place to a government which is accountable for its citizens. To simply remove the alien to a region in a state of continual territorial war and lacking even a government cuts against the interest of the United States in stable and orderly repatriation.[14] The progressive three-step process, including

[14] The government's scheme to remove petitioner to Somalia with no acceptance by a government and with the expectation that he will arrive into a state of lawlessness in personal danger also emphasizes the importance of the congressionally mandated requirement that a government agree to accept his return. Although not all governments successfully safeguard the human rights of their citizens, a deportee from the United States at least joins the citizenry of a country whose government the international community can hold accountable for abuses and pressure for reform.

its outer limit of the requirement of acceptance from a government willing to receive the alien, has been a part of the removal statute since 1952 and has survived numerous amendments and a recodification intact.

Petitioner's proposed deportation to Somalia violates that consistent statutory process. Petitioner did not designate a country of removal. Respondent concedes that petitioner, a native of Somalia, is a "national and citizen of Somalia." *See* Br. in Opp'n 3; 8th Cir. J.A. 37. Thus, the statute requires the Attorney General to attempt to remove petitioner under step two. The Attorney General admits that the acceptance requirement of § 1231(b)(2)(D) cannot be met at this time because Somalia has no government to accept petitioner. In petitioner's case, this fact should have ended the Attorney General's efforts to remove him to Somalia until the Attorney General could get acceptance from a recognized government there. Unless the Attorney General could remove petitioner to one of the other "additional removal countries" identified in step three, petitioner's situation would be the same as thousands of deportable aliens over the last half century who also could not be removed from the United States until there was a legitimate, recognized government from which acceptance could be obtained. *See* Donald M. Kerwin, *Throwing Away the Key: Lifers in INS Custody*, 75 No. 18 Interpreter Releases 649, 650-52 (May 11, 1998). The statutory language in step two, § 1231(b)(2)(D), contains no exception excusing the Attorney General from the acceptance requirement if no functioning or recognized government exists.

The additional country options offered in step three do not assist the Attorney General in petitioner's case. Under the final step of the process, if the alien cannot be removed to a country of which the alien is a subject, national, or citizen because the requisite acceptance cannot be obtained, then the statute sets forth "Additional removal countries" to which the alien might be removed:

> **(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.

8 U.S.C. § 1231(b)(2)(E).

The first six subparts of step three describe various countries, each of which has a logical connection to the alien—although not as close a connection as the country of which the alien is a subject, national, or citizen. There is no order of priority within this group of six country options. The last subpart (vii) of this step three sets the outer limit of

possible removal countries which is another country found by the Attorney General whose government is willing to accept the alien.

After escaping to Kenya in 1991, petitioner's family left Kenya and came to the United States as refugees in 1996. But the United States does not remove people back to countries which allowed creation of refugee camps on their territory without express acceptance because these countries otherwise would not allow the camps to exist if repatriation of a third country's refugees were foisted upon them later. Subparts (i)-(ii) then do not offer an additional removal option. Options (iii)-(vi) necessarily refer to Somalia, the same country to which the Attorney General could not remove petitioner under step two because of lack of a government able to consent to receive him. The logical progression of the statute prohibits the Attorney General from accomplishing under step three what could not be done under step two. The Attorney General has not found a second country that might be willing to accept petitioner under subpart (vii). Thus, the removal possibilities end at step two with Somalia until a government there is able to accept petitioner's return.

II. Respondent's Position Violates Basic Canons Of Statutory Interpretation.

"In the interpretation of statutes, the function of the courts is easily stated. It is to construe the language so as to give effect to the intent of Congress. There is no invariable rule for the discovery of that intention." *United States v. Am. Trucking Ass'ns*, 310 U.S. 534, 542 (1940). Where the words of the statute are sufficient to determine the purpose of the legislation, the Court need not look beyond their plain meaning. *Id*. at 543. In the present matter, the plain meaning of the words of the statute establishes that acceptance is required from any of the removal countries designated in the statute.

Words must also be read in their context within the statute, however. *Id.* at 542. The statute should be read as a whole to give every provision meaning. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 113 (2001). Of course, when the plain meaning of a statute leads to absurd or futile results, the Court may look beyond the words to the statutory purpose. *Am. Trucking*, 310 U.S. at 543. And "even when the plain meaning [does] not produce absurd results but merely an unreasonable one 'plainly at variance with the policy of the legislation as a whole' [the] Court has followed that purpose rather than the literal words." *Id.* Here, the plain meaning of the words of the statute establish that acceptance is required from any country designated for removal.

Respondent has offered two interpretations of the statute: the first asserts that because Somalia has no government, the acceptance requirement is not relevant and, second, that despite respondent's inability to obtain acceptance under step two, it may remove petitioner to the same country under step three without acceptance. Neither interpretation is supported by the text of the statute and both violate a number of cannons of statutory interpretation.

A. The Plain Language Of The Statute Requires Acceptance At Every Step.

Respondent's first argument, that the acceptance requirement is irrelevant because Somalia has no government, contradicts the plain meaning of the text. Section 1231(b)(2)(D) allows only one construction. It requires that the Attorney General get the timely acceptance of the country of which the alien is a citizen, subject, or national. The statute does not contain an exception if there is no government to ask. In fact, the Attorney General over the years has been unable to remove a large number of people because, in the eyes of our government, the removal country lacked a government from which acceptance could be

obtained. *See* Kerwin, *supra*, at 650 n.10. Had Congress wished to create such an exception, it would have written it into the text of the statute.

