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ESSAY

The Chinese Exclusion Cases and Policing in the Fourth Amendment–Free Zone

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Introduction

In the United States, there are two types of borders. The first type is the one politicians talk and debate about: tall fences surrounded by barbed wire jutting out of the dirt. The second type is hidden in plain sight. It extends 100 miles inland from all sea and land borders and covers two-thirds of the U.S. population, from New York, to Chicago, to San Francisco. Citizens and noncitizens alike in this 100-mile zone can be subjected to constant and sweeping policing by border officials.

This second border has silently eroded constitutional protections for most people in this country. In this zone, which covers the majority of the United States, over 200 million individuals are constantly susceptible to investigatory detention and warrantless search by immigration officials. This extra-constitutional world was made possible by the Plenary Power Doctrine, the foundation of U.S. immigration law. That doctrine confers absolute federal power over immigration on Congress and the Executive branch. Over the past century, the Plenary Power Doctrine has elevated immigration law to an untouchable pedestal that is subject to little judicial restraint. Although this doctrine is now taken for granted, few realize that it is rooted in a controversial past: the Chinese Exclusion Cases.[1] The Supreme Court first developed the Plenary Power Doctrine in *Chae Chan Ping* and *Fong Yue Ping* when upholding the exclusion of all Chinese laborers. [2] And though those cases are now thought of as a stain on U.S. history, their lasting ulterior effects form the backbone of the American immigration system as we know it today. In the shadow of this doctrine, immigration officials are now empowered to conduct warrantless searches deep into the interior of the country.

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1. This Essay focuses on Chae Chan Ping v. United States, 130 U.S. 581 (1889) and Fong Yue Ting v. United States, 149 U.S. 698 (1893).

2. *See Chae Chan Ping*, 130 U.S. 581; *Fong Yue Ting*, 149 U.S. 698.

This Essay demonstrates the Chinese Exclusion Cases' ulterior effects on Fourth Amendment jurisprudence. Part I provides a background and critique of the Chinese Exclusion Cases and the Plenary Power Doctrine. Part II then explores how the Plenary Power Doctrine took on a life of its own, forcing citizens and noncitizens alike to live in a Fourth Amendment–free zone.

I. Background: The Chinese Exclusion Cases and the Plenary Power Doctrine

The Constitution is silent regarding the government's power to exclude or expel noncitizens.[3] As a result, the nature of the federal government's authority to regulate immigration has been hotly contested. Although the Naturalization Clause grants Congress the power to adopt "an uniform Rule of Naturalization,"[4] the Court has never relied on this clause to justify the federal government's authority over immigration. Similarly, the Importation of Persons Clause governing the slave trade was never applied to the immigration context.[5] And for a period, the Court located the immigration power within the Commerce Clause, but subsequently abandoned that approach.[6]

Not until *Chae Chan Ping v. United States*, commonly known as the first "Chinese Exclusion Case," did the Court articulate a freestanding federal immigration power.[7] Importantly, the Supreme Court did so not based on any enumerated text from the Constitution, but based on the Plenary Power Doctrine.[8]

Chae Chan Ping concerned whether Congress acted within the scope of its constitutional authority when it excluded Chinese laborers from entering the United States. Plaintiff Chae, a Chinese laborer, lawfully resided in the United States for fifteen years, then visited China after securing an official certificate allowing for his readmission to the United States. But Congress passed the Chinese Exclusion Act of 1888 during Ping's return voyage. This legislation changed existing exclusion laws by barring all Chinese laborers who had left the United States from returning, regardless of previously issued readmission certificates.[9]

3. THOMAS ALEINIKOFF ET AL., IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 2-3 (8th ed. 2016).

4. U.S. CONST. art. I, § 8, cl. 4. Of note, the naturalization power does not expressly cover other immigration powers, such as admission into or exclusion from the United States.

