SUPREME COURT OF THE UNITED STATES

No. 03–674

KEYSE G. JAMA, PETITIONER *v.* IMMIGRATION AND CUSTOMS ENFORCEMENT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

[January 12, 2005]

JUSTICE SOUTER, joined by JUSTICE STEVENS, JUSTICE GINSBURG, and JUSTICE BREYER, dissenting.

Title 8 U. S. C. §1231(b) prescribes possible destinations for aliens removable from the United States. Paragraph (1) of that subsection governs aliens found excludable from the United States in the first place, whereas paragraph (2), which is at issue in this case, governs those once admitted for residence but since ordered to be deported (for criminal conduct while here, for example).[1] As to the latter, paragraph (2) sets out three options or successive steps for picking the recipient country. At step one, the alien himself designates the country, §1231(b)(2)(A), subject to conditions set out in subparagraphs (B) and (C). If no removal to a step-one choice occurs, the Secretary of Homeland Security at step two designates the country of which the alien "is a subject, national, or citizen" as the place to send him. §1231(b)(2)(D). If no such removal occurs, the Secretary at step three names a country with which the alien has some prior connection, or (as a last resort) one with which he has no connection at all. §1231(b)(2)(E).[2]

---

[1] Paragraph (2) is quoted in the Court's opinion. *Ante*, at 3–5. Paragraph (1) is quoted in an appendix to this dissent. *Infra*, at 19–20.

[2] The Court contends that the statute actually contains four steps rather than three, with the third consisting of the first six clauses of

The provision for step three describes six countries with various connections to an alien ("[t]he country in which the alien was born," for example, §1231(b)(2)(E)(iv)), as well as the choice of last resort, "another country whose government will accept the alien into that country," §1231(b)(2)(E)(vii). The question is whether not only the seventh, last-resort country but also the prior six are subject to the condition that the "government will accept the alien into that country." In my judgment, the acceptance requirement applies to all seven; the Court's contrary conclusion is at war with the text, structure, history, and legislative history of the statute, and I respectfully dissent.

I

The Court remarks that "[w]e do not lightly assume that Congress has omitted from its adopted text requirements

---

subparagraph (E) and the fourth being the seventh clause of that same subparagraph. *Ante*, at 5. But while the seventh clause is in a sense separated from the first six, it seems odd to view them as entirely distinct since Congress saw fit not only to put them in the same subparagraph, but also to limit the scope of the "impracticable, inadvisable, or impossible" phrase in clause (vii) to the countries "described in a previous clause of this subparagraph." 8 U. S. C. §1231(b)(2)(E)(vii). This difficulty with the Court's reading may explain why no other court has taken a four-step view of the statute and why even the Government describes the law as "'set[ting] forth a progressive, three-step process for determining a removable alien's destination country.'" Brief for Respondent 5 (quoting *Jama* v. *INS*, 329 F. 3d 630, 633 (CA8 2003)). The Court apparently takes the four-step view so that it can go on to say that three of the four steps, but not step three, expressly address "the consequence of nonacceptance." *Ante*, at 6. (Since it separates clause (vii) from clauses (i)–(vi), the four-step view also makes it easier to undermine Jama's argument that the acceptance requirement in clauses (i)–(vi) is grounded in the text of clause (vii).)

The Court's response that "step one, which is indisputably set out in three subparagraphs, belies the dissent's theory that steps must precisely parallel subparagraphs," *ante*, at 7, n. 2 (emphasis omitted), misses the mark because that is not in fact my contention.

that it nonetheless intends to apply." *Ante*, at 6. Indeed we do not, but the question in this case is whether Congress really has left out an acceptance requirement covering the entire "adopted text," that is, the provision governing all seven choices at step three. Jama says that the text contains just that requirement, in the seventh and final clause of §1231(b)(2)(E). As noted, that clause provides a last possible destination for aliens who cannot (or, in the Government's view, should not) be removed under subparagraphs (A) through (D) or the first six clauses of subparagraph (E); it does so by authorizing removal to "another country whose government will accept the alien," §1231(b)(2)(E)(vii).