Moreover, if it had been Congress' intent to grant the Executive power to remove aliens to geographical places where there was no functioning government to accept and receive an alien simply because the Executive could accomplish the removal to that place, then it made little sense to impose the requirement that there be a "government" willing to accept the alien in the last subpart of step three, which deals with the outer limit of the Executive's authority. If that had been Congress' intent, the statute would have read, in subpart (vii), that the Executive could remove the alien to any other place where it could accomplish removal.

Similarly, the text of the statute cannot support the reading that acceptance is not required in six of the seven subparts that make up step three. The acceptance requirement in subpart (vii), authorizing removal to yet another country which will accept the alien, articulates a requirement for all seven subparts. The text contains three different indications that the acceptance requirement applies to all seven subparts.

First, subpart (vii) of § 1231(b)(2)(E) requires "*another* country whose government will accept the alien into that country." The use of "another" instead of the indefinite "a" or "any" indicates that the acceptance requirement in (vii) is *additional* to an acceptance requirement in the first six subparts. As a matter of statutory construction, a plain reading of this last subpart of § 1231(b)(2)(E) is thus that it modifies the previous six subparts. *United States ex rel. Tom Man v. Murff*, 264 F.2d 926, 928 (2d Cir. 1959).

Second, only an artificially fragmented reading of § 1231(b)(2)(E) avoids this acceptance requirement. § 1231(b)(2)(E) should be viewed as a whole, not only as a matter of general statutory construction but also because of

the history of this particular provision. The precursor text, § 243(a) of the INA, enacted in 1952 and essentially unchanged to the present, is one paragraph. *See* 1952 text, *reproduced at* Appendix A, 1a. Subsequent revisions left the language largely unaltered but, as with many of the older statutes, inserted additional headings. Subparagraph § 1231(b)(2)(E) is not a stand-alone provision but an integrated component of the paragraph § 1231(b)(2): "Countries to which aliens may be removed." The subparagraphs are interconnected, with the alternative steps related to and dependant on the previous step. Steps one, two and the last subpart of step three all require the acceptance of the receiving government and only the most mechanical reading denies the requirement with respect to subparts (i)-(vi) of step three. The acceptance requirement permeates the provision.

Finally, an examination of the consequences of respondent's alternative reading makes clear that the acceptance requirement is present throughout § 1231(b)(2)(E), the step-three provision. Respondent argues that subparts (i)-(vi) do not require the consent of the receiving government, and invokes subpart (iv) denoting the country in which an alien was born. In addition to the problem that, in petitioner's situation, respondent's construction disables step two entirely, this interpretation also leads to unmanageable results when applied to the other subparts. These results could not have been the intention of Congress. For example, the first subpart, which authorizes the removal to the country from which the alien was admitted to the United States, will very often involve removals to Mexico, Canada or, because flights from northeast Africa go through western Europe, a European country. Yet Congress could not have intended to give the Attorney General discretion to remove an alien to any one of these countries, whose close relationship with the United States necessarily requires "respect for sovereignty," without that country's

acceptance. Thus, the Attorney General's construction of the statute necessarily involves reading into the statute an exception for failed states or countries which are too underdeveloped to resist. Had Congress intended to make the country designation and removal process purely a matter of executive discretion, the much simpler and logical method instead of requiring acceptance would have been to authorize the Attorney General to remove an alien to any place it believed was practical, advisable or possible, thus giving the Attorney General the discretion to decide if acceptance was necessary or not. The statute did not contain that grant of discretion and the Attorney General should not be allowed to read one in.

Respondent's interpretation also would allow the Attorney General to ignore the undeniably progressive nature of the provision. Again, the text simply does not allow this revision. The Attorney General wants to skip a step, or to do under step three exactly what it could not do under step two. Respondent's interpretation of the statute would twist the removal process so that: (a) acceptance *would* be required from the country that has the closest connection with the alien, that country of which he is a subject, national, or citizen, § 1231(b)(2)(D); (b) acceptance *would not* be required from those countries that have some connection to the alien, although less than the country of nationality or citizenship, when the Attorney General moved to one of the six additional countries in step three, § 1231(b)(2)(E)(i)-(vi); and (c) acceptance *reemerges* as a requirement as to the country of last resort in (vii) which, of course, would have the most attenuated connection to the alien. This reading illogically eviscerates the progressive structure of the statute.

The proper interpretation of the statute, which harmonizes the provision as a whole, is a plain reading which recognizes specific reference to "another country whose government will accept the alien into that country" in (vii) of step three as an integral and necessary part of the entire

subparagraph § 1231(b)(2)(E). Thus, in order for the Attorney General to remove to one of the six countries listed in the first six subparts of § 1231(b)(2)(E), there must be a government willing to accept the alien into that country.

B. Respondent's Interpretation Would Create Inconsistency In The Statute And Render Part Of The Statute Superfluous.

Respondent argued, and the Eighth Circuit panel majority agreed, that petitioner could be removed to Somalia, the country of petitioner's citizenship and nationality, despite the lack of acceptance under step two because Somalia also happens to be the country of birth under step three. This proposed interpretation of the removal statute, by which the Attorney General can avoid the explicit acceptance requirement of step two by removing the alien to the same country without acceptance in step three, was never adopted by any court prior to the Eighth Circuit's decision. It would make the second step of the statute, which requires acceptance by the government of which the alien is a subject, national, or citizen, superfluous and thus would violate a basic principle of statutory construction. *See Circuit City*, 532 U.S. at 113. As the district court observed, "a removable alien will almost invariably be a 'subject, national, or citizen' of the country in which he was born. As a result, the acceptance requirement of § 1231(b)(2)(D) is easily circumvented by § 1231(b)(2)(E)(iv) if the latter clause is read not to require acceptance." Pet. App. at 50a-51a.