5. *See* Louis Henkin, *The Constitution and United States Sovereignty: A Century of* Chinese Exclusion *and Its Progeny*, 100 HARV. L. REV. 853, 856-57 (1987).

6. *See, e.g.*, Edye v. Robertson, 112 U.S. 580 (1884); Henderson v. Mayor of New York, 92 U.S. 259 (1875); Chy Lung v. Freeman, 92 U.S. 275 (1875); Smith v. Turner, 48 U.S. 283 (1849).

7. 130 U.S. at 603.

8. *Id.*

9. *See* 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, 123-50 (2002).

Writing for a unanimous court, Justice Field first explained that the exclusion of the Chinese was necessary because "[i]t seemed impossible for them to assimilate with our people" and the Chinese were an "Oriental invasion" and a "menace to our civilization."[10]

Justice Field then traced the federal government's authority to expel noncitizens to the plenary power of a sovereign nation. Invoking international law principles, Justice Field argued that the United States wielded absolute power over its territory by virtue of its sovereignty:

> 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. It is a part of its independence.[11]

Despite establishing the plenary power of sovereigns to exclude noncitizens, Field did not address whether any constitutional structures may impose limitations on this power or whether this power was incorporated into the enumerated powers of the federal government. Instead, Field assumed that the Constitution automatically granted the United States all the foreign relations power of sovereign nations. This immigration authority is not cabined to enumerated text, he reasoned, but applies to structural features of governance:

> While under our constitution and form of government the great mass of local matters is controlled by local authorities, the United States, in their relation to foreign countries and their subjects or citizens are one nation, invested with powers which belong to independent nations, the exercise of which can be invoked for the maintenance of its absolute independence and security throughout its entire territory.[12]

Although *Chae Chan Ping* concerned only the exclusion of noncitizens from the United States, in subsequent cases the Court broadened the Plenary Power Doctrine to apply to immigration writ large. In 1893, the Chinese community challenged exclusion policies in *Fong Yue Ting v. United States*.[13] All three plaintiffs had been lawful residents in the United States for more than ten years. The plaintiffs failed to renew their residency documents and were ordered deported.[14]

As in *Chae Chan Ping*, the Court nodded to the Plenary Power Doctrine and argued that because of the territorial sovereignty of states under international law, noncitizens—even those who have established long term residency in the United States—enjoyed no constitutional protections. The Court reasoned that the power to expel "rests upon the same grounds" as the right to exclude in *Chae*

10. *Id.* at 595.

11. *Id.* at 603-04.

12. *Id.* at 604.

13. 149 U.S. 698 (1893).

14. One of the petitioners, Lee Joe, was lawfully present and applied for renewal, but was ordered deported because he was unable to produce a white witness as required by the Chinese Deportation Act of 1892. *Id.* at 731-32.

Chan Ping.[15] Once again, the Court also made no effort to situate immigration power in the Constitution, asserting that "[t]he Constitution of the United States speaks with no uncertain sound upon this subject."[16]

Chae Chan Ping and *Fong Yue Ting* stand for the proposition that Congress holds absolute authority to control the exclusion and expulsion of noncitizens from the United States. In both cases, the Court grounded the federal government's plenary power over immigration in the sovereignty of the United States. The Court also determined that this power was so broad that Congress's immigration decisions were subject to little, if any, judicial review.[17] The Court later extended this special judicial deference to administrative officials as well.[18]

A. Critiques of the Plenary Power Doctrine

The Plenary Power Doctrine established by the Chinese Exclusion Cases sanctions unlimited sovereign power that is unparalleled in other contexts. This unique status has opened the doctrine to critiques both from the bench and from legal scholars.