Jama contends that the description of "another" willing country applies an acceptance requirement to clauses (i) through (vi) of the same subparagraph, (E). If Congress had not intended this, it would have written clause (vii) differently, as by saying, for example, "a country whose government will accept the alien" or "any country whose government will accept the alien" or "another country, if that country will accept the alien." Congress, in other words, had some simple drafting alternatives that would not have indicated any intent to attach an acceptance requirement to clauses (i) through (vi), but instead used language naturally read as alluding to a common characteristic of all the countries in the series, a willingness to take the alien. Jama would therefore have us draw the straightforward conclusion that all step-three designations are subject to acceptance by the country selected, just as we have reasoned before when construing comparable statutory language. *United States* v. *Standard Brewery, Inc.*, 251 U. S. 210, 218 (1920) ("The prohibitions extend to the use of food products for making 'beer, wine, or other intoxicating malt or vinous liquor for beverage purposes.' . . . It is elementary that all of the words used in a legislative act are to be given force and meaning, and of course

the qualifying words 'other intoxicating' in this act cannot be rejected. It is not to be assumed that Congress had no purpose in inserting them or that it did so without intending that they should be given due force and effect. The Government insists that the intention was to include beer and wine whether intoxicating or not. If so the use of this phraseology was quite superfluous, and it would have been enough to have written the act without the qualifying words" (citation omitted)).

The Court dodges the thrust of the congressional language by invoking the last antecedent rule as a grammatical reason for confining the requirement of a receiving country's willingness strictly to the seventh third-step option, where it is expressly set out. Under the last antecedent rule, "a limiting clause or phrase . . . should ordinarily be read as modifying only the noun or phrase that it immediately follows . . . ." *Barnhart* v. *Thomas*, 540 U. S. 20, 26 (2003), quoted *ante*, at 7. If the rule applied here, it would mean that the phrase "whose government will accept . . ." modified only the last-choice "country" in clause (vii), to the exclusion of each "country" mentioned in the immediately preceding six clauses, notwithstanding the apparently connecting modifier, "another."

But the last antecedent rule fails to confine the willing-government reference to clause (vii). The rule governs interpretation only "ordinarily," and it "can assuredly be overcome by other indicia of meaning . . . ." *Barnhart*, *supra*, at 26. Over the years, such indicia have counseled us against invoking the rule (often unanimously) at least as many times as we have relied on it. See *Nobelman* v. *American Savings Bank*, 508 U. S. 324, 330–331 (1993); *United States* v. *Bass*, 404 U. S. 336, 340, n. 6 (1971); *Standard Brewery*, *supra*, at 218 (citing *United States* v. *United Verde Copper Co.*, 196 U. S. 207 (1905)). And here, the other indicia of meaning point with one accord to applying the acceptance requirement to each third-step

option.

The first of these indicia is the contrast between the text of clause (vii), which is the last resort for "deportation," and the wording of the corresponding provision in the adjacent and cognate paragraph of the same subsection that deals with "exclusion." As the Court explains, *ante*, at 14, the 1996 amendments addressing removal of aliens gathered into one statute prior provisions dealing with the two different varieties of removal: what the earlier law called exclusion, that is, the removal of an excludable alien "with respect to whom [removal] proceedings . . . were initiated at the time of such alien's arrival," §1231(b)(1), and what the earlier law called deportation, that is, the removal of all other aliens. Exclusion is the sole subject of paragraph (1) of the current statute, while deportation is the sole subject of paragraph (2), the one at issue here. See *supra*, at 1.

The separate attention to the two classes of removable aliens includes separate provisions for selecting the country to which an alien may be removed. Paragraph (1) sets out several options for excludable aliens, much as paragraph (2) does for those who are deportable. And just like the final clause of the final subparagraph of paragraph (2) (clause (vii)), the final clause of the final subparagraph of paragraph (1) provides a last resort that is available when removal of an excludable alien to any of the previously described countries "is impracticable, inadvisable, or impossible." §1231(b)(1)(C)(iv). The two last-resort provisions differ in one important way, however. The provision for deportable aliens in paragraph (2) speaks of "another country whose government will accept the alien into that country," §1231(b)(2)(E)(vii), while the one for excludable aliens in paragraph (1) reads, "[a] country with a government that will accept the alien into the country's territory," §1231(b)(1)(C)(iv). Congress thus used two different words ("another" and "a") in parallel provisions of two

immediately adjacent and otherwise similar paragraphs. Whereas "another country" with a willing government is readily read to imply that the country described is like one or more other countries already identified, "a country" with a willing government carries no such implication.

