

Reviewing Plenary Power: *Chae Chan Ping v. United States* (1889) and Executive Order 13769

Aviva Kohn
Princeton University

The United States has long been a nation of immigrants. Despite this reputation, many groups have faced hardship and prejudice upon their entry to the United States. In recent years, xenophobic rhetoric has been on the rise.¹ Included in this is a strong anti-immigrant sentiment. On January 27, 2017, President Trump propelled this idea to the national stage when he issued Executive Order 13769.² This order came after promises of a “Muslim ban” throughout his campaign and it prohibited all immigration from seven predominantly Muslim countries: Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen.³ After numerous legal challenges, President Trump has refined and revised his Executive Order. The most recent iteration restricts travel for citizens from Iran, Syria, Libya, Somalia, and Yemen, as well as North Korea, Chad, and some groups in Venezuela.⁴

While this blanket ban shocked many in the nation, the Federal Government has enacted similar policies in the past. Chinese immigration was effectively stopped entirely by the Chinese Exclusion Act. This culminated in *Chae Chan Ping v. United States* (1889), in which the Supreme Court deemed it constitutional and “not open to controversy” to exclude immigration from specific countries.⁵ Additionally, this case established the idea of Plenary Power, which is the practice of the courts not reviewing immigration policy.⁶ Recently, this has been used to support the validity of the Executive Order.⁷ However, looking closely at the case reveals why

¹ “Amid Rising Xenophobia, Violence, States Must Do More to Protect Migrants' Rights, General Assembly Hears on International Day for Ending Racial Discrimination | Meetings Coverage and Press Releases.” *United Nations*, United Nations, 21 Mar. 2017, www.un.org/press/en/2017/ga11895.doc.htm.

² Executive Order. No. 13769, 2017.

³ Beckwith, Ryan. “Travel Ban: Donald Trump's Own Words Hurt Executive Order.” *Time*, Time, 16 Mar. 2017, time.com/4703614/travel-ban-judges-donald-trump-words/.

⁴ Executive Order. No. 13780, 2017.

⁵ *Chae Chan Ping v. United States*. 130 U.S. 603. Supreme Court. 13 May 1889.

⁶ “Plenary Power.” *Wex Legal Dictionary*, Cornell Law School.

⁷ Epps, Garrett. “The Supreme Court's Travel Ban Dilemma.” *The Atlantic*, Atlantic Media Company, 28 Jan. 2018, www.theatlantic.com/politics/archive/2018/01/travel-ban-supreme-court/551669/.

Chae Chan Ping and Plenary Power should not be used to justify President Trump's Executive Order.⁸

What makes *Chae Chan Ping* unique is the history surrounding the case. In 1868, the Burlingame Treaty was signed by representatives of the U.S. and China in the hopes of attracting more laborers to the West Coast states.⁹ The Treaty had three main terms, the most important being a promise of the right to free immigration and travel for the Chinese in the United States.¹⁰ As a result of this provision came an influx in Chinese immigration to the United States.¹¹ However, as the population grew, so did anti-Asian sentiment.¹² Numerous incidents of this began to appear all along the West Coast.¹³

Despite the prejudice throughout the country, many Asian laborers continued to come to America.¹⁴ In 1875, Chae Chan Ping moved from China to San Francisco and joined this workforce.¹⁵ While he was here, the Federal Government passed the Chinese Exclusion Act.¹⁶ The law prohibited Chinese laborers from entering the country for 10 years.¹⁷ It also made Chinese migrants permanent aliens, precluding them from obtaining U.S. citizenship.¹⁸ This ban was extended permanently in 1902.¹⁹ Any Chinese laborer who left the country was required by the Act to obtain a customs certificate in order to re-enter the country.²⁰ Before he began a journey home in 1887, Ping followed the new laws and obtained a customs certificate granting him the right to return.²¹ Without this, he would not have been allowed back.²²

⁸ Exec. Order No. 13769, 3 C.F.R. (2017). Print.; "30 of Donald Trump's Wildest Quotes." *CBS News*. CBS Interactive, 21 Mar. 2016. Web. 07 Apr. 2017.