In the past century, the Supreme Court has become increasingly uncomfortable with the claim that immigration is extra-constitutional. In *Reid v. Covert*, the Court stated that "[t]he United States is entirely a creature of the Constitution. Its power and authority have no other source. It can only act in accordance with all the limitations imposed by the Constitution."[19] Justice Harlan noted in a concurring opinion that "[t]he powers of Congress, unlike those of the English Parliament, are constitutionally circumscribed. Under the Constitution Congress has only such powers as are expressly granted or those that are implied as reasonably necessary and proper to carry out the granted powers."[20] Read together, Justice Black's and Justice Harlan's opinions arguably add up to five votes repudiating the Plenary Power Doctrine. And in recent years, the modern Court's increasing reliance on textualism has come to be out of step with the international law and sovereignty principles underlying the Doctrine.

The Plenary Power Doctrine has also been questioned by legal scholars. First, the Court's reliance on international law norms to support the federal government's plenary power is suspect. In *Fong Yue Ting*, the Court's main support for the Plenary Power theory was the claim that "leading commentators on the law of nations" agreed that "the right [of a state] to expel from its territory persons . . . [is] too clearly within the essential attributes of sovereignty to be

15. 149 U.S. 679, 707. Exclusion refers to the non-admission of a noncitizen into a country, while expulsion refers to the removal of a noncitizen from a country.

16. 149 U.S. 679, 707.

17. *Chae Chan Ping*, 130 U.S. at 606.

18. Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1, 15 (1984).

19. 354 U.S. 1, 5-6 (1957).

20. *Id.* at 66 (Harlan, J., concurring).

seriously contested."[21] But one critical difference the Court conveniently omitted is that international law scholars generally agreed that the power to expel is not absolute.[22] Many leading commentators have recognized that the power of a nation to expel persons is limited, especially when the individual has existing relationships with the nation, like the plaintiffs who were lawful permanent residents in *Chae Chan Ping* and *Fong Yue Ting*.[23]

Second, the Plenary Power Doctrine does not comport with constitutional norms because it is inherently extra-constitutional. A comparison of immigration law to traditional constitutional law illustrates the special status of immigration. Immigration law is largely divorced from any developments in the due process and equal protection jurisprudence.[24] As Hiroshi Motomura noted, while "[m]ainstream constitutional law allows open recognition of . . . substantive values . . . immigration law does not."[25] Instead, immigration law lacks any "meaningful, judicially enforceable core of substantive constitutional protections."[26]

The Plenary Power Doctrine thus largely sidesteps the Constitution. In *Chae Chan Ping* and *Fong Yue Ting*, the Court failed to provide any support for the claim that the plenary power, even if inherent in a sovereign, is inalienable. In other words, the Court did not explain why immigration is free from ordinary constitutional constraints. Further, the Court's doctrinal justifications of sovereignty and territoriality in the Chinese Exclusion Cases are ultimately unsatisfying. The Court's reliance on international law is problematic because "[i]nternational law simply had nothing to say about the extent to which

21. 140 U.S. at 707.

22. *See* Peter L. Markowitz, *Straddling the Civil–Criminal Divide: A Bifurcated Approach to Understanding the Nature of Immigration Removal Proceedings*, 43 HARV. C.R. C.L. L. REV. 289, 309-11 (2008) (discussing the international law sources that the Court relied on in *Fong Yue Ting* and *Chae Chan Ping*).

23. For instance, leading international scholar Emer de Vattel explained that the term "foreigners" refers to those "who pass through or sojourn in a country." "Permanent residents," by contrast, are those "who have received the right of perpetual residence" and are essentially "citizen[s] of less privileged character." Emer de Vattel, 1 The Law of Nations, bk. I, ch. XIX, § 213 (1853). Other scholars have also argued that a nation has more limited authority over the expulsion of permanent residents. *See* Edward S. Creasy, First Platform of International Law 201, 201 (London, Taylor and Francis 1876); Theodore D. Woolsey, Introduction to the Study of International Law § 62, at 98-99 (3d ed. 1872). James Madison also agreed that the power to expel certain persons was limited, remarking that "[e]ven if the *admission* of friendly aliens was a matter of discretion under international law . . . once admitted to the country, the grant could not be rescinded . . . [T]he original bestowal may have been discretionary, but could not be revoked without good reason." Cleveland, *supra* note 9, at 94-95 (quoting James Madison).