Although this textual difference between simultaneously enacted provisions that address the same subject makes no sense unless Congress meant different things by its different usage, the Court treats the "a country" and "another country" provisions as if they were exactly the same. In doing so, it "runs afoul of the usual rule that 'when the legislature uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended.'" *Sosa* v. *Alvarez-Machain*, 542 U. S. ___, ___, n. 9 (2004) (slip op., at 16, n. 9) (quoting 2A N. Singer, Statutes and Statutory Construction §46:06, p. 194 (6th ed. 2000)); accord, *United States* v. *Gonzales*, 520 U. S. 1, 5 (1997) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion"); *Russello* v. *United States*, 464 U. S. 16, 23 (1983) ("We refrain from concluding here that the differing language in the two subsections has the same meaning in each. We would not presume to ascribe this difference to a simple mistake in draftsmanship"). Jama's contrasting interpretation, which I would adopt, is consistent with Congress's distinct choices of words.[3]

---

[3] The Court responds to this textual difference by asserting that "the word 'another' serves simply to rule out the countries already tried at the third step . . . ." *Ante*, at 8, n. 3. But the word "another" is not needed to rule out other countries; they are already ruled out by the phrase in clause (vii), "[i]f impracticable, inadvisable, or impossible to remove the alien to each country described in a previous clause of this subparagraph." §1231(b)(2)(E)(vii). Even had Congress used "a coun-

Our long-held view that distinct words have distinct meanings is, if anything, all the stronger here because the choice to use "another" was unmistakably deliberate. The prior statute governing deportable aliens like Jama described the country of last resort with a neutral modifier, providing that if no other suitable destination could be found then deportation had to be "to any country which is willing to accept such alien into its territory." Immigration and Nationality Act of 1952, §243(a)(7), 66 Stat. 213 (codified from 1952 to 1996 at 8 U. S. C. §1253(a)); see also Internal Security Act of 1950, §23, 64 Stat. 1010 (nearly identical text). But in 1996 Congress went to the trouble of changing "any" to "another," legislative action that can neither be dismissed as inadvertent nor discounted as a waste of time and effort in merely exchanging two interchangeable modifiers.

The Court cannot be right in reducing the 1996 amendment to this level of whimsy. And if there were any doubt about what Congress was getting at when it changed "any country" to "another country," legislative history and prior case law combine to show what Congress had in mind. At least one House of Congress intended various 1996 amendments (including "any country" to "another country") to make no substantive change in the law. H. R. Conf. Rep. No. 104–828, p. 216 (1996); H. R. Rep. No. 104–469, pt 1, p. 234 (1995) (Judiciary Committee Report) (both describing the relevant section as merely "restat[ing]" the earlier provision). Accordingly, the change from "any" to "another" makes most sense as a way to bring the text more obviously into line with an understanding on the part of Congress that an acceptance re-

---

try" or "any country" instead of "another country," that is, the "countries already tried at the third step," *ante*, at 8, n. 3, would still be "rule[d] out," *ibid.*, by the "impracticable, inadvisable, or impossible" language.

quirement applied to all options for deporting all aliens at step three.[4]

This is also the understanding that fits with what we know about the view of the law outside of Congress. In an early decision by Judge Learned Hand, the Second Circuit squarely held that the pre-1996 designations of receiving countries were all subject to the country's acceptance. *United States ex rel. Tom Man* v. *Murff*, 264 F. 2d 926 (CA2 1959). Other Circuit opinions took the same position in dicta. *E.g.*, *Amanullah* v. *Cobb*, 862 F. 2d 362, 365–366 (CA1 1988) (opinion of Pettine, J.); *id.,* at 369 (Aldrich, J., concurring) (both citing *Tom Man*, *supra*); *Chi Sheng Liu* v. *Holton*, 297 F. 2d 740, 743 (CA9 1961) (citing *Tom Man* and describing the predecessor to §1231(b)(2) as "provid[ing] that an alien cannot be deported to any country unless its government is willing to accept him into its territory" (internal quotation marks omitted)). Nor was the consensus confined to the courts, for the Board of Immigration Appeals read the predecessor to subparagraph (E)(i)–(vi) as having an acceptance requirement. *Matter of Linnas*, 19 I. & N. Dec. 302, 307 (1985) ("[T]he language of that section expressly requires, or has been construed to require, that the 'government' of a country selected under any of the three steps must indicate it is willing to accept a deported alien into its 'territory'"); but cf. *Matter of Niesel*, 10 I. & N. Dec. 57, 59 (BIA 1962).[5]

---

[4] The point is simply that Congress changed the text to make it reflect more clearly what Congress understood the law to be already, an understanding I explain in the text following this note. There is no suggestion that the change created "a momentous limitation upon executive authority," *ante*, at 8, n. 3; quite the contrary.