Respondent's reading of § 1231(b)(2)(E) would also allow outright defiance of a country's explicit refusal to accept an alien. Section 1231(b)(2) draws no distinction between a country's failure to inform the Attorney General of its acceptance and a country's explicit refusal of its acceptance. Although in this case the government must invoke step three because of a failure to inform, step three is also applicable if the countries in step one and two explicitly

refuse to accept the alien. Yet respondent's interpretation of step three—as not requiring acceptance—would allow it to invoke step three and dump an alien in a country that had already explicitly refused to accept that alien. The Ninth Circuit relied in part on this argument in ruling that the acceptance requirement also applies in step three. It noted that if respondent's interpretation were upheld, then even though a government has actually refused acceptance of a removable person in step two, the person could be "airdropped surreptitiously into that same country if it met the requirements of one of the subparts [of step three]." *Ali*, 346 F.3d at 881. The Ninth Circuit thus concluded that the INS should not be allowed to "thwart [the acceptance requirement] by skipping to Step 3." *Id.*

The Eighth Circuit dismissed this argument by saying that "between countries, it is not uncommon behavior to attempt to accomplish a task by asking politely first, and then to act anyway if the request is refused." Pet. App. 7a. Such a response denigrates the sovereignty of other nations and undermines the congressional determination that the Executive Branch should treat other nations respectfully. And the concern that the United States might ignore an explicit refusal is not misplaced. In *Abdulrahman v. Heston*, No. H-02-0743, slip op. (S.D. Tex. June 9, 2003), a district court quoted the Eighth Circuit's language in authorizing the Attorney General to remove a person to Ethiopia over that country's express refusal of acceptance. *Id*. at 5.

The Eighth Circuit's ruling also creates inconsistencies within the statute. As noted earlier, it makes the acceptance requirement necessary for the countries with the most significant and insignificant connection with the alien, but not for those in between. It also directly contradicts the intent of subparagraphs (b)(2)(D) and (b)(2)(E). If the Eighth Circuit majority's statement were consistent with Congress' intent in enacting the statute, then step three should explicitly include the "country of which the alien is a subject, national,

or citizen," as set forth in step two. Then, respondent could request acceptance in step two and, if acceptance were not granted, respondent could nevertheless remove the alien to that same country in step three. The only explanation for the fact that the "country of which the alien is a subject, national, or citizen" is *not* included as one of the countries in step three is that step three is intended to "widen the net" for additional countries *that might conceivably accept the alien*. Conversely, under respondent's interpretation of the statute, if the alien is *not* a subject, national, or citizen of the country in which he was born, then Congress strangely decided that an alien can be removed without acceptance to the country in which he was born, but *cannot* be removed without acceptance to the country of which he is a subject, national, or citizen. There is no reason for Congress to have excluded this option if it intended to permit respondent to remove the alien without acceptance. Respondent's interpretation therefore is unreasonable and "plainly at variance with the policy of the legislation as a whole." *Am. Trucking*, 310 U.S. at 543.

Respondent attempts to explain why the acceptance requirement would appear in step two but not in connection with the additional removal countries in step three by saying that the acceptance requirement is designed to show respect for the sovereignty of the country of which the alien is a subject, national, or citizen. Resp't Appeal Br. at 44. It makes no sense to interpret the statute, as the government would, as requiring this show of respect to the country of nationality or citizenship but not to a country further removed from the alien. Indeed, when the country is further removed from the alien, and less likely to be responsible for the alien, the need for acceptance is even greater, both in terms of respect for sovereign sensitivities and of course for the orderly transfer of the alien to a country able to receive him.

The removal statute's revised headings buoy petitioner's construction. Specifically, the 1996 amendment and recodification of what is now § 1231(b)(2)(E) changed the headings of that provision from "other countries" to "additional removal countries." Of course, headings are not conclusive of an issue of statutory interpretation. *See Bhd. of R.R. Trainmen v. Balt. & Ohio R.R. Co.*, 331 U.S. 519, 528-29 (1947). But they can help the Court resolve ambiguity. *See Mead Corp. v. Tilley*, 490 U.S. 714, 723 (1989) (resolving "any possible ambiguity" by looking to statute's title). Here, inserting the word "additional" demonstrated Congress' intent that the statute be interpreted precisely as it always had been, most prominently in *Tom Man*. And substantively, the word "additional" suggests that the country in subpart (vii) must be different from any other country previously considered.

Other paragraphs of § 1231 would have little meaning if there were no acceptance requirement. For example, § 1231(a)(7) provides:

> [N]o alien ordered removed shall be eligible to receive authorization to be employed in the United States unless the Attorney General makes a specific finding that * * * the alien cannot be removed due to the refusal of all countries designated by the alien or under this section to receive the alien.

If a receiving country's refusal to accept a deportee could so easily be overridden, this provision, too, effectively would be useless.

The importance of obtaining acceptance from the government of the receiving country is demonstrated by the fact that even the INA's provision for removal of alien terrorists includes that requirement as its outer limit on the executive's authority. INA § 507(b), 8 U.S.C. § 1537(b)(2) (reproduced at Appendix C, 8a). If an appropriate country is not determined by the alien's designation at § 1537(b)(2)(A),

then the statute authorizes the Attorney General to remove the alien immediately "to any country willing to receive such alien." § 1537(b)(2)(B). These two provision of the same Act, §§ 1231(b)(2) and 1537(b)(2), dealing with the same subject matter and setting forth the same procedures, must be construed *in pari materia*. *See, e.g.*, *Haig v. Agee*, 453 U.S. 280, 300-01 (1981) (interpreting Immigration and Nationality Act and Passport Act *in pari materia*).