24. *See generally* Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 COLUM. L. REV. 1625 (1992).

25. *Id.* at 1658.

26. *Id.*

domestic law might constrain governmental power."[27] In fact, the Court alluded to this point in *Knox v. Lee*, stating that just because an authority is a "necessary sovereign right . . . does not make it a necessary right in a limited constitutional government established to maintain justice."[28] But despite the its shaky foundations in precedent, the Plenary Power Doctrine still forms the lifeblood of the U.S. immigration system today.

II. Ulterior Consequences of the Chinese Exclusion Cases: The Evisceration of the Fourth Amendment at the Border and in the Interior of the United States

A. The Chinese Exclusion Cases and Fourth Amendment Jurisprudence

The effects of the Plenary Power Doctrine established by the Chinese Exclusion Cases are especially consequential in the Fourth Amendment arena. While the Fourth Amendment prohibits unreasonable searches and seizures, Congress has granted the Executive plenary authority to conduct routine searches and seizures at the border without probable cause or a warrant.[29]

The touchstone of the Fourth Amendment is reasonableness.[30] Generally, the reasonableness inquiry requires the weighing of individual rights and government interests.[31] But this balancing is fundamentally different when it concerns immigration, particularly in cases concerning the border. Because of the Plenary Power Doctrine, courts generally eschew the reasonableness balancing otherwise imposed on the government.[32] At the liminal space around the border, almost all searches and seizures are presumptively reasonable by virtue of where they occur.[33] This laxer standard accorded to searches and seizures at the border is known as the "border-search exception."[34] The border-search exception permits routine searches without probable cause or a warrant of persons and items that enter the country.[35] This exception has been employed in a wide range of immigration contexts: from controlling importation of

27. Cleveland, *supra* note 9, at 253.

28. 79 U.S. 457, 491 (1870).

29. *See* United States v. Montoya de Hernandez, 473 U.S. 531 (1985).

30. *See* Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring); Riley v. California, 573 U.S. 373 (2014).

31. *See generally Riley*, 573 U.S. 373 (setting forth the reasonableness test for the Fourth Amendment).

32. *See, e.g.*, United States v. Alfaro-Moncada, 607 F.3d 720 (11th Cir. 2010); Denson v. United States, 574 F.3d 1318 (11th Cir. 2009); United States v. Gurr, 471 F.3d 144, (D.C. Cir. 2006); United States v. Kelly, 302 F.3d 291 (5th Cir. 2002); United States v. Napan, 769 F. Supp. 2d 969 (E.D. Va. 2011).

33. *See id.*

34. *See* United States v. Ramsey, 431 U.S. 606, 620 (1977).

35. *See* United States v. Montoya de Hernandez, 473 U.S. 531 (1985).

contraband,[36] to preventing undocumented immigrants from entering the country,[37] to inspecting individuals for immigration status.[38]

The border-search exception exists because of the Plenary Power Doctrine created by the Chinese Exclusion Cases. In *United States v. Ramsey*, a case concerning the warrantless search of international airmail, the Court emphasized that the "border-search exception is grounded in the recognized right of the sovereign to control . . . who and what may enter the country."[39] The Court reasoned that the sovereign has an elevated public interest at the border "pursuant to the long-standing right of the sovereign to protect itself by stopping and examining persons and property crossing into this country."[40] As such, "searches made at the border . . . are reasonable simply by virtue of the fact that they occur at the border."[41] Similarly, in *United States v. Montoya de Hernandez*, in which customs officials had detained a traveler upon suspicion of drug trafficking, the Court held the warrantless seizure to be reasonable primarily because it occurred at a border.[42] The Court considered the location of the seizure, an international border, to be material:

