No. 08-1234

In The
Supreme Court of the United States

JAMAL KIYEMBA, *et al.*,

Petitioners,

v.

BARACK H. OBAMA, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

MOTION FOR LEAVE TO FILE BRIEF OUT OF TIME AND BRIEF OF *AMICUS CURIAE* IMMIGRATION REFORM LAW INSTITUTE IN SUPPORT OF RESPONDENTS

MICHAEL M. HETHMON*
IMMIGRATION REFORM LAW INSTITUTE
25 Massachusetts Ave. NW, Suite 335
Washington, DC 20001
(202) 232-5590
mhethmon@irli.org
Attorneys for the Amicus Curiae
**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

MOTION FOR LEAVE TO FILE BRIEF OUT OF TIME OF *AMICUS CURIAE* IMMIGRATION REFORM LAW INSTITUTE IN SUPPORT OF RESPONDENT

Pursuant to Supreme Court Rule 37.3, the Immigration Reform Law Institute (IRLI) respectfully moves for leave to file a brief of *amicus curiae* out of time, and to file the accompanying brief in support of Respondents.

Amicus Curiae regrets missing the deadline for filing. This case presents the Supreme Court with the important constitutional question as to the scope of the federal government's power to enforce the immigration laws and to expel, exclude, and detain foreigners from the territorial United States. As experts in the constitutionality and enforcement of immigration law, *Amicus Curiae* believes it has perspective that might assist the Court's consideration of the issue now pending before it.*

Amicus Curiae apologize for the late motion, but saw no need to file this brief or contact the parties about filing its *amicus curiae* brief until February 5, 2010, when Respondents' brief was filed. At that time the federal government and the District of Columbia metropolitan area were closed due to a snow emergency. This snow emergency caused closures to

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* Counsel acknowledges the legal scholarship of Patrick J. Charles, of the Institute staff, in providing source material from a forthcoming scholarly publication.

continue until February 12, 2010, the date that amicus briefs in support of Respondents were due. In light of the storm, *Amicus Curiae* could not gain the consent of the parties nor prepare its *amicus curiae* brief before the Court. However, upon the resumption of business, *Amicus Curiae* immediately contacted and obtained the consent of both parties and drafted this *amicus curiae* brief in support of Respondents.

Given that both parties have consented to the filing of this brief and because the Court has asked the parties to supplement their briefs concerning issues that *Amicus Curiae* can assist in answering, *Amicus Curiae* respectfully requests the Court to grant its motion out of time. A grant would not prejudice either party or burden the Court.

Respectfully submitted,

MICHAEL M. HETHMON*
IMMIGRATION REFORM
LAW INSTITUTE
25 Massachusetts Ave. NW
Suite 335
Washington, DC 20001
(202) 232-5590
mhethmon@irli.org
Attorney for the Amicus Curiae
**Counsel of Record*

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

OTHER AUTHORITIES

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

INTEREST OF *AMICUS CURIAE*[1]

Amicus Curiae Immigration Reform Law Institute (IRLI) is a legal non-profit 501(c)(3) corporation specializing in immigration law. *Amicus Curiae* believe that the history of the law of nations concerning plenary authority over immigration supports the Court's long established Plenary Power Doctrine and prevents the release of Petitioners into the territorial United States.

Amicus Curiae has an interest in the Court having a well-informed and accurate understanding of the Plenary Power Doctrine concerning immigration through the history of the law of nations and the Anglo legal tradition.

SUMMARY OF ARGUMENT

The question presented is whether the Executive Branch has the authority to exclude, expel, and detain foreigners, in accordance with the immigration laws as prescribed by Congress and through the

[1] Pursuant to this Court's Rule 37.6, *Amicus Curiae* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *Amicus Curiae*, or their counsel, made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief, and letters evidencing such consent have been filed with the Clerk of this Court pursuant to this Court's Rule 37.3.

Executive's war power. The plenary power of the political branches to exclude and expel foreigners from the United States has been recognized by the Court for over a century. *Chae Chan Ping v. United States*, 130 U.S. 581, 609 (1889); *Bridges v. Wixon*, 326 U.S. 135, 161 (1945) ("[Because] an alien . . . brings with him no constitutional rights, Congress may exclude him in the first instance for whatever reason it sees fit"). It is a power that is inherent within each nation's sovereignty, and can only be limited by treaty, statute, or some other express constitutional limitation. *Fong Yue Ting v. United States*, 149 U.S. 698, 705 (1893); *Kleindienst v. Mandel*, 408 U.S. 753, 765-66 (1972).

Should the Court grant Petitioners habeas corpus relief, Petitioners cannot seek the remedy of admission into the territorial United States. It is well established that Congress sets the laws by which the Executive Branch may exclude foreigners from entering this country. *Harisiades v. Shaughnessy*, 342, U.S. 580, 588-89 (1952) ("It is pertinent to observe that any policy towards aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government. Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or inference"). However, the Executive Branch may also exclude foreigners in the interests of national security under the war power and in the interests of self-preservation of

government. The Executive's power to exercise such exclusion does not require war, for any "internal dangers short of war . . . may lead to its use" that are within the constraints prescribed by Congress. *Id.* at 518.

Such plenary authority over the exclusion, expulsion, and detention of foreigners is not a doctrine that was created by this Court, as one *amici curiae* brief has asserted.[2] Neither has the plenary authority over immigration "eroded" as Petitioners' suggest. Pet. Br. 43. Instead, the Plenary Power Doctrine, which constitutionally endows Congress to enact immigration laws and for the Executive Branch to enforce them, is a doctrine that is deeply rooted in the law of nations and our Anglo legal tradition – a historical fact that the Founding Fathers understood when they drafted the Constitution.

As set forth below, reconstructing the historical and legal foundation for the Legislative and Executive Branches' Plenary Power to exclude and expel foreigners deserves better than the history of the Amistad affair[3] and *Amici Curiae* National Immigrant Justice Center, et al.'s assertion that the doctrine is not based upon any constitutional

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[2] Brief of *Amici Curiae* National Immigration Justice Center, et al., Supporting Petitioners, *Kiyemba v. Obama*, No. 08-1234, at 17 (2010).

[3] *See* Pet. Br. 43; Brief of *Amici Curiae* Scholars of Nineteenth-Century American Legal History Supporting Petitioners, *Kiyemba v. Obama*, No. 08-1234, at 2-11 (2010).

authority.[4] If anything, the historical and legal commentary available at the Founding should strengthen the Court's jurisprudence on the Plenary Power Doctrine.

Nothing in this brief challenges the Court's jurisprudence concerning habeas corpus relief other than that the Petitioners have no right or authority – through treaty, statute, or the Constitution – to enter the territorial United States as a remedy. *Amicus Curiae* simply urge that the Court base its decision on a well informed study of the historical and legal facts, which demonstrate that the Plenary Power Doctrine is established in the history of the law of nations and within the text of the Constitution itself.