[5] The Court contends that in *Linnas* the Board of Immigration Appeals was simply "adher[ing]" to the relevant circuit precedent. *Ante*, at 15, n. 10. But the Board never stated that it was merely following circuit precedent, a notable omission when contrasted with the BIA decisions the Court cites, in which discussion of the Board's policy of honoring circuit precedent was explicit. *Matter of K— S—*, 20 I. & N.

And even within the Government, this understanding seems to have survived right up to the time this case began to draw attention, for just last year the Justice Department's Office of Legal Counsel rendered an opinion (albeit one not directly addressing §1231(b)(2)) stating that an acceptance requirement attaches to clauses (i) through (vi). Memorandum Opinion for the Deputy Attorney General: Limitations on the Detention Authority of the Immigration and Naturalization Service 27, n. 11 (Feb. 20, 2003), available at http://www.usdoj.gov/olc/INSDetention.htm (as visited Dec. 7, 2004, and available in Clerk of Court's case file).

The Government, like today's Court, is fighting uphill when it tries to show that these authorities failed to express the consensus view of the law at the time Congress rearranged the statutes, and neither Government nor Court cites a single judicial ruling, prior to the Eighth Circuit's decision here, that held or stated in dicta or even implied that the acceptance requirement did not apply throughout the third step. The District Court in this case, echoing the Magistrate Judge, stressed this very point, saying that "in fifty pages of briefing, the government has not cited a single case in which a federal court has sanctioned the removal of a legally admitted alien to a country that has not agreed to accept him." App. to Pet. for Cert. 52a (emphasis and internal quotation marks omitted).[6]

Dec. 715, 718-720 (1993); *Matter of Anselmo*, 20 I. & N. Dec. 25, 31 (1989).

[6] The absence of contrary case law also knocks out the sole authority the Court relies on to reject Jama's argument that the prior law enjoyed a settled construction requiring consent. *Ante*, at 16. The Court cites *United States* v. *Powell*, 379 U. S. 48 (1964), which denied that there was any settled construction precisely because there was a case taking a contrary viewpoint, *id.*, at 55, n. 13 (citing *In re Keegan*, 18 F. Supp. 746 (SDNY 1937)). *Powell* is thus beside the point here given the unanimity of the courts that construed the former deportation provision to require acceptance.

The Court similarly cites "not . . . a single case." The fair conclusion is that when Congress amended the statute, it understood the law to require a country's consent and chose language suited to that understanding.

The Court's attempt to undercut this evidence founders on a mistake of fact. The Court describes the 1996 amendment as creating the current removal scheme "through the fusion of two previously distinct expulsion proceedings, 'deportation' and 'exclusion.'" *Ante*, at 14. According to the Court, this fusion neutralizes Jama's contention that the settled understanding of the prior law, expressed in consistent judicial treatment, was meant to be carried forward into subparagraph (E)(i)–(vi). Because the current statute was "forged . . . out of two provisions [one on exclusion and one on deportation], only one of which [on deportation] had been construed as petitioner wishes," *ante*, at 16, the Court says it is unsound to argue that Congress meant to preserve an acceptance requirement when the statute merged the old exclusion and deportation laws.

The Court goes wrong here, and we have already seen how. It is true that the 1996 law uses the word "removal" to cover both exclusion and deportation, *e.g.*, *Calcano-Martinez* v. *INS*, 533 U. S. 348, 350, n. 1 (2001), and places the former exclusion and deportation provisions in a single section (indeed, a single subsection) of the U. S. Code. The statutory provision now before us, however, in no way resulted from a textual merger of two former provisions. As noted, the language of the prior exclusion provision appears (with very few changes from its predecessor) in one paragraph, compare §1231(b)(1)[7] with 8 U. S. C. §1227(a) (1994 ed.), while the language on deportation appears in a separate paragraph, §1231(b)(2), which

[7] This is the paragraph that contains a last-resort provision using "[a] country" instead of "another country."

tracks almost exactly the text of the former deportation provision, compare §1231(b)(2) with 8 U. S. C. §1253(a) (1994 ed.). The provision to be construed, then, is not a "fusion" of old fragments on different subjects, but language unchanged in any way helpful to the Government from the text of the prior law, with its settled judicial and administrative construction.