⁹ "The Burlingame-Seward Treaty, 1868." *Office of the Historian*. U.S. Department of State, n.d. Web. 01 Apr. 2017.

¹⁰ *Ibid.*

¹¹ Brennan, Kevin L. "Burlingame Treaty of 1868." *Immigration to the United States*. immigrationtotheunitedstates.org, n.d. Web. 02 Apr. 2017.

¹² *Ibid.*

¹³ "Chinese Immigration and the Chinese Exclusion Acts." *Office of the Historian*. U.S. Department of State, n.d. Web. 02 Apr. 2017.

¹⁴ *Ibid.*

¹⁵ *Chae Chan Ping v. United States*. 130 U.S. 590.

¹⁶ "Chinese Immigration and the Chinese Exclusion Acts." *Office of the Historian*. U.S. Department of State, n.d. Web. 02 Apr. 2017.

¹⁷ *Ibid.*

¹⁸ *Ibid.*

¹⁹ *Ibid.*

²⁰ *Ibid.*

²¹ *Chae Chan Ping v. United States*. 130 U.S. 590.

With criticism rising over the loopholes in the Chinese Exclusion Act, including the right of Chinese migrants to return to the United States with the proper documentation, the Federal Government began the process of creating a new treaty. On March 16, 1888, the Bayard-Zhang Treaty was submitted to the Senate.²³ Under this new agreement, Chinese laborers would be completely barred from the United States for twenty years, including those who held customs certificates allowing them to return.²⁴ The United States Congress then passed the Scott Act, signed by President Cleveland in 1888 after the Chinese government refused to ratify the Bayard-Zheng treaty.²⁵ It prohibited the re-entry of all Chinese laborers outside the country, regardless of any legal certificate granting them the right to return, which left between 20,000 to 30,000 people stranded outside of the country, including Chae Chan Ping.²⁶

Ping returned to the country on a steamship later that month.²⁷ Despite having the proper documentation, he was still denied entry due to the Scott Act.²⁸ The captain of the ship detained Ping on board.²⁹ His lawyers then filed a writ of *habeas corpus* asking for his release and that he be given the opportunity to appear in court.³⁰ However, the US District Court for the Northern District of California determined that Ping was not deprived of liberty and he was returned to the ship.³¹ Ping appealed the decision to the Supreme Court with three main arguments.³² Firstly, he argued that the right of visitation in a treaty was form of property protected by the Fifth Amendment.³³ He also argued that the Scott Act violated the Burlingame Treaty by stopping

²² "Chinese Immigration and the Chinese Exclusion Acts." *Office of the Historian*. U.S. Department of State, n.d. Web. 02 Apr. 2017.

²³ Erhart, Victoria. "Bayard-Zhang Treaty of 1888." *Immigration to the United States*. Immigrationtotheunitedstates.org, n.d. Web. 03 Apr. 2017.

²⁴ **Note:** There were some exceptions with which customs certificates would still be granted and recognized, such as if a laborer had a wife or child within the United States. However, the laborer would have to return within a year in order to be allowed re-entry to the country.

²⁵ Gold, Martin. *Forbidden Citizens: Chinese Exclusion and the U.S. Congress: A Legislative History*. Alexandria, VA: TheCapital.Net, 2012. 247-51. Print.

²⁶ *Ibid.*; "Chinese Immigration and the Chinese Exclusion Acts." *Office of the Historian*. U.S. Department of State, n.d. Web. 04 Apr. 2017.

²⁷ *Chae Chan Ping v. United States*. 130 U.S. 590.