C. "Country" Means A State With A Central Government.

Whenever the removal statute refers to a "country," it means a country with a central government capable of accepting the alien. Courts have consistently required a functioning central government as an "essential aspect" of a "country" to which an alien can be deported. *In re Linnas*, 19 I.&N. Dec. 302, 307 (BIA Oct. 16, 1985); *see also Ademi v. INS*, 31 F.3d 517, 521 (7th Cir. 1994) (recognizing impossibility of seeking acceptance from a country which has ceased to exist); *Chan Chuen v. Esperdy*, 285 F.2d 353, 354 (2d Cir. 1960) ("[A]ny place possessing a government with authority to accept an alien deported from the United States can qualify as a 'country' * * * to which a deportable alien may be sent"); *Rogers v. Cheng Fu Sheng*, 280 F.2d 663, 664-65 (D.C. Cir. 1960) (suggesting a "country" with the meaning of the statute requires a functioning government with undisputed control over a well-defined geographical area).

The fact that "country" in the removal statute is intended to mean a country with a government is demonstrated by the language in step two that "[t]he 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*" accepts the alien. In step three, in (vii), the statute, once again, when elaborating on "country" says "another *country*

whose government will accept" the alien. § 1231(b)(2)(E)(vii).

The requirement that an accepting country have a functioning government defeats both of respondent's proposed interpretations of the statute. Respondent's first contention, that step two contains an exception for countries without a functioning government (such as Somalia), is patently inconsistent with the definition of "country" as a country with a central government.

Properly interpreting "country" in this way also defeats respondent's argument that step three does not require acceptance. The fact that the word "country" is not further elaborated upon in subparts (i) through (vi) to reference a government does not in any way suggest that in subparts (i) through (vi)—and in these subparts alone—"government" was excluded from the reference to "country." There was simply no need to elaborate upon country in subparts (i) through (vi) because the final subpart (vii), which is fully integrated into the subparagraph, contained the necessary reference to "government."

III. By Recodifying The Removal Statute Without Material Changes, Congress Adopted The Settled Construction Of The Acceptance Requirement.

"When administrative and judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its administrative and judicial interpretations as well." *See Bragdon v. Abbott*, 524 U.S. 624, 645 (1998). Courts and administrative agencies have interpreted the removal statute to require acceptance from the removal country for "nearly half a century." Pet. App. 9a (Bye, J., dissenting) (collecting cases). And Congress reenacted or made amendments to the Immigration and Naturalization Act in 1965, 1978, 1980, 1981, 1990, and 1996 without making material changes to

the removal statute. Congress has thereby expressed its agreement and approval of the acceptance requirement at step three of the removal statute.

A. Prior Federal Cases Unanimously Impose An Acceptance Requirement.

As early as 1938, the Second Circuit affirmed a district court's conclusion that the country to which the United States deports an alien must accept the alien: "It will be presumed that in every case of deportation that the United States immigration authorities have obtained the consent of the native sovereignty to receive the deported alien." *United States ex rel. Hudak v. Uhl*, 20 F. Supp. 928, 929 (N.D.N.Y. 1937), *aff'd*, 96 F.2d 1023 (2d Cir. 1938). When *Hudak* was decided, § 20 of the Immigration Act of February 5, 1917 c.29, 39 Stat. 874, controlled where an alien could be removed. *See Saksagansky v. Weedin*, 53 F.2d 13, 16 (9th Cir. 1931) (quoting the relevant portion of statute and holding that removal can only be effected pursuant thereto).

In 1952, Congress passed the Immigration and Nationality Act, which set forth the three step progressive removal process that has governed ever since. 8 U.S.C. § 1253(a) (reproduced at Appendix A, 1a). In 1959, the Second Circuit in *United States ex rel. Tom Man v. Murff*, 264 F.2d 926 (2d Cir. 1959) interpreted the statute to require acceptance before the Attorney General could remove an alien to the country where he was born under step three. In that case, the INS was attempting to deport an alien to China. At the time, the United States did not have diplomatic relations with the country known as "Mainland China" or "Communist China," but the INS contended that the alien could properly be sent there, even though there was no indication that he would be accepted when he arrived. The court in *Tom Man* considered whether the alien could be returned to Mainland China pursuant to 8 U.S.C. § 1253(a)(3), which was the statutory predecessor of

§ 1231(b)(2)(E)(iv). Section 1253(a)(3) allowed the INS to deport an alien "to the country in which he was born," if the country of which he was a "subject, national, or citizen" did not agree to accept him. Section 1253(a)(3) did not expressly include an acceptance requirement, just as the current § 1231(b)(2)(E)(iv) does not expressly include such a requirement. But § 1253(a)(7), the last subdivision of § 1253(a), did include an acceptance requirement, just as § 1231(b)(2)(E)(vii) does now.

In *Tom Man*, the court, in an opinion by Judge Learned Hand, concluded that deportation under *any* of the subdivisions of § 1253(a) "is subject to the condition expressed in the seventh subdivision; i.e. that the 'country' shall be 'willing to accept' him 'into its territory.'" 264 F.2d at 928. Thus, the court held that the alien could not be deported to Mainland China, pursuant to § 1253(a)(3) or otherwise, unless there was a "mutual agreement between that 'country' and ourselves." *Id.*

> There remains therefore one or more of the seven subdivisions of § 243(a) [previously codified at 8 U.S.C. § 1253(a)] of which number three [the country in which he was born] certainly covers him and probably several others. *However, we think that deportation under any of these is subject to the condition expressed in the seventh subdivision: i.e. that the "country" shall be "willing to accept" him "into its territory."*

Id. at 928 (emphasis added). In conclusion, the Second Circuit could not find "any reason to suppose that the necessary consent in such situations should not follow the pattern laid down earlier in the section." *Id.*

Judge Hand's view in *Tom Man* was not a lone voice. Indeed, every federal court that has considered the question until now has reached the same conclusion that acceptance is a fundamental condition of removal. *See Chi Sheng Liu v.*

Holton, 297 F.2d 740, 743 (9th Cir. 1961) (stating that former § 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 the Attorney General may not deport the plaintiff to China "until and unless" the government indicates its willingness to accept the plaintiff). *Cf. Pelich v. INS*, 329 F.3d 1057, 1061 (9th Cir. 2003) (stating that an 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 § 1231(b)(2)(E)); *Amanullah v. Cobb*, 862 F.2d 362, 368 (1st Cir. 1988) (Coffin, J., concurring) ("agree[ing] 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) ("'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.'") (quoting *Delany v. Moraitis*, 136 F.2d 129, 131 (4th Cir. 1943)).