> Here the seizure of respondent took place at the international border. Since the founding of our Republic, Congress has granted the Executive plenary authority to conduct routine searches and seizures at the border, without probable cause or a warrant, in order to regulate the collection of duties and to prevent the introduction of contraband into this country. This Court has long recognized Congress' power to police entrants at the border. As we stated recently: "Import restrictions and searches of persons or packages at the national border rest on different considerations and different rules of constitutional law from domestic regulations."[43]

The Chinese Exclusion Cases thus produced a parallel body of Fourth Amendment jurisprudence at the border: one where interests are heavily weighted in favor of the government. This skewed balance has severe consequences for the lives of most minority populations, citizens and noncitizens alike.

B. The Fourth Amendment Implications of the Chinese Exclusion Cases

36. *Id.* at 537.

37. Almeida-Sanchez v. United States, 413 U.S. 266, 272 (1973).

38. *See, e.g.*, United States v. Martinez-Fuerte, 428 U.S. 543 (1976).

39. 431 U.S. 606, 620 (1977).

40. *Id.* at 616.

41. *Id.*

42. *See* United States v. Montoya de Hernandez, 473 U.S. 531, 537-38 (1985). The Court ruled that the detention of the traveler was permissible under the less stringent reasonable suspicion standard, reasoning that "the facts, and their rational inferences, . . . clearly supported a reasonable suspicion that respondent was an alimentary canal smuggler." *Id.* at 542.

43. *Id.* at 537 (citations omitted) (quoting United States v. Ramsey, 431 U.S. 606, 616-17 (1977)).

in the 100-Mile Zone

Many may think that constitutional protections are only weakened by the Plenary Power Doctrine in border areas like Brownsville, Texas or San Diego, California. The truth of the matter, though, is that these border-related policies reach deep into the United States, silently shaping the lives of the majority of the U.S. population. Although the border-search exception was originally limited to the physical border, over time the functional border has been redrawn to move more and more inland, hollowing out the privacy rights of citizens and noncitizens. Even in places far removed from the physical border, deep into the interior of the United States, immigration authorities enjoy broad powers to conduct searches and seizures. These broad powers enable Customs and Border Protection (CBP), the primary border control organization and the largest law enforcement agency in the United States, to conduct warrantless searches in a 100-mile zone extending out from the border where over two-thirds of the U.S. population lives.[44]

Federal law grants CBP the authority to "board and search for aliens" in any vessel, train, aircraft, or other vehicle "within a reasonable distance from any external boundary of the United States."[45] The underlying policy was originally adopted by the Department of Justice in 1953, without undergoing the notice and comment process or much review.[46] The Department of Justice then interpreted a "reasonable distance" to be 100 miles from any external border, whether by land or sea.[47] And searches and seizures that occur at a distance of more than 100 miles from the border may also be deemed reasonable under "unusual circumstances."[48] Although the Supreme Court seems to have assumed that the 100-mile zone is a bright-line rule, at least two circuit courts, the Fifth and Tenth Circuits, have allowed searches beyond the 100-mile zone.[49] For instance, in *United States v. Venzor-Castillo*, the Tenth Circuit reasoned that the regulation itself "does not foreclose searches beyond [the 100-mile zone]."[50]

This 100-mile zone means that at least two-thirds of the U.S. population, or around 200 million people, is susceptible to investigatory detention and

44. *See Your Rights in the 100-Mile Border Zone*, ACLU TEXAS, https://perma.cc/Q6UJ-PT76 (archived Aug. 20, 2021); Tanvi Misra, *Inside the Massive U.S. "Border Zone"*, BLOOMBERG CITY LAB (May 14, 2018, 5:17 AM PDT), https://perma.cc/J362-KE93.

45. 8 U.S.C. § 1357(a)(3) (2006).

46. *See* H.R. REP. NO. 186 (1945); S. REP. NO. 632 (1945).

47. 8 C.F.R. §§ 287.1(a)(1)-(2) (2010).