ARGUMENT

I. THE PLENARY POWER DOCTRINE OVER IMMIGRATION IS WELL ESTABLISHED BY THE SUPREME COURT

Since the late nineteenth century, the Court has repeatedly affirmed that the political branches have plenary power to exclude and expel foreigners from the territorial United States. *Chae Chan Ping*, 130 U.S. at 609; *Fong Yue Ting*, 149 U.S. at 713; *Tiaco v.*

[4] Brief of *Amici Curiae* National Immigration Justice Center, et al., at 17, 19-22.

Forbes, 228 U.S. 549, 556-67 (1913); *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950); *Galvan v. Press*, 347 U.S. 52, 530 (1954); *Graham v. Richardson*, 403 U.S. 365, 377 (1971); *Reno v. Flores*, 507 U.S. 292, 305-06 (1993); *Denmore v. Kim*, 538 U.S. 510, 521-22 (2003). Conversely, Petitioners and *Amici Curiae* National Immigrant Justice Center, et al. assert that this well-established doctrine has eroded and should be reexamined because legal commentators have "unrestrainedly criticized the plenary power doctrine."[5]

The scholarship and legal commentary on which Petitioners and *Amici Curiae* National Immigrant Justice Center, et al. rest their argument are flawed on two points. First, it is asserted that the Plenary Power Doctrine over immigration was created by the Court in the *Chinese Exclusion Case*.[6] Second, it is asserted that because the text of the Constitution does not expressly grant such plenary authority that the Court should reexamine the Plenary Power Doctrine and apply "the same level of judicial scrutiny over matters of immigration . . . that apply to other

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[5] Pet. Br. 43; Brief of *Amici Curiae* National Immigration Justice Center, et al., at 20 fn. 3.

[6] *See* Brief of *Amici Curiae* National Immigration Justice Center, et al., at 17; Peter J. Spiro, *Explaining the End of Plenary Power*, 16 GEO. IMMIGR. L.J. 339, 340, 341 (2002) (describing the decision as "a rights-subverting constitutional anomaly"); Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and its Progeny*, 100 HARV. L. REV. 853, 854-57 (1989).

powers granted to Congress or the Executive in the Constitution."[7]

These claims not only conflict with the Court's precedent, but also conflict with the history of the law of nations and every sovereign nation's right of self-preservation.[8] An originalist approach reveals that the Founding Fathers intended for the law of nations, as defined by Congress, to be intertwined with the powers granted to the political branches in the Constitution. The Founding Fathers understood that the law of nations grants the political branches the unfettered sovereign authority to prescribe the rules of admission and settlement, which are based on the long standing doctrine of allegiance.[9]

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[7] *See* Brief of *Amici Curiae* National Immigration Justice Center, et al., at 22; Henkin, *The Constitution and United States Sovereignty*, *supra*, at 858-63.

[8] *United States ex rel. Turner v. Williams*, 194 U.S. 279, 290 (1904) ("rested on the accepted principle of international law that every sovereign nation has the power, as inherent in sovereignty and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe"); *Kansas v. Colorado*, 206 U.S. 46, 57 (1906) ("Self-preservation is the highest right and duty of a Nation").

[9] The Court has acknowledged the doctrine of allegiance respecting immigration in multiple cases. *See United States v. Wong Kim Ark*, 169 U.S. 649, 655-67 (1897) (discussing in detail the history of the doctrine of allegiance and its application to citizens and aliens); *Ohio ex rel. Clarke v. Deckebach,* 274 U.S. 392, 396 (1927) ("alien race and allegiance may . . . bear in some instances such relation to the legitimate object of legislation"); *Toyota v. United States*, 268 U.S. 402, 412 (1925) ("Filipinos are

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Throughout the historical and legal records, both preceding to and contemporaneous with the adoption of the Constitution, it is undisputed that Congress has the authority to adopt immigration laws that expel, exclude, and detain foreigners. Furthermore, these records show that the Executive Branch has the authority to enforce such immigration laws and to expel, exclude, and detain foreigners from the territorial United States that it classifies as dangerous to the safety of the United States.

II. THE ORIGINS OF THE PLENARY POWER DOCTRINE OVER IMMIGRATION

A. Hugo Grotius, Allegiance, And The Early Anglo Origins Of The Plenary Power Doctrine Over Immigration

The most prominent early international commentator on immigration law was Hugo Grotius (1583-1645).[10] In his 1608 treatise, *The Rights of War and Peace*, Grotius wrote that the law of nations required all foreigners, seeking admission, to "submit themselves to the established government and observe any regulations which are necessary in order to avoid

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not aliens and owe allegiance to the United States, there are strong reasons for relaxing as to them the restrictions").

[10] HERSCH LAUTERPACT, THE GROTIAN TRADITION IN INTERNATIONAL LAW: A CONTEMPORARY PERSPECTIVE 7 (Richard Falk, et al. eds., 1985).

strifes."[11] Emphasis should be placed on the word "any," for it illustrates that, as early as the seventeenth century, the law of nations acknowledged that foreigners did not have a right to enter and had to meet the qualifications established by a nation's laws respecting immigration.

This interpretation of Grotius is affirmed by the other sections of his treatise discussing immigration. These sections perfectly illustrate that immigration was directly linked to a nation's plenary power, foreign affairs, war power, self-preservation, and intertwined with the doctrine of allegiance. For example, in discussing the receiving of foreigners, Grotius writes, "[T]here ought to be no doubt that such a person *tacitly* binds himself to do nothing against that government under which he seeks protection."[12] In another section, Grotius confirms that immigration is a matter of plenary authority and foreign relations when he describes the receiving of exiles as a matter of "friendship" between nations.[13]

Indeed, Grotius did not invent the concept of plenary power or the doctrine of allegiance over immigration. Both doctrines existed well prior to it. Regarding the Anglo origins, England's Statutes of the Realm from the inception of the Magna Charta to

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[11] HUGO GROTIUS, THE RIGHTS OF WAR AND PEACE 201-2 (Francis W. Kelsey ed., 1925).

[12] *Id*. at 857.

[13] *Id*. at 819.

the early seventeenth century prove this point.[14] For example, in 1540 Parliament was compelled to pass a statute addressing immigration and the allegiance of aliens because an "infinite n[umber] of Strangers and aliens of fore[ig]n countries and nations which daily do[ ] increase and multiplie within his Grace Realme and Dominions in excessive nombres, to the great detriment hinderunce losse and empoverishment of his Graces naturall true lieges and subjects of this his Realme and to the greate decay of the same[.]"[15] Obedience to the sovereign authority Parliament and the crown was required of all foreigners. The statute stipulated that "ev[er]y alien and straungier borne out of the Kinges obe[die]nce . . . [to be] bounden by and unto the lawes and statut[e]s of this realme[.]"[16]

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[14] In England, as early as 1529, the Statutes of the Realm required due allegiance and obedience to the laws as a condition for settling. *See* 21 Hen. 8, c. 16, § 1 (1529) (Eng.). For other laws respecting foreigners during this period, and the distinctions between citizen and alien, *see* 14 Ric. 2, c. 2 (1390) (Eng.); 14 Hen. 6, c. 7 (1435) (Eng.); 31 Hen. 6, c. 4 (1452-3) (The king's courts have jurisdiction and aliens have legal recourse for injuries done at sea); 14 & 15 Hen. 8, c. 2 (1523); 22 Hen. 8, c. 8 (1530-1) (Eng.); 32 Hen. 8, c. 14 (1540) (Eng.).