²⁸ *Ibid.*

²⁹ *Ibid.*

³⁰ *Ibid.*

³¹ *Ibid.*

³² *Ibid.*

³³ *Ibid.*

immigration from China and that the Federal Government did not have the authority to overturn international treaties.³⁴ Finally, he alleged that the Chinese Exclusion and Scott Acts were passed with racist intent . The Court disagreed and upheld the ruling of the lower court.³⁵

Despite being over a century old, *Chae Chan Ping* relates to modern politics. One of the most important ideas to come out of the decision was plenary power, which is the concept that the judiciary should have no role in reviewing immigration choices made by congress. The Justices pointed to the “implied” legislative authority in the Commerce Clause.³⁶ They deemed the Federal Government’s ability to regulate immigration so central to national government that it should be beyond any precedent or judicial review.³⁷ This is an idea that is brought up often in modern day cases relating to immigration. It has been expanded into the idea of consular non-reviewability, which is that visa decisions made by U.S. Customs Officers cannot be appealed in the judicial system.³⁸ Most recently, this issue arose when President Trump issued Executive Order 13769 on January 27, 2017.

This Executive Order is incredibly similar to the Chinese Exclusion Act in its effects and surrounding rhetoric. Like the 1882 Act, the Executive Order, otherwise known as the Travel Ban, restricts immigration from specific countries.³⁹ Both directly target nations of certain races that are often joined with a religion that is not Christianity.⁴⁰ Like the Act, the Travel Ban was issued in a time of rising discrimination toward the majority of these prohibited countries. In fact, the prevalent rhetoric surrounding Muslims in this country today is almost identical to the wording used by the Court in *Chae Chan Ping*. Similar to much of the anti-Asian opinions in the

³⁴ *Ibid.*

³⁵ *Ibid.*

³⁶ *Ibid.*

³⁷ *Ibid.*

³⁸ Johnson, Kevin. “Argument Preview: The Doctrine of Consular Non-Reviewability – Historical Relic or Good Law?” *SCOTUSblog*, 3 Mar. 2017, www.scotusblog.com/2015/02/argument-preview-the-doctrine-of-consular-non-reviewability-historical-relic-or-good-law/.

³⁹ Exec. Order No. 13769.

⁴⁰ Exec. Order No. 13769;

1800's, many people believe that Muslims are dangerous and just too different to assimilate into American culture and, thus, their rising numbers are a danger to the nation.⁴¹

Due to the idea of Plenary Power and these similarities, *Chae Chan Ping* is often used to defend the constitutionality of the Executive Order.⁴² However, there are some fundamental differences between the two cases that call into question whether Plenary Power can be used to defend the Order. Both the Chinese Exclusion Act and the Scott Act were passed by Congress and signed by the President. President Trump acted unilaterally when he issued his Executive Order. In fact, this is an issue addressed by the justices within their ruling in *Chae Chan Ping*. In this decision, Justice Field says that the ability to exclude foreign immigrants is an "incident of sovereignty," and was a power delegated by the Constitution,⁴³ meaning that he believed that the Federal Government had the right to exercise this power in the best interest of the country. In considering enacting exclusionary immigration laws a power of delegated to Congress by the Constitution, the Court takes it away from the President and the executive branch. In fact, the idea of Plenary Power rests in the notion that Congress has the authority to pass immigration law, while it is the Executive Branch's duty to enforce it.⁴⁴ While this was the case with the law behind *Chae Chan Ping*, the situation today is very different. By acting through Executive Order, President Trump bypassed Congress' power and thus acted outside the realm of Plenary Power. The overwhelming differences between the two cases elucidate the fact that the Order was an overreach of Presidential power.⁴⁵

⁴¹ Exec. Order No. 13769; Telhami, Shibley. "What Americans Really Think about Muslims and Islam | Brookings Institution." *Brookings*. Brookings, 16 Aug. 2016. Web. 05 Apr. 2017.

⁴² "The Obscure Doctrine That Could Save Trump's Travel Ban." *The Week*, The Week, 6 Apr. 2017, theweek.com/articles/688615/obscure-doctrine-that-could-save-trumps-travel-ban.

⁴³ *Chae Chan Ping v. United States*. 130 U.S. 609.