48. 8 C.F.R. § 287.1(b) (2010).

49. In *United States v. Brignoni-Ponce*, the Supreme Court noted that "[u]nder current regulations, this authority [to conduct warrantless searches and seizures] may be exercised anywhere within 100 miles of the border." 422 U.S. 873, 877 (1975).

50. *See* United States v. Venzor-Castillo, 991 F.2d 634, 637 n.3 (10th Cir. 1993); *see also* United States v. Pacheco-Espinosa, 121 Fed. Appx. 352, 356-57 (10th Cir. 2005); United States v. Orozco, 191 F.3d 578, 579, 581, 582 n.3 (5th Cir. 1999).

warrantless search by immigration officials.[51] The border zone is also home to 72% of the U.S. minority population and 75% of the Hispanic population.[52] According to the ACLU, this includes most of the ten largest U.S. metropolitan areas, including New York City, Los Angeles, and Chicago.[53] A good number of states, including Connecticut, Florida, Massachusetts, New Jersey, New York, Michigan, and Rhode Island, fall entirely or almost entirely within this area.[54]

Over time, the Department of Homeland Security has increasingly enjoyed extra-constitutional powers in this 100-mile zone. For instance, border agents may conduct warrantless searches of persons inside this zone as long as there is a "reasonable certainty" that the individual recently entered the country, or if contraband is suspected to be within a vehicle.[55] Under this doctrine, border agents are not only allowed to inquire about immigration status, but may also conduct a full search of the seized person or automobile.[56] Agents can also enter private property without a warrant within twenty-five miles of any border provided that the property is not a dwelling.[57]

At bottom, this doctrine manifests in a dragnet of checkpoints across the United States. In the years since the 100-mile zone was created, the number of CBP agents has increased from a meager 1,100 to over 21,000.[58] Watchdogs estimate that those agents operate over 170 interior checkpoints throughout the country.[59] CBP operates these interior checkpoints on both major roads, offset by permanent infrastructure, and on secondary roads, deploying so-called

51. Todd Miller, *66 Percent of Americans Now Live in a Constitution-Free Zone*, NATION MAG. (July 15, 2014), https://perma.cc/53VR-T2H7 (estimating that close to 197 million Americans live within the 100-mile zone). To visualize the breadth of the 100-mile zone, journalists created a map of the population that fall within the zone. *100-Mile Zone*, BLOOMBERG CITY LAB, https://perma.cc/CKU4-5ZFS (archived Aug. 20, 2021).

52. Misra, *supra* note 46.

53. *See* ACLU TEXAS, *supra* note 46.

54. *Id.*; Will Lowe, *CBP Border Zone*, GITHUB (Aug. 16, 2019), https://perma.cc/H427-B5E3. Of note, CBP also considers the Great Lakes, which abuts Northern Ohio and Canada, to be part of the border. *See* Complaint at 2, 12-14, Michigan Immigrants Rts. Ctr. v. Dep't of Homeland Sec., No. 2:16-cv-14192, 2017 WL 2471277 (E.D. Mich. June 8, 2017), 2016 WL 7014067.

55. *See, e.g.*, United States v. Guzman-Padilla, 573 F.3d 865, 878 (2009).

56. *See* United States v. Cardenas, 9 F.3d 1139, 1149 (5th Cir. 1993).

57. CHRIS RICKERD, ACLU, CUSTOMS AND BORDER PROTECTION'S (CBP'S) 100-MILE RULE 1 (Sept. 15, 2014), https://perma.cc/FH4L-8HDV.

58. Bonnie Kristian, *Is Trump Trying to Unleash the Border Patrol on All of America?*, THE WEEK (Oct. 29, 2019), https://perma.cc/W274-ZMVE.