[15] 32 Hen. 8, c. 16, § 1 (1540) (Eng.). According to Sir Francis Bacon, the statute was passed because Parliament found that aliens "did eate Englishmen out of trade, and that they entertained no Apprentizes, but of their owne Nation[.]" FRANCIS BACON, THREE SPEECHES OF THE RIGHT HONORABLE, SIR FRANCIS BACON KNIGHT 19 (1641).

[16] 32 Hen. 8, c. 16, § 3 (1540) (Eng.). The plenary power to grant all privileges to aliens was vested with Parliament and the King. The statute stated, "it shalbe the Kinges most gratiouse

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Throughout this period, the crown possessed virtually unchecked plenary power over foreigners and foreign trade.[17] Also, it was established that aliens were subject to rules of law which differed significantly from the English common law. Aliens could not immediately claim the rights and liberties of the English subject, because the government was free to treat them as it pleased.[18] This power was exhibited in a 1557 statute which proclaimed that in order to ensure the sovereign had "suretie and preservation" of the realm:

> That all Frenchmen, and all and every other p[er]son or p[er]sons was under the Frenche Kinges Obeisances, not being Denizens, (other than suche as the King and Queen Highness . . . specially licence limit and appoint to remaine in the Realme,) shall departe out of this Realme and out and from the Dominions and Territories of the same, there to remaine and continue without returne into this Realme, during the time and continuance of the Warres.[19]

The underlying purpose of the statute was to exclude dangerous Catholics, even though a significant

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pleasure to graunte to any suche alien any speciall liberties or privileges more or otherwise than is conteyned in the said estatuis[.]" *Id*. at § 1.

[17] 4 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 335-36 (2d ed., 1966).

[18] *Id*. at 335.

[19] 4 & 5 P. & M., c. 6, § 1 (1557-8) (Eng.).

portion of English subjects were Catholic themselves.[20] More importantly, the statute distinguished between alien friends and alien enemies, the distinction between the two classes of aliens being determined by the doctrine of allegiance.[21]

As early as 1608 the King's Bench addressed the doctrine of allegiance concerning the legal status of aliens. *Calvin's Case*, 7 Coke. 1186 (1608) presented the challenging of an alien juror because he was born out of the king's allegiance. It did not matter that the alien had lived all his entire life in England, and had sworn allegiance to the king, for it was determined, "an alien be sworn in the leet or elsewhere, that does not make him a liege subject of the king, for neither the steward of a lord nor any one else, save the king himself, is able to convert an alien into a subject."[22]

The development of the doctrine of allegiance on immigration matters would reach its height during the seventeenth century. In 1641, Sir Francis Bacon stated that the "priviledge of *Naturalization*, followeth *Allegeance*, and that *allegeance* followeth

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[20] *See* BACON, THREE SPEECHES, *supra*, at 20-21 (Discussing the long standing fear that Catholic France sought to subdue Protestant England).

[21] For further statutory support, *see* 32 Hen. 8, c. 16, § 1 (1540) (Eng.); 21 Hen. 8, c. 16, § 1 (1529) (Eng.); 4 & 5 P. & M., c. 6, §§ 1, 2 (1557-8) (Eng.); 7 Jac. 1, c. 2 (1609-10) (Eng.).

[22] 9 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 92 (2d ed., 1966).

the *Kingdome*."[23] Citing Sir Thomas Littleton's 1481 treatise *On Tenures*,[24] Bacon defined an alien as a person "which is born out the allegeance of our *Lord the King*."[25] There were two classes of aliens – alien friends and alien enemies. An alien friend was defined as a person "borne under the obeisance of such a *King* or *State*, as is confederate with the *King* of *England*, or at least not at war with him."[26] However, even an alien friend "may be an *Enemy*," therefore to this "person the Law allotteth . . . [a] benefit" that is "transitory[.]"[27]

During the seventeenth century, differentiating between subjects and aliens, strangers, or denizens was a prominent practice within the law. The legal doctrine for this differentiation rested with allegiance. For instance, an ordinance restricting aliens from inhabiting the counties of Norfolk, Suffolk,

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[23] BACON, THREE SPEECHES, *supra*, at 15. There was debate as to whether an alien's allegiance was due to the sovereign, to Parliament, or to the kingdom itself. Bacon describes this debate, writing, "[F]or some said that allegeance hath respect to the Law, some to the Crowne, some to the Kingdome, some to the body politique of the King, so there is confusion of tongues amongst them, as it commonly commeth to passé in opinions, that have their foundations in subtilty, and imagination of man's wit, and not in the ground of nature." *Id.* at 16.

[24] For a modern copy, *see* LITTLETON'S TENURES IN ENGLISH (Eugene Wambaugh ed., 1908).

[25] BACON, THREE SPEECHES, *supra*, at 37.

[26] *Id*. at 11.

[27] *Id*.

Essex, Cambridge, Hertford, and Huntington stipulated "that no stranger shall come in, or inhabit within the town of Cambridge or the Isle of Ely, without approbation . . . upon certificate of his or their good affections to the King and Parliament, and also that they bring [this] certificate under four[ ] Deputy-Lieutenants hands[.]"[28] The doctrine of allegiance also appeared in Interregnum ordinances concerning trade and commerce. In a 1644 ordinance it stated in order for "Forreigners, and Strangers" to receive "incouragement for Trade, and commerce within the City of London and other Ports" that they must "keep their fidelity to the King and Parliament[.]"[29]

The popular print culture of the seventeenth century also reveals that Parliament and the crown had plenary authority over immigration, with the only matter of dispute being the distribution of power between the political branches – i.e., the crown and Parliament.[30] Not one pamphlet or broadside, including those by proponents of immigration, questioned the government's authority to regulate the entry, expulsion, and all other facets of immigration law.[31] In

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[28] ACTS AND ORDINANCES OF THE INTERREGNUM, 1642-1660, at 242-45 (1911).

[29] *Id*. at 498-501.

[30] BACON, THREE SPEECHES, *supra*, at 15-16; 4 HOLDSWORTH, *supra*, at 335-36.