The Court responds that §1232(b)(2) must descend from the prior exclusion provision because the old exclusion provision would have been used to send an alien in Jama's situation out of the country, whereas now §1232(b)(2) is used. *Ante*, at 16, n. 11. But this is beside the point. The issue before us concerns the process (laid out in §1232(b)(2)) by which certain aliens are sent out of the country. We are considering what that process requires. The Court's observation, by contrast, involves the separate issue of who is covered by that process. Put simply, whether or not changes to other sections of the Act or to the implementing regulations enlarged the class of aliens subject to the process is irrelevant to the question of what the process is, that is, the question of what §1232(b)(2) provides.

In sum, we are considering text derived from earlier law understood to require a receiving country's acceptance of any alien deported to it at step three. The only significant textual change helps to express that understanding of the law's requirements, and two House Reports stated that the amending legislation was not meant to change substantive law. Text, statutory history, and legislative history support reading the clause (vii) language, "another country whose government will accept the alien," as providing that any "country" mentioned in the six preceding clauses, (i) through (vi), must also be willing to accept the alien before deportation thence may be ordered.

II

I mentioned how reference to §1231(b)(1), governing exclusion, illuminates the choice to speak of "another country" in §1231(b)(2). A different cross-reference within the statute confirms the reading that all step-three choices are subject to an acceptance requirement. Jama argues that subparagraph (D), laying out step two, contains an acceptance requirement that in most cases the Government will be able to circumvent under the Court's interpretation of subparagraph (E)(i)–(vi) as lacking any such requirement.[8] The point is well taken.

Subparagraph (D) provides that if an alien is not removed to the country designated at step one, the Secretary "shall [at step two] remove the alien to a country of which the alien is a subject, national, or citizen unless the government of the country" is unwilling to accept the alien or fails to inform the Secretary within a certain time that it is willing. §1231(b)(2)(D). On the Court's reading of subparagraph (E), however, anytime an alien's country of citizenship (the designee at step two) is the same as his country of birth (a possible designee at step three, under subparagraph (E)(iv)), the country's refusal to accept the alien, precluding removal at step two, will be made irrelevant as the Government goes to step three and removes to that country under subparagraph (E)(iv). This route to circumvention will likewise be open to the Government whenever, as will almost always be the case, an alien's country of citizenship is also described in one of the other clauses of subparagraph (E). If an alien, for example, resided in his country of citizenship at any time prior to his arrival in the United States (as is undoubtedly true in virtually every case), the Government could get around

---

[8] The Government contends that subparagraph (D) actually contains no acceptance requirement, but as discussed below this argument is untenable.

the acceptance requirement of subparagraph (D) by removing him at step three: under clause (i) if he came directly from his country of citizenship or clause (iii) if he came by way of another country or countries.[9]

The Court's attempt to deflect this objection, like its attempt to deflect the pre-1996 consensus, runs into a mistake. As the Court inaccurately characterizes Jama's argument, he contends that reading a general acceptance requirement out of subparagraph (E) would permit circumvention of the acceptance requirement in "subparagraph (A) or (D)." *Ante*, at 11. The Court then goes on to answer the argument as thus restated by (correctly) pointing out that there is no unconditional acceptance requirement at every stage before step three; this is so because subparagraph (A) imposes no absolute acceptance requirement at step one. Instead, subparagraph (C) provides that the Government "may," but need not, refrain from deporting an alien to his country designated at step one if that country is unwilling to accept him. *Ibid.*

But the acceptance provision governing subparagraph

---

[9] The Court misses the point in saying that "it will not always be true" that "the country the [Secretary] selects at step three . . . also [is] the country of citizenship . . . ." *Ante*, at 10 (emphasis omitted). The point is not that under the Court's reading the Government will necessarily select a country at step three that allows it to circumvent the step-two acceptance requirement, but rather that it will always, or almost always, have the option to do so.

Here again, as with the Court's four-step interpretation of the statute, see *supra*, at 1–2, n. 2, not even the Government can subscribe to the Court's view, instead acknowledging forthrightly that in all or almost all cases, the alien's country of nationality will also be described in one of the clauses of subparagraph (E). Tr. of Oral Arg. 40–41 ("[T]he state of nationality is . . . always or virtually always going to be covered [in subparagraph (E)] because [the clauses of that subparagraph] include country of birth, country from which the alien departed to enter the United States, country in which he previously resided, country . . . that exercises sovereignty over the country in which he was born").

