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National Insecurity:
The Plenary Power Doctrine from FDR to Trump

November 3, 2017

Program Chair: Alice Hsu

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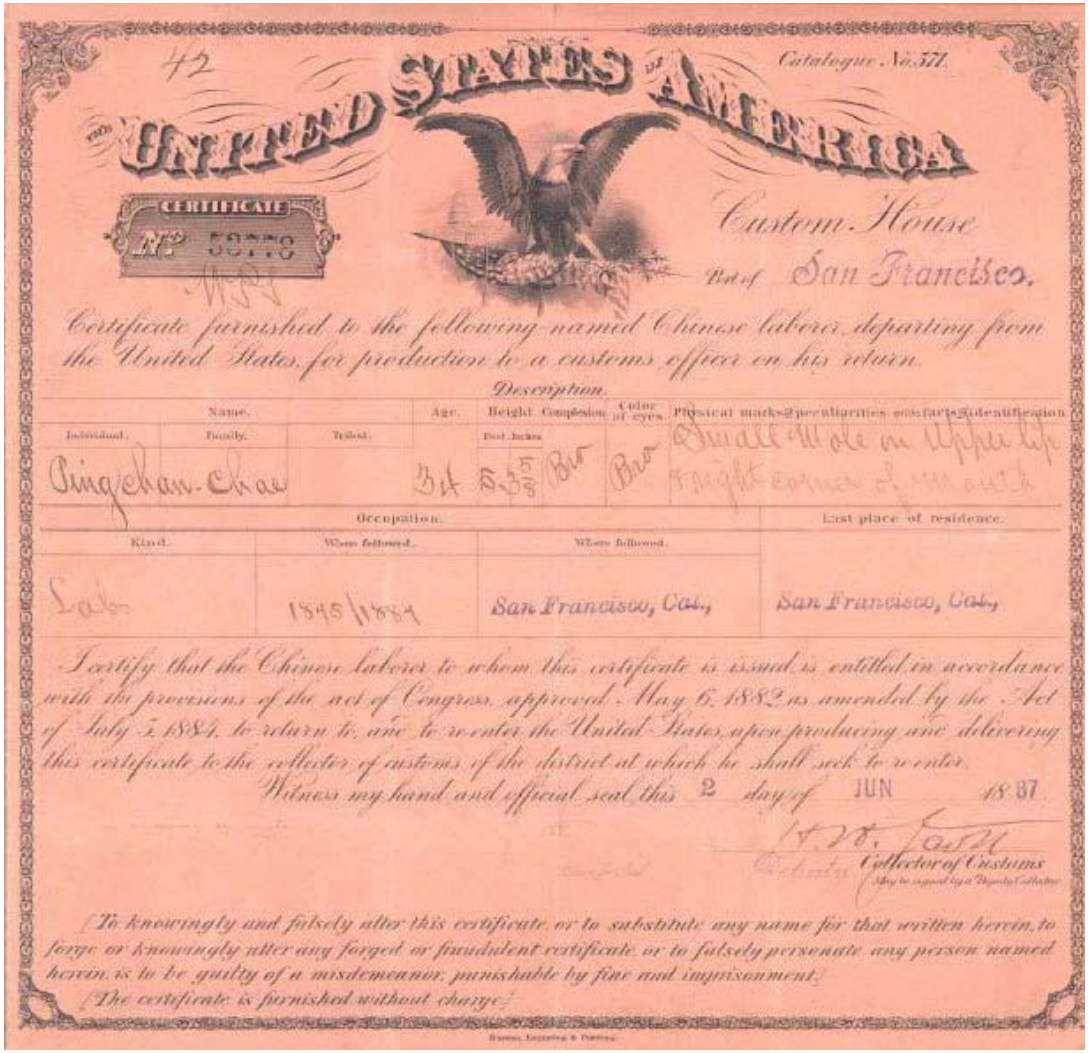
Agenda

- Plenary Power Doctrine – Pre-*Korematsu* to Present
  - Origins
  - Judicial Dissents
  - Modern Cases
- Overview of the Travel Ban
  - Executive Order 13769 (EO1) and Executive Order 13780 (EO2)
  - Presidential Proclamation dated September 24, 2017
  - President's Commentary
  - Plenary Power and the Travel Ban – Year in Review
    - Arguments made by the parties for and against EO2
    - Discussion of the travel ban, national security and the role of judicial review
  - National Security Considerations
- Suggested Reading, References and Resources

Chae Chan Ping's Re-Entry Certificate



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Catalogue No. 577.