[31] *See* JOSIAH CHILD, A NEW DISCOURSE OF TRADE WHEREIN IS RECOMMENDED SEVERAL WEIGHTY POINTS RELATING TO THE

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fact, many tracts argued that foreigners should not be naturalized or permitted to settle due to allegiance conflicts between one's nation of origin and England. For example, in the 1695 tract *Sundry Considerations Touching Upon the Naturalization of Aliens* it was argued that the "Safety of the States and Kingdomes is of too great" importance "to practice experiments" of immigration and naturalization.[32] The tract queried, "What if Wars should arise between this Kingdom, and those Kingdoms from which the great resort of Aliens should come[?]"[33] The answer was "can any man reasonably think that they would not have

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COMPANIES OF MERCHANTS (1692); DANIEL DEFOE, SOME SEASONABLE QUERIES, ON THE THIRD HEAD, VIZ. A GENERAL NATURALIZATION (1697); DANIEL DEFOE, LEX TALIONIS, OR, AN ENQUIRY INTO THE MOST PROPER WAYS TO PREVENT THE PERSECUTION OF THE PROTESTANTS IN FRANCE (1698); DANIEL DEFOE, GIVING ALMS NO CHARITY (1704); AN HUMBLE ADDRESS WITH SOME PROPOSALS FOR THE FUTURE PREVENTING OF THE DECREASE OF INHABITANTS OF THIS REALM (1677); THE GRAND CONCERN (1673); REASONS AGAINST THE GENERAL NATURALIZATION OF ALIENS (1662); THE HISTORY OF NATURALIZATION WITH SOME REMARQUES UPON THE EFFECTS THEREOF, IN RESPECT TO THE ESTABLISHED RELIGION, TRADE AND SAFETY OF HIS MAJESTIES DOMINIONS (1680); A BRIEF AND SUMMARY NARRATIVE OF THE MANY MISCHIEFS AND INCONVENIENCES IN FORMER TIMES AS WELL AS OF LATE YEARS, OCCASSIONED BY THE NATURALIZING OF ALIENS (1690); THE SPEECH OF SIR JOHN KNIGHT OF BRISTOL, AGAINST THE BILL FOR A GENERAL NATURALIZATION IN 1693 (1694).

[32] SUNDRY CONSIDERATIONS TOUCHING NATURALIZATION OF ALIENS: WHEREBY THE ALLEDGED ADVANTAGES THEREBY ARE CONFUTED, AND THE CONTRARY MISCHIEFS THEREOF ARE DETECTED AND DISCOVERED 14 (1695).

[33] *Id*. at 7.

respect to their Native Countries . . . or can we think they should wholly be distinct of their Allegiance . . . if not, then we have so many Enemies Incorporated to us, who may quickly . . . ruin our Peace and Kingdom[.]"[34]

In the tract *The History of Naturalization* it was argued that merchant aliens were "dangerous to the Government" because they "will not have their Affections changed, nor their Alliances extinguished by Naturalization[.]"[35] The tract elaborated on this point, stating that foreigners "like Summer-Birds, when they have filled their Pockets, or if trouble or War arise, they will not forget their Fathers Land" which will be to the "great inconvenience to His Majesty and His *Natural-born Subjects*."[36]

These tracts reveal that plenary power over immigration was uniformly considered to rest with the political branches of England. Such power was based on the international premise that a sovereign government must possess the power of self-preservation, to include the doctrine of allegiance. Determining the allegiance of foreigners was the entire legal basis by which foreigners were permitted to settle, and was a power inherent in the political branches of England. It was power that could not be questioned, for determining the allegiance of aliens

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[34] *Id*.

[35] THE HISTORY OF NATURALIZATION, *supra*, at 2.

[36] *Id*. at 3.

was expressly linked to the self-preservation of government and foreign affairs.[37] Even seventeenth century proponents of immigration, such as Daniel Defoe, recognized this legal fact. Defoe was for encouraging foreigners to settle, but only those that would "hazard[ ] their lives to save our Liberties" because the "strength of England augmented by such a considerable Accession of zealous Protestants" would "defend our Rights and Liberties as their own[.]"[38] In other words, Defoe supported the settling of only those foreigners that would not pose a danger to the safety of the realm, and knew this determination was a matter left to the political branches.

B. Blackstone, Vattel, And Eighteenth Century Commentators On The Plenary Power Over Immigration

The legal sources of the eighteenth century all attest to the legality of Plenary Power Doctrine over

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[37] PETER AND NICHOLAS ONUF, FEDERAL UNION, MODERN WORLD: THE LAW OF NATIONS IN AN AGE OF REVOLUTION, 1776-1814, at 15 (1993) (discussing that self-preservation is the first duty of nations and a primary tenet of the law of nations); SAMUEL WILLIAMS, A DISCOURSE ON THE LOVE OF OUR COUNTRY 21 (1775) (discussing self-preservation as the "main aim" and "end" of the English Constitution); *see generally* Patrick J. Charles, *The Right of Self-Preservation and Resistance: A True Legal and Historical Understanding of the Anglo-American Right to Arms*, 2010 CARDOZO L. REV. DE NOVO 18 (2010) (discussing self-preservation of government as the ends of government since Hugo Grotius).

[38] DEFOE, SOME SEASONABLE QUERIES, *supra*, at 3.

immigration and the doctrine of allegiance.[39] For example in John Comyn's *A Digest of the Laws of England*, the requirement that foreigners declare their allegiance by submitting to the laws is clarified where it states, "By the st. 32 H. 8. 16. s. 9. every alien shall be subject to the laws."[40] Wyndham Beawes' *Lex Mercatoria Rediviva* also discusses the legal framework of the Plenary Power Doctrine. Of interest is his analysis of the doctrine of allegiance as applying to Englishmen that settle in a foreign country. Beawes wrote, "If an *Englishman* shall go beyond sea, and shall there swear allegiance to any *foreign prince* or *state*, he shall be esteemed an alien, and shall pay the same duties as they; but, if he returns and lives in *England*, he shall be restored to his *liberties*."[41] Even in Matthew Bacon's *A New Abridgement of the Law* the doctrine of allegiance is discussed in detail. Bacon wrote:

> An Alien is one born in a strange Country and different Society, to which he is presumed

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[39] For an English summary of the Plenary Power Doctrine up to this period, *see* 10 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 395-98 (2d ed., 1966).

[40] 1 JOHN COMYN, A DIGEST OF THE LAWS OF ENGLAND 561 (Anthony Hammond ed., 1824). For other places where Comyn distinguishes between alien friends, alien enemies, and allegiance, *see id*. at 552, 560. The first edition was published in 1762.

[41] WYNDHAM BEAWES, LEX MERCATORIA REDIVIVA; OR, A COMPLETE CODE OF COMMERCIAL LAW 315 (2d ed., 1761). For Beawes' complete analysis on immigration law, *see id*. at 314-19.

> to have a natural and necessary Allegiance; and therefore the Policy of our Constitution has established several Laws relating to such a one; the Reasons whereof are, that every Man is presumed to bear Faith and Love to that Prince and Country where first he received Protection during his Infancy; and that one Prince might not settle Spies in another's Country; but chiefly that the Rents and Revenues of one Country might not be drawn to the Subjects of another.[42]

William Blackstone similarly discussed the importance of the doctrine of allegiance and submitting to a nation's laws as a requirement of all foreigners. He wrote that allegiance "both express and implied, is the duty of all the king's subjects" as is the case with aliens.[43] He defined an alien as "one who is born out of the king's dominions, or allegiance[.]"[44] Regarding the plenary power of government over foreign affairs and immigration, Blackstone wrote:

> [B]y the law of nations no member of one society has a right to intrude into another. And therefore Puffendorf very justly resolves, that it is left in the power of all states, to take such measures about the admission of strangers, as they think

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[42] 1 MATTHEW BACON, A NEW ABRIDGEMENT OF THE LAW 76 (6th ed., 1793).