59. The ACLU estimates the number of interior checkpoints based on news reports, although the exact number has never been published by CBP. *See The Constitution in the 100-Mile Border Zone*, ACLU, https://perma.cc/4MZK-TQA9 (archived Aug. 20, 2021).

tactical checkpoints made of ad hoc markers, such as traffic cones.[60] Some checkpoints have even been found beyond the 100-mile zone.[61]

In *United States v. Martinez-Fuerte*, the Supreme Court sanctioned the use of interior checkpoints, but restricted their use to a "limited inquiry into residence status."[62] The Court also ruled that these checkpoints cannot be used for general crime control.[63] Yet CBP routinely misunderstands and oversteps this legal limit. CBP is known to run checkpoints for drug interdiction, where detained motorists report never being asked about citizenship at all.[64] For instance, a New Hampshire court ruled that a CBP checkpoint near a cannabis festival in Woodstock violated both state and federal law because the main purpose of the checkpoint was the "detection and seizure of drugs."[65] Freedom of Information Act (FOIA) requests reveal that between 2006 and 2010, CBP agents in Rochester, New York arrested 300 people with legal status, including international students and refugees.[66] The same documents also revealed that 95% of these arrests in Rochester arose from transportation checks, rather than inquiries into legal status.[67]

The disparate impact on minority populations is yet more troubling. The 100-mile zone is home to over 72% of the U.S.'s minority population,[68] and CBP[69]

60. GOV'T ACCOUNTABILITY OFFICE, CHECKPOINTS CONTRIBUTE TO BORDER PATROL'S MISSION, BUT MORE CONSISTENT DATA COLLECTION AND PERFORMANCE MEASUREMENT COULD IMPROVE EFFECTIVENESS 6-10 (Aug. 2009), https://perma.cc/SLJ4-L3GF; ACLU TEXAS, *supra* note 46.

61. Several people were reported to have been stopped on Highway 93 north of Phoenix, at least 125 miles from the border. ACLU, RECORD OF ABUSE: LAWLESSNESS AND IMPUNITY IN BORDER PATROL'S INTERIOR ENFORCEMENT OPERATIONS 6 (Oct. 2015), https://perma.cc/8Y4R-88HY.

62. United States v. Martinez-Fuerte, 428 U.S. 543, 560 (1976).

63. Indianapolis v. Edmond, 531 U.S. 32, 44-45 (2000) (holding that the checkpoint was unconstitutional under the Fourth Amendment because its primary purpose was "ultimately indistinguishable from the general interest in crime control").

64. *U.S. Border Patrol Interior Checkpoints: Frequently Asked Questions*, ACLU, https://perma.cc/LJ7L-D7HB (updated Nov. 20, 2014).

65. State v. McCarthy, No. 469-2017-CR-01888, 2018 WL 2106769, at *8 (N.H. Cir. Ct. 2018).

66. *See* Gary Craig, *Report: Border Patrol Wrongly Arrested Hundreds in N.Y.*, USA TODAY (Feb. 14, 2013 10:52 PM), https://perma.cc/73K7-LEAC; *see generally* Complaint, Families for Freedom v. Customs & Border Prot., No. 10-CV-2705, 2011 WL 4599592 (S.D.N.Y. 2010), 2010 WL 1321911.

67. *Immigrant Rights Clinic Puts Spotlight on U.S. Border Patrol*, NYU LAW (Sept. 2, 2010), https://perma.cc/Z6JZ-U5BJ.

68. Misra, *supra* note 46.

69. CBP's website states that its "personnel may use race or ethnicity when a compelling governmental interest is present and its use is narrowly tailored to that interest." It further notes that "[n]ational security is per se a compelling interest." *CBP Policy on Nondiscrimination in Law Enforcement Activities and all other Administered Programs*, U.S. CUSTOMS & BORDER PROT. (Feb. 24, 2020), https://perma.cc/F6C2-YE32.