(A) (step one) is beside the point. Jama's argument rests not on some common feature of "subparagraph[s] (A) [and] (D)," *ibid.*, but on the text of subparagraph (D), that is, on step two alone. He argues that the Government's power under that step is subject to an acceptance requirement, which the Government's reading would allow it to skirt.[10]

As for the argument that Jama actually makes about the step-two acceptance requirement, the Court says only that it "need not resolve whether subparagraph (D)" contains such a requirement. *Ante*, at 12, n. 7. But that is precisely what we do need to resolve, for if step two does

---

[10] This is the argument in Jama's brief: "This proposed interpretation of the removal statute, by which the [Government] can avoid the explicit acceptance requirement of step two by removing the alien to the same country without acceptance in step three, . . . 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. 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.'" Brief for Petitioner 27 (citation omitted); see also *id.,* at 28 ("The Ninth Circuit relied in part on this [circumvention] 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]" (second alteration in original) (internal quotation marks omitted)).

The Court responds by pointing to the heading for a different section of Jama's brief and to isolated statements that appear in still other sections. *Ante*, at 10, n. 6. But the most the Court could say based on these references is that Jama advances alternative challenges: first that acceptance is required at every step (in which case it should be required in subparagraph (E)(i)–(vi)) and second that acceptance is at least required at step two, in which case the Government's interpretation allows the step-two acceptance requirement to be circumvented. Parties making alternative arguments do not forfeit either one, yet the Court ignores Jama's second argument.

contain an acceptance requirement, then the Court's interpretation allows the Government to evade it in nearly if not actually all cases, simply by proceeding to step three. All the Court can muster in response to Jama's actual argument (an argument it ascribes to me) is the statement that "other [unnamed] factors suffice to refute the dissent's more-limited contention." *Ibid.*

The Government at least joins issue with Jama, when it claims step two has no acceptance requirement to evade. The Government says that subparagraph (D) imposes the acceptance condition only on the Secretary's mandate to remove to the country of citizenship; it does not so condition the Secretary's discretionary authority. When acceptance is not forthcoming, the Government insists, the Secretary still has discretion to do what is merely no longer obligatory. But for at least two reasons, this reading is unsound.

The first is the textual contrast between steps one and two. As noted, subparagraph (C) can be read to give the Government express permission to ignore at step one a country's refusal to accept an alien: "The [Secretary] may disregard [an alien's] designation [of a country] if . . . the government of the country is not willing to accept the alien . . . ." §1231(b)(2)(C). No such express grant of discretion appears in subparagraph (D), which provides that at step two, "the [Secretary] shall remove the alien to a country of [citizenship] unless the government of the country . . . is not willing to accept the alien . . . ." §1231(b)(2)(D). The first of these ostensibly gives authority supplemented with discretion in the event that the acceptance condition is not satisfied; the second gives authority only if the acceptance condition is satisfied. The discretionary sounding language governing step one tends to show that Congress knew how to preserve the discretion to act in disregard of a country's nonacceptance; since it omitted any such provision suggesting discretion just a few lines later in sub-

paragraph (D), the better inference is that Congress had no intent to allow the Government to ignore at step two a failure to accept by an alien's country of citizenship.[11] Once again in this case, then, drafting differences between provisions that address a similar subject may fairly be read to express differences in congressional intent.

The second reason to reject the Government's position follows from the text of the predecessor statute, which clearly provided that when acceptance was not forthcoming at step two, the Government had to move on to step three. The relevant language of the prior version (a version that consisted of one paragraph instead of the current five subparagraphs) read:

> "If the government of [the] country [of citizenship] fails finally to advise the Attorney General or the alien within three months . . . whether that government will or will not accept such alien into its terri-

---

[11] Both the Court and the Government rely on such reasoning in another context, contending that because other parts of §1231(b)(2) contain express acceptance requirements, no such requirement should be deemed to attach to subparagraph (E)(i)–(vi). *Ante*, at 6 ("[O]ur reluctance [to imply an acceptance requirement] is even greater when Congress has shown elsewhere in the same statute that it knows how to make such a requirement manifest"); Brief for Respondent 13 ("[T]he express references to acceptance in other parts of Section 1231(b)(2) simply highlight the absence of any such reference in Section 1231(b)(2)(E)(i)–(vi)"). As I have discussed, of course, the Court's and the Government's application of this reasoning is misguided because the phrasing of subparagraph (E)(vii) expressly (through its use of the word "another") attaches an acceptance requirement to clauses (i)–(vi).