[43] 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 359 (1765).

[44] *Id*. at 361.

> convenient . . . Great tenderness is shewn by our laws, not only to foreigners in distress . . . but with regard also to the admission of strangers who come spontaneously. For so long as their nation continues at peace with ours, and they themselves behave peaceably, they are under the king's protection; though liable to be sent home whenever the king sees occasion.[45]

What Blackstone makes abundantly clear is that admission is a privilege, not a right or remedy, which is dependent upon the will of the political branches of government. While Blackstone admits that the English statutes were generous to foreigners entering the realm, he conditioned such entry and settling on "behave[ing] peaceably,"[46] a determination that was only to be made at the discretion of the political branches.[47]

The most influential legal commentator on the law of nations and immigration law was Emer De Vattel. Vattel was not of English origin, but his impact on England, the American colonies, and the Founding Fathers is undisputed.[48] Vattel viewed the

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[45] *Id*. at 251-52.

[46] *Id*. at 252.

[47] *Id*.

[48] In 1775, Benjamin Franklin wrote that Vattel's treatise is "continually in the hands of the members of our congress, now sitting, who are much pleased with your notes and preface, and have entertained a high and just esteem for their author." BENJAMIN FRANKLIN, MEMOIRS OF BENJAMIN FRANKLIN 297 (1834).

(Continued on following page)

admission of aliens as a privilege – not a right or a remedy.[49] In exchange for permission to "settle and stay," aliens were "bound to the society by their residence . . . subject to the laws of the state . . . and . . . obliged to defend it, because it grants them protection."[50] These allegiances were required even though a permitted alien did "not participate in all the rights of citizens."[51]

According to Vattel, the key to whether a foreigner may be granted the privileges and rights of a nation rests upon whether an alien had permission

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See also Andrew Lenner, *Separate Spheres: Republicanism Constitutionalism in the Federalist Era*, 41 AMER. J. LEGAL HISTORY 254, 259 (1997); James H. Kettner, *The Development of American Citizenship in the Revolutionary Era: The Idea of Volitional Allegiance*, 18 AMER. J. LEGAL HISTORY 208, 219 (1974); Andrew C. Lenner, *John Taylor and the Origins of American Federalism*, 17 J. EARLY REPUBLIC 399, 406, 408, 411 (1997); JAMES H. KETTNER, THE DEVELOPMENT OF AMERICAN CITIZENSHIP, 1608-1870, at 188 (1978); ONUF, FEDERAL UNION, MODERN WORLD, *supra*, at 123-44. For examples of eighteenth century analysis of these works by the Founding generation, *see generally* ST. GEORGE TUCKER, A LETTER TO A MEMBER OF CONGRESS (1799); THOMAS EVANS, AN ADDRESS TO THE PEOPLE OF VIRGINIA, RESPECTING THE ALIEN AND SEDITION LAWS (1798); OBSERVATIONS ON THE ALIEN AND SEDITION LAWS OF THE UNITED STATES (1799).

[49] 1 EMER DE VATTEL, THE LAW OF NATIONS § 213 (Knud Haakonssen ed., 2008) ("The inhabitants, as distinguished from citizens, are foreigners, who are permitted to settle and stay in the country.").

[50] *Id*.

[51] *Id.*

to *settle*. To accomplish this requirement, the alien must establish "a fixed residence in any place with an intention of always staying there."[52] Indeed, this residence was conditioned by the permission of a nation's political branches. As Vattel makes clear, a "man does not . . . establish his settlement . . . unless he makes sufficiently known his intention of fixing there, either tacitly, or by an express declaration" to the sovereign government.[53]

In fact, it was this legal premise that Parliament would include in its 1793 Alien Bill[54] and the American Founding Fathers would include in their first laws on naturalization.[55] In 1822, the Committee of the Judiciary would reiterate this premise, stating that to "dispense with [the declaration of the intent to *settle*] is to commit a breach in the established system, and to make residence, without declared intention to become a citizen, sufficient to entitle a person to admission" into the United States.[56]

It is within the law of nations to subject foreigners to the will of the sovereign government and

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[52] *Id.* at § 218.

[53] *Id.*

[54] 33 Geo. 3, c. 4 (1793) (Eng.).

[55] 1 U.S. STAT. 103-04 (1790); 2 U.S. STAT. 153-54 (1802).

[56] REPORT OF THE COMMITTEE ON THE JUDICIARY UPON THE SUBJECT OF ADMITTING ALIENS TO THE RIGHTS OF CITIZENSHIP WHO RESIDED WITHIN THE UNITED STATES ONE YEAR PRECEDING THE DECLARATION OF THE LAW WAR WITH GREAT BRITAIN (March 18, 1822).

to additional legal requirements as a condition to their enjoyment of a nation's rights and privileges. As Vattel states, "the public safety, the rights of the nation . . . necessarily require" it.[57] In other words, the law of nations bestows upon every nation plenary power over immigration as a means to exercise its right of self-preservation. As *Blackstone's Commentaries* makes clear, this plenary power can only be limited by statute, treaty, or some other express limitation upon the political branches.[58]

III. THE FOUNDING FATHERS DRAFTED THE CONSTITUTION WITH THE LAW OF NATIONS IN MIND AND THAT PLENARY AUTHORITY OVER IMMIGRATION RESTED WITH THE POLITICAL BRANCHES

Any argument that the Plenary Power Doctrine should be reexamined because the Constitution does not expressly grant such authority is historically unsupported. The consensus among Early American historians is that the Constitution was adopted to correct the problems that the Articles of Confederation posed in relation to foreign policy and immigration.[59] Historian Andrew C. Lenner writes that the law of nations was "an inherent attribute of

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[57] 2 VATTEL, *supra*, at § 101.

[58] 1 BLACKSTONE, *supra*, at 362.

[59] ONUF, FEDERAL UNION, MODERN WORLD, *supra*, at 113-44; DANIEL GEORGE LANG, FOREIGN POLICY IN THE EARLY REPUBLIC 80-86 (1985); Lenner, *Separate Spheres*, *supra*, at 253-56.

sovereignty" and "constituted a vital source of federal policy."[60] The law of nations was significant because the Founders realized "Americans had to convince Europe that they were capable of effectively employing military force, enforcing their commercial sanctions, and keeping their promises (i.e. treaties)."[61]

Indeed, the Founding Fathers were acutely aware of the tenets of international law well before the drafting of the Constitution. In drafting the Declaration of Independence, the Founders were faced with prescribing to the law of nations in order to obtain an alliance with the French.[62] Throughout the Revolutionary War the Founders were forced to adopt Articles of War that mirrored those of European nations.[63] Furthermore, the Founders had to be familiar with the law of nations when they entered into the 1783 Treaty of Paris, which addressed immigration matters when it distinguished between

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[60] Lenner, *Separate Spheres*, *supra*, at 256.