⁴⁴ *Ibid.*

⁴⁵ Chinese Immigration and the Chinese Exclusion Acts." *Office of the Historian*. U.S. Department of State, n.d. Web. 04 Apr. 2017.; Exec. Order No. 13769

In fact, this very issue was litigated in relation to the Executive Order. In one of the first challenges, the state of Hawaii sued President Trump over the Order.⁴⁶ The government argued, among other things, that due to Plenary Power the issue was beyond judicial oversight.⁴⁷ However, the Court of Appeals held that since the President acted as both legislator and enforcer of the law, the Plenary Power doctrine should not be applied.⁴⁸ The Court determined that the President did not have the authority to act on this issue alone. Rather, Congress had the Plenary Power and the Executive Branch just enforced the legislation.⁴⁹

Another fundamental difference between the two situations is public perception and outcry. While public opinion has no bearing on the Constitutionality of different laws, it certainly affects the ruling of the Justices. Common ideas and prejudices often find their way into the decisions of the Supreme Court. This was the case in *Chae Chan Ping*. Although there were critiques of the Chinese Exclusion Act, anti-Asian sentiment was so entrenched and mainstream in American culture that it permeated every aspect of life. For example, in his dissent for *Plessy v. Ferguson*, Justice Harlan stated that the Chinese were:

a race so different from our own that we do not permit those belonging to it to become citizens of the United States. Persons belonging to it are, with few exceptions, absolutely excluded from our country. I allude to the Chinese race.⁵⁰

This quotation is taken from a dissent arguing against segregation on the basis that the Constitution is “color-blind.”⁵¹ For Justice Harlan, anti-Asian sentiment meant that, while segregation was unconstitutional, excluding Asians and segregating the entire country from them was not. In fact, he ruled in favor of the Chinese Exclusion Act and the Government during *Chae Chan Ping*. This inconsistency exemplifies how prejudice can often affect the rulings of Justices.

⁴⁶ 9th Circuit Court of Appeals. *Hawaii v. Trump*. 24 Oct. 2017.

⁴⁷ *Ibid.*

⁴⁸ *Ibid.*

⁴⁹ *Ibid.*

⁵⁰ *Plessy v. Ferguson* 163 U.S. 561. Supreme Court. 18 May 1896.

⁵¹ *Plessy v. Ferguson* 163 U.S. 569.

Decisions issued by the Court must be read with attention to the context in which they were written. The need for this can be seen clearly in one quote from Justice Field's *Chae Chan Ping* decision: "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."⁵² This idea was relevant in its time. Despite small outcry and protests, the general population was in support of the Chinese Exclusion Act.⁵³ Today, however, the situation is very different. The nation as a whole has progressed and understands racism and prejudice very differently. The Travel Ban, for example, was immediately critiqued and calls for its repeal were shouted.⁵⁴ In fact, recent polls have shown that around half the country oppose the Executive Order.⁵⁵ Much of the nation believes that banning immigrants from certain countries with a correlation to their race or religion is without a doubt "open to controversy."⁵⁶

Chae Chan Ping is most often cited in relation to the Executive Order for the idea of Plenary Power. The justices clearly delegate the power of immigration laws and interpreting international treaties to Congress. They give the Executive Branch the duty of enforcing these laws and treaties. Trump's action disregards this process entirely. Instead of passing or attempting to pass legislation, he chose instead to act unilaterally. As such, the Plenary Power doctrine cannot be applied as his action was an overreach of his office's power. Furthermore, it is important to note that *Chae Chan Ping* was written in a very different climate of prejudice and does not address the issues of discrimination, a main concern of many people now. While America's racial history has not always been something to be proud of, it can still be useful

⁵² *Chae Chan Ping v. United States*. 130 U.S. 603.

⁵³ 9th Circuit Court of Appeals. *Hawaii v. Trump*. 24 Oct. 2017.

⁵⁴ Lee, Kurtis. "Do Most Americans Support President Trump's Travel Ban?" *Los Angeles Times*, Los Angeles Times, 8 Feb. 2017, www.latimes.com/politics/washington/la-na-essential-washington-updates-do-most-americans-support-trump-s-1486576690-htmstory.html.

⁵⁵ *Ibid.*

⁵⁶ *Chae Chan Ping v. United States*. 130 U.S. 603.

today. Taking into account these issues it becomes clear that *Chae Chan Ping* cannot serve as precedent for President Trump's Executive Order.⁵⁷

⁵⁷ Levy, Gabrielle. "Poll: Majority Support Trump's Travel Ban." *U.S. News & World Report*. U.S. News & World Report, 08 Feb. 2017. Web. 06 Apr. 2017.