Notably, the Court embraces precisely the opposite reasoning elsewhere in its opinion, stating that the discretion given to the Secretary in subparagraph (E)(vii) "accords with the similar flexibility to pass over inappropriate countries that the statute gives the [Secretary] at the other steps. . . . " *Ante*, at 9. Why the Court is willing to find an implied grant of flexibility in subparagraph (D) even though "Congress has shown elsewhere in the same statute that it knows how to make such a [grant] manifest," *ante*, at 6, is something of a mystery.

> tory, then such deportation shall be directed by the Attorney General within his discretion and without necessarily giving any priority or preference because of their order as herein set forth [to one of the countries now listed in subparagraph (E)]." Immigration and Nationality Act of 1952, §243(a), 66 Stat. 212.

Under this statute, the Government obviously lacked the discretion it now claims, of removing an alien at step two without the consent of the country of citizenship. This is significant for our purposes because, as already mentioned, two House Reports on the bill that transformed the old law into the new one indicate that no substantive changes were intended. See *supra*, at 7. Given this documented intent, together with the absence of any contrary indication in the text or legislative history, the current version should be read as its predecessor was. See *Koons Buick Pontiac GMC, Inc.* v. *Nigh*, 543 U. S. ___, ___ (2004) (slip op., at 11) (rejecting an asserted substantive change because of "scant indication" that Congress intended it).

In sum, subparagraph (D) provides no authority to remove at step two without the consent of the country of citizenship. Jama is consequently correct that unless all of the options at step three are read as being subject to the same consent requirement, the requirement at step two will be nullified.

III

At the last ditch, the Court asserts that Jama's position would "abridge th[e] exercise of Executive judgment," *ante*, at 9, and "run counter to our customary policy of deference to the President in matters of foreign affairs," *ante,* at 12–13. The Government similarly contends (throughout its brief) that Jama's approach would improperly limit the discretion of the Executive Branch. *E.g.*, Brief for Respondent 13 ("[C]onstruing Section 1232(b)(2)(E)(i)–(vi) not to require acceptance preserves the traditional author-

ity of the Executive Branch to make case-by-case judgments in matters involving foreign relations"). But here Congress itself has significantly limited Executive discretion by establishing a detailed scheme that the Executive must follow in removing aliens. This of course is entirely appropriate, since it is to Congress that the Constitution gives authority over aliens. Art. I, §8, cl. 4; see also, *e.g.*, *INS* v. *Chadha*, 462 U. S. 919, 940 (1983) ("The plenary authority of Congress over aliens under Art. I, §8, cl. 4, is not open to question"). Talk of judicial deference to the Executive in matters of foreign affairs, then, obscures the nature of our task here, which is to say not how much discretion we think the Executive ought to have, but how much discretion Congress has chosen to give it.

* * *

I would reverse the judgment of the Court of Appeals.

APPENDIX TO OPINION OF SOUTER, J.

Paragraph (1) of 8 U. S. C. §1231(b) reads as follows:

"(1) Aliens arriving at the United States.

"Subject to paragraph (3)—

"(A) In general.

"Except as provided by subparagraphs (B) and (C), an alien who arrives at the United States and with respect to whom proceedings under section 240 were initiated at the time of such alien's arrival shall be removed to the country in which the alien boarded the vessel or aircraft on which the alien arrived in the United States.

"(B) Travel from contiguous territory.

"If the alien boarded the vessel or aircraft on which the alien arrived in the United States in a foreign territory contiguous to the United States, an island adjacent to the United States, or an island adjacent to a foreign territory contiguous to the United States, and the alien is not a native, citizen, subject, or national of, or does not reside in, the territory or island, removal shall be to the country in which the alien boarded the vessel that transported the alien to the territory or island.

"(C) Alternative countries.

"If the government of the country designated in subparagraph (A) or (B) is unwilling to accept the alien into that country's territory, removal shall be to any of the following countries, as directed by the Attorney General:

"(i) The country of which the alien is a citizen, subject, or national.

"(ii) The country in which the alien was born.

"(iii) The country in which the alien has a residence.

"(iv) A country with a government that will accept the alien into the country's territory if removal to each country described in a previous clause of this subparagraph is impracticable, inadvisable, or impossible."