[61] *Id*.

[62] PATRICK J. CHARLES, IRRECONCILABLE GRIEVANCES: THE EVENTS THAT SHAPED THE DECLARATION OF INDEPENDENCE 229-335 (2008).

[63] *See* BARON VON STEUBEN, REGULATIONS FOR THE ORDER AND DISCIPLINE OF THE TROOPS OF THE UNITED STATES (Joseph Riling ed., 1966); PATRICK J. CHARLES, THE SECOND AMENDMENT: THE INTENT AND ITS INTERPRETATION BY THE STATES AND THE SUPREME COURT 114-30 (2009) (discussing how the Founders had to dispense with their dissatisfaction with European rules of martial law in order to defeat the British).

the "real British subjects"[64] and American citizens based on the doctrine of allegiance.[65]

In the summer of 1787, the members of the Constitutional Convention were aware of the failure of the existing federal system under the Articles of Confederation. Despite the 1783 Treaty of Paris and the Articles of Confederation, England and other foreign nations were able to frustrate the United States' diplomatic relations.[66] Furthermore, the fact that the structure of the Articles of Confederation frustrated many of the states' restrictive views on immigration led to the drafting of the Constitution.

The disparity between laws of the states respecting immigration was an influential factor in dispensing with the Articles of Confederation. As early as April 1787, James Madison had written to George Washington about the importance of the federal government "fixing the terms of and forms of naturalization." Madison felt it was a power that was "absolutely necessary" to be placed with the federal government in order to avert the States from "harass[ing] each other with rival and spiteful measures" and to prevent "the aggressions of interested majorities on the rights of minorities and of

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[64] TREATY OF PARIS, ART. V (1783).

[65] Kettner, *The Development of American Citizenship*, *supra*, at 241.

[66] ONUF, FEDERAL UNION, MODERN WORLD, *supra*, at 94-95.

individuals."[67] The North Carolina Constitutional Convention supported the plenary power as being "the means of preserving the peace and tranquility of the Union." It was well known by the Founding generation that the "encroachments of some states on the rights of others, and all of those of the Confederacy, [on the rules of admission and naturalization] are incontestable proofs" of the weakness of the Articles of Confederation.[68]

These issues were also elaborated during the 1787 Constitutional Convention. Madison supported the Naturalization Clause because he viewed it as the power to "fix different periods of residence[.]"[69] Madison's views were not shared by all. Many were concerned with the effect the granting of such power would have on foreigners who were already residing in the United States by the permission of the

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[67] JAMES MADISON, THE DEBATES IN THE FEDERAL CONVENTION OF 1787 WHICH FRAMED THE CONSTITUTION OF THE UNITED STATES OF AMERICA 593-94 (Gaillard Hunt, James Scott eds., 1920).

[68] 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 19-20 (Jonathan Elliot ed., 1836). *See also* ST. GEORGE TUCKER, A VIEW OF THE CONSTITUTION WITH SELECTED WRITINGS 197-98 (Clyde N. Wilson fwd., 1999); WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 85 (1829); JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 537 (1833).

[69] 5 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 398 (Jonathan Elliot ed., 1845).

respective states. These aliens had already established residency under the belief they would be permitted to remain and be admitted as citizens under state laws. Roger Sherman addressed this concern, stating, "The United States have not invited foreigners, nor pledged their faith that they should enjoy equal privileges with native citizens." It was up to Congress to "make any discriminations [it] may judge requisite."[70]

As shown above, the Constitution was not only drafted to incorporate the law of nations, but to ensure that the rules concerning immigration and naturalization would apply uniformly to prevent the States from "harass[ing] each other with rival and spiteful measures[.]"[71] As historians Peter and Nicholas Onuf state, the federal Constitution was drafted so that the "American states . . . would be governed by a perfected law of nations"[72] – a law of nations that was to be controlled by the plenary power of the political branches.

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[70] *Id.* at 412-13.

[71] *See supra*, note 68.

[72] ONUF, FEDERAL UNION, MODERN WORLD, *supra*, at 137.

IV. THE 1798 ALIEN ACT AND UNDERSTANDING THE PLENARY POWER DOCTRINE CONCERNING IMMIGRATION

Despite its frequent characterization as "notorious,"[73] the contemporary debates, political discourse, and print culture respecting the 1798 Alien Act[74] provide great insight to the Plenary Power Doctrine, and the Early Republic's view of immigration law in the constructs of the Constitution and the law of nations.[75] It is often forgotten that the law of nations was intimately intertwined with the Constitution. Both Federalists and Republicans supported its adoption as essential to America's progression in the international sphere.[76] Furthermore, the international legal thought of commentators such as S.F. Von Puffendorf, Hugo Grotius, Emmerich de Vattel, William Blackstone, and others were well known among the Founding generation.[77]

In 1795, another commentator's work on the law of nations was translated into English and made readily available. George Friedrich Von Martens' *Summary of the Law of Nations* reiterated it was the sovereign right of national government to exclude,

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[73] James A.R. Nafziger, *The General Admission of Aliens Under International Law*, 77 A.J.I.L. 804, 835 (1983).

[74] 1 U.S. STAT. 577-78 (1798).

[75] *See generally* LANG, *supra*.

[76] Lenner, *Separate Spheres, supra,* at 255-56.

[77] *See supra,* note 50.

expel, and detain foreigners in the interest of self-preservation:

> The sovereign has a right to forbid all foreigners to pass through, or enter his dominions, whether by land or sea, without express permission first obtained, even if such passage or entry should not be prejudicial to the state . . . every power has reserved to itself the right, 1. to be informed of the name and quality of every foreigner that arrives; and . . . 2. each state has a right to keep at a distance all suspicious persons; 3d. each state has a right to forbid the entry of foreigners or foreign merchandises[.][78]

For further evidence that the law of nations and the Constitution are intertwined, Article I Section 8 provides that Congress has the power to "define" the "Offences against the Law of Nations." Constitutional commentator William Rawle accurately described this provision as affirming that the "law of nations forms a part of the common law of every civilized country," including the United States.[79] In fact, it was this constitutional provision that Federalists cited to support congressional authority to adopt the 1798 Alien Act.[80] Other constitutional provisions that were

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[78] GEORGE FRIEDRICH VON MARTENS, SUMMARY OF THE LAW OF NATIONS 84-85 (1795).

[79] RAWLE, *supra*, at 108.