THE UNITED STATES OF AMERICA

CERTIFICATE

No. 5078

Custom House

Port of San Francisco.

Certificate furnished to the following named Chinese laborer departing from the United States, for production to a customs officer on his return.

Description.

Name.			Age.	Height.	Complexion.	Color of eyes.	Physical marks, peculiarities, scars for identification.
Individual.	Family.	Tribal.		Feet. Inches.			
Ping Chan Chae			34	5, 3 5/8	Brn	Brn	Small Mole on Upper Lip right corner of mouth

Occupation.			Last place of residence.
Kind.	Years followed.	Where followed.	
Labr	1845 | 1884	San Francisco, Cal.,	San Francisco, Cal.,

I certify that the Chinese laborer to whom this certificate is issued is entitled in accordance with the provisions of the act of Congress, approved May 6, 1882 as amended by the Act of July 5, 1884, to return to and re-enter the United States upon producing and delivering this certificate to the collector of customs of the district at which he shall seek to re-enter.

Witness my hand and official seal this 2 day of JUN 1887.

Collector of Customs

[To knowingly and falsely alter this certificate, or to substitute any name for that written herein, to forge or knowingly utter any forged or fraudulent certificate, or to falsely personate any person named herein, is to be guilty of a misdemeanor, punishable by fine and imprisonment.]

[The certificate is furnished without charge.]

Origins of Plenary Power Doctrine: The Chinese Exclusion Act Cases

***Chae Chan Ping v. United States*, 130 U.S. 581, 603-604 (1889)**

- "That the government of the United States, through the action of the legislative department, can exclude aliens from its territory is a proposition which we do not think open to controversy. Jurisdiction over its own territory to that extent is an incident of every independent nation."

- "The news of the discovery [of gold] penetrated China, and laborers came from there in great numbers . . . The differences of race added greatly to the difficulties of the situation."

- "[T]hey remained strangers in the land, residing apart by themselves, and adhering to the customs and usages of their own country. It seemed impossible for them to assimilate with our people. . ."

Historical Application of Plenary Power Doctrine

- Used to uphold the Chinese Exclusion Act's prohibition of Chinese laborers from returning to the United States after travel abroad (*Chae Chan Ping v. United States*, 130 U.S. 581 (1889)).

- Used to uphold the requirement by the Geary Act that, in order to remain in the country, Chinese resident aliens obtain special certificates of residence and offer "at least one credible white witness" that such person was a resident of the United States at the time of the passing of the Geary Act (*Fong Yue Ting*, 149 U.S. 698 (1893)).

- Used to uphold the military order resulting from President Roosevelt's Executive Order 9066 that forced the relocation and incarceration of 120,000 people of Japanese ancestry during World War II (*Korematsu v. United States*, 323 U.S. 214 (1944)).
  - This year marks the 75th anniversary of EO 9066

History of Judicial Dissent Against the Plenary Power Doctrine

- "I deny that there is any arbitrary and unrestrained power to banish residents, even resident aliens," *Fong Yue Ting*, 149 U.S. at 744 (Field, J., dissenting); *id.* at 762 (Fuller, J., dissenting) (similar).

- "This doctrine of powers inherent in sovereignty is one both indefinite and dangerous. The governments of other nations have elastic powers. Ours are fixed and bounded by a written constitution. The expulsion of a race may be within the inherent powers of a despotism. History, before the adoption of this constitution, was not destitute of examples of the exercise of such a power; and its framers were familiar with history, and wisely, as it seems to me, they gave to this government no general power to banish," *Harisiades v. Shaughnessy*, 342 U.S. 580 at 599-600 (Douglas, J., dissenting) (1952).

- "No society is free where government makes one person's liberty depend upon the arbitrary will of another. Dictatorships have done this since time immemorial. They do now." *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 at 217 (1953) (Black, J., dissenting).