Moreover, before the divided Eighth Circuit panel decision in this case, not one federal court had interpreted the removal statute to eliminate the acceptance requirement from the six countries in step three. *See* Pet. App. 38a ("the government has not cited a single case in which a federal court has sanctioned the removal of a legally admitted alien to a country that has not agreed to accept him").

B. Respondent's Own Interpretation Of The Statute Is At Odds With Its Current Litigation Position.

1. *Agency Case Holdings Unanimously Favor Acceptance Requirement.*

As with the pre-*Jama* consensus among all federal courts

considering the issue, agency decisions have recognized the removal statute's acceptance requirement. In *In re Linnas*, the Board of Immigration Appeals concurred with the holding in *Tom Man* and held that the removal statute's country designation process requires acceptance by the receiving government in all situations: "the 'government' * * * under any of the three steps must indicate it is willing to accept a deported alien into its 'territory.'" 19 I. & N. Dec. 302, 307 (BIA Oct. 16, 1985). In *In re Anunciacion*, the Board similarly stated that "obviously, the United States cannot deport an alien to a country which will not accept her." Instead, the Board explicitly recognized that the designated country must accept the deportee under all three steps of the statute. 12 I. & N. Dec. 815, 818 (BIA 1968).

Respondent has attempted to overcome this settled construction of the removal statute by citing a solitary 1962 BIA decision, *In re Niesel*, 10 I. & N. Dec. 57, 59 (BIA 1962). But *Niesel* is inapposite. *Niesel* merely held that an immigration judge need not make a *preliminary* inquiry into acceptance at the time of the initial country designation. Thus, *Niesel* did not address the final acceptance requirement of the country to which the alien would be returned: "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." *Id.* at 59 (emphasis added).

2. *Administrative Opinions Also Require Acceptance By The Receiving Country*.

In February, 2003, while this case was pending before the Eighth Circuit, the Office of Legal Counsel ("OLC") provided an opinion (unrelated to this case) to the Deputy Attorney General of the United States that directly undermines respondent's litigation position. The OLC maintained that § 1231(b)(2)(E)(i)-(vi) require acceptance from any receiving country: "Each of those countries [in

subparts (i) through (vi)], of course, 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." Memorandum Opinion for the Deputy Attorney General: Limitations on the Detention Authority of the Immigration and Naturalization Service n.11 and accompanying text, (February 20, 2003) *available at* http://www. usdoj.gov/olc/INSdetention.htm.

Furthermore, respondent's own operations instructions and regulations implicitly confirm the acceptance requirement: "deportation cannot be effected until travel documentation has been obtained." INS Operations Instruction 243.1, *available at* http://uscis.gov/lpBin/lpext.dll/inserts/slb/slb-1/slb-44969/slb-51000?f=templates&fn=document-frame.htm#slb-oi2431. If the country designated by the alien is unlikely to receive him, a simultaneous request for travel documents is to be made "to the authorities of the country to which he is likely to be deported." *Id.* And respondent admits that official travel documents cannot be obtained from Somalia. *See* Resp't Appeal Br. 10.

Finally, applicable federal regulations reinforce petitioner's interpretation. For example, 8 C.F.R. § 241.4(k)(1) provides for a "custody review * * * where the alien's removal, while proper, cannot be accomplished during the removal period because no country currently will accept the alien." *Ali*, 346 F.3d at 884. And 8 C.F.R. § 241.5(c)(1) authorizes issuance of employment authorization to an alien released from custody if the "[t]he alien cannot be removed because no country will accept the alien."

C. Congress Has Repeatedly Ratified Petitioner's Interpretation.

In light of this long-standing and consistent construction of the removal statute, if Congress had *not* intended that the

removal statute be read to include an acceptance requirement at each step, Congress could (and presumably would) have clarified the statute when Congress reenacted or made amendments to the Immigration and Naturalization Act in 1965, 1978, 1980, 1981, 1990, and 1996. To the contrary, Congress made no material changes and thus endorsed the settled judicial and administrative construction as correct.

As long ago as World War I there was an acceptance requirement for the removal of aliens. The Immigration Act of 1917 gave the government limited options in deporting an alien. The government could deport the alien to the country from which the alien: (1) came to the United States; (2) was a subject or citizen; or (3) was a resident prior to arriving in the United States. Immigration Act of 1917, Ch. 29, § 20, 39 Stat. 874. Acceptance from the country to which the alien was to be removed was required in all instances. *See United States ex rel. Hudak v. Uhl*, 20 F. Supp. 928, 929 (N.D.N.Y. 1937), *aff'd*, 96 F.2d 1023(2d Cir. 1938).