[80] *See* EVANS, AN ADDRESS TO THE PEOPLE OF VIRGINIA, *supra*, at 18; AN ADDRESS OF THE MINORITY OF THE VIRGINIA LEGISLATURE 8 (1799); 1 AMERICAN STATE PAPERS MISCELLANEOUS 180 (1834).

used to support the Alien Act include the Necessary and Proper Clause,[81] Commerce Clause,[82] Naturalization Clause,[83] and the power to provide for the common defense and general welfare.[84] The most powerful argument was the right of the federal government to invoke and protect its right of self-preservation.[85] The Federalists believed that the

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[81] 8 ANNALS OF CONGRESS 1974 (1798); 1 AMERICAN STATE PAPERS MISCELLANEOUS 180 (1834); EVANS, AN ADDRESS TO THE PEOPLE OF VIRGINIA, *supra*, at 17-19; THE COMMUNICATIONS OF THE SEVERAL STATES, ON THE RESOLUTIONS OF THE LEGISLATURE OF VIRGINIA 11 (1799); REPORTS OF THE COMMITTEE IN CONGRESS TO WHOM WERE REFERRED CERTAIN MEMORIALS AND PETITIONS COMPLAINING OF THE ACTS OF CONGRESS, CONCERNING THE ALIEN AND SEDITION LAWS 13 (1799).

[82] 8 ANNALS OF CONGRESS 1974 (1798); OBSERVATIONS ON THE ALIEN AND SEDITION LAWS OF THE UNITED STATES, *supra*, at 20-25.

[83] 8 ANNALS OF CONGRESS 2020 (1798); EVANS, AN ADDRESS TO THE PEOPLE OF VIRGINIA, *supra*, at 24-25; 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, *supra*, at 441.

[84] 8 ANNALS OF CONGRESS 1790, 1974, 1981, 1986 (1798); 1 AMERICAN STATE PAPERS MISCELLANEOUS 180, 182 (1834); EVANS, AN ADDRESS TO THE PEOPLE OF VIRGINIA, *supra*, at 28; CHARLES LEE, DEFENCE OF THE ALIEN AND SEDITION LAWS 5-6 (1798); AN ADDRESS OF THE MINORITY OF THE VIRGINIA LEGISLATURE, *supra*, at 6-10; THE COMMUNICATIONS OF THE SEVERAL STATES, *supra*, at 18; REPORTS OF THE COMMITTEE IN CONGRESS . . . CONCERNING THE ALIEN AND SEDITION LAWS, *supra*, at 3; OBSERVATIONS ON THE ALIEN AND SEDITION LAWS, *supra*, at 21-25; 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, *supra*, at 441.

[85] 8 ANNALS OF CONGRESS 1984, 1986-87 (1798); EVANS, AN ADDRESS TO THE PEOPLE OF VIRGINIA, *supra*, at 15; AN ADDRESS OF THE MINORITY OF THE VIRGINIA LEGISLATURE, *supra*, at 11; OBSERVATIONS ON THE ALIEN AND SEDITION LAWS, *supra*, at 6, 9, 13.

Preamble of the Constitution conveyed this right. It reads:

> We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

The sovereign right of self-preservation was conveyed in all the international legal treatises of the eighteenth century, to which the political pamphlets concerning the Alien Act all attest. For instance, Thomas Evans' pamphlet entitled *An Address to the People of Virginia, Respecting the Alien and Sedition Laws* attested to the constitutionality of the Alien Act on the grounds that it "attain[ed] the most important of all political ends, the *preservation of our national existence*[.]"[86] He believed this power was properly vested with the President by the "law of nations, which were pre-existent, and were recognized as of existing obligation by the constitution[.]"[87] Evans did not see anything "more dangerous to our *self-preservation* as a nation . . . than to have in the

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[86] EVANS, AN ADDRESS TO THE PEOPLE OF VIRGINIA, *supra*, at 15.

[87] *Id*. at 16.

bosom of our country the materials of a hostile army[.]"[88]

Indeed, sovereignty and self-preservation were intertwined, for a nation could not exercise the latter without sovereignty and a sovereign nation cannot exist without exercising its powers of self-preservation. This is why Charles Lee wrote, "There can be no complete sovereignty without the power of removing aliens; and the exercise of such a power is inseperably incident to the *nation*."[89] Similarly, in the pamphlet entitled *Observations on the Alien and Sedition Laws of the United States*, the anonymous author defended a nation's exercising the right of self-preservation in reference to "Laws concerning Aliens."[90] Paraphrasing Vattel, the pamphlet reads:

> The sovereign may forbid the entrance of his territory, either in general to every stranger, or, in a particular case, to certain persons, or on account of certain affairs, according as he may find it most for the advantage of the state . . . But even in countries where every stranger may enter freely, the sovereign is supposed to allow them access, only upon the tacit condition that they will be subject to the laws – to the general laws made to maintain good order, and which have no relation to the

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[88] *Id*. at 19.

[89] LEE, DEFENCE OF THE ALIEN AND SEDITION LAWS, *supra*, at 8-9.

[90] OBSERVATIONS ON THE ALIEN AND SEDITION LAWS, *supra*, at 9.

> title of citizen or subject of the state. The public safety and the rights of the nation necessarily suppose this condition, and the stranger tacitly submits to it, as soon as he enters the country, and he cannot presume upon having access upon any other footing.[91]

Similar self-preservation arguments in favor of the Alien Act can be found in documents such as *An Address of the Minority of the Virginia Legislature*, which stated, "Government is [an] institute and preserved for the general happiness and safety; the people therefore are interested in its preservation, and have a right to adopt measures for its security, as well against secret plots as open hostility."[92] Conversely, the Massachusetts Legislature phrased the argument, stating that Congress has "not only the right [of self-preservation], but [is] bound to protect [the nation] against internal as well as external foes."[93]

The House debates of the Alien Act itself reveal more of the same. Harrison Gray Otis argued that the Constitution "might as well have never been made" if the federal government cannot exercise authority which is "necessary to its existence[.]"[94] John Wilkes

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[91] *Id*. at 10.

[92] AN ADDRESS OF THE MINORITY OF THE VIRGINIA LEGISLATURE, *supra*, at 6-11.

[93] REPORTS OF THE COMMITTEE IN CONGRESS . . . CONCERNING THE ALIEN AND SEDITION LAWS, *supra*, at 12.

[94] 8 ANNALS OF CONGRESS 1987 (1798).

Kittera could not see how there was opposition to the exercise of the power to expel and exclude aliens on ideological or association grounds because the "power proposed . . . is exercised by every Government upon earth, whether despotic or democratic."[95] Kittera argued that if every man has the right to turn away individuals "dangerous to the peace and welfare of his family" that it was absurd to believe the federal government could not exercise similar discretion.[96] Meanwhile, William Gordon stated the power to expel and exclude foreigners for self-preservation was the "very existence of Government" itself. He knew the "sovereign power of every nation possesses it; it is a power possessed by Government to protect itself; and, in his opinion, ought now to be exercised."[97]

It should be stressed that the debates between the Federalists and Republicans were never over the expulsion or exclusion of foreigners, but rather over where the power to expel and exclude "alien friends"[98] rested.[99] Generally, Republicans did not deny that

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[95] *Id*. at 2016.