Modern Cases Dialing Back Plenary Power Doctrine

- In *Reno v. Flores*, 507 U.S. 292 (1993), the Court held that INS regulations must at least "rationally advanc[e] some legitimate governmental purpose." *Id.* at 306.
- In *Landon v. Plasencia*, 459 U.S. 21 (1982), the Court affirmed that a resident alien returning from a brief trip abroad must be afforded due process in an exclusion proceeding. *Id.* at 33.
- In *Zadvydas v. Davis*, 533 U.S. 678 (2001), in response to the government's contention that "Congress has 'plenary power' to create immigration law, and the Judicial Branch must defer to Executive and Legislative Branch decisionmaking in that area," the Court observed that such "power is subject to important constitutional limitations." *Id.* at 695 (citations omitted). "[F]ocus[ing] upon those limitations," *id.*, the Court determined that the indefinite detention of aliens deemed removable would raise "serious constitutional concerns" and accordingly construed the statute at issue to avoid those problems. *Id.* at 682.

Kerry v. Din, 135 S. Ct. 2128 (2015)

- Supreme Court held denial of visa to husband of U.S. citizen on basis of terrorism and national security concerns did not violate wife's rights to due process.

- In the concurring opinion, J. Kennedy stated that visa denial was valid because it was based on a "facially legitimate and bona fide reason," and, although as a general matter courts are not to "look behind" the government's asserted reason, courts should do so if the challenger has made "an affirmative showing of bad faith."

- Although it described the power of the political branches over immigration as "plenary," Justice Kennedy's concurring opinion made clear that courts may review an exercise of that power.

The Travel Ban – Winter of Executive Disorder

- **Executive Order 13769, "Protecting the Nation from Foreign Terrorist Entry into the United States," issued January 27, 2017**
  - Suspended the entry of foreign nationals from Iran, Iraq, Libya, Somalia, Sudan, Syria and Yemen to the United States for a period of 90 days
  - Indefinitely suspended the admission of refugees from Syria and suspends the admission of refugees from any other country for 120 days
  - On February 3, 2017, Judge James Robart (United States District Court, Western District of Washington) issued nationwide temporary restraining order on the enforcement of the executive order
  - February 9, 2017, 9th Circuit unanimously denied government request to stay TRO
- **Executive Order 13780, "Protecting the Nation from Foreign Terrorist Entry into the United States," issued March 6, 2017**
  - Rescinds Executive Order 13769
  - Suspends the entry of foreign nationals from Iran, Libya, Somalia, Sudan, Syria and Yemen to the United States for a period of 90 days
  - Suspends the admission of refugees from any country (including Syria) for 120 days
  - Ban initially scheduled to start March 16, 2017 and to be in effect through June 14, 2017

President Trump on Twitter: National Security and Travel Ban

Donald J. Trump @realDonaldTrump — Follow

We need to be smart, vigilant and tough. We need the courts to give us back our rights. We need the Travel Ban as an extra level of safety!

7:17 PM - Jun 3, 2017

55,492 53,732 178,571

Donald J. Trump @realDonaldTrump — Follow

We must stop being politically correct and get down to the business of security for our people. If we don't get smart it will only get worse

7:19 AM - Jun 4, 2017

37,490 75,827 244,957

Donald J. Trump @realDonaldTrump — Follow

People, the lawyers and the courts can call it whatever they want, but I am calling it what we need and what it is, a TRAVEL BAN!

6:25 AM - Jun 5, 2017

16,359 21,861 89,696

Donald J. Trump @realDonaldTrump — Follow

The Justice Dept. should have stayed with the original Travel Ban, not the watered down, politically correct version they submitted to S.C.

6:29 AM - Jun 5, 2017

11,078 15,534 71,814

Donald J. Trump @realDonaldTrump — Follow

The Justice Dept. should ask for an expedited hearing of the watered down Travel Ban before the Supreme Court - & seek much tougher version!

6:37 AM - Jun 5, 2017

9,029 14,973 66,364

Donald J. Trump @realDonaldTrump — Follow

In any event we are EXTREME VETTING people coming into the U.S. in order to help keep our country safe. The courts are slow and political!