Following World War II, Congress considered significant changes to the immigration laws. In fact, Congress specifically debated the "undeportable" alien issue. This issue was of particular concern after World War II because the nascent Cold War was making it increasingly impossible to deport alien Communists. *See Deportation and Detention of Aliens: Hearings on H.R. 10 Before the Subcomm. No. 1 of the House Comm. on the Judiciary*, 81st Cong., 1st Sess. at 4-5 (1949) ("many aliens, particularly alien Communists, ordered deported cannot be returned to the country of their nationality because of a passport refusal by their own government" Letter of Attorney General Tom C. Clark to Judiciary Committee); *see also Report of the Comm. of the Judiciary, pursuant to S. Res. 137*, as amended, 80th Cong., 1st Sess. at 637-38 (1950) ("[o]ne of the most serious problems with which the Immigration and Naturalization Service is faced is the disposition of aliens found deportable by the Service but who cannot be deported"). Congress

considered several options to address this problem including detention, orders of supervision, and "authorizing the Attorney General, within his discretion, to deport an alien to any country which would accept him into its territory." Senate Report at 638. Congress ultimately chose, in the Immigration and Nationality Act of 1952 ("INA"), to address the issue of "undeportables" by expanding the countries from which the Attorney General could seek to gain acceptance. But Congress did not eliminate the acceptance requirement. Section 243(a) of the INA set forth the modern removal process, including the progressive step-by-step country selection process with six countries in the last step, followed by the final reference to 8 U.S.C. § 1253(a), "any country which is willing to accept the alien into its territory." *See* INA § 243(a) (1952) (reproduced at Appendix A, 1a).

Like the current statute now codified at § 1231(b)(2), § 1253(a) described a three-step removal process. First, the alien could designate a country of removal. If the Attorney General was unable to obtain that country's acceptance or if the alien failed to make a designation, then the second step directed the Attorney General to deport the alien "to any country of which such alien is a subject, national, or citizen if such country is willing to accept him into its territory." Again, if acceptance could not be obtained, the third step of § 1253(a) directed the Attorney General to the same seven alternatives that are set forth in the current statute under § 1231(b)(2)(E).

Nearly fifty years later, in 1996, Congress passed the Illegal Immigrant Reform and Immigration Responsibility Act ("IIRIRA") Pub. L. No. 104-208, 110 Stat. 3009. Through the IIRIRA, Congress joined the procedures for removing excludable and deportable aliens (the former §§ 1227(a)(2) and 1253(a) into a new § 1231(b)(2)), thus adopting a unified procedure for removing all such aliens. *See Fieran v. INS*, 268 F.3d 340, 343-44 (6th Cir. 2001).

Respondent attempts to argue that the changes to the statute in 1996, in which the statute was re-codified from § 1253(a) to § 1231(b)(2), somehow negate the overwhelming pre-1996 authority holding that acceptance is required. Br. in Opp'n 10. A simple review of the statute before and after the 1996 amendment immediately dispatches this argument. The wording of the statutory provisions is nearly identical, and there are only negligible changes to the relevant punctuation and formatting. *Compare* 8 U.S.C. § 1253(a) (1994) (reproduced at Appendix B, 6a-7a) *with* § 1231(b)(2), *supra*, at 1.

Moreover, the IRRIRA's legislative history confirms that its minor modifications to the statutory language were not intended to be substantive. For instance, the House Judiciary Committee of the House of Representatives explained that "Section 241(b) establishes the countries to which an alien may be removed * * * [and] subsection (b)(2) [present-day § 1231(b)(2)] *restates* the provisions in current sections 243 (a) and (b) [8 U.S.C. § 1253(a)]." H.R. Rep. No. 104-469 at 234 (1996) (emphasis added). Therefore, under the new version and just like the old, the Committee interpreted the statutory procedure to require acceptance:

> An alien ordered removed shall be removed to any country the alien shall designate. If the alien refuses to designate a country, or if removal to the designated country would impair an international obligation or adversely affect U.S. foreign policy, *the removal shall be to any country willing to receive the alien. If no country is willing to receive the alien, the alien shall be detained.*

Id. at 243 (emphasis added).

When enacting the IRRIRA in 1996, Congress had the following historical facts before it: (1) consistent interpretation by the federal courts, including the Second, Ninth, and District of Columbia Circuits, and the BIA's own

1968 and 1985 decisions that the acceptance requirement applied to the six countries in step three as well as to the other steps in Section 243 of the INA; and (2) the acknowledged inability of the INS to deport thousands of aliens to countries from which acceptance could not be obtained, such as the Communist bloc countries during the forty-four years from 1952 to 1996. If, in the face of this history, Congress had intended to change the statutory removal process to eliminate the acceptance requirement, then Congress went about it in a very peculiar way, making only formatting and minor grammatical changes. The only sensible conclusion is that Congress maintained the statutory removal structure, including the important policy of the acceptance requirement. *See Lorillard v. Pons*, 434 U.S. 575, 580 (1978) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute" and when Congress reenacts the statute without addressing the existing interpretation, Congress is presumed "to adopt that interpretation").

Indeed, the only remotely substantive change made to the removal statute in 1996 supports a finding that Congress meant to affirm, not abandon, the acceptance requirement. The country of last resort in the former Section 243(a) was described as follows: "if deportation to any of the foregoing place or countries is impracticable, inadvisable, or impossible, then to *any country* which is willing to accept such alien into its territory." *See* Appendix B, 7a (emphasis added). This language was amended in § 1231(b) to read: "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." (Emphasis added.) The change from "any country" to "another country whose government is willing to accept" emphasizes both the acceptance requirement itself and the idea that only a government is capable of providing that acceptance.

D. Proper Statutory Interpretation Of The Acceptance Requirement Avoids Conflicts With International Law.

A statute should be construed when possible to avoid conflict with international law. *See, e.g.*, *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (stating that "an act of congress ought never to be construed to violate the law of nations, if any other possible construction remains"); *see also Kim Ho Ma v. Ashcroft*, 257 F.3d 1095, 1114 (9th Cir. 2001) (discussing "the well-established Charming Betsy rule of statutory construction which requires that we generally construe [c]ongressional legislation to avoid violating international law" out of respect for other nations); Restatement (Third) of Foreign Relations Law (1987) ("where fairly possible, a United States statute is to be construed as not to conflict with international law or with an international agreement with the U.S.").