[96] *Id*.

[97] *Id*. at 1984.

[98] St. George Tucker defined an alien friend as a foreigner who has "settlement in America" and is a member of a nation that "is neither declared war, nor any invasion, or predatory incursion perpetrated, attempted or threatened[.]" TUCKER, A LETTER TO A MEMBER OF CONGRESS, *supra*, at 10, 18.

[99] Andrew C. Lenner, *John Taylor and the Origins of American Federalism*, 17 J. OF THE EARLY REPUBLIC 399, 413

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government had a right to expel and exclude foreigners as it sees fit. The thrust of their argument rested with the belief, as Albert Gallatin stated it, that Congress "has not the power to remove alien friends, [and] it cannot be inferred" because "[n]o facts had appeared . . . which require these arbitrary means to be employed against them."[100]

Not even James Madison, who disfavored the Alien Act, argued that the removal of aliens – friends or enemies – was unconstitutional, but that "alien friends" were under concurrent federal and state jurisdiction.[101] He thought it improper to subject alien friends to "banishment by an arbitrary and unusual process, either under one government or the other."[102] In other words, Madison felt that the power to expel an "alien friend" rested with the state and municipal governments respectively.[103] Throughout the debates

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(1997); TUCKER, A LETTER TO A MEMBER OF CONGRESS, *supra*, at 10.

[100] 8 ANNALS OF CONGRESS 1980 (1798).

[101] 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, *supra,* at 546-60. *See also* Lenner, *Separate Spheres, supra*, at 266 ("Republican opposition to Federalist measures, it should again be stressed, was neither doctrinaire nor opportunistic, but rooted in principled disagreements over federalism and state sovereignty").

[102] 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, *supra*, at 559.

[103] Harrison Gray Otis correctly summed up the entire basis of the Republicans' argument, stating, "[A]ll these objections . . . [are] founded on the right of a trial by jury[.]" 8 ANNALS OF CONGRESS 2018 (1798).

and tracts, Republicans argued that "alien friends" suspected of being dangerous to government were entitled to a trial by jury as prescribed in the state or municipality in which the "alien friend" resided.[104]

The problem with the practical application of Madison and the Republicans' argument was that state and municipal governments only had the power to expel an alien from their own jurisdiction, not the country. Harrison Gray Otis addressed the fallacy of the Republicans' argument by stating that he could not see how state and municipal governments could have such power when they do not possess the authority over "peace and war, negotiations with foreign countries, the general peace and welfare of the United States . . . [and making] measures preparatory to the national defence[.]"[105] Most importantly, for the Constitution to place such a power within the states would only remove dangerous aliens from a respective territory.[106] Robert Goodloe Harper did not see how states can make such a determination when they do not have "any knowledge of

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[104] 8 ANNALS OF CONGRESS 1789-92 (1798); TUCKER, A LETTER TO A MEMBER OF CONGRESS, *supra*, at 15, 18, 20. None of the Republicans argued that "alien enemies" should be afforded due process. St. George Tucker expressly stated that "alien enemies" do not enjoy them. *Id*. at 18.

[105] 8 ANNALS OF CONGRESS 1986 (1798).

[106] *Id*. at 1987.

what relates to our foreign relations, or the common defence of the Union[.]"[107]

Even the staunchest opponents of the Alien Act did not argue that the expulsion or exclusion of foreigners, who were in fact dangerous or alien enemies, violated the Constitution or the Bill of Rights.[108] It was well established that a foreigner's ability to *settle* was a privilege bestowed by political branches. As Harrison Gray Otis stated:

> The sovereign authority of a nation may, undoubtedly, forbid the entrance of foreigners, and, consequently, prescribe the conditions of admission, the duration of their residence, and even the part of the country where they shall be permitted to reside.[109]

V. THE PLENARY POWER DOCTRINE PREVENTS PETITIONERS FROM SETTLING IN THE TERRITORIAL UNITED STATES ABSENT THE CONSENT OF THE POLITICAL BRANCHES

The Court of Appeals for the District of Columbia correctly held that absent a statute, treaty, constitutional provision, or executive order, Petitioners cannot be released in the territorial United States.

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[107] *Id*. at 1990.

[108] *See* JAMES OGILVIE, A SPEECH DELIVERED IN ESSEX COUNTY 4-5 (1798).

[109] 8 ANNALS OF CONGRESS 2018 (1798).

Kiyemba v. Obama, 555 F.3d 1022, 1026 (D.C. 2009). The plenary authority to admit foreigners rests solely with the political branches of government as a means of self-preservation. *United States ex rel. Turner*, 194 U.S. at 291 (it is "essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe"); *Knauff*, 338 U.S. at 543 (it "is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of government to exclude a given alien").

The fact Petitioners believe that they "present no threat to anyone" does not bar the Executive Branch from excluding their admission. Pet. Br. 36. As shown above, it is a well-established tenet of the law of nations that the danger or threat Petitioners pose is a determination to be made by the political branches of government based upon such factors as the doctrine of allegiance, and not by the Court absent authority through statute or treaty. *Tuan Anh Nguyen v. INS*, 533 U.S. 53, 67 (2001) (when determining an individual's "ties and allegiances, it is for Congress**,** not this Court, to make that determination"). As Sir Francis Bacon states, even an alien friend "may be an *Enemy*," therefore to this "person the Law allotteth . . . [a] benefit" that is "transitory" at the discretion of the sovereign government.[110] At the Constitutional

[110] BACON, THREE SPEECHES, *supra*, at 11.

Convention, Roger Sherman made a similar observation when he stated that if the "United States have not invited [the] foreigners" the political branches can "make any discriminations [it] may judge requisite."[111]

Petitioners' forced presence in a federal jurisdiction, such as Guantanamo Bay, does not alter this outcome. Certainly, the Court has held that specific individual protections afforded in the Constitution extend to Guantanamo Bay. *Boumediene v. Bush*, 128 S. Ct. 2229, 2262 (2009). However, such protections do not override the plenary authority of the political branches to exclude and expel foreigners from the territorial United States. The only way Petitioners can be released in the territorial United States is by way of statute or treaty. *See Zadvydas v. Davis*, 533 U.S. 678, 699-701 (2001); *Clark v. Martinez*, 543 U.S. 371, 386 (2005).[112]

CONCLUSION

Based on the foregoing, we ask that the Court uphold the Plenary Power Doctrine and refuse

[111] 5 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, *supra*, at 412-13.

[112] For discussion of these holdings, *see* Res. Br. 39-44; *Kiyemba*, 555 F.3d at 1027-28.

Petitioners' request that they be released in the territorial United States until they can be removed.

Respectfully submitted,

MICHAEL M. HETHMON*
IMMIGRATION REFORM
LAW INSTITUTE
25 Massachusetts Ave. NW
Suite 335
Washington, DC 20001
(202) 232-5590
mhethmon@irli.org
Attorney for the Amicus Curiae
**Counsel of Record*