6:44 AM - Jun 5, 2017

22,378 20,176 90,012

Donald J. Trump @realDonaldTrump — Follow

That's right, we need a TRAVEL BAN for certain DANGEROUS countries, not some politically correct term that won't help us protect our people!

9:20 PM - Jun 5, 2017

34,110 31,816 121,723

Donald J. Trump @realDonaldTrump — Follow

The travel ban into the United States should be far larger, tougher and more specific-but stupidly, that would not be politically correct!

3:54 AM - 15 Sep 2017

24,550 Retweets 106,939 Likes

21K 25K 107K

Plenary Power References in Travel Ban Briefs

- Early briefs explicitly invoked plenary power doctrine
  - *Washington v. Trump* (Feb. 2, 2017): "The Order was well within the President's authority under Congress' delegation, particularly in an area, like immigration, in which the admission to the United States of foreign aliens is subject to **plenary** control by the political branches."
    - Citing *Landon v. Plasencia*, 459 U.S. 21 (1982), but later relying on *Knauff v. Shaughnessy*, 338 U.S. 537 (1950) and *United States v. Curtiss-Wright Exp. Corp*., 299 U.S. 304 (1936)

- Later briefs make the same points, but try to distance them from plenary power doctrine
  - *Trump v. IRAP/Trump v. Hawaii* (Aug. 10, 2017): "It is a fundamental separation-of-powers principle, long recognized by Congress and this Court, that the political branches' decisions to exclude aliens abroad generally are **not judicially reviewable**."
    - Relying on *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950), *Harisiades* v. *Shaughnessy*, 342 U.S. 580 (1952)

EO2 Litigation: District and Circuit Court Spring Highlights

9th Circuit: *Hawaii v. Trump*

- On March 15, Judge Derrick Watson of the US District Court, District of Hawaii, issued a TRO for Executive Order 13780 on Establishment Clause grounds
- On May 15, 9th Circuit oral arguments were held
- On June 12, the 9th Circuit upheld the district court's block of Executive Order 13780 on statutory (INA) grounds (rather than Establishment Clause grounds)

4th Circuit: *IRAP v. Trump*

- On March 15, Judge Theodore Chuang, of the US District Court, Southern District of Maryland, issued a TRO for Executive Order 13780 on Establishment Clause grounds
- On May 8, 4th Circuit oral arguments were held
- On May 25, the 4th Circuit upheld the district court's block of Executive Order 13780 on Establishment Clause grounds

EO2 Litigation: Supreme Court Summer Highlights

- On June 26, 2017, SCOTUS granted certiorari in 9th and 4th Circuit cases.
  - Pending oral argument, the Court upheld the injunction as to "the plaintiffs and those similarly situated," but allowed parts of Executive Order 13780 to go into effect as applicable to foreign nationals who lack any "bona fide relationship with any person or entity in the United States"
- On June 28, 2017, U.S. State Department issued guidelines defining "close family" to include parents, parents-in-law, spouses, children, children-in-law, and siblings (including step relationships), but to exclude grandparents, grandchildren, aunts, uncles, nieces, nephews, cousins, brothers- and sisters-in-law, and fiancés
- On July 13, 2017, J. Watson (District of Hawaii) held that "close family" includes grandparents, grandchildren, aunts, uncles, nieces, nephews, cousins and siblings-in-law, expanding the narrower definition promulgated by the Trump administration
- On July 14, 2017, Federal Government simultaneously appealed the District Court order to the 9th Circuit and filed a motion for clarification with SCOTUS
- On July 19, 2017, SCOTUS denied the Federal Government's motion for clarification
- On August 28, 2017, the 9th Circuit heard oral argument on the government's appeal
- On September 11, 2017, briefs filed by IRAP and State of Hawaii

EO2 Litigation: Supreme Court Fall Highlights

- On September 25, 2017, the Supreme Court issued an order directing the parties to submit briefing by October 5th in response to President Trump's September 24, 2017 "Presidential Proclamation Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry into the United States by Terrorists or Other Public-Safety Threats" and canceled the October 10, 2017 oral arguments.
- On October 10, 2017, the Supreme Court remanded *Trump v. IRAP* to the 4th Circuit, with instructions to dismiss the case as moot.
- On October 24, 2017, the Supreme Court vacated and remanded *Trump v. Hawaii* to the 9th Circuit with instructions to dismiss as moot.