As the Ninth Circuit recognized in *Ali v. Ashcroft*, respondent does not dispute that removal to Somalia would place an alien like petitioner at risk of suffering human rights abuses. 346 F.3d at 885. The DHS itself has found that the desperate situation in Somalia poses a serious threat to the personal safety of any returning Somali. *See DHS Extension of the Designation of Somalia under Temporary Protected Status Program*, 68 Fed. Reg. 43,147-43,150 (July 21, 2003). It is respondent's position that 8 U.S.C. § 1231(b)(2)(E)(iv) authorizes the Attorney General to remove the alien to the "country" of birth even if there is no functioning government and the "country" is a lawless society. Such a removal scheme, where aliens would be forcibly removed to a geographical place without the prior acceptance by a functioning government, may well subject human beings to persecution, cruel, inhuman, and degrading treatment or punishment, arbitrary deprivation of life, and the panoply of human rights abuses condemned by customary international law and the provisions of three multilateral treaties to which

the United States is a signatory: (1) Article 33(1) of the United States Nations Convention Relating to the Status of Refugees, 189 U.N.T.S. 137, as incorporated by Protocol Relating to the Status of Refugees, 606 U.N.T.S. 267, 19 U.S.T. 6223; (2) Articles 6 and 7 of the International Covenant on Civil and Political Rights, 999 U.N.T.S. 171; and (3) Article 3 of the International Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 U.N.T.S. 85.

"Although Congress may override international law in enacting a statute, we do not presume that Congress had such an intent when the statute can reasonably be reconciled with the law of nations." *Kim Ho Ma*, 257 F.3d at 1114 n.30. A statutory construction that requires acceptance by the government of the country to which the alien will be removed under 8 U.S.C. § 1231(b)(2)(E) avoids potential conflict with the law of nations.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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MAY 18, 2004

APPENDICES

APPENDIX A

Section 243(a) of the INA, Public L. No. 414, 66 Stat. 163, 212 (June 27, 1952) (codified at 8 U.S.C. § 1253(a)), the direct predecessor to INA § 241 (8 U.S.C. § 1231) under which *United States ex rel. Tom Man v. Murff*, 264 F.2d 926 (2d Cir. 1959) was decided, read as follows:

> COUNTRIES TO WHICH ALIENS SHALL BE DEPORTED; COST OF DEPORTATION
>
> Sec. 243.
>
> (a) The deportation of an alien in the United States provided for in this Act, or any other Act or treaty, shall be directed by the Attorney General to a country promptly designated by the alien if that country is willing to accept him into its territory, unless the Attorney General, in his discretion, concludes that deportation to such country would be prejudicial to the interests of the United States. No alien shall be permitted to make more than one such designation, nor shall any alien designate, as the place to which he wishes to be deported, any foreign territory contiguous to the United States or any island adjacent thereto or adjacent to the United States unless such alien is a native, citizen, subject, or national of, or had a residence in such designated foreign contiguous territory or adjacent island. If the government of the country designated by the alien fails finally to advise the Attorney General within three months following original inquiry whether that government will or will not accept such alien into its territory, such designation may thereafter be disregarded. Thereupon deportation of such alien shall be directed to any country of which such alien is a subject national, or citizen if such country is willing to accept him into its territory. If the government of such country fails finally to advise the Attorney

General or the alien within three months following the date of original inquiry, or within such other period as the Attorney General shall deem reasonable under the circumstances in a particular case, whether that government will or will not accept such alien into its territory, then such deportation shall be directed by the Attorney General within his discretion and without necessarily giving any priority or preference because of their order as herein set forth either—

(1) to the country from which such alien last entered the United States;

(2) to the country in which is located the foreign port at which such alien embarked for the United States or for foreign contiguous territory;

(3) to the country in which he was born;

(4) to the country in which the place of his birth is situated at the time he is ordered deported

(5) to any country in which he resided prior to entering the country from which he entered the United States;

(6) to the country which had sovereignty over the birthplace of the alien at the time of his birth; or

(7) if deportation to any of the foregoing places or countries is impracticable, inadvisable, or impossible, then to any country which is willing to accept such alien into its territory.

(b) If the United States is at war and the deportation in accordance with the provisions of subsection (a), of any alien, who is deportable under any law of the United States shall be found by the Attorney General to be impracticable, inadvisable, inconvenient, or impossible because of enemy occupation, of the country from which such alien came or wherein is located the foreign port at which he embarked for the United States or because of

reasons connected with the war, such alien may, in the discretion of the Attorney General, be deported as follows:

(1) if such alien is a citizen or subject of a country whose recognized government is in exile, to the country in which is located that government in exile if that country will permit him to enter its territory or

(2) if such alien is a citizen or subject of a country whose recognized government is not in exile, then to a country or any political or territorial subdivision thereof which is proximate to the country of which the alien is a citizen or subject, or, with the consent of the country of which the alien is a citizen or subject, to any other country.