Bibliography

“Amid Rising Xenophobia, Violence, States Must Do More to Protect Migrants' Rights, General Assembly Hears on International Day for Ending Racial Discrimination | Meetings Coverage and Press Releases.” *United Nations*, United Nations, 21 Mar. 2017, www.un.org/press/en/2017/ga11895.doc.htm.

Beckwith, Ryan. “Travel Ban: Donald Trump's Own Words Hurt Executive Order.” *Time*, Time, 16 Mar. 2017, time.com/4703614/travel-ban-judges-donald-trump-words/.

Brennan, Kevin L. "Burlingame Treaty of 1868." *Immigration to the United States*. immigrationtotheunitedstates.org, n.d. Web. 02 Apr. 2017.

Chae Chan Ping v. United States. 130 U.S. 581. Supreme Court. 13 May 1889.

"Chinese Immigration and the Chinese Exclusion Acts." *Office of the Historian*. U.S. Department of State, n.d. Web. 04 Apr. 2017.

Epps, Garrett. “The Supreme Court's Travel Ban Dilemma.” *The Atlantic*, Atlantic Media Company, 28 Jan. 2018, www.theatlantic.com/politics/archive/2018/01/travel-ban-supreme-court/551669/.

Erhart, Victoria. "Bayard-Zhang Treaty of 1888." *Immigration to the United States*. Immigrationtotheunitedstates.org, n.d. Web. 03 Apr. 2017.

Executive Order. No. 13769, 2017.

Executive Order. No. 13780, 2017.

Gold, Martin. *Forbidden Citizens: Chinese Exclusion and the U.S. Congress: A Legislative History*. Alexandria, VA: TheCapital.Net, 2012. Print.

Johnson, Kevin. “Argument Preview: The Doctrine of Consular Non-Reviewability – Historical Relic or Good Law?” *SCOTUSblog*, 3 Mar. 2017, www.scotusblog.com/2015/02/argument-preview-the-doctrine-of-consular-non-reviewability-historical-relic-or-good-law/.

Lee, Kurtis. "Do Most Americans Support President Trump's Travel Ban?" *Los Angeles Times*, Los Angeles Times, 8 Feb. 2017, www.latimes.com/politics/washington/la-na-essential-washington-updates-do-most-americans-support-trump-s-1486576690-htmlstory.html.

Levy, Gabrielle. "Poll: Majority Support Trump's Travel Ban." U.S. News & World Report. U.S. News & World Report, 08 Feb. 2017. Web. 06 Apr. 2017.

"*Plenary Power.*" *Wex Legal Dictionary*, Cornell Law School.

Plessy v. Ferguson 163 U.S. 537. Supreme Court. 18 May 1896.

Poplin, Cody M. "9th Circuit Cites Volume 119 Essay." *The Yale Law Journal - Home*, Yale Law School, 13 Jan. 2018, www.yalelawjournal.org/news/9th-circuit-cites-volume-119-essay.

Simon, Steve Almas and Darran. "A Timeline of President Trump's Travel Bans." *CNN*. Cable News Network, 30 Mar. 2017. Web. 07 Apr. 2017

Telhami, Shibley. "What Americans Really Think about Muslims and Islam | Brookings Institution." *Brookings*. Brookings, 16 Aug. 2016. Web. 05 Apr. 2017.

"The Burlingame-Seward Treaty, 1868." *Office of the Historian*. U.S. Department of State, n.d. Web. 01 Apr. 2017.

"The Obscure Doctrine That Could Save Trump's Travel Ban." *The Week*, The Week, 6 Apr. 2017, theweek.com/articles/688615/obscure-doctrine-that-could-save-trumps-travel-ban.

9th Circuit Court of Appeals. *Hawaii v. Trump*. 24 Oct. 2017.

"30 of Donald Trump's Wildest Quotes." *CBS News*. CBS Interactive, 21 Mar. 2016. Web. 07 Apr. 2017.