Discussion of SCOTUS Briefing and Disposition

- Overview of government arguments in defense of Executive Order 13780
- Overview of plaintiffs' arguments against Executive Order 13780
- Role of amici curiae for and against Executive Order 13780
- SCOTUS orders; Sotomayor dissents

EO-3: 3rd time's a charm or 3 strikes you're out?

- Executive Proclamation issued on September 24, 2017 entitled

"Presidential Proclamation Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats

ENHANCING VETTING CAPABILITIES AND PROCESSES FOR DETECTING ATTEMPTED ENTRY INTO THE UNITED STATES BY TERRORISTS OR OTHER PUBLIC-SAFETY THREATS"

- NOW, THEREFORE, I, DONALD J. TRUMP, by the authority vested in me by the Constitution and the laws of the United States of America, including sections 212(f) and 215(a) of the Immigration and Nationality Act (INA), 8 U.S.C. 1182(f) and 1185(a), and section 301 of title 3, United States Code, hereby find that, absent the measures set forth in this proclamation, the immigrant and nonimmigrant entry into the United States of persons described in section 2 of this proclamation **would be detrimental to the interests of the United States**, and that their entry should be subject to certain restrictions, limitations, and exceptions. I therefore hereby proclaim the following…

National Security Global Review v. White House Action

- 47 countries identified as inadequate or at risk at beginning of worldwide review. Engagement yielded improvements.
- But White House says 7 countries determined to be “inadequate” after review.
  - Chad - Immigrants, B-1 (business), tourist (B-2), and business/tourist (B-1/B-2) visas suspended.
  - North Korea - Entry as immigrants and nonimmigrants is suspended.
  - Venezuela - Entry on B-1, B-2, and B-1/B-2 visas by officials and immediate family members of agencies involved in screening and vetting (see Proclamation for complete list of agencies) is suspended.
  - Iran - Entry as immigrants and non-immigrants suspended, *except* student (F & M) and exchange visitor (J) visas.
  - Libya - Immigrants, B-1 (business), tourist (B-2), and business/tourist (B-1/B-2) visas suspended.
  - Syria - Entry as immigrants and non-immigrants is suspended.
  - Yemen - Entry as immigrants and non-immigrants on B-1, B-2, and B-1/B-2 visas suspended.
  - Somalia - Entry as immigrants suspended. Entry as nonimmigrants subject to additional scrutiny.

National Security Global Review v. White House Action

Non-refugee populations banned by EO-1, EO-2 and EO-3				
	EO-1 § 3(c)	EO-2 § 2(c)	EO-3	
			Immigrants	Nonimmigrants
Iraq	All for 90 days	None, but subject to additional scrutiny	None, but subject to additional scrutiny	None, but subject to additional scrutiny
Sudan	All for 90 days	All for 90 days	None	None
Iran	All for 90 days	All for 90 days	All indefinitely	All types of visas indefinitely, except for F, M, and J visas
Libya	All for 90 days	All for 90 days	All indefinitely	All B-1, B-2, and B-1/B-2 visas indefinitely
Somalia	All for 90 days	All for 90 days	All indefinitely	None, but subject to additional scrutiny
Syria	All for 90 days	All for 90 days	All indefinitely	All indefinitely
Yemen	All for 90 days	All for 90 days	All indefinitely	All B-1, B-2, and B-1/B-2 visas indefinitely
Chad	None	None	All indefinitely	All B-1, B-2, and B-1/B-2 visas indefinitely
North Korea	None	None	All indefinitely	All indefinitely
Venezuela	None	None	None	B-1, B-2, and B-1/B-2 visas for certain government officials indefinitely

EO-3: Litigation Pending and Predictions

- On October 23, 2017, the Fourth Circuit consolidated appeals from both sides of Judge Chuang's preliminary injunction in *IRAP*.

- On October 24, 2017, the federal government appealed the Judge Watson's order in *Hawaii* converting the TRO to a preliminary injunction, as well as all other prior orders and decisions, including the October 17 order granting the TRO.

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