

## Artl.S8.C18.8.2 English Common Law on Immigration

Article I, Section 8, Clause 18:

*[The Congress shall have Power . . . ] To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.*


Before the Constitution was ratified, the English common law recognized that the monarchy had authority to bar aliens from entering the country and expel those who had entered, although the expulsion power may have been subject to limitations.<sup>1</sup> William Blackstone, writing in 1765, reviewed the law of nations and summarized the basis of the monarch's exclusion and expulsion powers as follows:

[I]t is left in the power of all states, to take such measures about the admission of strangers, as they think convenient; those being ever excepted who are driven on the coasts by necessity, or by any cause that deserves pity or compassion. . . . [S]o long as their nation continues at peace with ours, and they themselves behave peaceably, [foreigners] are under the king's protection; though liable to be sent home whenever the king sees occasion.<sup>2</sup>

Blackstone was an authority “most familiar to the Framers,”<sup>3</sup> and his endorsement of the principle that sovereigns possessed power to exclude or expel aliens from their territories was widely shared by scholars of the law of nations in the eighteenth and nineteenth centuries.<sup>4</sup> Many of these scholars, however, concluded that the proper exercise of the exclusion power required the sovereign to state good reasons for the decision to deny entry to an alien.<sup>5</sup> Scholars also debated the extent of the expulsion power, with some arguing that expulsion of resident aliens required special justification.<sup>6</sup>

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### Footnotes

1. ^ See Peter L. Markowitz, *Deportation Is Different*, 13 U. PA. J. CONST. L. 1299, 1309 (2011) (“Legal historians agree that the . . . power[ ] to exclude or prevent entry[ ] could be exercised by the king alone without any criminal process. In regard to the power to expel noncitizens from within England, there is some disagreement, as a theoretical matter, as to whether the power could be exercised through civil administrative fiat or solely through the criminal process. As a practical matter, however, the historical record demonstrates that expulsion was exercised exclusively as a common form of criminal punishment in England (imposed on both citizens and noncitizens) as early as the thirteenth century.”); see also *Fong Yue Ting v. United States*, 149 U.S. 698, 709 (1893)  (“In England, the only question that has ever been made in regard to the power to expel aliens has been whether it could be exercised by the king without the consent of parliament.”); *id.* at 757 (Field, J., dissenting) (arguing that “deportation from the realm has not been exercised in England since Magna Charta, except in punishment for crime, or as a measure in view of existing or anticipated hostilities”).
2. ^ 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 251–52 (1765).
3. ^ *Sessions v. Dimaya*, No. 15-1498, slip op. at 14 (U.S. Apr. 17, 2018) (Thomas, J., dissenting) (quoting Saikrishna B. Prakash & Michael D. Ramsey,

*The Executive Power Over Foreign Affairs*, 111 YALE L.J. 231, 253 (2001)).

4. ^ See 1 EMER DE Vattel, *THE LAW OF NATIONS* ch. XIX, § 230, at 107 (Joseph Chitty ed., T. & J.W. Johnson & Co. 1844) (1758) (“[T]he sovereign may forbid the entrance of his territory either to foreigners in general or in particular cases, or to certain persons or for certain particular purposes, according as he may think it advantageous to the state. There is nothing in all this that does not flow from the rights of domain and sovereignty.”); Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1, 15, 83 (2002) (“International law commentators generally viewed authority over foreign nationals as deriving from international rules regarding commerce or the state’s right to self-preservation. With respect to exclusion, principles of sovereignty and territoriality provided that states had authority to protect themselves from undesirable aliens seeking entry, but this power was not absolute.”) (footnotes omitted).
5. ^ Cleveland, *supra* note 4, at 83–85.
6. ^ *Id.* at 86–87.