(c) If deportation proceedings are instituted at any time within five years after the entry of the alien for causes existing prior to or at the time of entry, the cost of removal to the port of deportation shall be at the expense of the appropriation for the enforcement of this Act, and the deportation from such port shall be at the expense of the owner or owners of the vessels, aircraft, or other transportation lines by which such alien came to the United States, or if in the opinion of the Attorney General that is not practicable, at the expense of the appropriation for the enforcement of this Act: *Provided*, That the costs of the deportation of any such alien from such tort shall not be assessed against the owner or owners of the vessels, aircraft, or other transportation lines in the case of any alien who arrived in possession of a valid unexpired immigrant visa and who was inspected and admitted to the United States for permanent residence. In the case of an alien crewman, if deportation proceedings are instituted at any time within five years after the granting of the last conditional permit to land temporarily under the

provisions of section 252, the cost of removal to the port of deportation shall be at the expense of the appropriation for the enforcement of this Act and the deportation from such port shall be at the expense of the owner or owners of the vessels or aircraft by which such alien came to the United States, or if in the opinion of the Attorney General that is not practicable, at the expense of the appropriation for the enforcement of this Act.

(d) If deportation proceedings are instituted later than five years after the entry of the, alien, or in the case of an alien crewman later than five years after the granting of the last conditional permit to land temporarily, the cost thereof shall be payable from the appropriation for the enforcement of this Act.

(e) A failure or refusal on the part of the master, commanding officer, agent, owner, charterer, or consignee of a vessel, aircraft, or other transportation line to comply with the order of the Attorney General to take on board, guard safely, and transport to the destination specified any alien ordered to be deported under the provisions of this Act, or a failure or refusal by any such person to comply with an order of the Attorney General to pay deportation expenses in accordance with the requirements of this section, shall be punished by the imposition of a penalty in the sum and manner prescribed in section 237 (b).

(f) When in the opinion of the Attorney General the mental or physical condition of an alien being deported is such as to require personal care and attendance, the Attorney General shall when necessary, employ a suitable person for that purpose who shall accompany such alien to his final destination, and the expense incident to such service shall be defrayed in the same manner as the expense of deporting the accompanied alien is defrayed, and

any failure or refusal to defray such expenses shall be punished in the manner prescribed by subsection (e) of this section.

(g) Upon the notification by the Attorney General that any country, upon request denies or unduly delays acceptance of the return of any alien who is a national, citizen, subject, or resident thereof, the Secretary of State shall instruct consular officers performing their duties in the territory of such country to discontinue the issuance of immigrant visas to nationals, citizens, subjects, or residents of such country, until such time as the Attorney General shall inform the Secretary of State that such country has accepted such alien.

(h) The Attorney General is authorized to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to physical persecution and for such period of time as he deems to be necessary for such reason.

APPENDIX B

Prior to the 1996 recodification in 8 USC § 1231, 8 U.S.C. § 1253(a) (1994) read as follows:

§ 1253. Countries to which aliens shall be deported.

(a) Acceptance by designated country; deportation upon nonacceptance by country.

The deportation of an alien in the United States provided for in this chapter, or any other Act or treaty, shall be directed by the Attorney General to a country promptly designated by the alien if that country is willing to accept him into its territory, unless the Attorney General, in his discretion, concludes that deportation to such country would be prejudicial to the interests of the United States. No alien shall be permitted to make more than one such designation, nor shall any alien designate, as the place to which he wishes to be deported, any foreign territory contiguous to the United States or any island adjacent thereto or adjacent to the United States unless such alien is a native, citizen, subject, or national of, or had a residence in such designated foreign contiguous territory or adjacent island. If the government of the country designated by the alien fails finally to advise the Attorney General within three months following original inquiry whether that government will or will not accept such alien into its territory, such designation may thereafter be disregarded. Thereupon deportation of such alien shall be directed to any country of which such alien is a subject, national, or citizen if such country is willing to accept him into its territory. If the government of such country fails finally to advise the Attorney General or the alien within three months following the date of original inquiry, or within such other period as the Attorney General shall deem reasonable

under the circumstances in a particular case, whether that government will or will not accept such alien into its territory, then such deportation shall be directed by the Attorney General within his discretion and without necessarily giving any priority or preference because of their order as herein set forth either—

(1) to the country from which such alien last entered the United States;

(2) to the country in which is located the foreign port at which such alien embarked for the United States or for foreign contiguous territory;

(3) to the country in which he was born;

(4) to the country in which the place of his birth is situated at the time he is ordered deported;

(5) to any country in which he resided prior to entering the country from which he entered the United States;

(6) to the country which had sovereignty over the birthplace of the alien at the time of his birth; or

(7) if deportation to any of the foregoing places or countries is impracticable, inadvisable, or impossible, then to any country which is willing to accept such alien into its territory.

APPENDIX C

The provision currently governing removal of alien terrorists, INA § 507(b), 8 U.S.C. § 1537(b) ("Custody and removal"), reads as follows:

(b) Custody and removal

(1) Custody

* * *

(2) Removal

(A) In general

The removal of an alien shall be to any country which the alien shall designate if such designation does not, in the judgment of the Attorney General, in consultation with the Secretary of State, impair the obligation of the United States under any treaty (including a treaty pertaining to extradition) or otherwise adversely affect the foreign policy of the United States.

(B) Alternate countries

If the alien refuses to designate a country to which the alien wishes to be removed or if the Attorney General, in consultation with the Secretary of State, determines that removal of the alien to the country so designated would impair a treaty obligation or adversely affect United States foreign policy, the Attorney General shall cause the alien to be removed to any country willing to receive such alien.

(C) Continued detention

If no country is willing to receive such an alien, the Attorney General may, notwithstanding any other provision of law, retain the alien in custody. The Attorney General, in coordination with the Secretary of State, shall make periodic efforts to

reach agreement with other countries to accept such an alien and at least every 6 months shall provide to the attorney representing the alien at the removal hearing a written report on the Attorney General's efforts. Any alien in custody pursuant to this subparagraph shall be released from custody solely at the discretion of the Attorney General and subject to such conditions as the Attorney General shall deem appropriate.

(D) Fingerprinting

* * *