and Department of Justice[70] guidance explicitly allows Border Patrol agents to profile based on race. Latinos in vehicles are twenty-six times more likely to be asked for their ID than white counterparts and twenty times more likely to be sent in for secondary inspection,[71] which can last for hours.[72] These secondary inspections can also sweep up U.S. citizens.[73] In Northern Ohio, a region that shares a border with Canada, 85% of those arrested by Border Patrol agents in 2009 were Latino, although Latinos only account for 3% of the population. By comparison, only 0.25% of those apprehended by Border Patrol were Canadian.[74]

Although the CBP has been repeatedly accused of "improper gunplay, racial profiling, excessive roughness and verbal abuse," it continues to act with impunity in the 100-mile zone.[75] In 2014, the American Immigration Council found that of the 809 complaints of abuse filed against CBP agents between 2009 and 2012, 97% were never addressed by the agency.[76] FOIA documents obtained by the ACLU also corroborate these findings. Of the findings released to the ACLU, only one complaint resulted in disciplinary action: an agent was suspended for one day for unjustifiably stopping the son of a retired Border Patrol agent.[77]

The Plenary Power Doctrine created by the Chinese Exclusion Cases thus sanctions a Fourth Amendment–free zone that envelopes the majority of the U.S.'s population. In this zone, minority communities are subject to constant policing and suspicion without much recourse to relief.

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70. The DOJ states that "[f]ederal law enforcement officers may consider race, ethnicity, gender, national origin . . . that links persons . . . [to] a violation of Federal immigration law." DEP'T OF JUSTICE , GUIDANCE FOR FEDERAL LAW ENFORCEMENT AGENCIES REGARDING THE USE OF RACE, ETHNICITY, GENDER, NATIONAL ORIGIN, RELIGION, SEXUAL ORIENTATION, OR GENDER IDENTITY 2 (Dec. 2014), https://perma.cc/LYG2-2GMS.

71. Misra, *supra* note 46.

72. AM. IMMIGR. LAWS. ASS'N., KNOW YOUR RIGHTS: WHAT TO DO IF YOU ARE DETAINED AT A PORT OF ENTRY (LAWFUL PERMANENT RESIDENTS) 1 (2018) (on file with author).

73. For example, the 96-year-old former governor of Arizona was apprehended at a checkpoint in Nogales, Arizona for over forty minutes. Tim Gaynor, *Ex-Arizona Governor, 96, Detained at Checkpoint in Sweltering Heat*, REUTERS (last updated July 5, 2012, 4:21 PM), https://perma.cc/MP86-6LDU.

74. Encarnacion Pyle, *Alleging Profiling, OSU Students Help Sue Border Patrol*, COLUMBUS DISPATCH (updated Nov. 19, 2014, 7:56 AM), https://perma.cc/6PSZ-3U9Q.

75. Fernanda Santos, *Border Patrol Accused of Profiling and Abuse*, N.Y. TIMES (Oct. 14, 2015), https://perma.cc/AK7K-CYAB.

76. Daniel E. Martinez, Guillermo Cantor & Walter Ewing, *No Action Taken: Lack of CBP Accountability in Responding to Complaints of Abuse*, AM. IMMIGR. COUNCIL (May 4, 2014), https://perma.cc/55Z4-3UK2.

77. Government Document Product at 706-12, ACLU Found. of Ariz. v. Dep't of Homeland Sec., 2017 WL 8895339 (D. Ariz. Jan. 26, 2017), Bates No. CBP 068.

Conclusion

The Chinese Exclusion Cases created a world in which an entire class of noncitizens could be deported or excluded from the United States. Today, the ghost of the Chinese Exclusion Cases is still alive and well, interwoven into the lives of many citizens and noncitizens in the United States. Because of the Plenary Power Doctrine sanctioned by the Chinese Exclusion Cases, two-thirds of the U.S. population live in a Fourth Amendment–free zone where border officials can conduct warrantless searches with impunity. Minority populations, in particular, are subject to constant policing and suspicion: an experience that would not have been foreign to Mr. Chae Chan Ping and Mr. Fong Yue Ting.